

JOINT STATE GOVERNMENT COMMISSION

General Assembly of the Commonwealth of Pennsylvania

ELECTION LAW IN PENNSYLVANIA

*Report of the Election Law Advisory Board
for the Fiscal Year 2020-2021*

June 2021



*Serving the General Assembly of the
Commonwealth of Pennsylvania Since 1937*

REPORT

Election Law in Pennsylvania

Project Manager:	Yvonne Llewellyn Hursh, Counsel
Project Staff:	Glenn J. Pasewicz, Executive Director Stephen J. Kramer, Staff Attorney Grant Rosul, Staff Attorney Wendy L. Baker, Office Manager/Executive Assistant
The report is also available at http://jsg.legis.state.pa.us	

JOINT STATE GOVERNMENT COMMISSION

Room 108 Finance Building
613 North Street
Harrisburg, PA 17120

Telephone: 717-787-4397
Fax: 717-783-9380
E-mail: jntst02@legis.state.pa.us
Website: <http://jsg.legis.state.pa.us>

The Joint State Government Commission was created in 1937 as the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania.¹

A fourteen-member Executive Committee comprised of the leadership of both the House of Representatives and the Senate oversees the Commission. The seven Executive Committee members from the House of Representatives are the Speaker, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. The seven Executive Committee members from the Senate are the President Pro Tempore, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. By statute, the Executive Committee selects a chairman of the Commission from among the members of the General Assembly. Historically, the Executive Committee has also selected a Vice-Chair or Treasurer, or both, for the Commission.

The studies conducted by the Commission are authorized by statute or by a simple or joint resolution. In general, the Commission has the power to conduct investigations, study issues, and gather information as directed by the General Assembly. The Commission provides in-depth research on a variety of topics, crafts recommendations to improve public policy and statutory law, and works closely with legislators and their staff.

A Commission study may involve the appointment of a legislative task force, composed of a specified number of legislators from the House of Representatives or the Senate, or both, as set forth in the enabling statute or resolution. In addition to following the progress of a particular study, the principal role of a task force is to determine whether to authorize the publication of any report resulting from the study and the introduction of any proposed legislation contained in the report. However, task force authorization does not necessarily reflect endorsement of all the findings and recommendations contained in a report.

Some studies involve an appointed advisory committee of professionals or interested parties from across the Commonwealth with expertise in a particular topic; others are managed exclusively by Commission staff with the informal involvement of representatives of those entities that can provide insight and information regarding the particular topic. When a study involves an advisory committee, the Commission seeks consensus among the members.² Although an advisory committee member may represent a particular department, agency, association, or group, such representation does not necessarily reflect the endorsement of the department, agency, association, or group of all the findings and recommendations contained in a study report.

¹ Act of July 1, 1937 (P.L.2460, No.459); 46 P.S. §§ 65–69.

² Consensus does not necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation. At a minimum, it reflects the views of a substantial majority of the advisory committee, gained after lengthy review and discussion.

Over the years, nearly one thousand individuals from across the Commonwealth have served as members of the Commission's numerous advisory committees or have assisted the Commission with its studies. Members of advisory committees bring a wide range of knowledge and experience to deliberations involving a particular study. Individuals from countless backgrounds have contributed to the work of the Commission, such as attorneys, judges, professors and other educators, state and local officials, physicians and other health care professionals, business and community leaders, service providers, administrators and other professionals, law enforcement personnel, and concerned citizens. In addition, members of advisory committees donate their time to serve the public good; they are not compensated for their service as members. Consequently, the Commonwealth receives the financial benefit of such volunteerism, along with their shared expertise in developing statutory language and public policy recommendations to improve the law in Pennsylvania.

The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly. Certain studies have specific timelines for the publication of a report, as in the case of a discrete or timely topic; other studies, given their complex or considerable nature, are ongoing and involve the publication of periodic reports. Completion of a study, or a particular aspect of an ongoing study, generally results in the publication of a report setting forth background material, policy recommendations, and proposed legislation. However, the release of a report by the Commission does not necessarily reflect the endorsement by the members of the Executive Committee, or the Chair or Vice-Chair of the Commission, of all the findings, recommendations, or conclusions contained in the report. A report containing proposed legislation may also contain official comments, which may be used to construe or apply its provisions.³

Since its inception, the Commission has published over 400 reports on a sweeping range of topics, including administrative law and procedure; agriculture; athletics and sports; banks and banking; commerce and trade; the commercial code; crimes and offenses; decedents, estates, and fiduciaries; detectives and private police; domestic relations; education; elections; eminent domain; environmental resources; escheats; fish; forests, waters, and state parks; game; health and safety; historical sites and museums; insolvency and assignments; insurance; the judiciary and judicial procedure; labor; law and justice; the legislature; liquor; mechanics' liens; mental health; military affairs; mines and mining; municipalities; prisons and parole; procurement; state-licensed professions and occupations; public utilities; public welfare; real and personal property; state government; taxation and fiscal affairs; transportation; vehicles; and workers' compensation.

Following the completion of a report, subsequent action on the part of the Commission may be required, and, as necessary, the Commission will draft legislation and statutory amendments, update research, track legislation through the legislative process, attend hearings, and answer questions from legislators, legislative staff, interest groups, and constituents.

³ 1 Pa.C.S. § 1939.

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General Assembly of the Commonwealth of Pennsylvania

JOINT STATE GOVERNMENT COMMISSION

Room 108 – Finance Building

Harrisburg, Pa 17120

717-787-4397

Fax 717-783-9380

June 23, 2021

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To the Members of the General Assembly of Pennsylvania:

We are pleased to release Election Law in Pennsylvania, the first annual report of the Election Law Advisory Board established by Act 12 of 2020. This report represents the past year's work of the Advisory Board, which was created to study the election law and identify statutory language to repeal or modify, to collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues, to study the development of election technology, and to evaluate and make recommendations on improving and implementing best practices to ensure the integrity and efficiency of the electoral process in this Commonwealth.

This first report focuses on what many members believe to be of the highest priority, which is proposed amendments to address mail-in ballot processing, otherwise known in Pennsylvania as "pre-canvassing". The consensus of ELAB members is that advance mail-in ballot processing could resolve many of the problems that contributed to concerns about the validity of votes in Pennsylvania.

While the recommendations in this report are the consensus of the members of the Advisory Board, it should not be assumed by the reader that agreement was unanimous. Some provisions were the subject of much debate and concerns are noted in context.

The full report is available at <http://jsg.legis.state.pa.us>.

Respectfully submitted,

Glenn J. Pasewicz
Executive Director

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INTRODUCTION

The Constitution of the Commonwealth of Pennsylvania

Article I, § 5. Elections.

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.

The fundamental precept underlying Pennsylvania's election laws is the Constitutional guarantee of free and equal elections. Pennsylvania's laws intended to protect that constitutional right can be found in the act of June 3, 1937 (P.L. 1333, No.320), known as the Pennsylvania Election Code (Election Code) and Title 25 of the Pennsylvania Consolidated Statutes, added by the act of January 31, 2002 (P.L. 18, No. 3) (Title 25). Read together, these two statutes form Pennsylvania's election law.⁴ Additionally, Article VII of the Pennsylvania Constitution provides further details relating to voting rights and procedures.

In 2019, revisions were made to the Election Code, most significant of which for this study are the elimination of straight ticket voting, the addition of mail-in voting, and the replacement of, and funding for, voting machines.⁵ These amendments were specifically intended to create a fairer, more free and equal election process. New voting machines allow for the use of paper ballots so a voter can see his or her completed ballot and verify its accuracy before casting their votes. Elimination of straight ticket voting focused voters' attention on the candidate, rather than the candidate's party. Each office and its candidates must be considered separately, which allows Independents and third-party candidates a greater ability to compete against the two major parties, prevents weaker candidates from being elected simply because of their party affiliation, and encourages voters review the entire ballot, which may increase voting on ballot initiatives, constitutional amendments and referenda. Mail-in balloting similarly achieves the goals of a more deliberative voting process, as the voter using a mail-in ballot has ample time to research candidates, review the entire ballot, and vote from a more informed stance. Additionally, persons with transportation issues, including the elderly and persons with physical disabilities, and persons whose hours of employment and family responsibilities

⁴ Pennsylvania does not have a complete formal statutory code. Laws are found in two places – the Pamphlet Laws and the Consolidated Statutes. A commercial vendor, Purdon's, has created a compilation with titles identified by topics which can aid the legal practitioner in locating specific laws, but they do not carry the weight of legal citations. If challenged in court and there is a conflict between Purdon's and the Pamphlet Law or Consolidated Statutes, the Pamphlet Laws or Consolidated Statutes will triumph. In 1972, Pennsylvania began a consolidation process in the which the Pamphlet Laws, which address single topics only and are organized chronologically, are reorganized and codified by topic in the Consolidated Statutes. The process is on-going and more Pamphlet Laws are consolidated each year, and many new enactments are added directly to the Consolidated Statutes at the time of enactment.

⁵ Act of October 31, 2019 (P.L. 552, No. 77), amending the Election Code (Act 77).

prevent them from reaching their polling place in the allotted hours for voting can vote from home on a schedule that is convenient to them.⁶

Amendments in 2020 were enacted to provide for temporary emergency general primary election procedures in response to the COVID-19 pandemic, additional revisions to the mail-in voting provisions, and creation of the Election Law Advisory Board (ELAB),⁷ a permanent body within the Joint State Government Commission and directed to:

- Study the election law and identify statutory language to repeal, modify or update.
- Collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues.
- Study the development of new election technology and voting machines.
- Evaluate and make recommendations on:
 - improving the electoral process in this Commonwealth by amending the election law or through regulations promulgated by the Department of State; and
 - implementing best practices identified to ensure the integrity and efficiency of the electoral process in this Commonwealth.

By the end of each fiscal year, extensive and detailed findings are to be published on the Joint State Government Commission's publicly accessible Internet website and made available in electronic format to the Office of the Governor and members of the General Assembly.⁸

Membership of on the board consists of House and Senate leadership and the Secretary of the Commonwealth or their designees, and 18 individuals appointed by the Governor and confirmed by the Senate, one from each Congressional district in Pennsylvania. The gubernatorial appointees are to include members who represent the following groups: those advocating for individuals with disabilities, those advocating for voting rights, and those representing county commissioners or county election officials. No more than half of the appointees may be registered with the same political party.⁹

⁶ Floor debate on Senate Bill 421 (2019), which became Act 77: *see* Senate Legislative Journal June 25, 2019, pp. 721-722; House Legislative Journal October 28, 2019, pp. 1689-1713; House Legislative Journal October 29, 2019, pp. 1738-1741; and Senate Legislative Journal, October 29, 2019, pp. 999-1003.

⁷ Act of March 27, 2020 (P.L. 41, No. 12), amending the 1937 Election Code (Act 12).

⁸ § 1302-E(c) of Act 12.

⁹ § 1302-E(b) of Act 12.

The gubernatorial appointees were confirmed by the Senate on September 9, 2020. The board held a web-based organizational meeting on January 28, 2021 and additional web-based meetings were held on April 8, 2021 and June 10, 2021.

Commission staff established the ELAB website in June 2020 at <http://jsg.legis.state.pa.us/act12.cfm>, and posted summaries of potential topic areas of the election law that may be suitable for repeal, modification, or update. Additionally, a summary of election law pending legislation at that time was also provided. At the close of the 2019-2020 General Assembly, these proposals died. Many have been reintroduced for the 2021-2022 General Assembly and are detailed later in this report.

Subsequent to the summer of 2020, the presidential election in November 2020 triggered a number of challenges to the 2019 and 2020 amendments, in particular relating to the interpretation and implementation of the provisions governing mail-in ballots. The COVID-19 pandemic and the public health restrictions developed to attempt to contain the spread of the virus, together with individuals' reluctance to gather publicly and risk exposure to a novel disease whose potency and lethality were evolving and being revealed incrementally, resulted in a demand for mail-in voting that was unanticipated by the drafters of the amendments and the county officials charged with implementing them. Additionally, the primary election of 2020 was the first election held using the new electronic voting systems required under the Commonwealth's settlement in a recount lawsuit stemming from the 2016 presidential election. Concerns over the age and vulnerability to hacking as well as an inability to produce paper ballots for recount and audit purposes contributed to this settlement decision.¹⁰ Problems within the United States Postal Service exacerbated an already challenging surge in mail-in voting. This confluence of major changes and unanticipated delays imposed strains on the election system in Pennsylvania and identified possible shortcomings in the mail-in ballot amendments.

During the ELAB meetings and via information submitted to the Commission by interested parties, many of the problems associated with mail-in ballots were identified as the result of the law asking county election officials to run an in-person election and a mail-in election simultaneously. This produced delays in vote counts, further fueling concerns that errors and fraud were possible. The ELAB will be taking a deliberate approach to the elections laws to address and prioritize areas of the law where review, repeal and updates are needed, and given the fallout from the November 2020 election, this first report focuses on what the members believe to be of the highest priority, which is proposed amendments to address mail-in ballot processing, otherwise known in Pennsylvania as "pre-canvassing." It is the belief of many of the ELAB members that many of the problems that contributed to concerns about the validity of Pennsylvania's votes would be resolved if advanced mail-in ballot processing is permitted.

¹⁰ Jill Stein et al., v Pedro A. Cortes, Secretary of the Commonwealth et al., No. 16-CV-6287, E.D. Pa., (November 28, 2018).

While the recommendations in this report are the consensus of the members of the ELAB, it should not be assumed by the reader that agreement was unanimous. Some provisions were the subject of much debate and concerns are noted in context.

Potential areas of future study and recommendations include other aspects of mail-in voting, such as ballot verification, ballot curing, application deadlines, use of satellite offices and drop boxes, mailing lists for ballot requests, the effect of missing or illegible postmarks, treatment of naked ballots, and ballot challenges; voter registration, including verification and purging of rolls; polling places; early voting; poll worker recruitment and retention; and training for all election officials.

BALLOT PROCESSING: PROPOSED AMENDMENTS

This proposal is based on the assumption that mail-in voting in some form will continue to occur in Pennsylvania. Numerous legislative proposals are before the General Assembly that would revise or modify the statutory language governing these ballots, but only a few voices have called for the outright repeal of these provisions. Mail-in voting was very popular with Pennsylvania voters during the 2020 Presidential Election. Mail-in votes that were accepted and counted for President ranged from 370,361 in Philadelphia, the largest county by population in the Commonwealth, to 715 in Cameron County, the smallest county by population. The 10 smallest counties by population ranged from 715 to 5,074 accepted and counted mail-in votes, with an average of 1,367 mail-in votes for the three presidential candidates on the ballot.¹¹ This is not an insignificant amount of votes to process on election day, when some of these smaller county boards of elections have only a handful of employees who must be available to assist the judges of elections conducting the in-person voting in all of the county's precincts while also processing thousands of mail-in votes. The amendments proposed in this chapter are designed to address mail-in ballot processing in a manner that is secure, permits voters to fully exercise their right to vote without artificial impediments, and allows election officials to run elections using careful and deliberate procedures. Finally, the amendments would allow election results to be known within hours, rather than days, of the conclusion of in-person voting on election day.

Many issues surround mail-in ballot processing, and this chapter will attempt to address them individually and identify which provisions of the following proposed amendments relate to that issue.

What is Pre-Canvassing?

Pre-election day ballot processing occurs in a number of states. The term "pre-canvassing" appears to be unique to Pennsylvania law, can easily be confused with "canvassing," and does not have an intuitive meaning. One of the recommendations contained in the proposed amendments is to do away with this terminology and replace it with "processing," a more self-descriptive term and the term used almost universally in other states.

¹¹ Pennsylvania Department of State, Reporting Center, Pennsylvania Elections - Report Center (pa.gov).

Pennsylvania’s Election Code defines the term “canvass” to “mean the gathering of ballots after the final pre-canvass meeting and the counting, computing, and tallying of the votes reflected on the ballots.”¹² Likewise, it defines the term “pre-canvass” to mean the following:

*[T]he inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the **counting, computing, and tallying of the votes reflected on the ballots.***¹³ *[Emphasis added]*

Neither term includes the recording or publishing of the votes reflected on the ballots.¹⁴ Not publishing the votes is consistent with Pennsylvania’s legitimate concern with maintaining the secrecy of the ballot and not revealing vote counts in a manner that may influence voters who have not yet voted in person before the close of the polls on election day. But it is not clear how one counts, computes, and tallies without creating some sort of record. This confusion can be remedied by creating a definition of ballot processing that specifies the processing activities to be allowed, such as opening envelopes, removing ballots, and other activities.

Pre-Canvassing and Canvassing in Pennsylvania

Pennsylvania’s Election Code requires that each county board of elections “meet no earlier than seven o’clock A.M. on election day to pre-canvass all ballots received prior to the [pre-canvass] meeting.”¹⁵ Moreover, the law requires that the county board provide at least 48 hours’ notice of the pre-canvass meeting by publicly posting a notice of said meeting on its publicly accessible Internet website.¹⁶

One authorized representative of each candidate in an election and one representative from each political party must be permitted to remain in the room in which the absentee ballots and mail-in ballots are being pre-canvassed. However, the law prohibits any person who is observing, attending or participating in a pre-canvass meeting to disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.¹⁷

¹² Act of June 3, 1937 (P.L.1333, No.320), § 120(a.1); 25 P.S. § 2602(a.1).

¹³ *Ibid*; 25 P.S. § 2602(a)(1) and (q.1).

¹⁴ *Ibid*.

¹⁵ *Ibid*. § 1308(g)(1.1); 25 P.S. § 3146.8(g)(1.1).

¹⁶ *Ibid*.

¹⁷ *Ibid*.

After the pre-canvassing of ballots, county boards of elections are required to meet “no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting.”¹⁸ This meeting continues until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The board is prohibited from recording or publishing any votes reflected on the ballots prior to the close of the polls. The entire canvass process then continues through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot).¹⁹

Like the pre-canvass meetings, the canvass meetings require no less than 48-hour notice by publicly posting a notice on the county board of elections’ publicly accessible website. One authorized representative of each candidate in an election and one representative from each political party must be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.²⁰ In addition, the Election Code requires that when the board meets to pre-canvass or canvass absentee ballots and mail-in ballots, it must:

[E]xamine the declaration on the envelope of each ballot not set aside ... and shall compare the information thereon with that contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File,” whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the “Registered Absentee and Mail-in Voters File,” the absentee voters' list and/or the “Military Veterans and Emergency Civilians Absentee Voters File” verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.²¹

¹⁸ *Ibid.* § 1308(g)(2); 25 P.S. § 3146.8(g)(2).

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*; 25 P.S. § 3146.8(g)(3).

All absentee ballots not challenged and all mail-in ballots not challenged and that have been verified must be counted and included with the returns of the applicable election district as follows:

- The county board must open the envelope of every unchallenged absentee elector and mail-in elector without destroying the declaration executed thereon.
- If any of the envelopes on which are printed or labeled “Official Election Ballot” contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, said envelopes and the ballots contained therein must be set aside and declared void.
- The county board must open the envelopes, remove the ballots and count, compute and tally the votes.
- Following the close of the polls, the county board must record and publish the votes reflected on the ballots.²²

Alternatively, received ballots with challenged applications and ballots must be “placed unopened in a secure, safe and sealed container in the custody of the county board.” They will remain in such custody until the board fixes a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. A hearing can be held no later than seven days after the deadline for all challenges to be filed. During the hearing, the county board must hear said challenges and, in hearing the testimony, is not legally bound by the Pennsylvania Rules of Evidence. “The testimony presented must be stenographically recorded and made part of the record of the hearing.”²³

County board decisions upholding or dismissing any challenge are reviewed by the court of common pleas of the county upon the filing of a petition by any person aggrieved by a board decision. The appeal must be filed within two days after the decision. Pending final determination, the county board must suspend any action in canvassing and computing all challenged ballots received. When computation of the returns of the county is completed, the votes cast upon the challenged official absentee ballots that are finally determined to be valid are added to the other votes cast within the county.²⁴

If the proof of identification for absentee ballots or mail-in ballots is received and verified prior to the sixth calendar day following the election, then the county board of elections is legally required to canvass the absentee ballots and mail-in ballots. “If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-

²² *Ibid*; 25 P.S. § 3146.8(g)(4)(i)-(iv).

²³ *Ibid*. § 1308(g)(5); 25 P.S. § 3146.8(g)(5).

²⁴ *Ibid*. § 1308(g)(6), (7); 25 P.S. § 3146.8(g)(6)-(7).

in ballot shall not be counted.”²⁵ A qualified absentee elector is not required to provide proof of identification so long as the elector is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act or by an alternative ballot under the Voting Accessibility for the Elderly and Handicapped Act.²⁶

Ballot Processing in Other States

Intuitively, the states with the largest populations would be the states mostly likely to benefit from pre-election day ballot processing, simply to accommodate the larger number of votes likely to be received in any election. With resident populations ranging from 10 million to nearly 40 million,²⁷ these states present a variety of positions on ballot processing. Some states allow for no excuse vote by mail, while others have absentee balloting that provides for a range of restrictive to broad excuses to vote via absentee ballot. All states allow mail in voting under federal law for active duty military personnel and persons serving overseas.

California²⁸

As a general rule, vote by mail ballots may begin to be processed during the 29-day period running up to the election. This general rule applies only to verifying each voter’s signatures on the ballot return envelope and updating voter history.

Counties that have the “necessary computer capability” may open the envelopes, remove the ballots, duplicate any damaged ballots, prepare ballots to be machine read, or machine read them, including write-in votes so that they can be tallied by the machine beginning on the 15th day before the election. Under this process, the ballots are completely processed as received, including entered into the tabulators. Jurisdictions with computer capacity cannot engage in these activities before 5pm of the day before the election. Under either process, counts or tabulations may not be accessed or released prior to the close of the polls on election day.

²⁵ *Ibid.* § 1308(h)(2), (3); 25 P.S. § 3146.8(h)(2)-(3).

²⁶ *Ibid.* § 1308(i); 25 P.S. § 3146.8(i).

²⁷ United States Department of Commerce, U.S. Census Bureau, 2020 Census Apportionment Results, April 26, 2021, Table 2. Resident Population for the 50 States, the District of Columbia, and Puerto Rico: 2020 Census

²⁸ Cal.. Elec. Code §15101.

Texas²⁹

Texas allows early voting by mail, but generally does not allow any pre-election day processing or counting of votes. The one exception to this rule is for an election in a county with a population of 100,000 or more, in which case counting of early voting ballots may begin on the 4th day before the election. This exception applies to 41 of Texas' 254 counties.³⁰ This, however, is the status of the law on May 31, 2021. As of this writing, the Texas legislature is engaged in a vociferous battle over election law changes. If the results of this battle are available before this report goes to press, staff will attempt to update this paragraph with any changes that are enacted.

Florida³¹

On May 6, 2021, the Governor of Florida signed substantial amendments to Florida's mail-in voting law, including provisions that affect processing of mail-in ballots. Previously, processing of mail-in ballots could begin at 7:00 am on the 22nd day before the election. This authority has been eliminated. Processing now can only occur after the public testing of automatic tabulating equipment. Testing must occur 10 days prior to the start of early voting. In a federal election, early voting begins on the 10th day before the election. Local election officials have the discretion to offer early voting on the 15th, 14th, 12th, 11th or 2nd day before a state or federal election as well. In a federal election such as a presidential election, the earliest processing of vote by mail ballots can occur is 20 days before the election, but could vary in other elections. Processing includes all canvassing activities, which includes entering the ballots into electronic tabulation machines. No results may be released prior to the close of the polls on election day, and to do so will result in 3rd degree felony charges.

New York³²

While New York State allows early voting, it does not allow any pre-election day processing of ballots. Generally, the ballots are not to be canvassed or examined until after the close of the polls on election day, and no unofficial tabulations of election results may be printed or viewed in any manner until after the close of polls on election day. An exception exists that allows early voting tabulation to begin one hour before the close of the polls on election day, but only if the local board of elections adopts procedures to prevent the public release of election results prior to the close of polls on election day and the procedures are consistent with the regulations of the state board of elections. The

²⁹ Tex. Elec. Code §§ 85.001, 87.0241.

³⁰ World Population Review, Population of Counties in Texas (2021) (worldpopulationreview.com).

³¹ Fl. Stat. §§ 101.68, 101.657, and 101.5612(2) as amended by Statutes Chapter 2021-11.

³² N.Y. Elec. Law § 8-600.

procedures must be filed with the state board of elections at least thirty days before they are scheduled to be effective.

Illinois³³

Illinois allows mail-in voting, and allows the processing of vote by mail ballots to be completed upon receipt by the election authority at its central ballot counting location. The results of the processing may not be counted until after 7pm on election day.

Ohio³⁴

Ohio has no excuse absentee voting. These ballots may be processed upon receipt. Processing includes:

- Examining the identification envelope statement of voter to verify that the ballot is eligible to be counted;
- Opening the envelope if the ballot is eligible to be counted;
- Determining the validity of the ballot;
- Preparing and sorting the ballot for scanning by automatic tabulating equipment;
- Scanning the ballot by automatic tabulating equipment if the equipment used by the board of elections permits a ballot to be scanned without tabulating or counting the votes on the ballot scanned.
- Disclosure of the count prior to the closing of polling places is prohibited.

Georgia³⁵

In March 2021, Georgia amended its election law to allow pre-election day processing of its no excuse absentee ballots. Previously, ballots could not be processed until election day. Under the new provisions, ballots that have been verified and accepted may be processed beginning at 8:00 a.m. on the third Monday prior election day. The election superintendent is authorized to open the outer envelope, open the inner ballot

³³ Il. Cons. Stat. § 5/19-8.

³⁴ Ohio Rev. Code § 3509.

³⁵ Ga. Code § 21-2-386, as amended by Act 9 of 2021, effective March 25, 2021.

envelope and scan the absentee ballot using one or more ballot scanners. The process must be witnessed, and no one may tally, tabulate, estimate, or attempt to tally, tabulate, or estimate or cause the ballot scanner or any other equipment to produce and tally or tabulate the ballots prior to the close of the polls on election day.

North Carolina³⁶

North Carolina has no excuse absentee voting. Beginning with the fifth Tuesday before the election, the county board of elections holds a weekly meeting at which it approves absentee ballot applications at and which it can begin processing completed ballots that have been received. This includes removing those ballots from their envelopes and having them read by an optical scanning machine, without printing the totals on the scanner. The actual tally of the votes is required to occur on election day.

Michigan³⁷

Michigan allows for limited circumstance absentee ballots, which cannot be processed until election day. For the November general election of 2020, a law was passed to allow pre-processing of those ballots on the day before election day. While several pieces of legislation were introduced in the Michigan Legislature in the Spring of 2021, as of June 1, 2021, none of them have been enacted.

Other states that allow substantial pre-election day ballot processing are outlined below.

Arizona³⁸

Signature verification of early ballots is to occur upon receipt of the ballot and ballot affidavit. After the ballot is verified, the ballots may be transferred to the early election board of the municipality for tallying of the ballots which may begin immediately after delivery. The release of information regarding early voting tallies before one hour after the closing of the polls or all precincts have reported, whichever occurs first, is a class 6 felony.³⁹

³⁶ N.C.Gen.Stat. §§ 163-230.1 and 163.234.

³⁷ Mich. Com. Laws § 168.765.

³⁸ Ariz. Rev. Stat. §§ 16-550 and 16-551, as amended by Ch. 318, signed by the Governor May 5, 2021.

³⁹ Ariz. Rev. Stat. §§ 16-550 to 16-552.

Colorado⁴⁰

Colorado permits the opening, preparation, and counting of mail ballots at designated mail counting places beginning 15 days prior to the election. The election official in charge of the mail ballot counting place shall take all precautions necessary to ensure the secrecy of the counting procedures, and no information concerning the count shall be released by the election officials or watchers until after 7 p.m. on election day.

Delaware⁴¹

Beginning on the Friday before election day, absent ballots may be opened and examined to determine if the ballot has been properly completed, if the elector's intent can be determined, tally write-in votes or those that must be hand counted, and if it is determined that a ballot cannot be read by the tabulating equipment, duplicate the ballot if the voter's intent can be determined. They are then sealed in carrier envelopes and delivered to the relevant election district. The results cannot be extracted or reported before the polls close in election day.

Indiana⁴²

In amendments adopted in 2021, effective July 1, 2021, Indiana provided for early processing of absentee ballots. A county board of election may scan voted absentee ballot cards using an optical ballot scanner no earlier than 7 calendar days before the election, but the ballots may not be tabulated before election day. An exception to this rule applies to counties that use an electronic poll book or are a vote center county, if the county board of elections unanimously adopts a resolution to allow early processing of ballots. 47 of Indiana's 92 counties were designated as vote center counties in 2021.⁴³ In those counties, absentee ballots may be partially processed. Under these provisions, beginning with the third day prior to the election and continuing daily up until noon of the day before the election, the county boards may open the outer envelopes and verify if the ballot is properly endorsed and verified but may not unfold and examine the ballot. Tabulation may not occur until election day.

⁴⁰ Col. Rev. Stat. §§ 1-7.5-107.5, 1-7.5-202 and 1-7.5-203.

⁴¹ 15 Del. Code §§ 5508, 5509, and 5510A.

⁴² Ind. Code §§ 3-11.5-4-5, 3-11.5-4-6, 3-11.5-4-11 and 3-11.5-4-11.5, as amended by Public Law 108, signed by the Governor April 23, 2021.

⁴³ Indiana Department of State, accessed May 28, 2021, SOS: Voter Information: Vote Centers.

Iowa⁴⁴

Outside envelopes may be opened and affidavits verified and counting may begin the day before election day. Counting shall begin on the day before election day if, in the preceding general election, absentee ballot counts were not completed by 10pm election day. The results of tabulations are not to be released until all counts are completed on election day.

Montana⁴⁵

In Montana, signatures may be verified upon receipt and the outer envelope opened; The inner envelope may be opened three days prior to election and the ballot secured in a ballot box. Automatic tabulation using a vote-counting machine may begin day before election day, but manual tabulation may not begin until election day.

Nebraska⁴⁶

In Nebraska, verification of signature and affidavit occur upon receipt. On the second Friday before the election, verified ballots shall be opened, unfolded, flattened for purposes of using the optical scanner, and placed in a sealed container for counting. Counting boards may begin counting early ballots no earlier than twenty-four hours prior to the opening of the polls on the day of the election. No results can be released until after the polls close on election day.

Nevada⁴⁷

By new legislation enacted in June 2021, Nevada adopted permanent mail-in ballot voting. Each active registered voter in the county is to receive a mail ballot for every election. An appointed mail ballot central counting board may begin counting the received mail ballots 15 days before the day of the election. The board must complete the count of all mail ballots on or before the seventh day following the election. The counting procedure must be public. Results of the count are to be kept secret and not revealed until the end of election day.

⁴⁴ Iowa Code §53.23, as amended by Acts Chapter 12, signed by the Governor March 8, 2021.

⁴⁵ Mont. Code Ann. § 13-13-341(7)(a).

⁴⁶ Neb. Rev. Stat. §32-1027(7) and (8).

⁴⁷ Nev. Assembly Bill 321, signed by the Governor June 2, 2021 as Chapter 248.

New Mexico⁴⁸

Upon receipt, ballots are verified and voting lists updated in New Mexico. In election in which less than 10,000 mailed ballots were sent to the voters of a county, election judges may, beginning five days before the election, open the official mailing envelope, and insert the ballot into an electronic voting machine to be registered and retained until votes are counted after the close of polls on election day. In counties where 10,000 or more ballot were mailed, this process can begin two weeks before the election.

North Dakota⁴⁹

Beginning three days before election day, the outer envelopes may be verified and voter lists updated. A different person may open the ballot, unfold it, and place in secured ballot boxes. Votes may not be tallied or tabulation reports generated until after close of polls on election day.

Oklahoma⁵⁰

In Oklahoma, outer envelopes may be opened and signatures/affidavits verified beginning at 10 a.m. on the Thursday preceding the election. Generally, the inner envelopes are opened and fed into a voting device for counting on election, with no results to be printed, or made known to any person nor announced earlier than 7:00 p.m. on the day of the election. Upon written approval by the Secretary of the State Board of Election, the process for opening and scanning the inner envelopes can begin earlier than election, subject to the same security and information release restrictions imposed on ballots opened on election day.

Oregon⁵¹

Oregon allows ballots to be opened and scanned into a vote tallying system beginning on the seventh day before the election. Totals may not be recorded until after 8 p.m. on election day.

⁴⁸ N. M. Stat. § 1-6-14.

⁴⁹ N.D. Cent. Code §§ 18.1-07-12 and 18.1-07-12.1, as amended by Senate Bill 2142, signed by the Governor April 12, 2021. This amended extended the processing time from the day before the election until starting three days before the election.

⁵⁰ Okla. Stat. §§ 26-14-123 and 25-14-125.

⁵¹ Or. Rev. Stat. §§ 254.478 and 260.705.

Rhode Island⁵²

Rhode Island allows outer envelopes to be opened upon receipt. Ballots may be processed and certified beginning 14 days before the election. Ballots are then sorted by city and town, after which the inner envelopes may be opened and the ballots tabulated through the use of a central count optical-scan unit. Final counts may not occur until after 8p.m. on election day.

Vermont⁵³

No more than 30 days prior to the election, the outer envelopes of mail-in and absentee ballots may be opened and verified. If a town will be using a vote tabulator for the registering and counting of votes in the upcoming election, they ballots may be opened, processed and scanned the day before the election. Final counts will then be made on election day.

Virginia⁵⁴

Upon receipt, signatures on outer envelopes are to be verified and voting lists updated. The general registrar may open sealed ballots and insert them in optical scan counting equipment any time prior to the seventh day immediately preceding the election. This becomes a mandatory duty beginning on the seventh day immediately preceding the election. No ballot count totals shall be initiated. If the affirmation has been completed as required, the general registrar may open the sealed ballot envelope and insert the ballot in optical scan counting equipment or other secure ballot container without initiating any ballot count totals. If a general registrar does not choose to do so, the sealed ballot envelope shall be deposited into a secure container provided for such purpose, in which it shall remain until the general registrar initiates the process of opening the sealed ballot envelopes deposited into the secure container and inserting such ballots into optical scan counting equipment without initiating any ballot count totals. Such process shall be at the general registrar's discretion at any time prior to the seventh day immediately preceding the election but shall be mandatory beginning on the seventh day immediately preceding the election. Absentee ballots that need to be counted by hand can begin to be counted at noon on election day. No totals shall be generated before the close of the polls on election day.

⁵² R.I. Gen. Laws §§ 17-20-26 and 17-22-1.

⁵³ 17 Vt. Stat. §§ 2546 and 2546a.

⁵⁴ Va. Code. §§ 24.2-709.1 through 24.2-712, as amended by Acts of Assembly Chap 0471, signed by the Governor March 31, 2021.

Washington⁵⁵

Verification of ballots may begin upon receipt and after they have been verified, they may begin opening and preparing the ballots for tabulation, although actually counting may not occur until 8 p.m. on election day.

Ballot Processing in Other States Current Law as of June 21, 2021			
State	Pre-Election Day Ballot Preparation Allowed	Amount of Time before Election Day	Activities Authorized
Alabama ⁵⁶	No	--	Note receipt on absentee list only
Alaska ⁵⁷	Partially	7 days	Verification of voter's certificate; secrecy envelope not opened or vote counted until 8pm election day
Arkansas ⁵⁸	Partially	Tuesday before	Opening outer envelope, processing and canvassing of ballot paperwork of outer envelope only; secrecy envelope not opened or vote counted until 8am election day
Connecticut ⁵⁹	Partially	7 days	Sort into voting districts and verify qualified voter only; all envelopes opened and ballots counted at the time on election day designated by registrar of voters
Hawaii ⁶⁰	Yes	Upon receipt	After verification of outer envelope, may be opened and counted
Idaho ⁶¹	Partially	Upon receipt	Verification of affidavit on outer envelope only
Kansas ⁶²	Partially	Unspecified date	Some advance ballots by mail may be processed but not counted before election day

⁵⁵ Rev. Code Wash. § 29A.40.010 et seq.

⁵⁶ Ala. Code § 17-11-10. Prior to 2021, absentee ballots could not be opened until noon on election day. Act #2021-364 moved that time up to 7 am on election day. Signed by the Governor May 6, 2021.

⁵⁷ Alaska Stat. §§ 15.20.201 and 15.20.203.

⁵⁸ Ark. Code § 7-5-416, as amended by Act 736-2021, approved by the Governor April 15, 2021.

⁵⁹ Ct. Gen. Stat. §§ 9-140(c) and 9-150a.

⁶⁰ Hawaii Rev. Stat. §§ 15-9 and 15-10. The statute appears to allow all aspects of vote processing and counting to occur upon receipt, but the language is not elaborative on details.

⁶¹ Idaho Code §§ 1005, 10007 and 1008.

⁶² In Kansas, the county election officer appoints a special election board to count advance ballots. In the eight counties that use paper ballots, the board meets on election day to begin the count. In the remaining 97 counties which use voting machines, optical scanners, electronic or electronic/mechanical voting systems, the boards convene on election day or at any time before election day as the county election officer deems necessary. These boards may conduct the original canvass of advance voting ballots when the board convenes, but shall not complete final tabulation prior to election day. Kan. Stat. §§ 25-1133 and 25-1134.

Ballot Processing in Other States Current Law as of June 21, 2021			
State	Pre-Election Day Ballot Preparation Allowed	Amount of Time before Election Day	Activities Authorized
Kentucky ⁶³	No	--	--
Louisiana ⁶⁴	Partially	In parishes that receive more than 1,000 absentee ballots, the day before	Activities on the day before are limited to preparation and verification of outer envelopes; no tabulation or counting may occur until election day
Maine ⁶⁵	Partially	7 th day immediately preceding	Verification authorized; ballots may not be counted, voter intent may not be determined and election results may not be obtained or released until after the polls have closed on election day
Maryland ⁶⁶	No	--	Date and time stamp receipt only
Massachusetts ⁶⁷	Partially	Upon receipt	May verify signature/affidavit on outer envelope, open outer envelope; inner envelope not to be opened or processed before Election Day
Minnesota ⁶⁸	No	--	Date stamped upon receipt only
Mississippi ⁶⁹	No	--	--
Missouri ⁷⁰	No	--	--
New Hampshire ⁷¹	No	--	All processing and counting starts on election day after the polls open
New Jersey ⁷²	Partially	At least weekly three weeks prior to election day	Outer envelopes to be removed, signatures verified and voters with rejected ballots are to be sent a “cure letter” within 24 hours; inner envelopes opened and ballots counted on election day

⁶³ Ky. Rev. Stat. §§ 117.087.

⁶⁴ La. Rev. Stat. §§ 1313 and 1313.1.

⁶⁵ Maine Rev. Stat. §§ 759, and 760-B as amended by 2021 Public Law Ch. 11, approved by the Governor March 17, 2021.

⁶⁶ MD Code Elect. Law, § 302 and Code of Maryland Regulations (COMAR) §33.11.04.01 et seq.

⁶⁷ Mass. Gen. Laws 54 §§ 94 and 95.

⁶⁸ Minn. Stat. §§ 203B.08(subd.3), 203B.081, and 204C.20.

⁶⁹ Miss. Code § 23-15-639.

⁷⁰ Mo. Stat. § 115.299.

⁷¹ N.H. Rev. Stat. §§ 659:47 to 659:61.

⁷² N. J. Stat. §§ 63-17 to 63.22. New Jersey adopted early voting by P.L.2021, ch. 40, signed by the Governor March 30, 2021, but this addition did not change the vote counting timeline. These ballots are not to be counted until after the close of the polls on election day. N.J. Stat. § 19:15A-4.

Ballot Processing in Other States Current Law as of June 21, 2021			
State	Pre-Election Day Ballot Preparation Allowed	Amount of Time before Election Day	Activities Authorized
South Carolina ⁷³	No	--	All certification and counting occurs after 9 am on election day.
South Dakota ⁷⁴	Partially	Upon receipt	Outer envelopes may be opened and time stamped; all other processing and counting to occur after the close of polls on election day; exception if the total number of absentee ballots justifies starting earlier on election day
Tennessee ⁷⁵	No	--	All activities begin on election day; no counts released until after polls close
Utah ⁷⁶	Partially	Upon receipt	Signatures may be verified, eligibility checked and outer envelopes opened; all counting begins the day after election day
West Virginia ⁷⁷	No	--	All processing and counting occurs on election day
Wisconsin ⁷⁸	No	--	Time stamped only; all processing occurs on election day
Wyoming ⁷⁹	No	--	All processing occurs on election day

Source: National Conference of State Legislatures Elections and Campaigns databases; review of each state's election law by Commission staff.

Proposed Amendments

Revisions to the mail-in ballot processing to procedures need to answer two questions: how much time in advance of the opening of the polls on election day should be granted to begin processing, and what activities are authorized as part of the processing

⁷³ S.C. Code § 7-15-420. Amendments to allow processing to begin the day before the election were added as a Covid-19 pandemic response and lapse on December 31, 2021, reverting back to the language requiring all certification and counting to occur on election day. 2020 Act 133, signed by the Governor May 13, 2020.

⁷⁴ S.D. Cod. Laws §§ 12-19-10, 12-19-43 and 12-19-46. The earlier start provisions on § 12-19-43 were added by Senate Bill 184 (2021), signed by the Governor March 18, 2021.

⁷⁵ Tenn. Code §§ 2-6-202 and 2-6-303.

⁷⁶ Utah Code §§ 20A-3a-401 and 20A-3a-402.

⁷⁷ W. Va. Code §§ 3-3-8 and 3-3-11.

⁷⁸ Wisc. Stat. §§ 6.84 to 6.89; 7.52.

⁷⁹ Wy. Stat. §§ 22-9-101 to 22-9-125.

procedure. An additional issue is protecting the privacy of the ballots and maintaining a secure chain of custody.

Almost every state allows for an initial inspection and verification of the voter's affidavit on the outer envelope and updating and correcting lists of voters. A large subset of those states allow for a visual inspection of the inner envelopes to ensure that they are unmarked and undamaged, and then the inner envelopes are set aside. A dozen states do not allow any type of mail-in ballot preparation in advance of election day. Of the nine largest states by population reviewed above (Pennsylvania is ranked 5th overall), six of those states at least in some instances allow mail-in or absentee ballots to be verified, opened, and prepared for scanning. These six states also allow for ballots to be scanned into ballot scanners or other electronic tabulation devices. The only step not taken is to cause the scanner or tabulation machines to generate a total number of votes (in layman's terms, the only step that remains for election day is to "hit the button"). Another 16 of the remaining smaller states allow some time period before election day for ballots to be prepared and scanned, with only a machine-generated total left to be done on election day after the polls close. In other words, 22 states allow all but the final tabulation to occur some period of time before election day; 12 states prohibit any pre-processing, and the remaining 16 states (excluding Pennsylvania) allow pre-processing to some degree.

Some members of the Advisory Board have stated that processing needs to include scanning in order to be fully effective. Others have opined that Pennsylvania's newly installed (2019-2020) voting systems, found in all 67 counties, have the capacity to scan large volumes of votes and could accommodate the physical scanning of all mail-in ballots on election day. Pennsylvania's counties have security procedures in place to safeguard unopened mail-in ballots from the time they are received until election day by requiring them to be kept in sealed or locked containers, and these procedures may well be adequate to provide appropriate security for processed and scanned ballots. These amendments, however, also seek to strengthen safeguards and protect the chain of custody of opened ballots.

As to how much time should be allotted for ballot processing, states range from Georgia's 21 days to the day before election day. Possible models could be Georgia, California's 15-day period, or Florida's newly revised maximum 20-day period. Colorado, Nebraska, Nevada, and Rhode Island allow ballot preparation and, in some instances, ballot counting, to occur 14 to 15 days prior to the elections. The County Commissioners Association of Pennsylvania has advocated for additional ballot preparation time, but has not specified a particular time period.⁸⁰ During Advisory Board meetings, the time frames of 14 and 21 days have been suggested.

⁸⁰ CCAP Election Reform Preliminary Report, January 2021, CCAPElectionsReformReportJanuary2021.pdf (pacounties.org).

AN ACT

Amending the act of June 3, 1937 (P.L.1333, No.320), entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," in preliminary provisions and voting by qualified absentee electors, further providing for processing of official canvassing of official absentee ballots and mail-in ballots.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 102 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, amended March 27, 2020 (P.L.41, No.12), is amended to read:

Section 102. Definitions.--

(a.1) The word "canvass" shall mean the gathering of ballots [after the final pre-canvass meeting] and the counting, computing and tallying of the votes reflected on the ballots.

* * *

(q.1) The word "process" shall mean the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the

envelopes and [the counting, computing and tallying of the votes reflected on the ballots] the preparation of those ballots for scanning, including unfolding, straightening and duplicating if the ballot is damaged in some way that prevents it from being scanned but where the voter's intent is still clear. It shall also include scanning the ballot into a voting machine or other automatic tabulating device, if the equipment used by the county board of elections permits a ballot to be scanned without tabulating or counting the votes on the ballot scanned. The term does not include the recording or publishing of the votes reflected on the ballots.

Section 2. Section 1308 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, amended March 27, 2020 (P.L.41, No.12), is amended to read:

Section 1308. [Canvassing] Processing of Official Absentee Ballots and Mail-in Ballots.

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be [canvassed] processed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be [canvassed] processed in accordance with subsection (g). A mail-in ballot shall be [canvassed] processed in accordance with subsection (g).

* * *

(d) Whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act has died prior to

the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected by the [canvassers] board of elections but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election.

* * *

(g) (1)

(i) An absentee ballot cast by any qualified absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(ii) [An] Subject to the provisions of paragraph (1.1) an absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section [1302(a.3)] 1302.1(a.3) or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

(1.1) The county board of elections [shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting.] may begin processing official absentee and mail-in ballots no earlier than seven o'clock A.M. on the 14th day immediately preceding the election, during the hours of seven o'clock A.M. to seven o'clock P.M. each day, including holidays and weekends, if the number of absentee and mail-in ballots sent by the county to registered voters indicates that

extra time will be needed to ensure that all such ballots can be processed, counted and tallied prior to eleven o'clock P.M. on the day of the election. A county board of elections shall provide at least forty-eight hours' notice of [a pre-canvass meeting] the first day that pre-election day ballot processing will begin by publicly posting a notice [of a pre-canvass meeting] of the dates and times processing will occur on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are [pre-canvassed] processed. No person observing, attending or participating in [a pre-canvass meeting] any ballot processing activities may disclose the results of any portion of any [pre-canvass meeting] ballot processing prior to the close of the polls on election day. A person who makes an unauthorized disclosure under this paragraph shall be guilty of a misdemeanor of the first degree.

(2) The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not [included in the pre-canvass meeting] processed under paragraph (1.1). The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide at least forty-eight hours' notice of a canvass

meeting by publicly posting a notice on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.

(3) When the county board meets to [pre-canvass] process or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be [pre-canvassed] processed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words "Official Election Ballot" contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii)

(A) In the case of absentee and mail-in ballots processed during the time allotted in paragraph (1.1), after the ballots have been processed, they shall be locked and sealed in tamper-proof containers and secured in a locked secure location at the county board of elections physical location and otherwise retained subject to the provisions of this act regarding retention and safekeeping of canvassed ballots in general.

(B) In the case of absentee and mail-in ballots not processed under paragraph (1.1), the [The] county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

(iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

* * *

IMPACT OF EXECUTIVE AND JUDICIAL DECISIONS ON PENNSYLVANIA ELECTION LAW

Fundamental to democratic government is the concept of separation of powers and the notion of three separate but equal branches of government. At its most basic level, laws are enacted by the legislature, which also appropriates the funds necessary to operate the government, the executive branch implements and administers the law enacted by the legislature, and the judiciary interprets the Constitution and laws when controversies are brought before it. The presidential election of 2020 tested the limits of this separation and balance of powers at times; and in the minds of some, individual branches overstepped their bounds. Determinations by the Department of State and rulings by the Pennsylvania Supreme Court created temporary responses to questions raised and effectively filled in what were perceived to be gaps in primarily the mail-in ballot provisions of the law.⁸¹

The cases examined in Appendix B interpreted and modified Pennsylvania's mail-in law in the following ways:

- Act 77 was interpreted to permit counties to use drop boxes or other mobile or temporary collection sites. If this practice is not desired, the statute would need to be amended to explicitly prohibit their use and specify what constitutes an acceptable return of a mail-in ballot. Section 1306-D of the Election Code governs voting by mail-in electors. The provision states that “the elector shall send same [envelope] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”⁸² The Pennsylvania Supreme Court in *Pennsylvania Democratic Party v Boockvar*⁸³ found that this provision was subject to multiple reasonable interpretations. Accordingly, the court determined that hand delivered mail-in ballots could be accepted at locations other than county board of election office addresses, finding that the legislative intent of Act 77 was to provide voters with options to vote outside of traditional polling places.
- The deadline for receipt of completed mail-in ballots was statutorily established as no later than 8:00 pm on the day of the primary or election.⁸⁴ This remains the state of the law in Pennsylvania in June 2021. This rule was temporarily lifted by the Pennsylvania Supreme Court for the November 2020 General Election in *Pennsylvania Democratic Party v. Boockvar*. The court granted this relief to reduce voter disenfranchisement through factors beyond their control.

⁸² § 1306-D(a) of the Election Code, as added by Act 77.

⁸³ *Pennsylvania Democratic Party v. Boockvar*, 238 A. 3d. 345, 361 (Pa. 2020).

⁸⁴ § 1306-D(c) of the 1937 Election Code, as added by Act 77.

In finding the COVID-19 pandemic and its fallout on voters seeking to exercise their franchise the equivalent of a natural disaster, conflated by the combination of U.S. Postal Service delivery standards and the timelines set forth in the Election Code for receipt and return of a mail-in ballot, the Pennsylvania Supreme Court granted temporary and extraordinary equitable relief in the form of an injunction that permitted tabulation of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day, and received by 5:00 p.m. on the Friday following the election.⁸⁵

- The Pennsylvania Supreme Court in *Pennsylvania Democratic Party v. Boockvar* also held that ballots received between Election Day and the military ballot deadline that lacked a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, were presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrated that it was mailed after Election Day. The Court specifically stated that “[W]e refuse, however, to disenfranchise voters for the lack or illegibility of a postmark resulting from the USPS processing system, which is undeniably outside the control of the individual voter.”⁸⁶ While not issuing a ruling (the case was dismissed on jurisdictional grounds), the United States Court of Appeals for the Third Circuit commented that it believed that the Pennsylvania Supreme Court’s order to presume that mail-in ballots without postmarks are valid violates the Equal Protection Clause because it creates an unequal treatment of votes.⁸⁷ It would be prudent to amend the Election Code to provide specific guidance on how ballots with illegal or missing postmarks should be treated. This issue was not unique to the November 2020 general election and is likely to result in further litigation in the future if not addressed.
- Pennsylvania’s requirement that pollwatchers be residents of the county in which they serve was found to not violate the United States or Pennsylvania Constitutions.⁸⁸
- The ability to “cure” imperfect ballots was challenged on the basis that some counties allowed it and others did not, thus violating the equal protection rights of voters. The Pennsylvania Supreme Court sitting in the Middle District stated: “It is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots.”⁸⁹ As Pennsylvania’s statute neither allows nor prohibits ballot curing, a legislative declaration would probably be useful. Several states have specific statutes to deal with opportunities to cure mail-in ballots.

⁸⁵ *Id.* at 371.

⁸⁶ *Id.* at 371, n.26.

⁸⁷ *Boguet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d. 336, 354 (3d Cir. 2020).

⁸⁸ *Pennsylvania Democratic Party*, 238 A.3d. at 385.

⁸⁹ *Donald J. Trump for President, Inc., et al. v. Secretary Commonwealth of Pennsylvania*, 830 F. Appx. 377 (3d Cir 2020) (Trump II).

Pennsylvania Supreme Court Jurisdiction

There has been some confusion among some observers as to how the Pennsylvania Supreme Court has been able to assume jurisdiction over some of these cases. In normal circumstances, a plaintiff or petitioner brings a case to a court of original jurisdiction. In Pennsylvania, that is usually a county court of common pleas or in matters involving government agencies, the Commonwealth Court. Decisions are made at those levels, and appeals can be sought through the Superior Court and then the Supreme Court. Act 77 of 2019 provided that the Pennsylvania Supreme Court had exclusive jurisdiction over constitutional challenges to its provisions regarding straight ticket voting and mail-in ballots, in any challenge brought before it during the 180 days following the effective date of Act 77. As Act 77 was effective upon enactment on October 31, 2019, constitutional challenges under this exclusive jurisdiction had to be commenced prior to the end of April 2020. Most of the litigation involving mail-in balloting occurred after the 180-day deadline had passed. Additionally, several constitutional challenges were brought in federal court, outside of the Pennsylvania Supreme Court's jurisdiction. To the extent litigation was brought after April 2020, the cases were usually filed in courts of common pleas and the Commonwealth Court. However, the Pennsylvania Supreme Court has what is known as extraordinary jurisdiction, or “King’s Bench” jurisdiction, which allows it to reach down to a lower court and remove a case from that court’s docket and immediately consider it, without going through the appeal process. This authority is limited to extraordinary circumstances, such as cases in which the importance of an issue to public well-being or the expediency with which action must be taken in the interest of justice requires superseding normal judicial or appellate procedures. Pennsylvania’s Supreme Court has explicitly had this authority since 1722.⁹⁰

⁹⁰ 42 Pa.C.S. §§ 502 and 726; Pa. R.A.P. 3309.

ON-GOING PENNSYLVANIA LEGISLATIVE PROPOSALS

House State Government Committee Public Hearings

Between January 21 and April 15, 2021, the House State Government Committee conducted a series of 10 public hearings to gather information about Pennsylvania's election laws. On May 10, 2021, committee chair Representative Seth Grove released the committee's findings, "A Comprehensive Review of Pennsylvania's Election Laws: How Pennsylvania Can Guarantee Rights and Integrity in Our Election System."⁹¹ The report addressed such issues as the Department of State's election guidance, the SURE system and other election information technology, audits, voter registration, voting machines, mail-in and absentee ballots, county election board operations and satellite offices, election integrity and accessibility policy, election laws and procedures in other states, and testimony from stakeholders and members of the House of Representatives.

Proposed Legislation in Pennsylvania

Proposed legislation before the Pennsylvania General Assembly during the 2021-2022 legislative session addresses a variety of topics. Legislation introduced through June 21, 2021 has been listed below by topic. Seventy-four bills have been introduced, but as of June 21, 2021, all but two of the bills remain in the committees to which they were originally referred.

Absentee Ballots

Senate Bill 93, Printer's No. 164, allows electors who have requested permanent absentee voter status an option to revoke that status electronically.

Candidates and Campaigns

Senate Bill 140, Printer's No. 117, requires candidates' reports and statements to be filed electronically, and requires the Department of State to maintain a searchable computer database and electronic reporting system to include contributions and expenditures by candidates and political committees. Also provides for disposition of unused campaign funds.

⁹¹ https://www.legis.state.pa.us/WU01/LI/TR/Reports/2021_0002R.pdf.

House Bill 174, Printer's No. 141 prohibits public employees from using sick time to engage in campaign activities.

House Bill 851, Printer's No. 835 requires background checks for candidates for school district offices.

House Bill 852, Printer's No. 836 requires financial reporting of expected large political or campaign donations by nonprofit organizations by the organization and disclosure of receipts from candidates and campaigns.

House Bill 905, Printer's No. 892 calls for the mandatory disclosure of federal income tax returns of candidates for President of the United States and Governor of Pennsylvania.

Conduct of Elections

House Bill 28, Printer's No. 1658 provides for immunity from liability for individuals who report election misconduct. Establishes a \$5,000 reward for information regarding election fraud leading to the arrest and conviction of an offender.

House Bill 29, Printer's No. 1659 provides for standardized requirements for all paper ballots.

Senate Bill 59, Printer's No. 36 allows for ranked-choice voting at November municipal elections.

Senate Bill 404, Printer's No. 395, creates the Voter's Bill of Rights regarding such matters as being in line to vote at the time the polls close, where voting is allowed if the person has moved to another polling district, voting via special needs ballot, taking children under the age of 18 into the voting area, voting without intimidation or force, and choosing to vote in-person even though a mail-in ballot had been requested.

Senate Bill 422, Printer's No. 422 requires voter ID to vote.

Senate Bill 735, Printer's No. 899 proposes a constitutional amendment to require voter identification at the polls. The bill received second consideration in the Senate and was re-referred to the Senate Appropriations Committee on June 16, 2021.

House Bill 737, Printer's No. 722 prohibits possession of a firearm at a polling place (exception for law enforcement).

House Bill 853, Printer's No. 837 requires voter ID to vote.

House Bill 1300, Printer's No. 1760 is a comprehensive election reform bill. For purposes of this report, the bill requires county boards of elections to meet on the first Friday and Saturday before election day to pre-canvas and may meet any other day during the five days leading up to election day. Additionally, the bill adds further responsibilities to the

Election Law Advisory Board. The bill received first consideration in the House of Representatives and was re-committed to the House Rules Committee on June 15, 2021.

Early Voting

House Bill 316, Printer's No. 290 requires counties to provide early voting beginning 15 days prior to the date of the primary or election. Standards established for uniform days, times, hours of operation, and early voting sites. Counties may track votes by precinct but may not tabulate votes until close of polls on election day.

House Bill 366, Printer's No. 338 is similar to HB 316 above, except that the early voting period begins 30 days prior to the date of the primary or election, and requires a minimum number of polling places be available in the county, based on local population. The bill also extends the start of pre-canvassing to 14 days before the election.

Election Audits

House Bill 1197, Printer's No. 1258, provides for Department of State audits with 90 days of each election. Within 180 days of all general elections, DOS is to compare voting records with neighboring states to ensure no discrepancies or irregularities, such as a voter voting in both Pennsylvania and another state.

House Bill 1476, Printer's No. 1593 provides for voting system performance audits of each county election results.

House Bill 1477, Printer's No. 1594 provides for county voting system audits.

Election Day Voter Access

House Bill 18, Printer's No. 11 declares the first Tuesday after the first Monday in November, known as Election Day, as a legal holiday in Pennsylvania.

Senate Bill 309, Printer' No. 319 requires employers to give employees up to two hours absence from work in order to vote in-person.

House Bill 892, Printer's No. 883 requires employees to give employees up to two hours leave without loss of pay, leave or other benefits in order to vote in-person. The leave is limited to the beginning or end of the employee's shift.

Judicial Matters

Senate Bill 22, Printer's No. 6 provides that when a Governor files a vacancy in the office of judge or magisterial district judge. Upon the creation of a vacancy, the Office of General

Counsel is to provide an application period of 30 days. Redacted applications are to be posted on the office's website and a 30-day public comment period must occur.

House Bill 263, Printer's No. 234 proposes a constitutional amendment to change the way number of justices and the manner of electing those justices for the Supreme and Superior Courts of Pennsylvania.

Mail-Ballots

House Bill 25, Printer's No. 13 repeals mail-in ballot provisions.

House Bill 30, Printer's No. 1660 authorizes guardians, persons with power of attorney, and next of kin of qualified electors to apply for a mail-in ballot on their behalf. Creates a thumbprint identification system for those who cannot sign or mark their applications. Requires each county board to establish an election management system to track all mail-in ballots sent to electors.

House Bill 31, Printer's No. 1661 limits the locations of drop boxes and drop off locations, requires video surveillance of the site, and requires the ability to time, date and location stamp the ballots when dropped off.

Senate Bill 128, Printer's No. 100 changes Pennsylvania's voting method to all mail-in and absentee voting.

House Bill 195, Printer's No. 1189 repeals mail-in ballot provisions.

Senate Bill 322, Printer's No. 330 amends the mail-in ballot pre-canvassing provisions. It requires a judge of elections to deliver all completed absentee and mail-in ballots to the county board of elections by 2 A.M. It authorizes the chairs of the county political parties (or a designee) to remain in the room where pre-canvassing occurs. Persons allowed to watch the pre-canvassing are to be permitted to have a clear line of sight to view and hear the proceedings at a distance of six feet or less, but that does not impede the ability of the person canvassing the ballots from carrying out his or her duties.

House Bill 366, Printer's No. 338 extends the start of pre-canvassing to 14 days before the election. The bill also allows for early voting. See above.

Senate Bill 515, Printer's No. 506 repeals the permanent mail-in voter list and states that only the Department of State or the county board of election of the qualified elector's residence may send an application for a mail-in ballot to the elector.

Senate Bill 599, Printer's No. 673 extends the pre-canvassing period to 21 days before election day.

House Bill 808, Printer's No. 792 allows ballots postmarked by on or before election day and received by 8 P.M. on the 6th day following the election may be counted.

House Bill 895, Printer's No. 886 repeals the mail-in ballot application process and instead provides for automatic mailing of mail-in ballots to each qualified registered elector 60 days before the election.

House Bill 982, Printer's No. 994 extends the pre-canvassing period as follows:

- 1st, 2nd, and 2nd Class A counties begin may begin pre-canvassing 14 days prior to election day;
- 3rd Class counties may begin pre-canvassing 7 days prior to election day; and
- 4th through 8th Class counties may begin pre-canvassing 3 days prior to election day

House Bill 1266, Printer's No. 1346 provides that absentee and mail-in ballots received within three days after the election that are postmarked on or before election day shall be counted.

House Bill 1270, Printer's No. 1350 prohibits private organizations or individuals from sending an application for an absentee or mail-in ballot to an elector by mail or electronic means. The bill requires all qualified registered electors to be placed on a permanent mail-in ballot list. Electors may opt out of this list upon request.

House Bill 1498, Printer's No. 1636 repeals the ability of a person who received a mail-in ballot turning in the ballot for destruction and voting in-person on election day. The bill authorizes electors to present their completed mail-in ballots to the judge of elections at their polling place on election day.

House Bill 1499, Printer's No. 1637 specifically authorizes signature verification of absentee and mail-in ballots and grants the authority to reject ballots if the signatures are found not to match.

House Bill 1501, Printer's No. 1638 requires each mail-in ballot to include a unique scannable identification code.

House Bill 1502, Printer's No. 1639 provides that absentee and mail-in ballots (except military ballots) received after 8 P.M. on election day are void. Provides that no declared disaster emergency, executive order or court order may waive that deadline.

House Bill 1618, Printer's No. 1794 requires county boards of elections to meet at least once before election day to pre-canvass all ballots received prior to the meeting. This can occur at any point during the seven-day period prior to election day, including the day before election day. This authorization is contingent upon the board completing a pre-canvass of all ballots received prior to the Friday before election day. Pre-canvassing activities authorized are those currently present in the law.

House Bill 1619, Printer's No. 1795 extends the current pre-canvassing period to no earlier than 21 days prior to election day.

House Bill 1620, Printer's No. 1796 provides for a "notice to cure" if an absentee or mail-in ballot is received on which the signature cannot be verified to prove identity.

Senate Bill 784, Printer's No. 922 changes the application date for absentee ballots and allows additional time for prec canvassing.

Nomination Petitions

Senate Bill 56, Printer's No. 33 extends the provisions regarding the counting and treatment of irregular ballots to general elections (the provisions formerly applied only to primary elections). This includes a provision that irregular ballots are not to be counted unless the total number of ballots equals or exceeds the number of signatures required to file a nomination petition.

House Bill 367, Printer's No. 339 sets the minimum number of signatures need for candidates at primaries at 10 in cities of the 3rd Class.

House Bill 894, Printer's No. 990 extends the provisions regarding the counting and treatment of irregular ballots to general elections (the provisions formerly applied only to primary elections). This includes a provision that irregular ballots are not to be counted unless the total number of ballots equals or exceeds the number of signatures required to file a nomination petition. The bill also provides for open primaries.

House Bill 1425, Printer's No. 1532 waives nomination petition and affidavit requirements for incumbents seeking renomination for the same office or persons who were defeated in the immediately preceding election cycle for the same office. This waiver is inapplicable for offices that are the subject of redistricting in the first election cycle following the redistricting.

Pollwatchers

Senate Bill 573, Printer's No. 612 increases the number of authorized pollwatchers, removes the requirement that pollwatchers be residents of the county within which they serve and replaces it with a requirement that they be residents of the Commonwealth, and authorizes watchers to be within the enclosed space where ballot counting occurs, but they may not interfere with the counting.

Poll Worker Recruitment and Retention

House Bill 1638, Printer's No. 1813 provides an exemption from state income tax for compensation received by poll workers for the election-related duties.

Primaries

Senate Bill 346, Printer's No. 369 allows an "unenrolled elector" (independent or unaffiliated) to vote at a primary by declaring which political party the elector wishes to vote in for that primary election.

Senate Bill 428 moves the date of the primary in presidential election years to the third Tuesday of March.

Senate Bill 690, Printer's No. 816 allows an "unenrolled elector" (independent or unaffiliated) to vote at a primary by declaring which political party the elector wishes to vote in for that primary election.

House Bill 894, Printer's No. 990 allows unaffiliated qualified voters to vote at a primary by declaring which political party the elector wishes to vote in for that primary election. The party designation remains until the elector changes it. See above.

House Bill 1614, Printer's No. 1788 amends the number of official election ballots to be provided at primary and general elections.

Voter Registration

House Bill 24, Printer's No. 12 creates the Voter Registration Database Audit Act. The bill calls for an audit of the voter registration database and at the conclusion purging of the records of all deceased and inactive electors.

Senate Bill 30, Printer's No. 12 Senate Bill 30, Printer's No. 12 proposes a constitutional amendment to lower the voting age in Pennsylvania to 16.

Senate Bill 141, Printer's No. 118 provides for automatic voter registration upon application for a driver's license, and upon application for employment with a state agency or an application for program benefits through a state agency.

House Bill 143, Printer's No. 109 requires monthly cross-referencing of the State's database of registered voters with death record information from local registrars. The bill also provides for registration updates for person who move residence.

Senate Bill 198, Printer's No. 171, creates the Election Day Registration Act.

House Bill 205 provides for automatic registration of qualified electors. Personal information is to be collected from PennDOT, the Department of Human Services, and the Department of Military and Veterans Affairs. Electors so registered are to receive notice of the registration, the opportunity to decline, and the ability to enroll/designate a political party.

House Bill 215, Printer's No. 181 allows for same day voter registration.

House Bill 462, Printer's no. 423 provides for cancellation of a deceased persons registration. Within two days of receipt of a death certificate by a local registrar or the State Registrar of Vital Statistics, notice is to be given to local election officials.

Senate Bill 510, Printer's No. 536, allows youth between the ages of 16 and 18 to pre-register to vote.

House Bill 1053, Printer's No. 1087 authorizes same day voter registration.

House Bill 1334, Printer's No. 1432 creates the Secure and Fair Elections Act. The bill requires all persons seeking to register to vote to provide proof of U.S. citizenship. Persons registered to vote on the effective date of the act will be deemed to have provided satisfactory proof and will not be required to submit evidence of U.S. citizenship.

Voting Machines

House Bill 1663, Printer's No. 1858 requires voting machines used in Pennsylvania to be manufactured in the United States and sold by a vendor with a primary place of business in the United States.

Voting Rights of Previously Incarcerated

House Bill 1336, Printer's No. 1439 provides that the Department of State to notify inmates of the requirements of eligibility to vote after release from confinement in a penal institution in the Commonwealth.

House Bill 1337, Printer's No. 1434 provides that the Department of State shall maintain a database on its publicly accessible website to all persons to search for information about the voting habits and activities of previously incarcerated individuals.

2020 Election Concerns

Senate Bill 71, Printer's No. 53 requires the Department of State to provide a report on how complaints about the 2020 Election were handled.

Senate Bill 528, Printer's No. 602, the 2020 General Election Review and Audit Act requires the Auditor General to perform an audit of the 2020 presidential election.

ACTIVITIES IN OTHER JURISDICTIONS

United States Congress

This subchapter provides a cursory review of proposed federal legislation known as HR1, also commonly referred to as the “For the People Act of 2021.” It is worth noting that this piece of legislation has been a polarizing subject of discussion throughout national politics, especially with respect to its proposed amendments to federal election law.

Procedural History

HR1 is currently pending before the 117th United States Congress. The bill was initially introduced before the U.S. House of Representatives on January 4, 2021, where 222 Democrats ultimately signed on as co-sponsors. No Republicans co-sponsored the bill. On March 2, 2021, HR1 was brought up for debate before the House. On March 3, 2021, the House voted 220-210 to adopt HR1, with all but one present Democratic Representative (Rep. Bennie Thompson, Miss.) voting in favor and no support from any Republican Representatives. The bill was received in the U.S. Senate on March 11, 2021, and as of May 25, 2021, the bill has yet to be taken up in the Senate and remains pending.⁹²

The bill addresses several areas of the election process including election integrity and security, campaign finance, voter access, and ethics for the three branches of the federal government. In addition, the bill would federalize the election process by implementing nationwide mandates for the states to carry out in their election processes. For instance, the bill would require all states to universally implement early voting, automatic voter registration, no-fault absentee balloting for voters, and other requirements.

Significant Provisions

Below is a list highlighting some of the more significant provisions within the bill that will have a direct impact on state laws for federal elections.

Expanding Voter Registration

The bill mandates that the chief State election official of each State operate a system of automatic registration for the registration of eligible individuals to vote for elections for Federal office in the State. According to the bill, “automatic registration” is essentially a

⁹² Congress.Gov, “H.R. 1 – For the People Act of 2021,” <https://www.congress.gov/bill/117th-congress/house-bill/1/all-actions?overview=closed#tabs>, last accessed on May 25, 2021.

system that registers an individual to vote in elections for Federal office in a State, if eligible, by electronically transferring the information necessary for registration so that, unless the individual declines to be registered, the individual will be registered to vote.⁹³

Specifically, the official must ensure that the individual is registered to vote in elections for Federal office in the State if the individual is eligible, not later than 15 days after a contributing agency has transmitted information. This official is also required to send written notice to the individual, in addition to other means of notice established within the bill, of the individual's voter registration status, not later than 120 days after a contributing agency has transmitted such information.⁹⁴ The bill further provides that a state may not refuse to treat an individual as an eligible individual on the grounds that said individual is less than 18 years of age at the time a contributing state agency receives information with respect to the individual, so long as the individual is at least 16 years of age at such time.⁹⁵ Agencies administering the automatic registration system mandated by the bill must ensure that an eligible individual is given the opportunity to decline the opportunity to register to vote.⁹⁶

In addition, the bill requires each state to ensure the availability of internet for online registration on the official public websites of the appropriate State and local election officials. The websites must also include online assistance to applicants in applying to register to vote, a streamlined completion and submission registration application form prescribed by the Election Assistance Commission, and online receipts of completed voter registration applications.⁹⁷

Each State would be required under the bill to permit same day registration for any eligible individual. In other words, an eligible individual must be permitted on the day of a Federal election and on any day when voting, including early voting, to register to vote in a Federal election and to cast a vote in such election.⁹⁸

Under the bill, each state would be mandated to permit individuals to vote in an election for Federal office during an early voting period prior to the date of the election, in the same manner as voting is allowed on such date. The early voting period required would consist of a period of consecutive days (including weekends) beginning on the 15th day before the date of the election (or, at the option of the State, on a day prior to the 15th day before the date of the election) and would end on the date of the election. Each polling place permitting early voting must allow such voting for no less than 10 hours on each day; have uniform hours each day for voting; and allow such voting to be held for some period of time prior to 9:00 a.m (local time) and some period of time after 5:00 p.m. (local time).⁹⁹

⁹³ H.R. 1, 117th Cong., § 1012(a)(1)-(2) (2021).

⁹⁴ *Ibid.* § (b)(1)-(2).

⁹⁵ *Ibid.* § 1012(d).

⁹⁶ *Ibid.* § 1013(b)(2).

⁹⁷ *Ibid.* § 6A(a)(1)-(4).

⁹⁸ *Ibid.* § 304(a)(1)(A)-(B).

⁹⁹ *Ibid.* § 306(a)(1)-(2), (b)(1)-(3).

The bill also requires certain parameters for location of polling places, such as proximity to public transportation and college campuses.¹⁰⁰

Voting by mail must be an option available to all eligible voters in every state under the requirements of the bill. No state may impose any additional requirements or conditions on the eligibility of an individual to cast a vote by absentee ballot by mail.¹⁰¹

Protection of Information

The bill prohibits contributing state agencies from collecting, retaining, transmitting, or publicly disclosing an individual's decision to decline voter registration, an individual's decision not to affirm his or her citizenship, or any information that a contributing agency transmits pursuant to pre-existing voter registration information.¹⁰² Each state must establish appropriate technological security measures to prevent to the greatest extent practicable any unauthorized access to information provided by individuals using the online services for voter registration.¹⁰³

Voter Identification

The bill appears to relax state voter ID laws by requiring states to allow those who do not have an ID to present a statement "signed by the individual under penalty of perjury, attesting to the individual's identity and attesting that the individual is eligible to vote in the election." This requirement would only be applicable for federal elections.¹⁰⁴

Use of Electronic Addresses for Purposes other than Official Use

H.R. 1 would also require that a chief State election official ensure that any electronic mail address provided by an applicant is used only for purposes of carrying out official duties of election officials and is not transmitted by any State or local election official (or any agent of such an official, including a contractor) to any person who does not require the address to carry out such official duties and who is not under the direct supervision and control of a State or local election official.¹⁰⁵

Congressional Redistricting

The bill establishes terms and conditions States must follow in carrying out congressional redistricting after an apportionment of Members of the House of Representatives. Specifically, the bill requires that congressional redistricting be conducted in accordance with a redistricting plan established by an independent redistricting commission established by a state pursuant to specific terms in the bill.¹⁰⁶

¹⁰⁰ *Ibid.* § 306(c)(1), (3).

¹⁰¹ *Ibid.* § 307(a)(1).

¹⁰² *Ibid.* § 1015(d)(1)-(4).

¹⁰³ *Ibid.* § 6A(f).

¹⁰⁴ *Ibid.* § 1903(a).

¹⁰⁵ *Ibid.* § 1003(c).

¹⁰⁶ *Ibid.* § 2401(a)(1).

Under the plan, the following criteria must be followed:

- Districts must comply with the U.S. Constitution.
- Districts must comply with the Voting Rights Act of 1965 (52 U.S.C. 10301 et seq.), and all applicable Federal laws.
- Districts must be drawn, to the extent that the totality of the circumstances warrant, to ensure the practical ability of a group protected under the Voting Rights Act of 1965 (52 U.S.C. 10301 et seq.) to participate in the political process is not diluted or diminished.
- Districts must respect communities of interest, neighborhoods, and political subdivisions to the extent practicable. A “community of interest” is defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, cultural, geographic or historic identities. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, municipalities, tribal lands and reservations, or school districts, but shall not include common relationships with political parties or political candidates.¹⁰⁷

Campaign Finance

The bill also addresses the issue of campaign finance by expanding the prohibition on campaign spending by foreign nationals. In addition, the bill requires additional disclosure of campaign-related fundraising and spending, along with additional disclaimers regarding certain political advertising, and establishing an alternative campaign funding system for certain federal offices.¹⁰⁸ Any covered organization that makes campaign-related disbursements aggregating more than \$10,000 in an election reporting cycle must, not later than 24 hours after each disclosure date, file a statement with the Commission disclosing its campaign-related disbursements.¹⁰⁹

Ethics for the Three Branches of Government

The bill addresses ethics requirements for all three branches of government. For instance, the bill provides that the Judicial Conference issue a code of conduct applicable to each justice and judge of the United States. The code of conduct may include provisions that are applicable only to certain categories of judges or justices.¹¹⁰ The bill also prohibits Members of the House from serving on the board of a for-profit entity and establishing additional conflict-of-interest and ethics provisions for federal employees and the White House.¹¹¹ With respect to conflicts of interest and Covered Executive Branch employees,

¹⁰⁷ *Ibid.* § 2401(a)(1)-(4).

¹⁰⁸ *Ibid.* § 4105.

¹⁰⁹ *Ibid.* § 342(a)(1).

¹¹⁰ *Ibid.* § 7001(a).

¹¹¹ *Ibid.* Title VIII.

the bill prohibits such employees from participating “personally and substantially in a particular matter in which the covered employee knows or reasonably should have known that a former employer or former client of the covered employee has a financial interest.”¹¹²

Other States

State election laws are being amended at a rapid pace, and new enactments reach the evening news with startling frequency. This subchapter will attempt to address the newest developments in other states that may be of interest to Pennsylvania as it deliberates potential changes to its election laws beyond mail-in ballot processing.

Through June 21, 2021, other states have adopted numerous statutes and amendments affecting election law. This short summary highlights those changes that are not addressed elsewhere in this report.¹¹³

Arizona

- Comparison of death records with the statewide voter registration database
- Security procedures for voting machines and electronic polling devices
- Prohibits the use of private monies to prepare, administer or conduct an election
- Specifies that absentee ballots cannot reveal voter’s political affiliation
- Revisions to election ballots, dates, deadlines, election boards, nomination petitions, and polling locations

Arkansas

- Voter ID for provisions ballots
- Requires all voting machines to operate without a connection to the internet or an external network
- Limits on absentee ballot collection

¹¹² *Ibid.* § 602.

¹¹³ Information culled from the National Conference of State Legislatures, “2021 Election Enactments,” May 24, 2021, <https://www.ncsl.org/research/elections-and-campaigns/2021-election-enactments.aspx>.

- Prohibits election officials from distributing unsolicited absentee ballot applications
- Balloting Integrity Act – complaint process
- Restricts electioneering within 100 feet of primary exterior entrance to a polling place
- Requires county board to certify to State that it has a secure electronic connection to prevent unauthorized access to electronic pollbooks, voter registration database, voting equipment, and materials

Hawaii

- Changes to procedures for proclamations of voter service centers and drop boxes, including days, location, and hours of operation

Idaho

- Training and guidance on verification of signatures of electors and petition signers

Illinois

- Amends drop box provisions, allows curbside voting, and allow ballots returned without postage to be accepted
- Provision of voter registration information to citizens when released from incarceration and allows Department of Corrections to participate in automatic voter registration program
- Requires cybersecurity measures by local election authorities
- Mandates that information regarding voter registration to be provided to high school students
- State Board of Elections to provide local authorities with guidance 90 days before each election
- Makes November 8, 2022 a state holiday
- Provides for permanent mail-in voting lists

Indiana

- Removal from voter registration of persons incarcerated in another state
- Early absentee ballot voting in satellite offices
- Prohibits use of private funds for preparing, administering or conducting elections, including registering voters

Iowa

- Reduces early voting period from 29 days to 19 days
- Requires absentee ballots to be received by the close of the polls on election day
- Requirements of nomination petitions
- Proof of ID for provisional ballots
- Absentee ballot application and ballot tracing on state website to be available by February 26, 2024
- Prohibiting ballot harvesting

Kentucky

- Establishes three days of early voting
- Allows vote center polling places
- Creates an online absentee ballot request portal
- Allows voters to cure signatures on absentee ballots
- Provides for curing of ballots
- Establishes an online absentee ballot tracking service

Louisiana

- Requires annual training for members of parish board of elections

- Requires persons conducting exit polls to register with the State
- Registrars of voting to complete orientation and training
- Provides for voter registration rights of persons with felony convictions if the person has not been incarcerated for the past five years and had not been convicted of an election offense

Maryland

- Increases the number of voting centers in some counties
- Allows for permanent absentee ballot status and list
- Establishes provisions governing locations of drop boxes
- Requires absentee ballot applications be sent to every eligible voter before the primary election in 2022 and 2024
- Provides for information and voter registration applications for individuals released from correctional facilities
- Requires Baltimore City central booking facility to provide a designated drop box for eligible voters who are incarcerated in the facility to submit voter registration and absentee ballot applications, and absentee ballots
- Expands hours at early voting centers

Montana

- Eliminates same day voter registration. Deadline is now noon of the day before the election.
- Prohibits any pecuniary benefit to a person in exchange for distributing, ordering, requesting, collecting, or delivering ballots
- Requires Secretary of State to adopt rules governing election security and requires election security assessments to be made every year, beginning January 1, 2023
- Requires accessible voting locations for disabled voters during elections conducted primarily by mail

- Pollwatchers are allowed to be at each drop box during the days and times they are open for mail ballot elections
- Revises identification requirements for voter registration and voting
- Requires voter list maintenance to occur annually
- Allows election officials to reduce hours of operation at polling places where less than 400 voters are expected
- Allows counties to test vote tabulation machines before automatic tabulation begins

Nevada

- Governs voting by electronic transmission system by voter with a disability – registration, application for absentee ballot, and casting an absentee ballot
- Establishes mail in ballot procedures for all elections. Each active registered voter to receive a mail ballot for every election

New Jersey

- Allows county boards of election to determine drop box locations in certain circumstances
- Requires nine days of early voting for November elections; three days for non-presidential primary elections and five days for presidential primary elections

New York

- Adds the State University of New York (SUNY) as a designated voter registration agency for automatic voter registration¹¹⁴
- Restores voting rights of formerly incarcerated persons who were convicted of a felony

North Dakota

- Prohibits the use of private monies for election operations or administration

¹¹⁴ SUNY is comprised of 64 campuses; by comparison, Penn State has 24 campuses.

Oklahoma

- Modified the days when registered voters can apply in-person for absentee ballot
- Requires county election board to keep record of voter's preferred method of voting
- Authorizes the state to participate in multistate voter list maintenance organizations such as the Electronic Registration Information Center (ERIC)
- Authorizes purchase of equipment and software to implement electronic poll books

North Dakota

- Persons conducting public counting of the votes received at the polls are not to leave the site until the count is complete

Oregon

- Prohibits communication of false statements regarding voting procedures, places, dates and deadlines, etc. within 30 days of a primary or 60 days of a general elections
- Prohibits moving voters to inactive status due to not voting or updating voter registration for a period of time. Counties to notify persons of current inactive status and how to reactivate registration

Tennessee

- Counties with permanently established convenient voting centers to provide a report within 90 days of each election to include an evaluation of the centers, issues, and suggestions for improvement
- Prohibits the use of private monies for election operations or administration

Texas

- Requires early voting clerks to post early voting turnouts in a timely manner
- Creates felony offenses for knowingly and intentionally counting invalid votes

- Provides for persons allowed to be present at the polling place through the election day process
- Sets deadlines for local register of deaths to report to the registrar of the decedent's county of residence and the Secretary of State
- Provides for the development of an online tracking tool to all tracing of location and status of mail-in applications and ballots
- Requires voting system vendors to disclose ownership interests of persons and entities owning five percent or more of the vendor
- Provides for a standardized training program and materials for county election officers
- Provides for the withholding of certain state and federal funds from registrars who fail to timely perform duties requiring the approval, change or cancellation of a voter's registration
- Provides for risk-limiting audits after August 31, 2016, with a pilot effort to take place with the November 8, 2022 election
- Prohibits establishing false residence for purpose of influencing an election
- Requires that voting system equipment be manufactured, stored and held in the United States and sold by a company whose headquarters and parent headquarters are in the United States, beginning September 1, 2021.

Utah

- Requires removal of deceased voters from the voter rolls
- Creates an online system for voters to track their mailed ballots and receive notice of status
- Ranked-choice voting pilot program
- Requires election officials to report an estimate of the total number of ballots in the official's custody that remain to be counted beginning on the day after the election and ending on the day before the canvass date
- Effective date of change in voter designation or political party affiliation

Vermont

- Requires the Secretary of State to mail every active voter a postage-paid ballot for each general election

Virginia

- If online voter registration system fails before close of registration period, Governor has authority to order the system to be open after the closing date for a commensurate time
- Requires establishment of ballot drop boxes, allows for cure of signature statements in some circumstances
- Permits early absentee in-person voting
- Permits persons 16 years of age or older to pre-register to vote
- No person convicted of a felony may vote before completion of his/her sentence, at which time voting rights are automatically restored
- Prohibits voting by incapacitated persons
- Requires the establishment of a drop off location for the return of marked absentee ballots at the general registrar's office and each voter satellite office, as well as at each polling place on election day
- Requires the state to create a tool to allow voters with a visual impairment or print disability to electronically receive and mark absentee ballots

Washington

- Exempts election operation plans, security risk assessments and other election security records for public records disclosure law
- Restores voting rights of citizens on parole
- Misrepresentation of an unofficial ballot collection site or device as an official ballot drop box is a gross misdemeanor

Wyoming

- Requires voter ID to vote in person

***Statutory Authority
for Election Law Advisory Board***

PENNSYLVANIA ELECTION CODE - OMNIBUS AMENDMENTS
Act of Mar. 27, 2020, P.L. 41, No. 12 Cl. 25
Session of 2020
No. 2020-12

**ARTICLE XIII-E
PENNSYLVANIA ELECTION LAW ADVISORY BOARD**

Section 1301-E. Definitions.

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The Pennsylvania Election Law Advisory Board established under section 1302-E(a).

Section 1302-E. Pennsylvania Election Law Advisory Board.

(a) Establishment.--The Pennsylvania Election Law Advisory Board is established within the Joint State Government Commission.

(b) Members.--The board shall be comprised of the following members:

- (1) The Secretary of the Commonwealth or a designee.
- (2) The President pro tempore of the Senate or a designee.
- (3) The Minority Leader of the Senate or a designee.
- (4) The Speaker of the House of Representatives or a designee.
- (5) The Minority Leader of the House of Representatives or a designee.
- (6) One member from each congressional district, of whom no more than half may be registered with the same political party, appointed by the Governor and confirmed by the Senate and which shall include members who:

- (i) represent groups advocating for individuals with disabilities;²²
- (ii) represent groups advocating for voting rights; and
- (iii) represent county commissioners or county election officials.

(c) Duties.--The board shall have the following duties:

- (1) Study this act and identify statutory language to repeal, modify or update.

- (2) Collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues.
- (3) Study the development of new election technology and voting machines.
- (4) Evaluate and make recommendations on:
 - (i) improving the electoral process in this Commonwealth by amending this act or through regulations promulgated by the Department of State; and
 - (ii) implementing best practices identified to ensure the integrity and efficiency of the electoral process in this Commonwealth.
- (5) By the end of each fiscal year, publish extensive and detailed findings on the Joint State Government Commission's publicly accessible Internet website and make them available in electronic format to the Office of the Governor and members of the General Assembly.
- (d) Quorum.--A majority of appointed members shall constitute a quorum for the purpose of conducting business.
- (e) Chairperson and vice chairperson.--The members shall select a member to be chairperson and another member to be vice chairperson.
- (f) Transparency and ethics.--The board shall be subject to the following laws:
 - (1) The act of July 19, 1957 (P.L.1017, No.451), known as the State Adverse Interest Act.
 - (2) The act of October 4, 1978 (P.L.883, No.170), referred to as the Public Official and Employee Ethics Law.
 - (3) The act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law.
 - (4) 65 Pa.C.S. Ch. 7 (relating to open meetings).
- (g) Information gathering.--The board may conduct hearings and otherwise gather relevant information and analysis that it considers appropriate and necessary to fulfill its duties.
- (h) Reimbursement.--Members of the board shall be reimbursed for reasonable expenses.

2020 Pennsylvania Election Law Litigation

*Pennsylvania Democratic Party v. Boockvar*¹¹⁵

Posture of the Case

Initially, the Pennsylvania Democratic Party and several Democratic candidates for office filed a petition for an injunction and declaratory relief in the Commonwealth Court. The Pennsylvania Supreme Court, under its authority to exercise extraordinary jurisdiction over an issue of immediate public importance, assumed jurisdiction in this matter.

Issue before Pennsylvania Supreme Court:

In this case, the petitioners sought:

- A declaratory judgment to confirm that Act 77 permits county boards of elections to provide “mobile or temporary collection sites, and/or drop-boxes for the collection of mail-in ballots”;
- An injunction to lift the deadline in the Election Code statewide to allow any ballot postmarked by 8:00 p.m. on Election Night to be counted if it is received by the Boards” by 5:00 p.m. on Tuesday, November 10, which is the deadline for ballots to be received under the Federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA);
- An injunction requiring the county boards of elections to contact electors who make minor errors on their mail-in ballots and provide them the opportunity to cure the ballot defect until the UOCAVA deadline;
- A declaration that there is no statutory authority to set aside an absentee or mail-in ballot solely for failure to place it into the official ballot or “secrecy” envelope — effectively asking the court to permit the counting of “naked” ballots;
- A declaration that the Election Code’s poll watcher residency requirement does not violate the United States Constitution’s First and Fourteenth Amendments, its Equal Protection Clause, or the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

¹¹⁵ *Pennsylvania Democratic Party*, 238 A. 3d. at 361

Before the Supreme Court resolved these issues on their merits, a request to intervene was filed by Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, as well as Joseph B. Scarnati II, President Pro Tempore and Jake Corman, Majority Leader of the Pennsylvania Senate, in opposition to the petition.

The Supreme Court granted relief to the Petitioners' First, Second, and Fifth claims. Important to this litigation, to provide the relief the Petitioners sought in their Second claim, the Court fashioned its own rule which required ballots received up to three days after the election must be included so long as they are postmarked within that three-day period. If a mail-in ballot is not postmarked but received within that three-day window, it shall be presumed that the ballot was mailed within the allotted timeframe.

It denied relief as to the Third and Fourth claims, regarding ballot curing and secrecy envelopes respectively, holding that the Election Code does not permit ballot curing and that the Election Code explicitly requires that a mail-in ballot be placed inside the secrecy envelope to be considered valid.

Post-Ruling Procedure

On September 24, an application for a stay of its ruling was denied by the Pennsylvania Supreme Court. On September 28, stays were filed with the United States Supreme Court by the Pennsylvania Republican Party and Joseph Scarnati, respectively. On October 19, these applications for a stay of the Pennsylvania Supreme Court's ruling were denied by an equally divided United States Supreme Court.

On October 4, a petition for a writ of certiorari was filed by the Republican Party of Pennsylvania. The issue on appeal before the United States Supreme Court is whether the decision by the Pennsylvania Supreme Court requiring the state to count mail-in ballots received up to three days after Election Day, so long as they are not clearly postmarked after Election Day, violates federal election law and the Constitution.

On October 28, a motion to expedite consideration of the petition for a writ of certiorari was denied. Justice Alito, joined by Justices Thomas and Gorsuch, issued a statement disagreeing with this denial, and indicating that they consider this matter important and expressing a belief that its resolution should be expedited.

On November 6, the Republican Party of Pennsylvania filed an Emergency Application for an Injunction with the United States Supreme Court. The same day, Justice Alito ordered that all county boards of election in the Commonwealth segregate all mail-in ballots received after 8:00 PM on Election Day, to keep them in secure, safe, and sealed container separate from other voted ballots, and that all such ballots be counted separately.

However, there has been no action taken by the U.S. Supreme Court since that date. As of this date, the Court has not accepted, nor denied, the petition for a writ of certiorari in this case.

Posture

On September 28, following the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar* permitting mail-in ballots to be counted if they are received three days after the election, the Pennsylvania Republican Party petitioned the United States Supreme Court for an Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari. On October 19, the application to stay the Pennsylvania Supreme Court’s ruling was denied. This is the same application and denial as in *Pennsylvania Democratic Party* and *Scarnati*.

On October 23, the Pennsylvania Republican Party filed a petition for a Writ of Certiorari. The same day a motion to expedite consideration of the petition for a Writ of Certiorari was filed. On October 28, the motion to expedite was denied, with Justice Alito issuing a statement in which Justices Thomas and Gorsuch joined. This is the same motion to expedite, denial of motion to expedite, and statement of Justice Alito issued in *Pennsylvania Democratic Party* and *Scarnati*.

The questions presented to the United States Supreme Court in *Pennsylvania Republican Party* are:

- “Whether the Pennsylvania Supreme Court majority violated the United States Constitution by usurping the Pennsylvania General Assembly’s plenary authority to “direct [the] Manner” for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and its broad power to prescribe “[t]he Times, Places, and Manner” for congressional elections, id. art. I, § 4, cl. 1”; and
- Whether the majority’s extension and presumption conflict are preempted by federal statutes that establish a uniform nationwide federal Election Day. See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1.

The questions presented in this petition are identical to the ones presented in the petition of *Scarnati*. The petitions for writ of certiorari were denied on February 22, 2021.

Scarnati v. Pennsylvania Democratic Party

Posture

In *Pennsylvania Democratic Party v. Boockvar*, Joseph Scarnati filed a motion to intervene as President Pro Tempore of the Pennsylvania Senate. After the decision in that case, Joseph Scarnati and Jake Corman (Scarnati’s successor as President Pro Tempore)

¹¹⁶ This case and the Scarnati case that follows were combined into *Republican Party of Pennsylvania v. Degraffenred*, 592 U.S. ___ (2021).

filed one emergency stay and the Republican Party filed another emergency stay, as well as seeking an emergency stay under the heading of the *Pennsylvania Democratic Party*.

This case arises from Scarnati’s Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, filed on September 28. On October 19, the stay was denied by the Court, and Justices Thomas, Alito, Gorsuch and Kavanaugh would have granted it, indicating a 4-4 split (as Justice Barrett did not take the bench until October 27).

A petition for writ of certiorari in *Scarnati* was filed on October 23, along with a motion to expedite consideration of the Petition for a Writ of Certiorari. That motion was denied on October 28. This is the same motion in *Pennsylvania Democratic Party* but it appears to apply to *Scarnati*, *Republican Party of Pennsylvania*, and *Democratic Party of Pennsylvania*.

The questions presented to the United States Supreme Court in *Scarnati* are:

- “Whether the Pennsylvania Supreme Court majority violated the United States Constitution by usurping the Pennsylvania General Assembly’s plenary authority to “direct [the] Manner” for appointing electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2, and its broad power to prescribe “[t]he Times, Places, and Manner” for congressional elections, id. art. I, § 4, cl. 1”; and
- Whether the majority’s extension and presumption conflict with and are preempted by federal statutes that establish a uniform nationwide federal Election Day. See 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1.

It is noted in the petition for *Scarnati* that “the questions presented in this Petition are identical to those presented by the Republican Party of Pennsylvania in its Petition for a Writ of Certiorari in *Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (filed Oct. 23, 2020).

*Donald J. Trump for President, Inc. v. Boockvar*¹¹⁷

President Donald Trump’s campaign filed a complaint in the Federal District Court for the Western District of Pennsylvania alleging federal and state constitutional violations stemming from the Commonwealth’s implementation of mail-in voting. Between the time the campaign filed the lawsuit and the time the judge had occasion to rule on it the Pennsylvania Supreme Court decided several of the issues before the District Court, narrowing the scope of the instant litigation.

¹¹⁷ *Donald J. Trump for President, Inc. v. Boockvar*, 403 F. Supp. 3d 331 (W.D. Pa. 2020) (Trump I).

The three issues decided in this case were:

- “whether the use of so-called “drop boxes” for mail-in ballots is unconstitutional, given the lack of guidance or mandates that those drop boxes have security guards to man them”;
- “whether the Secretary’s guidance as to mail-in ballots—specifically, her guidance that county election boards should not reject mail-in ballots where the voter’s signature does not match the one on file—is unconstitutional”; and
- “whether Pennsylvania’s restriction that poll watchers be residents in the county for which they are assigned, as applied to the facts of this case, is unconstitutional.”

The Court entered a judgment for the defendant on all three issues. The Court concluded that the campaign lacked standing to bring the challenge, as they “have not presented a concrete injury to warrant federal-court review.” The Court further opined that even if the Court were to agree that the campaign had standing, their claims would fail on the merits because they “essentially ask this Court to second-guess the judgment of the Pennsylvania General Assembly and election officials, who are experts in creating and implementing an election plan,” explaining that “the job of an unelected federal judge isn’t to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials.” (internal citation omitted).

*Disability Rights Pennsylvania et al. v. Boockvar*¹¹⁸

On May 8, the Disability Rights Pennsylvania filed a complaint requesting declaratory and injunctive relief to expand the deadline for submitting mail-in votes in light of the Coronavirus pandemic. On May 15, the Pennsylvania Supreme Court entered an order *sua sponte* dismissing plaintiff’s complaint.

*Bognet v. Boockvar*¹¹⁹

On October 22, the plaintiffs, a candidate for federal office and private citizens, filed a complaint against Secretary Boockvar and all 67 county boards of election in federal District Court, claiming that the Pennsylvania Supreme Court decision in *Pennsylvania Democratic Party v. Boockvar* usurped the authority of the General Assembly to establish the “Time, Place and Manner” of federal elections in the federal Constitution’s Electors and Elections Clause by extending the receipt deadline for mail-in ballots to three days after Election Day.

On the same day, the plaintiffs filed a Motion for an Immediate Temporary Restraining Order and a Preliminary Injunction and an Expedited Hearing. On October 28, the Court denied the plaintiff’s motion.

¹¹⁸ No. 83 MM 2020 (Pa. Supreme Court).

¹¹⁹ *Bognet*, 980 F.3d. 336.

The Court ruled that plaintiff Bognet’s “alleged injury [as a result of the Pennsylvania Supreme Court decision] is too speculative to confer standing.” The Court reasoned that for Bognet to have suffered harm, “more votes which otherwise would not have been counted must be cast in favor of Bognet’s opponent than in his favor.” The Court also found that the two private citizen plaintiffs lacked standing. Their theory of vote dilution was not a concrete and particularized injury-in-fact necessary to confer Article III standing.

However, the Court found that the Pennsylvania Supreme Court’s order to presume that mail-in ballots without postmarks are valid violates the Equal Protection Clause because it creates an unequal treatment of votes. Although the District Court found that the plaintiff had established a likelihood of success on the merits of their claim, ordinarily entitling them to a preliminary injunction, the Court cited *Republican National Committee v. Democratic National Committee*¹²⁰ for the principle that “lower federal courts should ordinarily not alter the election rules on the eve of an election.” On that basis, the Court denied the plaintiffs their requested relief.

The plaintiffs filed a notice of appeal on October 29. On October 30, the plaintiffs filed an Emergency Motion for an Expedited Briefing Schedule. The same day the Third Circuit denied the plaintiff appellants’ Emergency Motion. After a full briefing by both parties, the court issued an opinion affirming the District Court’s denial of Plaintiff’s Emergency Motion for Preliminary Injunction.

The Third Circuit affirmed the District Court, finding that the plaintiffs lacked standing under the Elections and Electors Clause. After some analysis of the Elections and Electors Clause, the Third Circuit concluded that only a state legislature would have standing to bring a claim under that clause, stating that “Plaintiffs’ Elections Clause claims thus ‘belong, if they belong to anyone, only to the Pennsylvania General Assembly,’” quoting *Corman v. Torres*.¹²¹

Further, the Third Circuit held that “vote dilution” by counting unlawfully cast ballots is not a concrete harm sufficient to confer standing on the plaintiffs, finding that “violation of state election laws by state officials or other unidentified third parties is not always amenable to a federal constitutional claim.” If vote dilution of lawfully cast ballots by unlawfully cast ones were a true equal protection problem, “then it would transform every violation of state election law ... into a potential federal equal-protection claim requiring scrutiny of the government’s ‘interest’ in failing to do more to stop the illegal activity.”¹²²

Even if such a claim were enough to confer standing, the Third Circuit explained that the Equal Protection Clause’s concern regarding vote dilution was founded in circumstances where votes were weighed differently, not where, as in this instance, a state actor allegedly violates state law by counting votes it should not have counted. Here, “no

¹²⁰ *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020).

¹²¹ *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018).

¹²² *Trump I* at 391.

Pennsylvania voter’s vote will count for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness.”

In summation, the Third Circuit emphasized that it was not deciding whether the Deadline Extension or the Presumption of Timeliness were proper exercises of the Commonwealth’s lawmaking authority. It was deciding only the question of standing to enjoin the counting of ballots on the grounds that doing so “dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause.”

*Donald J. Trump for President, Inc., et al. v. Boockvar*¹²³

In this case, President Trump’s campaign sought to set aside ballots cast in the 2020 presidential election and enjoin the certification of the election based on the November 2nd guidance sent by Secretary Boockvar to the counties that the Pennsylvania Supreme Court decision in *Pennsylvania Democratic Party v. Boockvar* neither required nor prohibited ballot curing. Some counties chose to implement a “notice-and-cure” policy, such as Philadelphia, while others did not. In addition to the campaign, plaintiffs in the case included two voters whose votes were discarded because of a defect and whose counties (Lancaster and Fayette) did not give them the opportunity to cure their ballots.

Plaintiffs filed this claim on November 9, raising seven counts — two equal-protection claims, two due-process claims, and three claims under the Electors and Elections Clauses. On November 15, Plaintiffs filed their First Amended Complaint, withdrawing five of their claims and leaving only two claims for each the individual plaintiffs and the campaign — one equal protection claim and one Electors and Elections Clause claim under the federal Constitution each.

After the campaign filed this claim, the United States Court of Appeals for the Third Circuit in *Bognet v. Secretary Commonwealth of Pennsylvania*¹²⁴ determined that only the General Assembly would have standing to bring an Electors and Elections Clause claim in federal court. Relying on this case, the District Court dismissed this count on standing grounds as it applied to both the individual plaintiffs and the campaign.

The thrust of the remaining Equal Protection claim of the campaign is that “it is unconstitutional for Pennsylvania to give counties discretion to adopt a notice-and-cure policy,” on the basis that such a policy violates the Equal Protection Clause. However, even on the Equal Protection Clause claim, the District Court found that neither the campaign nor the individual plaintiffs who were not afforded the opportunity to cure their ballots had standing to challenge the November 2nd order.¹²⁵

¹²³ *Donald J. Trump for President, Inc. v. Secretary Commonwealth of Pennsylvania*, 830 F. Appx. 377 (3d Cir. 2020) (Trump II).

¹²⁴ *Bognet*, 980 F.3d. 336.

¹²⁵ *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020).

While the District Court found that the two individual plaintiffs had established injury in fact, they “fail[ed] to establish that it was Defendants who caused these injuries and that their purported injury of vote-denial is adequately redressed by invalidating the votes of others.” The Court further reasoned that even if the Secretary of State and other counties “unconstitutionally allowed other voters to cure their ballots that alone cannot confer standing on Plaintiffs who seek to challenge the denial of their votes.”

The District Court further found that because the Defendants’ conduct imposed no burden on the individual plaintiffs’ rights, any claim brought pursuant to the Equal Protection Clause would be reviewed under the rational basis test. Reviewing the individual plaintiffs’ claims under this test, the Court held that their claims “fail because it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots.”

The District Court explained that, even if it were to find that the individual plaintiffs’ Equal Protection rights were violated, it could not impose the remedy they seek — an injunction of the electoral certification. This is because “rather than requesting that their votes be counted, they seek to discredit scores of other votes” by asking the Court to issue such an injunction. The remedy sought is not proportional to the alleged violation of the individual plaintiff’s rights.

Further, “the Trump Campaign’s theory also fails because neither competitive nor associational standing applies, and it does not assert another cognizable theory of standing.” The Court also cited the recently decided *Bognet* in a footnote to clarify that that decision also foreclosed standing on the “theory that Pennsylvania’s purportedly unconstitutional failure to uniformly prohibit the notice-and-cure procedure constitutes vote-dilution[.]”

The District Court also noted that the campaign’s Brief in Opposition to the Motions to Dismiss only spent one paragraph discussing how several counties’ refusal to permit Republican poll watcher or canvass observers violated the campaign’s Equal Protection rights. The District Court stated that there is no Equal Protection issue presented because the campaign “makes no mention of disparity in treatment of observers based on which campaign they represented.” Because there is no allegation that Republican poll watchers or observers were treated differently than Democratic ones, there can be no cognizable Equal Protection claim.

On appeal to the Third Circuit, the Court upheld the dismissal of the Plaintiffs’ case on standing grounds. The Court emphasized that the number of ballots challenged — effectively all of the cured ballots “is far smaller than the roughly 81,000-vote margin of victory” for Biden. Further, the Court also held that the District Court did not abuse its discretion in not letting the Campaign amend its complaint a second time.

*In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*¹²⁶
and *In Re: 2,349 Ballots in the 2020 General Election*¹²⁷

In this case, consolidating the appeals of six separate cases, the Pennsylvania Supreme Court decided that the Election Code does not require a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged.

The outcome of the case hinged on whether such information is specifically required by the Election Code or whether the instruction to include the name, address, and date is merely "directory." The court concluded that, based on the unambiguous text of the Election Code as well as the principle that election laws ordinarily will be construed liberally in favor of the right to vote, such information is directory and the failure to include it does not disqualify a ballot.

*Kelly v. Pennsylvania*¹²⁸

On November 21, State Representative Mike Kelly and several other plaintiffs filed a complaint for declaratory and injunctive relief against the Secretary of State of the Commonwealth, the Pennsylvania General Assembly, and Governor Wolf in the Commonwealth Court. The plaintiffs sought a declaration that the universal mail-in ballot provisions of Act 77 are unconstitutional and an injunction prohibiting the certification of the 2020 election in Pennsylvania or requiring any such certification to be rescinded.

The thrust of Rep. Kelly's legal argument is that the scheme of Act 77 to allow any elector to vote by mail violates the limitation on absentee voting prescribed in the Pennsylvania Constitution, specifically Article VII, §14. Because Act 77 had the effect of amending the Pennsylvania Constitution, but did not go through the procedural requirements for such an amendment, it should have no legal effect. Effectively, Rep. Kelly asserted that the law was void *ab initio*.

The defendants countered that Act 77 prohibits any challenge to itself if it is filed 180 days after the law's passage and that the plaintiff waited too long to challenge the law under its own terms. The defendants further argued Article VII, §4 of the Pennsylvania Constitution permits the General Assembly to make any law it wishes regarding how elections are conducted, and that Article VII §14 is irrelevant to Act 77.

On November 22, the petitioners filed a Motion for Emergency/Special Prohibitory Injunction. The petitioners hoped to enjoin the defendants from taking official action to certify or otherwise finalize the results of the 2020 General Election. On November 24, before the Court could rule on the Motion for Emergency Injunction, the Secretary of State

¹²⁶ Nos. 31 EAP 2020, 32 EAP 2020, 33 EAP 2020, 34 EAP 2020, 35 EAP 2020.

¹²⁷ 29 WAP 2020 (Consolidated Cases).

¹²⁸ *Kelly v. Pennsylvania*, 2020 W.L. 7224280 (Not Reported) (Pa. Commw. Ct. 2020), vacated 240 A.3d 1255 (Pa. 2020).

of the Commonwealth certified the election results, but only for the offices of President and Vice President.

The petitioners questioned whether the respondents “might have short-circuited the certification process to purportedly avert this Courts’ determination on the merits by declaring victories in the presidential and vice-presidential elections, while leaving certification of the elections for the other offices for another time.”

Given the exigencies and time constraints, the Court felt it was necessary to preliminarily enjoin, on an emergency and temporary basis, executive branch defendants from undertaking any other actions with respect to the certification of the results of the presidential and vice-presidential elections. Further, the Court found that the plaintiffs “appear to have established a likelihood to succeed on the merits because Petitioners have asserted the Constitution does not provide a mechanism for the legislature to allow for expansion of absentee voting without a constitutional amendment.”

On November 25, the Governor and Secretary Boockvar filed an Application for Extraordinary Jurisdiction with the Pennsylvania Supreme Court, seeking to have the preliminary injunction invalidated. On November 28, the Pennsylvania Supreme Court, in a *per curiam* opinion, vacated the Commonwealth Court’s order to preliminarily enjoin the Commonwealth from taking any further action regarding the certification of the results of the 2020 General Election, and dismissed with prejudice the Petition for Review filed by Rep. Kelly and the other petitioners.

The Pennsylvania Supreme Court opined that the petitioners’ “challenge violates the doctrine of laches given their complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77’s enactment.” The Pennsylvania Supreme Court emphasized that it was relying upon the common law doctrine of laches, and not the 180-day time bar on challenges to Act 77 that is found in the text of the act.

On the same day, Rep. Kelly and the other plaintiffs filed an Emergency Application for Stay of the Pennsylvania Supreme Court’s November 28 order. On December 3, the Pennsylvania Supreme Court denied the plaintiffs’ Emergency Application for a Stay. On the same day, Rep. Kelly and the other plaintiffs filed an Emergency Application for Writ of Injunction with the United States Supreme Court. Also on December 3, Justice Alito requested responses from respondents by December 8. On December 8, the respondents filed their opposition to the Emergency Application. On February 22, 2021, SCOTUS denied the Petition for a Writ of Certiorari.¹²⁹

¹²⁹ *Id.*, cert. denied. 141 S.Ct. 1449 (2021).

*Donald J. Trump for President, Inc. v. Boockvar*¹³⁰

On November 4, President Trump’s campaign filed a Petitioner for Review in the Commonwealth Court seeking declaratory and injunctive relief against Secretary Boockvar and each of the 67 county boards of election. The campaign in this action challenged the Secretary’s November 1 guidance to counties that voters may wait until November 12 — six days after the additional three days given by the Pennsylvania Supreme Court for voters to mail-in ballots — to provide missing proof of identification.

The campaign pointed to Election Code § 1308(h), which requires that if a voter’s identification is not received for verification “by the sixth day following the election” such ballots shall not be counted. The campaign sought declaratory relief that Secretary Boockvar’s November 1 guidance on this issue was in contravention to the statutory requirement, and a “preliminary, special, and/or permanent” injunction directing the county boards of elections to adhere to the cited provision of the Election Code.

On November 12, the Court granted the campaign the requested declaratory and injunctive relief, finding that Secretary Boockvar “lacked statutory authority to issue the November 1, 2020, guidance to Respondents County Boards of Elections insofar as that guidance purported to change the deadline in Section 1308(h) of the Pennsylvania Election Code.” The Court also enjoined the counties and the Secretary from counting ballots which have been segregated pursuant to the Court’s November 5 order in *Donald J. Trump for President v. Montgomery County Board of Elections*, discussed below.

*Donald J. Trump for President, Inc. v. Montgomery County Board of Elections*¹³¹

On November 5, President Trump’s campaign filed a Petition for Review of Decision by the Montgomery County Board of Elections. The petition was a statutory appeal to the Common Pleas Court from the county Board of Elections’ decision denying the campaign’s objection to the counting of statutorily prohibited absentee and mail-in ballots cast in Montgomery County, Pennsylvania. The campaign objected to the counting of 600 ballots on which the electors did not fill out their address immediately below their signature line. The campaign asserted that electors are required to provide this information pursuant to Election Code §§ 1308(a) and 1306-D(a).

On November 13, the Common Pleas Court issued a memorandum and order denying the campaign’s petition. The court pointed to language from Election Code § 1308(g)(3), which gives the county board of elections discretion to determine if the declaration is sufficient. Further, the Common Pleas Court held that a ballot should not be invalidated simply because an elector failed to write their address on the outer envelope. The Common Pleas Court disagreed with the campaign’s interpretation of the two sections it relied upon, pointing to other language in the Election Code that did require the address of a witness when an elector was unable to sign due to illness or physical disability. Had

¹³⁰ *Donald J. Trump for President, Inc. v. Boockvar*, 602 MD 2020 (Commw. Ct.) (Trump III).

¹³¹ *Donald J. Trump for President, Inc. v. Montgomery County Board of Elections*, No. 2020-18680 (Mont. Co. Common Pleas 2020).

the General Assembly intended to require an elector's address to be printed on the outer envelope, the Common Pleas Court reasoned, it would have more explicitly stated that requirement.

Further, the instructions provided by the county board of elections did not inform voters that they should write their address on the outer envelope or risk having their ballot rejected. The instructions only informed the electors that they must sign and date their ballot. Regarding the campaign's requested relief, the Common Pleas Court cited *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A. 2d 303, 308-309 (Pa. 1974) for the proposition that invalidating a ballot "where the voter has complied with all instructions communicated to him and in the absence of any evidence of improper influence having been exerted, invalidation would necessarily amount to an unreasonable encroachment upon the franchise...."

The campaign filed a notice of appeal on November 16, but withdrew its notice of appeal on November 18.

*Barnette et al. v. Lawrence et al.*¹³²

On November 3, Kathy Barnette, a candidate for federal political office, along with several voters, filed a complaint for declaratory and injunctive relief against Kenneth Lawrence in his capacity as a member of the Montgomery County Board of Elections, as well as two other board members.

The candidate and voters alleged that the Montgomery County Board of Elections was pre-canvassing mail-in ballots prior to the 7:00 AM November 3 time and date for canvassing, and permitting mail-in electors in that county whose ballots were illegally pre-canvassed to change their ballot if the ballot was deficient in some way. The candidate and voters sought an injunction prohibiting the Montgomery County Board of Elections from pre-canvassing ballots and contacting voters to change their ballots if those ballots are deficient, as well as a declaratory judgment that the Montgomery County Board of Elections' actions violate the Election Code.

On November 3, the plaintiff candidate and voters filed a Motion for a Temporary Restraining Order of the same conduct. On November 5, the plaintiffs and the voters withdrew their Motion for a Temporary Restraining Order, as the pendency of another hearing in the Commonwealth Court would make the TRO requested "ineffective in addressing the matters covered in their Motion." On November 6, the Court denied the initial Motion for Temporary Restraining Order in light of the plaintiff's motion to withdraw the motion for a TRO.

¹³² *Barnette et al. v. Lawrence et al.*, 2:20-cv-05477-PBT (E.D. Pa. 2020).

On November 12, the plaintiffs moved to withdraw their complaint without prejudice.

*Donald J. Trump for President, Inc. v. Philadelphia County Board of Elections*¹³³

On November 5, President Trump’s campaign filed a Motion for Emergency Injunction against the Philadelphia County Board of Elections, asking the court to order the defendant to cease counting ballots until Republican canvass observers are given meaningful access to the sites where ballots are being counted.

After this motion was filed, the parties came to an agreement, and the Court dismissed the Motion for Emergency Injunction without prejudice.

*Hamm v. Boockvar*¹³⁴

On November 3, Plaintiffs Hamm, a candidate for the Pennsylvania General Assembly, Kelly, a candidate for federal Congressional office, and other individual voters filed a complaint in the Commonwealth Court seeking declaratory and injunctive relief from Secretary Boockvar’s November 3 guidance to the county boards of election that they should “provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected....”

Plaintiffs claim this guidance permitting county boards of elections to give electors an opportunity to cure defects in their ballots contradicts the Election Code, specifically § 1308 and the Pennsylvania Supreme Court decision in *In re November 3, 2020 General Election*.¹³⁵

On November 6, the Commonwealth court granted the Plaintiff’s requested relief, and further ordered that “all provisional ballots cast on election day where the elector’s absentee ballot or mail-in ballot was timely received by the county boards of election be segregated and secured from other provisional ballots pending compliance with procedures set forth in Section 1210 of the Election Code”

*In re: Allegheny County Provisional Ballots*¹³⁶

On November 16, petitioner Nicole Zicarelli, a candidate for the Pennsylvania Senate, filed a Petition of Review from the Allegheny County Board of Elections seeking to set aside approximately 300 provisional ballots. The petitioner alleges that these ballots were only signed on one line but the Election Code requires signatures on two separate lines. The Board responded that if the ballots were incorrectly signed by the electors on

¹³³ *Donald J. Trump for President, Inc. v. Philadelphia County Board of Elections*, No. 2:20-cv-05533-PD (E.D. Pa.2020).

¹³⁴ *Hamm v. Boockvar*, 600 M.D. 2020 (Commw. Ct. 2020).

¹³⁵ *Supra*, note 126.

¹³⁶ *In re: Allegheny County Provisional Ballots*, 1161 C.D. 2020 (Commw. Ct.), Petition for Allowance of Appeal Denied, 338 WAL 2020 (Pa. 2020).

mistaken or wrong advice of the Board, the electors should not be penalized by having their votes cancelled.

In a November 18 opinion, the Allegheny County Court of Common Pleas ruled in favor of the Allegheny County Board of Elections, finding that where no fraud is alleged the Board should favor the right to vote, and that where a voter relies on incorrect information from the Board the voter should not be penalized.

On appeal, the Commonwealth Court reversed the Allegheny County Court of Common Pleas, holding in a November 20 opinion that according to the plain language of the relevant statute — Election Code § 1210(a.4)(5(ii)(A) and (F) — the provisional ballots cannot be counted.

On November 23, the Pennsylvania Supreme Court denied the Allegheny County Board of Election’s Petition for Allowance of Appeal.

*In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*¹³⁷

On November 8, President Trump’s campaign filed a Petition for Review of the decision of the Bucks County Board of Elections denying the campaign’s objection to counting statutorily prohibited absentee and mail-in ballots. The campaign challenges ballots counted by the Bucks County Board of Elections that had no date or a partial date only; had no printed name or address; had a partial address; and had a mismatched address. These challenged ballots total 2,175. The campaign also challenges 69 mail-in ballots accepted as votes where the secrecy envelope was not sealed and 7 which had extraneous markings on them.

On November 19, the Court denied the Petition for Review. The Court began its analysis by noting that previous case law on the issue has militated in favor of enfranchising voters, not disenfranchising them, notwithstanding the canon that all provisions of the Election Code should be strictly enforced. “In an attempt to balance these two overriding principles, the Pennsylvania Supreme Court has ruled that certain provision of the Election Code are mandatory, and some are directory.” Ballots should not be disqualified if they fail to follow directory provisions of the law.

The campaign pointed to the use of the word “shall” throughout the Election Code, and particularly in the sections of the code requiring a date, printed name, and address. Regarding the ballots with a partial date handwritten on the outer envelope, the Court held that those ballots should not be invalidated as the parties stipulated that such ballots were received by Election Day.

Regarding the ballots with no date on the envelope, the Court found that the Election Code was clear in its mandate of requiring a date along with a signature on the outer envelope. However, the Court noted that the board co-mingled ballots from undated

¹³⁷ *In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 1191 C.D. 2020 (Commw. Ct.); Petition for Allowance of Appeal denied, 676 MAL 2020 (Pa. Supreme Court).

outer envelopes with all other ballots, so it is impossible to tell which ballots came from which envelopes. Because of the co-mingling of the improper ballots with the bulk of properly-cast ones, the Court stated it would be unfair to disenfranchise these voters as a result of the Board's decision. The Court noted that although there was no case law on the issue of co-mingling improper ballots with proper ones, the act of co-mingling was done in the presence of both Republican and Democratic representatives, who could have objected at that time. Thus, the Court implied that because the complaining party could have stopped the Board from co-mingling the improper ballots, they have essentially waived the issue.

Turning to the ballots with no handwritten name or address, a partial written address, or a mismatched address on the outer envelope, the Court found that the “[f]ailure of the elector to complete this information is not an error of law...there is no requirement that filling out the declaration needs to include handwriting the elector's name and address.” These are minor irregularities which should not be a basis to invalidate ballots.

Finally, addressing the ballots enclosed but not sealed in their secrecy envelopes, the Court found that there is no evidence that the electors failed to securely seal the ballot in the privacy envelope as required by the election code. Because there is insufficient evidence to determine whether the provision of the statute mandating sealing the ballot in the secrecy envelope was violated by the elector — as opposed to simply having the seal fail — the Court found that it would be an injustice to disenfranchise these voters, and declined to overrule the Board regarding their decision to count these ballots as well.

On November 23, the campaign filed an Application for Expedited Treatment and Summary Relief with the Commonwealth Court, asking that it grant summary adjudication on an expedited basis. On November 25, the Commonwealth Court affirmed the decision of the Bucks County Court of Common Pleas as it pertained to the electors' failure to write their names, addresses, and the dates of signatures on their ballots' outer envelope. The Commonwealth Court's ruling cited the recently decided case *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, holding that the Election Code “does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.”

As to the ballots which were placed in the secrecy envelopes but not sealed, the Commonwealth Court stated that the “legislature did not merely require the envelopes to be sealed, but specified that it be ‘securely’ sealed.” However, the Commonwealth Court noted that the instructions provided by the board of elections did not specify that the envelope needed to be securely sealed and that if it was not the ballot may not be counted. Given this, and the fact that it cannot be conclusively established that the voters failed to seal their ballots, the Court held that its ruling regarding the sealing of secrecy envelopes is to be applied prospectively only, and the 69 ballots which were unsealed in their secrecy envelopes will not be invalidated.

On December 4, the campaign filed an Emergency Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On December 8, the Emergency Petition for Allowance of Appeal was denied.

*Metcalf v. Wolf*¹³⁸

On December 4, State Representative Daryl Metcalfe and several other Republican state house members filed a Request for an Emergency Temporary Restraining Order and Injunctive Relief and Compliant for Writ of Mandamus against Gov. Wolf, Secretary Boockvar, and the Democratic State Electors of the Electoral College.

The complaint was premised on the assertion that the Governor and Secretary of State failed to implement the recommendations in the 2019 Auditor General’s report regarding deficiencies in the SURE system. Additionally, the complaint alleged that Secretary Boockvar had been allowing “select organizations with close ties to the Democratic Party ... direct[] access to the Commonwealth’s SURE System.” In support of this allegation, the complaint quotes Secretary Boockvar stating that she gave Rock the Vote, a Democratic NGO, access to the SURE system.

Additionally, the complaint includes an affidavit from a USPS mail carrier who transported completed Pennsylvania ballots from New York to Pennsylvania. It was estimated by the affiant that there were close to 200,000 such ballots shipped in one batch. The assertion was that these are falsified, fictitious, and illegal ballots.

Further, the complaint challenges some counties’ use of a notice-and-cure procedure for defective ballots, quoting portions of the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar* as support for the contention that the notice-and-cure policies pursued by some counties was illegal.

Other allegations of irregularities animated this complaint. For instance, Deputy Secretary for Elections Marks announced that those who voted by mail-in or absentee and whose ballots had been rejected as defective may go in person to a polling place and recast their vote as a provisional ballot. It is alleged by Rep. Metcalfe that not only did this policy contradict Election Code §§ 1308 and 1210, it was timed to coincide with a Democratic Party campaign to tell voters who had voted by absentee or mail-in ballot to go in-person to their polling place and cast an additional provisional ballot. It was further alleged that this policy presumed the fact that the absentee and mail-in ballot would have to have been pre-canvassed before Election Day in order for the county Boards of Election to determine which absentee and mail-in ballots were defective or deficient prior to Election Day — another violation of the Election Code.

Based on these irregularities and others covered in separate lawsuits detailed in this memorandum, the petitioners sought a Writ of Mandamus from the Court “directing Defendant Wolf to withdraw the certification of the 2020 presidential election,” as well as

¹³⁸ *Metcalf v. Wolf*, 636 MD 2020 (Commw. Ct.).

temporary and permanent injunctive relief preventing the Democratic electors from casting votes in the Electoral College.

On December 9, the Court denied the petitioners' sought-after Writ of Mandamus and Temporary and Permanent Injunctions. The Court found that the petitioners "are unable to demonstrate a clear right to relief or likelihood of prevailing on the merits because their underlying action, although styled as a complaint seeking a writ of mandamus, is really an improper and untimely election contest." In support of its ruling, the Court cited Pennsylvania Supreme Court precedent holding that the proper remedies for violations of the Election Code are to be found in the Election Code itself.

*In re: Canvassing Observation*¹³⁹

On November 3, President Trump's campaign filed an appeal from the Philadelphia Board of Elections decision denying his petition to conduct a closer inspection of the ballot canvassing process at the Philadelphia Convention Center. The campaign claimed the way its canvass observers were treated by the Philadelphia Board of Elections violated its statutory right under § 1308(b) to observe the canvassing of ballots.

The Common Pleas Court held otherwise, finding that the statute relied on by the campaign merely requires that the boards of elections allow the campaign's observers to "be present" at the canvassing operation — it does not require that the canvassers permit the observers to see ballots being counted, ballots being removed from their outer envelopes, and similar actions of the canvassers. The Court stated "the watchers' purpose is not to audit the individual ballots, and 'meaningful observation' or 'meaningful access' is not a legally recognized reason for a watcher getting close enough to do so."

On November 4, the campaign appealed to the Commonwealth Court. On November 5, the Commonwealth Court issued an opinion reversing the Philadelphia Common Pleas Court. In so deciding, the Court pointed to language in Election Code § 1308(g)(1.1) that permitted campaigns to have attorneys, representatives, or watchers present "in the room" where ballots are being canvassed.

This, the Court held, implied a right in the campaign to be more than just "present." "To find otherwise would completely undercut the intent of the Election Code by reducing candidates' representatives to tourists incapable of carrying out the observations allowed by the Election Code for the purposes of reporting to the candidate they represent." The Court then found that the Philadelphia Board of Elections violated the Trump campaign's right to have observers present, discussing in some detail how his campaign's observers were kept away from the canvassing tables. The Court then pointed out that the Philadelphia Board of Elections presented no evidence to contradict the campaign's observer's testimony.

¹³⁹ *In re: Canvassing Observation*, 241 A.3d 339 (Pa. 2020).

On November 5, the Philadelphia Board of Elections filed an Emergency Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On November 9, the Pennsylvania Supreme Court granted the Emergency Petition, on the following three legal questions:

- Whether, as a matter of statutory construction pursuant to Pennsylvania law, the Commonwealth Court erred in reversing the trial court, which concluded that Petitioner City of Philadelphia Board of Elections’ regulations regarding observer and representative access complied with applicable Election Code requirements.
- Whether the issue raised in Petitioner’s petition for allowance of appeal is moot.
- If the issue raised in Petitioner’s petition for allowance of appeal is moot, does there remain a substantial question that is capable of repetition yet likely to evade review, and, thus, fall within an exception to the mootness doctrine.

On November 17, the Pennsylvania Supreme Court issued its opinion, reversing the Commonwealth Court and reinstating the ruling of the Philadelphia Common Pleas Court.

As an initial matter, the Pennsylvania Supreme Court noted that after the favorable ruling from the Commonwealth Court, the campaign then filed for an injunction in the federal District Court for the Eastern District of Pennsylvania, alleging that the Philadelphia Board of Elections was not complying with the Commonwealth Court’s ruling. Recognizing that there was a pending appeal to the Pennsylvania Supreme Court, the federal District Court urged the parties to work out an agreement amongst themselves.

As to the first of three legal questions the court granted the petition on, mootness, the Court held that the case was not moot because, even at that late date, ballots were still being canvassed and the campaign wanted maximal access to the process.

Addressing the merits of the case, the Court restated the Philadelphia Board of Elections’ position — that it is entitled to craft rules for the canvassing process, and that is rule corraling the campaign observers into a segregated area was necessary to protect its workers from physical assault and coronavirus. On the other hand, “[t]he Campaign argues that, under the Board’s interpretation, merely being in the far end of a room like the Convention Center, which is as large as a football field, would be sufficient to comport with these requirements.”

In its analysis, the Pennsylvania Supreme Court agreed with the statutory interpretation forwarded by the Philadelphia Common Pleas Court, explaining:

[T]hese provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they “remain in

the room.” The General Assembly, had it so desired, could have easily established such parameters; however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so.

Because the General Assembly did not include any language regarding distance of observation, the Philadelphia Board of Elections was within its statutory authority to craft the canvassing observation rules that it did. There was “no basis for the Commonwealth Court to have invalidated these rules.” Justices Mundy and Saylor filed a dissenting opinion.

*Texas v. Pennsylvania et al*¹⁴⁰

On December 7, the State of Texas filed a Motion for Leave to File Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Wisconsin, and Michigan in the United States Supreme Court. The complaint alleged that these states’ election irregularities cumulatively acted to deprive Texas’s and the other complaining states’ residents the right to a free and fair election. The State of Texas also filed a Motion to Expedite and a Motion for a Preliminary Injunction and Temporary Restraining Order.

The irregularities complained of in the Motion for Leave to File Bill of Complaint included:

- Non-legislative actors’ purported amendments to States’ duly enacted election laws, in violation of the Electors Clause’s vesting State legislatures with plenary authority regarding the appointment of presidential electors;
- Intrastate differences in the treatment of voters, with more favorable [treatment] allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States; and
- The appearance of voting irregularities in the Defendant States that would be consistent with the unconstitutional relaxation of ballot-integrity protections in those States’ election laws.

Texas asserted that all of these flaws in state election laws “violate one or more of the federal requirements for elections” and “cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.” Missouri and 16 other states backed Texas by filing an *Amicus Curiae* brief with the United States Supreme Court.

¹⁴⁰ *Texas v. Pennsylvania*, 592 U.S. 155 (2020) (denying Motion for Leave to File a Bill of Complaint).

On December 14, the United States Supreme Court refused to hear the case. The Court stated that “The State of Texas’s motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot.”

Justice Alito, with whom Justice Thomas joined, would have accepted Texas’s Bill of Complaint, as those Justices believe that the United States Supreme Court, as the court of original jurisdiction as to matters between the States, cannot reject such cases. However, even those two Justices would not have granted Texas the sought-after relief. Justice Alito stated “[i]n my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction. I would therefore grant the motion to file the bill of complaint but would not grant other relief, and I express no view on any other issue.”