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THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
TO THE PENNSYLVANIA HOUSE DEMOCRATIC POLICY COMMITTEE
POLICY HEARING ON ELECTION REFORM

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Thank you, Chairman Bizzarro, for the opportunity to speak to the Committee about necessary reforms to Pennsylvania's Election Code. The topic of Election Reform in Pennsylvania could consume reams of paper, but our testimony here will focus on remedying implementation issues around mail-in voting to reduce voter confusion and disenfranchisement and to provide clear and uniform rules for counties.

I. Introduction

The General Assembly enacted "no-excuse" absentee voting as an additional method of voting as part of Act 77 of 2019.¹ Mail-in voting was part of the most comprehensive update to Pennsylvania's Election Code in decades. Primarily as a result of the global coronavirus pandemic, Pennsylvania voters embraced mail-in voting during the 2020 presidential election cycle. More than 2.6 million Pennsylvanians voted mail ballots in 2020 and more than 1.5 million voters requested mail ballots in the 2022 general election.

The rapid expansion of mail ballot² use has revealed certain areas that need clarification to eliminate confusion among voters and ensure uniform implementation among counties. We will discuss the following legislative needs that would materially improve the voter experience in Pennsylvania: First, extending the time period for counties to "pre-canvass" mail ballots sufficiently in advance of election day so that counties can identify fatal defects in mail ballots and notify voters to prevent voter disenfranchisement; and second, requiring counties to notify voters of problems with their mail ballots discovered either before or during pre-canvassing and adopt uniform standards for the process of curing defects. We will address each of these issues in more detail below.

¹ 2019, Oct. 31, P.L. 552, No. 77, § 8, adopting 25 P.S. 3150.11, et seq.

² Because the legal standards for applying for, marking and submitting absentee and mail ballots are virtually identical, we refer to both collectively as "mail voting" throughout this testimony.

II. Discussion

A. Pre-Canvass of Mail Ballots

Under current law, counties are forbidden from beginning to canvass mail ballots until 7:00 a.m. on Election Day.³ “Pre-canvassing” refers to the process whereby counties determine that the ballot was timely received and should be counted and prepare the ballots for counting by removing the secrecy envelope from the outer envelope, randomizing the secrecy envelopes, removing the mail ballots from the secrecy envelopes and organizing the ballots for counting. Pre-canvassing serves two important purposes. First, it gives counties enough time to prepare the ballots for counting so that mail ballot vote tallies can be included in unofficial result totals as soon as possible after the polls close on Election Day. Second, it enables counties to identify ballots where voters have made mistakes on the envelope or omitted the secrecy envelope so voters can correct those errors. “Pre-canvassing” does not include counting the ballots.⁴

Currently, because the Election Code forbids pre-canvassing until 7:00 a.m. on Election Day, counties may not have enough time to complete the canvass of mail ballots on Election night. Counties support extending the time for pre-canvassing to ensure accurate unofficial results as soon as possible.⁵ Many states permit pre-canvassing to begin before election day, with time limits varying widely from 1 day to 29 days before Election Day. Notably, 19 states allow verification of mail ballots to occur upon receipt, or very shortly thereafter, by the county or local election office.⁶ Extending Pennsylvania’s timeline for pre-canvassing will better serve counties and voters alike.

B. Notice and Cure

An essential improvement to prevent voter disenfranchisement is the adoption of uniform rules for counties to notify voters of problems with their mail ballots so that voters can correct them, or “cure” the defect, before the deadline for returning mail ballots. As discussed in the previous section, current law does not allow enough time for counties to evaluate mail ballots, let alone enough time to notify voters about defective mail ballots before the close of polls on Election Day. Accordingly, counties have adopted their own processes for determining whether mail ballots are defective. Some counties notify voters of obvious defects on the exterior of mail ballot envelopes when they receive them. Others weigh the ballots on a scale to determine if the inner secrecy envelope is missing and then notify voters. And some counties refuse to take any action regarding

³ 25 P.S. § 3146.8(g)(1.1)

⁴ For a discussion of mail ballot processing steps among states, see Bipartisan Policy Center, “Ballot Pre-processing Policies Explained,” Sept. 7, 2022, <https://bipartisanpolicy.org/explainer/ballot-pre-processing-explained/>

⁵ County Commissioners Association of Pennsylvania, 2023 County Government Priorities, <https://pacounties.org/advocacy/priorities>

⁶ See National Conference of State Legislatures, “Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options,” <https://www.ncsl.org/elections-and-campaigns/voting-outside-the-polling-place>, Table 16, “When Absentee/Mail Ballot Processing and Counting Can Begin,” <https://www.ncsl.org/elections-and-campaigns/table-16-when-absentee-mail-ballot-processing-and-counting-can-begin#toggleContent-12088>

mail ballots before 7:00 a.m. on Election Day based on an erroneous belief that the Election Code forbids the practice.

Because the legislature has failed to enact notice and cure provisions, whether a voter receives notice of a problem with their mail ballot varies widely across the Commonwealth. As a result, whether a voter is disenfranchised because of a mistake on their mail ballot depends on where the voter lives. The Commonwealth Court has held that the Election Code neither forbids nor requires counties to notify voters,⁷ thus leaving the decision to individual counties.

The Pennsylvania General Assembly should enact both extended pre-canvassing periods and procedures for notifying voters of a defect in their mail ballots. The Pennsylvania Department of State has already provided some operational guidance to counties, urging them to, at a minimum, enter data regarding defective ballots into the SURE system. This will generate an email to voters that their ballot has been canceled and allow the Department to create and publicize a list of voters whose ballots were canceled. Yet even these steps are not universally followed.

In addition to these operational requirements, the General Assembly should require that counties notify voters of defects in mail ballots and provide instructions to voters regarding their options for curing these defects. These options include requesting that the county mail a new replacement ballot to the voter, voting a replacement ballot in person at the board of elections office, or casting a provisional ballot at their polling place on Election Day. Because the Election Code is silent regarding the rules around curing defects on mail ballots, clarification is needed to avoid confusion and disenfranchisement.

The November 2022 general election provides an example of this confusion. The Pennsylvania Supreme Court ruled on November 1, 2022—a week before the election—that mail ballots missing the date or bearing an incorrect date on the outer envelope could not be counted.⁸ Some counties notified voters if their ballots were undated or incorrectly dated and advised them that they could correct the date on their ballot at the elections office on or before Election Day or vote a provisional ballot at their polling place. Other counties, however, refused to notify voters that their ballots were defective and even advised poll workers and voters that voters would be unable to cure their defective mail ballots by voting a provisional ballot at the polls.

This disparity in treatment of mail ballots occurred despite guidance issued by the Department of State on November 3, 2022, directing county elections directors to examine all mail ballots to determine if the return envelopes were signed and dated and to code ballots that were undated or incorrectly dated as CANC – NO SIGNATURE within the SURE system so that voters

⁷ *Republican National Committee et al. v. Chapman, et al.*, No. 447 M.D. 2022 (Commwlth Ct. Sept. 29, 2022), *aff'd* 284 A.3d 207 (Pa. 2022); *accord Pennsylvania Democratic Party v. Boockvar*, 662 Pa. 39, 238 A.3d 345, 374 (2020) (holding Pennsylvania Election Code does not require notice and cure but the parameters of that process are best left to the legislature).

⁸ *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022), reconsideration and reargument denied (Nov. 7, 2022).

would be notified if their mail ballots had been canceled.⁹ The Department also issued guidance in 2020 stating that a voter may vote a provisional ballot if the voter was issued but did not successfully vote an absentee or mail ballot and did not surrender the ballot at the polling place to be spoiled or if the voter's mail ballot was rejected by the county board of elections.¹⁰

The ACLU-PA sent letters to 27 counties that were not following the Department's guidance to urge them to notify voters of mail ballot defects and allow voters to cure defective ballots either at the elections office or by voting a provisional ballot at their polling place. While we do not believe any voters were denied the ability to vote a provisional ballot, we do not know whether those curative provisional ballots were counted. We also do not know how many voters were unable to cure their defective mail ballots because they were never notified.

A recent decision by the Luzerne County Board of Elections further illustrates the confusion around the appropriate use of provisional ballots to cure defective mail ballots. The Board initially voted to deny provisional ballots to voters who submitted defective mail ballots in a January 31 special election based on the mistaken belief that the Election Code prohibited voters from casting a provisional ballot if they had already submitted a mail ballot—even if that ballot would not be counted due to defects.¹¹ After the ACLU-PA contacted the county solicitor to explain that constitutional and statutory law required provisional ballots to be available to those voters, the Board reversed course, voting 4-1 to allow provisional voting in such circumstances.¹²

The issues we highlight above are some of the most pressing issues that need clarity from the General Assembly to improve the voting experience in Pennsylvania. In addition to these improvements to the mail-voting process, the General Assembly should enact minimum requirements for deployment and security of mail ballot drop boxes; eliminate the requirement that voters hand write the date on mail ballot envelopes and instead specifically require counties to stamp the date and time of receipt on mail ballot envelopes when they arrive at the elections office; ease restrictions on dropping off mail ballots by allowing voters to drop off the ballots of voters who live in the same household; and permit voters to submit completed and sealed mail ballots to the judge of elections at their local polling place on Election Day.

The ACLU-PA supports additional pro-voter reforms such as in-person early voting, same day registration and automatic voter registration. We would welcome the opportunity to assist with drafting measures to ensure that all eligible voters in Pennsylvania can participate fully in Pennsylvania elections.

⁹ Guidance on Undated and Incorrectly Dated Mailin and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court's Order in Ball v. Chapman, issued November 1, 2022, PA Dep't of State, Nov. 3, 2022, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf>

¹⁰ Pennsylvania Provisional Voting Guidance, PA Dep't of State, Oct. 21, 2020, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_ProvisionalBallots_guidance_1.0.pdf

¹¹ Luzerne County Election Board schedules meeting to reconsider ballot curing change, Times Leader, Jennifer Learn-Andes, Jan. 23, 2023,

<https://www.timesleader.com/news/1597730/luzerne-county-election-board-schedules-to-reconsider-ballot-curing-change>

¹² *Id.*