



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEAGUE OF WOMEN VOTERS)
OF DELAWARE, INC. and)
RACHEL GRIER-REYNOLDS,)
)
Plaintiffs,)
)
v.)
)
STATE OF DELAWARE)
DEPARTMENT OF ELECTIONS)
and ANTHONY J. ALBENCE, State)
Election Commissioner,)
)
Defendants.)

C.A. No. 2020-0761-SG

**OPENING BRIEF IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

David M. Fry (No. 5486)
SHAW KELLER LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801
(302) 298-0700
dfry@shawkeller.com

- and -

Karen Lantz (No. 4801)
ACLU OF DELAWARE
100 W 10th Street #706
Wilmington, DE 19801
(302) 654-5326
klantz@aclu-de.org
Attorneys for Plaintiffs

Dated: September 18, 2020

TABLE OF CONTENTS

Preliminary Statement	1
Nature and Stage of the Proceeding	3
Statement of Undisputed Facts	3
I. Overview of Absentee and Vote-by-Mail Procedures	3
II. Widespread USPS Delays Emerge in Late July	5
III. Delaware Expects a “Huge Volume” of Mail-In-Ballots Near the Return Deadline	6
IV. The Impact of COVID-19 on In-Person Voting for High-Risk Voters	7
Questions Presented.....	10
Argument	10
I. Legal Standards	10
A. Summary Judgment.....	10
B. Declaratory Judgment	11
C. Injunctive Relief.....	12
II. The return deadline, as applied, violates the Elections Clause	12
III. The return deadline, as applied, violates the Right to Vote Clause	18
IV. The Court should enjoin defendants from failing to count votes on ballots that are mailed on or before Election Day	22
A. Plaintiffs have demonstrated success on the merits	22
B. Voter disenfranchisement is, by definition, irreparable harm.....	23
C. The balance of the equities strongly favors an injunction	23
D. Scope of the Proposed Injunction	24
Conclusion	27

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Gordon</i> , C.A. No. 04C-09-055 PLA, 2008 Del. Super. LEXIS 103 (Del. Super. Mar. 27, 2008).....	13, 14
<i>Afran v. Cty. of Somerset</i> , 581 A.2d 1359 (N.J. 1990).....	19
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	11
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	19
<i>Cerberus Int’l, Ltd. v. Apollo Mgmt., L.P.</i> , 794 A.2d 1141 (Del. 2002)	11
<i>COPI of Del., Inc. v. Kelly</i> , C.A. No. 14529, 1996 Del. Ch. LEXIS 136 (Del. Ch. Oct. 25, 1996).....	12
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181 (2008).....	20
<i>Democratic Nat’l Comm. v. Bostelmann</i> , 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 57918 (W.D. Wis. Apr. 2, 2020).....	21
<i>Doe v. Walker</i> , 746 F. Supp. 2d 667 (D. Md. 2010).....	21, 22
<i>Energy Partners, Ltd. v. Stone Energy Corp.</i> , C.A. No. 2402-N, 2006 Del. Ch. LEXIS 182 (Del. Ch. Oct. 30, 2006).....	12
<i>Guare v. State</i> , 117 A.3d 731 (N.H. 2015)	19
<i>In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71</i> , 740 N.W. 2d 444 (Mich. 2007).....	19

<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014).....	23
<i>Moore v. Sizemore</i> , 405 A.2d 679 (Del. 1979)	11
<i>New Ga. Project v. Raffensperger</i> , 1:20-CV-01986-ELR, 2020 U.S. Dist. LEXIS 159901 (N.D. Ga. Aug. 31, 2020).....	21, 22
<i>Pa. Democratic Party v. Boockvar</i> , No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *58-59 (Pa. Sept. 17, 2020)	15, 25
<i>Republican Nat’l Comm. v. Democratic Nat’l Comm.</i> , 140 S. Ct. 1205 (2020)	21
<i>Taylor v. Jones</i> , C.A. No. 1498-K, 2002 Del. Ch. LEXIS 152 (Del. Ch. Dec. 17, 2002)	3
<i>Wallbrecht v. Ingram</i> , 175 S.W. 1022 (Ky. 1915)	13
<i>Williams v. Salerno</i> , 792 F.2d 323 (2d Cir. 1986).....	23
<i>Young v. Red Clay Consol. Sch. Dist.</i> , 122 A.3d 784 (Del. Ch. 2015).....	12, 13, 14, 18, 19
<i>Young v. Red Clay Consol. Sch. Dist.</i> , 159 A.3d 713 (Del. Ch. 2017).....	13, 14

Statutes

10 Del. C. § 6502.....	11
15 Del. C. § 5504.....	3, 4
15 Del. C. § 5508(b).....	4
15 Del. C. § 5604.....	3, 4

15 Del. C. § 5608(b)4

15 Del. C. § 570226

Other Authorities

Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice
in the Delaware Court of Chancery, Second Edition § 16.02[e]
(Matthew Bender & Co., 2019)23

TABLE OF EXHIBITS TO VERIFIED COMPLAINT (D.I. 1)

Exhibit	Description
A	Department of Elections Website on Absentee Voting, https://elections.delaware.gov/services/voter/absentee/citizen.shtml
B	Department of Elections Website on Voting by Mail, https://elections.delaware.gov/services/voter/votbymail/index.shtml
C	July 29, 2020 Letter from Thomas J. Marshall, General Counsel and Executive Vice President of the United States Postal Service, to Delaware State Election Commissioner Anthony Albence
D	<i>Postal Crisis Ripples Across Nation as Election Looms</i> , N.Y. TIMES, Aug. 15, 2020, https://www.nytimes.com/2020/08/15/us/post-office-vote-by-mail.html
E	Postmaster General Briefing on Service Performance Measurement, Aug. 12, 2020
F	Complaint for Declaratory and Injunctive Relief, <i>Commonwealth of Pa. v. DeJoy</i> , No. 2:20-cv-4096, D.I. 1 (E.D. Pa. Aug. 21, 2020)
G	Department of Elections 2020 Presidential Primary Election Report, https://elections.delaware.gov/results/html/index.shtml?electionId=PP2020
H	Department of Elections 2016 Presidential Primary Election Report, https://elections.delaware.gov/archive/elect16/elect16_pres_primary/html/election.shtml
I	Declaration of Anthony J. Albence, <i>Commonwealth of Pa. v. DeJoy</i> , No. 2:20-cv-4096, D.I. 18-4 (E.D. Pa. Sept. 2, 2020)
J	<i>Another Post Office Election Challenge: Making Sure Ballots Are Postmarked</i> , NATIONAL PUBLIC RADIO, Aug. 18, 2020, https://www.npr.org/2020/08/18/903490612/another-post-office-election-challenge-makings-sure-ballots-are-postmarked
K	Management Alert from the United States Postal Service Office of the Inspector General, Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area, July 7, 2020

Preliminary Statement

The COVID-19 pandemic has claimed more than 196,000 lives in the United States, including more than 540 in Delaware alone.¹ For people in high-risk groups—like older adults and those with underlying medical conditions—risking exposure means risking debilitating illness, hospitalization, and death.

Recognizing the public health risks associated with in-person voting and the difficult choices facing voters this fall, the General Assembly passed a bill to allow all Delawareans to vote by mail (House Bill 346 or “HB 346”). Governor Carney signed HB 346 into law on July 1, 2020, and the vote-by-mail procedure was used for the first time in Delaware’s September 15, 2020 primary election.

Despite the General Assembly’s best intentions, they could not have foreseen what happened next. In the weeks after HB 346 was signed into law, the United States Postal Service (the “USPS”) began to experience widespread delays in mail delivery. And on July 29, the USPS warned Delaware State Election Commissioner Anthony Albence (“Commissioner Albence”) that even if voters receive their ballots and mail them back promptly, there is a “significant risk” that the Department of Elections will not receive them by Delaware’s return deadline of 8:00 PM on Election Day. As a result, many voters who act in good-faith

¹ Current data is available at <https://covid.cdc.gov/covid-data-tracker/> and <https://myhealthycommunity.dhss.delaware.gov/locations/state>.

compliance with the statutory timing risk having their votes not counted. In a year where the number of mail-in ballots is expected to shatter previous records, these delays will likely cause a significant number of votes not to be counted. The impact will be felt most acutely by those in high-risk groups—like older adults and voters with underlying medical conditions—who cannot vote in person without putting their lives at risk.

This action seeks a declaratory judgment that, under the current circumstances, Delaware’s return deadline violates the Elections Clause and Right to Vote Clause of the Delaware Constitution.² But although the problem is serious, the solution is simple: The Court should enjoin defendants from failing to count votes on ballots that are deposited in the mail on or before Election Day—including (1) all ballots received by mail between 8:00 PM on November 3 and 8:00 PM on November 13 bearing a postmark, scan code, or other official USPS indicator that the ballot was mailed on or before November 3, and (2) all ballots received between 8:00 PM on November 3 and 8:00 PM on November 6 with either no postmark or an illegible postmark. This equitable remedy will ensure that voters acting in good-faith compliance with the law will have their votes counted, while imposing minimal—if any—burden on defendants.

² Article I, § 3 and Article V, § 2, respectively.

Nature and Stage of the Proceeding

Plaintiffs filed their Verified Complaint on September 3, 2020—two months before Election Day, and less than two weeks after the State of Delaware brought suit against the USPS over mail delays in the Eastern District of Pennsylvania. *See generally* Exh. F (complaint for declaratory and injunctive relief). The parties are proceeding on an expedited schedule, with briefing set to close less than 30 days after plaintiffs filed their Verified Complaint.

Statement of Undisputed Facts

The operative facts are undisputed—indeed, most come directly from the State of Delaware or Commissioner Albence himself. Unless otherwise noted, all exhibit citations refer to the exhibits attached to the Verified Complaint (D.I. 1), which should be treated as an affidavit under Court of Chancery Rule 56. *See, e.g., Taylor v. Jones*, C.A. No. 1498-K, 2002 Del. Ch. LEXIS 152, at *7 (Del. Ch. Dec. 17, 2002) (explaining that a “verified pleading may be used to support or oppose a motion for summary judgment if it meets the requirements of Rule 56(e)”).

I. Overview of Absentee and Vote-by-Mail Procedures

Delaware’s vote-by-mail procedures generally mirror the state’s procedures for absentee voting. Both statutes require ballots to be mailed to voters no “less than 4 days prior to an election” 15 Del. C. § 5504 (absentee); 15 Del. C. § 5604 (vote-by-mail). At the earliest, absentee and vote-by-mail ballots may be

mailed to voters 60 and 30 days before the election, respectively. 15 Del. C. § 5504 (absentee); 15 Del. C. § 5604 (vote-by-mail). After receiving their absentee or vote-by-mail ballots, voters may return their completed ballots by mail or drop them off at one of the designated sites for their county. Exh. A at 2-3 (absentee); Exh. B at 6 (vote-by-mail). Voters “who are sick or temporarily or permanently physically disabled” are also permitted to return their absentee ballots by email. Exh. A at 2.³ Votes indicated on absentee and vote-by-mail ballots will not be counted unless the ballots are received by the time polls close at 8:00 PM on Election Day. 15 Del. C. § 5508(b) (absentee); 15 Del. C. § 5608(b) (vote-by-mail).

There is one drop box in Kent County, two in Sussex County (both at the Sussex County Election Office), and three in New Castle County—two in the same building in Wilmington and one in New Castle. Exh. B at 1-2, 6.⁴ Except for the

³ This option is also available to uniformed and overseas voters. *See Uniformed and Overseas Voters*, DELAWARE.GOV, <https://elections.delaware.gov/services/voter/absentee/email.shtml> (last visited Sept. 17, 2020).

⁴ An updated version of the Department of Elections website now shows that there is a 24-hour “drop slot” at the Sussex County Election Office in Georgetown. *See Voting by Mail in Delaware*, DELAWARE.GOV, <https://elections.delaware.gov/services/voter/votebymail/index.shtml> (last visited Sept. 17, 2020).

slot in Sussex County, Delaware’s drop boxes are not accessible on weekends, and most are only accessible between the hours of 8:00 AM and 4:30 PM. *Id.*

II. Widespread USPS Delays Emerge in Late July

In recent weeks, news outlets have reported widespread and significant delays at the USPS. *See, e.g.*, Exh. D (August 15, 2020 article from the New York Times).⁵ While the cause of the USPS delays is being debated, there is no dispute that they have happened. *See, e.g.*, Exh. E at 5 (Postmaster General Briefing showing reduced on-time deliveries for First-Class Mail in mid- to late-July).

According to the State of Delaware, “Delaware state agencies have reported significant delays in the delivery of important mail, such as checks from the State Pension Office and EBT cards being delivered to recipients.” Exh. F, ¶ 188 (complaint filed by Delaware and other states against Postmaster General Louis DeJoy and the USPS in the Eastern District of Pennsylvania). Delaware has characterized the actions of the USPS as designed to “impede the efforts of [Delaware] to conduct free and fair elections in the manner [Delaware] ha[s] chosen.” *Id.*, ¶ 1. And Commissioner Albence has admitted that “[i]f the USPS

⁵ More recent data shows that “on-time delivery of the mail has improved slightly[,]” but “for first-class mail—like letters and postcards—the system has remained slower than it was earlier this year.” *Is the Mail Getting Slower? We’re Tracking It*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2020/09/14/upshot/is-the-mail-getting-slower-tracker.html>.

delays continue into November, it could result in significant absentee and mail-in ballots in Delaware going uncounted.” Exh. I, ¶ 23 (declaration of Commissioner Albence submitted under penalty of perjury on September 2, 2020, in the Eastern District of Pennsylvania litigation).

III. Delaware Expects a “Huge Volume” of Mail-in Ballots Near the Return Deadline

According to Commissioner Albence, “[a]s of August 21, 2020, 727,968 Delaware voters have registered to vote. As of August 28, 2020, 102,474 of these voters have requested an absentee or mail-in ballot for the November 3, 2020 general election, with applications still forthcoming.” Exh. I, ¶ 10. As of August 29, 2020, “100,492 Delaware voters have requested an absentee or mail-in ballot for the September 15, 2020 state primary election.” Exh. I, ¶ 10. And “[a]s of August 21, 2020, 24,552 Delaware voters are on the permanent absentee ballot list.” *Id.*, ¶ 11.

In the July 2020 presidential primary, 56,075 Delawareans cast absentee ballots (out of 124,478 total votes), compared to just 5,046 in the 2016 presidential primary (out of 163,532 total votes).⁶ Exh. G; Exh. H; Exh. I, ¶ 5. According to

⁶ Governor Carney issued an executive order on March 24, 2020, allowing “an otherwise duly registered voter” to use the “sick or physically disabled” absentee qualification if the voter “is asymptomatic of COVID-19 infection and otherwise abiding by CDC and DPH guidelines by exercising self-quarantine or social distancing to avoid potential exposure to (and community spread of) COVID-19, and who herself or himself freely chooses to use such qualification to vote by

Commissioner Albence, 1,661 absentee ballots (almost 3% of the total cast) “were received late and were not counted.” Exh. I, ¶ 18. Defendants “anticipate that this number will increase dramatically in the upcoming election if there are widespread USPS delays.” *Id.* And “with anticipated USPS delays, [defendants] expect to receive a huge volume of ballots” near the return deadline, “making processing more difficult.” *Id.*, ¶ 17.

In a letter to Commissioner Albence dated July 29, 2020, the USPS warned that “[e]ven if a voter receives a ballot before Election Day, there is a significant risk that the voter will not have sufficient time to complete and mail the completed ballot back to election officials in time for it to arrive by the state’s return deadline.” Exh. C. at 2.

IV. The Impact of COVID-19 on In-Person Voting for High-Risk Voters

There is no dispute that the risk of developing a severe illness from COVID-19 exposure is higher for older adults and those with underlying medical conditions.⁷ “Severe illness means that the person with COVID-19 may require

absentee ballot.” Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat.

⁷ *Older Adults*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Sept. 17, 2020); *Underlying Medical Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-underlying-medical-conditions.html> (last visited Sept. 17, 2020). The Court may take judicial notice of these facts because they “[c]an be accurately and readily determined” by

hospitalization, intensive care, or a ventilator to help them breathe, or they may even die.”⁸

According to the State of Delaware and Commissioner Albence, “[a]pproximately 19.4 percent of Delaware residents, and 24.2 percent of all registered Delaware voters, are 65 years of age or older.” Exh. F, ¶ 64; Exh. I, ¶ 9. In other words, at least 24.2% of registered Delaware voters are at heightened risk of developing a severe illness if they contract COVID-19.⁹

Some of those voters are members of the League of Women Voters of Delaware, Inc. (the “League”), which has 419 members across the State of Delaware, including members in each county and the City of Wilmington. D.I. 1,

referencing the CDC’s website, “whose accuracy cannot reasonably be questioned.” Del. R. Evid. 201(b); *see also, e.g., Jiménez v. Palacios*, C.A. No. 2019-0490-KSJM, 2019 Del. Ch. LEXIS 288, at *5 n.3 (Del. Ch. Aug. 2, 2019) (taking judicial notice of “press statements and releases issued by official representatives of the U.S. federal government” because the fact “[t]hat the referenced statements and releases set forth certain positions of the U.S. federal government . . . is not subject to reasonable dispute”).

⁸ *Older Adults*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Sept. 17, 2020).

⁹ For more information on the serious health risks associated with COVID-19 exposure—even for younger, healthy voters—see the Affidavit of Karyl Thomas Rattay, MD, MS, submitted on behalf of defendants in *Republican State Committee of Delaware v. State of Delaware, Department of Elections*, C.A. No. 2020-0685 SG (Del. Ch. Sept. 16, 2020).

¶ 5. Some of the League’s members are over the age of 60, and some have underlying health conditions. *Id.*

The threat of COVID-19 to high-risk voters is not merely hypothetical. Plaintiff Rachel Grier-Reynolds, for example, is a 74-year-old resident of Lewes, Delaware, with stage IV lung cancer—the most advanced stage of the disease. D.I. 1, ¶ 6. She has lost two-thirds of a lung, has scar tissue near her heart from radiation, and depends on the USPS for delivery of her chemotherapy medication. *Id.* Ms. Grier-Reynolds is a registered voter who, until recently, would regularly cast her vote in person. But given her age and underlying medical conditions, she has had to use extreme caution to avoid any risk of exposure to COVID-19. *Id.* For this reason, she voted by mail in Delaware’s July 7 presidential primary, and plans to vote by mail again this November. *Id.* She submitted her ballot for Delaware’s September 15 primary by email because she had not received her mail-in ballot three weeks after she had requested it. *Id.* Because she depends on the USPS for delivery of her chemotherapy medication, Ms. Grier-Reynolds is acutely aware of the recent slowdowns in mail service, and is concerned that her mail-in ballot will not be delivered in time to be counted this November. *Id.*

Questions Presented

- I. Does the return deadline, as applied, violate the Elections Clause?
- II. Does the return deadline, as applied, violate the Right to Vote Clause?
- III. If the return deadline, as applied, violates the Elections Clause or the Right to Vote Clause, what is the appropriate relief?

Argument

Under the unique circumstances surrounding the 2020 general election, enforcing the return deadline would compromise the voting rights of a significant number of Delawareans, creating an election that is neither free nor equal in violation of the Elections Clause. Enforcing the return deadline would also violate the Right to Vote Clause, depriving many eligible voters of their constitutionally guaranteed right to vote. In both cases, the impact of these constitutional violations will fall most heavily on seniors and those with underlying medical conditions, who do not have the option of safely voting in person. The only way to remedy these violations is an injunction, so that voters who deposit their ballots in the mail by Election Day can be confident that their votes will be counted.

I. Legal Standards

A. Summary Judgment

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Del. Ch. Ct. R. 56(c). When the moving party meets the initial burden of demonstrating that the undisputed facts support its claim or defenses, the burden of proof shifts to the non-moving party to demonstrate that there are unresolved material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979). The mere existence of some evidence in support of the nonmoving party, however, is insufficient to deny a motion for summary judgment; there must be enough evidence to enable a rational factfinder to find for the nonmoving party on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

B. Declaratory Judgment

Delaware's Declaratory Judgment Act provides that "courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." 10 Del. C. § 6501. Any person "whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." 10 Del. C. § 6502.

“In evaluating the justiciability of a declaratory judgment claim, a court must determine whether ‘the facts alleged, under all the circumstances, show that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” *Energy Partners, Ltd. v. Stone Energy Corp.*, C.A. No. 2402-N, 2006 Del. Ch. LEXIS 182, at *24 (Del. Ch. Oct. 30, 2006) (quoting *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990)).

C. Injunctive Relief

“To merit a permanent injunction, a plaintiff must show: (1) actual success on the merits, (2) irreparable harm, and (3) the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction.” *COPI of Del., Inc. v. Kelly*, C.A. No. 14529, 1996 Del. Ch. LEXIS 136, at *11 (Del. Ch. Oct. 25, 1996).

II. The return deadline, as applied, violates the Elections Clause.

The Elections Clause provides that “[a]ll elections shall be free and equal.” Del. Const. art. I, § 3. “The Elections Clause has independent content that is more protective of electoral rights than the federal regime” under the Fourteenth Amendment. *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 813 (Del. Ch. 2015) (“*Red Clay I*”).

“[T]he purpose of the Elections Clause ‘is to ensure that the right of citizens to vote in an election is unfettered.’” *Id.* at 857 (quoting *Abbott v. Gordon*, C.A. No. 04C-09-055 PLA, 2008 Del. Super. LEXIS 103, at *69 (Del. Super. Mar. 27, 2008)). “Free elections are essential because ‘[t]he very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection[.]’” *Id.* at 857-58 (quoting *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915)). Thus, for example, the Elections Clause protects the “right of citizens . . . to have free and equal access to the polls[.]” *Abbott*, 2008 Del. Super. LEXIS at *71; *see also Wallbrecht*, 175 S.W. at 1026 (interpreting identical clause in Kentucky Constitution and finding that an election is not “free and equal” when “any substantial number of legal voters” have been “denied the right to vote”).

Neither the Elections Clause nor the cases interpreting it require the Court to weigh any countervailing government interests, no matter how compelling those interests may be. *See Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 799 (Del. Ch. 2017) (“*Red Clay II*”) (holding that the defendant’s conduct violated the Elections Clause even though it “sought to achieve what [the Court] regard[ed] as an unmitigated public good”).

“[A] potential violation of the Elections Clause exists if the plaintiffs allege that ‘their access to the polls was disturbed’” *Red Clay I*, 122 A.3d at 858

(quoting *Abbott*, 2008 Del. Super. LEXIS, at *72). Moreover, “[a]n election in which the government engages in conduct that discriminates against the aged and disabled is not ‘free and equal.’” *Id.* at 858-59.

In *Red Clay II*, the court found that a school district violated the Elections Clause by holding family-friendly events at polling places during a school funding referendum, which “produced parking problems that hampered the ability of the elderly and disabled to access the polls.” 159 A.3d at 769. “An election is not ‘free and equal’ when . . . [government action] interfere[s] with the ability of elderly and disabled residents to access the polls.” *Id.* at 771. This is true regardless of the government’s intentions. *See id.* at 799 (finding that the district’s interference “with the ability of elderly and disabled residents to vote” was “not purposeful”).

This case presents similar concerns. As set forth above, even if a voter mails their completed ballot several days before the election, there is a significant risk that it will arrive too late to be counted. And because the Department of Elections is allowed to mail ballots as late as the Friday before Election Day, some voters who request mail-in ballots within the statutorily permitted timeframe will receive them too late to mail the voted ballot in time for receipt by Election Day. This risk of late-arriving ballots is exacerbated by the ongoing delays at the USPS and the high number of Delawareans expected to vote by mail. Commissioner Albence has

even admitted that “[i]f the USPS delays continue into November, it could result in significant absentee and mail-in ballots in Delaware going uncounted.” Exh. I, ¶ 23.

The burden of these delays will fall most heavily on voters who are at risk of serious health complications from exposure to COVID-19—including older adults and those with underlying medical conditions, like Ms. Grier-Reynolds. If these voters are unable to vote effectively by mail, many will be forced to choose between putting themselves at risk by voting in person or not voting at all. Indeed, the State of Delaware has acknowledged that the widespread delays at the USPS will “impede the efforts of [Delaware] to conduct free and fair elections in the manner [Delaware] ha[s] chosen.” Exh. F., ¶ 1.

In sum, even if voters follow the letter of the law, enforcing the statutory return deadline will result in many votes not being counted. This disenfranchisement—which is all but guaranteed for some number of voters—is tantamount to depriving voters of access to the polls. *See Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *58-59 (Pa. Sept. 17, 2020) (adopting three-day extension of Pennsylvania’s Election Day return deadline “to reduce voter disenfranchisement resulting from the conflict between the Election Code and the current USPS delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the pandemic”).

An election in which voters can be deprived of their right to vote even while adhering to the law is not “free and equal.” This is particularly true, as here, when the government’s conduct in effect discriminates against identifiable groups of voters—including voters in high-risk groups like Ms. Grier-Reynolds, for whom in-person voting is a potentially life-threatening option.

Delaware provides two alternatives to voting in person or voting by mail: dropping a completed ballot at one of *five* drop boxes in the entire state, or—in certain limited circumstances—submitting an absentee ballot by fax or email. Neither is an adequate substitute for reliable mail-in voting with a reasonable return deadline.

There are only six drop boxes in the entire state, three of which are in New Castle County (and two of which are in the same building). *See* Exh. B at 6.¹⁰ Four drop boxes are only open from 8:00 AM to 4:30 PM on Monday through Friday; the only exceptions are the drop box in the lobby of the Carvel State Office Building in Wilmington, which is accessible between 7:00 AM and 5:00 PM (but the building is closed on weekends), and the 24-hour drop slot at the Sussex

¹⁰ As noted above, the Department of Elections website now reflects that the Sussex County Election Office in Georgetown has a 24-hour drop slot. *Voting by Mail in Delaware*, DELAWARE.GOV, <https://elections.delaware.gov/services/voter/votebymail/index.shtml> (last visited Sept. 17, 2020).

County Election Office in Georgetown. *Id.*¹¹ A voter in Townsend, for example, cannot simply drop a completed ballot at a local polling site. Instead, the voter must drive—or find someone to drive them—21 miles to Dover or New Castle, between the hours of 8:00 AM and 4:30 PM on a weekday. *See id.* For voters who lack reliable transportation, cannot drive, or whose work or family obligations prevent them from visiting an election office in the middle of a weekday, Delaware’s drop boxes are not sufficient to relieve voters of the need to rely on the USPS to return their completed ballots.

Likewise, voting by fax or email is only available to a narrow subset of voters. This option is only available to absentee voters (not voters who request a ballot under the new vote-by-mail procedure) who are in the uniformed services, live overseas, or “are sick or temporarily or permanently physically disabled” Exh. A at 2.¹² This narrow qualification does not apply to healthy older voters or to younger voters with underlying medical conditions, all of whom are still at heightened risk for developing a severe illness from COVID-19 exposure. This

¹¹ Up-to-date information on drop box locations and hours can be found at *Voting by Mail in Delaware*, DELAWARE.GOV, <https://elections.delaware.gov/services/voter/votebymail/index.shtml> (last visited Sept. 17, 2020).

¹² *See also Uniformed and Overseas Voters*, DELAWARE.GOV, <https://elections.delaware.gov/services/voter/absentee/email.shtml> (last visited Sept. 17, 2020).

option is also no help to otherwise qualified voters who lack access to a printer or fax machine, as voters must print, sign, and then scan or fax their ballot.¹³

Thus, if the Department of Elections and Commissioner Albence are permitted to enforce a ballot return deadline of 8:00 PM on Election Day, they will effectively deny many Delaware voters access to the polls—and, in particular, older voters and those with underlying medical conditions. There is nothing “free and equal” about an election in which a significant number of voters will be disenfranchised through no fault of their own.

III. The return deadline, as applied, violates the Right to Vote Clause.

The Right to Vote Clause provides that “[e]very citizen of this State” who is eligible to vote in an election “shall be entitled to vote at such election” Del. Const. art. V, § 2. *See Red Clay I*, 122 A.3d at 813 (noting that the Delaware Constitution, unlike the U.S. Constitution, “explicitly provide[s] an individual with a right to vote”).

The Delaware courts have not provided a framework for analyzing whether government action violates the Right to Vote Clause. In states with analogous constitutional provisions, however, state courts often apply the federal test set forth

¹³ *See Uniformed and Overseas Voters*, DELAWARE.GOV, <https://elections.delaware.gov/services/voter/absentee/email.shtml> (last visited Sept. 17, 2020)

by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992).¹⁴ See, e.g., *Guare v. State*, 117 A.3d 731, 736 (N.H. 2015) (applying *Burdick* test where state constitution provided that “every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election”); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W. 2d 444, 463, 470 (Mich. 2007) (adopting *Burdick* test where state constitution provided that qualified citizens “shall be an elector and qualified to vote in any election except as otherwise provided in this constitution”); *Sonneman v. State*, 969 P.2d 632, 637 (Alaska 1998) (applying *Burdick* test to Article V, § 1 of the Alaska Constitution, which provides that qualified citizens “may vote in any state or local election”); see also *Afran v. Cty. of Somerset*, 581 A.2d 1359, 1363 (N.J. 1990) (pre-*Burdick* decision requiring “a compelling state reason for the imposition of the durational-residence burden on the right of franchise” under Article II, § 1, ¶ 3(a) of the New Jersey Constitution, which provides that qualified citizens “shall be entitled to vote”).

Under *Burdick*, the “rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens”

¹⁴ Looking to other states for persuasive authority is appropriate when there is little, if any, Delaware law on point. See *Red Clay I*, 122 A.3d at 837 (noting that “there is a ‘dearth of case law’ addressing the [Elections Clause]” and looking to “decisions from other states interpreting their analogous constitutional provisions” as one of “[t]he most obvious sources of authority”).

the rights in issue. 504 U.S. at 434. When the “rights are subjected to ‘severe’ restrictions,¹⁵ the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* (citation omitted). If “a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ . . . , ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* (citation omitted).

There is no “litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008). “However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Id.* (citation omitted).

Enforcing the return deadline for mail-in ballots in the 2020 general election will result in a severe restriction on Delawareans’ fundamental right to vote. As noted above, 1,661 absentee ballots in Delaware’s July presidential primary (almost 3% of the total cast) “were received late and were not counted.” Exh. I, ¶ 18. Defendants “anticipate that this number will increase dramatically in the upcoming election if there are widespread USPS delays.” *Id.* And “with anticipated USPS delays, [defendants] expect to receive a huge volume of ballots”

¹⁵ That is, if the restrictions “go beyond the merely inconvenient.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

near the return deadline, “making processing more difficult.” *Id.*, ¶ 17. There can be no question that this near-certain disenfranchisement of an indeterminate number of voters constitutes a severe burden on the right to vote. *See New Ga. Project v. Raffensperger*, 1:20-CV-01986-ELR, 2020 U.S. Dist. LEXIS 159901, at *77-78 (N.D. Ga. Aug. 31, 2020) (finding that an Election Day receipt deadline created a severe burden where the “evidence demonstrates that there were a record number of absentee ballot requests for the Georgia June 2020 Primary Election, and there will likely be even more requests for November 2020 election”); *Democratic Nat’l Comm. v. Bostelmann*, 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 57918, at *55-56 (W.D. Wis. Apr. 2, 2020) (finding that an Election Day receipt deadline created a severe burden where state “clerks are facing a record number of absentee ballot requests” and “are still working on sending out a backlog of over 21,000 absentee ballot applications”);¹⁶ *Doe v. Walker*, 746 F. Supp. 2d 667, 679-80 (D. Md. 2010) (finding that a return deadline 10 days after Election Day imposed a severe burden where ballots were mailed too late to “allow sufficient

¹⁶ The district court in *Bostelmann* issued a preliminary injunction extending the receipt deadline for Wisconsin’s primary election by six days, *id.* at *57, and the Seventh Circuit declined to stay this portion of the injunction. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-1538, 2020 U.S. App. LEXIS 25831, at *8 (7th Cir. Apr. 3, 2020). The Supreme Court partially stayed the injunction order, but only “to the extent it require[d] the State to count absentee ballots postmarked after [Election Day]” (the Court was not asked to stay the injunction with respect to ballots postmarked on or before Election Day). *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1206 (2020).

time for absent uniformed services and overseas voters to receive, fill out, and return their absentee ballots”).

The State of Delaware may have a general interest in promptly counting votes and certifying the results of an election. But “the state’s general interest in the [return deadline] is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law.” *Bostelmann*, 2020 U.S. Dist. LEXIS 57918, at *56-57. This is particularly true where, as here, “many voters who *timely* request an absentee [or vote-by-mail] ballot will be unable to receive, vote, and return their ballot before the receipt deadline.” *Id.* (emphasis in original); *see also New Ga. Project*, 2020 U.S. Dist. LEXIS 159901, at *81 (recognizing the important “interests in conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud[,]” but concluding that “the statutorily imposed deadline acts as an undue burden on the right to vote”).

IV. The Court should enjoin defendants from failing to count votes on voted ballots that are mailed on or before Election Day.

A. Plaintiffs have demonstrated success on the merits.

This factor is self-explanatory. If the Court agrees that the return deadline, as applied under the current circumstances, violates either the Elections Clause or the Right to Vote Clause, then plaintiffs have necessarily demonstrated success on the merits.

B. Voter disenfranchisement is, by definition, irreparable harm.

Irreparable harm is harm “for which there can be no adequate recompense at law.” Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery, Second Edition* § 16.02[e] (Matthew Bender & Co., 2019) (citation omitted). “Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases and noting that “once the election occurs, there can be no do-over and no redress”); *see also Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (finding that the plaintiffs “would certainly suffer irreparable harm if their right to vote were impinged upon”).

This is a classic case of irreparable harm. Defendants have acknowledged that the ongoing USPS delays will cause some number of Delaware voters to be disenfranchised. And when that happens, there is no post-election cure. The election will be over, the results will be certified, and a significant number of votes will be lost forever. “The injury to these voters is real and completely irreparable if nothing is done to enjoin this law.” *League of Women Voters*, 769 F.3d at 247.

C. The balance of the equities strongly favors an injunction.

There is no comparison between the competing interests in this case. On one hand are voters—particularly older voters and those with underlying medical

conditions—who depend on mail-in voting and are at serious risk of having their votes discarded. On the other hand is the Department of Elections, which is simply being asked to continue counting votes as long as they were mailed on or before Election Day. This simple, straightforward change will prevent the near-certain disenfranchisement of a significant number of voters.

D. Scope of the Proposed Injunction

As set forth in the proposed order submitted with this motion, the Court should enjoin defendants from failing to count votes on ballots that are mailed on or before Election Day. Specifically, all votes should be counted on ballots received by mail between 8:00 PM on November 3 and 8:00 PM on November 13, as long as they bear a postmark, scan code, or other official USPS indicator that they were mailed on or before November 3. This will provide defendants and the board of canvass (the body that certifies election results) with a definitive end point for counting votes, while ensuring that voters who act in good-faith compliance with the law will have their votes counted. *See* 15 Del. C. § 5701 (designating judges of the Superior Court as the board of canvass for general elections, for performing the duties imposed in the Delaware constitution); Del. Const. art. V, § 6 (imposing duties).

All votes should also be counted on ballots received by mail between 8:00 PM on November 3 and 8:00 PM on November 6 “that lack a postmark or other

proof of mailing, or for which the postmark or other proof of mailing is illegible[,] . . . unless a preponderance of the evidence demonstrates that [the ballot] was mailed after Election Day.” *See Boockvar*, 2020 Pa. LEXIS 4872, at *60. A limited presumption of timely mailing is necessary to ensure that voters are not disenfranchised because the USPS inadvertently failed to postmark their ballots, which the USPS Office of the Inspector General has acknowledged is possible. Exh. K at 7 (explaining that “ballots may be double fed on a machine, machines applying postmarks may run out of ink, or ballots may be comingled with certain mail that is not processed on machinery that applies a postmark”); *see also* Exh. J (recent article discussing postmarking breakdowns). The state should not “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.” *Boockvar*, 2020 Pa. LEXIS 4872, at *60 n.26.

Defendants will likely argue that even if the return deadline is unconstitutional as applied under the current circumstances, they cannot continue counting votes until November 13 because of the Delaware Constitution’s timing requirements for the activities of the board of canvass. *See* Exh. I, ¶ 18 (Commissioner Albence noting that the Department of Elections “ha[s] only two days to certify the election results”). But although the Delaware Constitution requires ballots, voting machine tapes, and other materials to be presented to the

board of canvass “at 10 o’clock a.m. on the second day after the election[,]” there is no constitutional requirement that the board of canvass finish its duties and certify election results on the day it convenes. *See* Del. Const. art. V, § 6.

To the contrary, the statutory framework implementing this requirement specifically contemplates situations where not all votes will be delivered on the Thursday after Election Day. *See* 15 Del. C. § 5702(a) (allowing the board of canvass to “issue summary process against the election officers” if records “are not produced when the Court convenes”). The process may also be delayed if the board of canvass is required to conduct one or more recounts. *Id.* at § 5702(b) and (c); *see also, e.g., Woo v. Robinson*, 484 A.2d 950, 955 (Del. 1984) (refusing to stay an order directing a recount in Delaware’s 1984 race for Lt. Governor).¹⁷

“While it is vital that election contests be promptly settled, it is equally imperative that this process, which goes to the heart of our democratic system, be free of the stain of doubt—that mistakes, however innocent, not subvert the solemn expression of the electorate’s will.” *Woo*, 484 A.2d at 955. Nothing precludes the Department of Elections from simply advising the board of canvass that not all votes have been received, and then providing the final tally of mail-in votes after

¹⁷ Lt. Governor Woo’s opponent did not concede until November 12, 1984—six days after the general election. *Vote Challenge Dropped*, THE NEW YORK TIMES, <https://www.nytimes.com/1984/11/14/us/vote-challenge-dropped.html> (last visited Sept. 17, 2020).

8:00 PM on November 13. At that point, the board of canvass will be able to complete its duties and certify the election results.

Conclusion

There is no dispute: If the Delaware Department of Elections and Commissioner Albence enforce a ballot return deadline of 8:00 PM on Election Day, a significant number of Delaware voters will be disenfranchised. There is also no dispute that the burden of this widespread disenfranchisement will fall most heavily on older voters and those with underlying medical conditions. Under these circumstances, the Court should require defendants to take the simple, straightforward step of continuing to count mail-in votes until November 13, 2020, as long as they were mailed on or before Election Day.

/s/ David M. Fry

David M. Fry (No. 5486)
SHAW KELLER LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801
(302) 298-0700
dfry@shawkeller.com

- and -

Karen Lantz (No. 4801)
ACLU OF DELAWARE
100 W 10th Street #706
Wilmington, DE 19801
(302) 654-5326
klantz@aclu-de.org
Attorneys for Plaintiffs

Dated: September 18, 2020

Words: 6,396

CERTIFICATE OF SERVICE

I, David M. Fry, hereby certify that on September 18, 2020 this document was served on the persons listed below in the manner indicated:

By File & ServeXpress

Allison J. McCowan
Frank N. Broujos
Ilona M. Kirshon
Deputy Attorneys General
STATE OF DELAWARE DEPARTMENT OF JUSTICE
Carvel State Building
820 French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400
allison.mccowan@delaware.gov
frank.broujos@delaware.gov
Ilona.kirshon@delaware.gov
Attorneys for Defendants

Max B. Walton
Matthew F. Boyer
Trisha W. Hall
CONNOLLY GALLAGHER LLP
267 East Main Street
Newark, DE 19711
(302) 757-7300
mwalton@connollygallagher.com
mboyer@connollygallagher.com
thall@connollygallagher.com
Attorneys for Defendants

/s/ David M. Fry
David M. Fry (No. 5486)
SHAW KELLER LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801
(302) 298-0700
dfry@shawkeller.com

- and -

Karen Lantz (No. 4801)
ACLU OF DELAWARE
100 W 10th Street #706
Wilmington, DE 19801
(302) 654-5326
klantz@aclu-de.org
Attorneys for Plaintiffs