

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION ONE  
CASE NO. 20-CI-00538**

*FILED ELECTRONICALLY*

**MARGARET STERNE, HELEN LeMASTER,  
FRED MOZENTER, DEBRA GRANER,  
MICHAEL CHANEY, and MacARTHUR DARBY**

**PLAINTIFFS**

**V.**

**MICHAEL ADAMS, in his official capacity as Secretary  
of State of the Commonwealth of Kentucky,**

**DEFENDANTS**

**SERVE:  
Office of the Attorney General  
700 Capitol Avenue, Suite 118  
Frankfort, KY 40601-3449**

**ANDY BESHEAR, in his official capacity as  
Governor of the Commonwealth of Kentucky,**

**SERVE:  
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**COMMONWEALTH OF KENTUCKY  
STATE BOARD OF ELECTIONS,**

**SERVE:  
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**DEANNA BRANGERS, in her official capacity as a  
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**ALBERT B. CHANDLER, III in his official capacity as a**

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**and**

**SHERRY WHITEHOUSE, in his official capacity as a  
member of the Kentucky State Board of Elections,**

**SERVE:  
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**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Margaret Sterne, Helen LeMaster, Fred Mozenter, Debra Graner, Michael Chaney, and MacArthur Darby for their First Amended Complaint for Declaratory and Injunctive Relief, state and allege as follows:

**INTRODUCTION**

1. This is an action under Section 6 of the Kentucky Constitution for declaratory and injunctive relief to require Kentucky’s election officials to extend the rules for no-excuse absentee voting used for the June 23, 2020 primary elections for the duration of the Covid-19 pandemic, including for the upcoming November 3, 2020 general election; and under Section 147 of the Kentucky Constitution for declaratory and injunctive relief to require that election officials electronically transmit ballots to voters with visual disabilities who vote by mail pursuant to the emergency election regulations, using the state’s existing delivery system implemented pursuant to KRS 117A.030(4). This relief is necessary and appropriate to permit the citizens of the Commonwealth to safely vote for local, state, and national leaders during a pandemic that has required massive changes to their daily lives. By delaying Kentucky’s primary until June 2020, and successfully implementing the no-excuse absentee voting rules, Defendants have conceded the necessity—and proved the viability—of the relief requested. And as the best available science shows that concerns regarding Covid-19 transmission will be at least as serious in November 2020 as they are today, that relief is necessary to safeguard voters’ health, as well as their rights to a “free and equal” election under the Kentucky Constitution.

## PARTIES

2. Plaintiff Margaret Sterne is a 65-year-old U.S. citizen registered to vote in Calloway County, where she resides with her brother. She had her right to vote restored in 2019. Her mother, Plaintiff Helen LeMaster, moved into the home in March of this year because her previous living situation did not allow her to practice safe social distancing measures. Plaintiff Sterne has been diagnosed with chronic obstructive pulmonary disease (COPD) and high blood pressure (hypertension). In March, her doctor's office contacted her to inform her that she was at high risk of severe illness from Covid-19 and that she could not visit the office in person for appointments. Any appointments she needs to make are conducted remotely by video. Plaintiff Sterne has been self-isolating at the family's home, which is located in a rural area with no nearby neighbors. She and her mother have not left the property since March, and her brother leaves only sparingly to run essential errands. In addition to her own health, Plaintiff Sterne is worried about the health of her mother and brother, the latter of whom who lives with several health conditions, including AIDS and heart disease, and who relies on an oxygen tank. For these reasons, Plaintiff Sterne must vote by absentee ballot in the November general election in order to safeguard her health and that of her mother and brother. Plaintiff Sterne is not eligible to vote by mail in the November general election, because she does not qualify for any excuse under KRS 117.085(1)(a). She is physically "able to appear at the polls on election day," KRS 117.085(1)(a), but this would severely jeopardize her and her mother's health.

3. Plaintiff Helen LeMaster is Plaintiff Sterne's mother and resides with Plaintiff Sterne in Calloway County. She is a U.S. citizen and has not lost her right to vote by reason of a felony conviction. Plaintiff LeMaster is 84 years old and has been diagnosed with COPD, high blood pressure (hypertension), atrial fibrillation, and a thyroid condition. She is also a breast

cancer survivor and had several lymph nodes removed from her arms as part of her cancer treatment. Plaintiff LeMaster moved to Kentucky from Indiana in March, because the previous individuals with whom she resided provided part-time care for their young grandchildren, and she worried they could expose her to novel coronavirus. Since moving in with Plaintiff Sterne, she has not left the property. All of her doctor's visits are conducted remotely and her prescription medications are mailed to her. On one occasion, a prescription had to be filled at a local pharmacy, but her son picked up the prescription using the pharmacy's drive-through. Plaintiff LeMaster is registered to vote in Kentucky, but she will not vote in November if required to vote in person because of the significant threat posed to her life by Covid-19. Plaintiff LeMaster wishes to vote by mail in the November general election but is not eligible to vote by mail, as she does not qualify for any excuse under KRS 117.085(1)(a). Plaintiff LeMaster is physically "able to appear at the polls on election day," KRS 117.085(1)(a), but this would severely jeopardize her health and that of her children.

4. Plaintiff Fred Mozenter is a 72-year-old U.S. citizen who is registered to vote in Franklin County. He has not lost his right to vote by reason of a felony conviction. He is a bladder cancer survivor who has been in remission since November 2018. Nonetheless, he still requires treatment every six months. Treatment consists of a three-week course of instillations that can only be administered in-person by his medical provider. Plaintiff Mozenter also lives with Type 2 Diabetes, reduced kidney function, and hypothyroidism. Since March, he and his wife, Plaintiff Debra Graner, have limited their public outings. When he has had to leave their home—for example, to pick up pre-ordered goods—he has worn a mask and typically stayed inside the car while the goods are loaded into his car for him. He has also used his pharmacy's drive-through to pick up prescription medications. Plaintiff Mozenter has had to go to his

doctor's office in person to receive cancer treatments, as well as to his local emergency room to address an unanticipated health issue. Plaintiff Mozenter seeks to vote by mail to protect his and his spouse's health against Covid-19; he does not want to take the risk of voting in person at a polling place. Plaintiff Mozenter is not eligible to vote by mail, as he does not qualify for any excuse under KRS 117.085(1)(a). He is physically "able to appear at the polls on election day," KRS 117.085(1)(a), but this would severely jeopardize his and his spouse's health.

5. Plaintiff Debra Graner is a 69-year-old registered voter in Franklin County and the spouse of Plaintiff Mozenter. She is a U.S. citizen and had her right to vote restored in 2019. Plaintiff Graner has been diagnosed with hypertension. Like her husband, she has left their home on a limited basis, for example, to collect pre-ordered goods such as groceries using curbside pick-up services. She always wears a mask and follows recommended social distancing standards. She and Plaintiff Mozenter have not socialized or gone to church since March, nor have they had guests over to their home. Plaintiff Graner requested a mail-in absentee ballot for the June 23, 2020 primary election prior to Gov. Beshear's executive order allowing all registered Kentucky voters to cast their ballots by mail in the primary. However, because she subsequently submitted another absentee mail-in ballot request online after the order's issuance, and did not return the physical form mailed to her by her clerk's office, she was never sent an absentee ballot. Despite several phone calls to her clerk's office, it was not until June 21 that she was informed that her request had not been processed. As a result, she voted absentee, in-person on June 22. Because Plaintiff Graner's age puts her at increased risk of severe illness from Covid-19, and because her husband's multiple health conditions place him at increased risk, voting in person on Election Day will endanger her health and that of her husband due to crowding, long lines, other voters' failure to wear masks, and inadequate safety measures. The

safest option is for Plaintiff Graner to cast a ballot by mail, but if she experiences issues in receiving her ballot again, she needs the option to vote in-person absentee before Election Day, which, under the emergency procedures in place for the June 23 election, encouraged voters to make an appointment with their county clerk's office so that election workers could maintain safe voting conditions.

6. Plaintiff Michael Chaney is 49 years old and registered to vote in Fayette County. He is a U.S. citizen and has never lost his right to vote due to felony conviction. Plaintiff Chaney has been diagnosed with congestive heart failure and is therefore at increased risk of severe illness from Covid-19. Since March, he has followed his doctor's recommendation to wear a respirator when he has to go into public as an added protection against contracting novel coronavirus. Plaintiff Chaney leaves his home approximately every two weeks to go to doctor's appointments and the grocery store. His household is taking extensive precautions against contracting Covid-19. Only one of his household members works outside of the home, and follows a "decontamination" procedure upon his return from work to protect the other household members. All of the household members restrict their outings. Plaintiff Chaney needs to vote by mail in November to protect his health and the health of a household member who is immunocompromised. However, he is not eligible to vote by mail, as he is physically "able to appear at the polls on election day," KRS 117.085(1)(a), and therefore does not qualify for any excuse under KRS 117.085(1)(a).

7. Plaintiff MacArthur Darby is a 74-year-old registered voter in Jefferson County. He is totally blind and has been diagnosed with cancer. He lives on his own. In general, since March, he has only left his home to go to doctor's appointments and to pick up prescription medication, though on a few occasions has gone to Kroeger, Costco, the T-Mobile Store, and a

clothing store. He receives his meals through a meal delivery plan and Instacart. A limited number of people have regularly been in his home since March, including someone who comes once a week to mow his lawn and make necessary repairs; two housekeepers, who come every other week; and a pest control employee who comes every three months. His computer technician comes on an as-needed basis. To the best of his knowledge, they each wear masks and maintain appropriate distance. Typically, Plaintiff Darby votes in person on Election Day at his polling place using a machine that reads his ballot to him and allows him to make his selections without assistance. Usually, it takes him about two to three hours to vote on Election Day, including travel to and from his polling place and time spent casting his ballot. During one election, he had to wait for two hours to cast his ballot because a poll worker had difficulty operating the machine and providing him with instructions. He ultimately had to ask someone to read his ballot to him so that he would not miss his paratransit bus. In the June 23, 2020 primary election, he cast his ballot by mail with the assistance of his daughter, who was visiting from Atlanta. Because his age and cancer diagnosis put him at increased risk from Covid-19, Plaintiff Darby needs to vote by mail. However, he is not eligible to vote by mail, as he is physically “able to appear at the polls on election day,” KRS 117.085(1)(a), and therefore does not qualify for any excuse under KRS 117.085(1)(a). Additionally, Plaintiff Darby seeks to invoke his right to a secret ballot under Section 147 of the Kentucky Constitution. The only way he can cast a secret ballot by mail is for his county clerk to transmit his ballot to him electronically, using the system promulgated pursuant to KRS 117A.030(4), so that he can use his computer’s reader technology to review and mark his ballot without assistance. Under current law, only military and overseas voters may have their ballots electronically transmitted to them. KRS 117.085(3)(b); KRS 117.086(1)(b); KRS 117A.030(4).



8. Defendant Michael Adams is the Secretary of State of Kentucky, and in that role serves as the state's chief election official and an *ex officio*, nonvoting member of the Kentucky State Board of Elections. KRS 117.015(2)(a). Secretary Adams is responsible for recommending to the Governor any necessary alterations to the time, place, or manner of an election during a declared state of emergency. *See* KRS 39A.100(1)(l). If the Governor approves such alterations, the Secretary of State also must approve by executive order any procedures established by the State Board of Elections for election officials to follow in carrying out the Governor's executive order. *Id.* He is sued in his official capacity.

9. Defendant Andy Beshear is the Governor of the Commonwealth of Kentucky. As relevant here, the Governor may issue an executive order altering the time, place, or manner of an election during a declared state of emergency, upon recommendation of the Secretary of State. *See* KRS 39A.100(1)(l). The Governor also must approve by executive order any procedures established by the State Board of Elections for election officials to follow in carrying out his executive order. *Id.* He is sued in his official capacity.

10. Defendant Kentucky State Board of Elections ("State Board of Elections") is a state agency vested with the authority to administer the election laws of the state and supervise the registration and removal of Kentucky voters. *See* KRS 117.015(1). As relevant here, the State Board of Elections must establish procedures for election officials to follow in carrying out any executive order altering the time, place, or manner of election that the Governor may issue pursuant to KRS 39A.100(1)(l). The State Board of Elections has offices located at 140 Walnut Street, Frankfort, Kentucky 40601.

11. Defendant DeAnna Brangers is a member of the State Board of Elections. She is sued in her official capacity.

12. Defendant Albert B. Chandler III is a member of the State Board of Elections. He is sued in his official capacity.

13. Defendant James Lewis is a member of the State Board of Elections. He is sued in his official capacity.

14. Defendant George Russell is a member of the State Board of Elections. He is sued in his official capacity.

15. Defendant Dwight Sears is a member of the State Board of Elections. He is sued in his official capacity.

16. Defendant Cory Skolnick is a member of the State Board of Elections. He is sued in his official capacity.

17. Defendant Sherry Whitehouse is a member of the State Board of Elections. She is sued in her official capacity.

### **JURISDICTION AND VENUE**

18. This Court has subject jurisdiction over this matter pursuant to KRS 418.040 and KRS 418.045. This is an actual and justiciable controversy with respect to the enforcement of the election laws in the Commonwealth of Kentucky.

19. Venue is proper in this Court pursuant to KRS 452.480.

### **FACTS**

#### **I. The Covid-19 Pandemic**

##### **A. Covid-19**

20. In December 2019, health officials in mainland China detected a novel coronavirus, SARS-CoV-2, which causes a disease known as Covid-19. On January 30, 2020, the World Health Organization (“WHO”) declared Covid-19 to be a Public Health Emergency of

International Concern. On March 11, 2020, the WHO declared that it had become a pandemic. Covid-19 has now spread throughout the world, including to every state in the United States and throughout Kentucky.

21. The novel coronavirus that causes Covid-19 continues to spread at an unprecedented pace around the world and within the United States. As of July 27, 2020, there were 4,163,892 confirmed cases in the United States, and there have been 145,982 deaths nationwide.<sup>1</sup> As of that same date, the Commonwealth of Kentucky had confirmed 27,079 positive cases of coronavirus and 700 deaths.<sup>2</sup>

22. According to the U.S. Centers for Disease Control and Prevention, (“CDC”), individuals are at higher risk of severe complications and death from Covid-19 if they are 65 years or older or have underlying health conditions and diseases, including cancer, chronic kidney disease, chronic obstructive pulmonary disease, serious heart conditions, obesity (body mass index (“BMI”) of 30 or higher), Type 2 diabetes, sickle cell disease, and immunocompromised state from a solid organ transplant.<sup>3</sup> It has noted that people with the following conditions *may* be at increased risk from Covid-19: moderate to severe asthma; cerebrovascular disease; cystic fibrosis; hypertension; immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines; neurological conditions; liver disease; pregnancy; pulmonary fibrosis; smoking; thalassemia; and Type 1 diabetes.<sup>4</sup>

23. Severe Covid-19 cases can cause a wide variety of secondary infections and pathologies, including but not limited to: pneumonia, acute respiratory distress syndrome, kidney

<sup>1</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

<sup>2</sup> See <https://govstatus.egov.com/kycovid19>.

<sup>3</sup> See [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html).

<sup>4</sup> *Id.*

failure, liver failure, strokes, heart attacks, cardiac inflammation, and gastrointestinal infections, among others. Furthermore, everyone is at some risk of severe complications and death from Covid-19, as health officials have recently associated Covid-19 with pulmonary embolism and stroke in younger patients without known risk factors and inflammatory disease in young children. In critical cases, some patients need to be intubated and put on a ventilator. Many critical care patients ultimately die.

24. There is also evidence that individuals of color are dying of Covid-19 at a higher rate than other demographic groups. *See, e.g., P. Bailey, Black Kentuckians are dying at 2.5x rate from the coronavirus, Gov. Beshear says, Courier Journal (Apr. 11, 2020).*<sup>5</sup> As of July 27, 2020, the Commonwealth's Covid dashboard showed that 14.59 percent of all those who have died from the virus in Kentucky are Black,<sup>6</sup> even though Kentucky's population is only 8.5 percent Black.<sup>7</sup>

25. Residents age 60 or older have also been disproportionately impacted, with over 90 percent of deaths in the state occurring in this age group.<sup>8</sup> This disparity could have serious implications for Kentucky elections and turnout, as voters age 65 or older comprised approximately 24 percent of Kentucky's electorate in the 2018 general election<sup>9</sup> and 18 percent in the 2016 general election.<sup>10</sup>

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<sup>5</sup> *See* <https://www.courier-journal.com/story/news/2020/04/11/gov-beshear-black-kentuckians-dying-higher-rate-covid-19/2977722001/>

<sup>6</sup> *See* KDPH COVID-19 Dashboard, <https://experience.arcgis.com/experience/647a7cae97c64091b63fee0bd55b140c>.

<sup>7</sup> *See* Kentucky Quick Facts, US Census Bureau, <https://www.census.gov/quickfacts/fact/table/KY/PST045219>.

<sup>8</sup> KDPH, *supra* note 6.

<sup>9</sup> Table 4c, *Voting and Registration in the Election of November 2018*, U.S. CENSUS BUREAU (Apr. 23, 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html>.

<sup>10</sup> Table 4c, *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU (May 10, 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>.

26. Additionally, according to the Kaiser Family Foundation, 44 percent of adults in Kentucky are at risk of severe illness from Covid-19.<sup>11</sup>

27. The CDC has warned that asymptomatic Covid-19-positive individuals can transmit the disease to others. As a result, individuals can spread the disease for a week or more before realizing they are infected, facilitating rapid contagion. Currently, there are no pharmacological treatments or vaccinations that have been shown to significantly alter the trajectory of the Covid-19 outbreak. Leading epidemiology experts anticipate that the pandemic will continue into the fall and winter of 2020, at a minimum.

## **B. Kentucky’s Response to Covid-19**

### **1. Healthy at Home / Healthy at Work**

28. Governor Beshear declared a State of Emergency (“State of Emergency”) on March 6, 2020, which remains in effect as of the date of this filing. *See* Exec. Order 2020-215. Shortly thereafter the Governor issued a series of executive orders and recommendations, known informally as the “Healthy at Home” initiative, designed to combat the spread of Covid-19. Among other things, the Commonwealth closed schools, daycare centers, non-life-sustaining businesses, restaurants (except for takeout service), and bars; prohibited non-essential medical procedures; and suspended visits to nursing homes and prisons in all but narrow circumstances.<sup>12</sup>

29. Researchers at the University of Kentucky concluded that these social distancing and other measures dramatically decreased the transmission of Covid-19: “by April 25, Kentucky would have had 44,482 confirmed Covid-19 cases without social distancing

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<sup>11</sup> “Adults at Higher Risk of Serious Illness if Infected with Coronavirus,” *State Data and Policy Actions to Address Coronavirus*, Kaiser Family Fdn. (July 14, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/>.

<sup>12</sup> A list of the actions taken by the Governor may be found at <https://governor.ky.gov/covid19>.

restrictions, as opposed to the 3,857 actually observed.”<sup>13</sup> “Under the assumption that individuals who did not become confirmed cases as a result of these restrictions would have died at the same rate,” the researchers also concluded that social distancing requirements “have prevented more than 2,000 fatalities” in the commonwealth. *Id.*

30. In early May, Governor Beshear began announcing plans for a phased reopening of the state’s economy, known as “Healthy at Work.”<sup>14</sup> “Before any reopening can begin” under this plan, “the Governor will determine whether Kentucky has met certain public health benchmarks” that “are based on the White House’s Guidelines for Reopening America.” *Id.* Those benchmarks include: “14 days of decreasing cases,” “[i]ncreased testing capacity on contact tracing,” “[p]ersonal protective equipment (PPE) availability,” “[a]bility to protect at-risk populations,” “ability to social distance and follow the CDC’s guidelines on large gatherings,” “[p]reparedness for possible future spike,” and “[s]tatus of vaccine and treatment.” *Id.* The Governor has declared that “[n]o reopening will occur until the Governor determines Kentucky has met these benchmarks.” *Id.*

31. Under Phase 1 of the Healthy at Work plan, certain industries were allowed to reopen (including manufacturing, distribution, construction, car dealerships, pet care, and photography) on May 11, so long as employers complied with the “10 Rules to Reopening” plus any industry-specific guidance. That means that all businesses reopening must “[c]ontinue telework where possible,” adopt a “[p]hased return to work” schedule; use “[o]nsite temperature/health checks,” require “[u]niversal masks and other necessary PPE,” “[c]lose common areas,” “[e]nforce social distancing,” “[l]imit face-to-face meetings,” provide “[s]anitizer/hand wash stations” and “[s]pecial accommodations,” and develop and implement a

<sup>13</sup> See <http://isfe.uky.edu/research/2020/did-social-distancing-measures-kentucky-help-flatten-covid-19-curve>.

<sup>14</sup> See <https://govstatus.egov.com/ky-healthy-at-work>.

“[t]esting plan.”<sup>15</sup> Phase 1 also permitted office-based businesses to reopen at no more than 50 percent capacity, and for horse racing to resume without any spectators. The Governor made clear that such reopening activities would only continue if they did not threaten progress in the state’s fight against Covid-19.

32. In Phase 2 of the Healthy at Work plan, the Governor announced a staged reopening of other types of businesses, including restaurants at 33 percent indoor capacity (May 22), movie theaters and gyms (June 1), campgrounds (June 11), and child care centers at reduced capacity (June 15). Once again, each of these businesses had to comply with the state’s 10 rules for staying healthy at work, plus industry-specific guidance.

33. Predictably, once Kentucky began reopening businesses and other activities, cases of Covid-19 began to arise again.<sup>16</sup>

34. Epidemiologists and infectious disease specialists have already concluded that there will very likely be equal or greater transmission of Covid-19 in the United States this fall. Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, has said a second wave of infections in the United States is “inevitable,” and the CDC’s Director Robert Redfield has said that wave may “be even more difficult than the one we just went through.” South Korea, Germany, and China are already seeing a resurgence of Covid-19 after loosening restrictions in response to declining new Covid-19 cases.

35. Pointing to the spread of Covid-19 cases in southern hemisphere countries as those regions enter their winter seasons, Dr. Fauci remarked, “And if, in fact, they have a substantial outbreak, it will be inevitable that we need to be prepared that we’ll get a cycle

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<sup>15</sup> See <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=147>.

<sup>16</sup> See R. Van Velzer, *Kentucky Coronavirus Cases Are Trending Upward*, <https://www.wkyufm.org/post/kentucky-coronavirus-cases-are-trending-upward#stream/0> (June 10, 2020) (quoting University of Louisville epidemiologist Forest Arnold).

around the second time.” He concluded, “[W]e really need to be prepared for another cycle.” Furthermore, experts from the Harvard T.H. Chan School of Public Health’s Center for Communicable Disease Dynamics warned that, to avoid exceeding hospital critical care capacities, prolonged or intermittent social distancing may be necessary into 2022.

36. It is therefore clear that measures to mitigate against the spread of Covid-19 are far from temporary and similar measures will likely be required for the remainder of 2020.

## 2. Absentee Voting During the Pandemic

37. Secretary Adams has admitted that Kentucky does not have the resources necessary to hold a normal election during the Covid-19 pandemic:

We just don’t have enough locations that are capable of social distancing. We don’t have enough poll workers. Normally it takes 3,600 voting locations and nearly 16,000 poll workers. We don’t have the locations. A lot of our locations are nursing homes, or locations that are closed, like schools. And we don’t have people running up to volunteer to be poll workers.<sup>17</sup>

Of these 16,000 poll workers, “9,000 of them are over the age of 65.”<sup>18</sup>

38. In his public comments, Secretary Adams also has acknowledged that expanded absentee voting is necessary during the Covid-19 pandemic to ensure a “free and fair” election as required by Kentucky’s Constitution: “[Elections] must be fair, which is why I’m ensuring valid integrity in this plan, but they must also be free, meaning we have to make it possible for people to freely vote without unnecessarily risking their personal safety or that of others.”<sup>19</sup>

39. Recognizing that Covid-19 presents unique challenges to Kentucky’s electoral process, the Defendants in this case took decisive and sensible action to ensure that Kentuckians

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<sup>17</sup> See J. Pitts, *Kentucky Secretary of State Adams says changes to voting for primary elections will keep people safe and make needed improvements to system* (May 12, 2020 Interview) (“Kentucky Bottom Line Interview”), <https://kychamberbottomline.com/2020/05/12/kentucky-secretary-of-state-adams-says-changes-to-voting-for-primary-elections-will-keep-people-safe-and-make-needed-improvements-to-system/>.

<sup>18</sup> See Kentucky Tonight, *Interview of Michael Adams* (March 3, 2020), <https://www.ket.org/program/kentucky-tonight/health-legal-and-voting-issues-during-the-covid-19-outbreak/>.

<sup>19</sup> See Ky Secretary of State, *This is not a mail-only election* (June 6, 2020 filmed presentation), <https://www.sos.ky.gov/elections/Pages/2020-Primary-Updates.aspx>.



would have a meaningful chance to vote in the 2020 primary elections despite the Covid outbreak.

40. On March 16, 2020, Secretary Adams sent a letter to Governor Beshear recommending that he “declare by executive order that all Kentucky elections scheduled for May 19, 2020—including the Democratic and Republican primary elections, special elections and local option elections—shall be delayed by thirty-five (35) days, and that such elections shall take place on June 23, 2020.” *See* Letter from Sec. Adams to Gov. Beshear (Mar. 16, 2020).<sup>20</sup>

41. Governor Beshear agreed and issued Executive Order 2020-236 that same day. That executive order noted that Covid-19 “continues to endanger public health and safety and, if not contained, threatens to overwhelm the Commonwealth’s resources.” It also recognized that “state and local governments share responsibility for the protection of public health, safety, and security and for taking appropriate actions to ensure the provision of essential public services.” In light of these—and other—concerns, the Governor ordered that (1) “[a]ll Kentucky elections scheduled for May 19, 2020 . . . are delayed until Tuesday, June 23, 2020” and (2) “[t]he Kentucky State Board of Elections shall establish procedures for election officials to follow pursuant to this Order.”

42. The following month, the Secretary of State sent the Governor another letter, this time recommending a modification to the manner in which the primary would be conducted. *See* Letter from Sec. Adams to Gov. Beshear (Apr. 23, 2020).<sup>21</sup> Specifically, he recommended that the Governor issue an executive order directing the State Board of Elections to issue an emergency regulation that, among other things:

<sup>20</sup> *See* <https://twitter.com/KYSecState/status/1239654331487576065>.

<sup>21</sup> *See* [https://governor.ky.gov/attachments/20200423\\_Ltr-from-Sec-of-State-Adams.pdf](https://governor.ky.gov/attachments/20200423_Ltr-from-Sec-of-State-Adams.pdf).

a. “defines the term ‘medical emergency,’ undefined by Kentucky Revised Statutes section 117.077, to include ‘a reasonable fear of infection or transmission during a state of public health emergency declared by the Governor’”;

b. provides, notwithstanding KRS 117.077, that “an application for an absentee ballot due to a medical emergency a) shall not require the applicant to state that the emergency condition occurred within 14 days of the election, b) need not be notarized, and c) shall entitle the applicant, upon verification of the application, to vote absentee, by mail or in person, if otherwise a lawful voter” and requires the creation of a new absentee ballot application consistent with these requirements;

c. “empower[s] all county clerks to conduct in-person absentee voting on June 8-13, 2020, June 15-20, 2020, and June 22, 2020” (or earlier dates); and

d. requires the creation of “a secure online portal for the request of an absentee ballot by a registered voter.”

43. Once again, Governor Beshear agreed with the recommendation. On April 24, 2020, he issued Executive Order No. 2020-296.<sup>22</sup> That order began by reiterating that federal and state public health officials “have recommended that everyone practice social distancing, meaning staying home as much as possible and otherwise maintaining six feet of distance from other individuals, to minimize the spread of the disease.” It further noted, “[w]here people congregate unnecessarily, or fail to follow adequate social distancing practices, they are spreading the disease . . .” The Governor announced that he was therefore accepting the Secretary of State’s recommendation “to ensure that Kentuckians can exercise their right to vote while remaining healthy at home.” The Governor’s executive order provided, among other things, that:

<sup>22</sup> See [https://governor.ky.gov/attachments/20200424\\_Executive-Order\\_2020-296\\_SOE-Relating-to-Elections.pdf](https://governor.ky.gov/attachments/20200424_Executive-Order_2020-296_SOE-Relating-to-Elections.pdf)

- a. “All Kentuckians should utilize absentee voting by mail for the June 23, 2020 primary election if they are able to do so”;
- b. “The State Board of Elections shall promulgate emergency regulations to provide for such expanded absentee voting by mail” and to “create a secure online portal that will allow voters to request that the absentee ballot be mailed to them”;
- c. “The State Board of Elections shall take all reasonable steps to ensure the safety of county clerks and poll workers when direct voting (not by mail) is necessary”; and
- d. “The State Board of Elections shall promulgate such additional emergency regulations as are necessary to ensure that Kentuckians can safely exercise their right to vote in the June 23, 2020 primary election, while protecting the safety of Kentucky’s county clerks and poll workers. The additional regulations shall be consistent with the April 23, 2020 recommendations of Secretary of State Adams, which are incorporated by reference herein.”

44. The State Board of Elections subsequently issued these emergency regulations. *See* 31 KAR 4:190E, Procedures for June 23, 2020 Elections.<sup>23</sup>

- 45. Among other things, the emergency regulations:
  - a. Provide that “Notwithstanding KRS 117.077, an application for an absentee ballot due to medical emergency a) shall not require the applicant to state that the emergency condition occurred within 14 days of the election, b) need not be notarized, and c) shall entitle the applicant, upon verification of the application, to vote

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<sup>23</sup> *See* [https://content.govdelivery.com/attachments/KYSOS/2020/05/01/file\\_attachments/1441085/SBE%20Covid19%20Emergency%20Regulation.pdf](https://content.govdelivery.com/attachments/KYSOS/2020/05/01/file_attachments/1441085/SBE%20Covid19%20Emergency%20Regulation.pdf)

by absentee, by mail or in person by appointment, as advised, if otherwise a lawful voter.” 31 KAR 4:190E, § 3;

b. Require the State Board of Elections to “send a non-forwarding postcard to every registered voter of the Commonwealth to inform them of the changes being made to the June 23, 2020 elections as a result of the COVID-19 pandemic, as well as the steps the voter must take to request an absentee ballot through the SBE secure online portal or by calling their County Clerk.” 31 KAR 4:190E, § 4. That postcard must “advise voters that, if they will vote in person absentee or in person on election day, they are advised to make an appointment with their County Clerk.” *Id.*

c. Require the State Board of Elections to “establish a secure online portal that will allow voters to request an absentee ballot through the submission of personally identifiable information,” which shall “serve as an absentee application in lieu of SBE’s ‘Medical Emergency Application to Vote Absentee’ form.” 31 KAR 4:190E, § 5. The online portal must “transmit the request to the County Clerk of the county in which the requester is registered to vote,” who must in turn “transmit to the voter an absentee ballot within seven (7) days.” *Id.* The State Board of Elections also was required “to County Clerks a unique barcode for each voter’s ballot envelope, providing the ability to track the ballot as it [is] mailed out and received back, in order to certify the movement of the ballot through the postal system and to issue voter credit.” *Id.*

d. Provide a deadline for county clerks to mail absentee ballots that “have the return postage paid for by the State Board of Elections.” 31 KAR 4:190E, § 6. The regulation also requires county clerks to count any ballot “delivered by the United States

Postal Service and bearing a postmark of [the primary election date] or earlier” if received by a specified date. *Id.*

e. Provide an opportunity for voters to cure any signature problems with mail-in ballots. Specifically, the emergency regulations direct that “[i]f a signature match cannot be made, the County Board of Elections, absentee ballot processing committee, or the County Clerk shall make a reasonable effort to contact the voter using the contact information provided by the voter’s absentee ballot application, and provide the voter with a timeframe and manner in which the voter may cure the discrepancy.” 31 KAR 4:190E, § 9.

f. Require county clerks to “make their offices and telephone lines available for the purpose of allowing registered voters of their respective counties to schedule appointments to vote absentee in-person by appointment . . . no fewer than 5 days per week in the two weeks before the week of election day.” 31 KAR 4:190E, § 10. “Appointments shall be consistent with public health and social-distancing standards and every reasonable effort shall be undertaken by County Clerks to see that in-person absentee voting is implemented in a manner that limits direct contact between voters, other voters, and election officials, and shall be conducted throughout the Clerk’s business hours.” *Id.*<sup>24</sup>

46. Secretary Adams assured Kentucky voters that, during an election held under these emergency regulations, election officials continue to employ appropriate safeguards against fraud. In a recent interview, he stated: “There’s no one who’s tougher on election fraud than I

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<sup>24</sup> Defendant Adams himself exercised his option to vote early under these absentee voting rules. See Michael Adams (@KYSecState), Twitter (Jun. 19, 2020, 9:01 PM), <https://twitter.com/KYSecState/status/1274145199921528832> (“I voted today by dropping my absentee ballot in the dropbox, and I checked out Jefferson County’s early voting operation at KY Fairgrounds. No lines! If you didn’t get an absentee ballot, vote here on Monday and beat Tuesday’s lines!”).

am. I believe in [ballot integrity] which is why I built so many safeguards into this system. . . . As a whole, it's a very safe system.”<sup>25</sup>

47. Secretary Adams also launched an educational campaign around mail-in ballots with the slogan, “Easy to vote, hard to cheat.”<sup>26</sup> His goal was to explain to voters that “absentee voting is a great concept and there are laws in place about how it works.” Secretary Adams stated that he is “much more concerned about voter confusion than I am about people trying to steal an election.”

48. With respect to the June primary election, Secretary Adams recognized that, by “expanding absentee voting – with appropriate safeguards” and “adopting in-person voting methods that limit personal contact, we prevent Mother Nature from disenfranchising Kentucky voters, while we also protect the lives of both our voters and our poll workers.”<sup>27</sup>

49. The emergency regulations worked just as intended. As Secretary Adams noted in a June 30 press conference discussing the election results,<sup>28</sup> turnout under the emergency voting rules was “pretty amazing,” with numbers last seen in 2008 during the competitive primary between Barack Obama and Hillary Clinton. (*Id.* at 1:00). Of these votes, “approximately 80-85% of votes were cast absentee.” (*Id.* at 1:50).

50. Indeed, the process was in many ways smoother than expected: “We thought we’d have a lot more ballots that had problems than we did.” (*Id.* at 2:00). Secretary Adams

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<sup>25</sup> Kentucky Bottom Line Interview, available at: <https://kychamberbottomline.com/2020/05/12/kentucky-secretary-of-state-adams-says-changes-to-voting-for-primary-elections-will-keep-people-safe-and-make-needed-improvements-to-system/>

<sup>26</sup> See M. Ye Hee Lee, *Kentucky braces for possible voting problems in Tuesday's primary amid signs of high turnout*, WashingtonPost.com (June 19, 2020), available at: [https://www.washingtonpost.com/politics/kentucky-braces-for-possible-voting-problems-in-tuesdays-primary-amid-signs-of-high-turnout/2020/06/19/b7b960ce-b199-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/politics/kentucky-braces-for-possible-voting-problems-in-tuesdays-primary-amid-signs-of-high-turnout/2020/06/19/b7b960ce-b199-11ea-8f56-63f38c990077_story.html)

<sup>27</sup> Press Release, *Secretary of State Adams Offers Details on Plan for June 23 Election* (Apr. 24, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=310>.

<sup>28</sup> See WKYT, *Secretary of State Michael Adams Speaks About Primary Election Results*, <https://www.facebook.com/WKYTTV/videos/653442258585954/>.

confidently stated that Kentucky “pulled this off successfully, letting people vote safely at home and that we did so with no reported incidents of fraud... We had a clean election. I’m very proud of that.” (*Id.* at 6:25). Summarizing this process, Secretary Adams stated: “I think I’ve shown that we can make absentee ballots work without fraud. I have shown that we can make early voting [work] without fraud.” (*Id.* at 13:10)

51. However, Secretary Adams also noted that “[t]urnout in November is going to be twice as high as it was for June—or higher.” (*Id.* at 10:30). Thus, he acknowledged that modifications to the regular election rules likely are needed because of Covid, and he stated he wants to have those rules in place by Labor Day, if not sooner. (*Id.* at 8:00).

52. Unfortunately for Kentucky’s voters, however, these successful emergency regulations were limited to the June 23, 2020 primary election. *See* 31 KAR 4:190E, § 1 (“All provisions outlined in this emergency administrative regulation shall apply to the Commonwealth’s June 23, 2020 elections only.”). Without further action by Defendants to extend these rules, expanded absentee voting will not be available to voters for the duration of the Covid-19 pandemic, including in the November 3, 2020 general election.

**C. Kentucky’s Regular Election Laws are Inadequate to Ensure a Free and Fair Election for the Upcoming 2020 General Election in Light of the Covid-19 Pandemic**

53. The general election for all federal offices, including the presidential election, will be held on November 3, 2020. Covid-19 will have an unprecedented impact on this upcoming election. Even before the Covid-19 pandemic, the Brookings Institution predicted that “turnout in

2020 could break all records and test our election machinery as it has never been tested before.”<sup>29</sup>

Other experts also anticipate record-breaking turnout in the 2020 presidential election.<sup>30</sup>

54. Kentucky’s election laws and procedures are not designed to facilitate safe, fair, and free elections during such a public health crisis, and the legislature has failed to take action to remedy this situation. Given the rapidly spreading infection, Kentucky’s current election laws for November will force voters to choose between exposing themselves to severe risks to their health and exercising their constitutionally protected right to vote.

### **1. Excuse Requirement to Vote by Mail-In Absentee Ballot**

55. Kentucky law limits the availability of voting by mail to specific categories of voters with qualifying excuses. Pursuant to KRS 117.085(1)(a), the eight categories of voters with qualifying excuses are:

- Eligible uniformed-service voters or overseas voters registered to vote in Kentucky;
- Students temporarily residing outside their county of residence;
- Incarcerated voters charged with a crime who have not yet been convicted;
- Voters who have changed their place of residence to a state other than Kentucky after the deadline to register to vote in their new state of residence has passed;
- Kentuckians temporarily outside the state but still eligible to vote;

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<sup>29</sup> William A. Galston, *What does high voter turnout tell us about the 2020 elections?* BROOKINGS INSTITUTION (Nov. 20, 2019), <https://www.brookings.edu/blog/fixgov/2019/11/20/what-does-high-voter-turnout-tell-us-about-the-2020-elections/>.

<sup>30</sup> See, e.g., Susan Milligan, *Preparing for a Voter Surge*, U.S. NEWS & WORLD REPORT (Sept. 20, 2019), <https://www.usnews.com/news/elections/articles/2019-09-20/experts-predict-huge-turnout-in-2020>; Nate Cohn, *Huge Turnout Is Expected in 2020. So Which Party Would Benefit?* N.Y. TIMES (July 15, 2019), <https://www.nytimes.com/2019/07/15/upshot/2020-election-turnout-analysis.html>; Ronald Brownstein, *Brace for a Voter-Turnout Tsunami*, THE ATLANTIC (June 13, 2019), <https://www.theatlantic.com/politics/archive/2019/06/2020-election-voter-turnout-could-be-record-breaking/591607/>.



- Voters whose employment requires the voter to be outside the county of residence on all hours and all days of in-person absentee voting and Election Day;
- Participants in the Secretary of State’s crime victim address confidentiality protection program; and
- Those who are “[n]ot able to appear at the polls on election day on the account of age, disability, or illness,” and have not been declared mentally disabled by a court of competent jurisdiction.

56. A qualified voter may request an application for an absentee ballot by telephone, facsimile machine, mail, electronic mail, or in person.

57. Additionally, for voters experiencing a “medical emergency” within “fourteen (14) days or less of an election,” the affected registered voter and their spouse “may apply for an absentee ballot.” The application “shall be notarized” and “shall state that the emergency condition occurred within the fourteen (14) day period.” KRS 117.077.

58. As it concerns ballot delivery, Kentucky law requires the State Board of Elections to “establish an electronic transmission system through which a covered voter may apply for and receive voter registration materials, military-overseas ballots, and other information authorized under this chapter.” KRS 117A.030(4). “Covered” voters include certain categories of uniformed-service members and U.S. citizens living overseas. KRS 117A.010(1). County clerks may electronically transmit ballots to covered voters using the system required under KRS 117A.030(4). Once the voter has completed the ballot, she “shall transmit the voted ballot to the county clerk by mail only . . .”. KRS 117.086(1)(b).

59. On information and belief, the State Board of Elections utilizes a system called Scytl Electronic Ballot Delivery to provide the electronic transmission system mandated by KRS

117A.030(4). According to Scytl, the company that produces this system, ballots are sent to voters over encrypted channels.<sup>31</sup> “Ballots can be marked on-screen via a secure marking utility that prevents common errors such as over-voting and under-voting. Voters also have the option to print their ballots and mark them by hand.”<sup>32</sup> Voters can submit their completed ballots by mail, fax, or online,<sup>33</sup> though as discussed above, Kentucky voters who receive their ballots electronically must return them by mail.

60. Defendants have already demonstrated that they have the power to construe the “medical emergency” excuse to include valid concerns regarding the risk of contracting Covid-19 and to waive the requirement that this emergency condition occur within 14 days of the upcoming general election.

61. However, Defendants have not yet agreed to allow such a basis to satisfy the Excuse Requirement for purposes of the November 2020 election, and none of the existing excuses have been construed for purposes of other elections to include voters who have valid concerns about the risk of contracting Covid-19. *See* 31 KAR 4:190E, § 1 (emergency regulation applies only to June 23 primary elections); Letter from Sec. Adams to Gov. Beshear (Apr. 23, 2020) (proposing to issue emergency regulations that define “medical emergency” to include “a reasonable fear of infection or transmission during a state of public health emergency declared by the Governor,” but only for the June primary election).<sup>34</sup>

62. Just as for the June 2020 primary election, absentee voting must be liberally allowed for the November 2020 general election to assure that election is free and equal as required by Kentucky’s Constitution. Otherwise, significant numbers of Kentucky voters may be

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<sup>31</sup> *Electronic Ballot Delivery*, SCYTL 1, available at <https://www.scytl.com/en/resource/electronic-ballot-delivery-scytl-solution-sheet/>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *See* [https://governor.ky.gov/attachments/20200423\\_Ltr-from-Sec-of-State-Adams.pdf](https://governor.ky.gov/attachments/20200423_Ltr-from-Sec-of-State-Adams.pdf).

dissuaded from exercising their constitutionally protected right to vote by a very rational fear of contracting the highly communicable and deadly novel coronavirus at their local in-person polling place.

63. Defendants have successfully implemented a system for securely transmitting electronic ballots to registered Kentucky voters located outside the United States, which are returned by mail and counted like other absentee mail-in ballots. This delivery system must be extended to Plaintiff Darby, who must vote by mail to protect his health but who cannot exercise his constitutional right to a secret ballot under the paper balloting system used for non-military, domestic voters.

## **2. New Voter ID Law (“SB 2”)**

64. Compounding the problem of excuse-required absentee voting is a new voter ID law which was passed by the Kentucky legislature in April 2020 (overriding the veto of Governor Beshear). The new voter ID law will be effective for the first time during the November 2020 election. *See* KY LEGIS 89 (2020), 2020 Kentucky Laws Ch. 89 (SB 2).

65. SB 2 adds a photo ID requirement for those seeking to vote in person or applying to vote by mail-in absentee ballot. Valid identification, as defined by Section 23 of SB 2, means a document with the voter’s name and photograph issued by: the United States; the Commonwealth of Kentucky; the United States Department of Defense; a branch of the uniformed services; the Merchant Marines; the Kentucky National Guard; a public or private college, university, or postgraduate technical or professional school located within the United States; or any city government, county government, urban-county government, charter county government, consolidated local government, or unified local government, which is located within Kentucky. KRS 117.375(12).

66. Imposing a new voter ID requirement during the Covid-19 pandemic forces Kentucky voters without valid identification to choose between their right to vote and putting their health at risk to attempt to obtain qualifying identification. Many of the places where Kentuckians would normally obtain an ID are closed or have restricted in-person traffic to avoid the spread of Covid-19. Indeed, that was one of the reasons articulated by Governor Beshear for his veto of SB 2: “The provisions of Senate Bill 2 would also likely threaten the health and safety of Kentuckians by requiring them to obtain an identification during the novel coronavirus (Covid-19) pandemic, a public health emergency. During this time, the offices that would provide this identification are not open to in-person traffic, which would be necessary to create the actual identification.” *Veto Message from Gov. Beshear regarding SB 2*.<sup>35</sup>

67. SB 2 provides an alternative for those without a recognized form of voter ID, but this alternative requires a voter to execute an affirmation on a form furnished by the Kentucky Board of Elections. *See* KRS 117.228(1). The law is unclear but appears to require that affirmation to be executed in front of an election official even when a vote is cast by mail-in ballot. KRS 117.228(1)(c); KRS 117.085(2).

68. To execute the voter affirmation required by SB 2, the voter must affirm, under penalty of perjury, various aspects of their identity and qualifications to vote, as well as confirm that one of eight possible “impediments” prevents them from procuring a photo ID. The eight impediments enumerated in SB 2 are: (a) lack of transportation; (b) inability to obtain their birth certificate or other documents needed to show proof of identification; (c) work schedule; (d) lost or stolen identification; (e) disability or illness; (f) family responsibilities; (g) the proof of identification has been applied for, but not yet received; or (h) the voter has a religious objection to being photographed. KRS 117.228(1)(c).

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<sup>35</sup> *See* <https://apps.legislature.ky.gov/record/20rs/sb2/veto.pdf>.

69. None of these impediments provides a basis for excusing the requirements of the photo ID law relating to the Covid-19 pandemic. SB 2 does not contemplate closures of or restricted access to government offices where voter IDs may be obtained due to a public health emergency. Even if a government office where IDs may be obtained is open, entering such public spaces during the Covid-19 pandemic puts Kentuckians at risk of acquiring a highly communicable and sometimes deadly virus. These risks are not among the enumerated list of impediments in the new voter ID law, and thus provide no excuse for voting without a recognized form of identification.

70. SB 2's requirements for either presenting a photo ID or executing an affirmation also extend to those applying for a mail-in absentee ballot. SB 2 requires that "the voter shall provide a copy of his or her proof of identification, as defined in KRS 117.375, or the executed voter affirmation as described in KRS 117.228(1)(c)." KRS 117.085(2). The latter statute—KRS 117.228(1)(c)—contemplates a signature witnessed by an election official.

71. To satisfy this requirement, voters who have an ID but lack a copy machine at home will at a minimum be forced to enter spaces where they risk acquiring Covid-19 to obtain a copy of their proof of identification. That risk alone may prevent an otherwise eligible absentee voter from exercising their right to vote. Moreover, as noted above, SB 2's ambiguous language also might require a voter to appear in front of an election official to sign the affirmation, which also would discourage voters from participating in the process during a pandemic.

72. Put simply, a pandemic is no time to impose a new requirement for identification that forces voters to enter government offices, have in-person interactions with election officials, and/or enter other public spaces to obtain a copy of their ID. These in-person interactions expose voters to risks of acquiring Covid-19 and will undoubtedly deter some Kentuckians from

exercising their right to vote. SB 2’s effective date should be postponed until after the conclusion of this public health emergency. The same no-excuse absentee mail-in and early voting rules that applied to the June 2020 primary elections should extend throughout the Covid-19 pandemic, including for the November 2020 general election.

**FIRST CLAIM FOR RELIEF**  
**Declaration of Rights**  
**(Violation of Ky. Const. § 6)**  
**All Plaintiffs**

73. Plaintiffs restate and incorporate by reference, as if set forth fully herein, the allegations in the preceding paragraphs of the Verified Complaint.

74. Section 6 of the Kentucky Constitution provides that “[a]ll elections shall be free and equal.” Ky. Const. § 6.

75. This “constitutional provision is mandatory.” *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915). “It applies to all elections, and no election can be free and equal, within its meaning, if any substantial number of persons entitled to vote are denied the right to do so.” *Id.* at 1026-1027.

76. After all, “[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; and when any substantial number of legal voters are, *from any cause*, denied the right to vote, the election is not free and equal, in the meaning of the Constitution.” *Id.* at 1026 (emphasis added).

77. In some cases, the cause of the unconstitutional election might be a law enacted by the legislature itself. Section 6 prohibits the Commonwealth from enacting laws that would “deny the voting privilege itself, either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.” *Wilkinson v. Queen*, 269 S.W.2d 223, 226 (Ky. 1954).

Even an “honesty of purpose in the enactment of a law intended to permit free and equal elections” cannot “save it from condemnation, if in its practical application it prevented a free and equal election.” *Wallbrecht*, 175 S.W. at 1027.

78. The constitutional violation might also arise from a *failure* to take affirmative steps to ensure a free and fair election, in light of other circumstances. “It necessarily follows that a failure of the Legislature to make provision whereby the voter may have an opportunity to exercise his right of suffrage . . . would likewise be a violation of the same constitutional provision.” *Smith v. Kelly*, 58 S.W.2d 621, 622 (1933).

79. Simply put, an election where the right to register and vote “is denied to any substantial extent” is “obviously not a free and fair election.” *Early v. Rains*, 89 S.W. 289, 292 (1905).

80. Applying these principles, Kentucky courts have found elections were not free and equal in a variety of circumstances where, for whatever reason, a significant percentage of voters were prevented—practically—from expressing their will.

81. For example, Kentucky courts have found that Section 6 was violated where election officials: failed to provide enough ballots on election day, *see Wallbrecht*, 175 S.W. at 1024; *Hocker v. Pendleton*, 39 S.W. 250 (1897); illegally purged voters from the rolls prior to a special election, *see Johnson v. May*, 305 Ky. 292, 296-297 (1947); allowed voters to register on only one day each year, *see Perkins v. Lucas*, 246 S.W. 150, 155-156 (1922); or failed to provide for a registration period preceding a special election, *see Early*, 89 S.W. at 292.

82. With particular relevance to this case, Kentucky courts have also invoked Section 6 to invalidate absentee voter rules that “effectively deprive some voters of the opportunity to vote.” *Queenan v. Russell*, 339 S.W.2d 475, 478 (Ky. 1960). “Although there is no unqualified

constitutional right to vote by absentee ballot . . . when the legislature chooses to grant the right by statute it must operate with equality among all the class to which it is granted.” *Id.*

83. And, finally, courts have used Section 6 prospectively to compel election officials to adopt procedures for an upcoming election that otherwise would not have been free and fair under the circumstances. *See, e.g., Smith v. Kelly*, 58 S.W.2d 621, 622 (1933) (upholding injunction compelling election officials to open more than one polling place in order to give voters a meaningful chance to vote).

84. These cases reflect a functional approach to Section 6 that is easily satisfied here. Unless Plaintiffs are granted the relief requested, the general election scheduled for November 3, 2020 will not be a “free and equal” election for thousands of registered Kentucky voters, including Plaintiffs.

85. Under Kentucky law, Plaintiffs are not currently permitted to vote on a free and equal basis with other Kentucky voters, because they are at elevated risk of complications and death from Covid-19 and cannot safely vote in person for that reason.

86. The Commonwealth’s current election laws are not sufficient to ensure a free and equal election during the Covid-19 pandemic, as Defendants have effectively conceded in promulgating 31 KAR 4:190E.

87. As Defendants have stated publicly, forcing voters to appear to vote in person creates an unnecessarily high risk of transmission of Covid-19, which transmits through respiratory droplets and aerosolization and fomite/surface transmission. Voters will potentially be forced to stand in long lines to cast their votes on Election Day, as recently occurred in both Wisconsin and Georgia. The only reason it did not happen during Kentucky’s recent primary

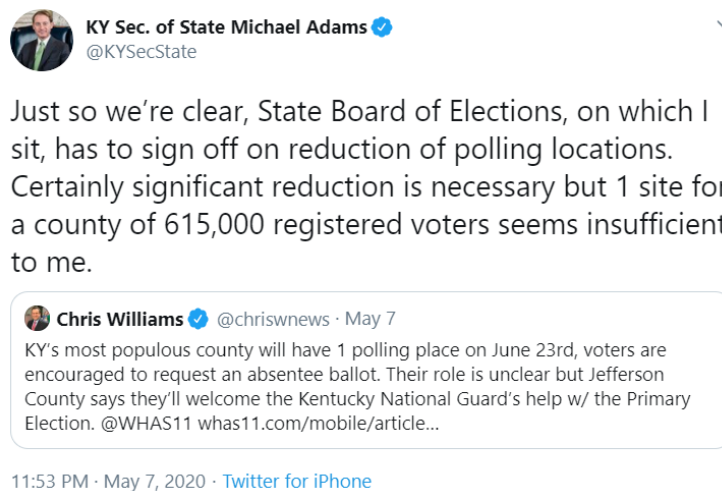


election was because the emergency regulations allowed for the kind of widespread absentee mail-in and early voting Plaintiffs seek in this case.

88. Voters forced to vote in person under the regular election rules also will have to congregate in confined polling places with election workers and other voters, contrary to social distancing guidelines. Sanitization and personal protective equipment cannot fully prevent Covid-19 transmission.

89. The risk of long lines and crowded polling places is particularly acute in Kentucky, where many counties were unable to recruit sufficient poll workers to operate a normal number of polling places for the June 23, 2020 primary elections. For example, in the state’s largest counties—Jefferson and Fayette—there was only one polling place each.

90. Secretary Adams himself publicly questioned whether that was sufficient to permit a truly free and equal election, even with the emergency regulations in place:



91. Given the likelihood that in-person voting locations will be similarly limited in November, combined with the easy transmission of Covid-19 in indoor, congregate settings, extending the emergency regulations’ absentee voting requirements and provisions is all the more vital to ensure a free and equal election this November in Kentucky.

92. The state’s new voter ID rules will only worsen the risk of Covid-19 transmission, because they force voters to interact with more individuals to obtain the necessary ID or, if they lack access to a copy machine, to obtain a copy of their ID for inclusion with their absentee ballot request form. The new voter ID rules could also add to long lines and delay at polling places, as many voters will likely need to fill out affirmations if they lack photographic identification. And, as noted above, SB 2’s ambiguous language also might require voters to execute an affirmation in front of an election official even if they intend to vote by mail. These rules will therefore compel more activities that are fundamentally inconsistent with the Governor’s Healthy at Home and Healthy at Work orders.

93. Moreover, because of government office limitations and closures—which could be re-imposed at any time due to the ongoing surge in Covid-19 cases as the Commonwealth attempts to “reopen”—it could be difficult for voters to obtain the necessary ID and/or affirmation. Even if a voter does have compliant ID, the voter will need to have access to a copy machine to provide a copy of the voter’s ID for submission with the absentee ballot request application. Should the State Board of Elections continue to use the online portal for absentee ballot requests, voters may need access to a scanner to upload operable images of their IDs.

94. Plaintiffs each face an increased risk of severe illness or death if they contract Covid-19 due their ages and pre-existing conditions. If not permitted to vote by mail in the General Election on November 3, 2020, they will have to choose between exercising their right to vote and their health—even their lives. Plaintiffs Sterne and LeMaster have already made the difficult decision to forego voting altogether if they cannot vote by mail in November, in order to protect their health.

95. Plaintiffs’ voting rights are further burdened by the threat that they could infect at-risk household members if they are required to vote in person. Plaintiffs Sterne and LeMaster live in the same household and are both at high risk of complications or death from Covid-19. Plaintiffs Mozenter and Graner live in the same household and are both at high risk of complications or death from Covid-19. The same is true for Plaintiff Chaney, who lives with congestive heart failure. Plaintiff Darby is at high risk due to age and a cancer diagnosis. Further, Plaintiff Sterne’s brother, who is Plaintiff LeMaster’s son, has several health conditions that would almost certainly result in death were he to contract Covid-19, a fact that has also informed their decision not to vote in November if they will be required to vote in person. Plaintiff Graner’s husband, Plaintiff Mozenter, is at risk both due to his cancer treatment and Type 2 diabetes, and Plaintiff Graner herself is in an at-risk age group. Similarly, Plaintiff Chaney has a household member who is immunocompromised and at increased risk of severe illness or death from Covid-19.

96. When considered in light of the “[t]he rule of common sense and reason” that applies in Section 6 cases, *Perkins v. Lucas*, 197 Ky. 1 (1922), these allegations are more than sufficient to show that Plaintiffs—and a significant number of similarly situated Kentucky voters—will be effectively prevented from voting on November 3, 2020 by the Covid-19 pandemic. *See also Cantrell v. Kentucky Unemployment Ins. Comm’n*, 450 S.W.2d 235, 237 (Ky. 1970) (“When all else is said and done, common sense must not be a stranger in the house of the law.” (Palmore, J.)).

97. Thus, the failure of Defendants to extend the rules set forth in 31 KAR 4:190E throughout the Covid-19 pandemic, including for the November 3, 2020 general election, plainly

violates Section 6 of the Kentucky Constitution, particularly when coupled with the new voter ID requirements imposed by SB 2.

**SECOND CLAIM FOR RELIEF**  
**Declaration of Rights**  
**(Violation of Ky. Const. § 147)**  
**Plaintiff MacArthur Darby**

98. Plaintiffs restate and incorporate by reference, as if set forth fully herein, the allegations in the preceding paragraphs of the Complaint.

99. Section 147 of the Kentucky Constitution provides in part: “In all elections by persons in a representative capacity, the voting shall be viva voce and made a matter of record; but all elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited, or any person absent from the county of his legal residence, or from the state, may be permitted to vote in a manner provided by law. . . . The General Assembly shall pass all necessary laws to enforce this section, and shall provide that persons illiterate, blind, or in any way disabled may have their ballots marked or voted as herein required.”

100. Section 147’s secret ballot provision is “mandatory,” *Cole v. Nunnelley*, 130 S.W. 972, 974 (Ky. 1910), and a voter’s right to cast a secret ballot is “inviolable.” *Major v. Barker*, 35 S.W. 543, 544 (Ky. 1896); *see also Banks v. Sergeant*, 48 S.W. 149, 151 (Ky. 1898), *rev’d on other grounds*, *Widick v. Ralston*, 197 S.W. 2d 261 (Ky. 1946) (“The secrecy of the ballot is the fundamental idea of all elections, and this is required by the constitution as well as by statute.”).

101. The purpose of this constitutional provision is to prevent coercion and protect voter independence. “By compelling the honest man to vote in secrecy, it relieves him, not merely from the grosser forms of intimidation, but from more subtle and perhaps more pernicious coercion of every sort. By thus tending to eradicate corruption, and by giving effect to

each man’s innermost belief, it secures to the republic what at such a juncture is the thing vitally necessary to its health,—a free and honest expression of the convictions of every citizen.” *Nall v. Tinsley*, 54 S.W. 187, 188 (Ky. 1899) (quoting John Henry Wigmore, *THE AUSTRALIAN BALLOT SYSTEM* 52 (2d ed. 1889)). In this regard, “The primary purpose of the secret ballot may therefore be taken to be the protection of the voter.” *Gardner v. Ray*, 157 S.W. 1147, 1153 (Ky. 1913).

102. Section 147 also works in tandem with Section 6’s guarantee of “free and fair” elections: “[T]he use of any except the secret official ballots affects the merits of the election, inasmuch as it is not a fair election, for that the law essentially requires.” *Tinsley*, 54 S.W. at 189.

103. The American Community Survey’s 5-year estimates for 2013-2017 found that adults age 18 to 64 with a “vision difficulty” constituted 3.1 percent of Kentuckians in that age group. That rate increased to 6.2 percent for adults age 64 to 75, and 11.6 percent for adults 75 years and older.<sup>36</sup>

104. Plaintiff Darby is totally blind and has voted in the past using a machine at his polling place that reads his ballot to him and permits him to make his selections without assistance. Unfortunately, on one occasion, he had to forego using this technology and have his ballot read to him because a poll worker had difficulty operating the machine and providing instructions. In the June 23 primary election, he voted by absentee mail-in ballot with the assistance of his daughter, who was visiting from Atlanta.

105. Congress has recognized that blind voters may be influenced at the ballot box to the extent that they rely on another individual for assistance. A Senate Report accompanying the 1982 amendments to the Voting Rights Act stated: “Certain discrete groups of citizens are unable

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<sup>36</sup> Available at <https://data.census.gov/cedsci/table?q=S1810&g=0400000US21&tid=ACSST5Y2018.S1810&hidePreview=true&mo=false>.

to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. These groups include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected.”<sup>37</sup>

106. However, modern technology has made it possible for blind voters to cast their ballots without assistance. And Kentucky already has a system in place for electronically transmitting ballots to military and overseas voters, meaning that Plaintiff Darby can vote safely from home without assuming the risk of contracting Covid-19 *and* vote his conscience with the same privacy afforded to other Kentuckians, using his computer’s reader technology to review and mark his ballot.

107. Because Plaintiff Darby’s age and health require him to vote by mail for all elections during the duration of the pandemic, electronic transmission of his ballot under the system required by KRS 117A.030(4) remains the only means for ensuring his right to vote by secret ballot pursuant to Section 147 and for guaranteeing his confidence that the selections made on his ballot are truly his own.

### **THIRD CLAIM FOR RELIEF Temporary and Permanent Injunction**

108. Plaintiffs restate and incorporate by reference, as if set forth fully herein, the allegations in the preceding paragraphs of the Complaint.

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<sup>37</sup> S. Rep. 97-417, at 62 (1982).

109. There is no adequate remedy at law with respect to Plaintiffs' claims under Section 6. If this Court does not act to compel Defendants to extend the effective date of their emergency regulations through the general election, a substantial percentage of Kentuckians otherwise eligible to vote will be denied the right to do so. *Wallbrecht*, 175 S.W. at 1026-1027.

110. For the reasons just explained, Plaintiffs are likely to succeed on their claim that Defendants' failure to extend critical portions of the emergency regulations through the time of the general election, and to enforce SB 2, will violate Section 6 of the Kentucky Constitution.

111. Moreover, Plaintiffs and the public at large will suffer immediate and irreparable injury if the current emergency regulations are not extended through, and SB 2's new voter ID requirements are enforced for, the general election. Holding an election under conditions that disenfranchise a substantial percentage of voters "is an invasion of the highest rights of the citizens, and tends to substitute other means of determining the popular will, for elections held by the people." *Wallbrecht*, 175 S.W. at 1027. "Such course, however innocent its motive, cannot be too severely discountenanced." *Id.*

112. In contrast, Defendants will suffer no harm from the requested injunction. Indeed, their actions and public statements to date have demonstrated that (1) making absentee voting available to all Kentuckians is necessary to ensure a free and equal election so long as Covid transmission remains a substantial risk, (2) they have the power necessary to issue such emergency regulations, (3) Defendants have the capacity to administer the absentee voting system laid out in the emergency rules, and (4) moving to this absentee voting system has not caused widespread voter confusion.

113. Moreover, Defendants—particularly Secretary Adams—have also assured the public that the emergency regulations provided appropriate safeguards to protect election integrity, which they accomplished without the added restrictions of SB 2.<sup>38</sup>

114. In view of the merits of Plaintiffs’ claims, the strong public interest in ensuring free and fair elections, and the lack of any harm to Defendants, Plaintiffs are entitled to preliminary and permanent injunctions compelling Defendants to extend critical portions of the rules set forth in 31 KAR 4:190E throughout the Covid-19 pandemic including for the November 3, 2020 general election, and to prohibit them from enforcing the new voter ID requirements of SB 2 until the Covid-19 pandemic ends.

115. For reasons described above, Plaintiff Darby is also likely to succeed on his claim that failure to electronically transmit his absentee mail-in ballot to him violates Section 147. There is no adequate remedy at law for Plaintiff Darby if his right to a secret ballot under Section 147 is violated; Defendants cannot compensate him for this type of loss. He needs to vote by mail to limit his potential exposure to novel coronavirus and reduce his risk of contracting severe illness from Covid-19; but if he cannot get his absentee mail-in ballot electronically transmitted to him, he will have to seek assistance from another person, forego his right to a secret ballot, and place in them full trust that they have faithfully made his desired selections on his ballot. This situation presents the type of interference with free expression that Section 147 is intended to prevent, and is wholly unnecessary and avoidable in light of the State’s existing electronic ballot delivery capabilities under KRS 117A.030(4). Because the State Board of Elections already makes electronic transmission of absentee ballots available to military and overseas

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<sup>38</sup> Kentucky Bottom Line Interview, available at: <https://kychamberbottomline.com/2020/05/12/kentucky-secretary-of-state-adams-says-changes-to-voting-for-primary-elections-will-keep-people-safe-and-make-needed-improvements-to-system/>



voters, Defendants will not be burdened if required to make the same delivery system available to Plaintiff Darby and similarly situated voters.

116. In view of the merits of Plaintiff Darby's Section 147 claim, the strong public interest in ensuring the right to a secret ballot, and the lack of any harm to Defendants, Plaintiff Darby and other voters with documented visual disabilities who opt to vote by mail, and to receive their ballot electronically, are entitled to preliminary and permanent injunctions compelling Defendants to electronically transmit their absentee mail-in ballots to them using the system established pursuant to KRS 117A.030(4).

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request the following relief:

- A. A Judgment on Plaintiffs' Claims for Relief for a Declaration of Rights;
- B. A Preliminary Injunction that:
  - 1. Enjoins the requirement that voters satisfy a statutorily recognized excuse to vote by mail, pursuant to KRS 177.085(1)(a), during the pendency of the Covid-19 pandemic;
  - 2. Enjoins the requirement that voters satisfy a statutorily recognized excuse to vote absentee in person, pursuant to KRS 177.085(1)(d), during the Covid-19 pandemic;
  - 3. Requires Defendants to electronically deliver Plaintiff Darby an absentee mail-in ballot using the ballot delivery system established pursuant to KRS 117A.030(4), and to make this delivery option available to other voters with documented visual disabilities who choose to vote by mail and select this method of transmission;

4. Delays the effective date of SB 2 until after the Covid-19 pandemic; and

5. Compels the Defendants to extend the following portions of the emergency regulations (31 KAR 4:190E) during the Covid-19 pandemic:

a. Section 3, which provides that “[n]otwithstanding KRS 117.077, an application for an absentee ballot due to medical emergency a) shall not require the applicant to state that the emergency condition occurred within 14 days of the election, b) need not be notarized, and c) shall entitle the applicant, upon verification of the application, to vote by absentee, by mail or in person by appointment, as advised, if otherwise a lawful voter”;

b. Section 4, which requires the State Board of Elections to send “a non-forwarding postcard to every registered voter of the Commonwealth to inform them of the changes being made to the [upcoming election] as a result of the COVID-19 pandemic, as well as the steps the voter must take to request an absentee ballot through the SBE secure online portal or by calling their County Clerk. That postcard should continue “to advise voters that, if they will vote in person absentee or in person on election day, they are advised to make an appointment with their County Clerk.”

c. Section 5, which requires the State Board of Elections to “establish a secure online portal that will allow voters to request an absentee ballot through the submission of personally identifiable

information” and states that such requests shall “serve as an absentee application in lieu of SBE’s ‘Medical Emergency Application to Vote Absentee’ form.” The portal should continue to “transmit the request to the County Clerk of the county in which the requester is registered to vote,” who must in turn “transmit to the voter an absentee ballot within seven (7) days.” *Id.* It also should continue to provide “to County Clerks a unique barcode for each voter’s ballot envelope, providing the ability to track the ballot as it [is] mailed out and received back, in order to certify the movement of the ballot through the postal system and to issue voter credit.” *Id.*

d. Section 6, which provides a deadline for county clerks to mail absentee ballots that “have the return postage paid for by the State Board of Elections” and requires county clerks to count any ballot “delivered by the United States Postal Service and bearing a postmark of [the general election date] or earlier” if received by November 7, 2020. *Id.*

e. Section 9, which provides an opportunity for voters to cure any signature problems with mail-in ballots and requires local election officials “to contact the voter using the contact information provided by the voter’s absentee ballot application, and provide the voter with a timeframe and manner in which the voter may cure the discrepancy.”; and

f. Section 10, which requires county clerks to allow voters “to schedule appointments to vote absentee in-person by appointment . . . no fewer than 5 days per week in the two weeks before the week of election

day.” Those “Appointments shall be consistent with public health and social-distancing standards and every reasonable effort shall be undertaken by County Clerks to see that in-person absentee voting is implemented in a manner that limits direct contact between voters, other voters, and election officials, and shall be conducted throughout the Clerk’s business hours.”

*Id.*

2. A Permanent Injunction that:

1. Enjoins the requirement that voters satisfy a statutorily recognized excuse to vote by mail, pursuant to KRS 177.085(1)(a), during the Covid-19 pandemic;

2. Enjoins the requirement that voters satisfy a statutorily recognized excuse to vote absentee in person, pursuant to KRS 177.085(1)(d), during the Covid-19 pandemic;

3. Requires Defendants to electronically deliver Plaintiff Darby an absentee mail-in ballot using the ballot delivery system established pursuant to KRS 117A.030(4), and to make this delivery option available to other voters with documented visual disabilities who choose to vote by mail and select this method of transmission;

4. Delays the effective date of SB 2 until after the Covid-19 pandemic; and

5. Compels the Defendants to extend the following portions of the emergency regulations (31 KAR 4:190E) during the Covid-19 pandemic:

a. Section 3, which provides that “[n]otwithstanding KRS 117.077, an application for an absentee ballot due to medical emergency a) shall not require the applicant to state that the emergency condition occurred within 14 days of the election, b) need not be notarized, and c) shall entitle the applicant, upon verification of the application, to vote by absentee, by mail or in person by appointment, as advised, if otherwise a lawful voter”;

b. Section 4, which requires the State Board of Elections to send “a non-forwarding postcard to every registered voter of the Commonwealth to inform them of the changes being made to the [upcoming election] as a result of the COVID-19 pandemic, as well as the steps the voter must take to request an absentee ballot through the SBE secure online portal or by calling their County Clerk. That postcard should continue “to advise voters that, if they will vote in person absentee or in person on election day, they are advised to make an appointment with their County Clerk.”

c. Section 5, which requires the State Board of Elections to “establish a secure online portal that will allow voters to request an absentee ballot through the submission of personally identifiable information” and states that such requests shall “serve as an absentee application in lieu of SBE’s ‘Medical Emergency Application to Vote Absentee’ form.” The portal should continue to “transmit the request to the County Clerk of the county in which the requester is registered to

vote,” who must in turn “transmit to the voter an absentee ballot within seven (7) days.” *Id.* It also should continue to provide “to County Clerks a unique barcode for each voter’s ballot envelope, providing the ability to track the ballot as it [is] mailed out and received back, in order to certify the movement of the ballot through the postal system and to issue voter credit.” *Id.*

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e. Section 9, which provides an opportunity for voters to cure any signature problems with mail-in ballots and requires local election officials “to contact the voter using the contact information provided by the voter’s absentee ballot application, and provide the voter with a timeframe and manner in which the voter may cure the discrepancy.”; and

f. Section 10, which requires county clerks to allow voters “to schedule appointments to vote absentee in-person by appointment . . . no fewer than 5 days per week in the two weeks before the week of election day.” Those “[a]ppointments shall be consistent with public health and social-distancing standards and every reasonable effort shall be undertaken by County Clerks to see that in-person absentee voting is implemented in a manner that limits direct contact between voters, other voters, and election

officials, and shall be conducted throughout the Clerk's business hours.”

*Id.*

- C. Reasonable costs of suit;
- D. All other relief to which the Plaintiffs may be entitled.

Respectfully submitted,

/s/ Casey L. Hinkle

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