

PUBLIC INTEREST

— LEGAL FOUNDATION —

VIA EMAIL

April 16, 2020

Virginia Department of Elections

Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219

Re: Emergency adjustments to mail balloting procedures, witness requirements

Dear Commissioner Piper and Members Brink, Lecruise, and O'Bannon:

It has come to our attention that your offices are in receipt of a letter from the American Civil Liberties Union-Virginia (“ACLU”) dated April 15, 2020. We write to offer contrary legal observations and share mitigation options as the Commonwealth and the nation continue to grapple with the novel Coronavirus (COVID-19) pandemic. The Public Interest Legal Foundation is a nonprofit law firm dedicated to election integrity that also promotes common-sense reforms that preserve the Constitutional framework of American elections.

It would seem that the Department of Elections does not have the legal authority to do what the ACLU is asking. Simply, your emergency powers under Virginia law are only available when sufficient time does not exist to mail and process absentee ballots. Only a deficiency of time triggers the power. Here, time is not lacking.

Virginia Code Va. Code § 24.2-713 states:

*The provisions of this section shall apply in the case of an emergency **that will not allow sufficient time** for the distribution and handling of absentee ballot applications and absentee ballots, in accordance with the procedures of this title, for qualified voters who are unable to vote in person because of the emergency.*

The primary is far enough off that this statute cannot be triggered. Moreover, any utilization of this statute to change existing absentee ballot laws would be an abuse of emergency powers.

The Commonwealth has plenty of time to issue and handle mail ballots, the original deadline to request for the May 2020 Primary was April 28. It is now moved to June 16 for a delayed June 23 Election.¹ There is no indication that these extended deadlines will not allow sufficient time for distribution and handling of mail ballots. The necessary precondition for the application of Section 24.2-713 is therefore not established.

Should your office find the ACLU’s overly broad interpretation of the emergency statutes convincing in general, the suggested mitigation strategy should still be rejected because it is

¹ Virginia Department of Elections; Upcoming Elections (accessed April 16, 2020), <https://www.elections.virginia.gov/casting-a-ballot/calendars-schedules/upcoming-elections.html>

harmful to voters' interests. Virginia code encourages witnesses to protect the rights of the voter as well as the integrity of the absentee process.

If, however, you are contemplating the exercise of emergency powers which we submit your office has no power to exercise, we respectfully advance an alternative for any would-be mail voter who considers herself unable or unwilling to arrange for a witness. Your office's deemed emergency powers should be used to require that such voters complete a short attestation included with all mail ballot packages that requires personally identifying details taken from any acceptable form of identification document required for first time absentee voters.² Only uniquely identifying numbers—not fully photocopied images of the acceptable forms of ID documents—would be required to complete the substitute attestation for a witness.

The substitute affidavit provides the most direct protection against a mail ballot delivered into the wrong hands for voting in the absence of a witnessing party.

In the face of this unprecedented challenge, we urge your office to not weaken said systems—particularly at the expense of election security and integrity.

Should you need to contact the Foundation regarding this matter with any questions or concerns, please do not hesitate to do. Thank you for your attention and service on this matter.

Sincerely,



J. Christian Adams, President and General Counsel
Public Interest Legal Foundation

² Virginia Department of Elections; Absentee Voting – Special Federal ID Requirements for Certain First Time Absentee by Mail Voters (accessed April 16, 2020), <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/>