

April 15, 2020

Department of Elections
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219

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



Virginia

701 E. Franklin Street
Suite 1412
(804) 644-8022
Richmond VA 23219
acluva.org

Eden Heilman
Legal Director
Direct Dial: 804-523-2152
Email: eheilman@acluva.org

We write to request that the Commissioner of the Department of Elections (“Commissioner”) take immediate action to alleviate the impact of the current global health crisis on upcoming elections by waiving, for the election on June 23, 2020, as well as any future election affected by the novel coronavirus including the November general election, Virginia’s requirement that absentee voters open, mark, and reseal their absentee ballot in the presence of a witness, and have that witness sign the ballot envelope before mailing it to their registrar.¹ We request further that the State Board of Elections (“Board”) take action to repeal or modify 1 Va. Admin. Code 20-70-20(B), which provides that lack of a witness signature on an absentee ballot envelope is always considered a material omission that renders invalid the ballot inside. The witness requirement, along with the Board’s regulation that ballots without witness signatures be rejected as a matter of course, presents potentially tens of thousands of Virginia voters who live alone and are social distancing in accordance with expert guidance and government orders with the Hobson’s choice of either risking their health or even their lives to vote or not voting at all. As such, because of the urgency of the matter in light of fast-approaching elections, in the event the Commissioner does not act by 5 p.m. on Thursday, April 16, 2020, the ACLU of Virginia and national ACLU intend to seek federal court involvement on behalf of persons and organizations who are impacted by this requirement.

On March 12, 2020, Gov. Northam declared a state of emergency in the Commonwealth of Virginia as a result of the outbreak of a deadly respiratory illness known as COVID-19.² That declaration remains in force until June 10, 2020, and a subsequent Executive Order reinforced the magnitude of the emergency by directing all Virginians to stay at home except under extremely limited circumstances, and to maintain six feet of distance from all other

¹ The witness requirement is codified in Va. Code § 24.2-706 and § 24.2-707.

² See Executive Order No. 51 (Mar. 12, 2020), *Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19)*, available at [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf)



701 E. Franklin Street
Suite 1412
(804) 644-8022
Richmond VA 23219
acluva.org

Eden Heilman
Legal Director
Direct Dial: 804-523-2152
Email: eheilman@acluva.org

persons with the exception of household members or caretakers.³ As of April 14, the Virginia Department of Health reported over 6,171 COVID-19 diagnoses in Virginia, resulting in 978 hospitalizations and 154 deaths.

In light of this crisis, the Commissioner has not only the moral obligation but also the explicit legal authority to waive the witness requirement to preserve Virginians' constitutional rights which will be violated without this action or court intervention. First, Virginia law provides that the Commissioner has authority to "designate alternative methods and procedures" for handling absentee ballots "*in the case of an emergency* that will not allow sufficient time for the distribution and handling of . . . absentee ballots." Va. Code § 24.2-713. The present crisis is precisely such an emergency. Because the threat posed by the novel coronavirus will last throughout the summer, including the entirety of the absentee voting period for the June 23 election,⁴ many of the approximately one-quarter of Virginians who live alone will not have "sufficient time" within the absentee voting period to safely comply with the witness requirement without putting their health or someone else's health at risk. The Commissioner is squarely within his rights during this extraordinary time to rectify this problem in order to preserve the constitutional rights of Virginia voters.

Second, the Commissioner may also utilize the authority conferred upon him directly by Gov. Northam's March 12 emergency declaration. That order granted "[a]uthorization for the heads of executive branch agencies, on behalf of their regulatory boards as appropriate, and with the concurrence of their Cabinet Secretary, to waive any state requirement or regulation."⁵ As the head of the Department of Elections, one of the five executive branch agencies overseen by the Secretary of Administration, the Commissioner is authorized by Executive Order 51 to waive the absentee ballot witness requirement with concurrence of Secretary Conner, and should do so to ensure Virginians can vote without meeting unnecessary and unconstitutional requirements.

In addition to the Commissioner waiving the absentee witness requirement for the upcoming election, the Board can and should take steps to ensure that

³ See Executive Order No. 55 (2020), *Temporary Stay at Home Order Due to Novel Coronavirus (COVID-19)*, available at [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf)

⁴ Mel Leonor & Justin Mattingly, *UVA Researchers Project Mid-August Peak for New COVID-19 Cases in Virginia*, Apr. 13, 2020, available at https://www.richmond.com/special-report/coronavirus/uva-researchers-project-mid-august-peak-for-new-covid-19-cases-in-virginia/article_c4e2c008-1617-52d8-ad08-706abfb3d696.html

⁵ See Executive Order No. 51, *supra* note 1.



Virginia

701 E. Franklin Street
Suite 1412
(804) 644-8022
Richmond VA 23219
acluva.org

Eden Heilman
Legal Director
Direct Dial: 804-523-2152
Email: eheilman@acluva.org

no ballot is rejected because of a voter's inability to obtain a witness signature during a pandemic. Although Virginia statutes require voters who receive a mailed absentee ballot to open, mark, and seal their ballot before a witness, and then have the witness sign their ballot envelope, *see* Va. Code § 24.2-707, those statutes do not state that absentee ballots that are missing witness signatures must be rejected as invalid. The statute simply says that complying with the witness requirement as provided will shield the voter from a challenge. The requirement that the ballot be rejected as invalid comes from an administrative regulation providing that the lack of a witness signature must always be considered a material omission rendering the ballot invalid. *See* 1 Va. Admin. Code 20-70-20(B). The Board has the authority under Va. Code § 24.2-103 to repeal or ease this rule without any legislative action, and should use that authority to ensure that (a) the mere lack of a witness signature is not sufficient to invalidate the ballot of a voter without any opportunity for the voter to verify their identity by other means, and that (b) in any event no ballot is rejected for failure to obtain a witness signature during a pandemic.⁶

The upcoming elections will almost certainly see a dramatic increase in the share of the Virginia electorate that will need to vote an absentee ballot, including many who live alone and will be voting absentee for the first time as a result of current global health crisis. Elderly, disabled, and Black Virginians over 18 are more likely to live alone relative to the population of Virginia as a whole and also are suffering from disproportionate rates of COVID-19 infection and death. These groups therefore will face a disproportionate share of the severe burden posed by the witness requirement on voters who live alone and are social distancing. It is our hope that the Department of Elections and the Board will take steps now to alleviate this very foreseeable problem by waiving the witness requirement for upcoming elections and repealing or modifying the rule requiring the rejection of absentee ballots without a witness signature.

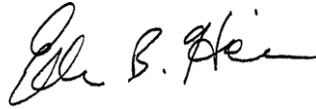
We would welcome the opportunity to work with the Commissioner and the Board to come to an appropriate resolution in time for registrars and electoral boards to implement changes in advance of the June 20 election. As noted above, however, in light of fast-approaching elections, in the event the Commissioner does not act by 5 p.m. on Thursday, April 16, 2020, the ACLU of Virginia and national ACLU will seek relief from the federal courts on behalf of impacted persons and organizations. Despite our potential need to pursue litigation, we also remain willing to work with you cooperatively on

⁶ The Board is required to post on the Internet within three business days, Va. Code § 24.2-103, but its actions concerning the conduct of elections are otherwise exempt from the requirements of the Virginia Administrative Process Act. *See* Va. Code § 2.2-4002(B)(8).

appropriate solutions to ensure that all Virginians can safely participate in the 2020 elections.

We look forward to reaching a quick resolution of this issue. Please do not hesitate to contact us at any time at 804-523-2152 or eheilman@acluva.org.

Sincerely,



Eden B. Heilman
Legal Director



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Virginia

cc: Secretary Keyanna Conner
Chief Deputy Attorney General Erin Ashwell

701 E. Franklin Street
Suite 1412
(804) 644-8022
Richmond VA 23219
acluva.org

Eden Heilman
Legal Director
Direct Dial: 804-523-2152
Email: eheilman@acluva.org