



April 12, 2020

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AMERICAN CIVIL  
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FOUNDATION OF  
MARYLAND

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Maryland State Board of Elections  
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*Via Electronic Mail to [atrento@oag.state.md.us](mailto:atrento@oag.state.md.us)*

FIELD OFFICE  
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Re: Ensuring the Rights of All Voters During the Seventh Congressional District  
Special Election

WWW.ACLU-MD.ORG

Dear Mr. Trento, Chairman Cogan, Vice Chairman Hogan, and Members of the  
Board:

OFFICERS AND DIRECTORS  
JOHN HENDERSON  
PRESIDENT

DANA VICKERS SHELLEY  
EXECUTIVE DIRECTOR

ANDREW FREEMAN  
GENERAL COUNSEL

We appreciate the challenge that COVID-19 has presented to the Board of Elections regarding the upcoming elections: Providing elections that both protect the public's health and safety and preserve Marylanders' right to vote. We are encouraged by your leadership and decision to embrace voting by mail while preserving an accessible, in-person voting option for the 2020 Primary. We write today to urge you to do the same thing for the same reasons for the Seventh Congressional District Special Election: Provide an in-person voting option to ensure that every Marylander – no matter their race, ability, circumstance, or status – is able to exercise their constitutionally-protected right to vote.

At the outset, we remind you that Maryland's Seventh Congressional District has a storied past: In 1971, Seventh District voters elected the first Black Congressman in Maryland's history, the late Parren J. Mitchell. Since Congressman Mitchell's path-breaking election, Seventh District voters have consistently sent Black Marylanders to Congress – most recently beloved Congressman Elijah Cummings, whose tragic death necessitates this Special Election. It is not acceptable, and smacks of racism, for the voters of this historic majority-Black district to be treated differently – with fewer protections for their voting rights than



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other voters across the state – as is currently proposed. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (When government “singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.”)

The right to vote is a fundamental exercise in civic duty guaranteed by the Constitution to all Americans. This includes voters with disabilities, voters needing language assistance, anyone who cannot receive a mailed ballot such as those with unstable housing or have been displaced during this pandemic, and voters who cannot register between now and the election due to lack of internet service or identification requirements which cannot currently be remedied due to government closures. Yet all of these voters could be disenfranchised should Maryland adopt a mail-only process for the Special Election.

The law is clear that an in-person option is necessary to protect the rights of voters in elections, under the Help America Vote Act of 2002 (HAVA)<sup>1</sup> and Americans with Disabilities Act (ADA). HAVA’s Uniform and Nondiscriminatory Election Technology and Administration Requirements compel the voting system, “to be accessible for individuals with disabilities . . . in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”<sup>2</sup> Further, the United States Election Assistance Commission clearly outlines the right to ADA-accessible polling places with voting machines for voters, in order to seek assistance from workers at the polling place.<sup>3</sup> Moreover, Title II of the ADA requires that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>4</sup> Voting is an activity of a public entity covered by Title II of the ADA. The laws are clear and unambiguous in the necessity for an in-person voting option to ensure voters are afforded the

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<sup>1</sup> Pub. L. 107-252, 42 U.S.C. § 15301 (2002).

<sup>2</sup> Help America Vote Act of 2002, 52 U.S.C. § 21801(a)(3)(A).

<sup>3</sup> UNITED STATES ELECTION ASSISTANCE COMMISSION, VOTING ACCESSIBILITY, <https://www.eac.gov/voters/voting-accessibility> (last visited: Apr. 11, 2020).

<sup>4</sup> Americans with Disabilities Act, 42 U.S.C. § 12132 (1990).



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opportunity to vote. These laws are not suspended in a crisis and the presence of a state emergency does not provide exceptions for the protections provided under HAVA and the ADA. Rather, these laws were put in place to steadfastly safeguard the rights of the most marginalized, especially when voting parameters and conditions would be changed and tested. Moreover, the racially disparate impact that would result from denial of these accommodations only to voters of the Seventh Congressional District voting in the Special Election – a majority of whom are Black – further reinforces the imperative that equal access be provided to all voters both in the Primary and in the Special Election.<sup>5</sup>

On April 2, 2020, the Maryland State Board of Elections made the decision to make the in-person option available for the Primary Election in recognition that voters with disabilities, voters without a stable addresses, displaced voters, and voters needing language assistance will all be disenfranchised without an in-person voting option, based in part by the legal analysis and recommendations presented by your counsel. Also, the Board's staff and counsel were clear in their recommendations that an in-person options was necessary<sup>6</sup>, and that there is a

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<sup>5</sup> In addition to the Constitutional protections against race discrimination under the Fourteenth and Fifteenth Amendments noted in *Gomillion* and its progeny, the federal Voting Rights Act is implicated by election procedures that are racially discriminatory in impact. That is, a Voting Rights Act violation occurs where election procedures have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, including where political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of protected citizens, including Black voters in the Seventh District, such that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. [42 U.S.C.A. § 1973\(b\)](#).

<sup>6</sup> The meeting materials for the March 25, 2020 Board Meeting included a memo to the Board dated March 20, 2020, presumably from its staff or counsel, which included the following statements: "Proposed Solution: Expand mail-in voting and early voting capabilities to preserve limited but necessary in-person voting to ensure all Marylanders are able to safely participate in the 2020 election"; "While expanding mail-in voting capabilities is important, it will be critical to do so as a means of preserving in-person voting options for those voters unable to participate by mail, not exclusively as a replacement. Examining states that have turned to a mail-dominant format shows its successes but also why its limitations require Maryland to preserve some degree of in-person voting."; "First, and most important, all the states with vote-by-mail systems still include some options for in-person voting."; "So while it is important for Maryland to expand its vote by mail system, it would be irresponsible to do so at the exclusion of some in-person voting options."; and "Preserving some degree of in-person voting options will therefore be essential to avoid disenfranchisement."



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safe way to carry out the critical in-person voting while adhering to the guidelines issued by both the United States Center for Disease Control and the United States Election Assistance Commission. We agree with the Board and its counsel's analysis and believe that such findings apply equally to the Special Election.

We see little that would distinguish the Special Election from the Primary in any way that would support a decision to provide an in-person voting option in one election and not the other. In fact, there are reasons that would suggest providing an in-person voting option for the Special Election will be less burdensome for the Maryland State Board of Election than for providing an in-person voting option for the Primary Election, given that the election involves only three of the 24 counties (including the county equivalent, Baltimore City) and special elections typically have much lower turnouts than Presidential primaries. Finally, we ask the Board to consider the racial impact of this decision, given the historical context and significance of this particular Congressional seat to Marylanders. If the Board's approach for the Special Election departs from what it has agreed is necessary to protect the rights of all voters for the Primary Election, it will consign Seventh District voters to second-class status in a way could raise significant concerns under the Constitution and Voting Rights Act.

For all of these reasons, we urge the Maryland State Board of Elections to implement an in-person option for voters during the Seventh Congressional District Special Election in accordance with the law, which would honor all Marylanders' right to vote and provide for a more equitable and fair election.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah A. Jeon".

Deborah A. Jeon  
Legal Director

A handwritten signature in black ink, appearing to read "Amy Cruice".

Amy Cruice  
Election Protection Director

April 10, 2020

Dear Chairman Cogan, Vice Chairman Hogan and members of the Maryland Board of Elections:

cc: Ms. Linda H. Lamone, Administrator

My name is Courtney L. Jenkins, Legislative Director with the American Postal Workers Union, AFL-CIO (APWU) Baltimore Francis "Stu" Filbey Area Local #181. I am also a mail processing clerk employed with the United States Postal Service (USPS). The APWU Baltimore Area Local #181 represents approximately 1,500 USPS mail clerks, motor vehicle servicepersons, and maintenance employees working at USPS offices and facilities across the Baltimore Metropolitan area.

With the recent proclamations made by Governor Hogan with regard to vote-by-mail (VBM) now being the primary method of voting in the upcoming 7th Congressional district special general election and the Presidential Primary; postal workers will now be responsible for helping ensure voters have a secure and fair election. The APWU has been supportive of efforts to bring VBM to the nation and will continue to be there for the public through this unprecedented public health crisis.

Because these proclamations require the state to move to vote by mail in such a short period of time, I want to stress the importance of elements some of which were included in the Board's comprehensive plan ensuring. This will enable postal workers to facilitate this process with efficiency. Brief proposals/suggestions are as follows:

- **Communication with the USPS-** the state covers different geographic districts within the United States Postal Service. The ballots being sent to voters will effect mail volume, and while postal workers have the experience of processing and delivering absentee ballots the typical volume of those ballots will not be what is expected in the upcoming elections. Regular communication with the USPS and the organizations representing it's employees ensures that directives and proper processing of ballots is accomplished. Supervisors currently conduct meetings with employees informing them of changes to mail flow and other operations; important information with regard to mail in ballots could be delivered in a manner such as the aforementioned.
- **Voter Education-** proper education of voters is essential in ensuring their vote is counted. Local #181 supports the comprehensive measures offered in the plan from the Board and encourages all forms of media to be utilized to educate the public on VBM. Increasing the amount of information provided to the public increases the security and efficacy of the process.
- **Data Collection-** efforts to introduce VBM have been made in Maryland's General Assembly including recent efforts to convene a study on mail in ballots. Although those efforts have been unsuccessful, Local #181

encourages the Board to collect data and best practices which could be utilized in the event the general election requires voters to cast their ballots via mail.

Postal workers are proud to deliver the essential mail that ties the nation together. Now that essential mail includes election ballots. As always postal workers will meet the call to action through rain, sleet, hail, snow and now a pandemic. I strongly encourage the Board to consider the above proposals and appreciate such consideration.

Respectfully submitted,

Courtney L. Jenkins, APWU Local #181 Legislative Director

**Courtney L. Jenkins**

Director of Organization & Legislation

Baltimore Francis 'Stu' Filbey Area Local #181

American Postal Workers Union, AFL-CIO

**Office: 410-691-4216**

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April 12, 2020

Members, Maryland State Board of Elections  
151 West Street, Suite 200  
Annapolis, MD 21401  
cc: Linda H. Lamone, State Administrator

Dear Chairman and Members of the Board:

We recognize the gravity of the circumstances created by COVID-19, and fully appreciate the work Maryland State Board of Elections staff have undertaken in the past few weeks to protect the health of the public while providing safe access to voting. But the Board's failure to provide any in-person voting option in the Seventh Congressional District Special Election will compromise the health of our democracy.

Providing no in-person voting option in the Special Election will disenfranchise voters who have historically faced barriers to accessing the ballot including voters with disabilities, those without a state ID who are not able to register or request an absentee ballot online, those without a permanent residence, those with limited English proficiency, those who require assistance with reading, and many other eligible voters – majority of which will likely be Black as they represent over 53% of the district population.

The State Board of Elections is supposed to promote fair and equitable elections; providing all eligible citizens of Maryland convenient access to voter registration and accessible locations in which they may exercise their right to vote. We understand that the pandemic has made this mission difficult to achieve in the upcoming elections, but believe the Board can act swiftly over the next two weeks - working in partnership with the Maryland Department of Health who has pledged to assist with executing your constitutional duty - to ensure equitable access to voting in the Special Election so no eligible voter is disenfranchised.

We urge the Board to take our previous recommendation into consideration - allowing for limited in-person voting at the local board of election offices in Baltimore City, Howard County, and Baltimore County on Election Day.

Just as in the Primary Election, limited in-person options in the Special Election are necessary and can be made available in a way that protects election workers and those entering vote centers. The Brennan Center's memorandum on "[How to Protect the 2020 Vote from the Coronavirus](#)," provides guidance from the [Center for Disease Control and Prevention \(CDC\)](#) and the [U.S. Election Assistance](#)

[Commission \(EAC\)](#) provides information on steps that can be taken to prevent transmission of the virus, in compliance with the guidance issued by government health agencies.

Even in crisis, we must work to preserve our democratic system. We urge the Board to reverse its decision to provide no in-person voting, ensuring access to the Special Election for every eligible voter in the Seventh Congressional District.

Joanne Antoine, Executive Director  
Common Cause Maryland





**VIA ELECTRONIC DELIVERY ONLY**

April 11, 2020

Andrea Trento  
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**RE: Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Helping America Vote Act and the United States Constitution Require the State Board of Elections include Accessible Polling Centers with Accessible Voting Machines for the April 28, 2020 Special General Election**

Mr. Trento:

Please accept this letter on behalf of Disability Rights Maryland to the State Board of Elections (SBE). Disability Rights Maryland is the federally mandated Protection and Advocacy agency for the State of Maryland. Our mission is to advance the civil rights of persons with disabilities. We work to ensure that people with disabilities are able to fully participate in civic life, including the electoral process.

The purpose of this letter is to advise the SBE that a failure to provide an option for accessible voting machines at accessible polling locations for the April 28, 2020 Special General Election would constitute a violation of federal civil rights law protecting the voting rights of persons with disabilities. The SBE plan to use solely mail in voting will deprive some voters with disabilities the opportunity for access and participation in the special election that is provided to other voters. Therefore, the SBE must create a system that would allow for accessible voting machines at accessible for the April 28, 2020 Special General Election.

Clients and constituents of Disability Rights Maryland are some of the most vulnerable to exposure and the worst symptoms of COVID-19, including persons with disabilities who are elderly, have pre-existing conditions, and are African-Americans. Many of our clients identify as all three. Therefore, we understand the serious nature of the public health threat COVID-19 and appreciate this extraordinary situation. **However, central to the civil rights movement that guides our work is the full participation, independence, and choice for persons with disabilities. These principals are undermined without securing the right of people with disabilities to vote privately and independently, which for some individuals with disabilities, can only be achieved through provision of accessible voting machines at accessible polling locations.**

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On March 5, 2020, Governor Hogan declared a State of Emergency because of the threat the spread of Covid-19 spread to the health of residents of Maryland. On March 17, Governor

Hogan issued a Proclamation delaying the April 28, 2020 Primary Election to June 2, 2020 and ordering the Special General Election to continue and directing that the State Board of Elections “shall utilize, as an alternate voting system, voting by mail.”<sup>1</sup>

Following a meeting on March 25, 2020, the State Board of Elections decided that there would be no in person voting centers for the April 28, 2020 Special General Election. A week later on April 2, 2020, the SBE adopted a Comprehensive Voting Plan the Primary Elections that there would be voting by mail available to all voters, and also in person voting centers available. Thus the SBE adopted different procedures affecting the same voters for different elections. With such actions, the SBE has acted to disenfranchise individuals who wish to exercise their right to vote in the special election affecting the Baltimore metropolitan area; while offering access to accessible voting machines to those individuals who wish to vote during the primary election, to be held statewide a mere five weeks later.

The Governor’s proclamation of April 10, 2020 approved the State Board of Elections Comprehensive Voting Plan for the June 2, 2020 Election, but further ordered the SBE to carry out a vote by mail only election **if** a written determination is submitted to the Governor: “1) substantiating the findings that it is not possible to utilize voting centers in a manner that mitigates and reduces a substantial threat to public safety or health posed by COVID-19; and 2) that conducting the Special General Election without voting centers will comply with the constitutions of Maryland and the United States, and any other federal law.”<sup>2</sup>

### **A Vote by Mail Only Election Would Violate Federal Law and the United States Constitution**

A vote by mail only election denies persons with disabilities the ability to vote privately and independently in violation of federal law and the Fourteenth Amendment of the United States Constitution. There are persons who are blind, low-vision, had restricted motor or joint skills to manipulate a paper ballot and pen, and persons with intellectual or developmental disabilities, who would indisputably be denied the right to vote independently and privately with a vote by mail only election in violation of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Helping America Vote Act, and the Fourteenth Amendment of the United States Constitution. Because a vote by mail only election does not comply with these federal laws, the SBE may not make the written determination as required by the Governor and must provide accessible voting machines at accessible voting locations similar to those required for the June 2, 2020 Primary. We do not suggest that polling places cannot be limited, but they must be offered in a manner that provides equal access to those who cannot use the mail process.

#### **I. The Absence of In-Person Polling Centers Violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act**

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<sup>1</sup> Proclamation of March 17, 2020, available at <https://governor.maryland.gov/wp-content/uploads/2020/03/Renewal-of-State-of-Emergency.pdf> (last accessed April 11, 2020).

<sup>2</sup> Proclamation of April 10, 2020, available at <https://governor.maryland.gov/wp-content/uploads/2020/04/Proclamation-Renewed-4.10.20.pdf> (last accessed April 11, 2020).

Under Section 504 of the Rehabilitation and Title II of the Americans with Disabilities Act, State and Local governments may not discriminate against persons with disabilities in their programs and services, this includes voting. 24 U.S.C. § 794, 42 U.S.C. § 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity [i.e., voting], or be subjected to discrimination by any such entity.”)

A vote by mail only election would indisputably deny persons with disabilities from equal access and participation in exercising their most fundamental right in a democracy. *See Nat’l Fed. Of the Blind v Lamone*, 813 F. 3d 494 (D. Md. 2016) (holding that an electronic ballot marking device was a reasonable modification to allow access for Maryland’s SBE absentee voter program). As explained above and in a number of written submissions to the SBE for the April 2, 2020 hearing,<sup>3</sup> persons with many disabilities would be denied access and privacy in their right to vote. On this point, there appears to be agreement among SBE and the community that a paper mail-in ballot alone would be *prima facie* discriminatory.

Because a paper only mail ballot would be facially discriminatory, the SBE is required to provide a reasonable modification to this policy.<sup>4</sup> The SBE’s proposed alternative for persons who cannot access a paper mail-in ballot requires residents to affirmatively request an electronic ballot from their local board of elections. This electronic ballot will then be e-mailed to the person, and the person will then need to print and mail-off the ballot.

This process has the practical effect of imposing additional eligibility criteria on voters with disabilities who cannot access paper ballots, specifically that they be able to communicate via e-mail a need for an electronic ballot, that they have access to e-mail, that they have access to a computer, and that they have access to a printer.<sup>5</sup> The SBE’s proposal cannot reasonably be seen as a cure to a discriminatory process. Persons with disabilities, unfortunately, are more likely to experience poverty than their non-disabled peers and tend to lack access to the requisite

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<sup>3</sup> E-mail from Laurie Feinberg to SBE (March 30, 2020); Letter from Katie Collins-Ihrke to SBE c/o Linda Lamone (April 1, 2020); Letter from William C. Ferguson IV, President of Maryland Senate and Adrienne Jones, Speaker of the Maryland House of Delegates to Lawrence J. Hogan, Governor State of Maryland (March 31, 2020); Letter from Common Cause-MD, ACLU of Maryland, League of Women Voters-Maryland, Maryland PIRG, and Disability Rights Maryland to SBE (April 1, 2020); Letter from Ronza Othman to SBE (April 1, 2020) in Meeting Material from April 2, 2020 Meeting, available at [https://elections.maryland.gov/about/meeting\\_materials/April\\_2\\_2020.pdf](https://elections.maryland.gov/about/meeting_materials/April_2_2020.pdf) (last accessed April 11, 2020)

<sup>4</sup> 28 C.F.R. 35.130(b)(7)(i) (“Public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”)

<sup>5</sup> 28 C.F.R. 35.130(b)(8) (“A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”) Unlike the previous litigation in *National Federation of Blind v. Lamone*, 813 F. 3d 494 (D. Md. 2016) that challenged the lack of modifications to the SBE’s *absentee* voting program, at issue in this matter is SBE’s entire voting system. There the requirements of computer hardware were necessary to provide the modification. Here, the hardware requirements are necessary to exercise the right to vote.

hardware to complete an electronic ballot.<sup>6</sup> This is undoubtedly true for the Baltimore area whose poverty rates exceed the state average.

The only manner of providing equal access and security to persons with disabilities is accessible voting machines at accessible polling places. Every jurisdiction that allows for “vote-by-mail,” does so in conjunction with in-person polling locations.<sup>7</sup> This is not an undue financial and administrative burden or a fundamental alteration of elections in Maryland. In fact, Maryland’s “vote-by-mail” statute specifically contemplates use of polling places. MD. ANN. CODE, ELECTIONS, § 9-503.<sup>8</sup>

The U.S. Election Assistance Commission has specifically authorized HAVA money to assist in the conducting of in-person voting centers for the April 28, 2020 Special General Election.<sup>9</sup> The threat posed by COVID-19 can be mitigated by adhering to the Center for Disease Control (CDC) guidance for the safe administration of in-person voting.<sup>10</sup>

Because accessible polling places with accessible voting machines will allow persons with disabilities to vote securely and independently and can be done with adherence to CDC guidelines, the SBE must modify its proposed voting plan to have in person polling centers for the April 28, 2020 Special General Election. The failure to modify this proposed voting system would violate federal law. Therefore, the SBE cannot issue the determination required by the Governor to conduct a vote by mail only election.

## **II. The Absence of In-Person Polling Centers Violates the Helping America Vote Act.**

Helping American Vote Act (HAVA) explicitly requires in-person voting centers and locations and specifically requires accessible voting machines. *See Am. Ass’n of People with Disabilities v. Harris*, 647 F. 3d 1093 (2011) (noting that HAVA requires accessible voting machines). Specifically, HAVA states:

“The voting system *shall*:

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<sup>6</sup> Institute on Disability at University of New Hampshire, 2019 Annual Disability Statistics Compendium, pg. 62 (2020), available at [https://disabilitycompendium.org/sites/default/files/iod/reports/2019-annual-disability-statistics-compendium-pdfs/2019 Annual Disability Statistics Compendium ALL.pdf?ts=1580831674](https://disabilitycompendium.org/sites/default/files/iod/reports/2019-annual-disability-statistics-compendium-pdfs/2019%20Annual%20Disability%20Statistics%20Compendium%20ALL.pdf?ts=1580831674).

<sup>7</sup> For a survey of State and local legislation for “Vote-by-Mail” see National Conference of State Legislatures, All-Mail Elections, <https://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx> (last accessed April 11, 2020) (“While “all-mail elections” means that every registered voter receives a ballot by mail, this does not preclude in-person voting opportunities on and/or before Election Day.”)

<sup>8</sup> Whether the SBE has the legal authority to administer an election contrary to the Maryland Code during the present emergency also raises a significant legal question.

<sup>9</sup> Electoral Assistance Commission, Guidance on Use of HAVA Funds for Expenses Related to COVID-19, <https://www.eac.gov/election-officials/guidance-use-hava-funds-expenses-related-covid-19> (last accessed April 11, 2020).

<sup>10</sup> Center for Disease Control, Recommendations for Election Polling Locations, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last accessed April 11, 2020).

- (A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;
- (B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.” 52 U.S.C. § 21081(a)(3)(A-B)

The U.S. Election Assistance Commission guidance on voting accessibility states that persons with disabilities have the right to “Have an accessible polling location with voting machines accessible for persons with disabilities.”<sup>11</sup> The United State Department of Justice has similarly written that:

“While absentee balloting can be offered to voters with disabilities, it cannot take the place of in-person voting for those who prefer to vote at the polls on Election Day. Any alternative method of voting must offer voters with disabilities an equally effective opportunity to cast their votes in person.”<sup>12</sup>

While these may be extraordinary times, the Governor’s order requires that the April 28, 2020 Special General Election adhere to federal law. HAVA requires an accessible voting machine at an accessible polling location. Failure to provide such an option violates the federal Helping America Vote Act. Therefore, the SBE cannot conduct a vote by mail only election without violating HAVA and cannot issue the determination required by the Governor.

### **III. Voting is a Fundamental Right and States Must Ensure Non-Discriminatory Access**

In *Tennessee v. Lane*, 541 U.S. 509 (2006), United States Supreme Court held that a State could be liable if they denied access to persons with disabilities from exercising fundamental rights.<sup>13</sup> Additionally, the Fourteenth Amendment prohibits irrational discrimination against persons with disabilities. See *City of Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432 (1985). The ability to exercise the vote is fundamental to the history and tradition of the Nation. For all the reasons set forth above, a vote by mail only election would deny access to certain people with disabilities their fundamental rights. The CDC has issued guidance for the safe administration of in person voting that would mitigate and reduce the threat to public safety posed by COVID-19. The SBE’s decision to deny the modification of accessible voting machines at accessible locations on March 25, 2020 appears to be rooted more in false assumptions about persons with disabilities rather than the scientific guidance issued by the

<sup>11</sup> U.S. Election Assistance Commission, Voting Accessibility, [https://www.eac.gov/about\\_the\\_eac/help\\_america\\_vote\\_act.aspx](https://www.eac.gov/about_the_eac/help_america_vote_act.aspx) (last accessed April 11, 2020).

<sup>12</sup> United States Department of Justice - Civil Rights Division: Disability Rights Section, The Americans with Disabilities Act and other Federal Laws Protecting Voters with Disabilities, [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm) (Last access April 11, 2020).

<sup>13</sup> The Court also noted the routine discrimination against persons with disabilities in voting.

CDC.<sup>14</sup> Therefore, the SBE's decision on March 25, 2020 to have a vote by mail only election violated the Fourteenth Amendment of the United States Constitution.<sup>15</sup>

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Thank you for carefully considering the significant legal issues involved in this election. While these are extraordinary circumstances, civil rights and the fundamental right to vote of should not be so easily curtailed and eliminated. Disability Rights Maryland is firmly committed to ensuring the voting rights of persons with disability to vote. Because the absence of accessible voting machines at accessible polling places violate federal laws, specifically the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Helping American Vote Act, as well as the United States Constitution, the SBE written submission to the Governor may not approve a vote by mail only voting system for the April 28, 2020 Special General Election.

Please do not hesitate to contact me at the information below with any questions regarding this matter.

Sincerely,

/s/

David A. Prater  
Managing Attorney  
Disability Rights Maryland  
1500 Union Ave.  
Suite 2000  
Baltimore, MD 21211  
[davidp@disabilityrightsmd.org](mailto:davidp@disabilityrightsmd.org)

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<sup>14</sup> At the March 25, 2020 Meeting of the SBE, a one Commissioner noted that most persons with disabilities would have someone living with them to assist them in completing the form. Such a comment appeared rooted in a notion that people with disabilities could not live independently.

<sup>15</sup> The Maryland Court of Appeals has interpreted the Maryland Corollary of the Fourteenth Amendment, Article 24 of the Declaration of Rights to be read *in parti material* in general apply in the same manner and to the same extent.

League of Women Voters of Maryland  
April 12, 2020

I am submitting the following comments from the League of Women Voters of Maryland.

We commend the State Board of Elections, State Administrator and staff for their efforts to develop procedures for conducting the primary election in as safe, convenient, and fair a manner as possible in difficult circumstances.

We offer the following comments on the Comprehensive Plan for the 2020 Primary Election that was approved by the Board on April 3.

1) Paragraph 5.B.5 (on page 7) proposes that the opening and counting of ballots will begin on May 21.

Once ballots are separated from the envelopes that link them to an individual voter, it will be impossible to correct any discrepancies if an additional ballot is submitted by that voter, either by mail or by voting in person on June 2. Especially as this is the first election in which Maryland will have mailed such a large number of ballots, there may be a substantial risk that persons will seek to obtain ballots from others and submit them fraudulently. We are aware of instances in previous elections in which some voters went to the polls to cast ballots, having forgotten that they had already submitted an absentee ballot.

If the initial processing is limited to reviewing the voter's oath to ensure that it has been properly completed, that would expedite the canvass while reducing the risk that an improperly submitted ballot was counted. We urge the Board to adopt these or similar measures designed to prevent duplicate voting.

2) Ballot Marking Devices and Provisional Ballots

We urge the Board to give special consideration to the appropriate procedures for the use of the ballot marking device on election day as all voters will have been mailed an absentee ballot. It is our understanding that in prior elections, when the pollbook reflected that a voter had been sent an absentee ballot, they were required to vote a provisional ballot rather than an ordinary ballot in order to avoid the risk of double voting. Will all those who vote in person on June 2 be required to vote a provisional ballot? If so, this will impose a significant additional burden on election judges as well as the voters. The Board should consider a procedure for voters to submit in advance a request to use the ballot marking device so that they will not be mailed an absentee ballot and will therefore be able to vote a regular rather than a provisional ballot.

### 3) Curing Defects in Absentee Ballots

As this will be the first election in which most voters will submit their ballots by mail, we anticipate that there may be a high rate of technical errors, such as failure to sign the oath on the ballot envelope. We urge you to consider adopting some procedure for notifying voters of such defects and providing them reasonable opportunities to verify the submission of their ballots.

4) We also note two provisions in the Governor's proclamation that appear to conflict with election law. Paragraph VIII. B. iii in the proclamation refers to challenging a person's "right to vote," but section 10-312(a)(1) specifies that a challenge may be made only to a person's identity. Paragraph XI. B of the proclamation refers to ensuring that "all qualified persons may register to vote and those who are not qualified do not vote," but this general language should not be read to override the statutory standards for determining who may vote. We urge the Board to ensure that training of election judges emphasizes that the specific provisions of election law remain in effect so that the broad language in the proclamation is not used to deny anyone their right to vote.

Thank you for your attention to these concerns.

Richard Willson  
Lois Hybl  
Co-Presidents  
League of Women Voters of Maryland

April 11, 2020

**VIA ELECTRONIC MAIL**

Maryland Board of Elections  
c/o Linda Lamone  
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Annapolis, MD 21401  
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linda.lamone@maryland.gov

Re: Ensuring Voting Rights of Blind and Print Disabled Voters

Dear Chairman Cogan, Vice Chairman Hogan, and Members of the Board:

I write to you again as President of the National Federation of the Blind of Maryland on behalf of my organization and its members regarding the April 28, 2020 special general election for the 7th Congressional District. We are grateful for the Board's consideration of our perspective and that of other voting rights advocates in your decision to provide much needed in-person voting opportunities during the June 2, 2020 primary election. We urge you to provide the same opportunity in the April 28, 2020 election.

The Governor's April 10, 2020 Proclamation on this topic makes it plain that in-person voting is the default method of voting which can be upset only if two conditions can be met that would allow for a vote-by-mail-only election. Renewal of Declaration of State of Emergency and Existence of Catastrophic Health Emergency — COVID-19, § IV, available at: [governor.maryland.gov/wp-content/uploads/2020/04/Proclamation-Renewed-4.10.20.pdf](http://governor.maryland.gov/wp-content/uploads/2020/04/Proclamation-Renewed-4.10.20.pdf). The first condition is that the Board must substantiate a finding that it is *impossible* to utilize voting centers in a manner that mitigates and reduces a substantial threat to public safety or health posed by COVID-19, and the second condition is that the Board must confirm that conducting the election without voting centers will not violate constitutional and federal law. *Id.*

These two conditions set a high bar for not providing in-person voting in most cases and an insurmountable one with respect to prohibiting in-person voting for blind and other print disabled Marylanders. As the foremost organization led by and advocating for the rights of blind and other print disabled Marylanders, including approximately 700 members who reside in the counties involved in the April 28, 2020 election, we will focus our remarks on the latter issue.

In my April 1, 2020 letter to this Board, I fully explained the necessity of at least some in-person voting for blind and other print disabled voters to be able to independently and privately exercise their right to vote. For the sake of brevity here, I incorporate by reference the contents of that letter. What bears repeating is that there are members of our organization -- who are also your neighbors, friends, or family -- who will be disenfranchised if they do not have the opportunity to cast a ballot using the accessible ExpressVote ballot marking device ("BMD"). Those individuals have a right to privately and independently vote and we mean to be clear that they desire to exercise that right.

# NATIONAL FEDERATION OF THE BLIND OF MARYLAND

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That right implicates the second condition in the Governor’s April 10 Proclamation. Again, any manner of election in Maryland that does not include at least some in-person voting runs headlong into the express and unqualified text of the federal Help America Vote Act (“HAVA”), which governs federal elections (the April 28, 2020 special general is such an election). That civil rights statute mandates that “[t]he voting system shall--be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters . . . ,” a requirement that *shall* be met “through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.” 52 U.S.C. § 21081(a)(3)(A), (B). The plain text of the statute precludes a vote-by-mail-only election; it is impossible to utilize a “direct recording electronic voting system” at a “polling place” using the mail. The Department of Justice agrees: “While absentee balloting can be offered to voters with disabilities, it cannot take the place of in-person voting for those who prefer to vote at the polls on Election Day.” The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities, available at: [https://www.ada.gov/ada\\_voting/ada\\_voting\\_ta.htm](https://www.ada.gov/ada_voting/ada_voting_ta.htm). Indeed, the Board argued recently that having “‘at least one’ voting system equipped for individuals with disabilities ‘at each polling place’” is an immutable floor set by HAVA. *National Federation of the Blind, Inc. v. Lamone*, No. SAG 19-2228, Doc. 24 at 27 n.10.

Title II of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act further speak to the Board’s obligation to provide in-person voting opportunities to blind and other print disabled voters who cannot otherwise exercise their fundamental right to vote. We will not belabor our previous discussion of these laws, but it suffices to say that excluding blind and other print disabled voters from an election violates many of the laws’ provisions which, at bottom, require an equal opportunity for disabled people to vote privately and independently just as their non-disabled neighbors. Since a mailed ballot is not equally accessible to many disabled voters in the 7th Congressional District, in-person voting using the accessible BMD is the appropriate and available means to comply with the law.

We reiterate that the presence of a state of emergency is not an exception to the protections of the ADA and Rehabilitation Act. Indeed, courts have found violations of those laws when public entities fail to provide for the needs of individuals with disabilities during emergency conditions. *E.g., California Found. for Indep. Living Centers v. Cty. of Sacramento*, 142 F. Supp. 3d 1035, 1062-63 (E.D. Cal. 2015) (holding that certain aspects of a county’s airport evacuation plan violated the ADA by failing to account for the needs of people with mobility disabilities); *Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 643-44 (S.D.N.Y. 2013) (finding that the city violated the ADA by failing to account for accessibility to people with disabilities in its evacuation plans and rejecting the city’s argument that *ad hoc* accommodations were sufficient).

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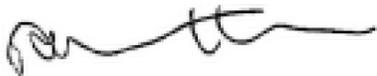
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As to the first necessary condition addressed in the April 10 Proclamation, various members of the Board have expressed in recent meetings that they do not wish to needlessly risk the health of poll workers and others. We agree that that is a critical consideration, and fortunately it is not one that would preclude in-person voting for blind and print disabled voters. Based on the information available to us, rather than speculation, we do not believe it is possible for the Board to substantiate that providing minimal in-person voting during the April 28 special general election presents any greater risk than doing so in the June 2 election. The April 28 election involves just three jurisdictions instead of 24 (which calls for a fraction of the poll workers, machines, personal protective equipment and/or disinfectant supplies, and thus presents far fewer other logistical issues compared to the later election), and, as the Board has hypothesized in its meetings, is likely to see less turnout than the June election.

We stress that the Governor demanded substantiated findings (rather than speculation) that even minimal in-person voting would be *impossible* to conduct safely. We do not believe any such certainly can be established given that just three in-person voting sites (one for each county, consistent with the Governor's Proclamation for the June 2 election) would be involved and in light of the assurances of Clifford Mitchell, MD, MPH, Director of the Department of Health's Environmental Health Bureau, that the Department stands ready to assist the Board with facilitating the vital work of ensuring the constitutional right to vote is available.

As you well know, the key to our democracy is access to the ballot. Decisions that foreclose that access have widespread and lasting implications for both the disenfranchised voter and the public at large. There is a means to have a safe and accessible election for blind and print disabled voters by permitting in-person voting for us, and we urge you to do so.

Sincerely,



Ronza Othman

cc: The Honorable Lawrence J. Hogan, Jr. (via email: [contact@maryland.gov](mailto:contact@maryland.gov))  
Matthew Clark (via email: [matthew.clark@maryland.gov](mailto:matthew.clark@maryland.gov))  
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**Title 33 STATE BOARD OF ELECTIONS**  
**Subtitle 08 CANVASSING**  
**Chapter 01 Definitions; General Provisions**

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), 11-201, and 11-301, Annotated Code of Maryland

**.02 Board Responsibilities.**

A. (text unchanged)

B. Constant Presence, Supervision Required.

(1) The canvass of votes at the counting center shall be conducted [in the presence and] under the [direct] supervision of the local board.

(2) The board shall be present in the counting center *when the canvass starts, concludes, and for all decisions sessions* [throughout each working session of the canvass].

**Explanation:** This proposed change removes the requirement that the members of the local board of elections be present at all times during the multi-day canvass. If adopted, the members would be required to be present (via videoconferencing) when the canvass starts, when the canvass ends, and for all decision sessions. This proposed change is consistent with content in the State Board's comprehensive plan for the 2020 Presidential Primary Election. See §5B(8), page 8.

This change is being proposed as an emergency change. This means that the changes to 33.08.01.02B would be effective for the special general election for the 7<sup>th</sup> Congressional Election (April 28, 2020) and the presidential primary election (June 2, 2020). After these elections, the requirement for board member participation would return to the current regulation.

**Title 33 STATE BOARD OF ELECTIONS**  
**Subtitle 11 ABSENTEE BALLOTS**  
**Chapter 04 Canvass of Ballots — Procedures**

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), 9-303, 11-301, 11-302, and 11-304, Annotated Code of Maryland

**.05 Return Envelopes — Opening, Reviewing, and Referrals.**

A. Batch Distributions.

(1) When directed by the board, the election director shall issue to *an individual assigned by the election director* [each team] a batch of returned ballots.

(2) (text unchanged)

B. Verifying Timeliness.

(1) The *individual* [team] shall first verify timeliness by checking the date stamp on the return envelope.

(2) If the date stamp is missing, the *individual* [team] shall check the postmark on the return envelope.

(3) If the postmark is missing or illegible, the *individual* [team] shall check the date the voter signed the oath required by Election Law Article, §9-310, Annotated Code of Maryland.

(4) If a ballot's timeliness cannot be verified, the ballot shall be considered not timely received and the *individual* [team] shall refer the ballot to the board for rejection.

C. Signature and Seal.

(1) The *individual* [team] shall verify that:

(a) – (b) (text unchanged)

(2) If the oath is not signed or the return envelope is unsealed, the *individual* [team] shall refer the envelope to the local board.

D. The *individual* [team] shall:

(1) – (2) (text unchanged)

E. Removing Ballots. After all the return envelopes in the batch have been opened and placed with the mailing address face down, the *individual* [team] shall remove the ballots from the return envelopes one at a time, taking care that each envelope remains face down.

F. Certificates of Voter Assistance. The *individual* [team] shall remove any certificates of voter assistance and place them in separate stacks.

#### G. Extra Ballots.

(1) The *individual* [team] shall make sure that not more than one ballot is in any return envelope.

(2) If a return envelope contains more than one ballot, the *individual* [team] shall refer the return envelope with all ballots to the local board.

H. Setting Aside Envelopes. After all ballots have been removed from the envelopes in the batch, the *individual* [team] shall set aside the return envelopes.

#### .07 Ballots — Inspection and Referrals.

A. Ballot Inspection. The *individual assigned by the election director* [team] then shall inspect each ballot for compliance and tabulating acceptability.

B. Ballots To Be Referred. The *individual* [team] shall refer to the local board any ballot that:

(1) – (3) (text unchanged)

C. Identifying Referrals. The *individual* [team] shall place each ballot referred to the board in a plain envelope, and mark the envelope with:

(1) The *individual* [team] number;

(2) – (3) (text unchanged)

D. Completion of Batch. When *the individual* [a team] has completed a batch, the election director shall:

(1) – (3) (text unchanged)

(4) Issue a new batch to the *individual* [team], unless all ballots already have been removed from their envelopes.

**Explanation:** This proposed change alters the requirement that a team of two individuals perform certain canvassing tasks. Under the proposed change, one individual can perform these canvassing tasks. This proposed change is consistent with content in the State Board’s comprehensive plan for the 2020 Presidential Primary Election. See §5B(6), page 7.

This change is being proposed as an emergency change. This means that the changes to 33.11.04.05 and .07 would be effective for the special general election for the 7<sup>th</sup> Congressional Election (April 28, 2020) and the presidential primary election (June 2, 2020). After these elections, the requirement for teams of two individuals would return.

**STATE BOARD OF ELECTIONS**  
**Subtitle 17 EARLY VOTING**  
**Chapter 05 Election Judges**

Authority: Election Law Article, §§2-102, 9-501, 9-503, and 9-506, Annotated Code of Maryland

**.01 Local Board Employees.**

A. – C. (text unchanged)

D. Applicability.

*(1) Except as provided in §D(2) of this regulation, [All] all federal and State laws, regulations, and procedures that apply to voting during early voting and on election day apply to voting at a voting center.*

*(2) An employee or board member of a local board is not required to be present at a vote center to set up or close down the vote center but shall provide support remotely as needed.*

**Explanation:** This proposed change means that a representative of the local board does not need to be physically present to open or close the vote center but the local board must provide remote support as needed.

This change is being proposed as an emergency change. This means that the changes to 33.17.05.01 would be effective for the special general election for the 7<sup>th</sup> Congressional Election (April 28, 2020) and the presidential primary election (June 2, 2020). After these elections, the requirement for local board on-site support would return.

**Title 33 STATE BOARD OF ELECTIONS**  
**Subtitle 21 SPECIAL ELECTIONS BY MAIL**  
**Chapter 06 Voting Center Procedures**

Authority: Election Law Article, §§2-102, 9-503, and 9-506, Annotated Code of Maryland

**[.01 Voting Center Evaluation Program.**

The early voting center evaluation program required by COMAR 33.17.06.03 applies to voting centers.]

**Explanation:** This proposed change removes the requirement for the formal evaluation program for voting centers. The purpose of this evaluation is collect information on-site about the operation and management of the voting centers. With the current public health emergency, it seems prudent to limit individuals at voting centers for the next two elections.

This change is being proposed as an emergency change. This means that the changes to 33.21.06.01 would be effective for the special general election for the 7<sup>th</sup> Congressional Election (April 28, 2020) and the presidential primary election (June 2, 2020). After these elections, the requirement for voting center evaluation program would return.