

# Testimony relating to Open Primaries

Pennsylvania House State Government Subcommittee on Campaign Finance and Elections

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Thank you for the opportunity to submit written testimony to the House State Government Committee regarding open primaries. As the committee members are aware, there are five (5) types of primary elections. The two pieces of legislation being discussed at this hearing—HB 976 (Rep. Marla Brown) and HB 979 (Rep. Jared Solomon)—fall into the Primaries Open to Unaffiliated Registrants category discussed below.

## Summary of Primary Types

**Closed Primaries:** This is the current type in Pennsylvania. In order to vote in a primary election, a person must be a registered voter and have affiliated with one of the two major political parties as a part of the voter registration process.

**Open Primaries:** States with open primaries do not ask a registrant to affiliate with a party when they register to vote. All registrants are eligible to vote in either the Democratic or Republican Party primary elections.

The Closed and Open Primary types are the cleanest forms of primaries because the rules are especially clear. In between these two are the three more complicated forms of primaries.

**Partially Closed Primaries** allow each of the two major political parties to decide on an annual or biennial basis who can vote in their primary election. For example, in Utah, the Republicans have historically had a closed primary and Democrats have allowed unaffiliated registrants to vote in their primary.

**Partially Open Primaries** allow registrants to cross party lines when they vote in the primary election and their primary election choice becomes their party affiliation going forward.

**Primaries Open to Unaffiliated Registrants** allow affiliated registrants to vote only in the primary of their party but provide unaffiliated registrants with the opportunity to vote in the primary of their choice.

## Defining Unaffiliated Registrants Correctly

The goal of both HB 976 and HB 979 is to allow some set of individuals who are not affiliated with either the Democratic Party or the Republican Party to vote in either of these primary

elections. Unfortunately, answering the question of what constitutes an unaffiliated registrant can be complicated.

When an individual completes their Pennsylvania voter registration application, they are given six (6) affiliation choices: Democratic, Republican, Green, Libertarian, (None) No Affiliation, and Other. The individuals who check the No Affiliation box are clearly unaffiliated. However, the people who select Other can then write in the name of the political party of their choosing. By doing so, they become a member of a political body. Mercer County has Democrats, Republicans, registrants with no affiliation, and registrants affiliated with one of the County's 48 political bodies.

The definitions of unaffiliated registrant in both of the bills under discussion are not as clear as is necessary. The definition needs to contemplate how to handle members of minor parties—Can Libertarians vote in a Republican or Democratic Primary?—and be clear about how to handle registrants who are affiliated with a political body. The simplest way of clarifying the law to achieve the goal of the sponsors would be to say that an unenrolled elector is an elector who is not affiliated with either the Democratic Party or Republican Party. If you want to exclude members of minor parties from voting in the Democratic Party or Republican Party primaries, be aware that recognized minor parties change year to year. Currently, the Libertarian Party is the only recognized minor party but the Green Party has been recognized in previous years.

### Issues with Opening the Primaries

There are numerous issues—logistical, legal, and practical—that counties would have to address should either of these proposed bills be enacted.

#### Ordering Ballots

If unaffiliated registrants can request on Election Day to vote in either the Democratic Party or Republican Party primary, the election office must be prepared for all unaffiliated registrants to vote in one primary or another. In Mercer County, I have approximately 9,500 unaffiliated registrants. For every primary, I would have to order an extra 19,000 ballots (9,500 Democratic ballots and 9,500 Republican ballots) to account for possible turnout by unaffiliated registrants. Statewide, almost 2.6 million additional ballots would have to be purchased to ensure no precinct runs out of ballots.

Adding 19,000 ballots to the ballot bags in Mercer County has an array of downstream effects. More ballots per precinct start to stretch the ballot security processes Counties use. More ballots require more ballot security bags, and having more than one ballot security bag may mean these bags will no longer fit into the delivery containers used to secure materials prior to Election Day. All of these ballots have to be accounted for at the start of Election Day and at the end of Election Day. More ballots also mean heavier bags, which are a strain on our older elected Judges of Elections.

Most of these ballots will come back unvoted, which means counties also have to be able to store these unvoted ballots for the requisite time, taking up already limited space in election offices.

### Other Affected Sections of the Election Code

Allowing unaffiliated registrants to vote in the primary election affects other parts of the election code not addressed in the proposed bills. For example, *25 P.S. § 3154, Computation of Returns by County Board*, states:

if it shall appear that the total number of partisan votes returned for any candidate or candidates for the same office or nomination at any primary exceeds the number of electors registered or enrolled in said district as members of that political party, **or exceeds the total number of persons belonging to that party who voted in said district or the total number of ballots of that party cast therein**, in any such case, **such excess shall be deemed a discrepancy and palpable error**, and shall be investigated by the return board, and **no votes shall be recorded from such district until such investigation shall be had...**

Likewise, the penalties section of the election code could still make voting in a primary a crime.

*25 P.S. § 3534, Elector Voting Ballot of Wrong Party at Primary*: Any elector who shall willfully vote at any primary the ballot of a party in which he is not enrolled, in violation of the provisions of this act, shall be guilty of a misdemeanor of the second degree, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five thousand (\$5,000) dollars, or to undergo an imprisonment of not more than two (2) years, or both, in the discretion of the court.

Also, *25 P.S. § 2911.1, Limitations on Eligibility of Candidates* for nomination by political bodies states:

Any person who is a registered and enrolled member of a party during any period of time beginning with thirty (30) days before the primary and extending through the general or municipal election of that same year shall be ineligible to be the candidate of a political body in a general or municipal election held in that same year nor shall any person who is a registered and enrolled member of a party be eligible to be the candidate of a political body for a special election.

Unless this section of the code is clarified, there will be uncertainty as to whether an unaffiliated registrant could vote in a primary election and then run for nomination by a political body (an "Independent" candidate).

The entire election code will need to be carefully reviewed to determine how allowing unaffiliated registrants to participate in primary elections affect the nomination, voting, and canvass processes. Otherwise, counties will be put in the position of having to choose which sections of the election code to follow. Such uncertainties result in lawsuits and can negatively affect voter confidence.

## Fairness and Political Considerations

One obvious question that will arise from this proposal is this:

- Why do unaffiliated registrants have the option of choosing the primary in which they want to vote but party members do not have the same option?

These proposals advantage unaffiliated registrants because they have the option to vote in the primary of their choice. Partisans too would benefit from being able to cross over and vote in the primary of their choice as well. Just as we now see some registrants affiliate with a party to vote in a primary election, there will likely be registrants who disaffiliate with their party so they can crossover and strategically vote in primary elections. In general, these bills will give registrants an incentive to disaffiliate so they can maximize their voting options in primary elections.

## Practical Considerations

The implementation of this statute will cause an array of practical considerations.

### Difficulty Detecting Illegal Crossover Voting

Election Board workers are going to have to listen to registrants who are affiliated with one of the parties complain that they do not get a choice of which primary election to vote in but those unaffiliated registrants do. This type of argument can become highly contentious and some party-affiliated registrants are going to successfully pressure Election Board workers to give them the ballot of their choice, which will remain a crime (25 P.S. § 3523 Election Officers Permitting Unregistered Electors to Vote; a third degree felony with punishments of a fine of up to \$15,000 and up to seven (7) years in prison). However, it will be very difficult to detect when this crossover voting occurs because voting by unaffiliated registrants will mean that the number of affiliated registrants who voted will no longer equal the number of party primary ballots voted.

### Indecisive Unaffiliated Registrants

HB 976 contains the following paragraph that I want to use to illustrate an issue with allowing unaffiliated registrants to vote and also with the election code more broadly.

*Section 902.1. Procedure for Unenrolled Electors to Cast Primary Ballots:* Upon confirming an unenrolled elector's status as a registered elector, the elections officer shall ask the unenrolled elector in which political party's primary the unenrolled elector desires to vote, and the elections officer upon reply shall record the unenrolled elector's selection upon the unenrolled elector's certificate and for the purpose of that ballot only shall be deemed enrolled in that party.

In our current primary elections, certain registrants who are affiliated with a party will be given their ballot, take it to the booth, look at the ballot, and decide they do not want to vote for any of the candidates listed. (The person they really like has retired; their friend is running in the other party's primary; they really should be affiliated with the other party, etc.) These voters typically either vote their ballot blank or their ballot is spoiled and they are removed from the poll book and numbered list of voters.

Certain unaffiliated voters will engage in this same activity but they will be able to surrender the ballot for one party and then get the ballot for the other party. This is a recipe for confusion; the person who handles ballots is often not the person who handles voter check-in. The Election Board workers handling check-in will have to interrupt their check-in process (which can introduce errors) to focus on the voter who wants to switch their one-time party affiliation and get a different ballot. This focus will be critical because one group of voters will be able to switch affiliations on the fly but other voters will not be able to do so.

#### Indecisive By Mail Applicants

Counties are required by statute to send an application in January of each year to all registrants who requested permanent mail voting status. A new application form will have to be created for unaffiliated registrants and these registrants will be asked to select a party ballot to receive in the primary. There will be four outcomes from this process:

1. **Unaffiliated registrants will receive the application and select their true choice of party.** These registrants will either vote their ballot or decide not to participate.
2. **Unaffiliated registrants will fail to select a party on their application.** Neither HB 976 or HB 979 discuss how to handle applications where a party is not selected on the application. Some applicants may not want to receive a primary election ballot but some applicants may forget to make a selection. The form will have to include an option "Do Not Send Primary Election Ballot" but this option will not address individuals who do not select a party.
3. **Unaffiliated registrants will change their minds about which party ballot they want after receiving the first party's ballot.** Registrants will receive the application, select a party, and then receive the ballot they requested. After reviewing the ballot, they will contact their county election office and state that they want to receive a ballot from the other party. Individuals already receive mail ballots and then change their party affiliation before the voter registration deadline and request a new ballot. It is a complicated process handling these voters. Allowing unaffiliated registrants to change their minds after receiving a mail ballot will add to the complexity of the mail voting process.
4. **Unaffiliated registrants will get confused and call their election office.** After three years of processing absentee ballot and mail ballot applications from permanent registrants, counties are used to receiving applications that are incomplete or completed incorrectly. Many registrants do not read the application carefully. When they see an item on the form asking, "Which party ballot would you like to receive for the upcoming primary election," they are going to call their county election office. We will be asked questions including: "What this mean?" "I don't want to become a member of a party." "I am unaffiliated. Why do I need to pick a party?"

Any legislation that would provide for unaffiliated registrants to vote in primary elections needs to carefully consider how to address the issues associated with voters who are on the permanent mail voting list.

In Arizona, where I worked previously, the process for handling permanent mail-in voters was much easier because the permanent list was truly permanent—there was no annual request

process—and it was incumbent on the registrant to request a one-time ballot-by-mail for any primary election. A permanent list registrant could make the request in writing or orally, providing their name, address, date of birth, and either a driver's license number or the last four digits of their social security number. The Arizona code also stated that a voter can request only one political party ballot for each election.

### Allowing Unaffiliated Registrants to Vote: Not a Panacea

The academic research on open primaries shows that moving to an open primary from a closed primary has modest if any effects on either voter turnout or polarization.

Primary Election turnout has historically been relatively low, which is understandable. In a General Election, voters are given information about who to vote for via the party affiliation of the candidate; in a primary there are no such cues regarding who to vote for. Getting information on endorsements or the qualifications of primary election candidates requires investigation and most voters are not interested in taking the time to do this.

If you compare primary election turnout in Pennsylvania, with our closed primaries, and New Jersey, which allows unaffiliated registrants to cast ballots, you will see the Pennsylvania consistently has higher turnout in primary elections. Based on my experience in Arizona, I can tell you that most registrants in primary election there were affiliated with one of the two major parties.

The academic research on partisan polarization has also found that opening primary elections to unaffiliated voters does not reduce polarization. Allowing unaffiliated registrants cast ballots in the primary will not result in a different type of candidate being nominated.

### Coda: The Election Code is Troubled Enough

Both HB 976 and HB 979 are useful tools for pointing out a larger issue with Pennsylvania Elections; the outdated and conflicting nature of the election code. For example, in Section 902.1. of House Bill 976, it says:

...the elections officer upon reply shall record the unenrolled elector's selection upon the unenrolled elector's certificate and for the purpose of that ballot only shall be deemed enrolled in that party.

This is correct under the code but also incorrect and also outdated. Why? Because almost every county in Pennsylvania uses district registers (poll books) for checking in voters, as provided for under 25 Pa.C.S.A. § 1402. Few if any counties use voter certificates, provided for under 25 P.S. § 3043. It is important to recognize that the core of the voter check-in process provided for under 25 P.S. § 1402 (which provides for election workers to use fountain pens) dates back to at least the early 1900s. Fully following § 1402 would not allow for the use of electronic pollbooks and would require election board workers to write extensively on the certificate basic information, such as the date of the election and the voter's name.

Pennsylvania is currently transitioning to a new voter registration system and that process has been delayed in part because of the antiquated nature of voter registration in the Commonwealth. The core of our voter registration laws assume fully paper voter registration, which is incompatible with a 21<sup>st</sup> century voter registration database. Having to create work

around so that a computer system can operate in a paper world is proving to be very costly and time consuming.

We already hold primary elections at the wrong time of day. (See 25 § 3045. "At all primaries and elections the polls shall be opened at 7 A.M., **Eastern Standard Time**, and shall remain open continuously until 8 P.M., **Eastern Standard Time**, at which time they shall be closed." All primary elections and some general elections are held on Eastern Daylight Time.) Open primaries will add complications to the election process without fundamentally changing any election outcomes (e.g., turnout levels). It would be much more helpful to remedy the problems in the existing election code.