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*Not admitted in Pennsylvania. Pro hac vice applications pending.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Application For Special Relief In The Nature Of A Preliminary Injunction and Brief in Support Thereof, within the time set by order of the court, of service hereof or a judgment may be entered against you.

Dated: May 8, 2020

By: 

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No. 266 MD 2020

**PETITIONERS' EMERGENCY APPLICATION FOR SPECIAL RELIEF IN THE
NATURE OF A PRELIMINARY INJUNCTION AND FOR EXPEDITED REVIEW**

Petitioners, by counsel, hereby move under Rule 1531(a) of the Pennsylvania Rules of Civil Procedure for relief in the form of a preliminary injunction requiring Respondents Secretary of the Commonwealth Kathy Boockvar and Director of the Bureau of Election Services and Notaries Jessica Mathis to adopt emergency procedures for Pennsylvania's June 2 primary election that would allow voters to submit ballots by mail up to Election Day, provided that such ballots are received by the seventh day after the election; and enjoining Respondents from enforcing Pennsylvania laws that prohibit third parties from assisting voters in delivering absentee or mail-in ballots. 25 P.S. §§ 3146.6(a); 3150.16(a).

In light of the fast approaching primary election, and the pressing legal issues Petitioners have raised, which will have significant implications on Petitioners and other Pennsylvanians' ability to participate in the June 2 primary, Petitioners further request that the Court issue an expedited briefing schedule requiring Respondents to file their opposition by Monday, May 18, 2020 and Petitioners to file their Reply, if any, by Thursday, May 21, 2020.

Counsel for Petitioners has conferred with counsel for Respondents, who have indicated that they do not oppose Petitioners' proposed briefing schedule.

In support of their application for preliminary injunction, Petitioners hereby incorporate the Verified Petition for Declaratory and Injunctive Relief filed in this action on April 22, 2020, and the accompanying Memorandum. Petitioners further state the following:

BACKGROUND

1. As set forth more fully in the Verified Petition for Declaratory and Injunctive Relief filed in this action on April 22, 2020, Petitioners allege that Pennsylvania's failure to adopt emergency procedures or safeguards to provide voters a reliable, safe vote-by-mail option, and its prohibition on third-party mail ballot delivery assistance, constitute violations of the Pennsylvania Constitution.

2. COVID-19 has upended Pennsylvania’s electoral system, including its in-person and absentee or mail-in voting procedures, as described in more detail in the Verified Petition for Declaratory and Injunctive Relief and the Memorandum filed in support of this application. In person voting will be severely restricted in the June 2 primary due to a significant reduction in polling places, election workers, and the risk of COVID-19 infection. The absentee or mail-in voting (collectively, “mail-in voting”) system is also severely strained due to the rapid expansion of mail ballot requests, which county boards are struggling to fulfill, and the USPS’s ongoing operational and budgetary crisis, which has resulted in reduced staff and significant delays in mail delivery services. These factors, caused in large part by COVID-19, will delay the issuance of mail ballots to voters, and the return of those ballots from voters to county boards, making it nearly impossible for many Pennsylvanians to vote by mail and submit their ballots with enough time to ensure that county officials receive them by 8:00 p.m. on Election Day as required by law. Making matters worse, Pennsylvania law prohibits most voters from obtaining assistance from third-parties to deliver their mail ballots by the Election Day deadline.

3. Indeed, the experiences in both Wisconsin and Ohio—two states that have conducted primary elections during the pandemic—confirm that the current challenges facing the vote-by-mail system could result in widespread disenfranchisement. In Wisconsin, tens of thousands of mail ballots, and potentially upwards of 100,000, failed to arrive by Election Day due to disruptions to USPS. In light of the severe restrictions to the in-person and mail-in voting process, and the risks posed by each, the Commonwealth has failed to provide Petitioners and other Pennsylvania voters with a safe, reliable, and accessible option for voting, thus denying them their constitutional right to a free and equal election. Pa. Const. art. I, §§ 1, 5, 26. Absent this Court’s intervention, the lack of any safeguards to ensure that Pennsylvanians can vote by mail during the

COVID-19 pandemic without undue risk of arbitrary disenfranchisement and undue burden will result in the rejection of thousands of ballots for reasons outside the voters' control.

INJUNCTIVE RELIEF

4. Petitioners move this Court for an Order (1) requiring Respondents to adopt emergency procedures that provide emergency write-in ballots for all voters who request mail ballots, designate all ballots submitted by mail as emergency ballots, and count all such ballots if postmarked by Election Day and received by the seventh day after the election, and (2) preliminarily enjoining the enforcement of 25 P.S. §§ 3146.6(a) and 3150.16(a) to the extent that each prohibits third-parties from delivering any voter's ballot to their respective county board of elections.

5. This court may order such relief, pursuant to Pennsylvania Rule of Civil Procedure 1531(a), when the moving party can establish the following factors: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest. *SEIU Healthcare Pa. v. Commonwealth*, 628 Pa. 573, 578 (2014).

6. Petitioners are likely to succeed on the merits of the claims they advance in this application. Pennsylvania's Constitution imposes a clear and unambiguous duty on the Commonwealth to ensure that all elections are "free and equal." *League of Women Voters v. Commonwealth*, 645 Pa. 1, 100 (2018); Pa. Const. art. I, § 5. Yet election officials have failed to

provide safe, reliable, and accessible voting opportunities for the June 2 primary election, as the severe limitations on in-person and mail voting during the COVID-19 pandemic force voters to choose between casting a ballot in person and subjecting themselves to the risk of COVID-19 infection, or submitting their ballots to the vagaries of a mail delivery service with limited capacity, and subject themselves to risk of arbitrary disenfranchisement. Furthermore, by prohibiting voters from obtaining assistance from others to deliver their mail ballots, Pennsylvania law imposes a severe burden on the franchise that disproportionately affects senior voters, such as the individual Petitioners here, who are vulnerable to severe illness from COVID-19, among other disadvantaged groups. These burdens, moreover, are not justified by any sufficiently weighty, let alone compelling, state interest. *Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012); *see also League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1215–16 (N.D. Fla. 2018).

7. An injunction is necessary to prevent the violation of Petitioners’ and other Pennsylvanians’ constitutional rights, and the potential disenfranchisement of thousands of voters in the June 2 primary, which imposes immediate and irreparable harm that cannot be adequately compensated by damages.

8. Greater injury will result from allowing the challenged conduct to continue than from issuing the requested injunctive relief. Neither the Court nor Respondents need to speculate about this point having witnessed the effects of similar electoral-system breakdowns in Wisconsin’s primary election. Here, Pennsylvanians will be forced into a catch-22 whereby they must risk their health to submit a ballot in person and avoid the vagaries of unpredictable mail delivery during a global pandemic, or mail their ballots from the safety of their own homes and subject themselves to a significant risk of disenfranchisement. Neither administrative convenience nor unsupported fears of fraudulent activity can justify either result.

9. The status quo has been upended by the COVID-19 pandemic and the resulting disruptions to daily life both in Pennsylvania and across the country. Petitioners' requested relief will restore to thousands of Pennsylvanians the opportunity to participate in a free and equal election, and to exercise their right to vote—and to have their votes counted—as guaranteed to them by the Pennsylvania Constitution. Pa. Const. art. I, §§ 1, 5, 26.

10. Petitioners' requested relief is reasonably tailored to provide Pennsylvanians with safe, accessible, and reliable voting opportunities, while minimizing the risk of arbitrary disenfranchisement and ensuring access to a free and equal election. The administrative burden to election officials, on the other hand, is minimal, because much of the relief Petitioners seek has already been implemented for certain categories of voters and election officials have until 20 days after Election Day to certify the results. 25 P.S. §§ 2642(k).

11. The public interest favors procedures that protect the constitutional rights to vote and to participate in a free and equal election. *Bergdoll v. Kane*, 557 Pa. 72, 85 (1999) (quotation omitted).

12. Finally, neither Petitioners' claims nor request for relief require application of Act 77's non-severability clause. Petitioners do not challenge the validity of the ballot receipt deadline, 25 P.S. §§ 3146.6(c), 3150.16(c), nor do they seek to prevent its enforcement, particularly for ballots delivered in person. Instead, Petitioners requested for injunctive relief seeks temporary, emergency measures for Pennsylvanians voting by mail to supplement, rather than supplant, existing procedures.

13. For these reasons and those set forth in their accompanying Memorandum, Petitioners request that the Court grant their application for preliminary injunction in the nature of a preliminary injunction and enter an Order:

- a. Requiring Respondents to adopt emergency procedures that provide for the distribution of emergency write-in ballots to all voters who request mail ballots, designate as emergency ballots all ballots submitted *by mail*, and count all emergency or emergency write-in ballots if: (i) postmarked by Election Day, June 2, 2020, and (ii) received by the seventh day after the election, June 9, 2020. The term “postmark” shall refer to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.
- b. Enjoining the enforcement of Pennsylvania laws that prohibit third parties from assisting in voters in delivering absentee or mail-in ballots, 25 P.S. §§ 3146.6(a); 3150.16(a).

14. In light of the fast approaching June 2 primary election, and the limited time remaining to implement relief to protect Petitioners’ and Pennsylvania voters’ constitutional rights, Petitioners’ request that the Court issue an expedited briefing schedule that requires Respondents to file their opposition to Petitioner’s application by **Monday, May 18**, and Petitioners to file their Reply, if necessary, by **Thursday, May 21**. Respondents do not oppose Petitioners’ proposed briefing schedule.

Dated: May 8, 2020

By: 

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No. 266 MD 2020

**ORDER GRANTING APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A
PRELIMINARY INJUNCTION**

AND NOW, this day of , 2020, upon consideration of Petitioners' Petition for Review and Application for Special Relief in the Nature of a Preliminary Injunction, it is hereby **ORDERED** that said Application is **GRANTED**.

IT IS FURTHER ORDERED that Respondents and their agents, servants, and officers and others are hereby **ENJOINED** from enforcing Pennsylvania laws that prohibit third parties from assisting in voters in delivering absentee or mail-in ballots, 25 P.S. §§ 3146.6(a); 3150.16(a), and **ORDERED** to adopt the following emergency procedures:

- (1) Provide for the distribution of emergency write-in ballots to all voters who request mail ballots; designate as emergency ballots all ballots submitted *by mail*; and count all emergency or emergency write-in ballots if they are:
 - a) Postmarked by Election Day, June 2, 2020, and
 - b) Received by the seventh day after the election, June 9, 2020.

(2) The term “postmark,” for the purposes of this Order, shall refer to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

BY THE COURT:

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No. 266 MD 2020

**ORDER GRANTING APPLICATION FOR EXPEDITE BRIEFING
SCHEDULE AND CONSIDERATION**

AND NOW, this day of , 2020, upon consideration of Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction, it is hereby **ORDERED** that Respondents shall file their response to Petitioners' application and supporting Memorandum by **Monday, May 18, 2020**, and Petitioners shall file their reply, if any, by **Thursday, May 21, 2020**.

BY THE COURT:
