

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE
CONFERENCE,

Petitioner,

v.

No. 364 MD 2020

KATHY BOOCKVAR, :
SECRETARY OF THE COMMONWEALTH, :
AND JESSICA MATHIS, DIRECTOR OF THE :
BUREAU OF ELECTION SERVICES AND :
NOTARIES, :

Respondents.

**PETITIONER’S APPLICATION FOR SPECIAL RELIEF
IN THE NATURE OF A PRELIMINARY INJUNCTION; AND
APPLICATION FOR EXPEDITED HEARING SCHEDULE**

Petitioner, the National Association for the Advancement of Colored People Pennsylvania State Conference (“NAACP-PSC”), by counsel, hereby moves under Rule 1531(a) of the Pennsylvania Rules of Civil Procedure for special 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 put in place temporary and common-sense procedures to ensure that the constitutional rights of millions of Pennsylvania voters are protected during an unprecedented public health crisis. In support of this

application, Petitioner hereby incorporates the Petition for Review filed in this action and the accompanying memorandum of law.

Petitioner further states as follows:

1. As Petitioner has described more fully in its Petition for Review and the memorandum of law filed with this application, on June 2, 2020, Pennsylvania held its primary election during this COVID-19 pandemic and the result was stunning—thousands of Pennsylvanians were disenfranchised because they could not vote or their votes were not counted.

2. During the primary, Respondents approved the closure and consolidation of thousands of polling places across the Commonwealth without sufficient notice to voters and without any criteria for their closure. Voters were left confused and, in some cases, unable to find the polling place in which they were supposed to vote or could not get to those locations. Because the pandemic will continue unabated up until the general election on November 3, 2020, and poll workers will be legitimately too afraid to report to work on election day, it is increasingly likely that polling places will again be closed or consolidated with insufficient consideration of location and accessibility and insufficient notice, which will once again adversely impact the right to vote of all voters and disproportionately affect voters of color.

3. The situation was no better for voters who somehow located their assigned polling places. Many of those voters had to wait in line, only to enter inside crowded buildings, which risked exposing them and poll workers to the virus because it was impossible to engage in any social distancing.

4. Some voters, especially those who are elderly or immunocompromised, who feared in-person voting because of COVID-19, took advantage of a new law, Act 77, that, for the first time, permitted vote by mail without excuse. The vote-by-mail system, unfortunately, also did not work according to plan. Elections officials were overloaded by nearly 2 million vote-by-mail applications and the over 1.5 million mail-in ballots that were cast. And that uncertainty was compounded by U.S. Postal Service's slow mail delivery during the pandemic. This perfect storm resulted in the disenfranchisement of thousands of Pennsylvanians who, despite timely applying for the mail-in ballots, did not have their ballots get to elections officials by election day, the statutory deadline. The general election will be even worse, as millions more are expected to vote in this pandemic.

5. In some twenty counties in Pennsylvania, most if not all voters were forced to vote using repeat-touch touchscreen voting machines, which can serve as vectors for spreading the COVID-19 disease. Requiring voters to vote universally on such voting machines during the pandemic places them at substantial and

unnecessary risk for contracting or transmitting COVID-19, creating barriers to voting and resulting in unequal access to the polls. In counties that make hand-marked paper ballots available to voters, with ballot-marking devices available for those who need or prefer to use them, election officials have greater flexibility in decreasing health risks for voters. Hand-marked paper ballots do not require person-to-person contact once the poll worker gives the ballot to the voter, helping to ensure that voters are not risking their health when exercising their fundamental right to vote.

6. Regrettably, the burdens of these inequities have fallen hardest on African-Americans, including members of the NAACP-PSC, and Hispanics. Already more likely to be infected by, and hospitalized from, coronavirus, racial minorities were more likely to be disenfranchised by the practices in the primary election, including the polling place closures, and are less likely to benefit from the vote-by-mail regime.

7. NAACP-PSC thus files this emergency motion because there is a substantial risk that thousands more Pennsylvanians will be disenfranchised in the November 3, 2020 general election unless this Court grants the relief requested that seeks to abate that risk.

8. In response, Petitioner requests that the Court enter comprehensive relief that would ensure that Pennsylvanians voting in the general election can cast their ballots, either in person or by mail, safely and freely without concern for their safety, unlike what occurred in the primary election. That relief includes entry of an order directing Respondents to: (1) ensure that each county board of election to maintain a sufficient number of polling places to ensure that no voter must wait more than 30 minutes to vote; (2) require each county board of election mail notice to voters of any change in polling place at least three weeks in advance of the General Election, as well as posting at old polling places; (3) ensure that Respondents provide for the accessibility of polling locations when reviewing county board of elections applications to consolidate any polling locations and disapprove any proposed consolidation that would require any voter to travel more than 0.5 miles further than the distance to their normal polling place, (4) require at least two weeks of early in-person absentee and mail-in voting for the General Election in advance of election day; and instruct county board of elections offices to establish satellite or mobile locations where voters can request, complete, and submit their mail-ballots, in a range of easily accessible locations, and during weekends and evenings; (5) require increased access to vote by mail across the Commonwealth, by among other things, directing county boards to automatically sending mail-in ballot applications to all

registered voters in accordance with their language preferences; requiring each county to provide ballot drop boxes, and accepting ballots returned to a drop-box by close of polls on Election Day; (6) instruct county boards of elections to expand number of ballot drop boxes where voters can returned their voted ballots by the close of polls on Election Day; (7) require use of low-touch hand-marked paper ballots as the primary voting method, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law; and (8) require all persons to wear a mask at all times while in polling places or in lines outside polling places and ensure that all polling places allow six-foot separation at all stages.

Request for Injunctive Relief

9. Under Rule 1532(a) of the Pennsylvania Rules of Appellate Procedure, at any time following the filing of a Petition for Review, this Court may order special relief, including a preliminary or special injunction “in the interest of justice and consistent with the usages and principles of law.” The standard for issuing a preliminary injunction under this rule is the same as that for a grant of a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *Shenango Valley Osteopathic Hosp. v. Dep’t of Health*, 451 A.2d 434, 441 (Pa. 1982).

10. A preliminary injunction should issue where the Petitioner, like here, has established that: “(1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury will result from refusing an injunction than from granting it and, concomitantly, that issuance of an injunction will not substantially harm other interested parties; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) a clear right to relief; (5) the injunction is reasonably suited to abate the alleged harm; and (6) issuance of an injunction will not adversely affect the public interest.” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610 (Pa. Commw. Ct. 2020); *accord SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 502 (Pa. 2014).

11. As well documented in the accompanying brief, Petitioner has satisfied each element for the entry of preliminary relief in this matter.

12. At the outset, Petitioner has a clear right to relief and is likely to succeed on the merits of each claim it advances in this application. The Pennsylvania Constitution makes plain that *all* elections must be “free and equal” and that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 803 (2018); Pa. Const. art. I, § 5. Given the fundamental nature of the right to vote,

perhaps the most important right in our democracy, this Court has explained that “[d]isenfranchising voters ‘through [no] fault of the voter himself’ is plainly unconstitutional.” *Applewhite v. Commonwealth*, 2014 WL 184988, at *23 (Pa. Commw. Ct. Jan. 17, 2014) (quoting *Appeal of Norwood*, 116 A.2d 552 (Pa. 1955)); see also *id.* at *18 (acknowledging that the right to vote is ‘fundamental’ and pervasive of other basic civil and political rights.”) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)).

13. Here, the coming general election, where thousands of Pennsylvanians will be disenfranchised through no fault of their own, cannot be free or equal and undermines the basic right to vote. The Court need not rely on speculation or guesswork to imagine what will happen in less than 100 days. As Petitioner has thoroughly documented in its memorandum, during the June 2020 primary election, the Commonwealth failed to adequately address the extraordinary burdens placed on voters by this pandemic. As a result, voters will have to jeopardize their well-being by being forced to vote in crowded polling locations or rely on mail-in balloting regime that is overwhelmed and may not accept their properly cast votes.

14. Likewise, Petitioner is likely to succeed in its claim alleging that Respondents’ current voting regime runs afoul of Pennsylvania Constitution’s equal protection guarantees in Article I, Sections 1 and 26. Art. I, §§ 1, 26. Those two

sections, read in tandem, make clear that the election scheme that the Commonwealth seeks to put in place for the general election will unfairly treat similarly situated voters differently. Reducing polling places and restricting access to mail-in voting will necessarily result in differential treatment of similarly situated voters—some of whom will be disenfranchised and some will not. Similarly, forcing some voters to use unsafe, repeat-touch touchscreen voting machines, while other voters are able to safely vote using hand-marked paper ballots, will result in differential treatment. Such differential treatment triggers strict scrutiny, which the Commonwealth’s conduct cannot withstand. *William Penn Sch. Dist.*, 170 A.3d 414, 458 (Pa. 2017).

15. An injunction is necessary to safeguard the constitutional rights of Pennsylvania voters, including Petitioner’s members. Put bluntly, unless an injunction issues, Respondents will oversee an election system that may deprive thousands of voters of their fundamental right to vote in the 2020 general election, which would constitute immediate and irreparable harm that cannot be adequately compensated by damages.

16. The immediate and irreparable harm that Petitioner has advanced outweighs any harm that the Commonwealth may claim. Administrative convenience must give way to the concrete harm that would befall Pennsylvanians

who are forced to participate in the election under these circumstances, risking their health to vote in person and receive the assurance that their vote was cast, or send in their mail-in ballots from the comfort of their home and hope that the ballots gets delivered in a timely basis.

17. The injunctive relief Petitioner seeks would restore the parties to the pre-COVID status quo, when voters did not have to weigh the substantial threat to their health in deciding how to vote, and is reasonably tailored to the offending activity, which is a broad failure by the Respondents to safeguard the vote.

18. The public interest favors an injunction that will ensure that Pennsylvanians can freely and fully exercise their fundamental right to vote and have those votes counted, while also protecting public health by limiting the transmission of a deadly virus during a declared public health emergency.

19. Rather than address every aspect or shortcoming from the primary election, the injunctive relief that Petitioner seeks targets specific issues—such as polling place consolidation and vote-by-mail protocols—that effectively disenfranchised thousands of people in Pennsylvania.

EXPEDITED TIMING

20. Given that the general election is fast approaching and the serious legal issues that the Petitioner has raised, the Petitioner also requests that the Court issue

an expedited briefing schedule requiring Respondents to file any opposition to this Application by Friday, August 14, 2020, and Petitioner to file any Reply by August 21, 2020. Petitioner also respectfully requests the Court to schedule a status conference and an evidentiary hearing in connection with the Application for Special Relief.

21. Counsel for Petitioner has conferred with counsel for Respondents, who have confirmed that Respondents do not object to the proposed briefing schedule, though Respondents do object to any evidentiary hearing or a status conference until after this Court's resolution of their preliminary objections in this matter.

WHEREFORE, for all the foregoing reasons and those alleged in the Petition for Review, Petitioner respectfully requests that this Court grant the Application for Special Relief in the Nature of a Preliminary Injunction and enter an order consistent with the proposed order accompanying this memorandum.

FURTHERMORE, Petitioner also respectfully requests that this Court set an expedited schedule for hearing this Application, in accordance with the proposed order that accompanies this Application.

Date: August 6, 2020

/s/ Sozi Pedro Tulante

Sozi Pedro Tulante (Pa. 202579)

Julia Chapman (Pa. 315959)

Tiffany Engsell (Pa. 320711)
Craig Castiglia (Pa. 324320)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
215.994.4000

Neil Steiner (admitted *pro hac vice*)
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
212.698.3822

Ronald Fein (*pro hac vice pending*)
John Bonifaz (*pro hac vice pending*)
Ben Clements (*pro hac vice pending*)
Free Speech For People
1320 Centre Street #405
Newton, MA 02459
617.244.0234

*Attorneys for Petitioner NAACP State
Conference of Pennsylvania*

CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: August 6, 2020

/s/Sozi Pedro Tulante

Sozi Pedro Tulante (Pa. 202579)

CERTIFICATE OF SERVICE

I, Sozi Pedro Tulante, hereby certify that on August 6, 2020, I caused a true and correct copy of the foregoing document titled Application for Special Relief in the Nature of a Preliminary Injunction; and Application for Expedited Hearing Schedule, to be served via electronic filing to all counsel of record.

Date: August 6, 2020

/s/ Sozi Pedro Tulante
Sozi Pedro Tulante (Pa. 202579)

an evidentiary hearing on Petitioner's Application for Special Relief in the Nature
of a Preliminary Injunction on _____;

By THE COURT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE
CONFERENCE,

Petitioner,

v.

KATHY BOOCKVAR, :
SECRETARY OF THE COMMONWEALTH, :
AND JESSICA MATHIS, DIRECTOR OF THE :
BUREAU OF ELECTION SERVICES AND :
NOTARIES, :

Respondents.

No. 364 MD 2020

**[PROPOSED] ORDER GRANTING SPECIAL RELIEF
IN THE FORM OF A PRELIMINARY INJUNCTION**

AND NOW, this day of , 2020, upon
consideration of Petitioner’s Petition for Review and Application for Special Relief
in the Nature of a Preliminary Injunction, including supporting memorandum of law,
it is hereby **ORDERED** that said Application is **GRANTED**.

IT IS FURTHER ORDERED that Respondents shall: (1) require each
county board of election to maintain a sufficient number of polling places to ensure
that no voter must wait more than 30 minutes to vote; (2) provide that each county
board of election mail notice to voters of any change in polling place at least three

weeks in advance of the General Election, as well as posting at old polling places; (3) ensure that Respondents provide for the accessibility of polling locations when reviewing county board of elections applications to consolidate any polling locations and disapprove any proposed consolidation that would require any voter to travel more than 0.5 miles further than the distance to their normal polling place, (4) require at least two weeks of early in-person absentee and mail-in voting for the General Election in advance of election day; and instruct county board of elections offices to establish satellite or mobile locations where voters can request, complete, and submit their mail-ballots, in a range of easily accessible locations, and during weekends and evenings; (5) require increased access to vote by mail across the Commonwealth, by among other things, directing county boards to automatically sending mail-in ballot applications to all registered voters in accordance with their language preferences; requiring each county to provide ballot drop boxes, and accepting ballots returned to a drop-box by close of polls on Election Day; (6) require expanded number of ballot drop boxes where voters can returned their voted ballots by the close of polls on Election Day; (7) require use of low-touch hand-marked paper ballots as the primary voting method, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law; and (8) require all persons to wear a mask at all times while

in polling places or in lines outside polling places and ensure that all polling places allow six-foot separation at all stages.

By THE COURT
