

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melinda Delisle; Jacques Delisle; Adam :
Delisle; Bryan Irvin; Charles Cella; :
Deborah Cella; Mary Cay Curran; Eliza :
Hardy Jones; Krista Nelson; Eileen :
McGovern; Cedric Hardy, :
Petitioners :

v.

No. 319 M.D. 2020

Kathy Boockvar, in her capacity as :
Secretary of the Commonwealth of :
Pennsylvania; and Jessica Mathis, in :
her capacity as Director of the Bureau :
of Election Services and Notaries of the :
Pennsylvania Department of State, :
Respondents :

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY PRESIDENT JUDGE LEAVITT

FILED: June 2, 2020

On May 25, 2020, Melinda Delisle, Jacques Delisle, Adam Delisle, Bryan Irvin, Charles Cella, Deborah Cella, Mary Cay Curran, Eliza Hardy Jones, Krista Nelson, Eileen McGovern, and Cedric Hardy (collectively, Petitioners), filed a Petition for Review (Petition) in the Pennsylvania Supreme Court against the Secretary of the Commonwealth of Pennsylvania, Kathy Boockvar, and the Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, Jessica Mathis (collectively, Secretary). Petitioners allege various disruptions to the June 2, 2020, primary election stemming from the COVID-19 pandemic and raise constitutional claims about the absentee and mail-in ballot provisions of the

Pennsylvania Election Code (Election Code),¹ which provisions were either amended by or added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). Petitioners also filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction (Preliminary Injunction Application). The Secretary filed an answer to the Preliminary Injunction Application, and the parties filed briefs in support of and in opposition to the Preliminary Injunction Application.

On May 29, 2020, the Supreme Court transferred the matter to the Commonwealth Court by *Per Curiam* Order.² Petitioners then filed with this Court an Emergency Application for Expedited Resolution of Petitioners' Preliminary Injunction Application. On June 1, 2020, for the reasons that follow, the Court denied the Preliminary Injunction Application and dismissed as moot the Emergency Application for Expedited Resolution of Petitioners' Preliminary Injunction Application.

Petitioners are 11 individual Pennsylvania voters residing in either Montgomery County, Delaware County, or Philadelphia County, Pennsylvania, each of whom allegedly applied for a mail-in ballot between March 2020 and May 25, 2020. Most applications were filed in May. Petitioner Melinda Delisle, a registered Democrat, alleges that she received a ballot for the Republican primary in error. The other Petitioners allege that their respective county board of elections has yet to mail, and Petitioners have yet to receive, their mail-in ballots.

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

² The Supreme Court transferred the matter to this Court because the Petition for Review was filed outside the 180-day time period during which Act 77 vested the Supreme Court with exclusive jurisdiction to decide the specific constitutional claims raised therein. Section 13(1)-(3) of Act 77. In its Order, the Supreme Court also denied Petitioners' alternative request for King's Bench or extraordinary jurisdiction. *See Delisle v. Boockvar* (Pa., No. 95 MM 2020, filed May 29, 2020).

Petitioners allege they are at risk of being disenfranchised because of a number of obstacles, including United States Postal Service (USPS) mail delivery delays, substantial backlogs in the county boards of elections' processing of absentee and mail-in ballot applications, and staffing shortages and other technical difficulties. Although our Supreme Court has ruled that these obstacles are speculative, *see Disability Rights Pennsylvania v. Boockvar* (Pa., No. 83 MM 2020, filed May 15, 2020), 2020 WL 2820467; *see also id.* (Wecht, J., concurring), Petitioners allege the obstacles have now manifested themselves. As a result, Petitioners fear they will not receive their absentee or mail-in ballots in time to mail them back to their respective county boards of elections by the statutorily-mandated 8:00 p.m. Election Day deadline. Moreover, the individual Petitioners do not want to vote in person due to the health risks related to the COVID-19 pandemic, which they fear will be heightened in a crowded polling place. One of the individual Petitioners has alleged that she is immunocompromised and, for that reason, does not want to vote in person on June 2, 2020.

Based on the above, Petitioners allege that Act 77's deadline by which the county boards of elections must receive absentee and mail-in ballots on Election Day violates the Pennsylvania Constitution, as applied to the June 2, 2020, primary election. Specifically, they claim that enforcement of this "received-by deadline" will violate the free and equal elections clause of article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, §5 (providing that "[e]lections shall be free and equal"), and the equal protection guarantees afforded by article I, sections 1 and 26 of the Pennsylvania Constitution, PA. CONST. art. I, §§1 and 26 (relating to the inherent rights of mankind and prohibiting discrimination by the Commonwealth

and its political subdivisions). In making their constitutional arguments, Petitioners claim they will be disenfranchised because they want to vote by absentee or mail-in ballots, but the above-mentioned obstacles in their respective counties, located in regions hardest hit by the COVID-19 pandemic, may cause Petitioners' votes not to be counted through no fault of their own.

The Petition requests an order declaring, *inter alia*, that enforcement of the received-by deadline in the Election Code is unconstitutional and invalid as applied to any election scheduled to occur during the ongoing public health emergency related to COVID-19; enjoining the Secretary, her agents, officers, and employees from enforcing the received-by deadline in the 2020 primary and general elections; and further enjoining the Secretary, her agents, officers, and employees, and the county boards of elections, to consider timely any absentee or mail-in ballot if: (1) it is received by the county board of elections by the 8:00 p.m. Election Day deadline; (2) it is postmarked³ on or before the day of the primary or general election and is received by the county board of elections no later than seven days after the date of the primary or general election; or (3) where there is no postmark, or the postmark is illegible, it is delivered to the county board of elections by the USPS no later than the day after the primary or general election.

Petitioners' Preliminary Injunction Application seeks the same relief as that sought in the Petition, but it is specific to the primary election of June 2, 2020. They seek to enjoin the enforcement of Act 77's requirement that absentee and mail-

³ In their Petition, Petitioners specify that "[a] 'postmark' shall be any type of mark applied by the USPS or any delivery service to the return envelope, including but not limited to a bar code or any tracking marks, which demonstrates that a ballot was mailed on or before [E]lection [D]ay[.]" See Petition, Wherefore Clause ¶ d.2., at 43.

in ballots be received by 8:00 p.m. on Election Day, which requirements are found in Sections 1306(c), 1308(g)(1)(ii), and 1306-D(c) of the Election Code, 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), and 3150.16(c),⁴ and to mandate the county boards of elections to count absentee or mail-in ballots received by a county board of elections by 8:00 p.m. on Election Day, postmarked by Election Day and received by June 9, 2020, or, if the ballot contains no postmark, a postmark without a date, or an illegible postmark, is received by the county board of elections no later than June 3, 2020.

In response to Petitioners' Preliminary Injunction Application, the Secretary asserts that Petitioners cannot establish the requisite likelihood of succeeding on the merits of their underlying action because they have failed to establish any basis to conclude that enforcement of the received-by deadline will result in an unconstitutional *statewide* deprivation of the right to vote. The Secretary also asserts that, based on the facts averred in the Petition, should judicial intervention be necessary in any of the Petitioners' counties of residence to avoid deprivation of voters' constitutional rights, Petitioners may seek relief in the appropriate court of common pleas.⁵

⁴ Section 1306-D was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77.

⁵ On May 30, 2020, the Governor of Pennsylvania declared a disaster emergency in the counties of Allegheny, Dauphin, and Philadelphia, due to civil disturbances that have arisen following the death of George Perry Floyd while in police custody in Minneapolis, Minnesota. *See* Governor's May 30, 2020, Proclamation of Disaster Emergency, <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200530-TWW-civil-disturbance-order.pdf> (last visited June 2, 2020). On June 1, 2020, the Governor amended his May 30, 2020, disaster declaration to include the additional counties of Delaware, Erie, and Montgomery. *See* Governor's June 1, 2020, Amendment to Proclamation of Disaster Emergency, <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200601-TWW-amendment-to-civil-disturbance-order.pdf> (last visited June 2, 2020).

This Court denied Petitioners' Preliminary Injunction Application on June 1, 2020. This opinion explains the bases therefor.

Preliminary Injunction Standards

"The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined." *Appeal of Little Britain Twp. From Decision of Zoning Hearing Board of Little Britain Twp., Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994). A preliminary injunction is a temporary remedy granted until the parties' dispute can be fully resolved. *Id.* The party seeking a preliminary injunction bears a heavy burden of proof and must establish all of the following criteria:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;

Shortly after this Court issued its Order dated June 1, 2020, denying Petitioners' Preliminary Injunction Application, the Governor issued an Executive Order extending the deadline by which absentee and mail-in ballots must be received by the county boards of elections of Allegheny, Dauphin, Delaware, Erie, Montgomery, and Philadelphia, due to the civil unrest and disturbances, which have required the evacuation of election officials in at least two counties, the imposition of curfews, and travel restrictions that are "impeding county election activities and opportunities for voters to submit their absentee and mail-in ballots[.]" See Governor's Executive Order No. 2020-02 (Extension of Deadline for Receipt of Absentee and Mail-In Ballots in Certain Counties), <https://www.oa.pa.gov/Policies/eo/Documents/2020-02.pdf> (last visit June 2, 2020). By the Governor's order, an absentee or mail-in ballot will be counted if postmarked no later than Tuesday, June 2, 2020, and received by the county board of elections no later than 5:00 p.m. on Tuesday, June 9, 2020. The Governor further ordered that any valid absentee or mail-in ballot received by mail that does not bear a legible postmark shall be counted, but only if it is received no later than 8:00 p.m. on Wednesday, June 3, 2020. He ordered further that no absentee or mail-in ballot will be counted if received by means other than postal mail after 8:00 p.m. on Tuesday, June 2, 2020. *Id.* The Governor's order grants the exact relief sought by Petitioners, albeit for a different reason.

- (2) greater injury will occur from refusing to grant the injunction than from granting it;
- (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
- (4) the petitioner is likely to prevail on the merits;
- (5) the injunction is reasonably suited to abate the offending activity; and
- (6) the public interest will not be harmed if the injunction is granted.

Brayman Construction Corp. v. Department of Transportation, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Patriot-News Company v. The Empowerment Team of the Harrisburg School District Members*, 763 A.2d 539, 546 (Pa. Cmwlth. 2000). “[W]hen a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. School District of the City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972).

Analysis

Section 1306(c) of the Election Code relates to voting by absentee ballots and provides the following deadline for receipt of absentee ballots: “a completed absentee ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. § 3146.6(c). Section 1308(g)(1)(ii) relates to the canvassing of official absentee ballots and mail-in ballots and similarly provides that such absentee and mail-in

ballots “shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. § 3146.8(g)(1)(ii). Article XIII-D of the Election Code includes Section 1306-D(c), which also provides a deadline for receipt of mail-in ballots as follows: “a completed mail-in ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. § 3150.16(c).

The Petition challenges, *inter alia*, the received-by deadlines found in Sections 1306(c), 1308(g)(1)(ii), and 1306-D(c) of the Election Code, 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), and 3150.16(c). Petitioners assert that they have lodged an as-applied challenge to avoid the risk of disenfranchisement and the possibility that their votes may not be counted. However, Petitioners seek a statewide injunction to extend the received-by deadline set forth in Sections 1306(c), 1308(g)(1)(ii), and 1306-D(c) of the Election Code, arguing that it cannot be constitutionally applied anywhere in the Commonwealth, especially in the counties where Petitioners reside. Petitioners essentially contend that a statewide injunction is necessary to ensure a free and equal election, otherwise Petitioners will be deprived of their right to vote merely because the geographic region in which they reside has been hit the hardest by the COVID-19 pandemic.

The Secretary argues that the relief sought by Petitioners would not merely supplement, but supplant, provisions set forth in Act 77. Those provisions impose an 8:00 p.m. Election Day deadline for the receipt of absentee and mail-in ballots. Petitioners seek to modify these provisions of the Election Code on the theory that they may disenfranchise voters in the midst of the COVID-19 pandemic

in violation of their constitutional right to vote. The Secretary explains that the Election Code has recently been amended by the Legislature to account specifically for the COVID-19 pandemic. *See* the Act of March 27, 2020, P.L. ___, No. 12 (Act 12). Through the enactment of Act 12, which the Secretary contends is plainly valid on its face, the Legislature postponed the primary election for five weeks from April 28, 2020, to June 2, 2020; gave counties more flexibility in consolidating and relocating polling places and recruiting poll workers; and made permanent changes to the Election Code designed to ease the processing of absentee and mail-in ballots, including allowing county boards of elections to begin pre-canvassing of absentee and mail-in ballots at 7:00 a.m. on Election Day, rather than after the polls close. However, in Act 12, the Legislature chose not to extend the received-by deadline challenged by Petitioners beyond the five weeks. The Secretary explains that

every deadline, by its very nature, operates to deny the ability to vote to those who are unable or unwilling to comply with the timing requirement. But elections must take place at some definite time, and election-administration deadlines are needed to ensure that elections are orderly.

Secretary's Response in Opposition to Application for Preliminary Injunction, at 20.

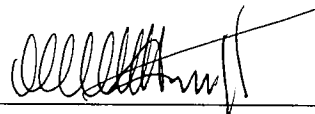
Because Petitioners have raised a challenge concerning the constitutionality of Sections 1306(c), 1308(g)(1)(ii), and 1306-D(c) of the Election Code, 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), and 3150.16(c), but have not alleged facts to show that enforcement of the received-by deadline will result in an unconstitutional *statewide* deprivation of the right to vote, the Secretary's assertion that Petitioners have failed to make their case for issuance of a statewide preliminary, or permanent, injunction appears meritorious.

The Court next considers the Secretary's assertion that, based on the facts averred in the Petition, even if judicial intervention is necessary to avoid a deprivation of voters' constitutional rights in one or more counties, the affected individuals are not without remedy because they may seek relief in the appropriate court of common pleas.

The Secretary's argument is compelling. Courts of common pleas, by statute, are responsible for being in continuous session on the days of the primaries and other elections from 7:00 a.m. to 10:00 p.m., and as long as reasonably necessary thereafter, to ensure "a free, fair and correct computation and canvass of the votes cast at said election"; settle summarily controversies that may arise with respect to the conduct of the election" and "decide such other matters pertaining to the election as may be necessary to carry out the intent of" the Election Code. Section 1206 of the Election Code, 25 P.S. § 3046 (duties of common pleas court on days of primaries and elections). *See In re General Election in City and County of Philadelphia on November 8, 1938*, 2 A.2d 301 (Pa. 1938) (holding that, where a voter's registration card is not produced by election commission at the voting place at the time of an election, as required by statute, such voter may apply to any judge of the court of common pleas for relief pursuant to Section 1206 of the Election Code, 25 P.S. § 3046); *see also In re General Election—1985*, 531 A.2d 836 (Pa. Cmwlth. 1987) (affirming decision of court of common pleas to suspend general election in 11 election districts for 2 weeks due to severe flooding, loss of electricity, and heat and water because of extreme weather, and rejecting request to hold a new, county-wide election).

Conclusion

The Secretary's arguments that Petitioners are not without a remedy, in that they may seek judicial intervention and relief from the appropriate court of common pleas on Election Day, are compelling. The Court therefore does not believe Petitioners are likely to prevail on the claims raised in their Petition at this juncture. Accordingly, the Court denies Petitioners' Preliminary Injunction Application and dismisses as moot the Emergency Application for Expedited Resolution of Petitioners' Preliminary Injunction Application.

A handwritten signature in black ink, appearing to read 'Mary Hannah Leavitt', is written over a horizontal line.

MARY HANNAH LEAVITT, President Judge