

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Filed 09/21/2020 Supreme Court Middle District

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. 57 MAP 2020

No. 364 MD 2020

PETITIONER’S JURISDICTIONAL STATEMENT

Petitioner, the National Association for the Advancement of Colored People Pennsylvania State Conference, pursuant to Pennsylvania Rules of Appellate Procedure 905, 909, 910, and 1101, files this Jurisdictional Statement in support of its Notice of Appeal filed this date in the Commonwealth Court, and sets forth the following:

I. REPORT OF THE OPINION BELOW

This is an appeal from the order of the Commonwealth Court dated September 11, 2020 (attached as Exhibit A), dismissing Petitioner’s Petition for Relief and sustaining preliminary injunctions based on demurrer and ripeness, and the order it

made final, also dated September 11, 2020 (attached as Exhibit B), denying Petitioner's Application for Special Relief in the Nature of a Preliminary Injunction. The opinion denying Petitioner's Application for Special Relief in the Nature of a Preliminary Injunction has not been reported.

II. JURISDICTION

The Supreme Court has jurisdiction over this appeal pursuant to 42 Pa. C.S.A. §§ 723(a) 5105(a), and Pennsylvania Rule of Appellate Procedure 1101, which provides that an immediate appeal to this Court may be taken as of right from final orders by the Commonwealth Court in matters which were originally commenced in the Commonwealth Court.

III. TEXT OF ORDER IN QUESTION

The text of the September 11, 2020 order is as follows:

ORDER

AND NOW, this 11th day of September, 2020, upon consideration of the preliminary objections to the Petition for Review Addressed to this Court's Original Jurisdiction (Petition) of the National Association for the Advancement of Colored People Pennsylvania State Conference (NAACP), it is hereby **ORDERED** as follows:

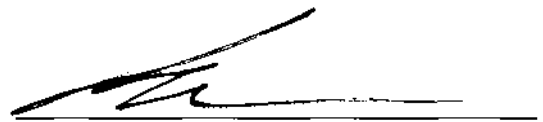
1. The first and second preliminary objections of Respondents Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the

Bureau of Election Services and Notaries (Respondents), based on demurrer and ripeness, respectively, are **SUSTAINED**. The third preliminary objection of Intervenor Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenor), based on demurrer, is **SUSTAINED**. The first preliminary objection of Intervenor President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate Majority Leader Jake Corman (Senate Leader Intervenor), based on ripeness, is **SUSTAINED**. The second and sixth preliminary objections of Intervenor Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (Republican Committee Intervenor), based on ripeness and demurrer, respectively, are **SUSTAINED**. The NAACP has failed to allege adequate facts demonstrating a constitutional violation/injury, beyond mere speculation, that would warrant the grant of the statewide relief requested in the Petition.

2. In light of our decision sustaining preliminary objections challenging the legal sufficiency of the NAACP's Petition (on the basis of demurrer and ripeness), the Court does not address the remaining preliminary objections. The Court notes, however, that the preliminary objection asserted by Respondents, House Leader Intervenor, Senate Leader Intervenor, and Republican Committee Intervenor raising

the failure to join indispensable parties, those being the 67 Pennsylvania county boards of elections, has merit in light of the relief the NAACP seeks in its Petition. Nonetheless, if the Court were to grant this preliminary objection, the Court would not have dismissed the Petition without first providing the NAACP with the opportunity to amend its pleading to add the indispensable parties.

3. The Petition is DISMISSED.



P. KEVIN BROBSON, Judge

IV. PROCEDURAL HISTORY

Petitioner filed its lawsuit on June 18, 2020, because Pennsylvania's response to the novel SARS-CoV-2 coronavirus pandemic deprives Pennsylvania citizens of their fundamental right to vote in the midst of an unprecedented public health crisis, in violation of the Free and Equal Elections Clause. Given the substantial risk that thousands of Pennsylvanians will be disenfranchised in the November 3, 2020 general election absent relief, Petitioner also sought a preliminary injunction on August 6, 2020, directing Respondents to maintain a sufficient number of polling places; require each county board of elections to mail notice to voters of polling place changes; ensure accessibility of polling place locations; require early in-person voting; require increased access to mail-in ballot applications; expand the number of

ballot drop boxes; require use of hand-marked paper ballots as the primary voting method; and require all persons to wear masks at polling places.

After the Commonwealth Court conducted a hearing on Petitioner's application for preliminary injunction and heard oral argument on the Respondents' and Intervenors' preliminary objections, it denied Petitioner's application and sustained the preliminary objections, dismissing the lawsuit.

V. QUESTION PRESENTED ON APPEAL

The questions presented for review are:

1. Did the Commonwealth Court err in sustaining preliminary objections of Respondents, House Leader Intervenors, Senate Leader Intervenors, and/or Republican Committee Intervenors?

2. Did the Commonwealth Court err in denying Petitioner's Application for Special Relief in the Nature of a Preliminary Injunction?

Date: September 21, 2020

/s/ Julia Chapman

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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: September 21, 2020

/s/ Julia Chapman

Julia Chapman (Pa. 315959)

Attorney Petitioner

CERTIFICATE OF SERVICE

I, Julia Chapman, hereby certify that on September 21, 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: September 21, 2020

/s/ Julia Chapman
Julia Chapman (Pa. 315959)

Attorney Petitioner

Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State Conference,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 364 M.D. 2020
	:	
	:	
Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries,	:	
	:	
Respondents	:	

ORDER

AND NOW, this 11th day of September, 2020, upon consideration of the preliminary objections to the Petition for Review Addressed to this Court’s Original Jurisdiction (Petition) of the National Association for the Advancement of Colored People Pennsylvania State Conference (NAACP), it is hereby **ORDERED** as follows:

1. The first and second preliminary objections of Respondents Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries (Respondents), based on demurrer and ripeness, respectively, are **SUSTAINED**. The third preliminary objection of Intervenors Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenors), based on demurrer, is **SUSTAINED**. The first preliminary objection of Intervenors President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate

Majority Leader Jake Corman (Senate Leader Intervenors), based on ripeness, is **SUSTAINED**. The second and sixth preliminary objections of Intervenors Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (Republican Committee Intervenors), based on ripeness and demurrer, respectively, are **SUSTAINED**. The NAACP has failed to allege adequate facts demonstrating a constitutional violation/injury, beyond mere speculation, that would warrant the grant of the statewide relief requested in the Petition.

2. In light of our decision sustaining preliminary objections challenging the legal sufficiency of the NAACP's Petition (on the basis of demurrer and ripeness), the Court does not address the remaining preliminary objections. The Court notes, however, that the preliminary objection asserted by Respondents, House Leader Intervenors, Senate Leader Intervenors, and Republican Committee Intervenors raising the failure to join indispensable parties, those being the 67 Pennsylvania county boards of elections, has merit in light of the relief the NAACP seeks in its Petition. Nonetheless, if the Court were to grant this preliminary objection, the Court would not have dismissed the Petition without first providing the NAACP with the opportunity to amend its pleading to add the indispensable parties.

3. The Petition is **DISMISSED**.



P. KEVIN BROBSON, Judge

Exhibit B

Services and Notaries (collectively, Respondents); (3) President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate Majority Leader Jake Corman (Senate Leader Intervenors); (4) Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenors); and (5) Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (collectively, Republican Committee Intervenors).³

³ As the NAACP's claims and relief in this matter, as set forth in its Petition for Review and Preliminary Injunction Application, bear directly on the November 3, 2020 General Election, which is less than two months away, in the interest of time the Court resolved the pending applications for intervention in an expedited fashion, erring on the side of overinclusion for purposes of creating a fulsome record on the Preliminary Injunction Application. The Court, nonetheless, consulted case precedent on the related, but separate questions of standing and intervention in lawsuits that involve the right to vote and the right to have one's vote counted. *See, e.g., Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 995 (Pa. 2002) (holding that because right to vote is personal, "entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan"); *Erfer v. Cmwltth.*, 794 A.2d 325, 330 (Pa. 2002) (applying *Albert* and confirming holding that Pennsylvania State Democratic Committee lacks standing to bring reapportionment challenge), *abrogated on other grounds by League of Women Voters v. Cmwltth.*, 178 A.3d 737 (Pa. 2018); Order, *League of Women Voters v. Cmwltth.* (Pa. Cmwltth., No. 261 M.D. 2017, filed Nov. 13, 2017) (sustaining preliminary objections challenging standing and, applying *Erfer*, dismissing League of Women Voters as a party petitioner for lack of standing). The Court has also looked to recent orders from the Pennsylvania Supreme Court relating to standing and intervention in similar election-related matters. *See* Order, *Disability Rights Pa. v. Boockvar* (Pa., No. 83 MM 2020, filed May 15, 2020) (denying as moot motions to intervene filed by Senate leaders, House leaders, and Republican political committees); *see also id.* (Wecht, J., concurring) (noting "skepticism that a single chamber of the legislature would have standing to intervene in an action of this nature" based on purported authorization by a majority of the members of each respective chamber); Order, *Crossey v. Boockvar* (Pa., No. 108 MM 2020, filed Aug. 21, 2020) (denying intervention to Republican political committees); *see also id.* (Saylor, C.J., concurring in part & dissenting in part) (noting similar interests between Republican political committees denied intervention and entity named as petitioner); Order, *Pa. Democratic Party v. Boockvar* (Pa., No. 133 MM 2020, filed Sept. 3, 2020) (granting intervention to Senate leaders representing Republican Senate Caucus and to the Republican Party of Pennsylvania, but denying intervention to Republican political committees, other political organizations, and individual electors); *see also id.* (Wecht, J., concurring in part & dissenting in part) (opining that "Republican Party of Pennsylvania can claim only the *prospect* of injury to its political interests, which does not constitute a cognizable basis upon which to intervene in" the case). In light of the foregoing, and in the interest of clarifying

Following the presentation of the NAACP's case in support of its Preliminary Injunction Application, Respondents, Senate Leader Intervenors, House Leader Intervenors, and Republican Committee Intervenors jointly applied for the suspension of the hearing and an order denying the Preliminary Injunction Application. They contended that the NAACP failed to meet its evidentiary burden on the necessary elements for preliminary injunctive relief. The Court heard oral argument from the parties and, thereafter, on the record, granted the application for suspension of the hearing, noting that it was inclined to deny the NAACP's Preliminary Injunction Application. The Court provided reasons for its tentative decision on the record but informed the parties that its decision was not final until it issued a written order. This Memorandum Opinion and the accompany Order represent the Court's final disposition of the NAACP's Preliminary Injunction Application.

The Petition for Review

Generally speaking, the Petition for Review in this matter sets forth the NAACP's concern that the current COVID-19 pandemic will cause various disruptions to the November 3, 2020 General Election (General Election), as were apparent in the June 2, 2020 Primary Election (Primary Election), and that the occurrence of such disruptions will result in the disenfranchisement of large numbers of Pennsylvania voters, particularly African Americans and Latinos, and, concomitantly, violations of rights protected under the United States and Pennsylvania Constitutions. More specifically,⁴ the NAACP raises general

the area of the law, the Court would welcome guidance from the Pennsylvania Supreme Court on the question of organizational standing to sue and/or intervene in matters involving "the right to vote and the right to have one's vote counted." *Erfer*, 794 A.2d at 330.

⁴ In Count I of the Petition, the NAACP alleges generally that the provisions of the Election Code relating to absentee and mail-in voting, the use of electronic voting machines, and the consolidation of polling places severely burden many Pennsylvanians' right to vote in violation of

constitutional claims challenging the “election scheme,” as set forth in the Pennsylvania Election Code⁵ (Election Code), as it relates to absentee and mail-in voting, a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552 (Act 77); in-person voting and the use of electronic voting machines, which Act 77 mandated; and the consolidation of polling places, which the General Assembly and the Governor authorized through the Act of March 27, 2020, P.L. 41 (Act 12) (expired).⁶ Specifically, as it relates to the General Election, the NAACP contends that Pennsylvania has failed to take appropriate steps to protect voters during the pandemic and has otherwise prevented voters from casting their ballots either in person or by mail. The NAACP claims that voters in

the free and equal elections clause of article I, section 5 of the Pennsylvania Constitution. Pa. Const. art. I, § 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”). Count II similarly alleges that the Commonwealth’s current election scheme will disproportionately and/or more severely burden many Pennsylvanians’ right to vote in violation of article I, section 5 of the Pennsylvania Constitution, including, in particular, African-American and Latino voters who have been disproportionately affected by COVID-19 in Pennsylvania generally and, on that basis, are more likely to be disproportionately burdened by the current voting scheme in the upcoming General Election. Finally, in Count III, the NAACP alleges that the current election scheme will, again, disproportionately and/or more severely burden Pennsylvania voters in violation of article I, sections 1 and 26 of the Pennsylvania Constitution. Pa. Const. art. I, §§ 1 (“All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”), 26 (“Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”).

⁵ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

⁶ Act 12 amended various provisions of Act 77 and added emergency provisions to the Election Code for the Primary Election only, including provisions postponing the Primary Election to June 2, 2020, permitting the consolidation of polling places, and mandating other steps to ease administration of the Primary Election in light of the unprecedented series of challenges faced by election officials not only due to the COVID-19 pandemic but also because Act 77’s major revisions to the Election Code would be applied to an election for the first time, during a pandemic. Although Act 12 has since expired, which the NAACP acknowledges in its Petition for Review, the NAACP nevertheless argues that there is a “real threat that substantially similar legislation” to Act 12 will be passed for the General Election. (Petition ¶ 73.)

the Primary Election experienced long lines and overcrowding due to the consolidation of polling places, making social distancing nearly impossible (Petition ¶¶ 8-9); inadequate notice of relocated or consolidated polling places (Petition ¶ 10); “an increased risk of transmission of the coronavirus” caused by counties requiring all voters to vote on electronic voting machines and failing to make hand-marked paper ballots available to voters (Petition ¶ 11); and absentee and mail-in ballots that arrived late due to either the county boards of elections’ delay in processing applications and/or sending ballots to voters or delays experienced by the United States Postal Service (USPS), forcing voters to decide either to mail in their ballots and risk that they would arrive late and not be counted or vote in person at great risk to their health (Petition ¶¶ 13, 17). It further claims that African-American and Latino voters, who have been disproportionately affected by the COVID-19 pandemic generally, are more likely to experience these issues compared to other voters. (Petition ¶¶ 18-19.) The NAACP contends that these same issues are likely to repeat themselves in the upcoming General Election without judicial intervention. (Petition ¶¶ 20-21.)

As relief, the NAACP seeks a comprehensive order directing the Secretary to: (1) ensure that each county board of elections maintains a sufficient number of polling places so each resident can exercise his or her right to vote; (2) require that each county board of elections gives adequate notice to voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, and posts such notice at old polling places; (3) require increased access to mail-in voting across the Commonwealth by (a) automatically sending mail-in ballot applications to all registered voters in accordance with their language preferences, (b) ensuring that absentee and mail-in ballots are available in formats that are accessible to voters with disabilities without requiring assistance from another

person, (c) requiring each county to provide ballot drop boxes and to accept ballots returned to a drop box by the close of the polls on Election Day, and (d) providing adequate guidance to election officials when verifying mail-in ballots through signature matching and requiring notice and an opportunity to cure a mail-in ballot with facial defects, such as a mismatched signature; and (4) require that all polling places in the Commonwealth use hand-marked paper ballots for the General Election, while retaining at least one electronic voting machine for those voters who request to use same and as required by Federal law. (See Petition at ¶¶ 66-67 (Wherefore Clause).)

Preliminary Injunction Application

The NAACP's Preliminary Injunction Application seeks even more comprehensive relief pertaining to the General Election than that requested in the Petition for Review, including an order directing the Secretary to: (1) ensure that each county board of elections maintains a sufficient number of polling places *to ensure that no voter must wait more than 30 minutes to vote*; (2) require that each county board of elections mails 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 the Secretary provides for the accessibility of polling locations when reviewing county boards of elections' applications to consolidate any polling locations and disapproves any proposed consolidation that would require any voter to travel more than 0.5 miles farther 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 boards of elections offices to establish satellite or mobile locations where voters can request, complete, and submit their mail-in 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, (a) directing county boards of elections to automatically send mail-in ballot applications to all registered voters in accordance with their language preferences, (b) requiring each county to provide ballot drop boxes, and (c) accepting ballots returned to a drop box by close of the polls on Election Day, (6) *instruct county boards of elections to expand number of ballot drop boxes where voters can return their voted ballots by the close of polls on Election Day*; (7) require the use of *low-touch* hand-marked paper ballots *as the primary voting methods*, 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.* (See Preliminary Injunction Application ¶ 8 (additional relief sought in Preliminary Injunction Application indicated by italicized text).)

Preliminary Injunction Standard

“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 Hr’g Bd. of Little Brittain Twp., Lancaster Cty., Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994), *appeal denied*, 663 A.2d 696 (Pa. 1995). Thus, 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 and must establish the following:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
- (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 Constr. Corp. v. Dep't of Transp., 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 Co. v. The Empowerment Team of the Harrisburg Sch. Dist. Members*, 763 A.2d 539, 546 (Pa. Cmwlth. 2000).

Here, the NAACP seeks a *mandatory* preliminary injunction against the Secretary, requiring her to direct each of the 67 Pennsylvania county boards of elections “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.” (Preliminary Injunction Application at 1.) According to the NAACP, the failure of the Court to grant the mandatory injunctive relief it seeks will result in the unconstitutional disenfranchisement and denial of thousands of Pennsylvania voters’ fundamental right to vote in a free, fair, and equal election. This Court has stated that a mandatory preliminary injunction

is one which goes beyond a mere restraint and commands acts to be done or undone. As such, mandatory preliminary injunctions should be more sparingly issued than those prohibitory in nature. In order to obtain a preliminary mandatory injunction, the moving party must demonstrate that he is legally entitled to immediate relief and that he will suffer irreparable injury if the relief is not granted.

Lewistown Police Ass'n v. Mifflin Cty. Reg'l Police Dep't, 661 A.2d 508, 510 n.11 (Pa. Cmwlth. 1995); see *Mazzie v. Cmwlth.*, 432 A.2d 985, 988 (Pa. 1981); *Zebra v. Sch. Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972). Furthermore, “courts will grant a mandatory injunction only upon a *strong showing* that the plaintiff has

a clear right to relief.” *Medico v. Makowski*, 793 A.2d 167, 169 (Pa. Cmwlth. 2002) (emphasis added).

Analysis

The Court has considered the record testimonial and documentary evidence offered by the NAACP in support of its Preliminary Injunction Application. The Court finds the testimony of the NAACP’s witnesses credible. Nonetheless, the Court concludes that the NAACP’s evidentiary presentation fell well short of the high burden that must be satisfied before this Court can grant the requested mandatory preliminary injunctive relief.

The NAACP failed to prove that, absent the requested mandatory injunctive relief, the NAACP and/or its members are likely to suffer immediate and irreparable harm. Much of the NAACP’s evidentiary presentation related to the difficulties its members encountered during the Primary Election under Act 77 and Act 12. The NAACP failed to prove that these difficulties, related almost exclusively to the consolidation of polling places in certain counties authorized by Act 12, are likely to recur during the General Election.

Reverend Kenneth L. Huston, Dr. Joan Duvall-Flynn, Ed.D., and Springfield Township Commissioner Eddie Graham, all of whom serve the NAACP in some capacity, honestly and credibly testified about their negative experiences while voting in the Primary Election, their fear of contracting COVID-19, and how deeply they care about their fundamental right to vote. The Court was so moved by their testimony that it is convinced that *nothing*, including a global pandemic, could prevent these three witnesses from voting in the upcoming General Election. Under the Election Code, they, and all Pennsylvanians, will be able to choose to vote in person at a polling place, by mailing in their ballot, or by hand-delivering a mail-in ballot to the county boards of elections.

In fact, Reverend Huston⁷ adamantly testified that despite voting in person in the Primary Election, he will vote by mail-in ballot in the General Election so as not to expose himself to the crowded conditions he experienced while voting in person in the Primary Election. Dr. Duvall-Flynn⁸ testified that she was also able to vote in the Primary Election and did so by mail-in ballot; she plans to use a mail-in ballot for the General Election as well. Commissioner Graham⁹ testified that he, too, voted in the Primary Election; however, he did not receive the mail-in ballot he applied for until the day of the Primary Election, despite having requested it in April 2020. He, therefore, travelled to his consolidated polling place on Election Day with a mask and gloves in order to vote, which he did. Commissioner Graham also testified that he plans to vote in person in the General Election because he does not trust the mail.

What this testimony shows is that these three witnesses are deeply committed to exercising their fundamental right to vote no matter the current, or future, circumstances. It shows that they have elected the option to cast their vote that best fits their personal circumstances and concerns in relation to the COVID-19 pandemic. The NAACP did not show that these voters, or any other voters, will suffer some cognizable harm to their right to vote in the absence of the requested relief in the Preliminary Injunction Application.

⁷ Reverend Huston testified that he lives in Monroeville in Allegheny County, Pennsylvania, serves as President of the NAACP Pennsylvania State Conference, and has been a member thereof for approximately 20 years.

⁸ Dr. Duvall-Flynn testified that she resides in Glen Mills in Delaware County, Pennsylvania, has a doctorate degree in education as well as other degrees, is a lifelong member of the NAACP, and has served the NAACP in a multitude of capacities during her lifetime.

⁹ Commissioner Graham testified that he lives in Oreland in Montgomery County, Pennsylvania, is a retired corporate attorney, is now serving his second term on the Springfield County Board of Commissioners, and has served the NAACP in numerous capacities.

Dr. Marc Meredith,¹⁰ testifying as an expert witness on behalf of the NAACP, opined that the “cost of voting”¹¹ in person increases when potential voters’ polling places are moved; that increased costs of voting may cause potential voters to vote by mail rather than in person or to abstain from voting altogether; and that racial and ethnic minorities are more likely to be disenfranchised due to the increased costs of voting in person. The Court finds the testimony of Dr. Meredith credible from a political science perspective. The Court accepts Dr. Meredith’s expert opinion that lower voting costs tend to increase voter turnout—*i.e.*, the higher the cost to vote, the less likely someone will vote. The Court, however, does not find Dr. Meredith’s opinion sufficient to establish immediate and irreparable harm. Dr. Meredith acknowledged in his testimony that the cost to vote is driven by many factors and that there is no such thing as a “cost-free” election. To the extent this cost-to-vote principle has any value in the context of the Preliminary Injunction Application, the NAACP would have had to show by evidence that, without the requested mandatory preliminary injunctive relief, the cost to vote in the upcoming General Election is likely to be so high that it would infringe upon the constitutional right to vote and to have one’s vote counted. The NAACP failed to establish such a connection.

¹⁰ Dr. Meredith testified that he is an associate professor of political science at the University of Pennsylvania and holds both a master’s degree in political science and a Ph.D. in political economics, as well as other commendable degrees. He explained that his focus is on American politics and elections. The Court accepted Dr. Meredith as an expert in political science and voter behavior, without objection.

¹¹ In this context, “cost to vote” is broadly understood as encompassing both monetary—*e.g.*, the costs of postage, gas, etc., and opportunity—*e.g.*, the value of time spent traveling to a polling place and in line waiting to cast an in-person ballot—costs incidental to exercising one’s right to vote.

Dr. David Weber's testimony¹² was certainly helpful in terms of understanding issues generally relating to the spread of COVID-19 and effective methods to limit the spread of the disease. Like Dr. Meredith's testimony, however, not much weight can be given to Dr. Weber's testimony in terms of proving the NAACP's entitlement to a mandatory preliminary injunction in this case. For example, while Dr. Meredith offered his opinions relating to the risk of transmission of COVID-19 through the use of common touch services, he also opined on how those risks can be mitigated. He certainly did not offer any opinion in support of the view that common touch services must be avoided entirely during the pandemic.

The NAACP failed to present any evidence that the Secretary or the county boards of elections are ignoring the risks of COVID-19 transmission and recommended mitigation efforts when planning for the upcoming General Election. Indeed, both Jonathan Marks, who serves as Deputy Secretary for Elections and Commissions at the Department of State, and Seth Bluestein, who serves as Chief Deputy Commissioner for Philadelphia City Commissioner Al Schmidt and oversees elections in Philadelphia, testified about ongoing efforts to mitigate the risk of spread of the virus during in-person voting. And, of course, voters who remain concerned about contracting the virus at a polling place may exercise the option of voting by mail. Nothing in Dr. Weber's testimony, or in the testimony of Mr. Marks or Mr. Bluestein, convinces the Court that voters will be, or are likely to be, disenfranchised in the upcoming General Election absent the requested mandatory injunctive relief.

¹² Dr. Weber is a medical doctor and professor of medicine, pediatrics, and epidemiology at the University of North Carolina School of Medicine. After sustaining various objections regarding the scope of Dr. Weber's testimony, the Court accepted Dr. Weber as an expert in epidemiology.

In reaching this conclusion, the Court does not pass on the question of whether the relief that the NAACP seeks in this case and in its Preliminary Injunction Application reflects good policy with respect to the administration of elections, during times of a pandemic or otherwise. That is not the question before the Court. The question is whether the requested relief is a constitutional imperative—*i.e.*, whether the requested relief *is necessary* to prevent immediate and irreparable constitutional injury. On this question, we find that the NAACP has not met its burden.

Given that we are not convinced that the NAACP has made the necessary showing of irreparable harm, the Court cannot fully engage in the balancing of harms contemplated by the second criteria for a preliminary injunction. Nonetheless, based on the requested relief and the testimony of both Mr. Marks and Mr. Bluestein, the Court finds that ordering the requested mandatory preliminary injunctive relief will impose costs and burdens on all 67 counties of the Commonwealth. While those costs are not easily quantifiable, the Court does not believe they would be insignificant or *de minimis*. Similarly, the testimony of Mr. Marks and Mr. Bluestein shows that the Department of State and the City of Philadelphia are actively preparing for the upcoming General Election. The testimony also shows that the NAACP is currently engaged in voter education efforts relating to mail-in voting. The mandatory preliminary injunctive relief that the NAACP seeks would certainly disrupt those efforts and likely the efforts of county boards of elections across the state to plan for the upcoming General Election. The Court is concerned that issuing the type of relief the NAACP seeks could also confuse the public as to how, where, and when they may cast their vote. For these reasons, the second and sixth criteria counsel against issuance of the requested mandatory preliminary injunctive relief.

With regard to whether the NAACP established a very strong showing that it has a clear right to the relief it seeks, the Court is not persuaded. The Petition for Review in this matter does not allege that any specific provision of the Election Code is unconstitutional on its face or even as-applied. Rather, the NAACP alleges that the Election Code, as a whole, is inadequate to address the unique circumstances of voting during a global pandemic and that this inadequacy is particularly acute for African-American and Latino voters. The bulk of the NAACP's concerns, however, stem from events during the Primary Election that were confined to a handful of the more populous counties in the Commonwealth, particularly in and around Philadelphia and Allegheny Counties, and in response to Act 12, which is no longer in effect. The Election Code expressly contemplates that issues may arise during an election and provides that such issues are to be addressed by the court of common pleas of each county.¹³ Accordingly, the Court is not convinced that the Petition for Review presents a strong case for the prophylactic *statewide* mandatory preliminary injunctive relief that the NAACP seeks. Even if the NAACP could meet the burden of rebutting the presumption of constitutionality attached to the Election Code,¹⁴ the Court doubts it has the authority to grant the remedy that the NAACP seeks in its

¹³ Section 1206 of the Election Code, 25 P.S. § 3046 (providing that each county court of common pleas “shall act as a committing magistrate for any violation of the election laws; shall settle summarily controversies that may arise with respect to the conduct of the election; shall issue process, if necessary, to enforce and secure compliance with the election laws; and shall decide such other matters pertaining to the election as may be necessary to carry out the intent of this act”); see *In re General Election in City & Cty. of Phila. 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); 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 eleven election districts for two weeks due to severe flooding, loss of electricity, and heat and water because of extreme weather, and rejecting request to hold new, county-wide election).

¹⁴ *Pa. Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017).

Petition for Review. *See, e.g., In re Fortieth Statewide Investigative Grand Jury*, 197 A.3d 712, 721 (Pa. 2018) (“In responding to the present constitutional challenge, our Court may not usurp the province of the legislature by rewriting the Act to add hearing and evidentiary requirements that grand juries, supervising judges, and parties must follow which do not comport with the Act itself, as that is not our proper role under our constitutionally established tripartite form of governance.”).

With respect to the final criteria, the NAACP’s requested relief would create a new paradigm for the upcoming General Election. It neither preserves the status quo nor restores the parties to any prior status. Moreover, the requested mandatory injunctive relief is overbroad when compared to the alleged constitutional injury. What the NAACP seeks ventures into policymaking territory in the conduct of elections reserved to the General Assembly under the United States Constitution.¹⁵ Indeed, the relief that the NAACP seeks in its Preliminary Injunction Application is, in the Court’s view, incompatible with the policy choices made by the General Assembly, as reflected in the Election Code.

For the above reasons, the NAACP has failed to meet its burden of establishing all of the criteria for entitlement to the mandatory preliminary injunction that it seeks in its Preliminary Injunction Application. The Preliminary Injunction Application is, therefore, denied.


P. KEVIN BROBSON, Judge

¹⁵ U.S. Const. art. I, § 4, cl.1.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State	:	
Conference,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 364 M.D. 2020
	:	
	:	
Kathy Boockvar, Secretary of the	:	
Commonwealth, and Jessica Mathis,	:	
Director of the Bureau of Election	:	
Services and Notaries,	:	
	:	
Respondents	:	

ORDER

AND NOW, this 11th day of September, 2020, the Application for Special Relief in the Nature of a Preliminary Injunction of Petitioner the National Association for the Advancement of Colored People Pennsylvania State Conference is DENIED for the reasons set forth in the accompanying Memorandum Opinion.



P. KEVIN BROBSON, Judge

Certified from the Record

SEP 11 2020

And Order Exit