

IN THE SUPREME 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. 108 MM 2020

PETITIONERS' ANSWER TO RESPONDENTS'
PRELIMINARY OBJECTIONS TO AMENDED PETITION
FOR DECLARATORY AND INJUNCTIVE RELIEF

Petitioners Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, (“Individual Petitioners”), and the Pennsylvania Alliance for Retired Americans (“the Alliance”) (collectively, “Petitioners”) hereby submit this Answer in opposition to Respondents’ Preliminary Objections to the Amended Petition for Declaratory and Injunctive Relief.

I. PRELIMINARY STATEMENT

Respondents, the Secretary of the Commonwealth and the Director of the Bureau of Election Services and Notaries (collectively, the “Secretary”), suggest that nothing short of outright disenfranchisement is sufficient to state a claim for

violations of the constitutional right to vote and to a free and equal election—despite the fact that the electoral procedures *currently in place* proved to be inadequate to protect these rights in the Commonwealth’s most recent election. In the June 2 primary, tens of thousands of Pennsylvania voters who requested mail ballots did not receive them until the day before, or in many cases well after, the primary, and others did not even receive their requested ballots to begin with and were forced to vote in-person or sit out the election entirely. Among voters who were able to mail their ballots by Election Day, tens of thousands saw their ballots arrive after the receipt deadline. And counties were forced to seek emergency relief from Courts of Common Pleas, citing the same conditions that Petitioners had alleged would result in disenfranchisement, including backlogs in processing a huge influx of mail ballot requests and USPS delivery delays due to effects of the COVID-19 pandemic.

The Secretary posits that things will be different in November, without indicating what will change or when. The election, meanwhile, is less than three months away; turnout among mail-in and absentee voters is expected to dwarf the primary; and the election procedures (and absence of safeguards) that led to the disenfranchisement, confusion, and ultimate breakdown of the electoral processes are still in place. Indeed, the Secretary’s recent recommendation to extend the ballot

receipt deadline,¹ and the Department of State’s efforts to provide pre-paid postage for mail ballots,² all but confirms that Petitioners’ claims—which seek the implementation of similar safeguards to protect the right to vote—are neither hypothetical nor speculative. To adopt the Secretary’s wait-and-see approach would require the Court to gamble with the constitutional rights of voters who cannot permissibly be required to endure constitutional harm in order to state a claim for relief; “[a]n injunction is of no help if one must wait to suffer injury before the court grants it,” *Texas v. United States*, 809 F.3d 134, 173 n.137 (5th Cir. 2015). In any event, it is well settled that burdens short of outright disenfranchisement can nonetheless violate voters’ constitutional rights. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)).

¹ See Pennsylvania Department of State, Pennsylvania 2020 Primary Election Act 35 of 2020 Report (published August 1, 2020), available online at <https://www.dos.pa.gov/VotingElections/Documents/2020-08-01-Act35Report.pdf>, at 42:

“Requiring ballots to be sent to voters earlier will only solve part of this problem, however. Some voters will not receive their ballots until only a day or two before an election; others will receive their ballot earlier but may not return it until closer to the election. To allow for all of these votes to be counted, the Department recommends that counties be required to count votes that are received by the county board of elections no later than the Friday following an election, provided that the envelopes have been postmarked by Election Day. Allowing ballots to be returned by the Friday after Election Day will allow ample time for all votes to be counted prior to the statutory deadline to order a statewide recount of any race that is decided by less than a 0.5% margin. Coupled with a change of date for counties to begin delivering or mailing ballots to voters, this change would provide eligible voters the greatest ability to cast their vote.”

² See <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391> (published July 31, 2020.)

The fact remains that Petitioners have identified practices and procedures—including the Commonwealth’s failure to adopt adequate safeguards to protect voters in the November election—that disenfranchised voters in the recent primary, imposed unconstitutional barriers even for those who ultimately cast a ballot, and, with the exception of the Department of State’s recent efforts to provide prepaid postage for mail ballots, are currently in place for the November election. Indeed, it is the Secretary, rather than Petitioners, who relies on speculation and vague assurances about future events to avoid judicial intervention at a time when voters need it most.

Finally, the fact that county boards of elections may have some involvement in enforcing Petitioners’ requested relief does not require their participation in this matter, nor does it render them indispensable. If that were the case, every county board would be indispensable in every case that potentially affects the conduct of any election. *But see League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (implementing court-draw reapportionment plan without county boards); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Jan. 17, 2014) (addressing challenge to voter ID law without county boards). Petitioners’ lawsuit affects only the ministerial duties of county boards, over which they have no discretion, and “the time honored presumption that public officials will perform their duties properly” eliminates the need for their joinder.

Nason v. Commonwealth, 494 A.2d 499, 502 (Pa. Commw. Ct. 1985). Therefore, the Court should overrule the Secretary's preliminary objections.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND³

1. Admitted that the Secretary of the Commonwealth is tasked with ensuring that Pennsylvania's elections are free, fair, secure, and accessible to all eligible voters. Petitioners are without sufficient knowledge or information to form a belief as to the truth of the remaining averments set forth in this paragraph.

2. Admitted.

3. Admitted that the 2020 Pennsylvania primary election was unprecedented. Petitioners are without sufficient knowledge or information to form a belief as to the truth of the remaining averment in this paragraph.

4. Admitted.

5. Petitioners are without sufficient knowledge or information to form a belief as to the truth of the averments set forth in this paragraph.

6. Admitted.

7. Petitioners are without sufficient knowledge or information to form a belief as to the truth of the averments set forth in this paragraph.

³ Respondents' preliminary statement does not present any averments to which a responsive pleading is required. To the extent that it requires a response, the preliminary statement is denied.

8. Admitted that the General Assembly and Governor Wolf enacted Act 12 of 2020 to postpone the primary election date from April 28 to June 2, and that the procedures in the Act applied only to the primary election. Petitioners are without sufficient knowledge or information to form a belief as to the truth of the averment regarding the efforts described in the first sentence of this paragraph. The remaining averments in this paragraph and the accompanying footnotes purport to summarize legislation and a court decision, both of which speak for themselves. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the referenced material.

9. This paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition.

10. This paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition.

11. This paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition.

12. This paragraph and the accompanying footnote purport to summarize the Petition, which speaks for itself. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition.

III. RESPONSE TO PRELIMINARY OBJECTIONS

A. Response to First Preliminary Objection

13. Petitioners incorporate their responses to the preceding paragraphs as if fully set forth herein.

14. This first clause and accompanying footnote in this paragraph purport to summarize the Petition, which speaks for itself. Petitioners deny those averments to the extent that they are inconsistent with the Petition. The remainder of the paragraph asserts legal conclusions to which no response is required.

15. This paragraph quotes decisions from various courts, which speak for themselves, and it and its accompanying footnote assert legal conclusions to which no response is required.

16. Admit that some voters' rights will be irreparably burdened if this Court does not grant the relief Petitioners seek or the legislative and executive branches do not implement adequate responsive measures. The paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition. The last sentence of this paragraph asserts a legal conclusion to which no response is required.

17. This paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition.

18. Denied. The fact that the legislature is currently considering expanding the time between the deadlines to apply for and return absentee and mail-in ballots confirms that the issues that Petitioners have identified are concrete, significant, and imminent. Respondents' suggestion that Petitioners' claims will only become ripe after an election crisis occurs ignores the nature of declaratory and injunctive relief: to prevent future harm.

19. The first sentence of this paragraph asserts a legal conclusion to which no response is required. The second, third, and last sentence of this paragraph purport to summarize the Petition, which speaks for itself. Petitioners deny those averments to the extent that they are inconsistent with the Petition. Admitted that the Petition advances cogent arguments for its requested relief. Petitioners are without sufficient knowledge or information to form a belief as to the truth of the remaining averments set forth in this paragraph.

20. Admitted that in a COVID-19-afflicted world, ensuring voters have sufficient access to voting requires significantly greater efforts than in usual circumstances. The remainder of this paragraph cites decisions from various courts,

which speak for themselves, and assert legal conclusions to which no response is required.

21. This paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny those averments to the extent that they are inconsistent with the Petition.

22. Admitted that Petitioners ask for a declaration that the Commonwealth's failure to provide adequate safeguards to ensure access to a free and equal election is unconstitutional. The remainder of the paragraph asserts legal conclusions to which no response is required; to the extent a response is required, the remainder of the paragraph is denied.

23. This paragraph quotes Justice Wecht's concurring statement in, *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020) (Wecht, J., concurring), which speaks for itself, and asserts legal conclusions to which no response is required.

24. Denied. This paragraph asserts a legal conclusion to which no response is required; to the extent a response is required, this paragraph is denied.

25. Denied. This paragraph asserts a legal conclusion to which no response is required; to the extent a response is required, this paragraph is denied.

WHEREFORE, Petitioners respectfully request that the Court overrule Respondents' First Preliminary Objection.

B. Response to Second Preliminary Objection

26. Petitioners incorporate their responses to the preceding paragraphs as if fully set forth herein.

27. This paragraph quotes a court decision, which speaks for itself, and to which no response is required.

28. This paragraph quotes a court decision, which speaks for itself, and to which no response is required.

29. This paragraph quotes a court decision, which speaks for itself, and to which no response is required.

30. The first sentence of this paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny those averments to the extent that they are inconsistent with the Petition. The last sentence of this paragraph asserts a legal conclusion to which no response is required.

31. This paragraph purports to summarize the Petition and quotes a court decision, both of which speak for themselves. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition.

32. Denied. This paragraph asserts a legal conclusion to which no response is required; to the extent a response is required, this paragraph is denied.

WHEREFORE, Petitioners respectfully request that the Court overrule Respondents' First Preliminary Objection.

C. Response to Third Preliminary Objection

33. Petitioners incorporate their responses to the preceding paragraphs as if fully set forth herein.

34. This paragraph quotes a rule of civil procedure, Pa. R. Civ. P. 1032(b), which speaks for itself, and asserts a legal conclusion to which no response is required. To the extent a response is required, this paragraph is denied.

35. This paragraph quotes and cites decisions from various courts, which speak for themselves, and to which no response is required.

36. This paragraph quotes a court decision, which speaks for itself, and to which no response is required.

37. Denied. The challenged provisions are unconstitutional for the reasons stated in the Petition, regardless of the actions that the Commonwealth's county boards of elections may or may not take. This paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny those averments to the extent that they are inconsistent with the Petition.

38. Admitted that Petitioners' requested relief may require certain actions by the county election officials but deny that such actions require their joinder in this lawsuit. Petitioners further state that this paragraph purports to summarize the Petition, which speaks for itself. Petitioners deny the averments in this paragraph to the extent that they are inconsistent with the Petition.

39. Admitted that county election officials have not joined this action. Denied that Petitioners' claims or requests for relief require the joinder of county election officials. Petitioners further state that this paragraph purports to summarize the Petition, which speaks for itself, and asserts legal conclusions to which no response is required. To the extent a response is required, this paragraph is denied.

40. This paragraph quotes an isolated statement from the Commonwealth Court's May 28, 2020 Order, which did not find that the county boards of elections were indeed indispensable parties, and to which no response is required. To the extent a response is required, the "observation" quoted by Respondents is not controlling and does not establish that county boards of elections are indispensable parties, thus the paragraph is denied.

41. This paragraph asserts a legal conclusion to which no response is required; to the extent a response is required, this paragraph is denied.

WHEREFORE, Petitioners respectfully request that the Court overrule Respondents' Third Preliminary Objection.

D. Response to Fourth Preliminary Objection

42. Petitioners incorporate their responses to the preceding paragraphs as if fully set forth herein.

43. This paragraph quotes and cites decisions from various courts, which speak for themselves, and to which no response is required.

44. Admitted that Petitioners seek an order directing Respondents to implement additional safeguards for the November 3, 2020 general election and any other election conducted during the COVID-19 pandemic, and that the requested safeguards would require Respondents to exercise their authority over the county boards. Denied that the requested relief renders county boards of elections indispensable parties.

45. This paragraph asserts a legal conclusion to which no response is required; to the extent a response is required, this paragraph is denied.

WHEREFORE, Petitioners respectfully request that the Court overrule Respondents' Fourth Preliminary Objection.

Dated: August 5, 2020

Marc E. Elias*
Uzoma N. Nkwonta*
Emily R. Brailey*
Stephanie I. Command*
Zachary J. Newkirk*
Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Sarah L. Schirack**
PERKINS COIE LLP
1029 W. 3rd Ave., Suite 300
Anchorage, AK 99517
Telephone: 907.279.8561

Torryn Taylor Rodgers**
PERKINS COIE LLP
505 Howard St., Suite 1000
San Francisco, CA 94105-3204
Telephone: 415.344.7000

Counsel for Petitioners

*Admitted pro hac vice

**Pro hac vice application forthcoming.

By: Adam C. Bonin

Adam C. Bonin
LAW OFFICE OF ADAM C.
BONIN
The North American Building
121 South Broad Street, Suite 400
Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 701-2321
adam@boninlaw.com

IN THE SUPREME 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. 108 MM 2020

[PROPOSED] ORDER

AND NOW this _____ day of _____ 2020, upon consideration of Respondents' Preliminary Objections to Petitioners' Amended Petition for Declaratory and Injunctive Relief, and the Answers of Petitioners thereto, it is hereby ORDERED that said Preliminary Objections are OVERRULED.

BY THE COURT:
