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IN THE SUPREME COURT OF PENNSYLVANIA

<p>MICHAEL CROSSEY, et al.,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,</p> <p style="text-align: center;">Respondents.</p>

No. 108 MM 2020

**PRAECIPE TO WITHDRAW CERTAIN OF
RESPONDENTS’ PRELIMINARY OBJECTIONS BASED ON
UNITED STATES POSTAL SERVICE’S ANNOUNCEMENT OF
STATEWIDE MAIL DELAYS AFFECTING GENERAL ELECTION**

“The right [to vote] is pervasive of other basic civil and political rights, and is the bed-rock of our free political system.” *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999) (internal quotation marks omitted). This right is enshrined in the Pennsylvania Constitution, which requires that all “elections conducted in this

Commonwealth must be ‘free and equal.’” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (quoting Pa. Const. art. I, § 5). This clause, which “has no federal counterpart,” mandates that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *Id.* at 802, 804. Respondents, the Secretary of the Commonwealth and the Director of the Bureau of Election Services and Notaries, are public officials charged with safeguarding Pennsylvanians’ ability to exercise the franchise and ensuring that Pennsylvania’s elections remain free and fair.

Recent developments show that judicial relief is needed to protect Pennsylvanians’ fundamental right to vote. Specifically, the Secretary has received a letter from the United States Postal Service’s General Counsel, Thomas J. Marshall, stating that, based on the Postal Service’s expected delivery times for mail service at the time of the general election, “there is a significant risk” that certain voters who timely request an absentee or mail-in ballot “will not have sufficient time to complete and mail the completed ballot[s] back to election officials in time for it to arrive by [Pennsylvania’s] return deadline.” (Letter from Thomas J. Marshall to Secretary Kathy Boockvar at 2 (July 29, 2020), attached as

Exhibit 1 hereto.) The Postal Service’s announcement represents a significant change to the outlook for voting by mail in the general election. In the lead-up to the primary election, Respondents were aware of isolated issues in certain counties, which raised the prospect of delays in the processing of ballot applications and the delivery of ballots for certain voters (and were addressed by, among other things, county-specific orders issued by certain Courts of Common Pleas¹). But prior to Mr. Marshall’s letter, the Postal Service had not indicated the likelihood of widespread, continuing, multiple-day mail-delivery delays presenting an overwhelming, statewide risk of disenfranchisement for significant numbers of voters utilizing mail-in ballots.² Respondents file this Praecipe to inform the Court of these developments and, based on these new circumstances, to withdraw their

¹ See *In re: Extension of Time for Absentee and Mail-in Ballots to Be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-02322 (C.P. Bucks Cnty.); *In re: Extension of Time for Absentee and Mail-in Ballots to Be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-06565 (C.P. Montgomery Cnty.); *In re: Extension of Time for Absentee and Mail-in Ballots to Be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-003416 (C.P. Del. Cnty.).

² For example, as previously explained to this Court, Department of State officials were in close contact with representatives of the Postal Service in the months leading up to the June 2020 primary election, and were not given any reasons to expect that delivery of first-class mail take longer than the typical one to three business days. Declaration of Jonathan Marks in Support of Respondents’ Response in Opposition to Application for Special Relief in the Nature of a Preliminary Injunction ¶¶ 42-46 (May 11, 2020), *Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020 (Pa. Sup. Ct.).

first and second Preliminary Objections to the Amended Petition in this case.³

I. PETITIONERS' CLAIMS AND RESPONDENTS' PRELIMINARY OBJECTIONS

The COVID-19 pandemic has posed significant challenges for the administration of elections. It has also created obstacles for voters, many of whom fear that travelling to polling places on election day will put their health—and, potentially, the health of their loved ones—at risk. Fortunately, in 2019, with broad and bipartisan support, the Pennsylvania legislature enacted Act 77, which, among other important updates to Pennsylvania's Election Code, for the first time offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. This historic change was a significant development that undeniably makes it easier for all Pennsylvanians to exercise their right to vote. Indeed, Act 77 has been essential to protecting Pennsylvanians' access to the

³ For the avoidance of doubt, Respondents clarify that their third and fourth Preliminary Objections, asserting failure to join necessary parties and sovereign immunity, do not apply to the Amended Petition's request for an extension of the received-by deadline resulting from alleged delays in mail-delivery times. Accordingly, as explained further below, Respondents no longer object to the Court's granting that specific relief. Respondents adhere to their third and fourth Preliminary Objections, however, with respect to the Amended Complaint's request for an order requiring elections officials to permit third-party delivery of absentee and mail-in ballots from non-disabled voters. The remaining item of relief sought in the Amended Complaint—provision of prepaid postage on ballot-return envelopes—is now moot. *See* Pennsylvania Pressroom, *Pennsylvania Will Provide Postage-Paid Return Envelopes with Mail and Absentee Ballots* (July 31, 2020), <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391>.

franchise during the ongoing public health crisis, mitigating congestion at polling places and providing a crucial alternative to in-person voting.

In their Amended Petition in the present action, Petitioners allege that the expected high volume of mail-in voting in the upcoming general election, combined with delays Petitioners predict in the processing and delivery of applications and ballots, threatens to disenfranchise certain Pennsylvania voters. Specifically, Petitioners warn that, due to these alleged delays, voters who timely request an absentee or mail-in ballot in advance of the application deadline—one week prior to election day, *see* 25 Pa. Stat. §§ 3146.2a(a), 3150.12a(a)—may be unable to complete and mail it back so that it is received by county boards of elections by the current deadline of 8:00 p.m. on election day. (Am. Pet. ¶ 55.) Accordingly, Petitioners request that, among other things, the Court extend the received-by deadline so that ballots mailed by election day will be counted even if takes a few additional days for them to be received by county boards of elections.

In their Preliminary Objections filed on July 27, 2020, Respondents argued, among other things, that Petitioners' claims of constitutional injury were hypothetical (Objection No. 1) and unripe (Objection No. 2). In particular, Respondents maintained that while future developments could potentially warrant judicial intervention, Petitioners' predictions were "simply too speculative, at th[at] point, to state a claim" for statewide relief. (Preliminary Objections at 6.) For

essentially the same reasons, this Court dismissed a lawsuit seeking similar relief in May 2020. *See Disability Rights Pennsylvania et al. v. Boockvar et al.*, No. 83 MM 2020, Order dated May 15, 2020 (sustaining Respondents’ preliminary objection); *see also id.*, Concurring Statement of Justice Wecht at 1–2 (May 15, 2020) (“While circumstances may change, the possibility that votes may be suppressed due to late ballot delivery, as presently alleged, is too remote at this time to constitute a cognizable injury.”).

II. NEW DEVELOPMENTS ESTABLISH A CONCRETE THREAT OF DISENFRANCHISEMENT WARRANTING JUDICIAL RELIEF

Respondents’ position was correct at the time their Preliminary Objections were filed. But circumstances have changed. Recent reports have revealed that the United States Postal Service, already strained by the COVID-19 pandemic, has implemented certain changes to its internal protocols and procedures that have resulted in widespread, multiple-day delays in mail delivery.⁴ The recent letter by the Postal Service’s General Counsel makes the threat to Pennsylvanians’ right to vote unmistakably clear and concrete. The letter states bluntly that “the Postal Service’s [current] delivery standards” are “incompatible with” Pennsylvania’s “deadlines for requesting and casting mail-in ballots.” (Exhibit 1, at 1, 2.) Given

⁴ *See, e.g.*, Jacob Bogage, *Postal Service overhauls leadership as Democrats press for investigation of mail delays*, Wash. Post, Aug. 7, 2020, <https://www.washingtonpost.com/business/2020/08/07/postal-service-investigation-dejoy/>.

the current mail-delivery times, the Postal Service recommends that, to be received by county boards by the election-day deadline, voters should mail their completed ballots “no later than Tuesday, October 27.” (*Id.* at 2.) As noted above, however, the Election Code permits voters until October 27 to *request* a ballot. *See* 25 Pa. Stat. §§ 3146.2a(a), 3150.12a(a). The result, in the words of the Postal Service’s letter, is that “there is a significant risk that ... ballots may be requested in a manner that is consistent with [Pennsylvania’s] election rules and returned promptly, and yet not be returned in time to be counted.” (Exhibit 1, at 2.) To state it simply: voters who apply for mail-in ballots in the last week of the application period and return their completed ballot by mail will, through no fault of their own, likely be disenfranchised.

Given these developments, it is no longer the case that the injury alleged by Petitioners is speculative or that their claims for relief are unripe. Accordingly, Respondents hereby withdraw the first two of the Preliminary Objections filed on July 27, 2020. Further, Respondents agree that, to remedy the burden on Pennsylvanians’ right to vote, this Court should order that ballots mailed by voters on or before 8:00 p.m. on election day will be counted if they are otherwise valid and received by the county boards of election on or before the third day following the election. Ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, should

enjoy a presumption that they were mailed by 8:00 p.m. on election day. Ballots bearing postmarks or other proof of mailing dated after election day would not be counted. Such relief would be narrowly tailored to address the injury at issue—namely, the threat that mail-delivery delays during an ongoing pandemic will disenfranchise Pennsylvania voters—and firmly anchored in judicial precedent. *See, e.g., In re General Election-1985*, 531 A.2d 836, 838–39 (Pa. Commw. Ct. 1987) (affirming two-week suspension of election in precinct affected by severe flooding and reasoning that adhering to the prescribed schedule under the prevailing circumstances, “where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws”); *supra* note 1 (citing recent decisions by Courts of Common Pleas); *accord Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016) (issuing injunction extending voter registration deadline due to effect of a hurricane); *Georgia Coalition for the Peoples’ Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (same). Here, unlike the issues that arose in some counties with respect to the June 2020 primary election, the injury arises from statewide delays in mail delivery; accordingly, statewide relief by this Court is appropriate.

In addition, a short extension of the deadline for receipt of completed absentee and mail-in ballots would be feasible to administer and not disrupt other

aspects of election administration. Respondents do not expect that such an extension would create any significant delay in the reporting of Pennsylvania's election results.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: August 13, 2020

By: /s/ Michele D. Hangle

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EXHIBIT 1



July 29, 2020

Honorable Kathy Boockvar
Secretary of the Commonwealth of Pennsylvania
302 North Capitol Building
Harrisburg, PA 17120-0001

Dear Secretary Boockvar:

Re: Deadlines for Mailing Ballots

With the 2020 General Election rapidly approaching, this letter follows up on my letter dated May 29, 2020, which I sent to election officials throughout the country. That letter highlighted some key aspects of the Postal Service's delivery processes. The purpose of this letter is to focus specifically on the deadlines for requesting and casting ballots by mail. In particular, we wanted to note that, under our reading of Pennsylvania's election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards. This mismatch creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them.

As I stated in my May 29 letter, the two main classes of mail that are used for ballots are First-Class Mail and USPS Marketing Mail, the latter of which includes the Nonprofit postage rate. Voters must use First-Class Mail (or an expedited level of service) to mail their ballots and ballot requests, while state or local election officials may generally use either First-Class Mail or Marketing Mail to mail blank ballots to voters. While the specific transit times for either class of mail cannot be guaranteed, and depend on factors such as a given mailpiece's place of origin and destination, most domestic First-Class Mail is delivered 2-5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3-10 days after it is received.

To account for these delivery standards and to allow for contingencies (e.g., weather issues or unforeseen events), the Postal Service strongly recommends adhering to the following timeframe when using the mail to transmit ballots to domestic voters:

- **Ballot requests:** Where voters will both receive and send a ballot by mail, voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum, and preferably long before that time.
- **Mailing blank ballots to voters:** In responding to a ballot request, election officials should consider that the ballot needs to be in the hands of the voter so that he or she has adequate time to complete it and put it back in the mail stream so that it can be processed and delivered by the applicable deadline. Accordingly, the Postal Service recommends that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters. Using Marketing Mail will result in slower delivery times and will increase the risk that voters will not receive their ballots in time to return them by mail.

- **Mailing completed ballots to election officials:** To allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state's due date. So, if state law requires ballots to be returned by Election Day, voters should mail their ballots no later than Tuesday, October 27.

Under our reading of your state's election laws, as in effect on July 27, 2020, certain state-law requirements and deadlines appear to be incompatible with the Postal Service's delivery standards and the recommended timeframe noted above. As a result, to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.

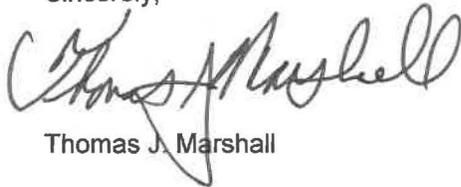
Specifically, it appears that a completed ballot must be received by Election Day to be counted. If that understanding is correct, we accordingly recommend, as noted above, that voters who choose to mail their ballots do so no later than Tuesday, October 27. However, it further appears that state law generally permits voters to request a ballot as late as 7 days before the November general election. If a voter submits a request at or near that deadline, and the ballot is transmitted to the voter by mail, there is a significant risk that the voter will not have sufficient time to complete and mail the completed ballot back to election officials in time for it to arrive by the state's return deadline. That risk is exacerbated by the fact that the law does not appear to require election officials to transmit a ballot until 48 hours after receiving a ballot application.

To be clear, the Postal Service is not purporting to definitively interpret the requirements of your state's election laws, and also is not recommending that such laws be changed to accommodate the Postal Service's delivery standards. By the same token, however, the Postal Service cannot adjust its delivery standards to accommodate the requirements of state election law. For this reason, the Postal Service asks that election officials keep the Postal Service's delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail. It is particularly important that voters be made aware of the transit times for mail (including mail-in ballots) so that they can make informed decisions about whether and when to (1) request a mail-in ballot, and (2) mail a completed ballot back to election officials.

We remain committed to sustaining the mail as a secure, efficient, and effective means to allow citizens to participate in the electoral process when election officials determine to utilize the mail as a part of their election system. Ensuring that you have an understanding of our operational capabilities and recommended timelines, and can educate voters accordingly, is important to achieving a successful election season. Please reach out to your assigned election mail coordinator to discuss the logistics of your mailings and the services that are available as well as any questions you may have. A list of election mail coordinators may be found on our website at: <https://about.usps.com/election-mail/politicalection-mail-coordinators.pdf>.

We hope the information contained in this letter is helpful, and please let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Thomas J. Marshall". The signature is written in a cursive style with a large, stylized initial "T".

Thomas J. Marshall

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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.

Dated: August 13, 2020

/s/ Michele D. Hangle
Michele D. Hangle