

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH D. HAMM, individually and :
as a candidate for the Pennsylvania :
State House of Representatives in the :
84th Legislative District; MIKE :
KELLY, individually and as a :
candidate for the United States House :
of Representatives 16th District; :
BILLY ALLRED; CHAD HORNER; :
CAROLYN CONNOR; and JOAN :
HAUSER, :

Petitioners, :

v. :

KATHY BOOCKVAR, in her official :
capacity as the Secretary of the :
Commonwealth of Pennsylvania, :

Defendant. :

ORIGINAL JURISDICTION

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Application for Special Relief in the Nature of a Preliminary Injunction within twenty (20) days, or within the time set by order of the court, of service hereof or a Judgment may be entered against you.

Respectfully Submitted,

**DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP**

Dated: November 3, 2020

By: /s/ Thomas E. Breth
Thomas W. King, III
PA. I.D. No. 21580
tking@dmkcg.com
Thomas E. Breth

PA. I.D. No. 66350
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128 West Cunningham Street
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Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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ORIGINAL JURISDICTION

**PETITIONERS’ APPLICATION FOR SPECIAL RELIEF IN THE FORM
OF A PRELIMINAY INJUNCTION UNDER PA. R.A.P. 1532**

1. Petitioners, by counsel, hereby move pursuant to Rule 1532 of the Pennsylvania Rules of Appellate Procedure for special relief in the form of a preliminary injunction enjoining Respondent, Kathy Boockvar, from permitting invalidly submitted absentee and mail-in ballots to be “cured” by the submission of provisional ballots and prohibiting Defendants from disclosing identifying information about voters who have submitted ballots that must be rejected for non-compliance with the Pennsylvania Election Code.

2. Petitioners filed a Petition for Review with this Court on even date. A copy of the Petition is attached hereto as Exhibit “A.”

BACKGROUND

3. On November 2, 2020, a day before the date of the general election, and right before pre-canvassing was scheduled to begin, Defendant, Kathy Boockvar, sent extraordinary instructions to every county in the Commonwealth of Pennsylvania in contravention of the Election Code. The email was entitled, “Important DOS Email – Clarification regarding Ballots Set Aside During Pre-canvass.” A copy of the email is attached to the Petition for Review as Exhibit “A.”

4. Under Section 3146.8 of the Pennsylvania Election Code, “[t]he county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. **No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.**”

25 P.S. § 3146.8 (emphasis added).

5. Further, on October 23, 2020, the Pennsylvania Supreme Court stated that, “[t]hus, unlike in-person voters, mail-in or absentee voters are not provided any opportunity to cure perceived defects in a timely manner.” *In re November 3, 2020 Gen. Election*, 149 MM 2020, 2020 WL 6252803, at *6 (Pa. Oct. 23, 2020).

6. Despite the above, Respondent issued guidance on election date stating, “[t]o facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.” *See Ex. A.*

7. Respondent’s guidance is in clear contravention of 25 P.S. § 3146.8 and the Pennsylvania Supreme Court’s decision in *In re November 3, 2020 Gen. Election*, 149 MM 2020, 2020 WL 6252803, at *6 (Pa. Oct. 23, 2020) because it allows voters an opportunity to cure perceived defects.

8. Affidavits in support of the foregoing are attached hereto and made a part hereof as Exhibits “B” and “C.”

INJUNCTIVE RELIEF

9. Petitioners move this Court for an Order declaring Respondent’s guidance to be invalid.

10. Pursuant to Pa. R. A. P. 1532(a), this Court may order special relief, including a preliminary or special injunction “in the interest of justice and consistent with the usages and principles of law.”

11. The standard for obtaining a preliminary injunction under this rule is the same as that for a grant of preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *Shenango Valley Osteopathic Hosp. v. Dep’t of Health*, 451 A.2d 434, 439 (Pa. Commw. Ct. 2004).

12. Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See* Pa. R.A.P. 1532(a).

13. Petitioners meet all the elements for the entering of a preliminary injunction in this case.

WHEREFORE, for all the foregoing reasons and those alleged in the Petition for Review, Petitioners respectfully request that this Honorable Court grant their Application for Special Relief in the Nature of a Preliminary Injunction and enter an order enjoining Respondent, her agents, servants, and officers, and others from permitting invalidly submitted absentee and mail-in ballots to be “cured” by the submission of provisions ballots and prohibiting Respondent from disclosing identifying information about voters who have submitted ballots that must be rejected for non-compliance with the Pennsylvania Election Code.

Respectfully Submitted,

**DILLON, MCCANDLESS, KING,
COULTER & GRAHAM, LLP**

Dated: November 3, 2020

By: /s/ Thomas E. Breth

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Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

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.

/s/ Thomas E. Breth

Thomas E. Breth

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/s/ Thomas E. Breth
Thomas E. Breth

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Defendant.

PROPOSED ORDER

Upon consideration of PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532 prohibiting Respondent from permitting invalidly submitted absentee and mail-in ballots to be "cured" by the submission of provisional ballots and prohibiting Respondent from disclosing identifying information about voters who have submitted ballots that must be rejected for non-compliance with the Pennsylvania Election Code;

It appearing to the Court that Petitioners are likely to succeed on the merits of their action, that they will suffer irreparable injury if the requested relief is not issued, that Respondent will not be harmed if the requested relief is issued, and that the public interest favors the entry of such an order, it is, therefore,

ORDERED that Petitioners' application is hereby GRANTED;

ORDERED that Respondent and anyone acting on their behalf are enjoined from contacting any voter whose mail-in ballot or absentee ballot contains perceived and actual defects;

ORDERED that, until all voting is complete during the 2020 general election, Defendants not disclose any identifying information concerning voters whose ballots are rejected, and that Respondent take appropriate means to ensure that no persons are able to obtain identifying information of any voters whose ballots are rejected;

ORDERED that Respondent reject, set aside, sequester, and declare spoiled any provisional ballots cast by persons who earlier submitted absentee or mail-in ballots, whether or not those earlier absentee or mail-in ballots conformed to the Election Code;

ORDERED that Respondent reject, set aside, sequester, and declare spoiled any ballots that have been cast in an attempt to cure an actual or perceived defect in an earlier-submitted ballot;

ORDERED that Respondent reject, set aside, sequester, and declare spoiled any ballots that have been altered, or that have attempted to be altered, to correct or cure a real or perceived deficiency in the ballot that might cause it to be not in conformity with the Pennsylvania Election Code, as interpreted in *Pennsylvania Democratic Party v. Boockvar*, No. 133-MM-2020;

ORDERED that Respondent immediately distribute this order to all county election boards in the Commonwealth of Pennsylvania, instructing them to follow all provisions of this Order.

Date: _____

Time: _____

Judge of the Commonwealth Court

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Defendant.

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this Petition for Review and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.



IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Dauphin County Lawyer Referral Service
213 North Front Street
Harrisburg, Pennsylvania 17101
(717) 232-7536

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Defendant.

NOTICE TO PLEAD

TO: KATHY BOOCKVAR

You are hereby notified to file a written response to the enclosed petition for review within thirty (30) days from service hereof or a judgment may be entered against you.

Respectfully Submitted,

**DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP**

Dated: November 3, 2020

By: /s/ Thomas E. Breth
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Commonwealth of Pennsylvania,

Defendant.

**PETITION FOR REVIEW
IN THE NATURE OF A COMPLAINT IN EQUITY**

INTRODUCTION

1. On November 2, 2020, a day before the date of the general election, and right before pre-canvassing was scheduled to begin, Defendant, Kathy Boockvar, sent extraordinary instructions to every county in the Commonwealth of Pennsylvania in contravention of the Election Code. The email was entitled, "Important DOS Email – Clarification regarding Ballots Set Aside During Pre-canvass." A copy is attached hereto and made a part hereof as Exhibit "A."

STATEMENT OF JURISDICTION

2. This Court has original jurisdiction over this action pursuant to 42 Pa.C.S. § 761(a)(1).

PARTIES SEEKING RELIEF

3. Petitioner, Joseph D. Hamm, is a candidate for the Pennsylvania State House of Representatives in the 84th Legislative District.

4. Petitioner, Mike Kelly, is a candidate for the United States House of Representatives 16th District.

5. Petitioner, Billy Allred, is a voter from Union County, Pennsylvania.

6. Petitioner, Chad Horner, is a voter from Jefferson County, Pennsylvania.

7. Petitioner, Carolyn Connor, is a voter from Union County, Pennsylvania.

8. Petitioner, Joan Hauser, is a voter from Lancaster County, Pennsylvania.

PARTY WHOSE ACTION IS AT ISSUE

9. Respondent, Kathy Boockvar, in her official capacity as the Secretary of the Commonwealth of Pennsylvania, issued guidance in contravention of the Election Code through her office on election day, November 3, 2020. *See Ex. A.*

STATEMENT OF MATERIAL FACTS

10. Today, November 3, 2020, is the general election.
11. Votes are currently being cast.
12. Votes are also currently being “pre-canvassed.”
13. Under Section 3146.8 of the Pennsylvania Election Code, “[t]he county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. **No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.**” 25 P.S. § 3146.8 (emphasis added).

14. Further, on October 23, 2020, the Pennsylvania Supreme Court stated that, “[t]hus, unlike in-person voters, mail-in or absentee voters are not provided any opportunity to cure perceived defects in a timely manner.” *In re November 3, 2020 Gen. Election*, 149 MM 2020, 2020 WL 6252803, at *6 (Pa. Oct. 23, 2020).

15. Despite the above, Respondent issued guidance on election date stating, “[t]o facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.” *See* Ex. A.

16. Respondent’s guidance is in clear contravention of 25 P.S. § 3146.8 and the Pennsylvania Supreme Court’s decision in *In re November 3, 2020 Gen. Election*, 149 MM 2020, 2020 WL 6252803, at *6 (Pa. Oct. 23, 2020) because it allows voters an opportunity to cure perceived defects.

17. Other counties in the Commonwealth of Pennsylvania; namely, Blair County, Berks County, Lancaster County, Carbon County, Clinton County, Lycoming County, Dauphin County, and Perry County all have refused to accept Respondent’s guidance because it is contravention of the Election Code.

18. Indeed, as the Supreme Court so stated, “mail-in...voters are not provided any opportunity to cure perceived defects.” *Id.*

19. Respondent’s guidance allows voters to cure their defects.

20. Respondent’s guidance creates a scenario where voters have two conflicting votes.

21. Respondent’s guidance violates the pre-canvassing provisions of the Election Code.

22. If Respondent's guidance is allowed to continue, it creates a high risk of jeopardizing the integrity of the November 3, 2020 general election.

COUNT I – DECLARATORY AND INJUNCTIVE RELIEF

23. Petitioners incorporate the foregoing paragraphs as if fully set forth at length.

24. Respondent has a duty to comply with the laws of the Commonwealth of Pennsylvania.

25. Petitioners have no adequate remedy at law to redress the harm as a result of Respondent's violation of the Pennsylvania Election Code and holdings of the Pennsylvania Supreme Court.

26. Injunctive relief is necessary to prevent the substantial injury and immediate and irreparable harm that Petitioners would suffer if Respondent is permitted to violate the laws of the Commonwealth of Pennsylvania.

27. A greater injury would occur in refusing the injunction than granting it because the Respondent's actions increase the risk of jeopardizing the integrity of the November 3, 2020 general election.

WHEREFORE, Petitioners respectfully request entry of an order in their favor and against Respondent prohibiting Respondent from permitting invalidly submitted absentee and mail-in ballots to be "cured" by the submission of provisions ballots and prohibiting Respondent from disclosing identifying information about voters

who have submitted ballots that must be rejected for non-compliance with the Pennsylvania Election Code.

Respectfully Submitted,

**DILLON, MCCANDLESS, KING,
COULTER & GRAHAM, LLP**

Dated: November 3, 2020

By: /s/ Thomas E. Breth
Thomas W. King, III
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tking@dmkeg.com
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128 West Cunningham Street
Butler, PA 16001
724-283-2200 (phone)
724-283-2298 (fax)

Counsel for Petitioners

Sent: Monday, November 2, 2020 8:38 PM

To: Marks, Jonathan

Subject: Important DOS Email - Clarification regarding Ballots Set Aside During Pre-canvass

*** This is an external email. Please use caution when clicking on links and downloading attachments ***

Dear County Election Directors,

The Department of State has been asked whether county boards of elections can provide information to authorized representatives and representatives of political parties during the pre-canvass about voters whose absentee and mail-in ballots have been rejected. The Department issued provisional ballot guidance on October 21, 2020, that explains that voters whose completed absentee or mail-in ballots are rejected by the county board for reasons unrelated to voter qualifications may be issued a provisional ballot. To facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.

Kind regards,

Jonathan M. Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
302 North Office Building | Harrisburg, PA 17120
☎ 717.783.2035 📠 717.787.1734
✉ jmarks@pa.gov



ATTORNEY VERIFICATION

I, Thomas E. Breth, am authorized to make this verification. I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

/s/ Thomas E. Breth

Thomas E. Breth

CERTIFICATE OF COMPLIANCE

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.

/s/ Thomas E. Breth

Thomas E. Breth

AFFIDAVIT

I, THOMAS KREINER, hereby declare as follows under penalty of perjury:

1. The following statements are based on my personal knowledge, and if called to testify I could swear competently thereto.
2. I am at least 18 years old and of sound mind.
3. I am a citizen of the United States and of the Commonwealth of Pennsylvania. I am a McKean County Commissioner and my business address is 500 W. Main Street; Smethport, PA 16749. I am an eligible Pennsylvania voter and am registered to vote.
4. I have voted in the November 3, 2020 general election.
5. I participated in a webinar with Kathryn Boockvar, Secretary of the Commonwealth regarding the general election of 2020.
6. I was instructed that questions could be directed to Erin Wells at 717-503-1489.
7. Ms. Wells reached out to me with general communication, "Hi Commissioner, just checking in. How's it going?"
8. I responded, "Ok. We are 25% thru the 4000+ ballots. Question, are the 'naked ballots' allowed to be contacted to correct their ballot?"
9. She responded, "Yes, those voters can/should be contacted. They would vote by provisional ballot if they choose to. Thank you !"
10. A true and correct copy of this text message is attached at Exhibit 1.
11. In addition, when I returned from lunch today, the Director of Elections, Lisa Pratt, told me and the Democratic Commissioner that the names of voters whose mail-in/absentee ballots had deficiencies should be provided to representatives of the political parties.



12. I believe that the text message provided instructions in contravention of Pennsylvania election law that forbids canvass observers from providing results of the election before the conclusion of the election day.



Thomas Kremer

Sworn to ~~and subscribed before me~~
this 7th day of November 2020.



Erin >

Hi Commissioner, just checking in. How is it going?

Ok. We are 25% thru the 4000 plus ballots. Question, are the "naked ballots" allowed to be contacted to correct their ballot?

Delivered

Yes, those voters can/ should be contacted. They would vote by provisional ballot if they choose to. Thank you!



iMessage



AFFIDAVIT

I, JEFFREY T. HASTE, hereby declare as follows under penalty of perjury:

1. The following statements are based on my personal knowledge, and if called to testify I could swear competently thereto.
2. I am at least 18 years old and of sound mind.
3. I am a citizen of the United States and of the Commonwealth of Pennsylvania. I am a Dauphin County Commissioner and my business address is 2 S. Second Street, 4th Floor, Harrisburg, PA 17101. I am an eligible Pennsylvania voter and am registered to vote.
4. I have voted in the November 3, 2020 general election.
5. I received the attached email from Jonathan M. Marks, Deputy Secretary for Elections & Commissions (Exhibit 1), last night.
6. The email was forwarded to me by the Dauphin County Director of Elections.
7. The email provided instructions to County Election Directors in contravention of Pennsylvania election law that forbids canvass observers from providing results of the election before the conclusion of the election day.

Sworn to and subscribed before me
this 3 day of November 2020.





Sent: Monday, November 2, 2020 8:38 PM

To: Marks, Jonathan

Subject: Important DOS Email - Clarification regarding Ballots Set Aside During Pre-cavass

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Kind regards,

Jonathan M. Marks
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Pennsylvania Department of State
302 North Office Building | Harrisburg, PA 17120
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✉ jmarks@pa.gov

