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DELAWARE COUNTY

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION

IN RE: EXTENSION OF TIME FOR : No. CV-2020-003416  
ABSENTEE AND MAIL-IN BALLOTS :  
TO BE RECEIVED BY MAIL AND :  
COUNTED IN THE 2020 PRIMARY :  
ELECTION :

**EMERGENCY PETITION OF THE DELAWARE COUNTY BOARD  
OF ELECTIONS REQUESTING AN EXTENSION OF TIME TO  
ACCEPT AND TABULATE ABSENTEE AND MAIL-IN BALLOTS  
FROM THE QUALIFIED REGISTERED ELECTORS OF DELAWARE  
COUNTY POSTMARKED AND MAILED BY JUNE 2, 2020 AND  
RECEIVED BY THE DELAWARE COUNTY BOARD OF ELECTIONS  
BY TUESDAY, JUNE 9, 2020 AT 5:00 P.M.**

TO THE HONORABLE JUDGES OF THE SAID COURT:

Petitioner, Delaware County Board of Elections, by its undersigned  
counsel, respectfully submits as follows:

Petitioner, the Delaware County Board of Elections (hereafter "Board  
of Elections" or "BOE"), petitions this Court for permission to extend the deadline  
for receipt of the ballots of absentee and mail-in voters of Delaware County that

are mailed and postmarked by June 2, 2020. Petitioner asks the Court to set a deadline for receipt of June 9, 2020 at 5:00 pm. In support of this Petition, the Board of Elections avers as follows:

1. Pursuant to 25 P.S. §2641, et seq., the Delaware County Board of Elections has jurisdiction over the conduct of elections, including the 2020 Primary Election scheduled for Tuesday June 2, 2020 (hereinafter the “2020 Primary”). The Board consists of Delaware County Board of Elections Chair Gerald Lawrence and members James J. Byrne, Jr. and Ashley Lunkenheimer. On today’s date, June 2, 2020, the Board of Elections authorized the filing of this petition.

2. The Delaware County Court of Common Pleas has jurisdiction over this matter pursuant to Article V, §2(b) (Courts of Common Pleas have “unlimited original jurisdiction in all cases except as may otherwise be provided by law.”) *See e.g. In re: General Election - 1985*, 531 A.2d 836, 839 (Pa. Cmwlth. 1987) (Court postponed the date of the Primary Election for 11 precincts that suffered extensive flooding, loss of electricity, heat, and water during extreme weather conditions).

3. This petition seeks relief arising from a nationwide emergency that evolves from day to day, requiring government and the Courts to adapt their procedures to enable them to carry out their functions the best way possible while minimizing the threat to public health and safety, even if it has meant temporary limitations on other rights normally guaranteed by law.

4. In early March of 2020, the highly infectious coronavirus (COVID-19) spread through the United States causing a public health emergency to be declared in the Commonwealth of Pennsylvania.

5. On March 10, 2020, Delaware County declared the existence of a disaster emergency in Delaware County due to the widespread outbreak of COVID-19 affecting the residents of Delaware County. Since then, this declaration and various COVID-related orders, including orders issued by Pennsylvania Governor Tom Wolf, have been extended and will remain in effect for the 2020 primary. Delaware County and other counties, as well as several Commonwealth departments and agencies, have worked nonstop to ensure that voting in the primary election will be as safe and as convenient as possible, despite the challenges posed by the health risks involved. The intensity of these efforts varies by region, because COVID-19 has had different effects in different areas of the Commonwealth. Notably, Delaware County was among the first counties to be subject to the Governor's stay-at-home order and, as of the filing of this petition, is among the relatively few counties still subject to aggressive mitigation efforts, restrictions for social distancing and closures.

6. The Legislature and Governor, recognizing that existing law would not accommodate a primary election at which persons subject to social distancing, stay-at-home-orders, and justifiable fear of unnecessary spread of disease would

feel free or be able to exercise their right to vote, postponed the date of the 2020 primary from April 28 to June 2, 2020. In recognition that many more voters than previously expected would want to vote by never before used mail-in ballot procedure, the Legislature and Governor— for the June 2 primary only— also extended the times to apply for and vote mail-in ballots and allowed counties to begin to count those ballots from the times the polls open, rather than waiting for the polls to close before counting. *See* Senate Bill 422, March 27, 2020.

7. The Board of Elections has made every effort to process the huge influx of applications for mail-in votes, while being hampered by, *inter alia*, temporary courthouse closures, subsequent staggered staffing requirements, the need for social distancing and hardware/printing limitations.

8. In the face of the COVID-19 challenges, the Board of Elections has made extraordinary efforts to process over 85,000 mail-in applications. For example, since at least February of 2020, there have been extensive planning efforts and weekly logistics meetings involving the Board of Elections, the Executive Director and various other departments to coordinate and plan for the election. The County added staff and volunteers from other departments, employed temporary workers and received assistance from the Delaware County Citizen Volunteer Corps. Staff from the Election Bureau and Voter Registration has worked weekends and evenings since March. Last week alone, there were 30-

40 people, including volunteers, processing applications. This past weekend, over 50 people worked on processing applications, some staying as late as 1 am. In addition, the Board of Elections has been express mailing the ballots at considerable expense, while working cooperatively with the post office to deliver thousands of ballots over the last few days.

9. Despite these best efforts, the Board of Elections has not been able to process the unprecedented number of mail-in ballot requests within the forty-eight (48) hours required by the Pennsylvania Election Code. The number of mail-in applications was far more than could have reasonably been anticipated, and has also been fueled by an influx of votes and requests from senior citizens, particularly those living in Delaware County's numerous senior citizen facilities, whose residents are generally more vulnerable to the COVID-19 virus than others. The 85,000 mail-in vote applications is drastically more than Delaware County has ever seen before, and more than could realistically be processed within the established timelines. In fact, Delaware County has received more mail-in vote applications than the entire State of Pennsylvania had in the 2016 primary election. See Mark Scolforo & Michael Rubinkam, *Mail-in, absentee ballot applications surge for June primary*, Pittsburgh Post-Gazette (Apr. 15, 2020).

10. The COVID-19 crisis has resulted in the relaxation, disruption, and suspension of innumerable normal government operations, such as:

(a) Orders from Governor Wolf, the Pennsylvania Supreme Court, and this Court allowing relaxation and suspension of normal operations and rules due to the emergency;

(b) unprecedented outreach by the Pennsylvania Department of State and major political parties to promote mail-in voting;

(c) social distancing rules in effect for both the public and government workers in government buildings; and

(d) ongoing unanticipated exigencies that require additional solutions that slow government operations in order to protect the health of employees and the public.

11. The above-described consequences of the COVID-19 pandemic have converged into a perfect storm in which requests for mail-in and absentee ballots have far exceeded the Bureau of Elections' expectations and capacity to process. Notwithstanding the heroic efforts of the Bureau and its staff to preserve the constitutional rights of all Delaware County citizens, it simply was unable to process all mail-in requests by the statutory deadline.

12. The statutory absentee and mail-in ballot deadline was 5:00 p.m. on Tuesday, May 26, 2020. *See*, 25 P.S. §§3146.2a, 3150.12a(a). But for the excess

demand created by the COVID-19 crisis, the Bureau of Elections would have been able to process all applications and mail ballots by Thursday, May 28, 2020.<sup>1</sup>

13. However, because of the significant and unavoidable backlog, the Bureau of Elections has continued to process thousands of applications and mail ballots to qualified electors in accordance with 25 P.S. §§3146.5 and 3150.15 on each day between Friday, May 29, 2020 and June 1, 2020. More specifically, on Friday, May 29, 2020, the Bureau mailed approximately 6,720-7000 ballots; Saturday, May 30, 2020, it mailed approximately 8,640-9000 ballots; Sunday, May 31, 2020, it mailed approximately 3,120-3250 ballots; and on Monday, June 1, 2020, the Bureau mailed approximately 5,760-6000 ballots. In total, in the four days following the statutory deadline to mail ballots to qualified voters, the Bureau mailed approximately 24,240-25,250 absentee and mail-in ballots, most of which will not be received in time for voters to return them by the deadline. *See* Exhibit A, Affidavit of Chief Clerk Lauren Hagan, attached hereto.

14. As of the Primary Election on June 2, 2020, the Bureau still has between four hundred and five hundred (400-500) mail-in and absentee ballots to

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<sup>1</sup> Pursuant to 25 P.S. §3146.2a(a) "except as provided in subsections (a. 1) and (a.2), applications for absentee ballots shall be received in the office of the county board of elections... not later than five o'clock p.m. of the first Tuesday prior to the day of any primary or election." Pursuant to 25 P.S. §3150.12a(a), the Board of Elections shall process any applications for mail-in ballots received by this same deadline.

mail out to qualified voters. The Bureau will endeavor to get these ballots to the qualified voters by Thursday, June 4, 2020.

15. The Bureau of Elections, using additional help from other county departments, temporary workers and volunteers, while working more than twelve hours daily, including weekends, has processed the absentee and mail-in ballot applications as rapidly as possible.

16. All qualified electors who appropriately applied for civilian absentee and mail-in ballots before the statutory deadline are required to return their voted absentee and mail-in ballots to the County by 8:00 p.m. on Tuesday, June 2, 2020 for the voted ballot to be considered for tabulation. See 25 P.S. §§ 3146.6, 3150.16.

17. Unfortunately, due to the unavoidable backlog, the last of the mail-in and absentee ballots have still not been mailed out as of June 1, 2020. As a result, thousands of qualified voters who made timely application for mail-in and absentee ballots will not receive their ballots in time to return them by June 2, 2020 at 8:00 pm.

18. Notably, of the civilian absentee and mail-in ballot applications that have been processed, at least through the end of last week, fewer than 25% of ballots sent have been returned.

19. In an effort to ameliorate the effect of last-minute mailing of the ballots, the Bureau of Elections has established ballot drop boxes for mail-in voters



at each polling place. Additionally, voters can drop their mail-in ballots at the Delaware County Government Center at 201 W. Front Street Media, PA on election day between the hours of 8:30 am and 8:00 pm. Voters who have not yet received a mail-in or absentee ballot that was requested can also vote by provisional ballot at their polling place on election day.

20. However, the above measures still will not afford access to many voters who receive ballots at the last minute due to their inability to travel. Many voters who requested mail-in and absentee ballots may not have transportation. They may be residing out-of-state or suffering from a medical condition. They may be quarantined or unable to leave their residence because they are in a vulnerable class and at high risk. For a variety of reasons beyond their control, voters may not be able to cast a provisional ballot or use a drop box. Additionally, many voters who receive their mail-in ballots at the last minute might not even learn of the ballot box option before utilizing the U.S. mail system.

21. Because thousands of qualified applicants for mail-in and absentee ballots will not receive their ballots in time to return them by the June 2, 2020 deadline, the Board of Elections now petitions this Honorable Court to extend the deadline for receipt of mail-in and absentee ballots that are post-marked and mailed on or before June 2, 2020 and received by the Board of Elections by a June

9, 2020 at 5:00 p.m., and allow the tabulation of such ballots for the June 2, 2020 primary election.

22. Such an extended deadline for receiving ballots – provided that it is not later than June 9, 2020 – would not exceed the existing deadline for military and overseas ballots which must be counted if received by the Board of Elections by 5:00 p.m. on the seventh day following the election. See, 25 Pa.C.S. § 3511(a). Moreover, the requirement of a postmark on or before June 2, 2020 would ensure that only ballots cast and mailed by Election Day would be counted.

23. For the list of 400-500 voters who have not even had a ballot mailed to them as of Election Day, the Board of Elections requests that the Court extend the deadline for receipt of these mail-in and absentee ballots to Friday, June 12, 2020.

24. No person, political party and/or candidate would be negatively affected by this relief, as it merely allows qualified voters who have abided by all statutory deadlines to cast their votes.

25. Although Pennsylvania has an interest in the finality of elections, Pennsylvania currently counts military-overseas ballots as long as they are received by 5 p.m. on the seventh day following the election. 25 P.S. § 3511(a). The County boards of elections have seven days following Election Day to examine provisional ballots. *Id.* at § 3050(a.4)(4). Challenges and appeals to

provisional ballots can last another nine days thereafter. *Id.* at § 3050(a.4)(4)(ii), (v). Finally, Pennsylvania officials need not certify election results to the Secretary until twenty (20) days after the election. 25 P.S. § 2642(k).

26. Ballot receipt deadlines have been extended in the past when circumstances have warranted it. For example, in 2016, Judge Bernard A. Moore of the Montgomery County Court of Common Pleas extended the deadline for receipt of absentee ballots by four (4) days when election officials received what they described as unprecedented demand for absentee ballots and voters complained that they had not yet received their ballots. *See* Laura McCrystal, *Montco judge extends deadline for absentee ballots*, PHILA. INQUIRER (Nov. 3, 2016). Likewise, shortly after Hurricane Sandy struck parts of Pennsylvania in 2012, the Governor extended the deadline for receipt of absentee ballots for several days in affected counties.

27. It is well-settled that the purpose of the Election Code is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process. *In re: General Election - 1985*, 531 A.2d 836, 839 (Pa. Cmwlth. 1987) (Court postponed the date of the Primary Election for 11 precincts that suffered extensive flooding, loss of electricity, heat, and water during extreme weather conditions). *Cf.*, *In re: Mayor, City of Altoona, Blair County*, 196 A.2d 371, 374 (1964) (the purpose of election laws is to secure freedom of choice and to

prevent fraud and corruption; to obtain a fair election and an honest election return; to insure fair elections, or an equal chance and opportunity for everyone to express his choice at the polls; and to secure the rights of duly qualified electors and not to defeat them). An election that involves members of the electorate who could be deprived of their opportunity to participate due to no fault of their own and because of circumstances beyond their control would be inconsistent with the purpose of the Election Code. *Id.*

28. The Pennsylvania Department of State, in litigation now pending in the Pennsylvania Supreme Court in *Delisle v. Boockvar*, Dkt. 95 MM 2020 (Pa. Supreme Court), has publicly stated that while it opposes a statewide solution to the problems counties are encountering in processing, mailing, and receiving absentee ballots, it does not oppose solutions adopted by individual counties and their Courts of Common Pleas to address specific problems – such as those described above – that those counties face individually.

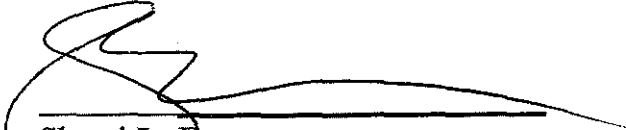
29. Disenfranchising voters who complied with all applicable deadlines in order to cast their mail-in or absentee ballot by failing to grant a reasonable and narrowly tailored extension of time to receive ballots would be an unnecessary and arbitrary violation of the affected voters' rights to equal protection and due process under the Pennsylvania Constitution, Pa. Const. art. I, §§ 1, 26, and the Fourteenth Amendment to the United States Constitution.

30. The County Board of Elections seeks this extension so that all duly qualified electors of Delaware County who did not timely receive their ballots due the COVID-19 crisis are able to participate in the election process.

**WHEREFORE**, the Delaware County Board of Elections respectfully requests this Honorable Court to **GRANT** its Emergency Petition to allow the Delaware County Board of Elections to accept and tabulate all absentee and mail-in ballots postmarked on or before June 2, 2020 and delivered by the United States Post Office to the Delaware County Board of Elections by June 9, 2020 at 5:00pm. For those 400-500 individuals whose ballots have still not been mailed out as of the morning on June 2, 2020, the Delaware County Board of Elections respectfully requests this Honorable Court to **GRANT** its Emergency Petition to allow the Delaware County Board of Elections to accept and tabulate any of these absentee and mail-in ballots that are returned by Friday, June 12, 2020.

Respectfully submitted,

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