



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEAGUE OF WOMEN VOTERS)
 OF DELAWARE, INC. and)
 RACHEL GRIER-REYNOLDS,)
)
 Plaintiffs,)
)
 v.)
)
 STATE OF DELAWARE)
 DEPARTMENT OF ELECTIONS)
 and ANTHONY J. ALBENCE, State)
 Election Commissioner,)
)
 Defendants.)

C.A. No. _____

VERIFIED COMPLAINT

Plaintiffs bring this action to prevent the near-certain disenfranchisement of Delaware voters this fall. For their complaint, plaintiffs allege as follows:

Nature of the Case

1. The COVID-19 pandemic has upended our way of life. The disease has claimed more than 183,000 lives in the United States, including more than 530 in Delaware alone.¹ For those in high-risk groups and their loved ones, risking exposure means risking hospitalization and death.²

¹ Current data is available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> and <https://coronavirus.delaware.gov/>.

² Information on risk factors is available from the CDC at <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-underlying-medical-conditions.html>.

2. Recognizing the public health risks associated with in-person voting and the difficult choices facing voters this fall, the General Assembly passed a bill to allow all Delawareans to vote by mail (House Bill 346 or “HB 346”). Governor Carney signed HB 346 into law on July 1, 2020, and the vote-by-mail procedure will be used for the first time in Delaware’s September 15, 2020 primary election.

3. Despite the General Assembly’s best intentions, subsequent developments have created conditions that are ripe for a perfect storm of voter disenfranchisement. Mail-in ballots are expected to shatter previous records—in July’s presidential primary, more than 56,000 Delaware voters cast absentee ballots, compared to just over 5,000 absentee ballots in 2016.³ At the same time, the United States Postal Service (the “USPS”) has experienced widespread delays in recent weeks. The USPS has also warned that even if voters receive their ballots and mail them back promptly, there is a “significant risk” that the Department of Elections will not receive them by Delaware’s return deadline of 8:00 PM on Election Day. As a result, many voters who request a mailed ballot near the

³ Governor Carney issued an executive order on March 24, 2020, allowing “an otherwise duly registered voter” to use the “sick or physically disabled” absentee qualification if the voter “is asymptomatic of COVID-19 infection and otherwise abiding by CDC and DPH guidelines by exercising self-quarantine or social distancing to avoid potential exposure to (and community spread of) COVID-19, and who herself or himself freely chooses to use such qualification to vote by absentee ballot.” Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat.

statutory deadline will be forced to choose between voting in person or not voting at all. Many others who act in good-faith compliance with the statutory timing risk having their votes not counted. The impact will be felt most acutely by those in high-risk groups—like seniors and voters with underlying medical conditions—who cannot vote in person without putting their lives at risk.

4. This action seeks a declaratory judgment that, under the current circumstances, Delaware’s return deadline violates the Elections Clause and Right to Vote Clause of the Delaware Constitution. The only way to remedy these violations and prevent the disenfranchisement of Delaware voters is to enjoin defendants from failing to count votes on ballots that are mailed on or before Election Day—including (1) ballots received by mail between 8:00 PM on November 3 and 8:00 PM on November 6; and (2) ballots received by mail between 8:00 PM on November 6 and 8:00 PM on November 13 bearing a postmark, scan code, or other official USPS indicator that the ballot was mailed on or before November 3.

The Parties

5. The League of Women Voters is a nonpartisan, activist, grassroots organization that believes voters should play a critical role in democracy. The national organization was founded in 1920, and Delaware has had a state League of Women Voters and active local leagues since 1921. The League of Women

Voters of Delaware, Inc. (the “League”) has 419 members throughout the state of Delaware, including in each county and the City of Wilmington, the majority of whom are registered voters in Delaware. Some of the League’s members are over the age of 60 and/or have underlying health conditions. The League engages in voter education and advocacy, including distribution of information about how to vote and candidate information services such as the Vote411 website.

6. Rachel Grier-Reynolds is a 74-year-old resident of Lewes, Delaware, with stage IV lung cancer—the most advanced stage of the disease. She has lost two-thirds of a lung, has scar tissue near her heart from radiation, and depends on the USPS for delivery of her chemotherapy medication. Ms. Grier-Reynolds is a registered voter who, until recently, would regularly cast her vote in person. But given her age and underlying medical conditions, she has had to use extreme caution to avoid any risk of exposure to COVID-19. For this reason, she voted by mail in Delaware’s July 7 presidential primary, and plans to vote by mail again this November. She submitted her ballot for Delaware’s September 15 primary by e-mail because she has not received her mail-in ballot, even though she requested it more than three weeks ago. Because she depends on the USPS for delivery of her chemotherapy medication, Ms. Grier-Reynolds is acutely aware of the recent slowdowns in mail service, and is concerned that her mail-in ballot will not be delivered in time to be counted this November.

7. The State of Delaware Department of Elections (the “Department of Elections”) is a state administrative agency. 15 Del. C. § 201. Among other duties, the Department of Elections is responsible for overseeing the process for sending, receiving, and recording absentee and vote-by-mail ballots. 15 Del. C. §§ 5503–5510; 15 Del. C. §§ 5603–5610.

8. Anthony J. Albence is the State Election Commissioner for Delaware. The State Election Commissioner’s duties include “general supervision over the county directors, deputy county directors, and other employees of the Department of Elections in carrying out their respective duties and responsibilities” 15 Del. C. § 302(12). He is sued in his official capacity.

Jurisdiction and Venue

9. The Court has subject-matter jurisdiction under 10 Del. C. § 341 because plaintiffs seek equitable relief in the form of a preliminary and permanent injunction.

10. The Court also has subject-matter jurisdiction to issue a declaratory judgment under 10 Del. C. §§ 6501 and 6502. As set forth in greater detail below, there is an actual controversy of sufficient immediacy to warrant the issuance of a declaratory judgment—namely, whether the Elections Clause and the Right to Vote Clause of the Delaware Constitution permit the Department of Elections and

Commissioner Albence to enforce a ballot return deadline that will necessarily disenfranchise Delaware voters this fall.

11. To the extent the Court needs to address any legal issues in the course of deciding plaintiffs' equitable claims, the Court has jurisdiction under the clean-up doctrine.

12. Venue is proper and the Court has personal jurisdiction over defendants because the Department of Elections is a Delaware state agency and Commissioner Albence is a State of Delaware employee.

Facts

13. Delaware's vote-by-mail procedures generally mirror the state's procedures for absentee voting. Both statutes require ballots to be mailed to voters no "less than 4 days prior to an election" 15 Del. C. § 5504 (absentee); 15 Del. C. § 5604 (vote-by-mail).

14. At the earliest, absentee and vote-by-mail ballots may be mailed to voters 60 and 30 days before the election, respectively. 15 Del. C. § 5504 (absentee); 15 Del. C. § 5604 (vote-by-mail).

15. Voters are allowed to request ballots by mail up until the 4-day mailing deadline. *See* Exh. A at 2 (absentee); Exh. B at 4 (vote-by-mail).

16. After receiving their absentee or vote-by-mail ballots, voters may return their completed ballots by mail or drop them off at one of the designated sites for their county. Exh. A at 2-3 (absentee); Exh. B at 6 (vote-by-mail).

17. There are only two drop boxes for all of Kent and Sussex Counties (one for each election office), in addition to three boxes in New Castle County—two in the same building in Wilmington and one in New Castle. Exh. B at 6.

18. Delaware’s drop boxes are not accessible on weekends, and most are only accessible between the hours of 8:00 AM and 4:30 PM. *Id.*

19. Absentee and mail-in ballots will not be counted unless they are received by 8:00 PM on Election Day. 15 Del. C. § 5508(b) (absentee); 15 Del. C. § 5608(b) (vote-by-mail).

20. After HB 346 was signed into law, subsequent factual developments have created a significant risk that voters who follow the law will have their ballots arrive too late to be counted.

21. In a letter to Commissioner Albence dated July 29, 2020, the USPS warned that “[e]ven if a voter receives a ballot before Election Day, 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.” Exh. C. at 2.

22. The “significant risk” of late delivery is heightened by at least two factors, both of which came to light after the enactment of HB 346.

23. First, in recent weeks, news outlets have reported widespread and significant delays at the USPS. *See, e.g.*, Exh. D.

24. While the cause of the USPS delays is being debated, there is no dispute that they have happened. *See* Exh. E.

25. According to the State of Delaware, “Delaware state agencies have reported significant delays in the delivery of important mail, such as checks from the State Pension Office and EBT cards being delivered to recipients.” Exh. F, ¶ 188.

26. Delaware has characterized the actions of the USPS as designed to “impede the efforts of [Delaware] to conduct free and fair elections in the manner [Delaware] ha[s] chosen.” *Id.*, ¶ 1.

27. Even a one- or two-day delay in mail delivery will lead to some number of votes that are not counted, which would effectively constitute disenfranchisement of voters who complied with the statutory requirements in good faith.

28. Commissioner Albence has admitted that “[i]f the USPS delays continue into November, it could result in significant absentee and mail-in ballots in Delaware going uncounted.” Exh. I, ¶ 23.

29. Second, a high percentage of voters are expected to vote by mail this fall.

30. According to Commissioner Albence, “[a]s of August 21, 2020, 727,968 Delaware voters have registered to vote. As of August 28, 2020, 102,474 of these voters have requested an absentee or mail-in ballot for the November 3, 2020 general election, with applications still forthcoming.” *Id.*, ¶ 10.

31. As of September 2, 2020, “100,492 Delaware voters have requested an absentee or mail-in ballot for the September 15, 2020 state primary election.” *Id.*

32. “As of August 21, 2020, 24,552 Delaware voters are on the permanent absentee ballot list.” *Id.*, ¶ 11.

33. In the July 2020 presidential primary, 56,075 Delawareans cast absentee ballots (out of 124,478 total votes), compared to just 5,046 in the 2016 presidential primary (out of 163,532 total votes). Exh. G; Exh. H; Exh. I, ¶ 5.

34. According to Commissioner Albence, 1,661 absentee ballots (almost 3% of the total cast) “were received late and were not counted.” Exh. I, ¶ 18.

35. The Department of Elections and Commissioner Albence “anticipate that this number will increase dramatically in the upcoming election if there are widespread USPS delays.” *Id.*

36. For voters in high-risk groups like Ms. Grier-Reynolds, the risks associated with COVID-19 exposure are so severe that in-person voting is potentially life-threatening.

37. According to the State of Delaware and Commissioner Albence, “[a]pproximately 19.4 percent of Delaware residents, and 24.2 percent of all registered Delaware voters, are 65 years of age or older.” Exh. F, ¶ 64; Exh. I, ¶ 9.

38. If seniors, the disabled, and those whose underlying medical conditions make COVID-19 exposure a serious health risk are deprived of the ability to vote by mail, many will not be able to vote at all.

39. While high-risk groups are most likely to depend on mail-in voting, there is a serious risk of disenfranchisement even for healthy voters.

40. For example, a younger person with no underlying medical conditions might plan to vote in person, but receive a positive COVID-19 diagnosis five days before Election Day. That voter could request a ballot on Thursday, and the Department of Elections could mail it as late as Friday afternoon. If the voter does not receive their ballot until Election Day—which the USPS has called a “significant risk”—they will have to choose between jeopardizing their health and that of others by voting in person, or not voting at all.

41. Delaware’s drop boxes are not an adequate substitute for reliable mail-in voting.

42. There are only five drop boxes in the entire state, three of which are in New Castle County (and two of which are in the same building). Exh. B at 6.

43. Four drop boxes are only open from 8:00 AM to 4:30 PM on Monday through Friday; the only exception is the drop box in the lobby of the Carvel State Office Building in Wilmington, which is accessible between 6:30 AM and 5:30 PM (but the building is closed on weekends). *Id.*

44. A voter in Delmar, for example, cannot simply drop a completed ballot at their local polling site. Instead, they must drive—or find someone to drive them—20 miles to the Sussex County Election Office in Georgetown, between the hours of 8:00 AM and 4:30 PM on a weekday. *Id.*

45. For voters who lack reliable transportation, cannot drive, or whose work or family obligations prevent them from visiting an election office in the middle of a weekday, Delaware's drop boxes are not sufficient to relieve voters of the need to rely on the USPS to return their completed ballots.

46. Other voters may not have decided for whom they wish to cast their vote, and may wish to take advantage of additional information, advertising, or candidate debates that happen closer in time to the election.

47. Significant numbers of voters also may simply not appreciate the potential delay in mail delivery and put their ballot in the mail 4 or 5 days in

advance—which a year ago would have been sufficient for First-Class Mail receipt, but may no longer be enough time.

48. Upon information and belief, some number of ballots cast in the general election may arrive at the Department of Elections offices without a postmark, scan code, or other official USPS indicator of the mailing date. *See* Exh. J; Exh. K at 5 (report from the USPS Office of the Inspector General noting that, in a recent election, the “Milwaukee Election Office reported their receipt of about 390 voter completed ballots with varying postmark issues including illegible postmarks, lack of a postmark, undated postmarks, or hand-stamped postmarks”).

49. According to the USPS Office of the Inspector General, “there can be breakdowns or exceptions to [the postmarking] process which would prevent a ballot from receiving a postmark.” Exh. K at 7. “For example, ballots may be double fed on a machine, machines applying postmarks may run out of ink, or ballots may be comingled with certain mail that is not processed on machinery that applies a postmark.” *Id.*

Count 1 – Violation of the Elections Clause and Right to Vote Clause

50. Paragraphs 1 through 49 are hereby incorporated by reference.

51. The Elections Clause of the Delaware Constitution provides that “[a]ll elections shall be free and equal.” Del. Const. art. 1, § 3.

52. The Right to Vote Clause of the Delaware Constitution provides that “[e]very citizen of this State” who is eligible to vote in an election “shall be entitled to vote at such election” Del. Const. art. 5, § 2.

53. “[T]he purpose of the Elections Clause ‘is to ensure that the right of citizens to vote in an election is unfettered.’” *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 857 (Del. Ch. 2015) (quoting *Abbott v. Gordon*, 2008 Del. Super. LEXIS 103, at *69 (Del. Super. Mar. 27, 2008)). “Free elections are essential because ‘[t]he very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection.’” *Id.* at 857-58 (quoting *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915)).

54. “[A] potential violation of the Elections Clause exists if the plaintiffs allege that ‘their access to the polls was disturbed’” *Id.* at 858 (quoting *Abbott*, 2008 Del. Super. LEXIS, at *72). Moreover, “[a]n election in which the government engages in conduct that discriminates against the aged and disabled is not ‘free and equal.’” *Id.* at 858-59.

55. As set forth above, if a voter requests a ballot near the statutory mailing deadline, there is a significant risk that they will receive their ballot too late to meet the return deadline. And even if a voter mails their completed ballot

several days before the election, there is a significant risk that it will be received too late to be counted.

56. This risk of late ballots will be exacerbated by the ongoing delays at the USPS and the high number of Delawareans expected to vote by mail.

57. The burden of these delays will fall most heavily on voters who are at risk of serious health complications from exposure to COVID-19—including seniors, the disabled, and those with underlying medical conditions like Ms. Grier-Reynolds. If they do not receive their ballots on time, they will be forced to choose between putting themselves at risk by voting in person or not voting at all.

58. Indeed, the State of Delaware has acknowledged that the widespread delays at the USPS will “impede the efforts of [Delaware] to conduct free and fair elections in the manner [Delaware] ha[s] chosen.” Exh. F., ¶ 1.

59. In sum, even if voters follow the letter of the law, many of their votes will not be counted if the statutory return deadline is enforced. This disenfranchisement—which is all but guaranteed for some number of voters—is tantamount to depriving voters of access to the polls.

60. An election in which voters can be deprived of their right to vote after following the law is not “free and equal.” This is particularly true, as here, when the government’s conduct in effect discriminates against the aged and disabled—

including voters in high-risk groups like Ms. Grier-Reynolds, for whom in-person voting is a potentially life-threatening option.

61. Thus, if the Department of Elections and Commissioner Albence are permitted to enforce a ballot return deadline of 8:00 PM on election day, they will violate the Elections Clause by depriving plaintiffs and other Delaware voters of their right to an election that is “free and equal.” They will also violate the Right to Vote Clause by disenfranchising Delawareans who are eligible and entitled to vote.

62. Plaintiffs are entitled to relief under Article 1, § 9 of the Delaware Constitution, but have no adequate remedy at law.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request that the Court enter judgment as follows:

- a) Declaring that the return deadline set forth in 15 Del. C. § 5508 and 15 Del. C. § 5608, as applied under the current circumstances, violates the Elections Clause and the Right to Vote Clause of the Delaware Constitution;
- b) Enjoining defendants from failing to count the votes recorded on any ballot received by mail between 8:00 PM on November 3, 2020, and 8:00 PM on November 6, 2020;

- c) Enjoining defendants from failing to count the votes recorded on any ballot received by mail between 8:00 PM on November 6, 2020, and 8:00 PM on November 13, 2020, bearing a postmark, scan code, or other official USPS indicator that the ballot was mailed on or before November 3, 2020;
- d) Awarding plaintiffs their reasonable fees and costs; and
- e) Awarding any other relief the Court deems just and proper.

/s/ David M. Fry
David M. Fry (No. 5486)
SHAW KELLER LLP
I.M. Pei Building
1105 North Market Street, 12th Floor
Wilmington, DE 19801
(302) 298-0700
dfry@shawkeller.com

- and -

Karen Lantz (No. 4801)
ACLU OF DELAWARE
100 W 10th Street #706
Wilmington, DE 19801
(302) 654-5326
klantz@aclu-de.org
Attorneys for Plaintiffs

Dated: September 3, 2020