

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

Hon. JASON NEMES, <i>et al.</i>	)	
	)	
Plaintiffs,	)	CASE NO. 3:20-CV-407-CRS
	)	
v.	)	
	)	
CARL BENSINGER, <i>et al.</i>	)	INTERVENOR'S
	)	COMPLAINT FOR INJUNCTIVE
	)	AND DECLARATORY RELIEF
Defendants.	)	
	)	

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Intervening Plaintiff, Amy McGrath for Senate, Inc. (hereinafter, the “McGrath Campaign”), files this intervening complaint against the Defendants in this matter, their respective agents, officers, employees, and successors, and further alleges as follows:

**INTRODUCTION**

1. The most sacred right in our democratic system of government is the right to vote. Amy McGrath is running for the United States Senate seat which has been held by Mitch McConnell for the last 35 years. Her campaign, Amy McGrath for Senate, Inc., has a significant and legally cognizable interest in ensuring that the Campaign’s supporters and all voters in the Commonwealth are provided with access to the polls on Election Day and the ability to safely exercise their democratic right to participate in free and fair elections.

2. As articulated in the Underlying Complaint<sup>1</sup> filed in this matter by the Hon. Jason Nemes, James “Rich” Howland, Ken Kearns, Aaron Gillum, Theodore Roberts, Tyson Hermes, and Erik Hermes (hereinafter, “Original Plaintiffs”), the COVID-19 outbreak has caused significant challenges to Kentuckians ability to safely participate in elective politics.

3. In addition to those particularized concerns laid out in the Underlying Complaint regarding disenfranchised voters, all Kentuckians are facing unique and distinct challenges in accessing the ballot box in light of the pandemic and the Emergency Regulations being carried out by the Defendants.

4. The McGrath Campaign has invested both substantial time and resources in its efforts to ensure that voters are fully informed of their choices during this election season, and are able to exercise their right to vote as they see fit. More specifically, the McGrath Campaign has invested hundreds of thousands of its campaign dollars in text-messaging services, mailers, television, radio, internet advertising, newspapers, setting up websites, hotlines, recruiting poll workers, training challengers and observers to take part during the ballot counting process and on election day, voter registration efforts, and professional staff whose sole focus is voter protection and education.

5. The restrictions on the number of polling places outlined in the Underlying Complaint, in addition to the restrictions placed on accessing and submitting absentee ballots threaten to disenfranchise hundreds of thousands of Kentuckians, many of whom are elderly, lack internet access and are therefore presented with unique difficulties in obtaining absentee ballots, are minorities, and are supporters of the McGrath Campaign who hope to cast a ballot for Amy McGrath on June 23.

6. The need for injunctive and declaratory relief is pressing because Kentucky's primary election is scheduled to take place in only 11 days.

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<sup>1</sup> R. 1 (referred to hereinafter as the "Underlying Complaint.")

**JURISDICTION AND VENUE**

7. The McGrath Campaign brings this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation, under color of state law, of rights secured by the First and Fourteenth Amendments to the U.S. Constitution, in addition to the Voting Rights Act (“VRA”).

8. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States. The McGrath Campaign brings this action to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the U.S. Constitution and federal law.

9. This Court has personal jurisdiction over Defendants, who are sued only in their official capacities as officers and officials of the Commonwealth of Kentucky.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b). Several of the Original Plaintiffs are located in Louisville, several Defendants are located in Louisville, and a substantial part of the events that gave rise to both the Underlying Complaint and the claims in this Complaint occurred in this judicial district.

11. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

**PARTIES**

**I. INTERVENING PLAINTIFF**

12. The Intervening Plaintiff, McGrath for Senate, Inc., is the primary political committee for Amy McGrath’s campaign for the United States Senate. It is duly organized

pursuant to Section 527 of the U.S. Internal Revenue Code (26 U.S.C. § 527) as a non-profit corporation, and organized under the laws of the Commonwealth of Kentucky.

13. As part of its mission, the McGrath Campaign works to ensure that its supporters are able to effectively exercise their right to vote. The McGrath Campaign is directly harmed by the restrictions placed on the number of polling sites and on accessing and submitting absentee ballots, both of which make it more difficult for the McGrath Campaign's supporters to vote.

14. “An organization may establish an injury to itself sufficient to support standing to challenge a statute or policy by showing that the statute or policy frustrates the organization's goals and necessitates the expenditure of resources in ways that would not otherwise be required.” *One Wisconsin Institute, Inc. v. Nichol*, 186 F.Supp.3d 958, 966 (W.D. Wis. 2016) citing MOORE'S FEDERAL PRACTICE ¶ 101.60(1)(f) (3d ed. 2015) (citing *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982)). Redirecting resources to educate voters about complying with new registration laws is an injury sufficient to meet organizational standing. *Nichol*, 86 F. Supp. 3d at 967. In a case challenging an Indiana law that required photo identification to vote, the Seventh Circuit found that the new law injured the Democratic Party by compelling them to devote resources to getting its supporters to the polls who would otherwise be discouraged to vote by the new law. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) *aff'd*, 553 U.S. 181, 128 (2008). “The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.” *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-84 (2000)).

15. Here, the McGrath Campaign clearly has standing to challenge these laws because the Defendants' decisions to limit access to absentee ballots and limit the number of polling

places in Jefferson, Fayette, Kenton, Boone, and Campbell Counties have forced the campaign to redirect their attention and resources toward turning out voters who would otherwise vote at the polls. More specifically, the McGrath Campaign has diverted resources toward educating voters about absentee voting and early voting, and has had to redirect the way its resources are being utilized to get people to the polls on Election Day despite voter fears of long lines and voting problems exacerbated by the Emergency Regulation at issue here.

16. Additionally, “[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004). “The individual participation of an organization’s members is not normally necessary when the association seeks prospective or injunctive relief for its members.” *Id.* at 574. For instance, the Sixth Circuit has held that a political party and labor organizations suffered an imminent and real injury and had standing to challenge a law that required confirmation of voters’ residences before the ballot could be counted because the polling workers would inevitably make mistakes. *Id.*

17. The McGrath Campaign additionally asserts sufficient associational standing on behalf of those who support it. Supporters of the campaign have standing to sue in their own right because many supporters have not obtained the ability to vote early or with an absentee ballot, despite their best efforts. As a result, voters with health concerns, transportation complications, difficulties accessing the interest, or those unable to contact the County Clerk by phone will not have an opportunity to vote in-person or otherwise. The McGrath Campaign represents all of its supporters that are faced with the Hobson’s choice of risking their health to

vote in-person at a single polling location, or not vote. Ultimately, many voters will not have the ability to express support for their chosen candidate as a result of there being only one polling station in these Counties, and because of the restrictions placed on absentee ballots.

## **II. ORIGINAL PLAINTIFFS**

18. Plaintiff Jason Nemes is the elected State Representative for Kentucky's 33rd State House District. Mr. Nemes' district covers northeast Louisville, and parts of Oldham County. Upon information and belief, Mr. Nemes is a U.S. citizen, a registered voter in the Commonwealth of Kentucky, a registered Republican, and a voter within Jefferson County, Kentucky. Mr. Nemes brings the underlying suit because of his concern about access to the polls for many Kentuckians as a result of the challenged practices.

19. Upon information and belief, Plaintiff James "Rich" Howland is a U.S. citizen a registered voter in the Commonwealth of Kentucky, a registered Republican, and voter within Jefferson County, Kentucky. Mr. Howland brings the underlying suit because of his concern about access to the polls for many Kentuckians as a result of the challenged practices.

20. Upon information and belief, Plaintiff Ken Kearns is a U.S. citizen, a registered voter in the Commonwealth of Kentucky, a registered Republican, and voter within Fayette County, Kentucky. Mr. Kearns brings the underlying suit because of his concern about access to the polls for many Kentuckians as a result of the challenged practices.

21. Upon information and belief, Plaintiff Aaron Gillum is a U.S. citizen, a registered voter in the Commonwealth of Kentucky, a registered Republican, and a voter within Boone County, Kentucky. Mr. Gillum brings the underlying suit because of his concern about access to the polls for many Kentuckians as a result of the challenged practices.

22. Upon information and belief, Plaintiff Theodore J. Roberts is a U.S. citizen, a registered voter in the Commonwealth of Kentucky, a registered Republican, and voter within Boone County, Kentucky. Mr. Roberts brings the underlying suit because of his concern about access to the polls for many Kentuckians as a result of the challenged practices.

23. Upon information and belief, Plaintiff Tyson Hermes is a U.S. citizen, a registered voter in the Commonwealth of Kentucky, a registered Republican, and voter within Kenton County, Kentucky. Mr. Hermes brings the underlying suit because of his concern about access to the polls for many Kentuckians as a result of the challenged practices.

24. Upon information and belief, Plaintiff Erik Hermes is a U.S. citizen, a registered voter in the Commonwealth of Kentucky, a registered Republican, and a voter within Campbell County, Kentucky. Mr. Hermes brings the underlying suit because of his concern about access to the polls for many Kentuckians as a result of the challenged practices.

### **III. DEFENDANTS**

25. Defendants Carl Bensinger, John Aubrey, Linda Huber, and Bobbie Holsclaw are members of the Jefferson County Board of Elections; Defendant Holsclaw is the Jefferson County Clerk; collectively, they enforce and administer the Commonwealth's voting laws within Jefferson County, Kentucky.

26. Defendants Don Blevins, Kathy Witt, Marilyn Dishman, and Daniel Miller are members of the Fayette County Board of Elections; Defendant Blevins is the Fayette County Clerk; collectively, they enforce and administer the Commonwealth's voting laws within Fayette County, Kentucky.

27. Defendants Gabrielle Summe, Chuck Korzenborn, Richard Scott Kimmich, and Sarah Rogers are members of the Kenton County Board of Elections; Defendant Summe is the

Kenton County Clerk; collectively, they enforce and administer the Commonwealth's voting laws, including within Kenton County, Kentucky

28. Defendants Justin Crigler, Michael Helmig, Emily Shelton, and Michael Howard are members of the Boone County Board of Elections; Defendant Crigler is the Boone County Clerk; collectively, they enforce and administer the Commonwealth's voting laws within Boone County, Kentucky.

29. Defendants Jim Leursen, Mike Jansen, James Shroer, and Jack Snodgrass are members of the Campbell County Board of Elections; Defendant Leursen is the Campbell County Clerk; collectively, they enforce and administer the Commonwealth's voting laws within Campbell County, Kentucky.

30. Defendant Albert Benjamin Chandler, III is the current Chairman of the Kentucky Board of Elections, and Defendants Sherry Whitehouse, George Russell, Katrina Fitzgerald, Deanna Brangers, Cory Skolnick, Dwight Sears, and James Lewis are members of the Kentucky Board of Elections. Pursuant to law, the Kentucky Board of Elections has the authority to "promulgate administrative regulations as necessary" to "administer the election laws of the state." Ky. Rev. Stat. § 117.015.

31. Defendant Michael Adams is the Republican Secretary of State of Kentucky, therefore serving as the Commonwealth's Chief Election Official, and as an ex officio, non-voting member of the Kentucky Board of Elections.

32. Defendant Andrew Beshear is a Democrat, and Governor of the Commonwealth of Kentucky.

33. All Defendants are sued solely in their official capacities.

## FACTS

### The COVID-19 Crisis within the Commonwealth

34. In early 2020, the Commonwealth of Kentucky was hit very hard by the COVID-19 pandemic. To date, almost 12,000 Kentuckians have been infected with COVID-19, and nearly 500 have died from it.

35. In an effort to protect the citizens of Kentucky, and to slow the spread of this terrible disease, Kentucky's elected officials have taken extraordinary steps to limit personal contact between the Commonwealth's citizens.

36. In light of the pandemic's threat, Secretary of State Adams recommended to Governor Beshear on March 16, that the primary election scheduled for May be postponed.<sup>2</sup>

37. Beshear accepted the recommendation and, in conjunction with the State Board of Elections, postponed the primary election to June 23, 2020.<sup>3</sup>

38. A few days later, on March 22, Governor Beshear issued a state-wide "healthy-at-home" order wherein he urged residents to practice "social distancing" to prevent the virus's spread.<sup>4</sup> As part of this effort, Governor Beshear further ordered that all non-life-sustaining businesses cease in-person services, advised that Kentucky's schools should remain closed for the rest of the school year, and deployed both the National Guard and additional law enforcement to assist at hospitals and medical facilities.<sup>5</sup>

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<sup>2</sup> <https://www.fox19.com/2020/03/16/ky-secretary-state-recommends-governor-delay-primary-until-june/>

<sup>3</sup> Ky. Office of the Governor, State of Emergency, Exec. Order No. 2020-296 (Apr. 24, 2020), [https://governor.ky.gov/attachments/20200424\\_Executive-Order\\_2020-296\\_SOE-Relating-to-Elections.pdf](https://governor.ky.gov/attachments/20200424_Executive-Order_2020-296_SOE-Relating-to-Elections.pdf)

<sup>4</sup> Ky. Office of the Governor, State of Emergency, Exec. Order No. 2020-257 (Mar. 25, 2020), [https://governor.ky.gov/attachments/20200325\\_Executive-Order\\_2020-257\\_Healthy-at-Home.pdf](https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf)

<sup>5</sup> Ky. Office of the Governor, Kentucky's Response to COVID-19 (May 17, 2020), <https://governor.ky.gov/covid19>; Commonwealth of Kentucky, Gov. Beshear Advises Schools to

39. In light of the threat, Kentucky's General Assembly passed emergency legislation granting new powers to the Governor, the Secretary of State, and the Board of Elections to modify Kentucky's existing voting procedures during a state of emergency. *See* H.B. 351 § 74(1)(1). The Governor vetoed select portions of the legislation, but the General Assembly overrode the veto.

40. Pursuant to H.B. 351, once the Governor declares a state of emergency and issues an executive order altering the time, place, or manner of an election, the Kentucky Board of Elections is responsible for establishing procedures for election officials to follow to accommodate the alteration. Before the Board of Elections proposed procedures may be put into practice, both the Secretary of State and the Governor must approve them.

41. On April 4, both Governor Beshear and the Kentucky Department of Public Health advised that Kentuckians should wear masks and practice social distancing to slow the virus' spread.

42. On April 8, Governor Beshear issued an executive order limiting the number of people permitted inside essential businesses by restricting shopping trips to one adult per household at a time, and further announced the closure of some state parks.

43. On April 21, Governor Beshear announced the "Healthy at Work" initiative to provide guidance to Kentucky businesses on when and how they could expect to safely reopen. Under the plan, businesses could only begin to reopen after the Governor determined that Kentucky met delineated benchmarks related to the prevalence and spread of the disease, and the protections those businesses had in place.

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Remain Closed to In-Person Instruction (Apr. 20, 2020), <https://kentucky.gov/Pages/Activitystream.aspx?n=GovernorBeshear&prId=135>.

44. On April 23, Secretary of State Adams issued recommendations for how June elections were to be conducted. The recommendations included a provision that did “empower all county clerks to reduce the number of sites for in-person voting...”<sup>6</sup>

45. On April 24, Governor Beshear issued an Executive Order directing the Board of Elections to promulgate regulations addressing the June elections with the aim of minimizing the spread of COVID-19.<sup>7</sup>

46. In response to this Order, the Board of Elections promulgated an Emergency Regulation, 31 KAR 4:190E (hereinafter, “Emergency Regulations), to govern the June 23, 2020 election. Relevant here, the Regulations provided:

- a. The Emergency Regulations apply only to the Commonwealth’s June 23, 2020 election. (31 KAR 4:190E, Section 1).
- b. The County Clerks shall transmit absentee ballots to voters who request an absentee ballot within seven (7) days of the request, but no later than June 16, 2020. (31 KAR 4:190E, Section 5)
- c. All voters who wish to request a mailed absentee ballot must do so by 11:59 p.m. EST on June 15, 2020 (31 KAR 4:190E, Section 6)
- d. Absentee ballots must be received by the County Clerk of the voter’s county of registration no later than 6:00 p.m., local time, on June 23, 2020, in order to be counted, except that, absentee ballots delivered by the United States Postal Service and bearing a postmark of June 23, 2020 or an earlier date, shall be counted if received by 6:00 p.m., June 27, 2020. (31 KAR 4:190E, Section 6)
- e. To assist County Clerks in managing the flow of receipt of voter-delivered absentee ballots, the State Board of Elections may purchase secure drop-boxes and provide them to County Clerks based on request and availability. (31 KAR 4:190E, Section 7)

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<sup>6</sup> Letter from Sec of State Adams to Governor Beshear (Apr. 23, 2020), [https://governor.ky.gov/attachments/20200423\\_Ltr-from-Sec-of-State-Adams.pdf](https://governor.ky.gov/attachments/20200423_Ltr-from-Sec-of-State-Adams.pdf).

<sup>7</sup> Ky. Office of the Governor, State of Emergency Relating to Kentucky Elections, Exec. Order 2020-296 (Apr. 24, 2020), <https://elect.ky.gov/SiteAssets/Pages/default/EO%202020-296.pdf>

- f. “County Clerks are directed to reduce the number of sites for in-person voting on June 23, 2020, with such reduction and such sites to be pre-approved by the State Board of Elections.” (31 KAR 4:190E, Section 11)
- g. All vote totals must be transmitted via “Certification, Official Count, Record of Election Totals” SBE 49, 11/03 to the Secretary of State’s Office no later than 6:00 p.m., local time, June 30, 2020. (Section 16)<sup>8</sup>

47. In violation of the law, the above referenced Emergency Regulations were noticed for a public hearing on July 31, 2020 at 10:00 AM with written comments due on the same date, notwithstanding the fact that the Emergency Regulations only applies to the conduct of the June 23 Primary Election.<sup>9</sup> This has led to a situation where interested parties have no means of seeking relief from these Emergency Regulations outside the Courthouse doors.

48. As the spread of the virus plateaued, Governor Beshear began to reopen Kentucky’s businesses. On April 27, health care services and facilities were permitted to reopen on a limited basis on the condition that the entities did comply with strict COVID-19 guidance.

49. On May 4, Governor Beshear announced that some other businesses could reopen on May 11, provided again that those businesses complied with strict safety protocols to protect individuals from the spread of COVID-19.

50. On May 7, Governor Beshear announced a tentative schedule for reopening more of Kentucky businesses. Again, these re-openings were contingent on those businesses complying with strict safety protocols to protect individuals from the spread of COVID-19.

51. On May 15, the Governor announced that state parks would reopen on June 1.

52. Although the Governor provided guidance permitting Kentucky government offices to begin reopening on May 18, several declined to reopen out of concerns over the pandemic. To this point, Fayette County Clerk Don Blevins, Jr. explained, that “[m]ost County

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<sup>8</sup> Ky. Bd. of Elections, Procedures for June 23, 2020 Election, 31 Ky. Admin. Regs. 4:190E (2020) (available at <https://www.sos.ky.gov/elections/Pages/2020-Primary-Updates.aspx>)