

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MIKE KELLY, SEAN PARNELL,
THOMAS A. FRANK, NANCY
KIERZEK, DEREK MAGEE, ROBIN
SAUTER, MICHAEL KINCAID, and
WANDA LOGAN,

Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
GENERAL ASSEMBLY, THOMAS W.
WOLF, and KATHY BOOCKVAR,

Respondents,

No. 620 MD 2020

DNC SERVICES CORP. / DEMOCRATIC
NATIONAL COMMITTEE,

Proposed Intervenor-
Respondent.

**BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PETITIONERS’
MOTION FOR EMERGENCY/SPECIAL PROHIBITORY INJUNCTION**

Proposed-Intervenor DNC Services Corp. / Democratic National Committee (“DNC”) hereby submits this brief as *amicus curiae* in opposition to the November 22, 2020 Motion for Emergency/Special Prohibitory Injunction and accompanying Memorandum of Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan (collectively, “Petitioners”). In support of their opposition to Petitioners’ Motion, DNC states the following:

I. INTRODUCTION

Petitioners' request for an injunction to disenfranchise millions of their fellow Pennsylvanians is an affront to democracy that should be swiftly rejected. And, because of their considerable delay, the request is now moot. All 67 counties have certified their results, the Secretary of State has performed her statutory duties of tabulation, and just this morning Governor Wolf signed a Certificate of Ascertainment, which has been submitted to the Archivist of the United States. There is, simply, nothing to enjoin.

An injunction now would impose unnecessary confusion and significantly greater injury to the DNC, Respondents, and the public at large than any harm it would purportedly undo. Indeed, Petitioners have failed to identify any harm they would suffer, so there is simply nothing on that side of the scale. By contrast, the relief they seek would cast doubt on the electoral process, harming Respondents—public servants who have admirably conducted a successful election in the midst of a global pandemic—the DNC and its candidate President-elect Joe Biden, and the nearly seven million voters who cast a ballot in Pennsylvania. There is simply no reason for this Court to insert itself at this hour into what has been a remarkably successful election in the midst of a pandemic, and Petitioners provide none.

Moreover, Petitioners argument on the merits is baseless and their requested relief asks this Court to violate the United States and Pennsylvania Constitutions. For all these reasons, this Court should deny Petitioners' requested relief.

II. Legal Standard

A party must establish six prerequisites in order to be entitled to a preliminary injunction: (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and (6) that a preliminary injunction will not adversely affect the public interest. *See Warehime v. Warehime*, 580 Pa. 201, 209-210, 860 A.2d 41, 46-47 (2004) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount Inc.*, 573 Pa. 637, 828 A.2d 995, 1002 (2003)). Petitioners satisfy none of these prerequisites.

III. Argument

A. Petitioners' request is moot.

Petitioners have requested that this Court preliminarily enjoin certification of Pennsylvania's November 3, 2020 general election, but their delay in bringing this lawsuit has rendered this request moot. In their Motion, Petitioners ask this Court to enter an Order prohibiting Respondents "from taking official action to tabulate, compute, canvass, certify, or otherwise finalize the results of the November 3, 2020, General Election" and, specifically, to enjoin Secretary Boockvar and Governor Wolf from acting to certify the election or the slate of presidential electors. Motion at 7-8. But the actions Petitioners ask this Court to enjoin have already occurred: all 67 counties in Pennsylvania have now certified their results, Pennsylvania's Secretary of State has tabulated those results, and, just within the last few hours, Governor Wolf has signed the Certificate of Ascertainment for the slate of electors for President-elect Biden and Vice President-elect Harris and submitted the certificate to the Archivist of the United States.¹ The certification of the November 3, 2020 general election in Pennsylvania is complete. As a result, this Court should dismiss the request for emergency relief as moot.

¹ See Press Release, Pa. Dep't of State, *Department Of State Certifies Presidential Election Results* (Nov. 24, 2020), available at <https://www.media.pa.gov/Pages/State-details.aspx?newsid=435>.

B. Petitioners' requested injunction would cause significantly greater harm to the other interested parties and the public than it would remedy.

Even if this Court does not dismiss Petitioners' motion as moot, this Court should still deny the preliminary injunction because of its vastly overbroad scope and the significant harm it would cause Respondents, the DNC, and the public at large. Were it not already moot, Petitioners' requested relief could have potentially prevented Pennsylvania from meeting the federal safe-harbor deadline for Pennsylvania's electoral votes (December 8) or even the meeting of the electors to cast their votes (December 14). It could have also thrown Pennsylvania's General Assembly into chaos, as the Pennsylvania Constitution requires that those members begin their service on December 1st. Pa. Const. art. II, § 2. Petitioners repeatedly try to downplay the cascading consequences of the requested delay but they are undoubtedly significant.

The most pressing harm is to the public at large, and this alone requires denying the requested injunction. "[W]here an adverse effect upon the public will result from the issuance of a preliminary injunction, it should not be granted." *McMullan v. Wohlgemuth*, 444 Pa. 563, 572, 281 A.2d 836, 841 (1971); *see also Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 49 (Pa. Commw. Ct. 2009) ("A preliminary injunction cannot run counter to the public interest."). The public has voted, the election is complete, and millions of Pennsylvanians chose to exercise the franchise through mail-in voting. Indeed, this Court has previously denied

injunctions regarding elections to provide the public certainty in voting, an interest even more pronounced when the election has already occurred. *Costa v. Cortes*, 143 A.3d 430, 442-43 (Pa. Commw. Ct. 2016) (denying preliminary injunction because removing proposed constitutional amendment from ballot “[l]ess than one week before the Primary Election” is not in the public interest, “as it would only foment further uncertainty among the public as to whether they should vote on [the amendment] and whether, if they do, their votes will be counted”). Enjoining certification now based on a challenge Petitioners could have brought at any time over the past year would rightly cause voters to doubt the system. Similar to this Court’s ruling in *Costa*, the United States Supreme Court has also cautioned against making drastic changes to election laws close to elections for just that reason. *See, e.g., Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (noting the wisdom of the Court’s hesitancy to make “judicially created confusion” by altering election rules close to election day); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (noting that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”) There is no doubt that the public would be tremendously disserved—and have their faith in democratic institutions shaken—were the Court to grant the requested relief.

Respondents and the DNC would have also suffered grave injuries if the requested relief were granted. Respondents, including Secretary Boockvar, conducted a general election under the provisions of Act 77, and President-Elect Biden has won the presidential race in the Commonwealth by more than 80,000 votes and is set to receive its 20 electoral votes. All counties have certified their results, and the Governor has signed the Certificate of Ascertainment. It is unclear what Petitioners can ask the Court to do now, but anything the Court orders could throw a wrench in the carefully calibrated state processes for a harm that—as the DNC noted in both its Preliminary Objections and amicus brief in support of those objections—Petitioners do not and cannot even identify. This is simply an insufficient and inappropriate basis to entitle Petitioners to the extraordinary remedy of a preliminary injunction.

Beyond the fact that Petitioners have not established that they would suffer any harm, let alone immediate and irreparable harm, absent an injunction, they have also inexcusably delayed in bringing this action. That unexplained delay in bringing this lawsuit and seeking injunctive relief also militates against their argument for this Court to take emergency action. *See, e.g., Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 409 (E.D. Pa. 2017), *aff'd*, 890 F.3d 1124 (3d Cir. 2018), and *aff'd*, 897 F.3d 518 (3d Cir. 2018)

C. Petitioners have no likelihood of prevailing on the merits.

As the DNC detailed in depth in its preliminary objections and amicus brief in support of those objections (and does not repeat at length here), Petitioners' constitutional argument is entirely baseless.² They purposefully misread Article VII, § 14 of the Pennsylvania Constitution—which requires that certain groups be allowed to absentee vote—to prohibit mail voting for everyone else, and try to alchemize Article VII, § 1 (which deals with voter qualifications) into a requirement of in-person voting. *Cf. Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *4 (M.D. Pa. Nov. 21, 2020) (“This claim, like Frankenstein’s Monster, has been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent.”) Neither argument has merit, and both violate numerous bedrock principles of statutory construction. Petitioners’ lack of likelihood of success on the merits dooms their request for emergency relief.

D. Petitioners’ requested relief violates the Pennsylvania and United States Constitutions.

Petitioners’ requested remedy—requiring wholesale rejection of mail ballots—violates the United States and Pennsylvania Constitutions. It does so in four distinct ways: First, discarding mail ballots would unduly burden the right to vote. That right includes “the right to have the ballot counted.” *Reynolds v. Sims*, 377 U.S.

² The DNC incorporates those pleadings fully herein by reference pursuant to Pa. R.C.P. No. 1019(g).

533, 555 n.29 (1964). And discarding the mail ballots cast in Pennsylvania would disenfranchise millions of Pennsylvania voters who cast timely ballots using one of the voting methods the Pennsylvania legislature prescribed. *See* Amicus Br. at 22-24. Second, Petitioners' requested relief would violate due process. To disenfranchise nearly 38% of Pennsylvania's voters who cast their ballots lawfully—and did so in reliance on officials' assurances that votes cast by mail would be treated the same as votes cast in person—"reaches the point of patent and fundamental unfairness," such that "a violation of the due process clause may be indicated." Amicus Br. at 24-26 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)). Third, discarding these ballots would violate equal protection. Petitioners' request to throw out all mail ballots would selectively disenfranchise voters who cast their ballots by mail, in violation of the Equal Protection Clause. *See* Amicus Br. at 26-28. Finally, Petitioners' requested relief violates the Free and Equal Elections Clause of the Pennsylvania Constitution, which requires that election procedures must "make . . . votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." Amicus Br. at 28 (quoting *League of Women Voters*, 178 A.3d at 804). Petitioners' requested remedies, on the other hand, would count the votes of similarly situated voters differently. *See* Amicus Br. at 29.

Conclusion

For the reasons stated herein, as well as those contained in its Proposed Preliminary Objections and Amicus Brief in support thereof, the DNC requests that this Court deny Petitioners' request for extraordinary relief.

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Respectfully submitted,

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**Motions for Admission Pro Hac Vice Forthcoming*

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/ Matthew I. Vahey

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CERTIFICATE OF SERVICE

I, Matthew I. Vahey, hereby certify that a true and correct copy of the foregoing document was served upon all counsel of record on November 24, 2020 by this Court's electronic filing system.

/s/ Matthew I. Vahey
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