

Petitioners' Application for an Expedited Discovery Schedule and Evidentiary Hearing does not serve that purpose.

This is largely because the Petitioners' Application is premature. It disregards potential avenues for expeditious adjudication that can only be evaluated after the issues in this matter have been properly joined. Only after the pleadings are fully framed will the Parties be able to determine if, and to what extent discovery is necessary. The need to avoid rushed, unnecessary and duplicative discovery is particularly important in this case considering the short amount of time before the Election. This Court should, therefore, defer consideration of the Application until after Secretary Boockvar responds to the Petition for Review.

ARGUMENT

The Petition for Review seeks prospective declaratory and injunctive relief concerning the Respondents' anticipated implementation of Act 77 in the November 2020 general election. Prompted by the June 2020 primary election, Petitioners seek: (i) a judicial declaration that Act 77 permits use of "secure, easily accessible" drop boxes "for the collection of mail-in ballots" and a permanent injunction obligating the County Boards of Election to develop a plan to ensure the expedient return of mail-in ballots (*id.* at Count I); (ii) an injunction pursuant to the Pennsylvania Constitution and Act 77 extending the deadline for mail-in ballots

(*id.* at Count II); (iii) an injunction requiring Respondents to permit electors to correct minor ballot defects (*id.* at Count III); (iv) a declaration that Naked Ballots may not be set aside and an injunction that obligates Respondents to “clothe and count” all “Naked Ballots on a uniform basis” (*id.* at Count IV), and; (vi) a declaration under the United States and Pennsylvania Constitution that Pennsylvania’s poll watcher residency requirement is valid (*id.* at Count V).¹

Petitioners’ claims in this action implicate important questions of Pennsylvania law that trigger this Court’s original jurisdiction over “all civil actions or proceedings against the Commonwealth government, including any officer thereof, acting in his official capacity” 42 Pa. C.S.A. § 761. Although Secretary Boockvar shares Petitioners’ interest in prompt adjudication of claims concerning a fair and free November 2020 general election, Petitioners’ Application for an Expedited Discovery Schedule and Evidentiary Hearing pursuant to Rule 1542 is premature. Rule 1542 provides that:

¹ In her motion to dismiss an action filed in the U.S District Court for the Western District of Pennsylvania raising identical claims, *Trump v. Boockvar*, No. 20-CV-00966 (W.D. Pa.), Secretary Boockvar asserted, *inter alia*, that those claims implicate important questions of Pennsylvania state law and should be decided in state court pursuant to the Eleventh Amendment to the United States Constitution and principles of federal abstention. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984); *see also Chez Sez III Corp. v. Twp. of Union*, 945 F.2d 628, 631 (3d Cir. 1991) (federal abstention appropriate when case presents federal constitutional issue and unsettled issue of state law whose resolution might narrow or eliminate federal constitutional question). A true and correct copy of Secretary Boockvar’s Motion to Dismiss and supporting brief are attached hereto as Exhibit “A.”

In any matter addressed to the appellate court's original jurisdiction, ***where it appears that a genuine issue as to a material fact has been raised by the pleadings,*** depositions, answers to interrogatories, stipulations of fact, admissions on file in supporting verified statements, if any, the court on its own motion or an application of any party shall, after notice to the parties, hold an evidentiary hearing for the development of the record.

Pa. R. App. 1542 (emphasis added). The issues in this case and any potential disputes of fact have not yet been joined because Secretary Boockvar (as well as the 67 County Boards of Election) have not yet responded to the Petition.

Moreover, based solely on the claims and allegations of the Petition for Review, Petitioners require neither discovery nor an evidentiary hearing as to certain claims. Petitioners' first, fourth and fifth counts seek, *inter alia*, judicial declarations concerning alleged rights under Act 77, the Pennsylvania Constitution, the United States Constitution, and the Pennsylvania Election Code. (*See* Pet. for Rev. ¶¶ 163-64, 193-95, 197, 205-07) (citing provision in Declaratory Judgments Act, 42 Pa. C.S.A. § 7533, which provides that persons "whose rights, status or other legal relations are affected by a statute, . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.")). Declaratory claims which present questions of statutory construction should be decided as a matter of law, and neither fact discovery nor an evidentiary hearing are necessary. *See, e.g.,*

Hommrich v. Pennsylvania Pub. Utilities Comm'n, ___ A.3d ___, 2020 WL 2375083 *2 (Pa. Commw. 2020) (declining evidentiary hearing and deciding question of statutory interpretation as a matter of law).

Under Secretary Boockvar's direction, the Department of State, in conjunction with all 67 counties, is now evaluating the Commonwealth's implementation of Act 77 in the June 2020 primary election to assess the most effective means and methods necessary for the November 2020 general election. The Department of State is also compiling data from 67 County Boards of Elections to be used in a statutorily mandated report, addressing, *inter alia*, applications for, votes cast, and challenges to absentee, mail-in, and provisional ballots in the June 2020 primary, the number of election officers and polling places utilized, and canvassing data covering the June 2020 primary election (the "August 1 Report"). *See* 71 P.S. § 279.6. In addition to the planned release of the Department of State's August 1 Report, Secretary Boockvar intends to file an early response to the pending Petition for Review on July 31, 2020.

To the extent that her response creates genuine disputes of material fact as to one or more of the claims in the Petition for Review which are not resolved by the data included in the August 1 Report, the need for focused, expedited discovery in advance of an evidentiary hearing can be assessed at that time. If, on the other hand, there is no dispute of fact as to certain claims, discovery may be unnecessary

and inefficient and this Court may be able to proceed directly to resolving the issues at hand.

When Secretary Boockvar files her response on July 31, 2020, the legal issues will be framed and joined so the Court may evaluate whether genuine disputes of material fact exist such that expedited discovery and/or an evidentiary hearing is appropriate. In addition, issuance of Department of State's August 1, 2020 Report will not only provide some of the critical information necessary to administer a fair election in November 2020, but also will provide statistics and data that otherwise might be sought in expedited discovery or that may even obviate the need for any discovery.

CONCLUSION

Secretary Kathryn Boockvar is committed to a free, fair, and orderly general election in November 2020. Secretary Boockvar shares Petitioners' desire for a prompt and efficient resolution of valid disputes impacting the November 2020 general election, but the Application is premature. The Application should be denied and a status conference should be set at a time convenient to the Court for

the purpose of establishing a case management order for the expeditious adjudication of this proceeding.

Dated: July 27, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby 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 from non-confidential information and documents.

/s/ Timothy E Gates

Timothy E. Gates

Dated: July 27, 2020

CERTIFICATE OF SERVICE

I, Timothy E. Gates, hereby certify that I am this day serving the foregoing Answer to Application for Expedited Discovery Schedule and Evidentiary Hearing upon the following counsel of record via PACFile eService, which service satisfies the requirements of Pa. R.A.P. 121.

/s/ Timothy E Gates
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