

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.

**PROPOSED INTERVENOR-RESPONDENT’S SUPPLEMENTAL AMICUS
IN RESPONSE TO NOVEMBER 25, 2020 ORDER**

In light of this Court’s order of November 25, 2020, Proposed-Intervenor DNC Services Corp. / Democratic National Committee (“DNC”) hereby files this Supplemental Brief as Amicus Curiae in response to the Supplemental Emergency Application filed by Petitioners.

I. INTRODUCTION

1. In October 2019, the General Assembly enacted Act 77, which allowed millions of Pennsylvanians to vote by mail for the first time. Since Act 77 became

law, Pennsylvania has held two elections, in which over 4.4 million Pennsylvania voters cast ballots by mail.

2. Petitioners did not challenge the constitutionality of Act 77 in October 2019—or even by the date of Pennsylvania’s primary elections (June 2) or general election (November 3).

3. Instead, Petitioners filed this action on November 21, 2020—well after the results of the November 3 election were known and just two days before the deadline for counties to certify the results of the election to the Secretary of the Commonwealth. In other words, they “lai[d] by and gamble[d] upon receiving a favorable decision of the electorate and then, upon losing, s[ought] to undo the ballot results in a court action.” *Toney v. White*, 48 F.2d 310, 314 (5th Cir. 1973) (en banc) (quotation marks omitted).

4. This suit is now moot at least as to the presidential election. All 67 counties have certified their results, the Secretary has tabulated those results, and Governor Wolf has formally signed the Certificate of Ascertainment of Presidential Electors identifying the electors who will cast Pennsylvania’s electoral votes. The Governor has also transmitted the names of Pennsylvania’s electors to the Archivist of the United States, as required by 3 U.S.C. § 6.

5. Put simply, Respondents have no further role to play in the presidential election, and Petitioners cannot receive the relief they seek from this Court.

6. For this reason, DNC urges this Court to dismiss at least the portion of the litigation—and dissolve the portion of the temporary injunction issued November 25, 2020—that relates to the presidential election.

II. ARGUMENT

The Supplemental Emergency Application Is Moot As A Matter Of Law At Least As To The Presidential Race

7. The Pennsylvania Election Code articulates the specific steps to be completed before Pennsylvania’s electors are selected. All those steps have now been completed.

8. Specifically, (1) each county board canvasses the ballots, computes the votes, and certifies the results, 25 Pa. Stat. § 3154, (2) with respect to state-wide elections (including “elections of presidential electors”), each Board sends the Secretary of the Commonwealth a certificate showing the totals of the return, *id.* § 3158, (3) the Secretary tabulates the votes cast and then, when all results are received, “certif[ies] and file[s] in her office the tabulation thereof,” *id.* § 3159 and (4) the Secretary “on receiving and computing the returns of the presidential electors, [must] lay them before the Governor, who [must] ... cause a certificate of election to be delivered to each person so chose,” *id.* § 3166.

9. There is no dispute that steps 1-3 have been followed. And while Petitioners suggest (Supp. Emergency App. ¶ 11) that the record is unclear about

whether the governor has actually caused a certificate of election to be delivered to each elector, that is simply incorrect.

10. The Governor has also undisputedly delivered the certified results of the presidential election to the archivist of the United States. *See* <https://www.media.pa.gov/pages/state-details.aspx?newsid=435> (press release from the Governor stating that the “Certificate of Ascertainment ... was submitted to the Archivist of the United States.”); *see also* Supp. Emergency Application ¶ 4 (acknowledging submission).

11. As a matter of federal law, the fact that the Certificate was submitted means that electors have already been appointed. *See* 3 U.S.C. § 6 (“It shall be the duty of the executive of each State, as soon as practicable *after the conclusion of the appointment of the electors* in such State by the final ascertainment, ... to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed[.]” (emphasis added)).

12. Petitioners are thus incorrect in asserting that the process of finalizing appointment of Pennsylvania’s slate of presidential electors is “far from complete.” As just explained, all of the “official actions” listed in paragraph 11 of petitioners’ Supplemental Application for Emergency Relief that apply to presidential electors are complete. *See* 25 Pa. Stat. §§ 3159; 3166.

13. The remaining “official actions” listed concern appointment of successful candidates to *different* offices. *See, e.g.*, 25 Pa. Stat. § 3160 (local and county officials); § 3163 (members of Congress); § 3164 (members of state legislature); § 3165 (state officials such as the Auditor General and State Treasurer). And section 2621 simply sets forth the general powers and duties of the Secretary of the Commonwealth. *See id.* § 2621.

14. Petitioners fare no better by claiming (Supp. Emergency App. ¶ 13) that, pursuant to 25 Pa. Stat. § 3160, “any ... commissions already issued by respondents could be nullified.” As the title and text of section 3160 make perfectly clear, that provision applies only to elections of “county and local officers.” It concerns an entirely distinct certification process—one handled by the relevant county election board—than the already-complete certification process applicable to presidential electors. *See* 25 Pa. Stat. §§ 3159, 3166 (governing certification of presidential electors). There is no nullification provision comparable to section 3160 that applies to presidential electors already certified by the governor as having been elected.

15. Even if section 3160 applied to presidential electors, the predicate judicial proceeding required to decommission such an officer—as in the case of section 3160—would be an election contest. *See* 25 Pa. Stat. § 3160 (explaining that a new commission may issue only following “the decision of the proper

tribunal having jurisdiction of a contested election”). Plaintiffs have not initiated an election contest—nor could they, as the deadline for filing an election contest passed on November 23, 2020. *See id.* § 3456 (Class II election contests “shall be made and filed ... within twenty days after the day of the ... election”).

16. *Finally*, Petitioners contend (Supp. Emergency App. ¶ 12) that mootness could potentially be overcome by “join[ing] the slate of presidential and vice presidential electors as additional Respondents in this action,” in order that this Court then enjoin the electors from meeting to cast their votes on December 14, 2020. But a case or controversy requires “a real and not a hypothetical legal controversy.” *City of Philadelphia v. SEPTA*, 937 A.2d 1176, 1179 (Pa. Cmwlth. 2007). Once a case is moot, in other words, a plaintiff cannot revive it by seeking to join new defendants: “[A]n actual claim or controversy must be present *at all stages of the judicial process* for the case to be actionable or reviewable.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 203 (2005) (emphasis added); *see also id.* (“If events occur to eliminate the claim or controversy at any stage in the process, the case becomes moot.”); *accord In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978) (mootness doctrine requires that “an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed”). Because this Court “cannot enter an order that has any legal force or effect” with regards to the presidential election, that portion of the case is

moot. *J.S.S. v. M.J.S.*, No. 850 WDA 2014, 2015 WL 7573389, at *12 (Pa. Super. Ct. Jan. 20, 2015).

17. In short, the only step that remains is for the presidential electors to “assemble at the seat of government of this Commonwealth” on December 14, 2020, and cast their ballots. 25 Pa. Stat. Ann. § 3192. Petitioners suggest (Supp. Emergency App. ¶ 12) that “this court may ... enjoin Respondents from permitting the electors to assemble at such location,” but they are mistaken. Respondents may not lawfully bar the electors from assembling in Harrisburg, or for that matter on the Capitol grounds, to “perform the duties enjoined upon them by the Constitution and laws of the United States.” 25 Pa. Stat. Ann. § 3192. Indeed, the Constitution itself requires the electors to assemble once they have been appointed, as they have been. *See* U.S. Const. amend. XII (“The Electors *shall meet* in their respective States” (emphasis added)); *see also* Pa. Const. art. I, § 20 (protecting citizens’ right to peaceably assemble); U.S. Const. amend. I (same).

III. CONCLUSION

18. For these reasons, this Court should at a minimum dismiss the portion of the action—and dissolve the temporary injunction issued on November 25, 2020—as it relates to the presidential race.

Dated: November 25, 2020

Respectfully submitted,

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** Admitted Pro Hac Vice*

***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 A. White
Matthew I. Vahey

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 25, 2020 by this Court's electronic filing system.

/s/ Matthew A. White
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