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68 MAP 2020

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IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners/Appellees

v.

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

Respondents/Appellants.

No. 68 MAP 2020

RESPONSE IN OPPOSITION TO THE EMERGENCY APPLICATION FOR STAY OF COURT'S ORDER OF NOVEMBER 28, 2020

Respondent/Appellant Kathy Boockvar, in her official capacity as Secretary of the Commonwealth of Pennsylvania; Respondent/Appellant the Honorable Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania; and Respondent/Appellant the Commonwealth of Pennsylvania (collectively, "Executive Respondents") hereby respond to Petitioners' Emergency Application for Stay of Court's Order of November 28, 2020 (the "Application").

I. INTRODUCTION

Once again, Petitioners are asking the courts to take expedited action in response to an emergency of Petitioners' own making. This Court dismissed the Petition for Review because Petitioners had waited far too long—until weeks after the second election carried out under Act 77—to bring it. Petitioners then submitted an Emergency Application for a Writ of Injunction to the U.S. Supreme Court on Tuesday, December 1, only to withdraw it the next day. Now, Petitioners return to this Court to ask it to address issues of federal law that Petitioners have never raised before. If Petitioners believed that this case raised issues of federal law, they had every opportunity to present those issues to the Commonwealth Court and to this Court. Nonetheless, in their voluminous filings, which included a 98-paragraph Complaint and more than 155 pages of briefing, Petitioners never once argued that the U.S. Constitution provides a basis for the relief Petitioners

now seek. It is simply too late to invoke the U.S. Constitution now; they have waived their arguments. For this reason, and because the fatal flaws in Petitioners' original case mean that the Supreme Court of the United States is highly unlikely to grant relief, this Court should deny Petitioners' Application.

II. PETITIONERS FAILED TO RAISE—AND THEREFORE WAIVED—THE FEDERAL-LAW ISSUES ON WHICH THEIR APPLICATION IS BASED

Petitioners contend they are likely to succeed in arguing to the Supreme Court of the United States that this Court's decision violated the Elections/Electors Clauses of the United States Constitution as well as Petitioners' purported rights under the First and Fourteenth Amendment. (Application at 2-23.) But Petitioners never raised these—or any other—federal questions in the proceedings before this Court or the earlier proceedings before the Commonwealth Court. From the beginning to the end of this case, Petitioners' arguments were couched *solely* in terms of Pennsylvania law. Petitioners' attack on Act 77 relied exclusively on the Pennsylvania Constitution and Pennsylvania-court decisional authority interpreting that charter. Petitioners never asserted that the enactment of Act 77 violated the Elections or Electors Clause.

Similarly, Petitioners never contended—or even so much as hinted—that the First or Fourteenth Amendment barred this Court from sustaining Respondents' Preliminary Objections and dismissing the Petition for Review with prejudice

without reaching the merits of Petitioners' challenge under the Pennsylvania Constitution. Of course, Petitioners had ample opportunity to present these arguments. Not only did Petitioners file an answer and brief in opposition to the Preliminary Objections on November 24, 2020; on November 27, 2020, they then filed a 64-page response to Respondents' Application for the Court Exercise Extraordinary Jurisdiction, in which Petitioners again set forth arguments in opposition to the Preliminary Objections.

Having failed to raise any federal-law questions prior to this Court's entry of final judgment, Petitioners cannot do so now. It is well settled that new arguments cannot be presented for the first time in a post-decision application. *See, e.g.*, *Commonwealth v. VanDivner*, 983 A.2d 1199, 1200-01 (Pa. 2009) (new argument raised for the first time in post-decision application "is waived").

And because Petitioners did not timely present any federal question to the Pennsylvania courts, there is no basis for the Supreme Court of the United States to review this Court's decision. *See* 28 U.S.C. § 1267; *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) ("A party may not preserve a [federal] constitutional challenge by generally invoking the [federal] Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon."). For this reason alone, Petitioners cannot show a reasonable probability of success before the Supreme Court of the United States, which is

itself sufficient to deny their present Application.

III. THERE IS NO STATE LAW PROCESS FOR A STAY OR INJUNCTION PENDING APPEAL OF AN ORDER OF THE PENNSYLVANIA SUPREME COURT

Petitioners raise the novel claim in their Emergency Application that this Court should stay its November 28, 2020 Order, and issue a mandatory injunction to restore Petitioners' version of the *status quo ante*, pending an appeal to the United States Supreme Court. (App. at 1). Such a remedy does not exist under Pennsylvania state law, and this Court should reject Petitioners' Application on this basis.

Pennsylvania Rule of Appellate Procedure 1732 addresses the method for an application for a stay or injunction pending appeal:

> (a) Application to trial court.— Application for a stay of an order of a trial court pending appeal, or for approval of or modification of the terms of any supersedeas, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal, or for relief in the nature of peremptory mandamus, must ordinarily be made in the first instance to the trial court, except where a prior order under this chapter has been entered in the matter by the appellate court or a judge thereof.
>
> (b) Contents of application for stay.— An application for stay of an order of a trial court pending appeal, or for approval of or modification of the terms of any supersedeas, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal, or for relief in the nature of peremptory mandamus, may be made to the appellate court or to a judge thereof, but the application shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant

requested, with the reasons given by the trial court for its action. Pa.R.A.P. 1732(a)-(b); *In re Passarelli Family Trust an Irrevocable Trust Instrument*, 231 A.3d 969, 972 (Pa. Super., 2020). Rule 1732 does not provide a process for staying an order of the Pennsylvania Supreme Court, and no other rule of appellate procedure grants Petitioners the right to the relief they seek; indeed, Petitioners cite no rule of appellate procedure in their Emergency Application at all. There is no common law precedent for petitioning the Supreme Court of Pennsylvania to stay its own order pending a potential appeal to the Supreme Court of the United States either. Simply put, the relief Petitioners seek is unavailable under Pennsylvania law.

As support, Petitioners cite *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (Pa. 1990), a case where the petitioner applied for a stay of a Superior Court order and the restoration of a preliminary injunction pending disposition on application for petition for review with the Supreme Court of Pennsylvania. *Maritrans* fits the Rule 1732 mold, and does not stand for the proposition that this Court ought to stay its final adjudication indefinitely pending appeal at the United States Supreme Court. As this Court has made clear in the past, "[a]n injunction pending appeal is applicable only during the period of appeal." *SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 498 (Pa. 2014). And Petitioners' appeal period is over. It ended when this Court dismissed

Petitioners' petition for review with prejudice on November 28, 2020. *Kelly et al. v. Boockvar et al.*, 2020 WL 7018314, at *2 (Pa., 2020). As indicated above, no state law stay or injunction pending appeal is available to Petitioners, and this Court should deny the Emergency Application for this reason.

IV. PETITIONERS FAIL TO DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS BEFORE THE U.S. SUPREME COURT

Even if the U.S. Supreme Court could review this Court's decision, there is no likelihood—let alone a strong likelihood—that it would reverse it. For the reasons stated in this Court's per curiam order, the Court correctly ruled that Petitioners' claims were barred under the doctrine of laches. *See* Order dated November 28, 2020; *see also* Justice Wecht's Concurring Statement; Respondents' Brief in Support of Preliminary Objections to Petitioners' Petition for Review, Ex. A to Nov. 25, 2020 Petition for Review ("Preliminary Objections Br.") at 15-19; Executive Respondents' Brief in Opposition to Petitioners' Motion for Emergency/Special Prohibitory Injunction ("PI Br.") at 7-9.

Moreover, this Court could have dismissed Petitioners' claims for several other compelling reasons. First, Petitioners lacked standing to bring their claims. They have admitted this; in their Response to the Application for Extraordinary Jursidiction, they stated that facts supporting their standing argument were "not alleged in the Petition, but could easily be alleged in an amended Petition" or "be found through judicial notice based on public election results" that Petitioners did

not identify. *See* Response dated Nov. 27, 2020 at 11-13. Setting aside whether these amendments could have established standing, Petitioners never made them; accordingly, their Petition failed as a matter of law. *See* Preliminary Objections Br. at 6-11. Second, Petitioners' claims were time-barred by Act 77's statutory 180-day limit on constitutional challenges. *See id.* at 11-13. Third, Petitioners' substantive argument is incorrect; Act 77 and the Pennsylvania Constitution are consistent, and the General Assembly had the authority to adopt Act 77. Finally, as Chief Justice Saylor articulated in his Concurring and Dissenting Statement, the remedies Petitioners sought were "extreme and untenable," and granting them would undermine the strong public interest in the finality of elections.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
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Dated: December 2, 2020

By: */s/ Michele D. Hangley*

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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.

Dated: December 2, 2020

/s/ Michele D. Hangley
Michele D. Hangley