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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DARYL D. METCALFE, *et al.*,

Petitioners,

v.

THOMAS W. WOLF, *et al.*,

Respondents,

No. 636 MD 2020

**EXECUTIVE RESPONDENTS' BRIEF IN OPPOSITION TO
PETITIONERS' FIRST AMENDED EMERGENCY MOTION FOR A
TEMPORARY RESTRAINING ORDER AND INJUNCTIVE RELIEF**

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Respondents Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania, and Kathy Boockvar, in her capacity as Secretary of the Commonwealth of Pennsylvania (together, “Executive Respondents”), submit the following Memorandum of Law in opposition to Petitioners’ First Amended Emergency Motion for Temporary Restraining Order and Injunctive Relief.

I. INTRODUCTION

The relief Petitioners seek—undoing the results of a presidential election and decertifying Pennsylvania’s elected presidential electors—would be a devastating blow to Pennsylvania’s democratic principles and the rights of its voters. ““Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. . . . The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.” Order, *Wis. Voters All. v. Wis. Elections Comm’n*, No. 2020AP1930-OA, at 3 (Wis. Dec. 4, 2020) (Hagedorn, J., concurring).

It is difficult to imagine what kind of election malfeasance could prompt such a result. Certainly, nothing of the sort is alleged in the Petition here. Instead, Petitioners simply run through a list of complaints about Pennsylvania law and baseless speculation about possible “irregularities.” This is not the stuff of

overturning elections. For this reason, and because Petitioners can meet none of the prerequisites for injunctive relief, the Court should deny the Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

Executive Respondents incorporate by reference the Factual and Procedural Background in the Brief in Support of Preliminary Objections to Petitioners' Petition for Review.

III. ARGUMENT

To obtain a preliminary injunction, a party must satisfy every one of several “essential prerequisites”: (1) “that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest” – that is, “that it is likely to prevail on the merits”; (2) “that an injunction is necessary to prevent immediate and irreparable harm”; (3) that “greater injury would result from refusing an injunction than from granting it”; (4) that “a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”; (5) that “the injunction ... is reasonably suited to abate the offending activity”; and (6) that “a preliminary injunction will not adversely affect the public interest.” *Summit Towne Centre, Inc. v. Shoe Show of Rock Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Moreover, because Petitioners seek, in part, mandatory relief compelling Governor Wolf to withdraw certification of the November 2020 Presidential election results and to withdraw the certificates of

election issued to the Democratic electors, (*see* Pet. Count I), this Court must apply even greater scrutiny to the injunction prerequisites in evaluating this aspect of the Motion. A mandatory preliminary injunction “is an extraordinary remedy that should be utilized only in the rarest cases.” *Purcell v. Milton Hershey Sch. Alumni Ass’n*, 884 A.2d 372, 377 (Pa. Commw. Ct. 2005) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995 (Pa. 2003)); *accord Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Commw. Ct. 2010); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 5374328, at *2 (Pa. Commw. Ct. Nov. 1, 2012); Standard Pa. Prac. 2d § 83:9 (2008) (“[T]he court must exercise extreme care and act in *only the clearest of circumstances* when a mandatory preliminary injunction is requested.” (emphasis added)).

Petitioners here cannot establish *any* of the necessary elements for the specific relief that they seek from this Court, let alone all of them. In particular, Petitioners’ claims fail as a matter of law for multiple, independent reasons: Petitioners have not alleged any cognizable injury; greater injury would result from granting the requesting injunction rather than denying it; and granting relief would neither restore the status quo nor benefit the public interest.

A. Petitioners Cannot Establish the Requisite Likelihood of Success

Petitioners’ claims are patently meritless, as explained in the Executive Respondents’ Preliminary Objections and supporting brief, which are incorporated

herein by reference. Petitioners cannot show *any* prospect of success on the merits, let alone the “likelihood of success” required for the extraordinary relief of a preliminary injunction.

First, Petitioners fail to set forth facts showing that they sustained a particularized, substantial injury sufficient to confer standing. The only purported injury they allege is an injury to the interest, shared in common with all other Pennsylvania electors, in having the election conducted in accordance with the law (as Petitioners conceive it). *See* Complaint ¶ 93 (Asserting that “[a]s Pennsylvania residents, Plaintiffs have a direct interest in ensuring that only lawfully-cast votes are included in Defendant Wolf’s enumeration and ascertainment of votes for presidential electors.”). As previously shown by Executive Respondents, it is hornbook law that such allegations do not confer standing. *See* PO Brief at 6-8.

Second, this Court lacks jurisdiction over this lawsuit because Petitioners are improperly attempting to invoke equity jurisdiction to circumvent the statutory strictures of the Election Code, which provide the exclusive procedures for challenging the results of an election. *See* PO Brief at 9-11.

Third, Petitioners’ claims are plainly barred by laches. Petitioners offer no explanation whatsoever of why they delayed weeks after the election – and months and even years after much of the alleged wrongful conduct occurred (Pet. ¶¶ 38-39; 41-54, 74-83, 55-63) – before bringing their challenge. The prejudice from this

inexcusable delay is apparent: more than a month after Election Day, Petitioners seek to bar the Commonwealth's electors from participating in the Electoral College, and in the process, disenfranchise every single voter who participated in the November 3, 2020 general election (*see* Pet. at 30). *See* PO Brief at 11-15.

Fourth, Petitioners have failed to state an actionable claim. Because Plaintiffs' request for an injunction is not a cause of action (rather a request for a remedy), the only cause of action in the complaint sounds in mandamus. *See* Compl. pp. 29-31. Plaintiffs cannot establish any of the three prerequisites to mandamus relief: "(1) a clear legal right to relief in the petitioner; (2) a corresponding duty in the respondent; and, (3) the lack of any other adequate and appropriate remedy." *Baron v. Cmmw. Dept. of Human Services*, 169 A.3d 1268, 1272 (Pa. Cmmw. Ct. 2017), *aff'd*, 194 A.3d 563 (Pa. 2018). First, Plaintiffs have not established a clear legal right to relief, as they are seeking to compel actions— withdrawing certification and issuance of electors' certificates—that are unprecedented and not contemplated by the Election Code. Second, even if Plaintiffs had a legal right to relief, mandamus does not lie because Plaintiffs seek to compel the Governor to exercise discretion—rather than taking ministerial action—in determining whether to credit Plaintiffs' unconfirmed, and in many cases directly disproven, allegations of "illegal" election returns. Third, Plaintiffs are not entitled to mandamus because they failed to pursue other appropriate

remedies—including those specifically enumerated in the Election Code—before seeking mandamus.

Fifth, one of Petitioners’ requests for relief – to prohibit certification of the November 2020 general election results – must be denied as moot, as Secretary Boockvar has already certified the results and Governor Wolf has already signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States and submitted the certificate to the Archivist of the United States. *Department of State Certifies Presidential Election Results*, (Nov. 24, 2020).

<https://www.media.pa.gov/pages/state-details.aspx?newsid=435>. See PO Brief at 15-16.

In sum, because Petitioners cannot show a likelihood of success, their motion for a preliminary injunction must be denied.

B. Petitioners Cannot Establish the Requisite Irreparable Injury

Just as Petitioners cannot currently establish a likelihood of success on the merits, they cannot satisfy the separate requirement of showing that the preliminary injunction they seek is necessary to avoid immediate, irreparable injury. “Actual proof of irreparable harm” is a “threshold evidentiary requirement to be met before a preliminary injunction may issue.” *Reed v. Harrisburg City Council*, 927 A.2d 698, 704 (Pa. Commw. Ct. 2007) (citing *New Castle*

Orthopedic Assocs. v. Burns, 393 A.2d 1383 (Pa. 1978)). “In order to meet this burden, a plaintiff must present ‘concrete evidence’ demonstrating ‘actual proof of irreparable harm.’” *City of Allentown v. Lehigh Cnty. Auth.*, 222 A.3d 1152, 1160 (Pa. Super. Ct. 2019); *accord Summit Towne Ctr.*, 828 A.2d at 1002 (holding that trial court properly denied preliminary injunction where evidence supporting claim of irreparable harm was “no[t] concrete” and “rested almost entirely on speculation and hypothesis”).

Plaintiffs cannot meet this requirement for the same reason they could not establish standing. They do not present any evidence of actual, concrete harm. Rather, the only harm they allege is abstract and generalized, and is tied to the common interest in obedience to the law. That cannot be—and is not—the basis of a preliminary injunction disenfranchising millions of Pennsylvania voters.

C. **Granting the Injunction Would Upset the Status Quo, Would Cause More Harm Than It Would Prevent, and Would Not Serve the Public Interest**

Petitioners’ Motion must also be denied because the preliminary injunction they seek would not restore the *status quo ante*. *See Reed*, 927 A.2d at 703 (quoting *Summit*, 828 A.2d at 1001) (the party seeking a preliminary injunction “must show that [it] will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”). Indeed, owing to Petitioners’ inexcusable delay in filing their Petition and the instant Motion for preliminary

injunctive relief, the true status quo is the current state of certification.

Based on Petitioners' allegations, the *status quo ante* they seek is be the world before the Secretary certified Pennsylvania's election results on November 24, 2020. But that is not the true status quo in this case. "The *status quo ante* is that "last actual, peaceable and lawful uncontested status which preceded the pending controversy." *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Const. Co., Inc.*, 893 A.2d 196, 204, n.10 (Pa.Cmwlth., 2006). Because Plaintiffs delayed bringing their lawsuit until after the time frame for election challenges provided in the Election Code, and after certification had taken place, the true status quo is what we have already—a certified 2020 presidential election. Undoing the certification of Pennsylvania's votes (were that relief not already moot) would not restore that *status quo ante*; it would simply threaten to disenfranchise the entire electorate. For this reason alone, the injunction must be denied.

And Petitioners fail to satisfy still other prerequisites for injunctive relief. It is well settled that a preliminary injunction "should in no event ever be issued unless the greater injury will be done by refusing it than in granting it." *Reed*, 927 A.2d at 704. Relatedly, a preliminary injunction must be denied if it will "substantially harm other interested parties in the proceedings" or "adversely affect the public interest." *Id.* at 702-03 (quoting *Summit*, 828 A.2d at 1001). This

constellation of requirements provides an independent basis for denying Petitioners' Application.

Petitioners do not contend that a single vote cast in the November 2020 election was cast by an ineligible voter, cast untimely, or cast by someone other than the person who purported to cast it. The relief Petitioners seek would do grievous harm; it would disenfranchise the almost 7 million Pennsylvania voters who were fully eligible to vote and did exactly as they were directed to do by both the General Assembly and elections officials. An injunctive order granting such relief would epitomize inequity. Indeed, Petitioners' arguments embody the sort of hypertrophied formalism, heedless of justice or fairness, that gave rise to courts of equity in the first place.

Nor is it any answer to these equitable concerns to say that Petitioners are seeking a temporary hold on certification, or a delay in Respondents' participation in the Electoral College on December 14. Such "temporary" relief cannot be divorced from the relief Petitioners seek in their Petition, which is to disenfranchise millions of Pennsylvanians. There is no purpose to grant a preliminary injunction except to allow for the possibility of that disenfranchisement, which should be inconceivable. There is no justification for arresting the clearly expressed will of the Pennsylvania electorate or the processes that the General Assembly, through the Election Code, has put in place to give

effect to the electorate's decisions. Granting a preliminary injunction would cast a completely unwarranted shadow over Pennsylvania's election results on the national stage. This injury, though intangible, is real.

In sum, because Petitioners' requested relief would upend the *status quo ante*, and the balance of equities weighs decisively against the grant of a preliminary injunction, this Court should deny Petitioners' motion.

D. Petitioners Must Post a Substantial Bond to Obtain the Relief Requested

For a preliminary injunction to issue, the Pennsylvania Rules of Civil Procedure require the posting of a bond or cash by the Petitioners in an amount to be established by the Court:

[A] preliminary or special injunction shall be granted only if ... the plaintiff files a bond in an amount fixed and with security approved by the court ... conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees.

Pa. R. Civ. P. 1531(b).

“The bond ‘requirement is mandatory and an appellate court must invalidate a preliminary injunction if a bond is not filed by the plaintiff.’” *Walter v. Stacy*, 837 A.2d 1205, 1208 (Pa. Super. Ct. 2003) (quoting *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129, 1131 (Pa. Super. Ct. 1987)).

In setting the amount of the bond, the Court should “require a bond which would cover damages that are reasonably foreseeable.” *Greene Cnty. Citizens United by Cumpston v. Greene Cnty. Solid Waste Auth.*, 636 A.2d 1278, 1281 (Pa. Commw. Ct. 1994). In this case, Petitioners ask the Court to order Respondents to undo certification of the results of the Presidential and Vice Presidential elections, and prevent its duly-chosen electors from participating in the Electoral College. As mentioned above, the certification for the Presidential and Vice Presidential election has already occurred. Such an order would force Respondents to embark upon an expensive, time-consuming administrative process that would involve at least the following: preparing an advertising campaign to apprise the public of the new state of certification; and hiring extra personnel or causing current employees to work overtime to ensure certification can happen—assuming it still could—on the tighter time frame that would exist after this injunction is lifted, or the case is resolved.

Therefore, should the Court decide to issue the injunction—and it should not—the balance of equities dictates that it set the amount of security required at an amount sufficient to compensate all entities that the injunction will injure. *See Greene County Citizens United by Cumpston*, 636 A.2d at 1281. While this amount cannot easily be calculated to the penny, the monetary harm is certain to be in the millions of dollars, and the stigmatic harm even more damaging. The

required bond will doubtless be large, but it must be commensurate with the amount of harm that a grant of the requested injunction would cause. Therefore, if the Court decides to grant Petitioners' motion for preliminary injunctive relief, Respondents request the Court set the bond for an amount at least \$10,000,000. The precise amount should be determined following an evidentiary hearing.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion for a preliminary injunction.

Respectfully submitted,

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Dated: December 8, 2020

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I certify that the Executive Respondents' Brief in Opposition to Petitioners' Motion For Emergency/Special Prohibitory Injunction 3,450 words as measured in accordance with Pennsylvania Rule of Appellate Procedure 2135.

Dated: December 8, 2020

/s/ Michele D. Hangley
Michele D. Hangley

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 8, 2020

/s/ Michele D. Hangle
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