

NOV 25 2020

Filed 11/25/2020 1:29:42 PM Commonwealth Court of Pennsylvania  
620 MD 2020

**HANGLEY ARONCHICK SEGAL  
PUDLIN & SCHILLER**

**KRAMER LEVIN NAFTALIS &  
FRANKEL LLP**

Michele D. Hangle (I.D. No. 82779)  
Robert A. Wiygul (I.D. No. 310760)  
John G. Coit (I.D. No. 324409)  
Christina C. Matthias (I.D. No. 326864)  
John B. Hill (I.D. No. 328340)  
One Logan Square, 27th Floor  
Philadelphia, PA 19103-6933  
(215) 568-6200

Barry H. Berke (admitted *pro hac vice*)  
Dani R. James (admitted *pro hac vice*)  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9308

*OFFICE OF ATTORNEY GENERAL*

J. Bart Delone  
Chief Deputy Attorney General  
Chief, Appellate Litigation Section  
Sean A. Kirkpatrick  
Senior Deputy Attorney General  
15th Floor, Strawberry Square  
Harrisburg, PA 17120  
(717) 783-3226

*Attorneys for Respondents*

**M.D. Appeal Dkt.**

**168 2020**

**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

Received in Supreme Court

NOV 25 2020

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DNC SERVICES CORP. / DEMOCRATIC  
NATIONAL COMMITTEE,

Proposed Intervenor –Respondent.

### **JURISDICTIONAL STATEMENT**

Respondent Kathy Boockvar, in her official capacity as Secretary of the Commonwealth of Pennsylvania; Respondent the Honorable Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania; and Respondent the Commonwealth of Pennsylvania (collectively, “Respondents”) submit this Jurisdictional Statement in support of their Notice of Appeal filed concurrently herewith.

#### **I. OPINION BELOW**

The subject of Respondents’ appeal is the November 25, 2020 Order of the Commonwealth Court of Pennsylvania. A copy of the Order is attached as Exhibit A hereto. The Commonwealth Court has not issued an accompanying opinion.

#### **II. BASIS OF THE SUPREME COURT’S JURISDICTION**

The Supreme Court has jurisdiction over this appeal from the Commonwealth Court’s Order granting injunctive relief pursuant to 42 Pa. C.S. § 723(a) and Pennsylvania Rules of Appellate Procedure 1101(a) (providing for appeals to the Supreme Court as of right from an order of the Commonwealth Court entered in a matter originally commenced in the Commonwealth Court) and

311 (providing that, subject to exceptions not pertinent here, “[a]n order that grants ... an injunction” is appealable as of right). *See, e.g., Titler v. State Employees’ Ret. Sys.*, 734 A.2d 390 (Pa. 1999) (exercising jurisdiction over appeal from Commonwealth Court Order granting preliminary jurisdiction).

### **III. TEXT OF THE ORDER IN QUESTION**

The text of the Commonwealth Court Order in question is:

NOW, November 25, 2020, upon consideration of Petitioners’ Motion for Emergency/Special Prohibitory Injunction (Emergency Motion), the subsequent filings by the parties, and the new allegations raised in Petitioners’ Supplemental Application for Emergency Relief filed at 11:42 p.m. on November 24, 2020 (Supplemental Emergency Application), it is hereby preliminarily ordered and decreed as follows:

1. As to the Supplemental Emergency Application, to the extent that there remains any further action to perfect the certification of the results of the 2020 General Election (the “Election”) for the offices of President and Vice President of the United States of America, Respondents are preliminarily enjoined from doing so, pending an evidentiary hearing to be held on Friday, November 27, 2020 at 11:30 am via WebEx.
2. As to the Emergency Motion, filed on November 22, 2020, inasmuch as Respondents, based on their Press Release and briefs, have not undertaken certification of any of the other results of the Election, Respondents are preliminarily enjoined from certifying the remaining results of the Election, pending the evidentiary hearing on Friday, November 27, 2020 at 11:30 am via WebEx.
3. Respondents shall file and serve an Answer and Memorandum of Law in opposition to the Supplemental Emergency Application by 3:00 p.m. TODAY, November 25, 2020.
4. A scheduling order concerning the evidentiary hearing will follow.

#### **IV. CONCISE STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE**

In October 2019, with broad and bipartisan support, the Pennsylvania legislature enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania’s Election Code. Among these were provisions that, for the first time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. In the more than one year that elapsed before Petitioners filed this lawsuit, two statewide elections were successfully conducted under the mail-in voting provisions of Act 77: the primary election, which took place on June 2, 2020, and the general election, which took place on November 3, 2020.

On Saturday, November 21, 2020—18 days after election day, and after the results of Pennsylvania’s presidential election had become clear—Petitioners initiated this action by filing a Petition for Review, styled as a “Complaint for Declaratory and Injunctive Relief,” in the Commonwealth Court (the “Petition”). The Petition asserted a facial constitutional challenge to Act 77. Petitioners sought an injunctive order disenfranchising millions of Pennsylvania voters—that is, an order “prohibit[ing] Defendants from certifying the results of the General Elections which include mail-in ballots” or, “alternatively, direct[ing] that the Pennsylvania General Assembly choose Pennsylvania’s [presidential] electors”). (Petition at 24.)

On Sunday, November 22, 2020, Petitioners filed a Motion for Emergency/Special Prohibitory Injunction. The Motion sought 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” pending further order of the Court. That day, the Court ordered Petitioners to serve the Petition, and Petitioners did so *by first class mail*. (Order dated November 22, 2020.)

Notwithstanding the service issues, the Court convened a telephonic status conference at 3:00 p.m. on November 23. At the conference, counsel for Respondents stressed that the Petition failed as a matter of law for a number of independent reasons, including laches—Petitioners had not offered any explanation, let alone a satisfactory one, for why they delayed bringing their challenge until more than a year (and two elections) after Act 77’s enactment. Respondents asked the Court to rule on Preliminary Objections before it took up the motion for preliminary injunction.

At 5:47 p.m. on November 23, the Court entered an Order directing Respondents to file all Preliminary Objections, together with a supporting brief, by 11:00 p.m. that night, and Respondents did so. At 9:57 a.m. on November 24, despite the fact that Petitioners had not responded to the Preliminary Objections, the Court entered an Order directing Respondents to file answers to the Petitioners’

Motion for Emergency/Special Prohibitory Injunction two-and-one-half hours later. Respondents timely filed an answer and brief in opposition to the Motion, which stated, *inter alia*, that, in accordance with law, the Secretary had certified the results of the election for president and vice president and the Governor had signed and submitted the Certificate of Ascertainment.

At 11:17 a.m. on November 25, 2020, the Commonwealth Court entered the injunctive Order from which this appeal was taken.

**V. QUESTION PRESENTED FOR REVIEW**

Did the Commonwealth Court err in issuing injunctive relief notwithstanding Petitioners' failure to satisfy any of the prerequisites identified in *Summit Towne Centre, Inc. v. Shoe Show of Rock Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003), let alone all of them?

HANGLEY ARONCHICK SEGAL  
PUDLIN & SCHILLER

Dated: November 25,  
2020

By: /s/ Michele D. Hangle  
Michele D. Hangle (ID No. 82779)  
Robert A. Wiygul (I.D. No. 310760)  
John G. Coit (I.D. No. 324409)  
One Logan Square, 27<sup>th</sup> Floor  
Philadelphia, PA 19103  
Tel: (215) 568-6200  
Fax: (215) 568-0300

OFFICE OF ATTORNEY GENERAL

By: /s/ J. Bart Delone

J. Bart Delone

Sean A. Kirkpatrick

Strawberry Square, 15<sup>th</sup> Floor

Harrisburg, PA 17120

(717) 787-2717

*Kramer Levin Naftalis & Frankel LLP*

Barry H. Berke (admitted *pro hac vice*)

Dani R. James (admitted *pro hac vice*)

1177 Avenue of the Americas

New York, New York 10036

(212)715-9308

*Counsel for Respondents*

# **EXHIBIT A**



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Honorable Mike Kelly, Sean	:	
Parnell, Thomas A. Frank, Nancy	:	
Kierzek, Derek Magee, Robin	:	
Sauter, Michael Kincaid, and Wanda	:	
Logan,	:	
Petitioners	:	
	:	
v.	:	No. 620 M.D. 2020
	:	
Commonwealth of Pennsylvania,	:	
Pennsylvania General Assembly,	:	
Honorable Thomas W. Wolf,	:	
Kathy Boockvar,	:	
Respondents	:	

**ORDER**

NOW, November 25, 2020, upon consideration of Petitioners’ Motion for Emergency/Special Prohibitory Injunction (Emergency Motion), the subsequent filings by the parties, and the new allegations raised in Petitioners’ Supplemental Application for Emergency Relief filed at 11:42 p.m. on November 24, 2020 (Supplemental Emergency Application), it is hereby preliminarily ordered and decreed as follows:

1. As to the Supplemental Emergency Application, to the extent that there remains any further action to perfect the certification of the results of the 2020 General Election (the “Election”) for the offices of President and Vice President of the United States of America, Respondents are preliminarily enjoined from doing so, pending an evidentiary hearing to be held on **Friday, November 27, 2020 at 11:30 am via WebEx.**
  
2. As to the Emergency Motion, filed on November 22, 2020, inasmuch as Respondents, based on their Press Release and briefs, have not undertaken certification of any of the other results of the Election, Respondents are preliminarily enjoined from certifying the remaining results of the Election, pending the evidentiary hearing on **Friday, November 27, 2020 at 11:30 am via WebEx.**

3. Respondents shall file and serve an Answer and Memorandum of Law in opposition to the Supplemental Emergency Application by 3:00 p.m. TODAY, November 25, 2020.
4. A scheduling order concerning the evidentiary hearing will follow.

/s/ Patricia A. McCullough  
PATRICIA A. McCULLOUGH, Judge

**CERTIFICATION PURSUANT TO Pa.R.A.P. 910(c)(1)**

I certify that this Jurisdictional Statement complies with the word limit set forth in Pennsylvania Rule of Appellate Procedure 910 because it contains 989 words, as calculated by the word processing system used to prepare the Statement.

Dated: November 25, 2020

/s/ Michele D. Hangle  
Michele D. Hangle

**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: November 25, 2020

/s/ Michele D. Hangley

Michele D. Hangley