

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**JOSEPH D. HAMM, Individually and as a  
Candidate for the Pennsylvania House of  
Representatives in the 84<sup>th</sup> Legislative  
District; MIKE KELLY, individually and  
as a Candidate for the United States House  
of Representatives 16<sup>th</sup> District; BILLY  
ALLRED; CHAD HORNER; CAROLYN  
CONNOR; and JOAN HAUSER,**

**Petitioners,**

**v.**

**KATHY BOOCKVAR, in her official  
Capacity as the Secretary of the  
Commonwealth of Pennsylvania,**

**Respondent.**

**No. 600 MD 2020**

**RESPONDENT KATHY BOOCKVAR’S MEMORANDUM OF LAW IN  
OPPOSITION TO APPLICATION FOR SPECIAL RELIEF IN FORM OF A  
PRELIMINARY INJUNCTION**

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*Counsel for Respondent,  
Kathy Boockvar*

To establish a right to preliminary injunctive relief, the movant must satisfy the following essential elements: (1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it and issuance of an injunction will not substantially harm other interested parties; (3) a preliminary injunction will properly restore the status quo; (4) the movant is likely to prevail on the merits; (5) the injunction sought is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Petitioners have not satisfied and cannot satisfy any of the required elements and, as a result, their Application for Special Relief in the Form of a Preliminary Injunction should be denied.

*First*, Petitioners fail to establish that they will be irreparably harmed in the absence of an injunction. The harm they allege—that voters were allowed to cast provisional ballots on Election Day—is past and therefore not a proper basis for preliminary injunctive relief. *See, e.g., Three County Servs., Inc. v. Philadelphia Inquirer*, 486 A.2d 997, 1000 (Pa. Super. 1985). Moreover, Petitioners fail to allege that they suffered any concrete injury as a result of any recommendation or guidance to county election boards concerning provisional ballots. Petitioners

Hamm and Kelly won their respective races by wide margins. Petitioners Allred, Horner, Connor and Hauser allege only that they are voters. Am. Pet. For Review ¶¶ 5-8. They do not claim that they were denied an opportunity to cast a provisional ballot or were prevented from voting. Petitioners allege, at best, only a generalized grievance that the law, as they (incorrectly) perceive it, was not followed and, as a result, they plainly lack standing. *Markam v. Wolf*, 136 A.3d 134, 146 (Pa. 2016) (“generalized interest in the conduct of government common to the general citizenry” does not confer standing). And because they lack standing, they fail to allege and cannot establish irreparable harm necessary for preliminary injunctive relief. *See Skippack Cmty. Ambulance Ass’n, Inc. v. Skippack, Twp.*, 534 A.2d 563, 566 (Pa. Cmwlth. 1987) (reversing grant of preliminary injunction where movant lacked standing).

*Second*, there is no doubt that granting the requested preliminary injunction would cause greater injury and would substantially harm interested parties, specifically the voters who cast provisional ballots. Petitioners are asking this Court to disenfranchise voters who cast valid votes in accordance with the Election Code. The relief sought will result in the irremediable loss of the cherished right to cast a vote and therefore would certainly cause greater injury and harm to interested parties. *See Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (“The right to vote includes the right to have the ballot counted.”); see also Pa. Const. Art. 1, §

5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”). The second factor thus weighs strongly against granting the requested injunctive relief.

*Third*, a preliminary injunction would destroy rather than preserve the *status quo*. Petitioners complain about an email sent on November 2, 2020 and the pre-c canvassing process that started at 7:00 am on Election Day, November 3, 2020 and ended with the close of the polls at 8:00 pm, Am. Pet. For Review ¶¶ 9-12, 17, yet they waited until 6:18 pm on Election Day to commence this action and to apply for preliminary injunctive relief. Segregating and voiding provisional ballots cast on Election Day would destroy the *status quo* and disenfranchise voters who submitted provisional ballots in reliance on the regular provisional ballot procedure. The third factor thus weighs heavily against granting preliminary injunctive relief.

*Fourth*, Petitioners are not likely to prevail on the merits<sup>1</sup> for at least three reasons: (1) The provisional ballots that Petitioners seek to void are in possession of the county election boards which are vested with “jurisdiction over the conduct of . . . elections in such county . . .,” 25 P.S. § 2641(a), and responsibility for pre-

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<sup>1</sup> It should be noted that requests for similar relief were denied by the Court of Common Pleas of Bucks County and Northampton Counties. Copies of the Orders are attached as Exhibit “A” and “B,” respectively.

canvassing and canvassing votes cast in their respective counties, 25 P.S. § 3146.8(g)(1)(1.1), and for determining whether provisional ballots cast in their counties should be counted, 25 P.S. § 3050(a.4)(4). This Court is without authority to order Secretary Bookvar to take any action with respect to provisional ballots that she does not possess. *See Van Aken v. Pennypack Woods Home Ownership Ass'n*, 336 A.2d 895, 896 (Pa. Cmwlth. 1975); (2) The Election Code specifically authorizes voters to cast provisional ballots in the circumstances alleged in the Amended Petition for Review. The Election Code directs that “[a]n elector who requests a mail-in ballot and who is not shown on the district register as having voted *may vote by provisional ballot* under section 1210(a.4)(1) [25 P.S. § 3050].” 25 P.S. § 3150.16(b)(2). (Emphasis added.) Because the Election Code permits voters to vote provisionally if their mail-in or absentee ballots are not accepted, Petitioners fail to state a claim as a matter of law and not entitled to any relief;<sup>2</sup> (3)

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<sup>2</sup> Petitioners do not address or acknowledge the relevant statutory provision authorizing provisional ballots—25 P.S. § 3146.6(b)(2)—in their brief. Instead, they focus on purported activities *prior to* Election Day, Supp. Br. at 11-12, but those procedures are not at issue in this case which involves pre-canvassing on Election Day, Am. Pet. For Review ¶¶ 10-14, 17, 24. Petitioners admittedly recycled the brief that their counsel filed on behalf of another party in the U.S. District Court for the Eastern District of Pennsylvania in the action captioned *Barnette, et al. v. Lawrence, et al.*, No. 2:20-cv-05477. *See* Supp. Br. at 1. That action was withdrawn by the plaintiffs following a preliminary injunction hearing on November 5, 2020 and before a ruling on the motion.

Petitioners lack standing as detailed above. For any or all of these reasons, Petitioners are not likely to prevail on the merits.

*Fifth*, the injunction sought is not reasonably suited to abate the alleged offending activity. For one thing, the Election Code mandates a specific procedure for county election boards to determine whether provisional ballots should properly be counted. *See* 25 P.S. § 3050(a.4)(4). This action is an attempted end run around the required statutory procedure.<sup>3</sup> Further, it is well settled in Pennsylvania that the rights of voters are not to be prejudiced by purported errors of election officials. *See, e.g., In re Contest of Election for Office of City Treasurer From Seventh Legislative Dist.*, 162 A.2d 363, 366 (Pa. 1960) (votes cannot be invalidated due to “mere irregularities in the conduct of the election”). The fifth factor has not been satisfied.

*Sixth*, there is no doubt that the injunctive relief sought will adversely affect the public interest by disenfranchising voters without notice, without an

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<sup>3</sup> Petitioners argue in their brief that “the *Dillon* rule” prohibits county election boards from supplementing procedures in the Election Code. Supp. Br. at 13-17. This argument misreads the Election Code. As noted above, county election boards are specifically vested with jurisdiction to conduct elections in their counties, 25 P.S. § 2642(a), and to “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers and electors,” 25 P.S. § 2642(f). More to the point, the Election Code expressly authorizes voting by provisional ballot in the circumstances at issue here. 25 P.S. § 3146.6(b)(2).

opportunity to be heard and contrary to representations made to them by county officials that they were permitted to cast provisional ballots. The public interest thus demands rejection of the request for injunctive relief.

Petitioners fall far short of establishing any of the factors necessary for preliminary injunctive relief. They do not reference the Pennsylvania standard in their brief and do not cite any relevant authority<sup>4</sup> that supports their extraordinary request to cancel voted ballots after Election Day. Petitioners' application for injunctive relief should be denied.

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<sup>4</sup> Petitioners maintain that the Supreme Court ruled out any opportunity to “cure” a rejected mail-in or absentee ballot in *In re November 3, 2020 General Election*, --- A.3d ---, 2020 WL 6252803 (Pa. Oct. 23, 2020). Supp. Br. at 17-18. This is not a correct reading of the decision in that case. That case resolved the very different issue of whether ballots may be rejected based on signature analysis—the Court held they may not—and, in relation to this particular question, the Supreme Court cited with approval another decision by the Honorable J. Nicholas Ranjan of the U.S. District Court for the Western District of Pennsylvania, which stated that, “unlike in-person voters, mail-in or absentee voters are not provided any opportunity to cure perceived [signature] defects in a timely manner.” *In re November 3, 2020 General Election*, 2020 WL 6252803 at \*6. That decision was not by a “lower court” as Petitioners contend in their brief. Supp. Br. at 17. *In re November 3, 2020 General Election* does not in any way address the statutory provisions relating to provisional ballots that are at issue here and does not support the relief sought by Petitioners in this case. Nor did the Supreme Court foreclose the use of provisional ballots in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020). That decision holds that the Election Code does not require that counties implement any specific notice and cure procedure, *id.* at \*20, but does not address the provisional ballot process that is at issue here.

Respectfully submitted:

/s/ Daniel T. Brier

Daniel T. Brier

Donna A. Walsh

John B. Dempsey

*Counsel for Respondent Kathy*

*Boockvar, Secretary of the Commonwealth  
of Pennsylvania*

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570-342-6100

Date: November 6, 2020



**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 requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Daniel T. Brier  
Daniel T. Brier

Date: November 6, 2020

# Exhibit A

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

DONALD J. TRUMP FOR PRESIDENT, INC.

v.

BUCKS COUNTY BOARD OF ELECTIONS

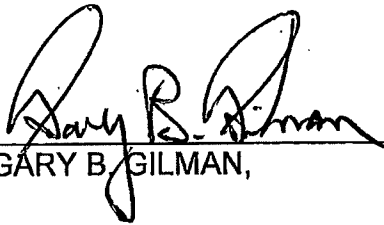
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ORDER

AND NOW, this 3<sup>rd</sup> day of November, 2020, after extensive conferencing with counsel and consideration of Petitioner Donald J. Trump for President, Inc.'s "Petition for Review of Decision by the Bucks County Board of Elections," said Petition is Denied and Dismissed.

BY THE COURT:

*N.B. It is your responsibility  
to notify all interested parties  
of the above action.*

  
GARY B. GILMAN, J.

cc: Joseph W. Pizzo, Esquire  
Kenneth Ferris, Esquire  
Jessica VanderKam, Esquire  
Matthew Hoover, Esquire  
Matthew Adler, Esquire



Case #: 2020-05627-0001 12712049  
Main (Public)  
Code: 144 Judge:27  
Rcpt Z2400452 11/4/2020 11:17:24 AM

# Exhibit B

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY  
COMMONWEALTH OF PENNSYLVANIA  
CIVIL DIVISION

IN RE: MOTION FOR INJUNCTIVE  
RELIEF OF NORTHAMPTON COUNTY  
REPUBLICAN COMMITTEE

No.: C-48-CV-2020-6915

FILED  
2020 NOV 3 PM 2:13  
COURT OF COMMON PLEAS  
CIVIL DIVISION  
NORTHAMPTON COUNTY PA

ORDER OF COURT

**AND NOW**, this 3<sup>rd</sup> day of November, 2020, upon consideration of the oral motion of the Northampton County Republican Committee to Enjoin the Northampton County Board of Elections from disclosing the identity of cancelled ballots during pre-canvassing, and upon consideration of the arguments presented thereon, it is hereby ordered that the motion for injunctive relief is hereby **DENIED**.

The court reporter shall immediately transcribe the November 3, 2020 hearing in anticipation that the Northampton County Republican Party will file a Notice of Appeal to the Pennsylvania Commonwealth Court.

**BY THE COURT:**

  
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**MICHAEL J. KOURY, JR.,  
PRESIDENT JUDGE**

**CERTIFICATE OF SERVICE**

I, Daniel T. Brier, hereby certify that I am this day serving Respondent's Memorandum of Law in Opposition to Application for Preliminary Injunction upon all counsel of record via PACFile eService, which services satisfies the requirements of Pa. R.A.P. 121.

Date: November 6, 2020

/s/ Daniel T. Brier