

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.

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

Respondents,

DNC SERVICES
CORP./DEMOCRATIC NATIONAL
COMMITTEE

Proposed
Intervenor-
Respondent.

Docket No. 620 M.D. 2020

**PETITIONERS' SUPPLEMENTAL
APPLICATION FOR
EMERGENCY RELIEF**

Filed on behalf of Petitioners,
The Honorable Mike Kelly, Sean
Parnell, Thomas A. Frank, Nancy
Kierzek, Derek Magee, Robin Sauter,
Michael Kincaid, and Wanda Logan

Counsel of Record for Petitioners:

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**PETITIONERS' SUPPLEMENTAL
APPLICATION FOR EMERGENCY RELIEF**

Petitioners the Honorable Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, and Wanda Logan, by and through their undersigned counsel, file the following Supplemental Application for Emergency Relief:

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

1. Petitioners initiated this action by filing a Petition for Review, erroneously styled as a Complaint for Declaratory and Injunctive Relief (“the Petition”) on November 21, 2020.
2. On November 22, 2020, Petitioners filed an application for emergency relief that was styled as a motion for emergency special/prohibitory injunctive relief (the “Injunction Motion”) and a memorandum of law in support thereof (the “Memorandum of Law”) requesting that this court enjoin Respondents from taking official action to tabulate, compute, canvass, certify, or otherwise finalize the results of the November 3, 2020, General Election.
3. On November 24, 2020, at 9:57 a.m., this Court issued a scheduling Order requiring Respondents to file their answers to the Petitioners’ Application for Emergency Relief by 12:30 p.m. on November 24, 2020.
4. The Executive Respondents’ Brief in Opposition to Petitioners’ Motion for Emergency/Special Prohibitory Injunction (“Executive Respondents’

Brief in Opposition”) claims that the Application for Emergency Relief is “now moot” because the Secretary “certified the results of the November 3 election in Pennsylvania for president and vice president of the United States,” and “Governor Tom Wolf signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president and Kamal D. Harris as vice president of the United States,” and “[t]he certificate was submitted to the Archivist of the United States.” Executive Respondents’ Brief in Opposition at pp. 1-2 and Exhibit A thereto.

5. Likewise, the Brief as Amicus Curiae in Opposition to Petitioners’ Motion for Emergency/Special Prohibitory Injunction asserts on page 2 as follows:

All 67 counties have certified their results, the Secretary of State has performed her statutory duties of tabulation, and just this morning Governor Wolf signed a Certificate of Ascertainment, which has been submitted to the Archivist of the United States. There is, simply, nothing to enjoin.

6. Reports of that certification activity started surfacing in the media around 11:00 a.m. on November 24, 2020 (*e.g.*, Pennsylvania and Nevada certify Biden wins over Trump (Nov. 24, 2020, 11:02 AM EST, <https://www.cnn.com/2020/11/24/pennsylvania-certifies-election.html>)).

7. Respondents' were not required by any law or urgent circumstances to take such actions when they did. The timing of Respondents' action was wholly voluntary. This Court may take judicial notice that in the 2016 Presidential Election, the results were certified, and the Certificates of Ascertainment were

signed on December 12, 2016. *See* Department of State Certifies Presidential Election Results, available at <https://www.media.pa.gov/pages/State-details.aspx?newsid=207> (December 12, 2016).

8. It appears that Respondents' actions may have been accelerated in response to the Application for Emergency Relief and/or this Court's scheduling Order setting an expedited schedule for answers to that Application for Emergency Relief, in an effort to preclude any remedial action by this Court faster than this Court was able to evaluate the Application for Emergency Relief and the answers to it.

9. Respondents are incorrect in their assertion that Petitioners' requested injunctive relief is now moot. Respondents assert only that certain actions with regard to the finalization of the presidential and vice presidential election results have taken place - *i.e.*, the tabulation of the returns, and the signing of the certification submitted to the Archivist.

10. While Respondents may have proactively attempted to avoid potential injunctive relief granted by this Court, Respondents duties with regard to finalization of the full election results are far from complete.

11. Respondents have not indicated that any of the following enjoined official actions have taken place:

- Issuance of commissions to persons elected, pursuant to 25 Pa.Stat. § 3160.
- Issuance of certificates election, and transmission of such certificates to the Speaker of the House of Representatives of the United States, in the case of the election of representatives in Congress, pursuant to 25 Pa.Stat. § 3163.
- Issuance of certificates of election to the persons elected members of the Senate and House of Representatives of the Commonwealth, and presentation of the several returns of the same elections before the senate and House of Representatives pursuant to 25 Pa.Stat. § 3164.
- Delivery of the returns of elections for Auditor General and State Treasurer to the President of the Senate, so that they be "declared elected thereto," the making and filing of certificates for all such elections, the issuance of commissions for all such elections, and the issuance of commissions for each election of Judge of every court, pursuant to 25 Pa.Stat § 3165.
- Issuance of certificates of election to successful candidates of elections pursuant to 25 Pa.Stat. § 2621.
- Delivery of certificates of election for each presidential and vice presidential elector pursuant to 25 Pa.Stat. § 3166.

12. The meeting of presidential and vice presidential electors will also not take place until December 14 at 12:00 PM, pursuant to 25 Pa.Stat § 3192 and 3 U.S.C. § 7. Should it be absolutely necessary, in order for this Court to be empowered to provide adequate relief, Petitioners may seek for leave from this court to join the slate of presidential and vice presidential electors as additional Respondents in this action, and move to enjoin them from taking certain action. Because the electors, by law, must perform their duties at the "seat of government of this Commonwealth," this court may also enjoin Respondents from permitting the electors to assemble at such location.

13. Additionally, "[w]henver it shall appear by the decision of the proper tribunal having jurisdiction of a contested election, that the person to whom said commission shall have been issued has not been legally elected to the office for which he has been commissioned, then a commission shall issue to the person who shall appear to be legally elected to said office, the issuing of which commission shall nullify and make void the commission already issued, and all power and authority under said commission first issued shall thereupon cease and determine." 25 Pa. Stat. § 3160. Should this Court find in favor of Petitioners on the merits of this action, any such commissions already issued by respondents could be nullified, and Respondents could be required to issue commissions to those legally elected to office.

14. Accordingly, there is still time for this Court to grant emergency relief, which remains clearly warranted for all of the reasons stated in the Application for Emergency Relief.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an Order, substantially in the form of the proposed Order attached to the Application for Emergency Relief, granting such Application for Emergency Relief and grant such other or further relief as this Court may deem proper.

Respectfully submitted,

OGC Law, LLC

/s/ Gregory H. Teufel
Gregory H. Teufel
Attorney for Petitioners

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.

Date: November 24, 2020

/s/ Gregory H. Teufel
Gregory H. Teufel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record on November 24, 2020 by this Court's electronic filing system.

/s/ Gregory H. Teufel
Gregory H. Teufel