

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR
PRESIDENT, INC., *et al.*,
Plaintiffs

v.

KATHY BOOCKVAR, *et al.*,
Defendants

No. 2:20-CV-00966-NR

Judge J. Nicholas Ranjan

Electronically Filed Document

**Motion to Dismiss on Behalf of Defendant,
Northampton County Board of Elections**

Defendant, Northampton County Board of Elections (“Northampton County”), moves to dismiss the Plaintiffs’ Complaint pursuant to Fed. R. Civ. P. 12 (b) (3), (6) for the following reasons:

**Plaintiffs’ Complaint Should Be Dismissed Due to
Lack of Standing and Jurisdiction**

1. Plaintiff Donald J. Trump for President, Inc. is the principal committee for the reelection campaign of Donald J. Trump, and the Republican National Committee is the political committee that leads the Republican Party (together, the “Organizational Plaintiffs”). Complaint, ¶¶ 8, 13.

2. The Complaint also names as Plaintiffs several individuals, candidates for various elected offices and potential poll watchers, each of whom is a qualified elector in the state of Pennsylvania. Complaint, ¶¶ 9, 10, 11, 12, 14, 15. Plaintiffs

Glen Thompson, Mike Kelly, John Joyce, Guy Reschenthaler, Melanie Stringhill Patterson, Clayton David Show, (together, the “Individual Plaintiffs”) reside in Centre, Butler, Blair, Washington and Fayette counties. *Id.*

3. Northampton County Board of Elections is the governmental office charged with running and operating primaries and elections in the County of Northampton, Pennsylvania.

4. Before the Court can proceed to hear a controversy, it must address a basic jurisdictional issue: “If a plaintiff lacks standing, the court lacks judicial power to entertain the claim presented.” *Gariano v. CSC Insurance Co.*, 845 F. Supp. 1074, 1077 (D.N.J. 1994).

5. As stated in Paragraph 4 of the Complaint: “The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is validly cast. An individual’s right to vote is infringed if his or her vote is cancelled by a fraudulent vote or diluted by a single person voting multiple times.”
Complaint, ¶ 4.

6. Standing is claim-specific.

7. Plaintiffs have brought several claims solely under federal and state constitutional provisions, namely, the First and Fourteenth Amendments to the United States’ Constitution, and the Equal Protection and the Free and Fair Election Clauses under the Pennsylvania Constitution.

8. In essence, Plaintiffs allege that various counties applied different policies regarding voting by mail-in ballot and also prevented poll watchers from

serving as poll watchers outside of their county of residence and prevented poll watchers from participating in the canvassing of mail-in ballots.

9. The Complaint brings all claims on behalf of all Plaintiffs against all Defendants. There are several issues regarding each Plaintiff's standing to bring claims against each Defendant:

- A political campaign or candidate does not have standing under the First or Fourteenth Amendments with respect to equal access to the right to vote and only has standing to challenge conduct which prevents the candidate from appearing on the ballot. *See Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F. Supp. 2d 684 (W.D. Pa. 2003).
- A national political committee likewise does not have standing under the First or Fourteenth Amendments with respect to equal access to the right to vote. *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002), *abrogated on other grounds*, *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

10. Moreover, there is no support for the notion that an elector has standing to seek an injunction against a county board of elections in which the elector does not reside.

11. The argument under the First and Fourteenth Amendments is that the government entity acts against the individual to dilute the voter's voting power and disparately treats the voter with respect to the voter's rights. Only the county in which the voter resided had jurisdiction over the voter's ballot. *Cf. Pierce v.*

Allegheny Cnty. Bd. of Elections, 324 F.Supp.2d 684 W.D. Pa. 2003) (plaintiff's injury traceable to board of election's inconsistent application of policy in county where plaintiffs were voters).

12. Other counties' policies do not apply to Plaintiffs who do not reside or vote there; rather, it is the Plaintiff's home county that applies a similar policy inconsistently and the state which accepts and certifies of the statewide elections that allegedly dilutes Plaintiff's vote. *Id.* ("A state must impose uniform statewide standards in each county in order to protect the legality of a citizen's vote") (emphasis added).

13. That Plaintiffs' do not have standing to challenge inconsistencies regarding counties in which they are not electors is demonstrated by the notion that their claims are based solely on their rights with respect to statewide application of the Election Code.

14. There is no harm to the right to vote or violation of the Equal Protection clause when different counties implement different policies with respect to strictly local elections. *Id.* at 699.

15. Notably, the Individual Plaintiffs seek to regulate each county's elections regardless of whether they are strictly local or statewide.

16. Individual Plaintiffs are not aggrieved by other counties' conduct with respect to local elections in which the Individual Plaintiffs' cannot vote.

17. Here, Plaintiffs seek to require the state and 67 different county boards of elections to produce records generally regarding claims of voter fraud.

Individual Plaintiffs make no specific allegations that the counties in which they are electors (Blair, Washington, Butler, Fayette, or Center) violated the Election Code or diluted the power of their votes.

18. If any Plaintiff lacks standing, this Court lacks authority to order declaratory or injunctive relief on Plaintiffs' behalf. *Cf. Stein v. Boockvar*, 2020 WL 2063470, *3 (E.D. Pa. Apr. 29, 2020) (noting that court dismissed plaintiff's first complaint and motion for preliminary injunction because of "threshold defects" including plaintiff's lack of standing).

19. Thus, the Court should dismiss Plaintiff's pleadings and request for relief on the grounds of lack of standing.

**Plaintiffs' Complaint Should be Dismissed Pursuant to
Federal Rule of Procedure 12 (b) (3)**

20. Northampton County is in the Eastern District of Pennsylvania.

21. Plaintiffs sued the Moving County in the Western District, which does not have venue of claims over the moving Defendants.

22. Plaintiffs have not alleged that the Moving County took any actions in the Western District.

23. The Congressmen Plaintiffs are not on the ballots in any of the moving counties and have no standing to make claims against the Moving County.

24. Any witnesses that the Moving County might call are all in eastern Pennsylvania, approximately 300 miles and 6 hours of driving time away from Pittsburgh.

25. The Moving County asks either that the Plaintiffs' claim be dismissed for lack of venue or that the claims against them be transferred to the U.S. District Court for the Eastern District of Pennsylvania, which is the appropriate forum for this case.

**Plaintiffs' Complaint Should be Dismissed Pursuant to
Federal Rule of Procedure Rule 12 (b) (6)**

26. The Plaintiffs' Complaint makes broad allegations of the wrongdoing of all Pennsylvania counties' boards of election without specifying the specific deficiencies attributable to the moving counties; in fact, in the Plaintiffs Complaint, they acknowledge in paragraph 2 that they attribute election "wrongdoing" to only 20 of Pennsylvania's 67 counties.

27. Plaintiffs have not alleged that the Moving County has injured them in any way; nor have they reasonably offered evidence, based on a factual investigation, that the Moving County plan on conducting the November Presidential Election in a way that is inconsistent with Pennsylvania election law.

28. In addition, Plaintiffs have made a claim for attorneys' fees against the Moving County without alleging that it did anything wrong in the past or will do anything wrong in the future.

29. The Plaintiffs have not alleged the statutory basis for claiming attorneys' fees; if their claim is under 42 U.S.C. Section 1988, their claim fails because they have not alleged a deprivation of a Constitutional right caused by the moving counties.

30. For these reasons, all claims against the Moving County should be dismissed.

**Plaintiffs' Complaint Should be Transferred to the Commonwealth
Court Pursuant to the Pullman Abstention**

31. If the Court should decide that it has jurisdiction over the claims against the Moving County, the Moving County asks that the Court abstain from deciding this case under the Pullman Abstention Doctrine.

32. The claims raised by the Plaintiffs are closely related, if not nearly identical, to the claims currently pending before the Pennsylvania Commonwealth Court in a case filed by the Pennsylvania Democratic Party and others.

33. A copy of the Commonwealth Court filing, which includes all the Defendant Counties, is attached as Exhibit A and is a matter of public record on the dockets of the Commonwealth Court; although the Complaint is attached, the Moving County asks the Court to take judicial notice of this filing.

34. The Plaintiffs seek relief in this case based on recent amendments to Pennsylvania's election law, which have not been decided by the Commonwealth Court, but which will be decided in the related Commonwealth Court case.

35. Before this Court rules on whether the Counties have violated the Plaintiff's Constitutional rights, it should allow the Commonwealth Court to decide and interpret Pennsylvania election law on the issues Plaintiffs raise in this case.

36. Having both the Commonwealth Court and this case decide similar issues on a parallel track could lead to inconsistent results; the Commonwealth Court is the better forum for these issues to be resolved since they relate to Pennsylvania election law which has not been previously interpreted by the Commonwealth Court.

37. For these reasons, the Moving County ask the Court to abstain pursuant to the Pullman Abstention Doctrine.

Plaintiffs' Complaint Should be Transferred to the Commonwealth Court Pursuant to the Colorado River Abstention

38. For similar reasons to the Pullman Abstention arguments, the Moving County also ask the Court to abstain from deciding this case pursuant to the Colorado River Abstention Doctrine.

39. Given this Court's lack of venue over all of the Defendant Counties situated in the Middle and Eastern Districts of the State, it is more appropriate for the Commonwealth Court to be deciding questions of unsettled Pennsylvania law which are currently pending before it rather than having three separate district courts decide the claims. This could conceivably result in three district courts and the Commonwealth Court all deciding similar claims at the same time and just prior to the November election which could call into question the lawfulness of the Pennsylvania vote count.

40. Not only is this an unwieldy process unfair to the parties to have to litigate in multiple jurisdictions, but it also could result in inconsistent decisions

which would further complicate the national election when time is of the essence in deciding these questions before November.

41. For these reasons, abstention under the Colorado Abstention Doctrine is also appropriate.

Plaintiffs' Complaint Should be Dismissed Pursuant to Federal Rule of Procedure 12 (b) (6) because it Presents Claims which are Nonjusticable Political Questions

42. The Plaintiff are asking the Courts to define how the Pennsylvania Department of State and sixty seven (67) independent counties interpret the requirements of a state statute in the absence of any showing of a discreet harm.

43. Such questions are committed by statute to the Department of State and Boards of Election and are nonjusticiable political questions.

44. Additionally, the Plaintiffs are alleging a harm in failing to regulate sufficiently leading to a "potential" for third party criminal acts.

45. This is despite the clear policy valuations being made by state and local entities to provide a broad and more concrete enfranchisement.

46. *Baker v Carr*, 369 U.S. 186 (U.S. 1962), clarified nonjusticiability did not mean consideration of a cause was immediately foreclosed, it meant that "the duty asserted [could not] be judicially identified and its breach [could not be] judicially determined, and protection for the right asserted [could not] be judicially molded." *Baker*, 369 U.S. at 199.

47. The *Baker* Court indicated a political question may be present when there was “a textually demonstrable constitutional commitment . . . to a coordinate [branch] . . . or a lack of judicially discoverable and manageable standards . . . or the impossibility of deciding [an issue] without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decisions already made; or the potentiality of embarrassment from multifarious pronouncements by various departments” Id. at 217.

48. The two hallmarks of a political question was a commitment to a coordinate branch and a lack of judicially manageable standards.

49. By rejecting a broad interpretation of the political question doctrine it "distinguish[ed] the defense of political rights from imprudent intervention into political disputes." DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING COMPARATIVE AND THEORETICAL PERSPECTIVES, 27 (Macmillan Publishing Company 1992, (emphasis omitted).

50. In this case, Plaintiffs do not claim that the legislature is responsible for the alleged harm, rather, Plaintiffs appear to assert that third parties are purportedly more likely to commit fraud because of decisions made by the legislature; the policy determinations have already been made by the Pennsylvania legislature who on balance believed that the enfranchisement of

more people outweighed the unsubstantiated limited risks asserted by the Plaintiffs.

51. There is not set of standard this or any other court could impose that would completely eliminate the “potential” for fraud.

**Plaintiffs’ Complaint Should be Stricken Pursuant to
Federal Rule of Procedure 12 (b) (6) as There is No Properly Pleaded
Claim of Vote Devaluation**

52. The Plaintiffs have alleged the policy determinations of the Pennsylvania legislature have violated their right to an equally weighted vote because of the potential for fraud or improper action.

53. The Plaintiffs fail to consider the differing constitutional underpinnings of vote devaluation cases, the burdens of proof in such cases, the context in which absolute equality in voting weight is required and the various legislative justifications for deviations.

54. This has significant effect on the pleadings required for the Congressional and Presidential candidates; it also significantly effects their standing to bring this suit against Northampton County.

55. The one person one vote principle stated that "as nearly as practicable" districts must be drawn to produce population equality, thus leading to as close as possible an equally weighted vote. *Wesberry v. Sanders*, 376 U.S. at 7-8; *Gray v. Sanders*, 372 U.S. 368 (1963) (standard first annunciated).

56. This standard applies to both state legislative districts and Congressional districts; however, it is derived from two different origins and two slightly different standards have emerged.

57. State legislative districts have been reviewed under the Equal Protection Clause of the Fourteenth Amendment and an overall range of ten percent is permitted between the most and least populated districts, to accommodate state policies. DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING COMPARITIVE AND THEORETICAL PERSPECTIVES, 31 (Macmillan Publishing Company 1992).

58. Congressional districts are regulated under Article I, § 2 of the United States Constitution, which generally requires absolute equality. *Kirkpatrick*, 394 U.S. at 530 (1969); *White v. Weiser*, 412 U.S. 783, 790 (1973); *Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

59. As to Congressional districts, even de minimis deviations, such as an overall range under one percent, have been sufficient to invalidate Congressional redistricting plans. *Karcher*, 462 U.S. at 731.

60. However, even in the case of Congressional districts, some deviations are permitted if they are unavoidable or occur despite a good faith effort to reach equality. *Kirkpatrick*, 394 U.S. at 530-31 (citations omitted)(the ‘as nearly as practicable standard’ requires that the State make a good-faith effort to achieve precise mathematical equality [and] [u]nless population variances among

congressional district are shown to have resulted despite such effort, the State must justify each variance).

61. *Kirkpatrick* stated essentially the standard "permits only the limited variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." *Id.* at 531.

62. The *Karcher* case further stated that "[f]irst, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort . . . [if the plaintiffs] fail to show the differences could have avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance [] was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 730-31.

63. In regard to burdens of proof, the *Karcher* Court held that, first, the plaintiff has the burden of proving that deviations could have been reduced by a good faith effort; second, if the plaintiff's burden is met the State must prove each deviation is necessary to achieve a legitimate goal. *Karcher*, 462 U.S. at 730-31. The Court noted that "[a]ny number of consistently applied legislative policies might justify some variance, including . . . making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* at 740. Further, the showing required to establish that a particular policy "is flexible, depending on the size of

the deviations, the importance of the State's interests, and the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely."

64. The *Weiser* Court also made clear there must deference to legislative policies. In *Weiser*, the Court noted that when "fashioning a reapportionment plan or . . . choosing among plans" courts should "follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *Weiser*, 412 U.S. at 795 n. 15.

65. Notably, the entirety of the precedent regarding Congressional districts was founded on Article I, Sec. 2. of the US Constitution. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531, 89 S. Ct. 1225, 1229 (1969) (the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown); *Wesberry*, 376 U.S. at 7-8 ("[r]epresentatives be chosen 'by the People of the several States' means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's"); *Id.* at 8-9 (Justice Black stating the unequal weighting of votes undermined "fundamental ideas of [our] democratic government" and "cast aside the principle of a House of Representatives elected 'by the people'").

66. However, in this case there are both Congressional and Presidential candidates and the manner of electing a Presidential candidate is an entirely different provision of the Constitution.

67. Specifically, USCS Const. Art. II, § 1, Cl 2 stated that:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .

68. As a result of this precedent, the Plaintiffs' pleading is deficient in several regards; as an initial matter, there has been no pleading that the deviation was avoidable.

69. At a minimum, the Plaintiffs must show that the state or county is able to avoid any potential deviation through a good faith effort; however, the Plaintiffs only alleged a potential for criminal conduct, without any allegations this could be legislated against.

70. Further, there is no allegation that there was anything other than a good faith effort on the part of government actors.

71. Such deviations are permitted if they are unavoidable or will occur despite a good faith effort on the part of government actor.

72. Such pleadings are necessary as it is part of the initial burden of those challenging the purported devaluation of a vote.

73. Even if one were to assume the Plaintiffs have met their initial burden, there is clearly an exceptionally strong legislative goal being sought by the

Pennsylvania legislature – the enfranchisement of more citizens and the protection of their right to vote in a particular difficult time for the American voter, a global pandemic.

74. As noted, while the burden of justification is flexible depending on the size of the deviation, given the important justification and the miniscule offering on the part of the Plaintiffs, this burden has been not met.

75. Adherence to this state policy does not detract from the requirements of the Federal Constitution.

76. Additionally, there is no offering on the part of the Plaintiffs to show how this state goal can be better achieved, i.e. an offering that allow more people a safe access to voting.

77. Finally, as to the sole potential statewide candidate, it cannot be said that the Article I standard is applicable and, as a result, there must be a greater quantified potential disparity or devaluation under the Equal Protection Clause of the Fourteenth Amendment.

78. Further, if this claim fails as to the statewide candidate, there remains no party that would warrant inclusion of Northampton County in this suit as no individuals reside in or represents this county in the lawsuit as a Plaintiff.

Joinder in and Incorporation of Co-Defendants’ Motions to Dismiss

79. Moving County is one (1) of sixty-seven (67) Pennsylvania counties named as Defendants in this lawsuit along with the Secretary of the Commonwealth of Pennsylvania.

80. It is anticipated and expected that the other sixty-six (66) counties and the Secretary of the Commonwealth of Pennsylvania will file Motions to Dismiss in this matter.

81. It is anticipated and expected that the Motions to Dismiss filed by the sixty-six (66) counties and Secretary of the Commonwealth of Pennsylvania will provide grounds for dismissal of Plaintiffs' Complaint that would also be grounds for dismissal of Plaintiffs' Complaint against Moving County.

82. Moving County Northampton County Board of Elections joins in and incorporates by reference any Motions to Dismiss filed by the other sixty-six (66) counties and the Secretary of the Commonwealth of Pennsylvania to the extent that such Motion to Dismiss would provide a basis for the dismissal of Plaintiffs' Complaint as to Moving County.

83. Should this Court grant a Motion to Dismiss filed by any of the other sixty-six (66) counties or the Secretary of the Commonwealth and dismiss Plaintiffs' Complaint, Moving County respectfully requests that any Order dismissing Plaintiffs' Complaint would apply equally to Moving County.

WHEREFORE, the Defendant, Northampton Board of Elections, ask the Court to dismiss Plaintiffs' Complaint.

COUNTY OF NORTHAMPTON

By: /s/ BRIAN J. TAYLOR
Brian J. Taylor, Esq.
Attorney ID: 66601

Date: July 24, 2020

Certificate of Service

I hereby certify that on this date, a copy of this document was served upon all counsel of record via the Court's CM/ECF system, which will provide electronic notice to all parties of record.

COUNTY OF NORTHAMPTON

By: /s/ BRIAN J. TAYLOR
Brian J. Taylor, Esq.
Attorney ID: 66601

Date: July 24, 2020