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**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.

Civil Action No. 2:20-cv-966-NR

JUDGE J. NICHOLAS RANJAN

**DEFENDANT LUZERNE COUNTY ELECTION BOARD’S RESPONSE IN
OPPOSITION TO PLAINTIFFS’ MOTION TO MODIFY STAY ORDER
(ECF #410) AND FOR LIMITED PRELIMINARY INJUNCTIVE RELIEF**

Answering Defendant Luzerne County Board of Elections (“Luzerne County”), by and through the undersigned counsel, hereby files the instant Response in Opposition to Plaintiffs’ Motion to Modify Stay Order (ECF #410) and for Limited Preliminary Injunctive Relief, as follows:

Luzerne County respectfully requests that this Court deny Plaintiff’s Motion to Modify Stay Order and Motion for Limited Preliminary Injunctive Relief. Plaintiffs’ Motion to Modify the Court’s Stay Order is contrary to the express language of the order and is wholly lacking in any stated legal or factual basis. Further, this Court has already determined that Plaintiffs’ underlying Motion for

Limited Preliminary Injunctive Relief is without legal basis. Plaintiffs also cannot prevail on the merits of their underlying claims which form the basis for their request for limited injunctive relief.

The injunctive relief sought by Plaintiffs represents no more than an attempt to sow the desired chaos and confusion surrounding the return of absentee and mail in ballots, serving only to distract the defendants from their important election duties.

ARGUMENT

I. Plaintiffs' Motion to Modify the Court's Stay Order is contrary to the express language of the order and is wholly lacking in any stated legal or factual basis.

This Honorable Court stated in its August 23, 2020 Order granting in part Defendants' motions to dismiss and staying the case as follows:

IT IS FURTHER ORDERED that the case is STAYED. The Court's entry of a stay is without prejudice to any party moving to lift the stay after either: (i) resolution of the unsettled state-law issues identified in the Court's Opinion by the Pennsylvania Commonwealth Court or the Pennsylvania Supreme Court; or (ii) a prolonged delay by the state courts in resolving the unsettled state-law issues (i.e., if no decision has been entered by the state courts by October 5, 2020). Under the latter scenario, any motion to lift the stay shall be limited to the claims that are not based on unsettled issues of state law. That is, the movant could only ask to proceed on the following claims from the Amended Complaint [ECF 234]: (i) Plaintiffs' third-party ballot-delivery claims that are set forth as parts of Counts I, II and III; (ii) Plaintiffs' facial challenge to Pennsylvania's poll-watching residency restriction set forth in Counts IV and V; and (iii) Plaintiffs' claims for improper provisional voting as set forth in Counts VIII and IX.

See (ECF #410).

The Court's Order sets forth the specific circumstances under which any motion to lift the stay may be filed. Notwithstanding, a mere five days after this Order was entered, Plaintiffs have filed the underlying Motion to Modify this Order requesting that the 'stay lifting date' be moved back to September 14, 2020, rather than October 5, 2020 as set in the Court Order.

Plaintiffs fail to identify any legal basis for their request. Further, Plaintiffs fail to cite any factual basis for their request, aside from the following:

34. Because ballot designs may be certified and available as early as September 14, 2020 and ballots may start being delivered at any point thereafter, Plaintiffs further believe that waiting until the Court's initial October 5, 2020, date to entertain lifting the stay will result in substantial prejudice to Plaintiffs and their claims.

35. Accordingly, it is appropriate for this Court to grant the limited preliminary injunctive relief sought by Plaintiffs in this Motion and to modify the stay entered by this Court on August 23, 2020 to change the "prolonged delay" date from October 5, 2020 to September 14, 2020.

See (ECF # 414) at ¶¶ 34, 35.

Plaintiffs fail to identify any significance of the September 14, 2020 date beyond that it is the date on or after which "ballot designs may be certified and available." Id. Plaintiffs present no compelling legal or factual basis to support their request to modify the Court Order and their Motion should be denied.

II. This Court has already determined that Plaintiffs’ underlying Motion for Limited Preliminary Injunctive Relief is without legal basis.

This Honorable Court stated in its August 23, 2020 Opinion regarding Defendants’ motions to dismiss and staying the case as follows:

As for Plaintiffs’ argument that the Court, even if it abstains, must still decide any motions seeking preliminary relief, that misses the mark. True, if Plaintiffs had filed a motion for a preliminary injunction, the Court would have likely been required to rule on it before abstaining. *See, e.g., Chez Sez III Corp.*, 945 F.2d at 634 n.4 (noting that the district court had to consider appellants’ request for preliminary relief even though the court decided to abstain under the *Pullman* doctrine); *Pierce*, 324 F. Supp. 2d at 704 (“Notwithstanding a decision to abstain on the merits, this court is still obliged to consider plaintiffs’ request for preliminary relief.”) (citations omitted).

But Plaintiffs didn’t file one. Plaintiffs intentionally opted to forgo seeking any preliminary provisional relief, instead requesting a speedy hearing for declaratory relief under Rule 57. [ECF 6, ¶ 9 n.3 (“Plaintiffs recognize that the current length of time until the upcoming 2020 General Election counsels against the filing of a preliminary injunction motion if other means of case expedition will lead to the necessary relief in a timely manner. Thus, to conserve judicial resources, Plaintiffs are attempting to meet that need by way of a speedy declaratory judgment hearing and expedited discovery.”)].

A request for declaratory relief is a final adjudication on the merits, not a request for preliminary relief. *See Cnty. of Butler v. Wolf*, No. 20-677, 2020 WL 2769105, at *5 (W.D. Pa. May 28, 2020) (Stickman, J.) (“Contrary to a request for preliminary injunctive relief, the entry of a declaratory judgment is a complete and final order.”) (citing *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 211 (3d Cir. 2001)). Plaintiffs’ deliberate choice on how to

proceed obviates the Court's need to take any immediate action. *See Fuente*, 207 F. Supp. 3d at 453 (“[T]hough courts in the past have entertained parties’ requests for emergency relief contemporaneously with a decision to abstain on the merits of the case, this scenario is distinguishable from such instances, as indeed no motion has even been filed for such relief.”) (cleaned up).

See (ECF #409) p. 33-34.

The Court's well-reasoned language stands on its own and speaks for itself. While the Court would have been required to rule on a Preliminary Injunction prior to abstaining if Plaintiffs had opted to pursue one, the Plaintiffs did not do so. Rather, Plaintiffs expressly opted to seek a speedy hearing for declaratory relief. Accordingly, Plaintiffs' argument that the court must still decide their underlying Motion for Limited Preliminary Injunctive Relief fails.

III. Plaintiffs cannot prevail on the merits of their underlying claims which form the basis for their request for limited injunctive relief

Plaintiffs argue in their underlying Motion that limited preliminary injunctive relief is proper because Plaintiffs have a reasonable probability that their claims will succeed on the merits. See (ECF #414). Plaintiffs are incorrect.

As this Court noted in its August 23, 2020 Opinion, most of Plaintiffs' claims as set forth in their Amended Complaint relate to sets of guidance issued by Secretary Boockvar and allegations that Secretary Boockvar's guidance violates the Pennsylvania Election Code as amended. The Guidance as set forth in Plaintiffs'

Amended Complaint, as outlined in the August 23, 2020 Opinion, were issued in January, March, and May, 2020 in advance of the June 2020 Primary Election. The factual premise for the majority of Plaintiffs' claims is that the June 2020 Primary Election was conducted in a manner which resulted in certain perceived and alleged wrongs, and that as Secretary Boockvar had not retracted the guidance or directives that she issued in January, March, and May, 2020, those guidance and directives remain in place such that the Defendants would administer the November 2020 General Election in a manner identical to the June 2020 Primary election. This also served as the basis of Plaintiffs' Response in opposition to Luzerne County's Motion to Dismiss Plaintiffs' claims as moot.

However, as Plaintiffs note in their underlying motion, on August 19, 2020 Secretary Boockvar issued new guidance. Plaintiffs state that the August 19, 2020 guidance represents a "material change in the position" previously taken by the Pennsylvania Department of State in its prior guidance. See (ECF # 414) ¶16.

It follows that the premise of Plaintiffs' Amended Complaint, specifically, that the June 2020 Primary Election will be administered identically to the November 2020 General Election, such that the Plaintiffs will be subject to the same injuries in November as they were in June 2020 because both elections will be held pursuant to the same sets of guidance by Secretary Boockvar must fail. Plaintiffs were surely attempting to correct this fatal flaw to their pleading as Plaintiffs

acknowledged in the underlying Motion that they were “working on a motion to amend their pleadings” when the Court entered its August 23, 2020 Order. See (ECF # 414) ¶32.

Plaintiffs have no certainty or probability that their underlying claims will succeed, and Plaintiffs motion must be denied.

CONCLUSION

The injunctive relief sought by Plaintiffs represents no more than an attempt to sow, wherein the relief sought will sow the desired chaos and confusion surrounding the return of absentee and mail in ballots, serving only to distract the defendants from their important election duties.

For the foregoing reasons, and for those reasons as set forth above, Defendant Luzerne County Board of Elections respectfully requests that this Court deny the Plaintiffs’ Motion.

Respectfully submitted:

DATED: September 2, 2020

s/ Regina M. Blewitt

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing Response of Defendant Luzerne County Board of Elections Response in Opposition to Plaintiffs’ Motion to Modify Stay Order (ECF #410) and for Limited Preliminary Injunctive Relief was filed electronically and served via the Court’s CM/ECF system, pursuant to the Federal Rules of Civil Procedure.

s/ Regina M. Blewitt

Regina M. Blewitt

DATED: September 2, 2020