

*HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER*

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

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

OFFICE OF ATTORNEY GENERAL

Karen M. Romano (ID No. 88848)
Keli M. Neary (ID No. 205178)
Nicole M. Boland (ID No. 314061)
Stephen M. Moniak (ID No. 80035)
Strawberry Square, 15th Floor
Harrisburg, PA 17120
(717) 787-2717

Counsel for Respondents

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

DNC SERVICES CORP. / DEMOCRATIC
NATIONAL COMMITTEE,

Proposed Intervenor –Respondent.

**EXECUTIVE RESPONDENTS' BRIEF IN OPPOSITION TO
PETITIONERS' SUPPLEMENTAL APPLICATION FOR EMERGENCY
RELIEF**

Respondents, Governor Thomas W. Wolf, Secretary of the Commonwealth Kathy Boockvar, and the Commonwealth of Pennsylvania (collectively, the “Executive Respondents”) submit this brief in opposition to Petitioners’ Supplemental Application for Emergency Relief (“Application”).

I. INTRODUCTION

Undeterred by the certification of Pennsylvania’s election results, Petitioners now invite this Court to take judicial actions unprecedented in the nearly 250-year history of the American Republic. By way of example only, they seek an order: preventing the House of Representatives of the Commonwealth, whose term begins on December 1, 2020, from constituting itself or operating; precluding elected members of the United States Congress—including the primary Petitioner himself—from taking office; and directing Respondents to prevent Pennsylvania’s presidential and vice presidential electors from meeting to fulfill their constitutionally prescribed duties.

Executive Respondents have catalogued the myriad flaws fatal to this lawsuit—and to Petitioners’ request for preliminary/“emergency” injunctive relief—in their previously filed Preliminary Objections and supporting brief (filed November 23, 2020) and Response to Petitioners’ Motion for Emergency/Special Prohibitory Injunction and supporting brief (filed November 24, 2020). Indeed, Petitioners’ responses to those filings (and others) have only confirmed that their

Petition must be dismissed. Executive Respondents incorporate their prior arguments by reference herein.

These previous filings provide more than ample basis to deny Petitioners' Supplemental Application for Emergency Relief. Nonetheless, Executive Respondents take this opportunity to correct some of the Supplemental Application's factual misstatements, as well as to point out some of the more absurd implications of the relief Petitioners have requested.

II. THE TIMELINE SUGGESTED BY PETITIONERS IS INCORRECT

As an initial matter, Petitioners are mistaken in suggesting that Executive Respondents decided to “accelerate” certification of the results of Pennsylvania’s election—and the transmittal of a signed Certificate of Ascertainment for Pennsylvania’s slate of presidential and vice-presidential electors to the Archivist of the United States—as a result of this Court’s scheduling Order entered November 24 at 9:57 a.m. (*See* Application ¶¶ 3-8.) As counsel for Executive Respondents explained in the telephonic status conference with the Court on November 23, 2020, Executive Respondents were then already in the process of finalizing certification. In fact, Secretary Boockvar met with Governor Wolf to certify the returns, and to sign the Certificates of Ascertainment of electors, *before* the Court’s scheduling Order was entered.

III. THE RELIEF SOUGHT BY PETITIONERS IS AS RADICAL AS IT IS UNPRECEDENTED

The Supplemental Application for Emergency Relief lays bare the absurd, self-defeating nature of the relief Petitioners seek. To take only one example, Petitioners seek to enjoin Executive Respondents from issuing certificates of election to the persons elected members of the Senate and House of Representatives of the Commonwealth. (Application ¶ 11.) This would mean that the House of Representatives, which is scheduled to begin its next session on December 1, 2020, *would not be able to constitute itself or operate*. Of course, if that relief were awarded, another item of relief Petitioners request—which is an order directing the General Assembly to select Pennsylvania’s presidential and vice presidential electors—has no basis in law and so would be impossible. To take another example: Petitioners seek to enjoin Executive Respondents from issuing certificates of election for representatives in the United States Congress or from transmitting such certificates to the Speaker of the House of Representatives of the United States (Application ¶ 11)—thus preventing the primary Petitioner, Mike Kelly, who was re-elected in the November 3 election conducted under the challenged provisions of Act 77—from assuming office.

No federal or state court has ever come close to issuing the relief Petitioners seek. And for good reason. First, Petitioners’ proposed remedies would raise substantial federalism issues and, to the extent they implicate federal law issues,

may well raise a non-justiciable political question. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). The Twelfth Amendment of the U.S. Constitution entrusts Congress with the responsibility for receiving and counting certificates identifying slates of presidential electors. Congress has enacted a statute, the Electoral Count Act (ECA), which establishes procedures for raising and resolving objections to particular certificates. *See, e.g.*, 3 U.S.C. § 15. And that same statute delegates to the “executive of each State” the duty to certify to the Archivist of the United States “the final ascertainment” of electors under state law. 3 U.S.C. § 6. Where a governor has already discharged his duty under 3 U.S.C. § 6 and transmitted a certificate to the federal government, it is (at best) doubtful that a court—consistent with the federal constitutional plan—can stay the effect of the certification.

Second, there is no precedent for an injunction that purports to stay the effect of a Governor’s certification of a slate of presidential electors. The novelty and implications of Petitioners’ proposed injunction is reason enough to deny it—and to conclude that the requested relief therefore could not avert any asserted injury here. *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

Third, issuing an injunction after Pennsylvania has already certified its election results would grievously undermine the public’s trust in the electoral

system, contravene democratic principles, and reward Petitioners for their inexcusable delay and procedural gamesmanship. Accordingly, equity and the public interest disfavor an injunction.

To start, that is because granting Petitioners' motion would sow chaos and confusion across the nation. It would also invite additional last-minute efforts to smear electoral processes that are the heart of our democratic republic. There can be no doubt that the public interest would be ill-served by unprecedented judicial intervention into a Governor's completed certification of presidential electors—especially on such flimsy grounds and especially when that risks the mass disenfranchisement of voters.

Moreover, issuing an injunction would contravene bedrock principles of equity by rewarding Petitioners for their bad-faith litigation tactics. *In re U.S. Lines, Inc.*, 318 F.3d 432, 437 (2d Cir. 2003) (“[I]t is well-established that a litigant who seeks equity must do equity.”). The Court should not reward such dilatory and overtly strategic behavior with an injunction; if anything, this conduct should foreclose their motion.

IV. CONCLUSION

For the foregoing reasons, and those set forth in Executive Respondents' previous filings, the Court should deny Petitioners' Supplemental Application for Emergency Relief.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: November 24, 2020

By: /s/ Michele D. Hangle
Michele D. Hangle (ID No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
John G. Coit
John B. Hill
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

OFFICE OF ATTORNEY GENERAL

By: /s/ Karen M. Romano
Karen M. Romano (ID No. 88848)
Keli M. Neary (ID No. 205178)
Nicole M. Boland (ID No. 314061)
Stephen M. Moniak (ID No. 80035)
Strawberry Square, 15th 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

CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I certify that the Executive Respondents' Brief in Opposition to Petitioners' Motion For Emergency/Special Prohibitory Injunction 1,034 words as measured in accordance with Pennsylvania Rule of Appellate Procedure 2135.

Dated: November 25, 2020

/s/ Michele D. Hangley
Michele D. Hangley

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. Hangle
Michele D. Hangle