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1232 CD 2022

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

Counsel for Appellees

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ELIZABETH ELKIN, et al. Appellants, v. THE PHILADELPHIA CITY COMMISSIONERS, et. al. Appellees.	No. 1232 CD 2022

APPELLEES' ANSWER IN OPPOSITION TO APPELLANTS' EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

Appellees, the Philadelphia City Commissioners, Lisa Deeley in her official capacity, Omar Sabir in his official capacity, and Seth Blustein in his official capacity, submit this Opposition to Appellants' Emergency Application for Injunction Pending Appeal by Appellants (the "Application" or "App.").

I. Appellants Do Not Satisfy The Standard for Review of Denial of a Preliminary Injunction Nor the Standard for Stay Pending Appeal.

Appellants do not meet the very high standard for emergency and extraordinary relief from this Court, irrespective of whether their application is treated as a motion for stay pending appeal or a motion reviewing a trial court's denial of a preliminary injunction.

As to the former, when a party seeks either the grant or vacatur of a stay, the movant bears the burden. *See Rickert v. Latimore Twp.*, 960 A.2d 912, 924 (Pa. Commw. Ct. 2008). Accordingly, "to carry its burden, the petitioner ***must*** make a substantive case on the merits," showing that the "stay will prevent petitioner from suffering irreparable injury, and establishing other parties will not be harmed and the grant of the stay is not against the public interest. Those standards were articulated in a series of decisions handed down by this Court." *Dept. of Environmental Res. v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989) (emphasis added); *accord Rickert*, 960 A.2d at 923 ("the petitioner must establish: 1) that he is likely to prevail on the merits; 2) that without the requested relief he will suffer irreparable injury; and 3) that the removal of the automatic supersedeas will not

substantially harm other interested parties or adversely affect the public interest." These standards apply equally to review of stay and supersedeas orders. *Young J. Lee, Inc. v. Com., Dep't of Revenue, Bureau of State Lotteries*, 379, 474 A.2d 266, 272 (Pa. 1983)

As to the latter, review of a trial court's order granting or denying preliminary injunctive relief is "highly deferential." *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Indeed, courts "do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below." *Id.* (quoting *Roberts v. Bd. of Dirs. of Sch. Dist.*, 341 A.2d 475, 478 (Pa. 1975)). "Only when it is clear no grounds exist to support the decree, or the rule of law was 'palpably erroneous or misapplied,' will such order be reversed." *SPTR, Inc. v. City of Phila.*, 150 A.3d 160, 165-66 (Pa. Cmwlth. 2016) (quoting *Summit Towne*, 828 A.2d at 1001 (collecting cases)); *accord* Novak v. *Commonwealth*, 523 A.2d 318, 319 (Pa. 1987).

First, as a matter of law, the Court cannot grant any preliminary injunctive relief because Appellants lack standing to raise their claims. Courts across the country have held that "a claim of vote dilution brought in advance of an election on the theory of the risk of potential fraud fails to establish the requisite concrete injury" to assert standing. *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.

Supp. 3d 331, 378 (W.D. Pa. 2020). Accordingly, such "speculative" harm is insufficient to establish standing under Pennsylvania law. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016)

Second, Appellants made no showing that poll book reconciliation is required under either the Election Code or the Pennsylvania Constitution. Instead, Appellants conceded that poll book reconciliation is not specifically mentioned in the Election Code, and instead cited to a hodgepodge of other provisions, most enacted *long* before no-excuse mail-in voting was ever contemplated in Pennsylvania, to suggest that the procedure is required.

Third, Appellants also suggested that poll book reconciliation is "required under the Free and Equal Elections Clause" because "not one [duplicated vote] can be lawfully permitted or ignored by Defendants without violating . . . organic Pennsylvania law." This is contrary to all precedent on the provision, which holds that "substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner" are permitted. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 369 (Pa. 2020), *cert. denied sub nom. Republican Party of Pennsylvania v. Degraffenreid*, 209 L. Ed. 2d 164, 141 S. Ct. 732 (2021) (citing *Banfield v. Cortes*, 110 A.3d 155, 176–77 (Pa. 2015). Indeed, the Supreme Court has expressly held that only "in a case of plain, palpable and clear abuse of the [General Assembly's] power [to promulgate

laws governing elections] which actually infringes the rights of the electors" can the court intervene under this clause. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018).

Finally, Appellants did not demonstrate in the lower court that they were entitled to the relief they seek. Appellees raised that an injunction would result in "judicial micromanaging of the Philadelphia board's authority over elections" and "prevent the timely count and canvass of mail-in ballots in Philadelphia County," both of which are issues of public concern that are still at stake in the matter before this Court. Appellees also noted that Appellants' "speculation and conjecture cannot, as a matter of law, establish the essential prerequisite of immediate, irreparable harm," while "entering an injunction now will almost certainly harm both Defendants and Philadelphia County."

For these reasons, which are articulated at length in the Appellees' lower court briefing,[1] Appellants' application should be denied.

II. Philadelphia May Implement Poll-Book Reconciliation, Rendering this Appeal Moot.

Regrettably, the trial court order contains a number of incorrect statements that have no basis in the evidence. As Appellees explained to the trial court—which is not disputed in its opinion—neither the Pennsylvania Election Code nor

[1] The papers submitted to the trial court in consideration of Appellants' request for a preliminary injunction are attached as an exhibit to this filing.

the Pennsylvania Constitution requires poll book reconciliation. Nevertheless, the Court has unfortunately suggested that "poll book rendition [sic]" is required to prevent Philadelphia voters from being "encourag[ed]" to engage in "fraudulent voting."

The Commissioners stand by their vote to discontinue pre-counting reconciliation. But because the trial court's opinion has cast unwarranted doubt on the integrity of Philadelphia's election at the eleventh hour and risks feeding disinformation campaigns that seek to cultivate distrust in the democratic process, Appellees are currently considering whether to implement poll book reconciliation in this election cycle. If they do so, Plaintiffs' appeal will be moot. The Commissioners will provide an update to the Court during the hearing tomorrow morning on whether they will implement poll book reconciliation in the 2022 general election, and whether the issues raised by the application are therefore moot.

III. Conclusion

For the foregoing reasons, if this appeal is not mooted, the Court should deny the Appellants' application, and the trial court's decision denying the preliminary injunction should remain in effect pending disposition of Appellants' appeal.

Dated: November 7, 2022

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: */s/ Bonnie M. Hoffman*

Bonnie M. Hoffman (I.D. No. 201140)
Robert A. Wiygul (I.D. No. 310760)
Gianni M. Mascioli (I.D. No. 332372)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

Counsel for Appellees

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 7, 2022

/s/ Bonnie M. Hoffman
Bonnie M. Hoffman