

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 68 MAP 2024

Black Political Empowerment Project, Power Interfaith, Make the Road Pennsylvania, ONEPA Activists United, New PA Project Education Fund, Casa San Jose, Pittsburgh United, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania,

Petitioners/Appellees,

v.

Al Schmidt, in his official capacity as Secretary of the Commonwealth, Philadelphia County Board of Elections, Allegheny County Board of Elections,

Respondents,

Republican National Committee and Republican Party of Pennsylvania,

Intervenors/Appellants.

**INTERVENORS/APPELLANTS' EMERGENCY APPLICATION
FOR ENFORCEMENT AND/OR CLARIFICATION OF THE COURT'S
SEPTEMBER 13, 2024 ORDER**

Kathleen A. Gallagher
(PA #37950)
THE GALLAGHER FIRM,
LLC
436 7th Avenue, 30th Fl.
Pittsburgh, PA 15219
412.308.5512 (Phone)

*Counsel for
Intervenors/Appellants*

John M. Gore*
E. Stewart Crosland
Louis J. Capozzi III
(PA #327261)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
202.879.3939 (Phone)

*Admitted *pro hac vice*

Thomas W. King, III
(PA #21580)
Thomas E. Breth
(PA #66350)
DILLON, MCCANDLESS,
KING, COULTER &
GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
724.283.2200 (Phone)

Intervenors/Appellants the Republican National Committee and the Republican Party of Pennsylvania, by their undersigned counsel, make this Emergency Application pursuant to, *inter alia*, Rules 123 (Application for Relief) and 2591(b) (Enforcement of appellate court orders). Intervenor/Appellants respectfully seek on an expedited basis enforcement and/or clarification of this Court's September 13, 2024 Order and state in support thereof:

1. On Friday, September 13, 2024, this Court vacated the Commonwealth Court's order in this case because "the Commonwealth Court lacked subject matter jurisdiction to review the matter." Sept. 13, 2024 Order 1 (per curiam). The Court explained that the Commonwealth Court lacked subject matter jurisdiction for two independent reasons: "given the failure to name the county boards of elections of all 67 counties, **and** because the joinder of Al Schmidt, in his official capacity as Secretary of the Commonwealth, did not suffice to invoke the Commonwealth Court's original jurisdiction." *Id.* (citing 42 Pa. C.S. § 761(a)(1)) (emphasis added). The Court also denied "[t]he request for extraordinary jurisdiction pursuant to 42 Pa. C.S. § 726." *Id.* at 2. The Court did not order any remand or further proceedings. *See id.* at 1-2. This Court still has jurisdiction under Rule 2572 (Time for Remand of Record).

2. The Court's Order is plain: Joinder of the Secretary does not "suffice to invoke the Commonwealth Court's original jurisdiction" over

Petitioners/Appellees' Free and Equal Elections challenge to the General Assembly's date requirement for absentee and mail-in ballots. *Id.* at 1. That conclusion is correct, for reasons Intervenors/Appellants have previously explained. *See* Intervenors/Appellants' Principal Brief 10-17 (filed Sept. 3, 2024).

3. Nonetheless, without any authority to do so and in contravention of Rules 2572 and 2591(a), the Commonwealth Court has ordered further proceedings in this matter—and is preparing to reissue its order enjoining enforcement of the date requirement for the imminent 2024 general election. In particular, on Monday, September 16, 2024, the Commonwealth Court scheduled a status conference for “Tuesday, September 17, 2024 . . . to discuss advancing further proceedings in this matter on an expedited basis.” *Black Pol. Emp. et al. v. Schmidt et al.*, 283 MD 2024 “Status Conference Scheduled” (Pa. Comm. Ct. Sept. 16, 2024).

4. The status conference proceeded today before Judge Ceisler. At the conference, Judge Ceisler asked counsel for Petitioners whether Petitioners intend to seek leave to file an amended petition to join the remaining 65 county boards of elections to this case. Counsel for Petitioners indicated that Petitioners intend to do so. Counsel for Intervenors/Appellants objected to any further proceedings in the Commonwealth Court. Counsel for Intervenors/Appellants pointed out that this Court's September 13 Order held that the Commonwealth Court lacked subject matter jurisdiction on two bases, one of which is that joinder of the Secretary does

not suffice to invoke the Commonwealth Court’s original jurisdiction. Counsel for Intervenors/Appellants explained that joining the 65 remaining county boards would not cure that jurisdictional defect and, thus, requested that the Commonwealth Court dismiss the case.

5. Judge Ceisler indicated that she believed this Court’s September 13 Order contains “ambiguity” with respect to its reasoning. She indicated that, in her view, the purported ambiguity stems in part from the fact that the Order vacated the Commonwealth Court’s order but did not dismiss this case. Despite the express language showing the two independent bases for the Order, she further indicated that she believed that the only jurisdictional defect in the Petition was failure to join the 65 remaining county boards of elections and, thus, that an amended petition joining those 65 boards would correct the defect. Finally, she stated that the matter would proceed on an expedited basis to the merits, that the parties would be required to file briefs on a compressed schedule, that the Commonwealth Court would not convene another oral argument, and that the Commonwealth Court intended merely to “tweak” and reissue its prior order enjoining enforcement of the date requirement.

6. Judge Ceisler stated that the Commonwealth Court would issue an order setting a schedule for Petitioners to seek leave to file an amended petition. That order issued shortly after the status conference. It set a deadline of 10 a.m. on Wednesday, September 18, for Petitioners to file their application for leave and a

deadline of 2 p.m. on Thursday, September 19, for any party to file an opposition to the application. *See Black Pol. Emp. et al. v. Schmidt et al.*, 283 MD 2024 Order (Pa. Comm. Ct. Sept. 17, 2024) (Ex. A).

7. The Commonwealth Court’s ordering of further proceedings is improper and *ultra vires* because this Court has held that the Commonwealth Court “lack[s] subject matter jurisdiction.” Sept. 13, 2024 Order 1. Indeed, *regardless* of whether the remaining 65 county boards of elections are joined, joinder of Secretary Schmidt does not “suffice to invoke the Commonwealth Court’s original jurisdiction.” *Id.*; *see also* 42 Pa. C.S. § 761(a)(1); Intervenors/Appellants’ Principal Brief 10-17.

8. Moreover, any further proceedings in this case not only contravene this Court’s Order, but also threaten to unleash “voter confusion,” “chaos,” *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 504-07 (Pa. 2006), and an erosion of the public “[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of participatory democracy,” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This is especially true if the Commonwealth Court reissues an injunction prohibiting enforcement of the date requirement on the eve of, or even after, the imminent opening of the mail-voting period for the 2024 general election in which millions of Pennsylvanians will cast their ballots for President, U.S. Senate, U.S. Representative, and numerous state and local offices.

9. The Commonwealth Court also lacks authority to proceed because the case has not yet been remanded under Rule 2572 and, in any event, the Commonwealth Court's actions are counter to this Court's Order and the requirements of Rule 2591(a).

10. Intervenors/Appellants maintain there is no ambiguity in the Court's September 13 Order. The Order is plain on its face, and in prior cases in which the Court has reversed the Commonwealth Court's conclusion that it had original jurisdiction, the Court has simply "vacated" the Commonwealth Court's "order" without expressly ordering dismissal of the action. *In re Petition for Enforcement of Subpoenas*, 214 A.3d 660, 670 (Pa. 2019) ("The order of the Commonwealth Court is vacated."). Accordingly, the Court should grant this Emergency Application, respectfully on an expedited basis, and enforce its prior Order under Rule 2591(b) by dismissing or requiring the Commonwealth Court to dismiss the case.

11. Alternatively, in light of the Commonwealth Court's belief that the Order is ambiguous, Intervenors/Appellants also respectfully request that the Court, if needed, clarify its prior Order. In particular, Intervenors/Appellants request that the Court amend its Order to expressly dismiss this action or to direct the Commonwealth Court to do so. Doing so clearly serves judicial economy and avoids wasting resources on the *ultra vires* actions of the Commonwealth Court.

12. In that regard, if the Court believes that further explanation is appropriate, Intervenors/Appellants respectfully request that the Court clarify that dismissal is required because the Commonwealth Court lacks original jurisdiction in this case, the Petition did not properly name “the Commonwealth government” or “officer” as a Respondent, 42 Pa. C.S. § 761(a)(1), and this jurisdictional defect cannot be cured through an amended petition or joinder of the remaining 65 county boards.

WHEREFORE, Intervenors/Appellants respectfully requests that this Court enforce its Order of September 13, 2024, by ordering that this case be dismissed or, in the alternative, clarify its Order to expressly indicate that this action is dismissed or to expressly direct the Commonwealth Court to do so. If necessary, the Court should further clarify that dismissal is required because the Commonwealth Court lacks original jurisdiction in this case, the Petition did not properly name “the Commonwealth government” or “officer” as a Respondent, 42 Pa. C.S. § 761(a)(1), and this jurisdictional defect cannot be cured through an amended petition or joinder of the remaining 65 county boards.

Dated: September 17, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

THE GALLAGHER FIRM, LLC

436 Seventh Avenue, 30th Floor

Pittsburgh, PA 15219

Phone: (412) 308-5512

kag@gallagherlawllc.com

John M. Gore (*pro hac vice*)

E. Stewart Crosland

Louis J. Capozzi III

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Phone: (202) 879-3939

jmgore@jonesday.com

scrosland@jonesday.com

lcapozzi@jonesday.com

Thomas W. King, III

Thomas E. Breth

DILLON, McCANDLESS, KING,

COULTER & GRAHAM, LLP

128 W. Cunningham St.

Butler, PA 16001

Phone: (724) 283.2200

tking@dmkcg.com

tbreth@dmkcg.com

Counsel for Intervenors/Appellants

VERIFICATION PURSUANT TO PA.R.C.P. 1024(c)

I, attorney Kathleen A. Gallagher, verify that the averments of fact contained in the foregoing Intervenor/Appellants' Emergency Application For Enforcement and/or Clarification of the Court's September 13, 2024 Order are true and correct to the best of my knowledge, information and belief. This verification is made pursuant to Rule 1024(c) of the Pennsylvania Rules of Civil Procedure because the parties filing this Application lack sufficient knowledge or information related to the facts herein as they did not participate in the status conference referenced in the foregoing Emergency Application.

I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: September 17, 2024

/s/ Kathleen A. Gallagher _____
Counsel for Intervenor/Appellants

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Application contains 1,333 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Kathleen A. Gallagher
Counsel for Intervenors/Appellants

CERTIFICATE OF COMPLIANCE

I hereby 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.

/s/ Kathleen A. Gallagher
Counsel for Intervenors/Appellants

Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Black Political Empowerment	:	
Project, POWER Interfaith, Make the	:	
Road Pennsylvania, OnePA Activists	:	
United, New PA Project Education	:	
Fund, Casa San José, Pittsburgh	:	
United, League of Women Voters of	:	
Pennsylvania, and Common Cause	:	
Pennsylvania,	:	
Petitioners	:	
	:	
v.	:	
	:	
Al Schmidt, in his official capacity as	:	
Secretary of the Commonwealth,	:	
Philadelphia County Board of	:	
Elections, and Allegheny County	:	
Board of Elections,	:	
Respondents	:	No. 283 M.D. 2024

PER CURIAM

ORDER

NOW, September 17, 2024, following a status conference with the parties, during which Petitioners indicated their intention to seek leave to file an amended petition for review in this matter in light of the Supreme Court of Pennsylvania’s September 13, 2024 Per Curiam Order vacating this Court’s August 30, 2024 Order, it is hereby **ORDERED** as follows:

1. Petitioners shall PACFile and serve any application for leave to amend their Petition for Review Addressed to this Court’s Original Jurisdiction **by no later than 10:00 a.m. on Wednesday, September 18, 2024.**

2. Any party who opposes the application for leave to amend shall PACFile and serve an answer in opposition thereto **by no later than 2:00 p.m. on Thursday, September 19, 2024**. Any party who fails to file an answer by that date and time will be considered by the Court to be unopposed to the application for leave to amend.
3. Upon receipt of the application for leave to amend and any answer(s) in opposition thereto, the Court will decide how this matter will proceed and promptly issue an order to that effect.