

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

DONALD J. TRUMP FOR PRESIDENT, INC.; <i>et al.</i> ,)	Civil Action
)	
)	
Plaintiffs,)	
)	No.: 2-20-CV-966
v.)	
)	
KATHY BOOCKVAR in her capacity as Secretary of the Commonwealth of Pennsylvania; <i>et al.</i> ,)	
)	
)	
Defendants.)	Judge J. Nicholas Ranjan

**OPPOSITION TO PLAINTIFFS’ MOTION TO MODIFY STAY ORDER AND MOTION
FOR LIMITED PRELIMINARY INJUNCTIVE RELIEF**

Yesterday, the Pennsylvania Supreme Court exercised its extraordinary jurisdictional powers and will soon “provide conclusive interpretations of the state-law issues that serve as the basis for many of Plaintiffs’ claims.” The Pennsylvania Supreme Court’s action confirms this Court’s judiciousness when, ten days ago, it exercised its discretion to abstain under the *Pullman* doctrine. Plaintiffs’ recent filing is an attempt to circumvent that abstention order and urge this Court to rule on the merits of the very statutory interpretation issues this Court deferred to the Pennsylvania state courts, issues that will now be conclusively decided by the state’s highest court on an expedited basis. Plaintiffs’ motion should be denied.

For those reasons, and pursuant to this Court’s August 28, 2020 Order (Dkt. No. 416) the Pennsylvania State Democratic Party, Congressman Dwight Evans, State Senators Sharif Street, Art Haywood, Vincent Hughes, Anthony Williams, State Representatives Danillo Burgos, Morgan Cephas, Austin Davis, Isabella Fitzgerald, Edward Gainey, Jordan Harris, Mary Isaacson, Malcolm Kenyatta, Patty Kim, Stephen Kinsey, Peter Schweyer, and candidates for office Nina

Ahmad, Anton Andrew, Janet Diaz, Manuel M. Guzman, Jr., Rick Krajewski (collectively “Democratic Intervenors”) hereby file this Opposition to Plaintiffs’ Motion to Modify Stay Order and Motion for Limited Preliminary Injunctive Relief.

I. THIS COURT GRANTED DEFENDANTS’ ABSTENTION MOTIONS AND STAYED THE MATTER IN FULL

On August 23, 2020, this Court entered an order abstaining from consideration of the Plaintiffs’ alleged federal constitutional violations and staying the case until the courts of the Commonwealth have the opportunity to consider the unsettled questions of state law that would, completely or in large measure, obviate the need for federal court review of the Commonwealth’s prospective administration of the 2020 general election. Dkt. 409-410.

This Court determined that abstention based on *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) was warranted – “at least for the time being”–because “federal intervention could ‘disrupt’ Pennsylvania’s exercise of [its] core constitutional power’ over the administration of elections.” Dkt. 409 at 29. Further, this Court expressed concern that “[a] federal-court constitutional decision, premised on an erroneous interpretation of ambiguous state law” so close to a contentious national election and amid a global pandemic, “would risk electoral chaos and undermine the integrity of the democratic process in the minds of voters.” *Id.*

Although this Court abstained based on *Pullman* and stayed the matter, it provided the Plaintiffs a menu of options “to obtain substantial relief through speedy resolution of unsettled state-law questions.” *Id.* at 31. *First*, pending state court litigation filed by Democratic Intervenors would likely resolve many of the unsettled state-law issues. *Second*, Plaintiffs could file their own case in state court seeking interpretations of the unsettled state-law issues. *Id.* The Court noted that Plaintiffs had a “head start” in doing so as they have conducted substantial discovery in this matter.” *Id.* at 32. *Third*, Plaintiffs could appeal this Court’s ruling to the Third Circuit and seek

certification of any “unsettled and ambiguous state-law questions that have not otherwise been raised in the pending Commonwealth Court case.” *Id.*

In issuing its decision, this Court rejected Plaintiffs’ argument that abstention would not preclude the Court’s consideration of various other motions seeking preliminary relief, including Plaintiffs’ request for a speedy hearing for declaratory relief. The Court explained that the argument “misses the mark” especially because Plaintiffs did not file a motion for preliminary injunction *before* the Court ruled on abstention. *Id.* at 33. The Court observed that Plaintiffs made the intentional strategic choice not to seek preliminary relief, but instead requested a speedy hearing for declaratory relief under Fed. R. Civ. P. 57. *Id.* This, the Court explained, was not a request for a preliminary adjudication, but a request for an expeditious final adjudication on the merits. *Id.* at pg. 33.

All told, the Court granted defendants’ motions insofar as they requested abstention, cancelled the September 22 and 23 evidentiary hearing, vacated the current Scheduling Order, and stayed the case until after one of two events: (1) resolution of the unsettled state-law issues identified in this Court’s opinion by the Pennsylvania Commonwealth Court or the Pennsylvania Supreme Court; or (2) a prolonged delay by the state courts in resolving unsettled state law issues (i.e., if no decision has been entered by state courts by October 5, 2020). *Id.*

II. PLAINTIFFS FILE MOTION TO MODIFY AND SEEK PRELIMINARY RELIEF

This Court’s August 23 ruling was clear. Rather than follow the express paths set forth by the Court, Plaintiffs chose to file the instant Motion to Modify. The Motion to Modify seeks the following preliminary relief:

- Ordering Defendants to restructure their ballot receipt and handling processes into a number of different categories as if Plaintiffs had prevailed on their claims on the merits;

- Prematurely ordering Defendants to refrain from pre-canvassing or canvassing certain ballots, as if Plaintiffs had prevailed on their claims on the merits, despite the fact that canvassing is not permitted under applicable law until Election Day; and
- Ordering Defendant to retain and make available for periodic review all digital images and video to the extent any video security surveillance system or internal camera is available and used to monitor drop-boxes and other sites and locations used to return and collect absentee and mail-in ballots, without any legal basis for doing so; and
- Modifying the stay order to essentially require the Pennsylvania Supreme Court to resolve the matters before it within two weeks, rather than October 5, 2020, despite the Court's finding that those courts are the appropriate forum to handle such claims and that the time provided was reasonable.

III. ARGUMENT

A. This Court Should Deny Plaintiffs' Motion Because Abstention Is Appropriate.

As an initial matter, for the detailed reasons outlined in this Court's August 23 ruling, abstention is—and continues to be—warranted. Despite their re-dressed contentions, the core of this case involves unsettled questions of state law, namely the mail-in and absentee voting regime of Act 77 of 2019 (“Act 77”). As this Court recognized, *Pullman* abstention requires federal courts to defer state law issues to state courts when such circumstances exist. The Commonwealth Court and the Pennsylvania Supreme Court are entitled to the first word regarding the proper interpretation of Act 77 and resolving as-applied challenges to Act 77's ballot receipt deadlines given the pandemic and apparent sabotage of the Postal Service resulting in unprecedented mail delivery delays in Pennsylvania and across the county.

The Pennsylvania Supreme Court, on September 1, 2020, exercised its King's Bench powers and has assumed extraordinary jurisdiction over *Pennsylvania Democratic Party, et al v. Boockvar, et al*, 407 MD 2020 (Pa. Commw. Ct. 2020), now 133 MM 2020 (Pa. 2020). The briefs of all parties in that matter are due on September 8, 2020 and the Supreme Court likely will move promptly to resolve the questions of state law that undergird the Plaintiff's claims.

This Court was, and continues to be, right that “soon, the Pennsylvania state courts will be able to provide conclusive interpretations of the state-law issues that serve as the basis for many of Plaintiffs’ claims here.” Dkt. 409, at pg. 31.

B. This Court Must Deny the Motion to Modify Because Plaintiffs’ Request for Preliminary Relief Would Require this Court to Reverse Its Decision to Abstain.

In its August 23 ruling, this Court provided Plaintiffs several options to obtain the relief they now seek. *See* Dkt. 409, pg. 31-33. This Court then explained that had Plaintiffs filed a motion for preliminary injunction contemporaneously with their Complaint, “the Court would have likely been required to rule on it before abstaining,” but Plaintiffs chose not to do so. Now that the Pennsylvania Supreme Court has exercised its right to undertake an expedited review, the Plaintiffs motion for preliminary injunction would be counter-productive and inappropriate.

As this Court noted in its recent August 23, 2020 Memorandum and Order, the state courts should have the opportunity to interpret the statutory provisions that are in dispute. After all, the alleged federal constitutional violations will be resolved, in whole or in substantial part, once the Pennsylvania Supreme Court issues an interpretation that can be applied and followed by the Secretary of the Commonwealth and the 67 county boards.

Should this Court entertain Plaintiffs’ motion for preliminary injunction, it would be required to consider whether: (1) Plaintiffs are likely to succeed on the merits; (2) Plaintiffs will suffer irreparable harm in the absence of preliminary relief; and (3) the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Consideration of the first element clearly involves an interpretation of state law. It would be counter-productive to abstain under the *Pullman* doctrine and allow the state courts the opportunity to interpret a new statute, and then less than two weeks later, interpret that very statute

immediately before the Pennsylvania Supreme Court provides the interpretation that essentially eliminates the very federal constitutional concerns that the Plaintiffs have raised. This Court should not have to engage in an exercise of predicting how the Pennsylvania Supreme Court will rule, knowing that it has accepted these issues for expedited consideration.

As to the public interest element, the requested injunctive relief is far from benign. County Boards of Elections are receiving vote by mail applications and will soon be sending them out to voters. Under the Plaintiffs' requested relief, all 67 county boards would be forced to undertake unnecessary and extensive tracking, security, and accounting processes as to how each particular voter submitted his or her ballot—which would only slow down further an already heavily taxed system. An injunctive process would be highly disruptive and a needless exercise when the Pennsylvania Supreme Court will soon resolve these various issues of statutory interpretation, likely well before ballots are being returned and opened.

Accordingly, this Court should deny Plaintiffs' request for preliminary relief. Aside from failing to meet the applicable standard—which the Secretary, counties, and other intervenors will no doubt address—requesting it *after* this Court has decided to abstain and temporarily stay the matter is not appropriate and essentially asks this Court to reverse its August 23 ruling without any basis for doing so.

C. Democratic Intervenors Join Certain Other Oppositions Filed.

In addition to the arguments above, Democratic Intervenors join the arguments set forth in the Oppositions filed the Northampton County Board of Elections and the Secretary of the Commonwealth. Further, Democratic Intervenors intend to review other Oppositions to the Motion once they are filed and may file a supplemental Notice of Joinder as appropriate. Joinder of these arguments is subject to, and does not waive any defenses and objections.

IV. CONCLUSION

For the reasons set forth above, the Democratic Intervenors respectfully request that this Court deny Plaintiffs' Motion to Modify Stay Order and Motion for Limited Preliminary Injunctive Relief.

Respectfully submitted,

/s/ A. Michael Pratt

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September 2, 2020

CERTIFICATE OF SERVICE

I, A. Michael Pratt, hereby certify that on September 2, 2020, I caused a true and correct copy of the foregoing Democratic Intervenors' Opposition to Plaintiffs' Motion to Modify Stay Order and Motion for Limited Preliminary Injunctive Relief on counsel of record for Plaintiffs, Defendants and other intervenors listed on the docket via the Court's ECF system.

/s/ A. Michael Pratt

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