

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 659 M.D. 2016

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COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: THE MATTER OF THE 2016 PRESIDENTIAL ELECTION

BRIEF OF *AMICUS CURIAE* THE AMERICAN CENTER FOR LAW AND
JUSTICE IN SUPPORT OF RESPONDENTS, THE PENNSYLVANIA
REPUBLICAN PARTY, THE PENNSYLVANIA ELECTORS OF
PRESIDENT-ELECT DONALD J. TRUMP, AND THE PENNSYLVANIA
ELECTORS OF VICE-PRESIDENT-ELECT MICHAEL PENCE

GREGORY R. REED
([REDACTED])

JOSHUA A. REED
([REDACTED])

REED LAW
[REDACTED]

Telephone [REDACTED]

Facsimile: [REDACTED]

Email: [REDACTED]

Lead Counsel

JAY ALAN SEKULOW

STUART J. ROTH

COLBY M. MAY

CECE HEIL

MATTHEW R. CLARK

BENJAMIN P. SISNEY

OLIVIA F. SUMMERS

AMERICAN CENTER FOR LAW AND JUSTICE
[REDACTED]

Telephone [REDACTED]

Facsimile: [REDACTED]

Email: [REDACTED]

Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before the United States Supreme Court and numerous state and federal courts around the country in cases concerning the First Amendment and election law, including *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *McConnell v. FEC*, 540 U.S. 93 (2003), and *Bush v. Gore*, 531 U.S. 98 (2000).

The ACLJ files this Brief of *Amicus Curiae* pursuant to 210 PA. CODE R. 531. The proper resolution of this case is a matter of utmost concern to the ACLJ because of its impact on the integrity of American presidential election process. A number of Pennsylvanians are members of the ACLJ's Committee to Protect the Integrity of the 2016 Presidential Election Process. On its own behalf and on behalf of the aforementioned Committee, the ACLJ urges this Court to dismiss the Petition and deny the Petitioners' requests for relief.

Pursuant to 210 PA. CODE R. 531(b)(2), *Amicus Curiae* states that no person or entity other than the *amicus curiae*, its members, or counsel have (i) paid in whole or in part for the preparation of the *amicus curiae* brief or (ii) authored in whole or in part the *amicus curiae* brief.

ARGUMENT

I. THE “LEGAL INSUFFICIENCY” PLEADING STANDARD GOVERNS ELECTION CONTEST PETITIONS AND PETITIONERS PATENTLY FAIL TO MEET IT.

Petitioners wholly fail to satisfy the basic pleading requirements of the Pennsylvania Rules of Civil Procedure and the principles underlying those rules. In particular, the Petition is subject to demurrer for its facial “[l]egal insufficiency.” 231 PA. CODE R. 1028(a)(4); *Madigan Appeal*, 253 A.2d 271, 273 (1969). As this Court has recognized, “preliminary objections may be filed by any party to any pleading on the grounds of legal insufficiency of a pleading (demurrer).” *Smolsky v. Pa. Gen. Assembly*, 34 A.3d 316, 319 (Pa. Cmmw. Ct. 2011) (citing 231 PA. CODE R. 1028(a)(4)). Courts “must accept as true all *well-pleaded material allegations* in the petition for review, as well as all inferences *reasonably deduced* therefrom.” *Id.* (emphasis added) (citing *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmmw. Ct. 1994)). Importantly, however, “court[s] need not accept as true *conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.*” *Id.* (citing *Meier*, 648 A.2d at 600). On its face, the Petition is based on “expression of opinion” and demands “unwarranted inferences from facts.” *Id.* As will be shown herein, the material allegations of the Petition are legally insufficient.

That this proceeding takes the form of an election contest does not free Petitioners from the constraints of pleading requirements. Petitioners admit 25 PA. CONS. STAT. § 3456 governs the Petition in this case. *See* Petition, ¶ 4. This statute requires that “[t]he petition *shall concisely set forth the cause of complaint, showing wherein it is claimed that the primary or election is illegal . . .*” 25 PA. CONS. STAT. § 3456 (emphasis added); *see* 25 PA. CONS. STAT. § 3457 (requiring petitioners to aver “that according to the best of their knowledge and belief, the primary or election was illegal and the return thereof not correct”). Hence, the material allegation of a contest petition is “the cause” of the illegality of the contested election and the incorrectness of its return. The Supreme Court of Pennsylvania has made clear that the pleading of this critical allegation in contest cases is subject to scrutiny:

While it is true that the provisions [of 25 PA. CONS. STAT. § 3456] are to be construed liberally and a petition for contest is not to be declared legally insufficient merely because it fails to include or to detail the evidence supporting the allegation of illegality in the election, still it is absolutely essential that such a petition “aver plainly and distinctly such facts which if sustained by proof would require the court to set aside the result.”

Madigan Appeal, 253 A.2d at 273 (quoting *Pazdrak’s Contested Election*, 288 Pa. 585, 137 A. 109 (1927); *Newport Twp Election Contest*, 121 A.2d 141 (1956)). Particularly instructive in this case, “[t]he court will not grope in the dark, or follow a contestant on a fishing expedition, in the hope of being able to find

enough to enable him by the investigation to make out his case.” *Id.* (quoting *Warren Borough Election*, 274 Pa. 352, 118 A. 256 (1922)); *see also Ayre’s Contested Election*, 287 Pa. 135, 134 A. 477 (1926). This is precisely what Petitioners herein attempt, *see* Petition, ¶¶ 4, 8, and *Madigan Appeal* is precisely the authority that disallows their attempt.

“Read with these principles in mind,” the Pennsylvania Supreme Court held “it [wa]s patently clear from the record that the original petition for contest in the instant case was legally insufficient to warrant the court in proceeding further with an investigation of the election.” *Madigan Appeal*, 253 A.2d at 273. The petition rejected in *Madigan Appeal*, much more specific in its allegations of irregularity than the Petition at bar, actually identified a specific number of ballots allegedly not counted in error by a particular Board of Elections. Yet, it was held to be legally insufficient.

Petitioners admit they “protectively” filed the Petition to satisfy a deadline, and request this Court to hold that petition in abeyance pending the outcome of unidentified recounts. Petition, ¶¶ 4, 8. They contend that section 3456’s recitation of the right to seek leave to amend allows this. Petition, p.3, ¶ 1. But *Madigan Appeal*, directly on point, forecloses Petitioners’ scheme. The petition to amend in that case was disallowed because it was found to be, “in effect, an endeavor to file an election contest petition well beyond the twenty day, post-

election period.” *Madigan Appeal*, 253 A.2d at 274. This is precisely what Petitioners herein openly tell the Court they intend to do, Petition, ¶¶ 4, 8, and pursuant to *Madigan Appeal*, the attempt must fail.

The *Madigan Appeal* Court identified yet another fatal flaw:

They point to errors found in the boxes recounted during the court-supervised recount, and *speculate* that a pervasive recount of all such previously unrecounted boxes would yield proportionate errors, and result in the appellant’s election.

Madigan Appeal, 253 A.2d at 275. Speculation has no place in an election contest. Even while pointing to specific errors found in a recount, “the petitioners showed no cause necessitating an election contest,” and that is what section 3456 plainly requires. *Id.* The Court emphasized: “As we noted before, the court will not grope in the dark, or follow a contestant on a fishing expedition, in the hope of being able to find enough to enable him by the investigation to make out his case.” *Id.* (internal quotations and citations omitted).

Upon review of the Petition, it “appear[s] with certainty that the law will not permit recovery,” *Smolsky*, 34 A.3d at 319, as Petitioners fail to properly allege the most fundamental element section 3456 requires of a contest petition, the cause of complaint — illegality of the election and an incorrect return. *Madigan Appeal*, 253 A.2d at 273-74. Petitioners’ overt reliance on “unwarranted inferences from

facts, argumentative allegations, or expressions of opinion” leaves no meaningful doubt to be resolved in their favor. *Smolsky*, 34 A.3d at 319.

According to the Petition, “To the best of Petitioners’ knowledge and belief, the 2016 Presidential Election was illegal and the return thereof was not correct.”

Petition, ¶ 5. Petitioners advance three grounds as the “basis” for this alleged “belief”:

(i) the affidavit of Alex Halderman,¹ which is annexed hereto as Exhibit A, and which outlines the vulnerabilities of the electronic voting systems used within the Commonwealth to interference or hacking;

(ii) public reports of computer hacking aimed at the Democratic National Committee (DNC) and the election systems in Illinois and Arizona; and

(iii) the discontinuity between pre-election polls and the result as reported by the media. According to published reports, the computer intrusions of the DNC and other election-related sites originated with a foreign government.

Petition, ¶ 6. *Amicus* addresses the insufficiency of each ground in turn.

A. The First Ground Upon Which Petitioners Base Their Material Allegation of Illegality is Legally Insufficient.

Petitioners allege that Mr. Halderman “outlines the vulnerabilities of the electronic voting systems used *within the Commonwealth* to interference or hacking.” Petition, ¶ 6(i) (emphasis added). But Mr. Halderman does no such

¹While Mr. Halderman is described as an “expert,” Petition, ¶ 3, no effort is made to address the requirements contained in Pennsylvania Rules of Evidence 702, 703 and related case law.

thing. Instead, Mr. Halderman opines merely that “[m]any states, including Pennsylvania, continue to use out-of-date machines that are known to be insecure.” Halderman Aff., Petition, Exh. A, ¶ 11. This is as specific to Pennsylvania as Mr. Halderman gets. He mentions “*American* voting machines” a few times, but makes no mention or identification, provides no opinion or analysis, and alleges no fact pertaining to a single particular machine used anywhere in the Commonwealth in the 2016 election. That Mr. Halderman opines that *American* voting systems “can” be hacked hardly supports an inference that *specific machines* used in the Commonwealth were in fact hacked and the results of a *specific election* manipulated.

Mr. Halderman’s assertions are merely “expressions of opinion” which need not be taken as true. *Smolsky*, 34 A.3d at 319. But even if they were, and American voting machines are outdated and vulnerable, it remains a gigantic step for this Court to infer that even a single actual instance of illegality occurred in the Commonwealth during the 2016 presidential election, much less a sufficient number of illegal votes making its return incorrect. As such, this first ground upon which Petitioners rely is grossly overstated, constitutes mere “expressions of opinion,” and requires this Court to make enormously “unwarranted inferences from facts.” *Smolsky*, 34 A.3d at 319. This is legal insufficiency. *See Madigan Appeal*, 253 A.2d at 273; Pa. 231 PA. CODE R. 1028(a)(4).

B. The Second Ground Upon Which Petitioners Base Their Material Allegation of Illegality is Legally Insufficient.

According to Petitioners, “public reports of computer hacking aimed at the Democratic National Committee (DNC) and the election systems in Illinois and Arizona” support their alleged belief and “grave concern” that the election was illegal and its return incorrect. Petition, ¶¶ 6(ii), 7. Absent from their Petition, however, is *any* allegation purporting to connect the “hacking” of the DNC and “election systems in Illinois and Arizona”² with a single instance of interference or manipulation of a voting machine in the Commonwealth during the 2016 election. In other words, *even if this second ground is taken as true*, it fails to support an reasonable inference that the 2016 election in the Commonwealth was illegal and that its return incorrect. This legal insufficiency is fatal. *See Madigan Appeal*, 253 A.2d at 273 (“[S]till it is absolutely essential that . . . a [§ 3456 contest] petition aver plainly and distinctly such facts which if sustained by proof would require the court to set aside the result” of the election.); *id.* (holding it was “patently clear” that contest petition was “legally insufficient”); 231 PA. CODE R. 1028(a)(4) (identifying “[l]egal insufficiency” of pleading as ground for demurrer).

²Petitioners’ use of the language “election systems” in this sentence might suggest that actual election results in Illinois and Arizona were manipulated. A closer look at the news reports cited by Mr. Halderman on this point reveals that voter data was stolen from voter registration databases, not a manipulation of votes in or the results of any actual election.

C. The Third Ground Upon Which Petitioners Base Their Material Allegation of Illegality is Legally Insufficient.

Petitioners' third and final ground upon which their alleged belief of illegality via a hacked election is based is "the discontinuity between pre-election polls and the result as reported by the media." Petition, ¶ 6(iii). Mr. Halderman has an opinion on that claim which, unsurprisingly, did not make it into the Petition:

Were this year's deviations from pre-election polls the results of a cyberattack? Probably not. I believe the most likely explanation is that the polls were systematically wrong, rather than that the election was hacked.

J. Alex Halderman, *Want to Know if the Election was Hacked? Look at the Ballots*, MEDIUM.COM (Nov. 23, 2016), <https://medium.com/@jhalderm/want-to-know-if-the-election-was-hacked-look-at-the-ballots-c61a6113b0ba#.b8jnw9odj> (emphasis added).

Beyond the conflict with their own expert's opinion, Petitioners fail to identify a single poll to which they refer. As a result, meaningful analysis of the scientific merits of any such poll is impossible for Respondents or this Court.³ Petitioners take not a single step to bridge the chasm between their conclusory assertion that "the polls got it wrong" and the necessary inference of illegal

³This type of insufficiency — "insufficient specificity in a pleading" — implicates yet an additional basis for failure pursuant to 231 PA. CODE R. 1028(a)(3).

election manipulation. For this reason, the petition is legally insufficient and would not survive a demurrer brought pursuant to 231 PA. CODE R. 1028(a)(4).

All three bases miss the mark. Perhaps, Petitioners must believe, if they allege enough hypothetical, hyperbole, and computer activity unrelated to the Commonwealth's 2016 election, something will stick. But reliance on three legally insufficient grounds does not generate a legally sufficient petition. The product of three times zero is still zero. As this Court explained,

no litigant is permitted to prosecute a lawsuit which fails to state a claim upon which relief may be granted. Depriving someone of a frivolous claim deprives him of nothing at all, except perhaps the punishment of sanctions.

Brown v. Penn. Dep't of Correction, 913 A.2d 301, 306 (Pa. Cmmw. 2006), *pet. for allowance of appeal denied*, 918 A.2d 748 (2007) (internal quotations and ellipses omitted) (quoting *Lewis v. Casey*, 518 U.S. 343, 353 n.3, (1996)).

II. TO THE EXTENT MATERIAL ALLEGATIONS ARE LEGALLY SUFFICIENT TO WITHSTAND DEMURRER, PETITIONERS MUST NOW PRESENT ACTUAL EVIDENCE OF ILLEGAL VOTE MANIPULATION IN PENNSYLVANIA'S 2016 ELECTION TO EVEN POSSIBLY OBTAIN RELIEF.

Alternatively, assuming the best possible case for Petitioners, at most they would have stated a 25 PA. CONS. STAT. § 3458 prima facie case for a class II contest and as such, a time has been fixed for hearing. But alleging a prima facie case sufficient to warrant a hearing under section 3458 is quite a distinct task from

identifying and producing evidence sufficient to justify the relief requested. *See Madigan Appeal*, 253 A.2d at 275 (even where admitted errors in some districts were identified, disallowing contest petition that failed to show how recounting other districts could yield proportionate errors; describing same as insufficient “speculation”). To prevail, Petitioners must present evidence at the hearing of actual illegal electronic vote manipulation — something not even alleged or identified in their Petition. Even if this Court were to overlook the legal insufficiencies of Petitioners’ pleading, it must not overlook a glaring lack of evidence. While “a case is not tried at the preliminary objection phase of litigation,” *Podolak v. Tobyhanna Twp. Bd. of Supervisors*, 37 A.3d 1283, 1288 (Pa. Cmmw. 2012), it *will* be tried. And even if Petitioners “are not required to produce evidence at this point in the proceedings [i.e., the pleading stage] to prove their allegations,” *id.*, they *will* be. Hearing has been set. Petitioners allege they believe that Pennsylvania’s 2016 election was illegal and that its return is incorrect. They must now produce evidence that this, in fact, occurred.

III. PLEADING, EVIDENTIARY, AND PROCEDURAL STANDARDS FOR ELECTION CONTESTS SHOULD REMAIN HIGH TO PROTECT THE CONSTITUTIONAL RIGHTS OF ALL CITIZENS OF THE COMMONWEALTH AND THE INTEGRITY AND SANCTITY OF THE ENTIRE ELECTION PROCESS.

The policy of the Pennsylvania General Assembly in protecting its citizens’ right to seek a judicially supervised recount when evidence of foul play has

surfaced is critically important. This Petition makes a mockery of that policy and cheapens and jeopardizes that protection. This Court's acquiescence to the Petitioners' pitch — that Pennsylvania's 2016 presidential election was illegal because, in theory, someone somewhere can tamper with election machines — would set a dangerous precedent. Moreover, Petitioners' proposal — that some as of yet unidentified districts, counties, or precincts would be recounted or recanvassed, while others apparently would not, could violate the United States Supreme Court's holdings in *Bush v. Gore*, 531 U.S. 98 (2000) (holding that recount procedures instituted by Florida court were inconsistent with its Fourteenth Amendment obligation to avoid arbitrary and disparate treatment of the members of its electorate). Having participated in that case as *amicus*, *Amicus Curiae* urges this Court to filter out the facially baseless claim made by the Petitioners herein and in so doing, preserve the integrity of the Commonwealth's 2016 presidential election, its Election Code, its citizens' constitutional rights, and the American election process.

More must be required than a bald assertion that “the polls got it wrong” to support an inference that the election was illegal and its return incorrect. *See* Petition, ¶ 6. Surely an allegation of “grave concern about the integrity of electronic voting machines used in their districts,” Petition, ¶ 7, is insufficient when not a single fact is alleged about an actual voting machine in any particular

district of any Petitioner.⁴ Surely it takes more than an “expert” describing how electronic vote manipulation “can” happen somewhere to support an inference that an illegal election occurred in the Commonwealth of Pennsylvania — requiring drastic, resource-crippling, time-consuming measures by this Court, the expenditure of untold numbers of taxpayer dollars, and the possibility that, if not completed before December 13, 2016, the Commonwealth’s electoral votes would be set aside altogether rendering the votes of all its citizens null and void.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Petition, deny any relief requested by Petitioners, and grant any relief requested by Respondents.

⁴Petitioners allege their “concern” that illegal hacking activity occurred, yet cite not a single report or example of illegal hacking manipulating votes anywhere in the Commonwealth — or *any* state. To the contrary, Pennsylvania Secretary of State Pedro Cortes publically stated that there has been “no evidence whatsoever” of voting irregularities; “Absolutely not.” Angela Couloumbis & Rob Tornoe, *Stein Campaign Files Pennsylvania Recount Suit*, PHILLY.COM (Nov. 28, 2016, 5:02 PM), <http://www.philly.com/philly/blogs/real-time/Despite-successful-fundraising-effort-recount-of-Pennsylvania-remains-difficult.html>. Moreover, media reports actually indicate that no illegal activity compromised the U.S. election results in any state. See *U.S. Statement on Reliability of Election Results*, N.Y. TIMES (Nov. 26, 2016), <http://www.nytimes.com/2016/11/26/us/politics/us-statement-on-reliability-of-election-results.html> (“As we have noted before, we remained confident in the overall integrity of electoral infrastructure, a confidence that was borne out on election day.”). Even in the example cited by Mr. Halderman regarding reports that Russia attempted to electronically manipulate Ukraine’s elections, the attempts *were detected and defused by Ukraine*.

Counsel for Respondents Pennsylvania Republican Party, Pennsylvania Electors of President-Elect Donald J. Trump, and Pennsylvania Electors of Vice-President-Elect Michael Pence

Service by email at [REDACTED] with the permission of:
Matthew Hermann Haverstick, Esq.
Kleinbard LLC

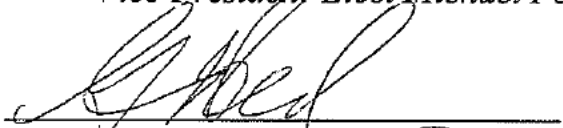
[REDACTED]

Counsel for Respondents Pennsylvania Republican Party, Pennsylvania Electors of President-Elect Donald J. Trump, and Pennsylvania Electors of Vice-President-Elect Michael Pence

Service by email at [REDACTED] with the permission of:
Joshua John Voss, Esq.
Kleinbard LLC

[REDACTED]

Counsel for Respondents Pennsylvania Republican Party, Pennsylvania Electors of President-Elect Donald J. Trump, and Pennsylvania Electors of Vice-President-Elect Michael Pence



GREGORY R. REED

[REDACTED]
JOSHUA A. REED 

REED LAW
[REDACTED]

Lead Counsel for Amicus Curiae

Dated: December 2, 2016

PROOF OF SERVICE

I hereby certify that on this 2nd day of December, 2016, I am serving the foregoing Brief of *Amicus Curiae* to the persons stated below in the manner indicated, which service satisfies the requirements of 210 PA. CODE R. 121:

Service by email at [REDACTED] with the permission of:
Lawrence M. Otter, Esq.

[REDACTED]

Counsel for Petitioners

Service by email at [REDACTED] with the permission of:
Lawrence J. Tabas, Esq.

Service by email at [REDACTED] with the permission of:
Jenna Kaitlyn Shedd-Saw1, Esq.

Obermayer Rebmann Maxwell & Hippel LLP

[REDACTED]

Counsel for Respondents Pennsylvania Republican Party, Pennsylvania Electors of President-Elect Donald J. Trump, and Pennsylvania Electors of Vice-President-Elect Michael Pence

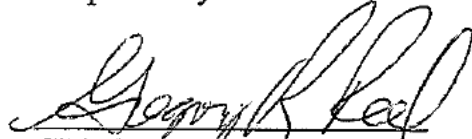
Service by email at [REDACTED] with the permission of:

Rebecca Lee Warren, Esq.

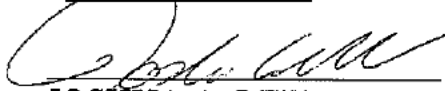
Obermayer Rebmann Maxwell & Hippel LLP

[REDACTED]

Respectfully submitted,



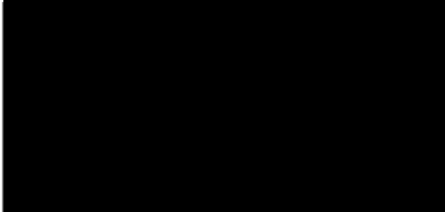
GREGORY R. REED,

JOSHUA A. REED


REED LAW


Lead Counsel

JAY ALAN SEKULOW
STUART J. ROTH
COLBY M. MAY
CECE HEIL
MATTHEW R. CLARK
BENJAMIN P. SISNEY
OLIVIA F. SUMMERS
AMERICAN CENTER FOR LAW
AND JUSTICE


Counsel for Amicus Curiae

Dated: December 2, 2016