Twitter Thread by Mike Dunford

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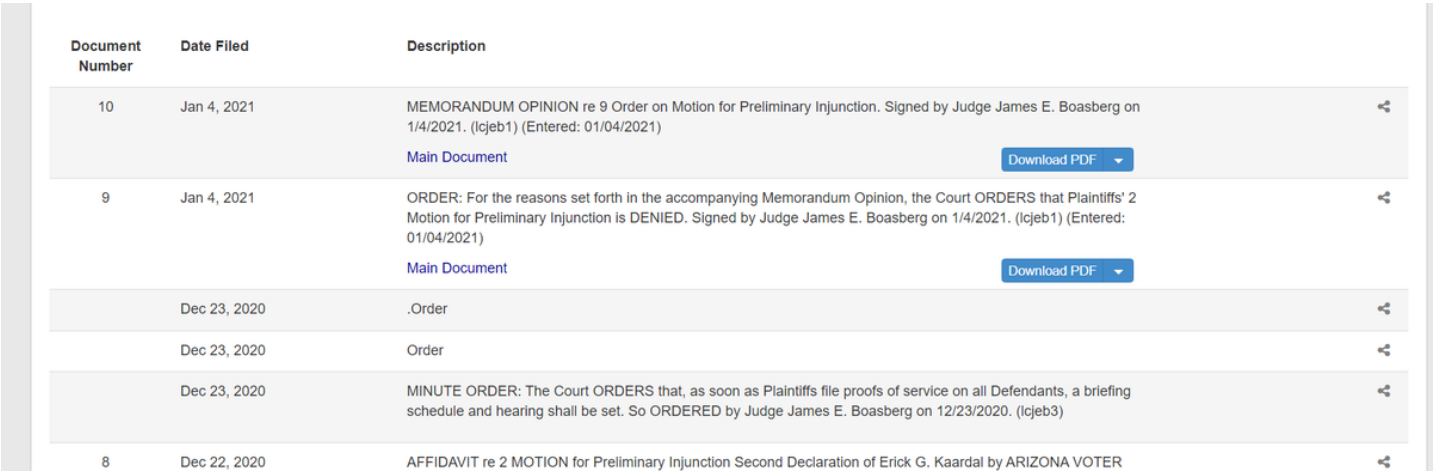
Election Litigation Update: DC - the "let's sue the Electoral College" case.

This is a bit surprising, given that as of last time I checked nobody had been served and no appearance had been entered. I suspect it's an effort to make sure the case isn't "pending" on the 6th.

> Link: https://t.co/oOJZD1F4x2
>
> — Brad Heath (@bradheath) January 4, 2021

And, sure enough, still no proof of service on ANY defendant, still no appearance from defense counsel. And this is denying the motion for preliminary injunction but does NOT dismiss the case - which is potentially ominous for plaintiff's counsel.



Document Number	Date Filed	Description
10	Jan 4, 2021	MEMORANDUM OPINION re 9 Order on Motion for Preliminary Injunction. Signed by Judge James E. Boasberg on 1/4/2021. (lcjeb1) (Entered: 01/04/2021) Main Document Download PDF
9	Jan 4, 2021	ORDER: For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that Plaintiffs' 2 Motion for Preliminary Injunction is DENIED. Signed by Judge James E. Boasberg on 1/4/2021. (lcjeb1) (Entered: 01/04/2021) Main Document Download PDF
	Dec 23, 2020	.Order
	Dec 23, 2020	Order
	Dec 23, 2020	MINUTE ORDER: The Court ORDERS that, as soon as Plaintiffs file proofs of service on all Defendants, a briefing schedule and hearing shall be set. So ORDERED by Judge James E. Boasberg on 12/23/2020. (lcjeb3)
8	Dec 22, 2020	AFFIDAVIT re 2 MOTION for Preliminary Injunction Second Declaration of Erick G. Kaardal by ARIZONA VOTER

This isn't a "happy judge" kind of first paragraph. Not even a little bit. Nope.

MEMORANDUM OPINION

Plaintiffs' aims in this election challenge are bold indeed: they ask this Court to declare unconstitutional several decades-old federal statutes governing the appointment of electors and the counting of electoral votes for President of the United States; to invalidate multiple state statutes regulating the certification of Presidential votes; to ignore certain Supreme Court decisions; and, the *coup de grace*, to enjoin the U.S. Congress from counting the electoral votes on January 6, 2021, and declaring Joseph R. Biden the next President.

Y'all, this isn't even directed within a few hundred miles of my direction and I sill just instinctively checked to make sure that there's room for me to hide under my desk if I have to - this is a very not happy, very federal, very judge tone.

Voter groups and individual voters from the states of Wisconsin, Pennsylvania, Georgia, Michigan, and Arizona have brought this action against Vice President Michael R. Pence, in his official capacity as President of the Senate; both houses of Congress and the Electoral College itself; and various leaders of the five aforementioned states. Simultaneous with the filing of their Complaint, Plaintiffs moved this Court to preliminarily enjoin the certifying of the electors from the five states and the counting of their votes. In addition to being filed on behalf of Plaintiffs without standing and (at least as to the state Defendants) in the wrong court and with no effort to even serve their adversaries, the suit rests on a fundamental and obvious misreading of the

Constitution. It would be risible were its target not so grave: the undermining of a democratic election for President of the United States. The Court will deny the Motion.

Also - the judge just outright said there's a bunch of reasons for dismissal. And not in "might be" terms. In definite fact ones. But the case isn't dismissed yet.

If I was plaintiffs counsel, I'd definitely be clearing under my desk right now, and possibly also my underwear.

Yikes. Ouch.

Judge calling out the length of your filing by both page count and number of footnotes is very much the same energy as your mother using your full name, middle name included, at you. At volume.

I. Background

To say that Plaintiffs' 116-page Complaint, replete with 310 footnotes, is prolix would be a gross understatement. After explicitly disclaiming any theory of fraud, see ECF No. 1

Oh dear. This is very unhappy judge energy.

a gross understatement. After explicitly disclaiming any theory of fraud, see ECF No. 1 (Complaint), ¶ 44 ("This lawsuit is not about voter fraud."), Plaintiffs spend scores of pages cataloguing every conceivable discrepancy or irregularity in the 2020 vote in the five relevant states, already debunked or not, most of which they nonetheless describe as a species of fraud.

Did they think the judge would not notice that they hadn't filed anything?

E.g., id., at 37–109. Those allegations notwithstanding, Plaintiffs' central contention is that certain federal and state election statutes ignore the express mandate of Article II of the Constitution, thus rendering them invalid. Id. at 109–12. Although the Complaint also asserts causes of action for violations of the Equal Protection and Due Process Clauses, those are merely derivative of its first count. Id. at 112–15.

In order to provide an equitable briefing and hearing schedule on a very tight timetable, this Court immediately instructed Plaintiffs to file proofs of service on Defendants so that they could proceed on their preliminary-injunction Motion. See 12/23/20 Min. Order; Fed. R. Civ. P. 65(a)(1) ("The court may issue a preliminary injunction only on notice to the adverse party."). Twelve days later, Plaintiffs have still not provided proof of notice to any Defendant, let alone filed a single proof of service or explained their inability to do so.

This is pure boilerplate. I'm a little - but only a little - surprised that there's nothing added to cover the judge's right to deny without the other parties being served or appearing.

II. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. NRDC, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the

absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting Winter, 555 U.S. at 20). "The moving party bears the burden of persuasion and must demonstrate, 'by a clear showing,' that the requested relief is warranted." Hospitality Staffing Solutions, LLC v. Reyes, 736 F. Supp. 2d 192, 197 (D.D.C. 2010) (citing Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006)).

Before the Supreme Court's decision in Winter, courts weighed these factors on a "sliding scale," allowing "an unusually strong showing on one of the factors" to overcome a weaker showing on another. Davis v. Pension Ben. Guar. Corp., 571 F.3d 1288, 1291–92 (D.C. Cir. 2009) (quoting Davenport v. Int'l Bhd. of Teamsters, 166 F.3d 356, 361 (D.C. Cir. 1999)). Both before and after Winter, however, one thing is clear: a failure to show a likelihood of success on the merits alone is sufficient to defeat the motion. Ark. Dairy Coop. Ass'n, Inc. v. USDA, 573 F.3d 815, 832 (D.C. Cir. 2009) (citing Apotex, Inc. v. FDA, 449 F.3d 1249, 1253–54 (D.C. Cir. 2006)); Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 281 F. Supp. 3d 88, 99 (D.D.C. 2017), aff'd on other grounds, 897 F.3d 314 (D.C. Cir. 2018).

I literally just swore out loud when I read this. Brutal.

III. Analysis

Given that time is short and the legal errors underpinning this action manifold, the Court treats only the central ones and in the order of who, where, what, and why. Most obviously,

Right - very much no standing.

treats only the central ones and in the order of who, where, what, and why. Most obviously, Plaintiffs have not demonstrated the "irreducible constitutional minimum of standing." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). Although they claim to have been "disenfranchised," ECF No. 4 (PI Mem.) at 37, this is plainly not true. Their votes have been counted and their electors certified pursuant to state-authorized procedures; indeed, any vote nullification would obtain only were their own suit to succeed. To the extent that they argue

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more broadly that voters maintain an interest in an election conducted in conformity with the Constitution, id. at 38, they merely assert a "generalized grievance" stemming from an attempt to have the Government act in accordance with their view of the law. Hollingsworth v. Perry, 570 U.S. 693, 706 (2013). This does not satisfy Article III's demand for a "concrete and particularized" injury, id. at 704, as other courts have recently noted in rejecting comparable election challenges. See Wood v. Raffensperger, 981 F.3d 1307, 1314–15 (11th Cir. 2020); Bowyer v. Ducey, No. 20-2321, 2020 WL 7238261, at *4–5 (D. Ariz. Dec. 9, 2020); King v. Whitmer, No. 20-13134, 2020 WL 7134198, at *10 (E.D. Mich. Dec. 7, 2020). Plaintiffs' contention that the state legislature is being deprived of its authority to certify elections, moreover, cannot suffice to establish a distinct injury-in-fact to the individuals and organizations before this Court. Finally, to the extent that Plaintiffs seek an injunction preventing certain state officials from certifying their election results, see PI Mem. at 1, that claim is moot as certification has already occurred. Wood, 981 F.3d at 1317.

I think I mentioned when I took my initial look at this stupidity that I thought there were some personal jurisdiction issued. Looks like I'm not the only one who noticed that.

Moving on from subject-matter jurisdiction, the Court must also pause at personal jurisdiction. Plaintiffs cannot simply sue anyone they wish here in the District of Columbia. On the contrary, they must find a court or courts that have personal jurisdiction over each Defendant, and they never explain how a court in this city can subject to its jurisdiction, say, the Majority Leader of the Wisconsin State Senate. Absent personal jurisdiction over a particular Defendant, of course, this Court lacks authority to compel him to do anything.

I will admit that I didn't refer to the whole "post-election certification" thing as "flat-out wrong." I mostly went with "made-up" or various expletives. But flat-out wrong definitely works.

Even if the Court had subject-matter and personal jurisdiction, it still could not rule in Plaintiffs' favor because their central contention is flat-out wrong. "Plaintiffs claim that Article

It's a seriously dumb lawsuit with a weapons-grade dumb legal theory, and the judge most definitely noticed.

Even if the Court had subject-matter and personal jurisdiction, it still could not rule in Plaintiffs' favor because their central contention is flat-out wrong. "Plaintiffs claim that Article II of the U.S. Constitution provides a voter a constitutional right to the voter's Presidential vote being certified as part of the state legislature's post-election certification of Presidential electors.

Absence [*sic*] such certification, the Presidential electors' votes from that state cannot be counted by the federal Defendants toward the election of President and Vice President." Compl., ¶ 32 (emphasis added); see also PI Mem. at 1. More specifically, "Plaintiffs [*sic*] constitutional claims in this lawsuit are principally based on one sentence in Article II of the U.S. Constitution." Compl., ¶ 54; see also PI Mem. at 1. That sentence states in relevant part that the President "shall hold his Office during the Term of four Years, and . . . be elected[] as follows: [¶] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." U.S. Const., art. II, § 1.

Plaintiffs somehow interpret this straightforward passage to mean that state legislatures alone must certify Presidential votes and Presidential electors after each election, and that Governors or other entities have no constitutionally permitted role. See Compl., ¶ 55. As a result, state statutes that delegate the certification to the Secretary of State or the Governor or anyone else are invalid. Id., ¶ 58. That, however, is not at all what Article II says. The above-quoted language makes manifest that a state appoints electors in "such Manner as the Legislature thereof may direct." So if the legislature directs that the Governor, Secretary of State, or other executive-branch entity shall make the certification, that is entirely constitutional. This is precisely what has happened: in each of the five states, the legislature has passed a statute directing how votes are to be certified and electors selected. See Ariz. Rev. Stat. Ann. § 16-212(B); Ga. Code Ann. § 21-2-499(b); Mich. Comp. Laws Ann. § 168.46; Wis. Stat. Ann. § 7.70(5)(b); 25 Pa. Stat. § 3166.

"Somewhere between a willful misreading of the Constitution and fantasy." True. Harsh, but true.

For example, Georgia requires its Secretary of State to "certify the votes cast for all candidates . . . and lay the returns for presidential electors before the Governor. The Governor shall enumerate and ascertain the number of votes for each person so voted and shall certify the

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slates of presidential electors receiving the highest number of votes." Ga. Code Ann. § 21-2-499(b). Similarly, under Michigan law, "the governor shall certify, under the seal of the state, to the United States secretary of state, the names and addresses of the electors of this state chosen as electors of president and vice-president of the United States." Mich. Comp. Laws Ann. § 168.46. Plaintiffs' theory that all of these laws are unconstitutional and that the Court should instead require state legislatures themselves to certify every Presidential election lies somewhere between a willful misreading of the Constitution and fantasy.

Ooh. No, nope, no. Not what you want judge to say about you nope.

Plaintiffs readily acknowledge that their position also means that the Supreme Court's decisions in Bush v. Gore, 531 U.S. 98 (2000), and Texas v. Pennsylvania, No. 155 (Orig.), 2020 WL 7296814 (U.S. Dec. 11, 2020), "are in constitutional error." Compl., ¶ 76. They do not, however, explain how this District Court has authority to disregard Supreme Court precedent. Nor do they ever mention why they have waited until seven weeks after the election to bring this action and seek a preliminary injunction based on purportedly unconstitutional statutes that have existed for decades — since 1948 in the case of the federal ones. It is not a stretch to find a serious lack of good faith here. See Trump v. Wis. Elections Comm'n, No. 20-3414, 2020 WL 7654295, at *4 (7th Cir. Dec. 24, 2020).

Yup. Mention of sanctions - and a "I'll decide when this wraps up what to do with you."

Yet even that may be letting Plaintiffs off the hook too lightly. Their failure to make any effort to serve or formally notify any Defendant — even after reminder by the Court in its Minute Order — renders it difficult to believe that the suit is meant seriously. Courts are not instruments through which parties engage in such gamesmanship or symbolic political gestures. As a result, at the conclusion of this litigation, the Court will determine whether to issue an order to show cause why this matter should not be referred to its Committee on Grievances for potential discipline of Plaintiffs' counsel.

IV. Conclusion

As Plaintiffs have established no likelihood of success on the merits here, the Court will deny their Motion for Preliminary Injunction. A contemporaneous Order so stating will issue this day.

So, what are plaintiffs' options?

Honestly, I don't know. They can, of course, run to the DC Circuit right now if they want - denial of injunctive relief is immediately appealable.

But that would be EXCEPTIONALLY stupid.

With nobody served, no injunctive relief can be granted under the federal rules, so it's not like an appeal can accomplish anything. Best they get is an order telling a now-more-pissed off judge to let them serve and try again.

Next option is to voluntarily dismiss. That might be the right option and what the judge wants to happen. Or it might give the judge reason to say "yup, bad faith" and slam the hammer down. Or both. Or neither.

Or they can plow ahead and attempt service.

Those are the things they can do.

What they probably will do is something so dumb I didn't even think of it.