No. 20-3214

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JIM BOGNET, *ET AL.*,

Plaintiffs-Appellants,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, *ET AL.*,

Defendants-Appellees.

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor Defendant-Appellee,

On Appeal from the United States District Court for the Western District of Pennsylvania in Case No. 3:20-cv-00215, Judge Kim R. Gibson

ANSWERING BRIEF OF KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

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I. INTRODUCTION

In the November 3, 2020 general election, voters cast their ballots in reliance on a ballot receipt deadline that the Pennsylvania Supreme Court set and the United States Supreme Court twice left undisturbed. In this appeal, Appellants ask this Court to take the extraordinary step of disenfranchising many such voters after the fact. Even if such extraordinary relief could ever be warranted, Appellants present no reason to grant it here. The District Court correctly rejected Appellants' novel and unprecedented election law theories, declined to invalidate the Pennsylvania Supreme Court's determination of an issue of Pennsylvania law, and rejected a proposed injunction that would have disrupted the election administration of the Commonwealth of Pennsylvania and its sixty-seven county boards of elections. This Court should affirm the District Court's denial of the Motion for Preliminary Injunction.[1]

[1] It may well turn out to be the case that the number of ballots at issue in this case, *i.e.*, the number of absentee and mail-in ballots mailed by voters on or before Election Day and received by county boards of elections between 8:00 p.m. on November 3, 2020, and 5:00 p.m. on November 6, 2020, is not large enough to affect the outcome of the election. If and when Secretary Boockvar is able to determine that this appeal is moot, she will promptly file an appropriate motion with this Court.

II. STATEMENT OF THE CASE AND FACTS

A. The Ballot Receipt Deadline Litigation in the Pennsylvania Supreme Court

After Pennsylvania's June 2, 2020, primary election, a group of Petitioners filed suit in Pennsylvania state court against the Defendants in this action. The Petitioners alleged that in the primary, a combination of U.S. Postal Service ("USPS") delays, county delays in sending out mail-in and absentee ballots, and the effects of the COVID-19 pandemic had made it difficult or impossible for many voters to timely return their ballots. They sought, *inter alia*, a weeklong extension of the deadline for receipt of ballots. *See Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, --- A.3d ----, 2020 WL 5554644, at *20-26 (Pa. Sept. 17, 2020). While Secretary Boockvar at first opposed any deadline extension, she reassessed her position after receiving a letter from the USPS General Counsel. *Id.* at *26-27. This letter stated that Pennsylvania's ballot deadlines were "incongruous with the Postal Service's delivery standards" and that "if state law requires ballots to be returned by Election Day, voters should mail their ballots no later than Tuesday, October 27." (S.A.9.)

The Republican Party of Pennsylvania was granted leave to intervene. In its Application for Leave to Intervene, the Republican Party asserted that it was representing the rights of its candidates and members. (*See* S.A.18-19.) The Republican Party opposed an extension of the deadline. *Pa. Democratic Party*,

2020 WL 5554644, at *28-32.

B. The Pennsylvania Supreme Court Rules, and the Mail-In and Absentee Balloting Process Moves Forward

The Pennsylvania Supreme Court ruled on September 17, 2020. It held, *inter alia*, that, given the huge numbers of absentee and mail-in ballots expected during the continuing pandemic and issues with USPS delivery standards, a one-time, three-day extension of the ballot-receipt deadline, up to 5:00 p.m. on Friday, November 6, 2020, was necessary.[2] *Id.* at *36-38. The Court noted that the extension would apply only to ballots "mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day." *Id.* at *37. It adopted a presumption that any ballot that arrived by mail during this window without a legible postmark was "mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." *Id.* at 37 n.26.

On the same day, the Pennsylvania Supreme Court issued rulings that finalized the list of candidates that would appear on statewide ballots. Shortly thereafter, the Pennsylvania Department of State certified the ballot, and counties

[2] Appellants obliquely suggest this three-day extension is purely arbitrary. Br. at 2. That is incorrect: The Pennsylvania Supreme Court based the extension period on its findings regarding "USPS delivery standards given the expected number of Pennsylvanians opting to use mail-in ballots during the pandemic," and chose three days as "least at variance with Pennsylvania's permanent election calendar, which we respect and do not alter lightly, even temporarily." *Pa. Democratic Party*, 2020 WL 5554644, at *18.

began printing and mailing their ballots.[3] The Department of State,[4] public interest groups,[5] the press, and, upon information and belief, local governments notified voters of the extended ballot receipt deadline.[6] Eventually, just over 3 million applications were submitted, and approximately 2.5 million ballots were returned, in the 2020 General Election.[7]

In the meantime, the Republican Party and another intervenor sought stays from the U.S. Supreme Court, making the same Constitutional and statutory arguments that Appellants make here. The Supreme Court denied the requests. *See Scarnati v. Boockvar*, No. 20A53, 2020 WL 6128194 (U.S. Oct. 19, 2020); *Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 WL 6128193 (U.S. Oct. 19, 2020). The Republican Party and Pennsylvania House and Senate leaders then

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[3] *See* https://www.msn.com/en-us/news/politics/pennsylvania-voters-will-begin-receiving-mail-in-ballots-soon-official-say/ar-BB199I5C.

[4] *See, e.g.*, https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx; https://www.votespa.com/readytovote/Documents/Toolkit/ReadyToVote-Newsletter.pdf.

[5] *See, e.g.*, https://www.vote.org/absentee-ballot-deadlines/.

[6] Plaintiffs have not disputed this fact. In their brief in response to Plaintiffs' motion for a temporary restraining order below, the Secretary notified the District Court that she would produce additional evidence on this and other topics at any evidentiary hearing. The District Court did not hold an evidentiary hearing, as it properly denied Plaintiffs' motion based on the legal argument and undisputed facts presented in the parties' papers and oral argument.

[7] *See* Mail Ballot Application Statistics, https://data.pa.gov/stories/s/2020-General-Election-Voting-Story/kptg-uury (visited at 9:15 p.m. on November 8, 2020).

filed petitions for certiorari, which are pending. *See id.* The Republican Party further moved to expedite consideration of its petition for certiorari before November 3; the Supreme Court denied the motion. *Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020).[8]

On November 6, 2020, the Republican Party filed yet another Supreme Court application, this time seeking an order requiring segregation of all ballots received by mail during the three-day-extension period—something the Secretary had already instructed all county boards of elections to do—and not to count them. The same day, Justice Alito entered an administrative order referring the application to the Supreme Court Conference and ordering the counties "to comply with the … guidance provided by the Secretary" that such ballots should be segregated and counted separately from other mail-in and absentee ballots. Order, *Republican Party of Pa. v. Boockvar*, No. 20A84 (U.S. filed Nov. 6, 2020). As the Secretary has informed the Supreme Court, all 67 counties have confirmed that they will follow that guidance.

[8] On November 6, 2020, the Supreme Court ordered all county boards of election to ensure "(1) that all ballots received by mail after 8:00 p.m. on November 3 be segregated and kept "in a secure, safe and sealed container separate from other voted ballots," and (2) that all such ballots, if counted, be counted separately." *Republican Party of Pennsylvania v. Boockvar*, No. 20-542, Miscellaneous Order (U.S. Nov. 6, 2020).

C. The Proceedings Below

Appellants are a Republican Congressional candidate, Jim Bognet,[9] and four registered voters. Appellants appear to concede that all but one Appellant—Alan Clark—are registered members of the Republican Party. *See* Br. 41 at 21 n.5.

Appellants filed suit on October 22, 2020, more than a month after the Pennsylvania Supreme Court's ruling and a mere twelve days before Election Day. The same day, they moved for a temporary restraining order and a preliminary injunction preventing the Secretary and county boards of election "from accepting ballots that arrive after [November 3, 2020]." (ECF 6, at 25.) They gave no explanation of why they waited so long to file.

The District Court, acting as quickly as could possibly be expected, denied Plaintiffs' Motion on October 28. The Court agreed with Appellees that Appellant Bognet, a candidate for Congress, lacked Article III standing. (App.29-30.) Citing the holdings of multiple other courts, the Court also agreed that the "vote dilution" injury alleged by the remaining Appellants (four voters) was "insufficient to confer standing." (App.32.) The District Court nonetheless found that the Voter-Appellants had standing to assert, and had shown a likelihood of success on, their claim that the "presumption of timeliness" for ballots received within the three-day-extended period without a legible postmark violated the Equal Protection

[9] *See* https://www.bognetforcongress.com/.

Clause. (App.33-36.) But the District Court recognized that—given Plaintiffs' inexplicable delay in filing suit, the imminence of the election, and the resultant prejudice to voters—the equities and the public interest weighed decisively against granting injunctive relief. App.37-38.)

III. SUMMARY OF THE ARGUMENT

The District Court correctly declined to grant injunctive relief. The District Court correctly held that Appellants lacked standing to assert most of their claims, and correctly held that the equities precluded relief on the narrow sliver of claims that remained.

Moreover, although the District Court did not reach these issues, there were additional compelling reasons to deny relief. First, one or more of the Appellants were precluded from bringing their claims, because their representative, the Republican Party of Pennsylvania, had already pursued these claims and lost. Indeed, the Republican Party and Republican legislators moved the U.S. Supreme Court for essentially the same relief Appellants sought here (an order enjoining the extension of the received-by deadline), based on the same arguments (purported violations of the Electors and Elections Clauses of the U.S. Constitution and of federal election day statutes), *and the Supreme Court denied the motions*.[10]

[10] *Scarnati v. Boockvar*, No. 20A53, 2020 WL 6128194 (U.S. Oct. 19, 2020); *Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 WL 6128193 (U.S. Oct. 19, 2020).

Second, Appellants' appeal is moot, because the relief they sought below is no longer available to them. And finally, Appellants' legal theories are completely without merit.

IV. STANDARD OF REVIEW

This Court reviews a district court's decision regarding a request for preliminary injunction "for abuse of discretion," and it reviews "the district court's underlying factual determinations under a clearly erroneous standard and consider the court's determinations on questions of law *de novo*." *Acierno v. New Castle County*, 40 F.3d 645, 652 (3d Cir. 1994) (citation omitted). In particular, the Court reviews the factual determinations underlying the district court's "balance of harms" and "public interest" determinations "for clear error[.]" *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 595 (3d Cir. 2002).

V. ARGUMENT

A. <u>This Court Should Affirm Because Appellants Failed to Show They Are Likely to Prevail in This Litigation</u>

"For an injunction to issue[,] the plaintiffs ha[ve] to demonstrate (1) that they are reasonably likely to prevail eventually in the litigation and (2) that they are likely to suffer irreparable injury without relief." *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 319 (3d Cir. 2020). Only if these "two threshold showings" are made may "the District Court then consider[], to the extent relevant, (3)

whether an injunction would harm the [defendants] more than denying relief would harm the plaintiffs and (4) whether granting relief would serve the public interest." *Id.* at 319-20. Appellants cannot show a likelihood of success because they lack Article III standing, and their claims are meritless; the lower court correctly denied Appellants' Motion, and this Court should not disturb that ruling on appeal.

1. Appellants Lack Article III Standing

As a threshold matter, Appellants lack standing to assert their claims. "Article III of the Constitution limits the jurisdiction of federal Courts to 'Cases' and 'Controversies.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007). "One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Id.* An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation omitted). To qualify as "particularized," "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. By contrast, "[w]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

Appellants divide their purported Article III standing into two buckets: voter standing and candidate standing. Neither category of Plaintiff has standing here.

(a) There Is No Article III Standing under a Voter Standing Theory

First, Appellants do not have standing to bring their claims under a voter standing theory. Appellants focus on two purported injuries to voters: vote dilution in violation of the Fourteenth Amendment and violations of the Electors Clause and the Congressional and Executive Elections Clauses of the United States Constitution as well as the statutory requirement for a uniform Election Day. *See* Br. at 14-19. Neither is a permissible injury-in-fact. Additionally, the District Court was wrong to hold that the Pennsylvania Supreme Court subjected voters to arbitrary and disparate treatment by creating a presumption that certain votes were mailed before Election Day. (App.32-35.)

(i) Dilution of the Voter Appellants' Votes Is Not an Injury In-Fact

Appellants improperly rely on *Gill v. Whitford*, 138 S. Ct. 1916 (2018), to assert that because the Commonwealth's "acceptance of unlawful votes unconstitutionally dilutes Appellants' individual lawful votes, Appellants have adequately alleged a particularized 'injury in fact.'" Br. at 16 (citations and quotations omitted). But, as the District Court correctly held, "the vote dilution alleged by the Plaintiffs is too generalized to establish standing." (App.32.) This is

because when the Commonwealth counts a vote received after Election Day, any hypothetical dilutive effect is the same on *every voter in Pennsylvania*.

Because Appellants' hypothetical dilution injury is no different than the injury to every other voter in Pennsylvania, their reliance on *Gill v. Whitford*—a partisan gerrymandering case—is misplaced. In *Gill*, when determining whether partisan gerrymandering gave rise to Article III voter standing, the Supreme Court distinguished between two separate types of voter injuries: "district specific" injuries—which are actionable, and injuries that are "statewide in nature"—which are not actionable. *Id.* at 1921. The critical distinction, according to the Court, is that district specific injuries affect "plaintiffs' own votes." *Id.* at 1931. Here, Appellants identify only one purported district-specific injury:

> [Voter Appellants] are registered to vote in Somerset County, a rural county with a much lower rate of requesting mail-in ballots than the majority of the state's more densely populated areas. For instance, Somerset County only had a mail-in ballot request rate of 20.1%. By contrast densely populated Montgomery County has a 46.3% request rate, Chester County has a 45.3% request rate, Allegheny County has a 45% request rate Bucks County has a 40.7% request rate, and Philadelphia County has a 39.7% request rate. As a consequence, as rural voters the [Voter Appellants' votes] are being more diluted in favor of urban voters.

Br. at 18.

This theory is fatally flawed. The Voter Appellants all reside in Somerset County. (Compl. ¶¶ 11-14.) All of Somerset County is in Pennsylvania's 13th

Congressional District,[11] which does not include any "urban" counties or any of the "densely populated areas" identified by the Voter Appellants.[12] Thus, in all elections other than for President, at-issue votes are not "diluted" at all by voters outside the 13th Congressional District.

In the presidential election, any theoretical vote dilution affects all voters equally, regardless of locale. "[T]he relevant electoral unit in such an election is the entire Commonwealth of Pennsylvania." *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 20-966, 2020 WL 5997680, at *42 (W.D. Pa. Oct. 10, 2020) (quotation omitted).

> [W]hat is the dilutive impact of a hypothetical illegal vote cast in Philadelphia during that election? Does it cause, in any sense, an "unequal evaluation of ballots" cast in different counties, such that lawful ballots cast in Philadelphia will be less likely to count, worth less if they do, or otherwise disfavored when compared to votes cast in other counties? The answer is evident—it does not. Rather, the hypothetical illegal vote cast in Philadelphia dilutes all lawful votes cast in the election anywhere in the Commonwealth by the exact same amount.

[11] *See* Certification of Acting Secretary of the Commonwealth of Pennsylvania re: textual description of the Pennsylvania Supreme Court's Remedial Plan for Congressional Districts, 159 MM 2017 (Pa. Feb. 22, 2018), *available at* http://www.pacourts.us/assets/files/setting-6015/file-6879.pdf?cb=ebe678.

[12] *See id.*

Id. (quoting *Bush v. Gore*, 531 U.S. 98, 106 (2000)). Thus, Voter Appellants are no worse off because of where they live, and any alleged injury is entirely generalized. In fact, multiple federal courts have concluded as much in substantially similar cases in recent weeks and months. *See, e.g.*, *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter" and "therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury" (citing cases)); *Donald J. Trump for President, Inc. v. Cegavske*, No. 20-1445, --- F. Supp. 3d ----, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (assuming *arguendo* that challenged statute would result in counting of invalid votes, "plaintiffs' claims of a substantial risk of vote dilution 'amount to general grievances that cannot support a finding of particularized injury as to [p]laintiffs'"); *Martel v. Condos*, No. 5:20-cv-131, --- F. Supp. 3d ----, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (concluding that plaintiffs' vote dilution theory amounted to a generalized grievance); *see also League of Women Voters of Va. v. Va. State Bd. of Elections*, 458 F. Supp. 3d 460 (W.D. Va. 2020) (denying intervention as of right because plaintiffs' alleged "interest in protecting [their] right [to vote] from dilution or debasement[] is no different as between any other eligible Virginian").

Appellants are also incorrect that *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), supports their assertion of Article III standing. Br. at 16-17. *Akins* did not involve an alleged statewide dilution of all votes. *See id.* at 21.[13] Moreover, in describing the sort of burden on the right to vote that would give rise to standing, the Court focused on "interference with voting rights conferred by law." *Id.* at 24. But here, Voter Appellants do not allege that anyone has interfered with voting, stopped voters from voting, or in any way made it harder for Voter Appellants to vote.

Instead, this Court's post-*Akins* decision in *Berg v. Obama* provides a more apposite analogy to the alleged injuries to voters here. In *Berg*, the plaintiff challenged Barack Obama's eligibility to run for and serve as President of the United States. *See* 586 F.3d at 240. But the plaintiff shared "the uncertainty of Obama's possible removal, *pari passu* with all voters; and the relief he sought would have 'no more directly and tangibly benefited him than the public at large.'" *Id.* (quoting *Lujan*, 504 U.S. at 573-74). Further, at least one other federal court of appeals has held that statewide vote dilution is not an Article III injury. *See Tafuto v. Donald J. Trump for Pres. Inc.*, No. 19-2211, --- F. App'x ----, 2020 WL

[13] Instead, the *Akins* plaintiffs' injury "consist[ed] of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures—that, on respondents' view of the law, the statute require[d] that AIPAC make public." 524 U.S. at 21.

5614433, at *1 (2d Cir. Sept. 21, 2020) (affirming dismissal for lack of standing where plaintiff "assert[ed] that defendants' digital gerrymandering campaign diluted anti-Trump votes" because "these allegations assert an injury that was generalized and widely shared by millions of voters"). Voter Appellants, like the plaintiffs in *Berg* and *Tafuto*, share their purported injury "with all voters[.]" *Berg*, 586 F.3d at 240. Their generalized injury is not actionable.

(ii) The Voter Appellants' Other Claims Do Not Create an Injury-In-Fact

Appellants also lack standing to bring (1) their other constitutional claims, under the Electors Clause and the Congressional and Executive Elections Clauses of the United States Constitution, (*see* Compl. Claims I, II, III), and (2) their statutory claim, under 3 U.S.C. § 1. (*See* Compl. Claim II.)

Any injury created by violations of these claims is quintessentially abstract and generalized—rather than concrete and particularized. Appellants contend that the Pennsylvania Supreme Court's extension of the received-by deadline usurped *the Pennsylvania Legislature's* and *Congress's* purported powers. *See* Br. at 22-30, 33-37. But, of course, neither legislative body—nor, for that matter, any member thereof—is a plaintiff in this case, and Appellants cannot assert the rights of the legislatures. *See Coffman*, 549 U.S. at 441-42 (holding that Colorado voters lacked standing to assert that a Colorado Supreme Court decision violated the Elections Clause and distinguishing earlier Elections Clause cases brought "on behalf of the

State rather than [by] private citizens acting on their own behalf"); *Hotze v. Hollins*, No. 20-03709, 2020 WL 6437668, at *2 (S.D. Tex. Nov. 2, 2020) (dismissing voter and candidate plaintiffs' Elections Clause claims because "[t]he Supreme Court has held that individual plaintiffs, like those here, whose only asserted injury was that the Elections Clause had not been followed, did not have standing to assert such a claim.… These cases appear to stand for the proposition that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause."); *cf. Arizona State Legislature v. Arizona Ind. Redistricting Comm'n*, 576 U.S. 787, 802 (2015) (Arizona Legislature possessed standing to claim Elections Clause violation because it "is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers"). And it is well settled that a complaint "that the law … has not been followed" is "precisely the kind of undifferentiated, generalized grievance" that will not confer standing. *Coffman*, 549 U.S. at 442; *see also Hotze*, 2020 WL 6437668, at *2 (S.D. Tex. Nov. 2, 2020) ("[T]he alleged irreparable harm caused to Plaintiffs is that the Texas Election Code has been violated and that violation compromises the integrity of the voting process. This type of harm is a quintessential generalized grievance: the harm is to every citizen's interest in proper application of the law."). Once again, this Court's decision in *Berg* is illustrative. The Voter Appellants here, like the plaintiff in

Berg, share their "interest in proper application of the Constitution and laws' … with all voters; and the relief … sought would have 'no more directly and tangibly benefit [on them] than the public at large.'" 586 F.3d at 240 (quoting *Lujan*, 504 U.S. at 573–74).

Appellants mistakenly assert that the rule announced in *Coffman* and applied in *Berg* is a branch of prudential standing. Br. at 18-19. But neither *Coffman* nor *Berg* discussed prudential standing at all, and neither case framed its analysis in terms of third-party standing, which is sometimes used to analyze similar concerns with litigants raising another person's legal rights. Instead, both cases focused on the fundamental principle that generalized grievance is not a justiciable injury-in-fact. *See Coffman*, 549 U.S. at 442; *Berg*, 586 F.3d at 239.

Although *Coffman* and *Berg* are not prudential standing cases—and are enough reason to dismiss the Electors Clause and the Congressional and Executive Elections Clause claims—prudential standing also counsels in favor of dismissal. The prudential limitations on standing include "the general prohibition on a litigant's raising another person's legal rights.'" *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). As Appellants acknowledge, the Electors Clause and Elections Clauses grant rights to state legislatures. Br. at 22-24; *see Arizona State Legislature*, 576 U.S. at 802. The constitutional claims "asserted in the … complaint belong, if they belong to anyone, only to the

Pennsylvania General Assembly." *Corman v. Torres*, 287 F. Supp. 3d 558, 572 (M.D. Pa. 2018) (three-judge panel). Appellants would have prudential standing to assert these claims "only … if the General Assembly faces a hindrance to vindicating its own rights." *Id.* at 573. Because there is no "reason to believe the General Assembly could not vigorously defend its rights," "none of the Plaintiffs has prudential standing to assert claims for relief premised on rights granted to the Pennsylvania General Assembly by the federal Elections Clause" or Electors Clause. *Id.*

(iii) The District Court Wrongly Concluded the Presumption of Timeliness Created Standing for the Voter Appellants

Although not discussed at all by Appellants,[14] the District Court wrongly concluded that the Voter Appellants had standing to bring their claims challenging the presumption of timeliness created by the Pennsylvania Supreme Court's Order:

> The Presumption of Timeliness itself allows for mail-in ballots cast after Election Day (innocently or fraudulently) to be counted if those ballots have an illegible postmark or do not have any postmark at all. This Presumption of Timeliness subjects in-person voters and voters who vote by mail to different treatment. It is impossible for an in-person voter to submit his or her ballot after Election Day and have it counted-the polls will be closed. In contrast, a voter who votes by mail will be able to cast his or her ballot after the congressionally

[14] Because Appellants do not discuss at all the District Court's sole basis for determining they had standing, it is unclear whether Appellants are abandoning that argument.

> mandated Election Day and have it counted, even though that ballot does not possess the indicia of being timely (namely a valid postmark on or before November 3, 2020).

(App.34.) This analysis is flawed, however, because the purported injury collapses once again into vote dilution. The presumption of timeliness does not stop or otherwise obstruct any voter from voting. And, as noted above, any purported dilution would not be unique to any one voter and instead would be generalized, affecting all voters equally.

(b) There Is No Article III Standing Here under a Candidate Standing Theory

Appellants appear to state that Appellant Bognet is bringing only Elections Clause claims, Br. at 20, but candidates do not have standing to pursue Elections Clause Claims. *See Coffman*, 549 U.S. at 441-42 (holding that Colorado voters lacked standing to assert that a Colorado Supreme Court decision violated the Elections Clause and distinguishing earlier Elections Clause cases brought "on behalf of the State rather than [by] private citizens acting on their own behalf"); *Hotze v. Hollins*, No. 20-03709, 2020 WL 6437668, at *2 (S.D. Tex. Nov. 2, 2020) (dismissing voter and candidate plaintiffs' Elections Clause claims because "[t]he Supreme Court has held that individual plaintiffs, like those here, whose only asserted injury was that the Elections Clause had not been followed, did not have standing to assert such a claim.… These cases appear to stand for the proposition

that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause.").

Appellants argue that because Appellant Bognet devoted resources to educating voters about the rules before the Pennsylvania Supreme Court's decision, and because he has an interest in an accurate count, he has a cognizable injury. Br. at 20. All of these alleged injuries, however, ignore the Supreme Court's holding of *Coffman*. They are another way of saying that Appellant Bognet will be harmed because "the law—specifically the Elections Clause—has not been followed." *Coffman*, 549 U.S. at 442. "This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Id.* Appellants do not distinguish *Coffman* because they cannot distinguish *Coffman*.

The Court should follow *Coffman* and *Hotze* and affirm the District Court's determination that Appellant Bognet lacks standing.

2. This Lawsuit Is an Improper Collateral Attack on the Pennsylvania Supreme Court's Order

Even if Appellants had standing to bring them, the claims of all but one of the Appellants would be precluded under the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion). This lawsuit is an undisguised attempt to collaterally attack the Pennsylvania Supreme Court's judgment in *Pennsylvania Democratic Party*.

"Res judicata is not a mere matter of technical practice or procedure but a rule of fundamental and substantial justice." *Shah v. United States*, 540 F. App'x 91, 93 (3d Cir. 2013). "It is central to the purpose for which civil courts have been established, the conclusive resolution of disputes, and seeks to avoid the expense and vexation of multiple lawsuits, while conserving judicial resources and fostering reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* (internal quotation marks omitted); *accord Balent v. City of Wilkes-Barre*, 669 A.2d 309, 315 (Pa. 1995). Under the Pennsylvania preclusion rules that govern here, *see Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 548 (3d Cir. 2006), res judicata applies where four factors are present: "(1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued." *Robinson v. Fye*, 192 A.3d 1225, 1231 (Pa. Commw. Ct. 2018). Where it applies, res judicata bars not only "those claims that were 'actually litigated' in the first adjudication," but also any claims that "could have been litigated … if they were part of the same cause of action." *Id.* Notably, "[a] judgment is deemed final for purposes of res judicata and collateral estoppel unless or until it is reversed on appeal." *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996).

Here, factors (1), (2), and (4) are obviously met. The *Pennsylvania Democratic Party* case involved the same dispute, namely, whether the

Pennsylvania Supreme Court should—and could lawfully—extend the received-by deadline to protect voters from disenfranchisement as a result of COVID-19 and mail delays. *See Pa. Democratic Party*, 2020 WL 5554644, at *10-18. Indeed, Appellants argue that this case should effectively be treated as an appeal of the Pennsylvania Supreme Court's order in *Pennsylvania Democratic Party*. Br. at 42-43. And the Republican Party of Pennsylvania, among others, contended that the requested relief in *Pennsylvania Democratic Party* was unlawful for the same reasons Appellants assert here: it purportedly violated the Electors and Elections Clauses, as well as the federal statutory designation of a uniform Election Day. (*See, e.g.*, S.A.192, 220-21, 228-29.) *See Pa. Democratic Party*, 2020 WL 5554644, at *14-15 (discussing these arguments). Finally, the Secretary of the Commonwealth and the county boards of elections all appeared in *Pennsylvania Democratic Party* in the same capacities in which they appear here.

Although Appellants here were not named parties in *Pennsylvania Democratic Party*, factor (3) of the res judicata test is also present, with respect to Appellant Bognet and all voter Appellants other than Alan Clark—as Appellants appear to concede that each Appellant other than Mr. Clark is a registered member of the Republican Party. Br. 41 at 21 n.5.[15] "The doctrine of res judicata applies to

[15] In the District Court, Appellees argued that all of Appellants' claims are barred by res judicata. The District Court did not, however, address these arguments one way or another. (*See generally* App.21-38.). In a footnote, Appellants argue that

and is binding, not only on actual parties to the litigation, but also to those who are in privity with them." *Stevenson v. Silverman*, 208 A.2d 786, 788 (Pa. 1965). "Privity is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the res judicata." *Shah*, 540 F. App'x at 93. Notably, the Pennsylvania rules for res judicata, collateral estoppel, and privity are "not inconsistent with the federal law" on the same issues. *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 310 (3d Cir. 2009). This law recognizes that res judicata may apply to a nonparty to the first proceeding where "the nonparty was 'adequately represented by someone with the same interests who [wa]s a party'" in the first suit. *Id.* at 312 (quoting *Taylor v. Sturgell*, 128 S. Ct. 2161, 2173 (2008)). "Adequate" representation, in turn, requires that "(1) [t]he interests of the nonparty and her representative [*i.e.*, the party] are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Taylor*, 128 S. Ct. at 2176 (citation omitted).

That test is plainly met here. The Republican Party of Pennsylvania and the interests of its candidates and members are clearly aligned with respect to the

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the Court should reject the res judicata argument as to ***all*** Appellants because one Appellant, Alan Clark, is not a registered member of the Republican Party. Br. at 21 n.5. The clear implication is that all Appellants other than Mr. Clark are registered Republicans.

subject matter of this lawsuit, and the Republican Party indisputably understood itself to be acting in a representative capacity on behalf of its voters and candidates. The Republican Party told the Pennsylvania Supreme Court that it sought to intervene in *Pennsylvania Democratic Party* "to assert and protect the rights of [its] members in upcoming elections" and "to uphold the Election Code under which [it], [its] voters, [its] members, and [its] candidates exercise their constitutional rights to vote and to participate in elections in Pennsylvania." (S.A.18.) In fact, when its standing to oppose the Pennsylvania Supreme Court's judgment before the U.S. Supreme Court was contested, the Republican Party asserted that it had "associational standing" to proceed "on behalf of itself and its members, including its voters." (S.A.68.) To the same effect, in a companion case in which the Party similarly intervened to oppose extending the received-by deadline based on the same arguments asserted in *Pennsylvania Democratic Party* and by Appellants here, the Party expressly stated that it was litigating "on behalf of … [its] candidates, and [its] member voters." (S.A.40; *see* S.A.48-51 ¶¶ 17, 22, 24.)

Because the Republican Party asserted associational standing to litigate on behalf of its candidates and voters, the judgment in *Pennsylvania Democratic Party* precludes all Appellants other than Appellant Clark, from bringing the same claims here. *See, e.g.*, *Midwest Disability Initiative v. JANS Enters., Inc.*, No. 17-

4401, 2017 WL 6389685, at *4 (D. Minn. Dec. 13, 2017) (where party signified an intention to represent interests of its members in its pleadings in first suit, judgment in that suit bound the non-party member in second suit), *aff'd*, 929 F.3d 603, 607-09 (8th Cir. 2019); *Int'l Union v. Brock*, 477 U.S. 274, 289-90 (1986) (implying that where entity asserted associational standing, "a judgment won against it" will, absent proof of inadequate representation, "preclude subsequent claims by the association's members"); *see also Curling v. Raffensperger*, 403 F. Supp. 3d 1311, 1328 n.20 (N.D. Ga. 2019) (noting that where Coalition in earlier lawsuit "asserted associational standing … on behalf of its individual … [member] electors residing [in particular district], the Coalition's members who resided in [that district] would have been in privity with the Coalition").

Although it is not a prerequisite of res judicata, it is clear that Appellants here understood that the Party was representing their interests. That is likely why Appellants did not file this suit immediately upon the Pennsylvania Supreme Court's entry of judgment on September 17, 2020, but instead waited until more than a month later, after the U.S. Supreme Court denied the Party's application for relief. Not only are the elements of the preclusion doctrine plainly met here, but not applying the doctrine would have distressing practical implications. In *Pennsylvania Democratic Party*, the two major political parties vigorously litigated, on behalf of their candidates and voters, the issue of whether the

received-by deadline should and could be extended. To hold that the candidates and voters are not bound by the judgment in that case would be to invite an endless procession of copycat challenges seeking a different result in disputes over election regulations, with election officials having to devote time and resources to defending each one. That is precisely what the doctrine of res judicata is supposed to avoid.[16]

3. Appellants' Claims Are Barred by the Doctrine of Laches

Appellants' claims are barred by the doctrine of laches. "Laches consists of two elements: (1) inexcusable delay in bringing suit, and (2) prejudice to the defendant as a result of the delay." *Santana Products, Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 138 (3d Cir. 2005) (citing *University of Pittsburgh v. Champion Products, Inc.*, 686 F.2d 1040, 1044 (3d Cir. 1982)). As the *Purcell* discussion makes clear, the prejudice is undeniable. And Appellants' delay in

[16] Although the doctrine of res judicata is dispositive here, collateral estoppel is also applicable. That doctrine "renders issues of fact or law incapable of relitigation in a subsequent suit if, in a prior suit, these (1) same issues were (2) necessary to a final judgment on the merits and (3) the party against whom issue preclusion is asserted was a party or was in privity with a party to the prior action and (4) had a full and fair opportunity to litigate the issue in question." *Robinson*, 192 A.3d at 1232 (cleaned up). Here, as shown above, the Republican Party had a full and fair opportunity to litigate—and did litigate—the same arguments in opposition to the *Pennsylvania Democratic Party* Order that Appellants raise here. Further, resolution of those arguments was necessary to the Pennsylvania Supreme Court's final judgment: in extending the deadline the Court necessarily rejected the Republican Party's/Appellants' arguments that federal law barred such an extension.

bringing suit was inexcusable. The litigation seeking an extension of the received-by deadline was filed no later than ***April*** of this year. (S.A.100 ¶¶ 3-10; *see also* S.A.165-68 ¶¶ 52-58.) The Republican Party moved promptly to intervene. (S.A.39; *see also* S.A.12.) Appellants here, by contrast, sat on the alleged rights they now assert, evidently content to let the Party represent their interests. That was Appellants' prerogative, but they must live with the consequences of their choice; they cannot now seek to disenfranchise voters a week after Election Day. *See Public Interest Legal Found. v. Boockvar*, No. 20-2905 at *12, 14 (M.D. Pa. Oct. 20, 2020) ("[W]e decline to order such drastic action simply because Plaintiff elected to file its suit on the eve of the national election…. In an election where the margins may be razor-thin, we will not deprive the electorate of its voice without notice or proper investigation on the basis of an ill-framed and speculative venture launched at this late date."); *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 404-05 (E.D. Pa. 2016) (denying preliminary injunction based on, *inter alia*, prejudicial delay and proximity to election, where political party and voters waited until 18 days before election before moving for preliminary injunction prohibiting enforcement of county-residence restriction on poll watchers, and the "requested relief … would alter Pennsylvania's laws just five days before the election"); *Stein v. Boockvar*, No. 16-6287, 2020 WL 2063470, at *19-20 (E.D. Pa. Apr. 29, 2020) (laches barred relief where relief sought, namely, order requiring decertification,

prior to November 2020 election, of voting machines used in Philadelphia and other counties, would "effectively disenfranchise" voters); *Maddox v. Wrightson*, 421 F. Supp. 1249, 1252 (D. Del. 1976) (lawsuit filed "a mere five weeks before the election" was barred by laches where plaintiffs "were aware of ballot access difficulties at least seven weeks before th[e] suit was filed"); *Dobson v. Dunlap*, 576 F. Supp. 2d 181, 187-88 (D. Me. 2008) (rejecting plaintiffs' effort to excuse their delay in filing suit by pointing to pendency of lawsuit brought by another claimant; plaintiff "voters cannot have it both ways: they cannot disassociate themselves from the [prior] action for purpose of preclusion" while relying on the action to excuse their delay).

4. Appellants' Claims Fail on the Merits

(a) The Pennsylvania Supreme Court's Holding That Ballots Mailed On or Before Election Day Can Be Received After Election Day Does Not Violate Federal Election Day Statutes

In arguing that the Pennsylvania Supreme Court's decision violates a trio of Federal statutes that establish a uniform Election Day, *see* 1 U.S.C. § 1, 2 U.S.C. § 7, 3 U.S.C. § 1, Appellants confuse the casting of votes with the receipt of ballots by county boards of elections. The Pennsylvania Supreme Court's decision does not disturb the November 3 deadline for casting mail-in ballots; the Court simply held that ballots mailed before the deadline could be received after the deadline.

This is not unreasonable or unusual. As an initial matter, the Pennsylvania Supreme Court's decision is consistent with how Pennsylvania law handles military and overseas ballots timely cast, but not received until after Election Day. *See* 25 Pa.C.S. § 3511 (military and overseas ballots are counted if received within seven days of Election Day). Appellants do not challenge this longstanding statute, which, in fact, effectuates the Federal Uniformed and Overseas Citizens Absentee Voting Act. 52 U.S.C. § 20301, *et seq*. Certainly Congress was aware of its uniform Election Day statutes when it mandated that all states tabulate military and overseas ballots submitted on Election Day, but received after, and did not view such a mandate as incongruous with a uniform Election Day.

The Court's decision is also consistent with the policies of many other states that have enacted laws mirroring the Pennsylvania Supreme Court's deadline extension,[17] as well as the evidentiary presumption that ballots with illegible or absent postmarks were timely mailed. Under Nevada law, "[i]f an absent ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the absent ballot shall be deemed to have been postmarked on or before the day of the election." Nev. Rev. Stat. Ann. § 293.317(2). In Illinois, any mail-in ballot received without a postmark "after the

[17] *See* https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx.

polls close on election day and before the close of the period for counting provisional ballots cast at that election, shall be … opened to inspect the date inserted on the certification, and, if the certification date is election day or earlier" it will be counted. 10 ILCS 5/19-8(c); *see also* 10 ILCS 5/18A-15. And New Jersey likewise accepts any "ballot without a postmark … that is received by the county boards of elections from the United States Postal Service within 48 hours of the closing of polls on November 3, 2020[.]" N.J. Stat. Ann. § 19:63-31(m). *See also* N.Y. Elec. Law § 8-412; Cal. Elec. Code § 3020(b); W. Va. Code, § 3-3-5(g)(1).

Moreover, as the Pennsylvania Supreme Court correctly recognized, voters have no control over mail-delivery timetables, or whether their mailed ballots will be legibly postmarked or even postmarked at all. *Pennsylvania Democratic Party*, 2020 WL 5554644 at *13 n.20. Under USPS regulations, post offices are required to postmark election mail. *See* 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at 443.3; Your 2020 Official Election Mail Kit 600, at 25, United States Postal Service, https://about.usps.com/kits/kit600.pdf (last visited 11/9/2020). While these regulations do not guarantee that every ballot envelope will be postmarked, the actions—and diligence—of an unknown postal employee are beyond the control of the voter.

Further, the mail-in ballot envelope contains a Voter's Declaration that must be signed and dated by the qualified elector. 25 P.S. § 3527.[18] Voter fraud in Pennsylvania is a third-degree felony, carrying a maximum 7-year prison term. *Id*.

The question the Pennsylvania Supreme Court confronted was how to handle ballots with no clear postmarks received from the USPS shortly after Election Day. This issue is an evidentiary one. And on that issue, federal law is silent. While the federal laws set Election Day as November 3, 2020, their plain text provides nothing regarding how to determine whether a ballot was in fact cast by that date. *See* 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7 (establishing date but saying nothing regarding these evidentiary issues). When federal election laws are silent, states are empowered to resolve the election issues. *United States v. Classic*, 313 U.S. 299, 311 (1941); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (noting only limit on "a state's discretion and flexibility in establishing the time, place and manner of elect[ions]" is that it "cannot directly conflict with federal election laws on the subject"). In fact, States "are given … a

[18] Contrary to Appellants' assertion, Appellee Boockvar does not suggest the claims in this lawsuit are predicated upon "widespread fraud," Br. at 37, only that Pennsylvania's criminal penalties provide strong disincentives for voters to back-date a ballot, or otherwise vote late. *Cf.* 25 Pa.C.S. § 3511(b) (punishing fraudulently dated military-overseas ballots, which Plaintiffs do not challenge, similarly). This further underscores the fact that Appellants' purported injury of voters being able to vote after Election Day is speculative, and extremely unlikely.

wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *Classic*, 313 U.S. at 311.[19] In sum, the evidentiary presumption adopted by the Pennsylvania Supreme Court does not violate federal law.

(b) The Remedies the Pennsylvania Supreme Court Provided to Implement the Pennsylvania Constitution's Free and Equal Elections Clause Do Not Undermine the Elections or Presidential Electors Clauses

The lower court correctly held that Appellants' allegations do not make out a violation of the United States Constitution's Elections or Presidential Electors Clauses. As the Supreme Court stated in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 817-818 (2015) ("*AIRC*"), nothing in the Elections "Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in *defiance of provisions of the State's constitution*." (emphasis added). On the contrary, a state legislature lacks the "power to enact laws" governing federal elections "in any manner other than that in which the

[19] Appellants rely heavily on *Foster v. Love*, 522 U.S. 67, 72 (1997), to support their argument that States may not undermine the "single, uniform, federal Election Day." Br. at 34-35. But *Foster* is clearly distinguishable. There, Louisiana law allowed candidates to be elected to federal office in October. The Pennsylvania Supreme Court's Order, in contrast, does not establish a new election date. There is no "combined action" of state officials and voters after Election Day – voters must have voted by 8 p.m. on November 3rd.

Constitution of the state has provided that laws shall be enacted." *Smiley v. Holm*, 285 U.S. 355, 368 (1932). Thus, in *Smiley*, the Court held that, "where the state Constitution … provided" for a gubernatorial veto as "a check in the legislative process," the state legislature was required to enact a redistricting plan "in accordance with" that requirement. *Id*. at 367-369. The Pennsylvania Constitution establishes the Free and Equal Elections Clause as just such a "check in the legislative process." *Smiley*, 285 U.S. at 368.

"[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995). It makes no difference if those restraints flow from the United States Constitution or, as here, the Pennsylvania Constitution. Indeed, the Supreme Court has already specifically rejected the suggestion that enforcing a state constitutional provision that is inconsistent with a state statute undermines the Elections Clause. In *AIRC*, the Arizona State Legislature argued that where a constitutional amendment enacted by popular initiative conflicted with existing state law, the Elections Clause required that the statute prevail. 576 U.S. at 818. The Supreme Court rejected that argument because the Elections Clause does not empower a state legislature, through legislation, to "trump" a state "constitutional provision

regulating federal elections." *Id.*; *see also McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("The legislative power is the supreme authority, except as limited by the constitution of the state"). Indeed, "a state legislature … is bound by substantive restrictions set forth in the state constitution when enacting laws governing federal elections."[20]

As for whether the Pennsylvania Supreme Court's remedy violates the Electors Clause, the Electors Clause is not implicated here. That Clause "vests the power to determine the manner of appointment in 'the Legislature' of the State." *AIRC*, 576 U.S. at 839. For example, over the course of American history, electors have been "appointed by the legislatures," "by popular vote for a general ticket," or "elected by districts." *McPherson*, 146 U.S. at 31. The three-day extension and presumption of timely mailing in no way affect the manner in which electors will be appointed: voters will choose the electors who choose their representatives. 25 P.S. §§ 2963, 3191 ("qualified electors," *i.e.*, voters, shall select electors of President and Vice President of the United States); *cf. McPherson*, 146 U.S. at 24 (state legislature, as a body of representatives, could divide authority to appoint electors across each of the State's congressional districts).[21]

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[20] Michael T. Morley, *The New Elections Clause*, 91 Notre Dame L. Rev. Online 79, 96 (2016).

[21] Although the Electors Clause empowers state legislatures to appoint presidential electors in the manner they choose, that clause by itself did not create state

(c) Appellants Cannot Demonstrate a Likelihood of Success on the Merits of Their Equal Protection Claim

Below, Appellants advanced two equal protection arguments, and this Court should deny their appeal because they cannot show they are likely to succeed on either theory. The District Court correctly found their first argument—that the Pennsylvania Supreme Court's decision violates their rights under the Equal Protection Clause "to have their ballots counted without dilution"—was without merit. (App.31-32.) This Court should reject Appellants' second theory as well. Appellees are not, as Appellants contend, "administering Pennsylvania's election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots." Br. at 40. Appellees are following the Election Code and the Pennsylvania Supreme Court's interpretation of it: the rules are commonsense, not

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legislatures; rather, state legislatures are creations of their own state constitutions. *See* Pa Const. art. II, § 1 (vesting legislative power in the General Assembly). In other words, "Article II . . . takes state legislative bodies as it finds them, subject to . . . the state constitutional limits that [the people of each state] create." Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, The Federal Lawyer, Mar./Apr. 2001, Vol. 48, No. 3 at 31; *see also McPherson*, 146 U.S. at 25 ("What is forbidden or required to be done by a state is forbidden or required of the legislative power under state constitutions as they exist."). Thus, as with the Elections Clause, a state legislature is bound by substantive restrictions set forth in the state constitution when enacting laws governing the appointment of presidential electors. *See AIRC*, 576 U.S. at 817-18.

arbitrary, and apply uniformly to all Pennsylvania voters. Neither the facts nor the law support Appellants' Equal Protection claim.

(i) Appellants' Vote Dilution Equal Protection Argument is Meritless

Appellants first argue the Pennsylvania Supreme Court's decision infringes their rights under the Equal Protection Clause because the possibility that "unlawful" votes will be cast violates the "one-person, one-vote principle" of *Reynolds v. Sims.* 377 U.S. 533, 583 (1964). The District Court properly found this "generalized harm" was "insufficient to confer standing," and concluded Appellants were unlikely to succeed under this equal protection theory. This Court should not disturb that ruling.

In *Reynolds,* the Supreme Court held the "Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis," to avoid "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside." *Reynolds v. Sims,* 377 U.S. 533, 563, (1964).[22] These Appellants allege, without evidence, "that votes that are

[22] Appellants cite various "ballot-box stuffing" cases for this proposition as well. Br. at 30 (citing *United States. v. Saylor*, 322 U.S. 385, 387 (1944) and *Ex parte Siebold*, 100 U.S. 371, 388–89 (1879). But these cases are inapposite. *Saylor* and *Siebold* were criminal cases holding federal criminal statutes reached conspiracy by election officers to stuff ballot-boxes. *Saylor* 322 U.S. at 389; *Siebold* 100 U.S. at 336. Not only does the Pennsylvania Supreme Court decision not rubber-stamp similar criminal behavior, but is strongly maintains that each voter may vote only once, and by 8:00 p.m. on Election Day.

invalid under the duly enacted laws of Congress and the General Assembly *will* be counted" despite the Supreme Court of Pennsylvania's clear admonishment that "voters utilizing the USPS must cast their ballots prior to 8:00 p.m. on Election Day, like all voters." *Pa. Democratic Party*, 2020 WL 5554644, at *18 n. 26. Unlike the plaintiffs in *Reynolds*, Appellants here cannot show that their in-person votes have any less weight or value than mail-in electors' votes. Likewise, there are no "illegal" votes here; the Pennsylvania Supreme Court upheld the uniform Federal Election Day and extended the received-by deadline under the General Assembly's delegation in the Election Code. *See* 25 P.S. § 3046. Thus, *Reynolds* simply does not apply. As discussed above, Appellants' allegations of vote dilution are at best speculative, and cannot carry their burden of showing likelihood of success. *See supra* Section I.A.

(ii) The Lower Court Incorrectly Credited Appellants' Bush v. Gore Equal Protection Argument

Appellants also contend that the Pennsylvania Supreme Court's decision creates an election administration scheme that will proceed "in an arbitrary fashion pursuant to nonuniform rules" in violation of the principles set forth in *Bush v. Gore*, 531 U.S. 98, 107 (2000). The District Court erred in adopting Appellants' theory that the Pennsylvania Supreme Court's "presumption of timeliness" for mail-in ballots lacking a legible postmark created a "preferred class of voters," and that the voter plaintiffs were likely to succeed because that process did not have

"'sufficient guarantees of equal treatment.'" App. 34, 36 (citing *Bush*, 531 U.S. at 107). In doing so, the lower court equated processes for determining timeliness of a mail-in ballot and an in-person ballot, which compares apples to oranges. First, all voters had the option of voting by mail (all are equal in that respect). *See* 25 P.S. 3150.12b. And the problem for which the presumption is a solution – namely, what to do about ballots without a legible postmark – simply does not arise for in-person voting. Even if the District Court were right that the presumption created an equal protection problem, that problem would be no means be resolved by eliminating the presumption. In that case, mail-in voters who cast a timely ballot without a legible postmark would have their own equal protection claim relative to in-person voters.

While the Constitution demands equal protection, that does not mean all forms of differential treatment are forbidden. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications."). Instead, equal protection "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* (citation omitted). What's more, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that

the classification rationally further a legitimate state interest." *Id*. (citations omitted). Appellants' equal-protection claim fails at this first step, without even reaching *Anderson-Burdick*, because Appellants have not alleged or shown that the presumption of timeliness affects "persons who are in all relevant aspects alike," or that it will will result in the dilution of votes. Furthermore, even if the *Anderson-Burdick* framework applies, the attenuated "burden" Appellants have identified—an increased risk of vote dilution created by the possibility for untimely ballots to evade the USPS mandatory postmark regime—is more than justified by Defendants' important and precise interests in regulating elections. *See Trump*, 2020 WL 5997680, at *38 (denying an Equal Protection claim based on similarly thin record of potential voter fraud at unmanned dropboxes).

Ultimately, Appellants' second equal protection theory dovetails with their first—for either to succeed these Appellants would have to show their own fundamental rights to vote were burdened by Appellees' purportedly disparate treatment. In an attempt to articulate an injury under their second theory Appellants confuse two separate strands of equal protection doctrine: suspect classifications and fundamental rights. The first strand bars a state from codifying a preference for one class over another, but it prescribes heightened scrutiny only where the classification is drawn from a familiar list—race, gender, alienage, national origin. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The

second strand bars a state from burdening a fundamental right for some citizens but not for others. Absent some such burden, however, legislative distinctions merit no special scrutiny. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 806–08 (1969). As indicated above, and as the District Court found, these Appellants' votes are not "diluted;" no other voter's ballot is given greater value; and, crucially, every voter only gets one vote. Therefore, Appellants' fundamental right to vote is not "burdened," and they allege no unconstitutional preference for one class of voters over another that would violate the Equal Protection Clause. The District Court erred in finding an equal protection violation on these facts, and this Court should not find Appellants would be likely to succeed on this second theory of their equal protection claim.

Further, the *Bush* theory of equal protection the District Court relied upon has no application to this case. As Judge Ranjan explained in *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 20-966, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020), the *Bush* Court invalidated "election recount procedures that allowed different counties to use 'varying standards to determine what was a legal vote.'" *Id.* at *41 (quoting *Bush*, 531 U.S. at 107). "[T]he absence of uniform, statewide rules or standards to determine which votes counted" "meant that entirely equivalent votes might be counted in one county but discounted in another." *Id.; accord Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018) (rejecting Equal Protection challenge

where at-issue election measure "does not burden anyone's right to vote. Instead, it makes it easier for some voters to cast their ballots ….").

The challenged Pennsylvania Supreme Court Order here is not even remotely comparable to *Bush*'s recount order. The Order here plainly *does* impose uniform, statewide rules to determine which votes count: in every county in the Commonwealth, ballots returned by mail and received before the extended received-by deadline will count (unless there is evidence that they were mailed after the deadline), and ballots received after the deadline will not. Indeed, the rules now are exactly as uniform and statewide as those in place before the Order issued; the only difference is that the received-by deadline is three days later, to protect the right to vote from the effects of COVID-19 and mail delays. The lower court was wrong to find an equal protection violation in the Pennsylvania Supreme Court's uniformly applicable presumption of timeliness, which treats all like voters alike.

Moreover, in a sharp departure from the ordinary voting-rights lawsuit, no one is hurt by this deadline extension. The extension does not in any way infringe a single person's right to vote: all eligible voters who wish to vote may do so on or before Election Day. *See Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020) (finding "no vote . . . is diluted…. [when] [e]very qualified person gets one vote and each vote is counted equally in determining the final tally.").

Finally, this is a matter of state law. The Pennsylvania Supreme Court has already held that, under Pennsylvania law, votes cast consistent with the procedures in its opinion are lawful, and that this counting method is the only way to remain faithful to the Free and Fair Elections Clause of the Pennsylvania Constitution. The meaning of the Free and Fair Elections Clause, and the factual findings of the Pennsylvania Supreme Court in making its determinations are not on trial here. Appellants obliquely reference state officials administering the election in an "arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots" and argue vaguely about "[d]ilution of lawful votes … by the casting of unlawful votes." ECF 6, at 20, 21. Whether ballots are received more than three days after Election Day depends on an issue of state law, the state-court interpretation of which is entitled to deference. *See Vooys v. Bentley*, 901 F.3d 172, 194 n.129 (3d Cir. 2018) ("state supreme courts are the final arbiters of matters of state law"); *Richardson v. Thompson*, No. 13-1466, 2014 WL 65995, at *5 (W.D. Pa. Jan. 8, 2014) ("the Pennsylvania Supreme Court [is] the final arbiter of the meaning of the Pennsylvania Constitution").

B. Even if Appellants Could Show a Likelihood of Success, The District Court Correctly Found They Are Not Entitled to an Injunction

Even if Appellants could show that they are likely to prevail, they would not be entitled to an injunction; they must also show that "they are likely to suffer

irreparable injury without relief." *Hope*, 972 F.3d at 319. And even if they make this showing, the Court should consider "whether an injunction would harm the [defendants] more than denying relief would harm the plaintiffs" and "whether granting relief would serve the public interest." *Id.* at 319-20. Here, Appellants cannot show any injury, and the balance of harms weighs strongly against relief. "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis original and internal quotation marks omitted). Appellants have not made a clear showing that they are entitled to relief; indeed, they have made no showing at all.

1. Appellants Have No Injury, Let Alone Irreparable Injury

Appellants cannot show irreparable harm for the same reasons that they do not have standing—their "vote dilution" theory of harm is both non-cognizable (as shown above) and a truly puzzling basis for finding "irreparable harm." Under the Pennsylvania Supreme Court's Order, all voters must cast their vote by November 3. All the Order does is provide three additional days for the mail to arrive in accommodation of an election process and postal service operating under the unprecedented strains of COVID-19. The Order does not burden anyone's ability to vote. By contrast, it makes it less likely that mail delays will disenfranchise

qualified electors. Contrary to Appellants' suggestion, democracy is not an irreparable injury.

Appellants' real concern, though they do not expressly acknowledge it, seems clear: it is the possibility that their preferred candidate(s) will not be elected.[23] But not only do Appellants provide no evidence whatsoever showing that the Pennsylvania Supreme Court's Order will make the difference as to whether that happens, it is well settled that "an individual voter is not [cognizably] harmed by a candidate losing an election." *Mecinas v. Hobbs*, No. 19-5547, 2020 WL 3472552, at *6 (D. Ariz. June 25, 2020) (collecting cases); *see Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009) (voter lacked standing to assert claim that President Obama was ineligible to be President; voter's "wish that the Democratic primary voters had chosen a different presidential candidate … do[es] not state a legal harm"). Because Appellants cannot show any injury, let alone an irreparable one, their motion must be denied. *See Hope*, 972 F.3d at 319 (3d Cir. 2020).

[23] Although Plaintiff Bognet is a candidate for office, he does not allege that the Pennsylvania Supreme Court's decision will cause him to lose the election, only that in extending the received-by deadline for mail-in ballots "the irreparability of harm to Bognet's campaign is thus plainly apparent." Br at 38. To the contrary, it is not apparent candidate Bognet is harmed at all—the allegedly unlawful votes could have been cast for him, instead of his opponent. He cannot show he is harmed by Appellees counting all votes cast in accordance with the law as it stood on November 3, much less irreparably.

2. The Balance of Equities and Public Interest Weigh Heavily in Favor of Denying Appellants' Motion

(a) The District Court Did Not Clearly Err by Crediting the Danger of Creating Confusion Shortly Before an Election

"[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 409 (2008) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam)). In *Purcell*, the Supreme Court observed that, in the days before an election, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S at 4-5. Long before *Purcell*, the Supreme Court recognized the value in letting elections go forward—even where constitutional infirmities existed—presumably because of the chaos and unfairness to voters that can result from late federal court intervention. *See Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("We feel that the District Court in this case acted in a most proper and commendable manner. It initially *acted wisely in declining to stay the impending primary election in Alabama*[.]." (emphasis added)). In short, the Supreme Court has "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Natl. Comm. v. Democratic Natl. Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). These are exactly the principles that animated the District Court's

decision below. The court assessed that the risks inherent in "alter[ing] state elections laws in the period close to an election[,]" weighed against granting injunctive relief. (App.37 (quoting *Democratic Nat'l Comm.*, 2020 WL 6275871, at *3 (Kavanaugh, J, concurring in denial of application to vacate stay).) Likewise, the District Court determined that because "the Plaintiffs filed their Motion less than two weeks before the election" and given that "election [wa]s rapidly approaching [and] [g]ranting the relief Plaintiffs seek would result in significant voter confusion[,] … granting injunctive relief would not be in the public interest." *Id.*

The District Court's fact-intensive assessment of these factors, the balance of harms and the public interest, is "reviewed for clear error." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 595 (3d Cir. 2002). It was not clear error for the District Court to conclude that, less than a week before a presidential election, the risk of confusion created by reversing the existent state of play, as decided by the highest court in Pennsylvania, outweighed the benefit of an injunction, particularly given the Supreme Court's guidance in *Purcell*. (App.37.)

Appellants mount a multi-pronged attack on *Purcell*, but each of their arguments is more wrong than the next. Most fundamentally, Plaintiffs act as though this Court should review the District Court's decision on the balance of

harms and public interest *de novo*, in particular because "Election Day has come and gone." Br. at 45. As stated above, the Court's review is for clear error. *See Novartis* 290 F.3d 578, 595. And, at most, the fact that Election Day has passed would counsel in favor of *remand* for reconsideration of the current equities and public interest—not entry of an injunction. As discussed below, voters' reliance interests strongly disfavor granting an injunction.

Additionally, Appellants go beyond the record before this Court, citing to public statements made by Secretary Boockvar to suggest that the Secretary's encouragement to get their ballots in as soon as possible—i.e., act prudently—mitigates against the public confusion that would have resulted from changing election law a week before Election Day. Br. at 44-45. Plaintiffs' fundamental principle is flawed—the Secretary encouraging voters to vote before Election Day if possible would not avert subsequently confusing individuals who did not or could not take that advice. And in any event, the Court should not consider any of the statements on which Appellants rely. "This Court has said on numerous occasions that it cannot consider material on appeal that is outside of the district court record." *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 96 (3d Cir. 1990) (collecting cases).

Further, Appellants are wrong that the District Court improperly applied *Purcell* to the circumstances of this case. According to Appellants, "there is no

principled reason for why *Purcell* should not apply against interference by state courts and administrative bodies acting in violation of the federal Constitution." Br. at 42.) But this puts the cart before the horse, accepting the merits of Appellants' argument. The *Purcell* principle, however, is merits-blind. As Justice Kavanaugh's concurrence in *Democratic National Committee* makes clear, the considerations motivating the *Purcell* principle are fact-intensive and prudential. 2020 WL 6275871, at *3-4.

Additionally, Appellants are wrong to suggest that the status quo before this case was the "the election rules established by the General Assembly's duly enacted statutes." Br. at 42 (citing 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2948 (3d ed.)). This case is not an appeal of the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Committee.* This is an original action, initiated in a federal district court *after* the Pennsylvania Supreme Court decided *Pennsylvania Democratic Committee*. Thus, the correct status quo is what was in existence at the time Appellants initiated this case. *See Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt*., LLC, 793 F.3d 313, 318 (3d Cir. 2015) (defining the status quo as "the last, peaceable, noncontested status of the parties.").[24]

[24] Appellants rely on an unpublished, out-of-circuit opinion by a divided panel for the proposition that in Elections Clause cases, state legislatures set the status quo. *See* Br. at 43 (citing *Carson v. Simon*, No. 20-3139, 2020 WL 6335967, *8 (8th

(b) Additional Equities and Public Interest Considerations Favor Denying Injunctive Relief

Appellants fail to show that the equities or the public interest favor the relief they seek, either. Appellants glibly assert that "the Defendants can in no way be harmed by the granting of this motion 'because the enforcement of an unconstitutional [practice] vindicates no public interest.'" Br. at 40. That statement does not even attempt to grapple with the actual equities and entirely ignores the practical effects of the relief Appellants seek. Notably, Appellants do not dispute what the Pennsylvania Supreme Court found—namely, that in the absence of the modest extension the Court ordered, "the strain of COVID-19 and the 2020 Presidential Election" would "unquestionably … result[] in the disenfranchisement" of qualified voters who have abided by Pennsylvania's election timeline. *Pa. Democratic Party*, at *18. As shown above, at this late date, the negative consequences of refusing to "accept" late-arriving ballots are even more significant, and would disenfranchise many voters, confuse the electorate, and divert the limited resources of election officials from other crucial tasks. By comparison, the interests invoked by Appellants are abstract and modest; they are measured by whatever injury is done to the General Assembly's alleged legislative

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Cir. Oct. 29, 2020)). *Carson* was wrongly decided—the status quo for injunctive relief purposes is the status quo before the initiation of a case—and is in any event inconsistent with this Court's precedents. *See Arrowpoint*, 793 F.3d at 318. The Court should not follow *Carson* on this point.

prerogatives as a result of altering one of its many prescribed election deadlines, by only three days, in a single election, in response to an unprecedented pandemic. If there was any doubt as to how the scales tilt, this dispels it: *the U.S. Supreme Court has already considered and denied a request to stay the Pennsylvania Supreme Court's Order*. In sum, the District Court correctly found that both the equities and the public interest stand opposed to granting Appellants' motion for preliminary relief.

And Appellants' requested after-the-election injunction would have this Court punish voters who thought they were casting lawful ballots. As the below timeline demonstrates, authority after authority confirmed to voters that ballots postmarked by Election Day and received by November 6, 2020 would be counted:

1. September 17, 2020 – the Pennsylvania Supreme Court holds that "ballots mailed by voters via the United States Postal Service and postmarked by 8:00 p.m. on Election Day, November 3, 2020, shall be counted if they are otherwise valid and received by the county boards of election on or before 5:00 p.m. on November 6, 2020." *Pennsylvania Democratic Party*, 2020 WL 5554644, at *31.

2. September 24, 2020 – the Pennsylvania Supreme Court denies the Republican Party of Pennsylvania's request to stay the *Pennsylvania Democratic Party* order. (S.A.94.)

3. October 19, 2020 – The United States Supreme Court denies the Republican Party of Pennsylvania's request to stay the *Pennsylvania Democratic Party* order. *Republican Party of Pa v. Boockvar, Sec. Of Pa, et al.*, No. 20A54, 2020 WL 6128193 (U.S. Oct. 19, 2020).

4. October 28, 2020 – The United States Supreme Court denies the Republican Party of Pennsylvania's request to expedite consideration

> of its petition for a writ of certiorari seeking review of *Pennsylvania Democratic Party*. *Republican Party of Pennsylvania v. Boockvar*, No. 20-542, 2020 WL 6304626 (U.S. Oct. 28, 2020).

Further, at all times after September 17, 2020, the Department of State and county boards of elections administered the election in accordance with the Pennsylvania Supreme Court's order in *Pennsylvania Democratic Party*, including in its communications with voters. Simply put, time and again the highest courts in Pennsylvania and the United States, as well as the government bodies tasked with administering the election, gave voters every reason to rely on the fact that votes postmarked by Election Day and received by November 6, 2020 would be counted. This Court should not penalize voters with disenfranchisement for their reliance on the Pennsylvania Supreme Court, the United States Supreme Court, the Pennsylvania Department of State, and the county boards of election.

Granting such post-hoc relief would plainly conflict with the Supreme Court's recent action in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). In that case, a South Carolina District Court order, entered on September 18, 2020, enjoined that state's witness requirement for absentee ballots during the COVID-19 pandemic. On October 5, the High Court stayed the District Court's decision, thus reinstating the witness requirement. Recognizing that South Carolina voters submitted ballots without witnesses in the timeframe between the District Court's September 18 injunction and the Supreme Court's October 5 stay,

however, that Court specified that "any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement." *Id.* The Supreme Court thus acknowledged that voters should not be punished for relying upon the rules, and this Court should apply that principle to the balancing of harms that would become Pennsylvania voters.

VI. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the District Court's denial of the motion for temporary restraining order and preliminary injunction.

November 9, 2020

Respectfully submitted,

/s/ Michele D. Hangley

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CERTIFICATE OF BAR MEMBERSHIP (LAR 46.1)

Pursuant to Third Circuit Local Appellate Rule 46.1, I, Michele D. Hangley, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Michele D. Hangley
MICHELE D. HANGLEY

Dated: November 9, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 12,588 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

3. In addition, pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies. I further certify that the electronic version of the brief has been scanned for viruses by Trend Micro OfficeScan 10.6.5372 (updated continuously) and is, according to that program, free of viruses.

/s/ Michele D. Hangley
MICHELE D. HANGLEY

November 9, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Michele D. Hangley
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