

No. 20-3371

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IN THE  
**United States Court of Appeals**  
FOR THE THIRD CIRCUIT

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**DONALD J. TRUMP FOR PRESIDENT, INC. ET. AL,**  
*Plaintiffs-Appellants,*

— v. —

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

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE  
DISTRICT OF PENNSYLVANIA - CIVIL ACTION NO. 20-CV-02078-MWB

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**EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS UNDER FRAP 8  
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION PENDING APPEAL TO STAY EFFECT OF  
CERTIFICATION AND EXPEDITED RESPONSE**

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**November 23, 2020**

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## I. PRELIMINARY STATEMENT<sup>1</sup>

Plaintiffs-Appellants seek a temporary restraining order and preliminary injunction based on the proposed Second Amended Complaint to stay the effect of Defendants' likely certification of the 2020 Presidential election. The District Court's denial of Plaintiffs' Motion to File a Second Amended Complaint is the subject of this appeal. Plaintiffs do not seek to enjoin the certification of any other Pennsylvania election.

**Plaintiffs request expedited briefing pursuant to Local Rule 4.1 with Defendants' response due at 5:00 p.m., November 24.** Defendants do not agree to expedited briefing or the relief sought.

### **Standard for Relief**

This motion turns on the established preliminary injunction standard and the federal Constitution. While deciding the injunctive relief questions may “involve the resolution of litigation challenging the constitutional authority of [state and county election officials ... courts cannot avoid their responsibility merely ‘because the issues have political implications.’” *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Instead, “the Judiciary has a responsibility to decide cases properly before it.” *Id.* at 194. Put simply, federal courts have a “virtually unflagging obligation”

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<sup>1</sup> Exhibits are being separately filed. All emphases are added, and citations, quotation marks, footnotes, and brackets are omitted, unless otherwise stated.

to exercise the jurisdiction provided by Congress. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 813 (1976).

### **Pennsylvania Mail Ballot Requirements**

The Constitution gives state legislatures the exclusive power to determine how states will appoint members of the electoral college. In Pennsylvania, electors are awarded to the winner of the state’s popular vote. Accordingly, election officials must count every *lawful* ballot, while ensuring that every *unlawful* ballot is cast aside. *Carson v. Simon*, 2020 WL 6335967, \*7 (8<sup>th</sup> Cir. Oct. 29, 2020). What distinguishes a lawful ballot from an unlawful one flows from Pennsylvania law. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*) (“When the state legislature vests the right to vote for President in its people, the right to vote *as the legislature has prescribed* is fundamental.”). Election officials have no discretion to depart from the legislatures’ directives, and they must apply the ballot security and integrity requirements *equally* throughout the Commonwealth.

The Pennsylvania legislature recently amended its election procedures to allow citizens to vote in person or by mail. After careful deliberation, the legislature retained and enumerated specific requirements for mail-in ballots, including (beyond the filled-out ballot), an inner secrecy envelope, a filled-out declaration, a signature, a date, and a complete address. Ballots that do not comply with these requirements are unlawful and must not be counted. The Pennsylvania Supreme Court so held

before this election, rejecting the notion that these provisions were merely “directory”:

To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements . . . [developing a] procedure to alleviate that risk is one best suited for the Legislature.

*Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).<sup>2</sup>

### **Summary of Argument**

*First*, Plaintiffs are likely to succeed on their appeal that the Court erred in denying their Motion to Amend. Further, Plaintiffs are likely to succeed in their merits claims that Defendants engaged in an intentional scheme to count mail ballots that did not comply with Pennsylvania law to favor Joseph Biden over President Donald J. Trump under *Marks v. Stinson*, and the numerous cases on which it was based, including *Reynolds*. In addition, Plaintiffs are likely to succeed on their Due Process and Equal Protection claims for intentionally counting defective mail ballots in order to favor Biden or Trump under *Marks v. Stinson*.<sup>3</sup> Plaintiffs are likely to

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<sup>2</sup> Plaintiffs understand that the Pennsylvania Supreme Court may have ruled today to allow these deficiencies despite clear Pennsylvania law and its 2020 precedent to the contrary, in plain violation of *Bush v. Gore*, changing longstanding law in the middle of a Presidential election. Counsel has not had sufficient time to study today’s rulings.

<sup>3</sup> Plaintiffs’ Due Process claims were expressly included in the original Complaint and in the proposed Second Amended Complaint. These claims are premised, in part, on two Pennsylvania Supreme Court decisions, *i.e.*, *In re November 3, 2020 Gen. Election*, 2020 Pa. LEXIS 5560 (Pa. Oct. 23, 2020) (holding mail ballots may not be challenged on Election Day despite a provision to the contrary), and *In re*



succeed on their Due Process and Equal Protection claims that Pennsylvania's mail ballot scheme, without the right to meaningfully observe or challenge deficient mail ballots during the canvassing, is so porous that it is unconstitutional under *Reynolds* and *Griffin*.

**Second**, Plaintiffs will suffer irreparable harm if the limited relief sought – a short stay of certification (or its legal effect if certification has already occurred) – is not provided since the relief will not interfere with the appointment of electors for the candidate who has won the most legal votes before the December 8 safe harbor provided by 3 U.S.C. §5. In short, it would be unconscionable to allow Pennsylvania to certify electors for Biden and then have it turn out that Trump won the race.

**Third**, the balance of harm favors Plaintiffs. The Trump Campaign will be irreparably harmed if the results are certified and electors are appointed for Biden when the Trump Campaign ends up winning the vote, given the uncertainty of how to remedy electors who are improperly appointed before December 8.

**Finally**, the public interest is served by a short stay which harms no-one while this Court considers Plaintiffs' appeal on denial of the Motion to Amend and the District Court's decision on remand. The public demands that the winner of the *legal*

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*Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020) (rendered on November 17, 2020, which disallowed meaningful observation of the canvassing of mail ballots).

votes – free of the shroud of Constitutional violations committed by Defendants – be awarded Pennsylvania’s electoral votes.

*In sum*, by November 23, 2020, the Defendant Boards of Elections are expected to certify to Defendant Secretary Boockvar results of an invalid and constitutionally infirm election process before this case can be heard on its merits. In turn, Secretary Boockvar is likely to certify the Commonwealth-wide election results and Plaintiffs may be deprived not only of their constitutional rights but also of a meaningful remedy. Under Fed.R.Civ.P. 8, Plaintiffs ask this Court for an injunction staying the legal effect of certification to prevent any unjust outcome, pending resolution of this appeal and the District Court’s decision on their Injunctive Relief Motion on remand. Plaintiffs propose expedited proceeding on the merits that will conclude before December 8, the safe harbor date for appointing electors under 3 U.S.C. §5. If Plaintiffs do not prevail, Defendants will not suffer any harm. If Plaintiffs succeed, Defendants – which are all government entities – have no legitimate interest in certifying invalid election results.

## **II. PROCEEDINGS BELOW**

On November 19, 2020, Plaintiffs filed the Renewed Injunction Motion to bar Defendants from certifying the election until further order of Court. (ECF 182).

Defendants responded 5 p.m. on Friday, November 20. Plaintiffs' Reply was filed by Noon on November 21. (ECF 198).<sup>4</sup>

On Saturday evening, November 21, the Court granted Defendants' motions to dismiss the Amended Complaint and denied Plaintiffs' Motion to Amend without Defendants even responding, *solely* on the basis that "amendment would unduly delay resolution of these issues" concerning the certification of the election. The Court noted amendment would involve "a new briefing schedule, conduct a second oral argument, and then decide these issues." *Id.* It did not find bad faith, dilatory motive, prejudice or futility. The Court denied the Renewed Injunction Motion as moot. (Opinion, Exh. 11, ECF 202; Order, Exh. 12, ECF 203)

### **III. BACKGROUND**

#### **A. The Election Code**

Pennsylvania law mandates putting each ballot in an inner secrecy envelope, which shall then be placed in the second [envelope], on which is printed

the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

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<sup>4</sup>On November 18, Plaintiffs filed the Motion for Leave to File the Second Amended Complaint (ECF 172), attaching the proposed Second Amended Complaint (Exh. 10 ECF 172-2) with a Supplement filed at (ECF 185).

25 Pa. Stat. Ann. §3150.16.

After officials receive the mail-in ballots, the law requires them to “safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.” 25 Pa. Stat. Ann. §3146.8(a). Election officials may “pre-canvass” ballots “no earlier than seven o’clock A.M. on election day,” but “[n]o person observing, attending or participating in a pre- canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.”

25 Pa. Stat. Ann. §3146.8(g)(1.1).

To provide due process protection, “[w]atchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are *opened* and when such ballots are *counted* and recorded.” 25 Pa. Stat. §3146.8(b). Working together, these provisions ensure that mail-in ballots are not manipulated, tampered with, or even inspected until election day; that no one can *open* or *count* ballots without a poll watcher present; and that even if someone pre-canvasses a ballot on election day, no one can be told “the results” of that pre-canvass until polls close.

## **B. Defendants Violate Pennsylvania Law**

Secretary Boockvar has long advocated state officials should count more mail ballots than the law allows, knowing this would favor Biden over Trump. For instance, on September 28, 2020, she issued guidance to the County Boards of

Elections that mail-in and absentee ballots returned without inner secrecy envelopes should be counted.<sup>5</sup> That guidance directly contradicted the mandatory language in Pennsylvania’s Election Code, which is why the Pennsylvania Supreme Court struck it. *See Pa. Democratic Party*, 238 A.3d 345 (Pa. 2020) (“[T]he Legislature intended for the secrecy envelope provision to be mandatory.”)<sup>6</sup>

Despite the clear commands of the Election Code, Secretary Boockvar and the other Defendants systematically disregarded key ballot integrity and security measures associated with mail-in votes. As the Second Amended Complaint details, Defendant County Election Boards engaged in a scheme to count absentee and mail ballots which should have been disqualified. (SAC ¶252) The Trump Campaign was provided no meaningful access or actual opportunity to review and assess mail-in ballots during the pre-canvassing meetings in order to favor Biden over Trump. (SAC ¶4) Sometimes, no watchers were permitted at all. Other times poll watchers were permitted for only some periods, or were required to stand so far away that they could not tell which ballots were improperly counted. The Defendant County Boards have continued ignoring Pennsylvania law, and some have just days

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<sup>5</sup>See Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020 (Exh. 2).

<sup>6</sup> The law is clear: “If any of the [secrecy] envelopes . . . contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein **shall** be set aside and declared void.” 25 Pa. Stat. Ann. §3146.8(g)(4)(ii).

ago voted to count thousands of ballots with incomplete addresses, no signature, and other deficiencies.<sup>7</sup> In addition, Secretary Boockvar's Naked Ballot Guidance was issued in order to encourage the counting of mail ballots which she knew would favor Biden. (SAC ¶¶98) County Election Boards also proceeded to pre-canvass mail-in ballot envelopes prior to Election Day in order to favor Biden over Trump. (SAC ¶139)

### **C. Pennsylvania Supreme Court Decisions in Violation of *Bush v. Gore***

Subsequent to the filing of the original Complaint, the Pennsylvania Supreme Court ruled in a five to two partisan decision that parties and candidates have no right to meaningfully observe the canvassing of mail ballots. *In re Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020). This inexplicable decision denying the right of meaningful observation was on the heels of *In re November 3, 2020 Gen. Election*, 2020 Pa. LEXIS 5560 (Pa. October 23, 2020) which *sua sponte* declared that the provision of the Pennsylvania election code which provided for challenging mail ballots by observers on election day, 25 P.S. §3146.8(f), was

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<sup>7</sup> See Meeting of the Commissioners of Elections (Nov. 9, 2020) (Exh.3) (Philadelphia County voted to count many thousands with no date, street address, or printed name); Election Day Updates (Nov. 12, 2020) (Exh. 4) (Allegheny County voted to count thousands of undated ballots); In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, ¶¶22–23(Exh. 5)(Bucks County voted to count ballots with no date and others with no printed name or address, a mismatched address, or other errors).

invalid. As a result of these last minute decisions on the eve of the Presidential election, Pennsylvania no longer allows meaningful observation or challenges to mail ballots which do not comply with Pennsylvania law before they are mixed with other ballots, opened, and counted. It is hard to imagine an election scheme which is more porous and violative of Due Process than this – ballots mixed, opened, and counted without any ability to trace them without observation and challenge. Under *Bush v. Gore*, 531 U.S. at 98, this Court may independently interpret Pennsylvania law and not sustain these decisions which altered the law in the middle of a presidential election.

#### **D. The Pennsylvania Supreme Court Decisions Violate Due Process**

Given Defendants implemented these decisions, Pennsylvania law is so porous in not allowing the observation and challenging of mail ballots that it violates basic due process regarding free and fair elections. *See Marks v. Stinson*, 19 F.3d at 887 (due process violation from “massive absentee ballot fraud, deception, intimidation, harassment and forgery, [and] many of the absentee votes were tainted”); *Griffin v. Burns*, 570 F.2d 1065, 1074-79 (1<sup>st</sup> Cir. 1978) (due process violation in refusal to count absentee and shut-in ballots state officials had offered to voters); *Common Cause Georgia v. Kemp*, 347 F.Supp.3d 1270, 1293-99 (N.D. Ga. 2018) (for due process violation, granting injunctive relief to “ensure that provisional ballots cast by eligible registered voters ... [were] properly counted”

based on “statistical evidence as well as additional sworn declarations of poll watcher and voters” and extending certification deadline two days to allow for ballot counting).<sup>8</sup>

### **E. *Marks v. Stinson* Approved Proof Procedure**

Plaintiffs engaged a statistical expert to determine the number of mail ballots that were improperly counted based on statistically significant sampling of the 1.5 million cast in the Defendant Counties once they are produced by Defendants and reviewed by counsel. This procedure of sampling and statistical analysis was approved by the Court in *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), which observed:

Courts, with the aid of expert testimony, have been able to demonstrate that a particular result is worthy of the public's confidence even though not established solely by applying mathematics to the record evidence. *See e.g. Curry*, 802 F.2d at 1317-19. What is required is evidence and an analysis that demonstrate that the district court's remedy is worthy of the confidence of the electorate.

*Id.*, at 889, f.n. 14.

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<sup>8</sup> *See also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6<sup>th</sup> Cir. 2008) (sustaining due process challenge where “voters were denied the right to vote because their names were missing from the rolls,” “[p]oll workers improperly refused assistance to disabled voters,” and “[p]rovisional ballots were not distributed to appropriate voters”); *Bonas v. Town of N. Smithfield*, 265 F.3d 69 (1<sup>st</sup> Cir. 2001) (due to failure to hold election required by town charter “disenfranchisement of the electorate” in violation of due process”); *Duncan v. Poythress*, 657 F.2d 691 (5<sup>th</sup> Cir. Sep. 1981) (refusal to call special election required by state law due process violation).



This principle was applied by the District Court on remand in relying on statistical evidence in removing Stinson and placing Marks in a Pennsylvania state Senate seat by excluding illegally cast mail-in ballots and finding Marks won the election. *See Marks v. Stinson*, 1994, U.S. District LEXIS 5273 (E.D. Pa. April 26, 1994).

Prior to any hearing, if granted expedited discovery, Plaintiffs will examine these envelopes to determine the percentage of mail ballots that were illegally counted – of which Biden won approximately 75% and Trump 25%, a 50% margin for Biden. Plaintiffs, through statistical expert analysis, will then extrapolate this percent to the 1.5 million mail ballots. This simple exercise will determine whether Plaintiffs can prove their case – *i.e.*, that sufficient *illegal* ballots were counted that changed the election result.<sup>9</sup> If so, the District Court should set aside these votes and declare Trump the winner. In the interim, the legal effect of any certification should be stayed until the District Court can rule if this appeal is granted.

#### **IV. LEGAL STANDARD**

##### **A. Fed.R.Civ.P. 8(a)**

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<sup>9</sup> For example, if 10% of the 1.5 million mail ballots were improperly counted because they lacked signatures, dates, or inside security envelopes, 75% x 150,000 votes should be deducted from Biden, and 25% x 150,000 votes should be deducted from Trump, a margin of 75,000 votes for Biden which would be sufficient to overturn reported results.

Plaintiffs satisfy Rule 8(a)(1)'s requirement to "move first in the district court for . . . an order . . . granting an injunction," by first requesting this preliminary injunction from the District Court, which was denied without an evidentiary hearing or opinion. *See* Opinion, Exh. 11 and Order, Exh. 12.

### **B. Temporary Restraining Order and Preliminary Injunction**

"Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

A temporary restraining order "is a stay put, equitable remedy that has [as] its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation." *Fres-Co Sys. United States v. Hawkins*, 2016 U.S. Dist. LEXIS 199343, at \*3, n.1 (E.D. Pa. Aug. 26, 2016) (internal quotations and citations omitted). The temporary restraining order standard mirrors the familiar test for a preliminary injunction. *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592 (E.D. Pa. 2012). A movant need only demonstrate "(1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief." *Bimbo Bakers USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010).

A sufficient showing on the first two factors can suffice:

As a court sitting in equity, the District Court’s task was to weigh the four factors, but it was not incumbent on [movant] to prevail on all four factors, only on the overall need for an injunction. A sufficiently strong showing on either the likelihood of success or irreparable harm may justify an injunction, though a petitioner’s showing on the other factors may be lacking.

*Neo Gen Screening, Inc. v. TeleChem Int’l, Inc.*, 69 F. App’x 550, 554 (3d Cir. 2003).

The first factor – “likelihood of success” – means “a reasonable chance, or probability, of winning” but it “does not mean more likely than not.” *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011)(*en banc*). The second factor – “irreparable harm” – requires Plaintiffs to show “that [they are] more likely than not to suffer irreparable harm in the absence of preliminary relief.” *Holland v. Rosen*, 895 F.3d 272, 286 (3d Cir. 2018) (quoting *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017)). In the election context, “[t]he counting of votes that are of questionable legality ... threaten[s] irreparable harm.” *Carson*, 2020 WL 6335967, at \*7 (quoting *Bush v. Gore*, 531 U.S. at 104).

**V. ARGUMENT: THE COURT SHOULD STAY THE LEGAL EFFECT OF CERTIFICATION**

“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. at 104 (emphasis added).

Plaintiffs assert that Defendants not only failed to administer the 2020 Presidential Election in compliance with the manner prescribed by the legislature, but Defendants violated Plaintiffs' equal protection and due process rights in order to favor Biden over Trump. Unless any legal effects of certification are stayed, Plaintiffs may be left with no remedy because Pennsylvania's electoral votes for President and Vice President may be awarded to someone else.<sup>10</sup>

**A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR APPEAL OF THE DISTRICT COURT'S DENIAL OF THE MOTION TO AMEND**

The District Court abused its discretion in denying Plaintiffs' Motion to Amend. Fed.R.Civ.P. 15 commands that leave to amend shall be "freely granted;" yet the District Court denied the Motion to Amend without even assessing its merits, for the sole reason that grant of leave to amend would cause "undue delay"—without there ever having been a judicial determination that the "result" certified is the legally correct result. Plaintiffs' Appeal Brief addresses the reasons that the District

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<sup>10</sup> Given the District Court has the power to decertify the electors before December 8, 2020, the statutory safe harbor date for appointing state electors, this Court may stay any legal effect of certification in the event that Defendants have already done so, pending the District Court's ruling on the Renewed Injunction Motion if this Appeal is granted. *See, e.g., Marks v. Stinson, supra; Krieger v. Peoria*, 2014 U.S. Dist. LEXIS 117235, \*10-15 (D.Ariz. Aug. 22, 2014) (granting TRO and holding that Defendants shall not count certain votes and, instead, shall hold a special election where "plaintiffs have shown a likelihood of success on the merits of their constitutional claims .... [b]ecause an election based in part on incomplete ballots that omit a candidate's name [is] fundamentally unfair").

Court was in error and provides the basis that there is a likelihood of success on this issue. In short, the District Court’s decision without review of the merits of the Motion to Amend flies in the face of the Supreme Court’s dictate in *Bush v. Gore* that “[a] desire for speed is not a general excuse for ignoring equal protection guarantees.” 531 U.S. at 108. That holding could not possibly be more directly applicable here.<sup>11</sup>

### **B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS<sup>12</sup>**

To make out this first factor, “the plaintiff need only prove a *prima facie* case, not a certainty that he or she will win.” *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001). This Court has held that “a sufficient degree of success for a strong showing exists if there is a ‘reasonable chance, or probability, of winning.’” *In re Revel AC, Inc.*, 802 F.3d 558, 568-69 (3d Cir. 2015) (quoting *Singer*, 650 F.3d 223). Plaintiffs make that showing based on the Proposed Second Amended Complaint.

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<sup>11</sup> *Bush v. Gore* imposed remedies in light of a deadline for action by the Electoral College that is commanded by federal statute – 3 U.S.C. §5. *See* 531 U.S. at 110. The November 23 state law certification date viewed by the District Court is nothing of the kind; indeed, the District Court identified no reason why delay of certification would be problematic in any way.

<sup>12</sup> While the focus of this argument is on the Trump Campaign, the individual Plaintiffs, Pennsylvania citizens and voters, have the right not to have an election decided by illegal votes.

In short, Defendants violated the Equal Protection Clause and Due Process Clause of the Constitution by counting votes that were unlawful under the Pennsylvania Election Code in order to favor Biden over Trump. Article II of the Constitution provides that the rules for Presidential elections be established by each state “in such Manner as the Legislature thereof may direct.” U.S. Const. art. II §1, cl. 2. Where, as here, the legislature has enacted a specific election code, “the clearly expressed intent of the legislature must prevail.” *Bush v. Gore*, 531 U.S. at 120 (Rehnquist, C.J., concurring). If the constitutional text were not enough, a Supreme Court majority explained that it would not defer to a state court’s interpretation of an election code because a law “enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors” is a federal constitutional question “under Art. II, §1, cl. 2, of the United States Constitution.” *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000).<sup>13</sup>

Pennsylvania law mandates that mail-in ballots meet detailed requirements. *See* 25 Pa. Stat. Ann. §3150.16. These include a secrecy envelope, which shall then be placed in the second [envelope], on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such

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<sup>13</sup> This view is not novel. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (explaining “the words, ‘in such manner as the legislature thereof may direct’ ... operat[e] as a limitation upon the state in respect of any attempt to circumscribe the legislative power”).

envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

*Id.*

“Shall” means shall, the requirements are mandatory, and ballots that fail to meet them should not be counted. There is every reason to believe the number of defective ballots is in the tens of thousands - *more than 37,000 mail-in ballots were rejected under these rules in the primary, which had far fewer voters.* See <https://www.npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016>. Plaintiffs have sought expedited discovery to obtain access to the 1.5 million mail ballots cast in the Defendant Counties – or a statistically significant sample – in order to prepare their evidence, including expert evidence, to determine the number of defective mail ballots which were counted.<sup>14</sup> See Motion to Expedite Discovery (ECF 171).

**1. Defendants Violated the Equal Protection Clause to Favor Biden over Trump**

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<sup>14</sup> Of course, there is nothing improper about not counting improperly cast votes. Only legal votes should be counted. *Cf. Bush v. Gore*, 531 U.S. at 119 (Rehnquist, C.J., concurring) (“No reasonable person would call it ‘an error in the vote tabulation,’ ... or a ‘rejection of legal votes,’ ... when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.”)

**First**, Defendant County Election Boards, controlled by Democrats, engaged in a scheme to count mail ballots which should have been disqualified, knowing it would overwhelmingly favor Biden because of the registrations of persons who voted by mail and the strategies of the competing campaigns. (SAC ¶¶168, 177, 179, 194, 223, 252, 253) As a result, Defendant County Election Boards deliberately favored Biden, effectively stuffing the ballot box in his favor with illegal votes in violation of *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273, *aff'd*, 19 F.3d 873. *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote.”); *Snowden v. Hughes*, 321 U.S. 1, 11 (1943) (“Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.”)

**Second**, Defendant County Election Boards provided political parties and candidates, including the Trump Campaign, no meaningful access or actual opportunity to review and assess mail-in ballots during the canvassing of mail ballots in order to favor Biden over Trump. (SAC ¶4)

**Third**, Defendant County Election Boards failed and refused to set aside and challenge defective ballots resulting in the arbitrary, disparate, and unequal treatment between those who vote in-person at the polling place versus those who



vote by absentee or mail-in ballot – all designed to favor Biden over Trump. (SAC ¶¶110, 112, 117)

**Fourth**, Secretary Boockvar’s Naked Ballot Guidance was issued in order to “encourage the counting of mail ballots which she knew would favor Biden.” (SAC ¶98) Following the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party*, 2020 Pa. LEXIS 4872 (Pa. Sep. 17, 2020), which ruled that the secrecy provision language in Election Code Section 3150.16(a) is “mandatory,” Boockvar removed the Naked Ballot Guidance from the Pennsylvania Department of State’s website, but did not issue guidance advising all 67 County Election Boards to not count non-compliant absentee or mail-in ballots. (SAC ¶¶99-100)

**Fifth**, certain Democratic controlled Defendant County Election Boards proceeded to pre-canvass mail-in ballot envelopes prior to Election Day to favor Biden over Trump. In Philadelphia County, election officials examined ballots in advance of Election Day, identifying those that might be rejected. (SAC ¶¶139-141) Many voters were told ahead of time to cast a provisional ballot on Election Day.<sup>15</sup> By contrast, most counties followed Secretary Boockvar’s October 21 guidance and did not erect such an illegal voter “assistance” program.<sup>16</sup>

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<sup>15</sup> See, e.g., Murray Decl.(Exh. 6); Hetak Decl.(Exh. 7).

<sup>16</sup> See, e.g., Chew Decl.(Exh. 8); Leinbach Decl.(Exh. 9). On November 2 Deputy Secretary Jonathan Marks sent a general email suggesting that such contacts occur “during the pre-canvass” (meaning on election day). Jonathan M. Marks Email (Nov.

*Sixth*, statistical analysis is expected to evidence that over 70,000 mail and other ballots which favor Biden were improperly counted – sufficient to turn the election – a remedy expressly applied in *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273, at \*78, later affirmed. (SAC ¶18)

*Finally*, Defendants violated the Equal Protection Clause because as a result of their conduct to obscure access to the vote-counting process, watchers in Allegheny, Philadelphia and other Defendant Counties did not have the same right as watchers in Republican controlled Pennsylvania Counties, such as York, to be present when envelopes containing official absentee and mail-in ballots were reviewed, opened, counted, and recorded. (SAC ¶56) While apparently facially neutral, it was designed to prevent the Campaign and Republican watchers from uncovering the deliberate scheme to favor Biden over Trump.

**2. Defendants Violated The Due Process Clause To Favor Biden over Trump In A System Which Was So Porous So As To Violate Due Process on Its Face**

“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote.” *Reynolds*, 377 U.S. at 555. Due process is implicated “[i]f the election process itself reaches the point of patent and fundamental

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2, 2020)(Exh. 1). In no way did this email suggest it was legal to manipulate or tamper with mail-in ballots prior to election day to determine their validity and offer voters advice on provisional voting.

unfairness.” *Griffin v. Burns*, 570 F.2d at 1077. *See also Marks v. Stinson*, 19 F.3d at 888 (“[R]ejection of a ballot where the voter has been effectively deprived of the ability to cast a legal vote implicates federal due process concerns.”) Defendant County Election Boards intentionally and purposefully discriminated in to favor presidential candidate Biden over Trump by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to count defective ballots, violating Due Process. (SAC ¶252)

Numerous decisions have sustained due process challenges to elections involve documented instances of improperly cast ballots and the failure to properly count cast ballots. *See Marks*, 19 F.3d at 887 (due process violation from “massive absentee ballot fraud, deception, intimidation, harassment and forgery,” and “many of the absentee votes were tainted”); *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2005) (“election officials refus[al] to tally absentee ballots ... may violate the voters' constitutional rights.”); *Griffin*, 570 F.2d at 1074 (due process violation where state refused to count “the absentee and shut-in ballots that state officials had offered to the voters”); *Krieger v. Peoria, City of*, 2014 U.S. Dist. LEXIS 117235, at \*16 (“an election based in part on incomplete ballots ... likely violates Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment.”)

Here, given the Pennsylvania Supreme Court’s decisions that Pennsylvania

law does not allow meaningful observation of the canvassing of mail ballots and the opportunity to object before they are opened and the ballots mixed together and counted, it is so porous that it violates basic due process and the Due Process Clause regarding free and fair elections.

### **3. Defendants Should Bear the Burden of Proving the Mail Votes Were Legal**

Defendants excluded Trump and Republican watchers from meaningfully observing the canvassing, thereby ensuring that Plaintiffs would not have immediate means of showing the legal *vis-à-vis* illegal votes. Even worse, the Pennsylvania Supreme Court held that there is no right to meaningful observation, *In Re Canvassing Observation*, and no right to object to deficiencies on mail ballots before they are opened and counted, *In Re November 3 General Election*. On its face, this system is so porous as a matter of law to violate Due Process under *Reynolds*, *Griffin*, and *Marks*. In this situation, Defendants should have the burden of proving the mail votes were legal. *See, e.g., Warf v. Bd. of Elections*, 619 F.3d 553, 561-62 (6<sup>th</sup> Cir. 2010) (“once the contestant has made a showing of irregularity, ... contestee must then come forward with evidence of substantial compliance with balloting procedures”); *Wilkes-Barre Election Appeals*, 1967 Pa. Dist. & Cnty. Dec. LEXIS 9, \*16 (Pa.Com.Pl. Luz. Cnty. Dec. 27, 1967) (concluding that where “challenger has presented a *prima facie* case to substantiate his challenge [to absentee ballot,] ... the burden of proof shifted to the voter to establish her position.”)

**C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF**

The irreparable nature of the harm to the Plaintiffs is apparent. If the Pennsylvania vote count – including unlawful ballots – is certified and not stayed to permit meaningful review, the electoral votes will be awarded to Biden. If Plaintiffs later prove that the election was invalid, unfair, unequally administered, and included the tabulation of unlawful mail-in ballots, their victory will be Pyrrhic.<sup>17</sup>

**D. THE BALANCE OF HARMS FAVORS PLAINTIFFS**

The balance of harms favors Plaintiffs. Plaintiffs seek a short stay, and not past December 8, to preserve the *status quo* while this case proceeds. Defendants will bear little harm so long as they certify by December 8, the federal safe-harbor date. If Defendants prevail by or before that date, the same electors will be appointed with ample time to vote in the Electoral College. If Plaintiffs prevail, it can only be because Defendants had no legitimate interest in certifying a constitutionally flawed outcome. Either way, Defendants will not suffer harm from a slight delay. By

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<sup>17</sup> To the extent Defendants have certified the election, numerous cases sustain decertification as a remedy. However, given the uncertainty as to how this may be effected, relief should be provided now. *See, e.g., Marks v. Stinson*, 19 F.3d at 887 (upholding district court order invalidating election tainted by “massive absentee ballot fraud, deception, intimidation, harassment and forgery”); *Griffin*, 570 F.2d at 1077 (“There is precedent for federal relief where broad-gauged unfairness permeates an election...”); *Kreiger*, 2014 U.S. Dist. LEXIS 117235, \*15-16 (enjoining defendants from counting votes and ordering new election where the “fundamental unfairness [was] more than isolated.... [T]he defective ballots in this case were mailed to approximately one-half of voters.”).

contrast, Plaintiffs may lose their opportunity for meaningful relief entirely if the legal effect of certification is not stayed, since it is not clear what remedies would remain after that point once electors are appointed. “How strong a claim on the merits is enough depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.” *Reilly*, 858 F.3d at 179 (quoting *Hoosier Energy Rural Elec. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7<sup>th</sup> Cir. 2009)). The low costs on Defendants and high potential harm to Plaintiffs make this a case with substantial “net harm an injunction can prevent.”

**E. THE PUBLIC INTEREST IS FURTHERED BY ENTRY OF INJUNCTIVE RELIEF**

The Third Circuit has recognized that the protection of the voting and associational rights of political parties, their candidates, and their potential supporters is an important right that meets the public interest test for injunctive relief. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997). Plaintiffs’ challenge is important to all those who will vote in Pennsylvania’s elections in the future. “[G]ranted the preliminary injunction is in the public interest [T]he United States Supreme Court has observed: ‘[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.’” *Pierce*, 324 F. Supp. 2d at 707 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). “Because of the importance that each elector’s

vote count to the same extent as other electors in other counties, it is in the public interest to grant a limited preliminary injunction.” *Id.*

## VI. CONCLUSION

Extensive evidence exists that Defendants mis-administered the 2020 Presidential Election in such a disastrous manner that they violated the Equal Protection Clause and structural guarantees of our Constitution in order to favor Biden over Trump. And Defendants blocked Plaintiffs’ attempts to meaningfully observe and document their actions at almost every turn. This mal-administration reached the point of patent and fundamental unfairness and evidences an intentional attempt by Defendants to jeopardize both the ability of Pennsylvanians to select their leaders and the constitutional rights of all Plaintiffs. This Court should stay the vote certification pending this appeal, otherwise Plaintiffs may be without a way to remedy the severe, innumerable constitutional violations.

Respectfully submitted:

Dated: November 23, 2020

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**United States Court of Appeals for the Third Circuit**

**Corporate Disclosure Statement and  
Statement of Financial Interest**

No. \_\_\_\_\_

v.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, \_\_\_\_\_  
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

\_\_\_\_\_  
(Signature of Counsel or Party)

Dated: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that this 23<sup>rd</sup> day of November 2020, I filed a copy of  
the foregoing

**PLAINTIFFS APPELLANTS' MOTION FOR  
TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

which will serve all parties registered to receive same.

*/s/Marc A. Scaringi*

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