IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DONALD J. TRUMP FOR)	
PRESIDENT, INC., et al.,)	
Plaintiff-Appellants,)	
)	
v.)	No. 20-3771
)	
KATHY BOOCKVAR, et al.,)	
Defendant-Appellees.)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, IN CASE NO. 20-CV-2078, HONORABLE MATTHEW W. BRANN

DEMOCRATS ABROAD'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEES

- 1. The movant, Democrats Abroad ("DA"), by and through its undersigned counsel, seeks leave to participate in this case as Amicus Curiae in support of the Defendants' Motions to Dismiss.
- 2. As contemplated by Fed. R. App. P. 29(a)(2), DA have sought permission of the parties before filing this motion. Plaintiffs-Appellants' counsel have indicated their consent, but other parties have not indicated a position one way or another. Thus, DA moves for the Court's leave to participate under Rule 29(a)(3).
 - 3. The Court below granted a motion allowing DA to

participate as an amicus. See ECF No. 146, minute order at App-053.

DA is the official Democratic Party arm for the millions of 4. Americans living outside the United States. DA is recognized as a "state" party by the Democratic National Committee and is represented on the DNC by eight voting members at the quadrennial Democratic National Convention with pledged delegates. DA is staffed by volunteers who assist overseas voters with registration, run a global voter registration effort and support overseas voters with a 24/7 help desk. DA researches voting and election information specific to overseas voters for all 50 states and the 6 non-state US jurisdictions (District of Columbia, Puerto Rico, American Samoa, Guam, US Virgin Islands, and Northern Mariana Islands), including: requirements for voting for each jurisdiction; deadlines for submitting voter registration, ballot requests, and returning ballots; available methods for returning forms and ballots; state-specific requirements for overseas voting; and update contact information for local election offices. Volunteers also respond to questions from overseas voters and provide support to help them request their ballots and vote from overseas. As part of their preparation for upcoming elections, DA staff contacts the various

Secretary of State offices and Local Election Offices (LEOs) to verify election information is correct and up to date. They also contact LEO offices on behalf of overseas voters who need help with registering, requesting their ballots, and/or returning their ballots. Since DA works closely with voters who use absentee and mail-in ballots every year, they are experts in dealing with these issues in all 50 states and the six non-state jurisdictions and their expertise is highly relevant to mail-in voting.

- 5. DA has more than eight thousand members who vote in Pennsylvania, including in each of the Defendant counties. DA has already diverted significant resources to dealing with Pennsylvania absentee ballot issues, and will have to spend much more staff time and resources counseling its members on Pennsylvania developments, and interacting with Pennsylvania election staff, if the case is not dismissed.
- 6. This case involves Appellants' attack on the legitimacy of mail in ballots submitted and counted in each of the Defendant counties, including those submitted by Amicus' members. Given the Amicus's mission of protecting its members and representing their interests in communicating with LEOs, Amicus is uniquely situated to

advocate that its thousands of Pennsylvania members not be disenfranchised by Appellants.

7. To that end, the DA seeks to submit a Brief, attached hereto as Exhibit A, protecting its members' interests and advocating for that the Court affirm the well-reasoned judgment of the Court below.

WHEREFORE, DA requests that this Court grant this Motion for Leave to Participate as Amicus Curiae, and accept and consider the Brief attached hereto during the disposition of this proceeding.

Respectfully submitted,

/s/

J. Remy Green
COHEN&GREEN P.L.L.C.
1639 Centre Street, Suite 216
Ridgewood, New York 11385
(929) 888.9480 (telephone)
(929) 888.9457 (facsimile)
remy@femmelaw.com

Sean M. Shultz
SAIDIS, SHULTZ & FISHER LLC
100 Sterling Parkway, Suite 300
Mechanicsburg, Pennsylvania
17050

20-3371

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT



DONALD J. TRUMP FOR PRESIDENT, INC.; LAWRENCE ROBERTS; AND DAVID JOHN HENRY,

Plaintiff-Appellants,

— v. —

KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; ALLEGHENY COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS; AND PHILADELPHIA COUNTY BOARD OF ELECTIONS,

Defendant-Appellees.

DEMOCRATIC NATIONAL COMMITTEE; NAACP PENNSYLVANIA STATE CONFERENCE; COMMON CAUSE PENNSYLVANIA; LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; BLACK POLITICAL EMPOWERMENT PROJECT; LUCIA GAJDA; STEPHANIE HIGGINS; MERIL LARA; RICHARDO MORALES; NATALIE PRICE; TAYLOR STOVER; JOSEPH AYENI; TIM STEVENS,

Intervenor Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, IN CASE NO. 20-CV-2078, HONORABLE MATTHEW W. BRANN

BRIEF FOR AMICUS CURIAE DEMOCRATS ABROAD IN SUPPORT OF APPELLEES

For Appearances of Counsel, See Inside Cover

J. REMY GREEN

COHEN&GREEN P.L.L.C.

1639 Centre Street, Suite 216 Ridgewood, New York 11385 (929) 888-9480 (telephone) (929) 888-9457 (facsimile)

remy@femmelaw.com

SEAN M. SHULTZ

SAIDIS, SHULTZ & FISHER LLC

100 Sterling Parkway, Suite 300

Mechanicsburg, Pennsylvania 17050

(717) 590-8529 (telephone)

(717) 960-1123 (facsimile)

sshultz@ssfadvocates.com

CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1, *Amicus* Democrats Abroad states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

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PRELIMINARY STATEMENT¹

The attorneys for the President of the United States should not need "three last chances" to coherently state a cause of action. See Monty Python's Flying Circus: The Spanish Inquisition (BBC television broadcast Sept. 22, 1970). Yet, apparently, that third, last chance is all they seek from this Court. All the while, they have – with no apparent sense of irony given the amount their theory of the case turns on technical defects with ballots – blown past the statutory deadline to certify the election results and now seek to have this Court disregard technical defects in their pleadings and motion practice below.

On the merits, Appellants have brought a case mainly targeting mail-based voting, alleging it is somehow less "open and transparent" than in-person voting and insinuating it is somehow poisonous to democracy. It is not. Mail voting has existed since the founding, and has existed on a large scale since the Civil War.²

Amicus Democrats Abroad ("DA") – an organization dedicated to

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution toward the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission.

² See generally, Olivia Waxman, <u>Voting by Mail Dates Back to America's Earliest Years. Here's How It's Changed Over the Years</u>, TIME (Sept. 28, 2020).

ensuring Americans living overseas can safely and successfully cast their ballots – submits this brief to provide the Court to provide context in terms of the challenges that Americans overseas face in casting their ballots, even in the best of times. In 2018, the Federal Voting Assistance Program found that a stunning 4.7% of eligible voters abroad cast their ballots – a number that would increase to 31.7% if only certain obstacles were "resolved through voter education, state legislative changes, or improved communication with election offices."³

The President – whether intentionally or unintentionally⁴ – seeks to have this Court place still more obstacles in the paths of Americans (including uniformed members of the military) who already struggle to cast their ballots from overseas. And seeks to do so *after* those

³ Federal Voting Assistance Program, <u>U.S. Citizens Abroad And Their Voting Behaviors In 2018</u>: Overseas Citizen Population Analysis Summary Brief (2018), available at https://www.fvap.gov/uploads/FVAP/Reports/FVAP voters brief v3a-(1).pdf ("FVAP Brief").

⁴ Notably, proposed intervenors Rep. Mike Kelly et al. (who have also filed in this Court), have separately sued to have a 2019 expansion of access to mail-in absentee ballots declared retroactively unconstitutional. *See Kelly v. Pennsylvania*, Docket No. ___ M.D. 2020 (Commonwealth Ct. of Penn.). Given the status of those ballots, just as Appellants do in their Second Amended Complaint, intervenors acknowledge that the relief they seek is disenfranchising more than seven million citizens of Pennsylvania by "direct[ing] that the Pennsylvania General Assembly choose Pennsylvania's electors." Complaint in *Kelly* at 24; *see also* App-482 (proposed Second Amended Complaint, seeking an order "providing for the Pennsylvania General Assembly to choose Pennsylvania's electors").

Americans have already cast their ballots. At base, "[Appellant]s ask this Court to disenfranchise almost seven million voters." App-062. Their theory of the case seeks to pick off adverse votes, after voters have already made "decisions about whether and when to request mail-in ballots as well as when and how they cast or intended to cast them" — and in doing so, ask this Court to run through virtually every guardrail the Supreme Court and this Court alike have erected around cases like this. *Bognet v. Sec'y Pa.*, No. 20-3214, 2020 U.S. App. LEXIS 35639, at *50 (3d Cir. Nov. 13, 2020) ("*Bognet*").

Just as it did in *Bognet*, this Court should decline that invitation.

INTEREST OF AMICUS CURIAE

DA is the official Democratic Party arm for the millions of
Americans living outside the United States. More than that, though,
for many voters overseas (including uniformed members of the military)

– regardless of party affiliation⁵ – DA is the primary resource they use
to ensure their votes are actually counted. DA is staffed by volunteers
who assist overseas voters with registration, run a global voter

⁵ The Republican Party does not have any comparable organization. DA provides its overseas voter registration services on a non-partisan basis (including through its website at www.votefromabroad.org).

registration effort and support overseas voters with a 24/7 help desk. DA researches voting and election information specific to overseas voters for all 50 states and the 6 non-state U.S. jurisdictions, 6 including: requirements for voting for each jurisdiction; deadlines for submitting voter registration, ballot requests, and returning ballots; available methods for returning forms and ballots; state-specific requirements for overseas voting; and update contact information for local election offices. Volunteers also respond to questions from overseas voters, uniformed services voters, and their dependents, and provide support to help them request their ballots and vote from overseas.

As part of their preparation for upcoming elections, DA staff contacts the various Secretary of State offices and Local Election Offices (LEOs) to verify election information is correct and up to date. They also contact LEOs on behalf of overseas and military voters who need help with registering, requesting their ballots, and returning their ballots. Since DA works closely with voters who use absentee and mailin ballots every year, they are experts in dealing with these issues in all

 $^{^6}$ That is, District of Columbia, Puerto Rico, American Samoa, Guam, U.S. Virgin Islands, and Northern Mariana Islands.

50 states and the six non-state jurisdictions, and their expertise is highly relevant to mail-in voting.

This year, DA has already diverted significant resources to dealing with Pennsylvania absentee ballot issues, and will have to spend much more staff time and resources counseling its members on Pennsylvania developments and interacting with Pennsylvania election staff, if the Appellants receive the ultimate relief they seek. In short, DA has a vital interest in ensuring that the Court does not (at Appellants' urging) erect barriers in the path of Americans who seek to cast their vote from overseas.

FACTUAL BACKGROUND ON VOTING ABROAD

Americans live abroad for many reasons: for work or to live near family, to study, or to serve their country. But when they move abroad, they do not give up their U.S. citizenship or their rights, including their sacred right to vote in elections. Though many Americans living abroad might prefer to vote in person, because they live far from their polling locations they have no real choice other than by absentee ballot. As a starting point, in ordinary times, the Uniformed and Overseas Citizens

Absentee Voting Act ("UOCAVA")⁷ protects the rights of uniformed and overseas voters who live abroad to do just that.

Overseas voters face many voting-related hurdles that voters who live in the United States do not: they may live in different time zones (making it difficult to call state officials to get information about specific requirements for any given election) or they may live in countries or areas with poor infrastructure or limited postal service. A voter's job for example, in the military—may require them to live in areas that are hostile to the presence of U.S. citizens. On top of these hurdles, U.S. citizens who vote from abroad face additional challenges in successfully returning their ballot to their local Board of Elections in the United States. Their ballots must travel through the mail systems of at least two countries (in some cases, in both directions), and must still be delivered on time. The process can be confusing to voters who have to navigate the requirements of their state, rigid timelines, changes in ballot styles, and so on, all without help from the poll workers or Board of Elections officials or LEOs who are relatively easier to interact with when they are in the same time zone as the voter.

⁷ 42 U.S.C. § 1973ff, et seq.

Because of this and other obstacles, Americans voting from overseas have their ballots rejected at shocking rates for what should be avoidable problems. In a comprehensive report, the U.S. Election Assistance Commission found that "by far the most common reason for rejection [of a UOCAVA ballot] was that a ballot was received after a state's deadline for UOCAVA absentee ballot receipt." And, as noted above, though overseas turnout sits historically at a mere 4.7%, FVAP has found that among UOCAVA voters, the "voting rate would be over 5x higher at 31.7% turnout without obstacles."

Relatedly, Pennsylvania currently requires return of overseas ballots by physical mail. *See* 25 P.S. § 3146.6. That places the State on the minority side of a vital divide: including the States that have changed practices because of the pandemic, a significant majority of the States allow voters abroad to return their ballots by email or fax. ¹⁰ This lack of a way to *quickly* submit a ballot poses a particular burden for

⁸ U.S. Election Assistance Commission, <u>Election Administration and Voting Survey: 2018 Comprehensive Report</u> 98 (2018), *available at* https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

⁹ FVAP Brief at 3.

¹⁰ See FVAP, <u>Ballot/FWAB States Transmission Methods</u>, available online at https://www.fvap.gov/uploads/FVAP/Images/FWABTransmissionMethods.pdf. Note that Pennsylvania allows UOCAVA voters to request their ballot by fax or email, but not to return the ballot by any means other than physical mail.

voters abroad. While in-state voters, when they realize they have made a mistake, they can (often but not always, depending on the reason they are voting by mail) cure their ballots with a provisional vote. Voters abroad cannot.

This year in particular, the challenges faced by overseas voters are stark. Even when voters request their ballots at the earliest possible moment, Pennsylvania is only required to send ballots 45 days ahead of each general election (as determined by the MOVE Act, amending UOCAVA). For the November General Election, that was September 19th this year. With global postal mail slowed down because of the pandemic, however, there are delays of weeks between when a ballot is sent and when it is received. Indeed, voters in some countries face delays of 6-8 weeks in the mail¹¹ – meaning the 45 days provided by the MOVE Act only create a *possibility* that a particular ballot will be counted, even if mailed back to the State the same day a voter receives it.

The uniform call from advocates for UOCAVA voters – including branches of the Federal Government – has been to remove barriers to

¹¹ Other countries have had their mail stop entirely.

voting Americans overseas. Appellants' proposed relief would place a collection of new barriers in front of Americans overseas. Thus, even if Appellants' factual allegations were correct, plausible, pled in the operative complaint, and more than bare legal conclusions (the allegations are none of these things), 12 the remedy they seek would ultimately add a roll of the dice to whether a particular UOCAVA voter's ballot is tabulated and counted – to the extent the remedy does not just toss out ballots entirely. Adding that on top of the many barriers that already exist for Americans abroad would – as explained below – unjustifiably burden an already burdened class of voters.

ARGUMENT

I. <u>Appellants' Proposed Relief Is Unconstitutional and Would Disenfranchise Large Numbers of Americans Abroad.</u>

Appellants seek to place a cloud of doubt around the validity of mail ballots – including *all* ballots by UOCAVA voters – in the

¹² Judge Brann observed that, rather than "[a]s one might expect," coming to court "formidably armed with compelling legal arguments and factual proof of rampant corruption," Appellants made only, "speculative accusations, unpled in the operative complaint and unsupported by evidence." App-062. Other courts have also, faced with similar factual claims by the President's campaign, found that these claims are not exactly well-supported. See, e.g., Donald J. Trump for President, Inc. v. Benson, 20-000225-MZ, Slip. Op. at 1 (Mich. Ct. of Claims Nov. 6, 2020) (noting that "[t]he complaint does not specify when, where, or by whom plaintiff was excluded. Nor does the complaint provide any details about why the alleged exclusion occurred," and excluding "supplemental evidence" as pure hearsay).

November 3 General Election. Even if the Court reverses, and lets
Appellant argue their motion to file a Second Amended Complaint (the sole relief they seek from this Court), the only non-moot relief sought in that complaint is disenfranchising the entire State and tossing the election to the Assembly.

The President of the United States (and his campaign) has for months been tweeting conspiracy theories about massive fraud in mailin balloting, without, in any of the many litigations he and his campaign have brought, presenting one iota of proof. On the eve of the Election, for example, the President tweeted: "The Supreme Court decision on voting in Pennsylvania [declining to overturn a decision by the Pennsylvania Supreme Court allowing votes with election day or earlier postmarks to be counted] is a VERY dangerous one. It will allow rampant and unchecked cheating and will undermine our entire systems of laws. It will also induce violence in the streets. Something must be done!" 13

As the Supreme Court has long recognized, the right to vote is *the* "fundamental political right, because [it is] preservative of all rights."

 $^{^{13}~}See~\underline{\rm https://twitter.com/realDonaldTrump/status/1323430341512622080}.$

Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). This jurisprudential and political touch point has become so well accepted that the qualification that preceded the declaration in Yick Wo – that voting is a "privilege" merely conceded by society according to its will, under certain conditions" – sounds unfathomably foreign. *Id. Compare*, e.g., Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). In short: "Where that right is constitutionally guaranteed and exercised by citizens through free and fair elections protected by government authority, democratic rule thrives. Conversely, impairing the franchise, or imposing undue burdens on the ability of voters to cast ballots for their elected leaders, necessarily threatens democracy and erodes the underpinnings of a republican form of government." Jones v. United States Postal Serv., 2020 U.S. Dist. LEXIS 172430 (SDNY 2020).

In seeking to cast doubt on the validity of all mail-in ballots,

Appellants ask the Court itself to place a severe burden on the right to
vote. But "[o]ur goal must be to enfranchise and not to disenfranchise
[the electorate.]" *Pennsylvania Democratic Party v Boockvar*, 2020 Pa.
LEXIS 4872, at *22 (2020), *stay denied*, 2020 U.S. LEXIS 5181 (2020),

motion for expedited cert. denied, 2020 U.S. LEXIS 5181 (2020), ballots arriving after Election Day ordered segregated, 2020 U.S. LEXIS 5181 (2020) (cleaned up). See also, Donald J. Trump for President, Inc. v Boockvar, 2020 US Dist LEXIS 188390, at *173 (WD Pa 2020) ("Here, imposing a signature-comparison requirement as to mail-in and absentee ballots runs the risk of restricting voters' rights").

Americans overseas have little or no other choice than to vote by mail in ballot. "Voting is a right, not a privilege, and a sacred element of the democratic process. For our citizens overseas, voting by absentee ballot may be the only practical means to exercise that right." Bush v Hillsborough County Canvassing Bd., 123 F Supp 2d 1305, 1307 (ND Fla 2000). See also, United States v Cunningham, 2009 US Dist LEXIS 98010, at *11 (ED Va 2009); United States v Georgia, 892 F Supp 2d 1367, 1368 (ND Ga 2012), aff'd, 778 F.3d 926 (11th Cir. 2015) ("Despite their differences of opinion, there is no doubt that both parties share the same fundamental, and most important, end goal of ensuring that overseas voters are able to effectively exercise their right to vote in United States elections").

Thus, because the Court itself will be making choices about which

classes of voters may have their ballots counted, it should scrutinize its own actions just as it would those of election officials (if not more so). That is, as the Court below explained, the kind of "leveling down" relief Appellants seek "is impermissible where the withdrawal of a benefit would necessarily violate the Constitution." App-091, citing Palmer v. Thompson, 403 U.S. 217, 226-27 (1971) and Reynolds, 377 U.S. at 554. Cf. also, Shelley v Kraemer, 334 US 1,14-19 (1948). In other words, it "t is not in the power of this Court to violate the Constitution" and the "Court has no authority to take away the right to vote of even a single person, let alone millions of citizens." App-092.

This Court has recently framed this question as one of choosing the least-bad option in post-election cases of this kind. That is, "[o]ne can assume for the sake of argument that aspects of the now-prevailing regime in Pennsylvania are unlawful as alleged and still recognize that, given the timing of Plaintiffs' request for injunctive relief, the electoral calendar was such that following it 'one last time' was the better of the choices available." *Bognet* at *49, *quoting Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

In that regard (as thoroughly explained below), Appellants'

prayed-for relief bears no connection – let alone the connection required by strict scrutiny – to their alleged interests. Appellants' new request (that is, the request added by the proposed Second Amended Complaint) of simply tossing the election to the Assembly is not narrowly tailored to anything resembling compelling government interest. Instead, it is only tailored to President Trump's desire to have some chance of reversing the overwhelming result of this election. Even if Appellants had any actual evidence of, well, anything—and they do not—then one "le[ss] restrictive alternative" would be the process by which observers challenge individual ballots, or a litigation of far more limited scope, not to disenfranchise hundreds of thousands of voters en masse. 14 Another less restrictive alternative would be the "easy" remedy "leveling up to address the alleged cancellation of [the individual] Plaintiffs' votes." App-091-92.

On the other side of the scale, for *amicus* DA and the Americans overseas it represents, the right/remedy disconnect here poses a far

¹⁴ The result of Appellants' proposed relief would, under Anderson-Burdick,

be a "burden [that] is exceptionally severe[:] A large number of ballots will be invalidated, and consequently, not counted based on circumstances entirely out of the voters' control." *Gallagher v NY State Bd. of Elections*, 2020 US Dist LEXIS 138219, at *47 (SDNY Aug. 3, 2020).

steeper burden: they have no way to vote besides by mail and must make their choices on *how* to cast their vote much further in advance than other voters. The relief Appellants request is unconstitutional itself. Thus, because the remedy sought in the Second Amended Complaint is unconstitutional (to say nothing of the Court below's unchallenged standing determination), the proposed amendment is futile – and need not be entertained. *In re New Jersey Tit. Ins. Litig.*, 683 F3d 451, 462 (3d Cir. 2012) ("Thus, even if Appellants substituted a plaintiff with concrete plans to purchase title insurance, s/he would still lack standing—thus making the amendment of Appellants' complaint futile").

II. This Appeal Comes Far Too Late For Effective Relief.

By the time this Court is reading this brief, Pennsylvania will likely have certified election results. As this Court just held in *Bognet*, "Plaintiffs' challenge to it was not filed until sufficiently close to the election to raise a reasonable concern in the District Court that more harm than good would come from an injunction changing the rule."

Bognet at *52. Amicus DA and the voters it represents are particularly vulnerable to late-breaking changes in election rules: their ballots are

in the mail and finalized long before the ballots of their stateside counterparts. And just as in *Bognet*, any relief would cause far more harm than good. So, just as the Court below concluded, further "amendment would unduly delay resolution of the issues." App-096.

A. Purcell Bars Relief.

As the Supreme Court has "repeatedly emphasized," "lower federal courts should ordinarily not alter the election rules on the eve of an election." Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020), citing Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006). This is because "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion." 549 U.S. at 4-5. The underlying rationale of *Purcell*, not to undermine voter confidence in the election process by creating confusion, can apply equally well to this action brought after the election, which seeks to disenfranchise hundreds of thousands of other mail-in voters who fulfilled all legal requirements in casting their ballots. Cf. Gallagher v NY State Bd. of Elections, 2020 US Dist LEXIS 138219, at *47 (SDNY Aug. 3, 2020) (post-election case finding an "exceptionally severe" burden where "large number of ballots will be invalidated, and

consequently, not counted based on circumstances entirely out of the voters' control"). It is, standing alone, a sufficient reason to deny the requested relief that Appellants are seeking to undo a completed election. ¹⁵

B. <u>Laches, reliance, and mootness also bar relief.</u>

If Appellants wished to have absentee votes comply with some desired set of rules and procedures, they had months before the election to advocate for those rules through lobbying and litigation—and they did in fact bring (and lose) such related litigation, for example seeking to impose a signature comparison requirement in reviewing ballots.

¹⁵ See, e.g., Samuel v Virgin Is, Joint Bd. of Elections, 2013 U.S. Dist LEXIS 3689, at *29-30 DVI 2013) ("Plaintiffs did not explain why they waited until the eleventh hour to file their request for a TRO and preliminary injunction in which they seek to undo an election. The timing of their filing their lawsuit confirms that they will not suffer any irreparable harm"); Soules v Kauaians for Nukolii Campaign Comm., 849 F2d 1176, 1180 (9th Cir. 1988) ("Moreover, the courts have been wary lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs"); Hendon v. N. C. State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983) ("[F]ailure to require pre-election adjudication would permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action"); Lake v State Bd. of Elections, 798 F Supp 1199, 1208 (MDNC 1992) ("Such irregularities are the classic concern of the states under the constitutional framework. Federal intervention to attempt to rectify any injury done here would require the undoing of a completed election, a remedy properly reserved to the State of North Carolina and available under its election laws").

See, e.g., Donald J. Trump for President, Inc. v Boockvar, 2020 US Dist LEXIS 188390 (WD Pa 2020).

Having delayed this case until after election, given the margins they face for the relief they seek to be meaningful at all, Appellants are seeking only a single remedy: the wholesale disenfranchisement of large groups of voters. Indeed, while they assure this Court otherwise, Appellants' briefing and Second Amended Complaint makes clear that "[u]ltimately, [they] will seek the remedy of Trump being declared the winner." App-367-that see also App-482.16 And it is not as if it were a secret mail-in ballots would be significant this election. There is a oncein-a-century pandemic going on. There were many, many primary elections where millions upon millions of mail ballots were cast in unprecedented numbers, because States decided to expand access to the franchise to protect citizens from transmission risks. Appellants should not be heard now given their opportunistic delay.

¹⁶ While Appellants make reference to "legal votes cast" at App-368, both in context and given the recent decision by the Pennsylvania Supreme Court, there is not much left to that "legal votes" argument. And, more to the point perhaps, there is no "legal vote"-based remedy in the Second Amended Complaint, and all Appellants seek on appeal is an order sending the case back to the District Court for proceedings on that complaint.

Laches applies, as the Seventh Circuit has explained, with particular force in election cases:

"Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously. As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made. The candidate's and party's claims to be respectively a serious candidate and a serious party with a serious injury become less credible by their having slept on their rights."

Fulani v Hogsett, 917 F2d 1028, 1031 (7th Cir. 1990), cert. den. 501 U.S. 1206 (1991).¹⁷

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 $^{^{17}}$ See also, Perry v Judd, 840 F Supp 2d 945, 949 (ED Va 2012), injunctiondenied, 471 Fed. Appx. 219 (4th Cir. 2012) ("[Plaintiffs] knew the rules in Virginia many months ago; the limitations on circulators affected them as soon as they began to circulate petitions. The plaintiffs could have challenged the Virginia law at that time. Instead, they waited until after the time to gather petitions had ended and they had lost the political battle to be on the ballot; then, on the eve of the printing of absentee ballots, they decided to challenge Virginia's laws. In essence, they played the game, lost, and then complained that the rules were unfair"); Memphis A. Phillip Randolph Inst. v Hargett, 2020 U.S. Dist LEXIS 133721, at *24-25 (MD Tenn 2020), aff'd, 2020 U.S. App. LEXIS 32581 (6th Cir. 2020) ("[T]he Court finds unreasonable delay by Plaintiffs in waiting, after Governor Lee's March 12 state of emergency order, seven weeks to file the original complaint and two months to file the Motion. As parties allegedly facing severe violations of their constitutional rights as a result of the implicated election laws, especially considering the existing COVID-19 pandemic, Plaintiffs should have been on the proverbial red alert by the time the Governor's order was issued on March 12 ... [P]laintiffs seeking the very extraordinary remedy of enjoining state procedures governing an approaching primary election needed to move more quickly than they did, and the Court has not been satisfied by the various explanations for the delay"); Arizona Libertarian Party v Reagan, 189 F Supp 3d 920, 924 (D Ariz 2016), aff'd, 925 F.3d 1085 (9th Cir. 2019), cert. den. 207 L. Ed. 2D 1052 (2020) ("Plaintiffs were

Finally, the relief Plaintiffs seek is, at this point, moot. Pennsylvania certified its election results on November 24. But even if Appellants are correct that the Court has the power to unwind the certification of election results here (it does not), that relief is not sought in the Second Amended Complaint. As the Supreme Court recently cautioned, in this kind of litigation, courts should be careful of "disregard[ing] the critical point that the plaintiffs themselves did not ask for [a particular kind of] additional relief." Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ____, Slip Op. at 3 (2020) (per curiam). In other words, if the Court remands, Appellants will need to file yet another amended complaint to seek any meaningful relief beyond disenfranchising the whole of Pennsylvania – drawing out the timeline that the Court below already found was far too long. Appellants have had plenty of bites at the apple, and – even in the Second Amended Complaint – still have not "come formidably armed with compelling legal arguments and factual proof of rampant corruption." App-062. They do not need a third last chance.

therefore aware of the underlying basis for their challenge by August 2015. Despite this knowledge, Plaintiffs did not file their complaint until April 12, 2016, and did not file their 'emergency' motion for a temporary restraining order until May 12, 2016, less than three weeks before the June 1 deadline for nomination petitions").

In sum, Americans voting from overseas – like all Americans – have the right to security and confidence of knowing that their votes were counted and the results of the November 3 election are final.

Perhaps more importantly, they also have a right to know their votes will not be subject to post-hoc digging for result-oriented reasons to toss just enough votes to ensure a particular candidate win an election.

Thus, even if the Court buys what Appellants are selling (it should not), well-settled law favors allowing the challenged procedures to be applied "one last time," given the broad reliance on those procedures. *Bognet* at 49.

CONCLUSION

Appellants' complaint, at its heart, is about results rather than principles. Their faction lost an election. Thus, they urge, some relief is required. But as James Madison famously said in *Federalist* 10, "[a]mong the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction ... The instability, injustice, and confusion introduced into the public councils, have, in truth, been

the mortal diseases under which popular governments have everywhere perished."

That sentiment did not die with the founding generation. In Rutan v Republican Party, Justice Stevens noted:

"Ironically, at the time of the adoption of the Bill of Rights, the party system itself was far from an accepted political norm. Our founders viewed it as a pathology ... Madison and Hamilton, when they discussed parties or factions (for them the terms were usually interchangeable) in *The Federalist*, did so only to arraign their bad effects ... George Washington devoted a large part of his political testament, the Farewell Address, to stern warnings against 'the baneful effects of the Spirit of Party.' His successor, John Adams, believed that 'a division of the republic into two great parties is to be dreaded as the greatest political evil under our Constitution.'

497 US 62, 82, n. 3 (1990).

And lest there be any doubt, "[o]ur contemporary recognition of a state interest in protecting the two major parties from damaging intraparty feuding or unrestrained factionalism, has not disturbed our protection of the rights of individual voters and the role of alternative parties in our government." *Id*.

Ultimately Appellants' sole remaining request for relief in the Second Amended Complaint – tossing the entire election to the Assembly and disenfranchising the entire State – only serves the

purpose of delegitimizing this election and disenfranchising voters who relied on the mail to vote, all for the sake of faction. The Court need not – and should not – follow Appellants there.

Respectfully submitted,

/s/

J. Remy Green COHEN&GREEN P.L.L.C. 1639 Centre Street, Suite 216 Ridgewood, New York 11385 (929) 888.9480 (telephone) (929) 888.9457 (facsimile) remy@femmelaw.com

Sean M. Shultz SAIDIS, SHULTZ & FISHER LLC 100 Sterling Parkway, Suite 300 Mechanicsburg, Pennsylvania 17050

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/s/

J. REMY GREEN

COHEN&GREEN P.L.L.C.

1639 Centre Street, Suite 216 Ridgewood, New York 11385

(929) 888.9480 (telephone)

(929) 888.9457 (facsimile)

remy@femmelaw.com

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I certify that I have served this brief on all parties via CM/ECF.

DATED: Ridgewood (Queens), New York November 24, 2020

/s/

J. REMY GREEN
COHEN&GREEN P.L.L.C.
1639 Centre Street, Suite 216
Ridgewood, New York 11385
(929) 888.9480 (telephone)
(929) 888.9457 (facsimile)
remy@femmelaw.com