No. 20-3371

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DONALD J. TRUMP FOR PRESIDENT, ET AL.,

Appellants

v.

SECRETARY COMMONWEALTH PENNSYLVANIA, ET AL.,

Appellees

Appeal from the United States District Court for the Middle District of Pennsylvania. Case number 4:20-cv-2078, Honorable Matthew W. Brann

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BRIEF OF AMICI CURIAE ERWIN CHEMERINSKY, MARIN K. LEVY, LEAH LITMAN, PORTIA PEDRO, & RICK SWEDLOFF IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

None of the amici signing this brief are corporations with a parent corporation or corporations owned by a publicly held corporation. *See* Fed. R. App. P. 29(a)(4)(A).

November 24, 2020

/s/ *Matthew Stiegler*
MATTHEW STIEGLER

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INTERESTS OF AMICI CURIAE

Amici are law professors who possess an interest in the reasoned development of remedies doctrines. They write to provide a scholarly perspective on the remedies sought by the Trump campaign. Amici are:[1]

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INTRODUCTION

In the 2020 presidential election, the people of Pennsylvania exercised the most fundamental of American rights, and the one that preserves all others—the right to vote. The electoral process was hard-fought, and the race was tight. But it yielded a definitive result. By a margin of over 80,000 votes, Pennsylvanians chose Joseph Biden as their preferred candidate for President of the United States. In the weeks that followed, the results have been certified. And on December 10, Pennsylvania's 20 electoral votes are set to be counted for Joe Biden, in the manner that the United States Constitution and Pennsylvania law describe.

Donald Trump's campaign now seeks the extraordinary remedy of having a federal court order Pennsylvania to ignore the presidential preference of many—or all—of its seven million votes that the Commonwealth itself has deemed lawfully cast. Trump would have a court order Pennsylvania to count only "legal" ballots (based on rules not in effect when the votes were cast, susceptible to being opportunistically reverse-engineered to favor himself) or declare the election entirely invalid so that the Legislature can install as President the candidate that the voters rejected. Such relief was improper when Trump initially framed it as a request to enjoin certification. It is even more inappropriate now that certification has occurred, and a court would have to order decertification or require the Pennsylvania General Assembly

to appoint electors.[2] For the good of the country, for the good of the Constitution, for the good of democracy, and for the good of the voters who did all the law required of them to cast lawful ballots, the Court should reject Trump's challenge.

While the Trump campaign would like to prolong the uncertainty by obtaining leave to file another complaint, there is no reason to delay the inevitable. Any complaint that sought to interfere with Pennsylvania's certification of its election results would fail: The remedy flouts generally applicable principles of equity, democracy, and federalism. The judgment below can be affirmed because Trump's amendments would be futile.

SUMMARY OF THE ARGUMENT

I. The Trump campaign's challenge comes far too late. The processes that Trump challenges were in place for months before the election—and Trump had no quarrel with them in court until he lost. The law has long looked down on courts changing election rules on the eve of an election, to avoid disrupting the electorate. Asking judges to change the rules *after* the election is even worse, because it means asking them to overthrow a legitimate election process. Call it laches. Call it the *Purcell* principle. The result is the same: A challenge that comes too close to an election comes too late.

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[2] This brief does not address whether this case is now moot in light of Pennsylvania's certification of the results.

II. Delay aside, granting the drastic remedy Trump seeks would lead to dangerous results. A federal court order interfering with state officials' legally mandated election-certification duties would undermine fundamental pillars of our constitutional structure. It would weaken public confidence in the democratic process, subvert democracy, undermine federalism, and threaten the orderly transfer of power.

Any one of these reasons would be grounds to dismiss Trump's claims. All of them, together, make clear why the district court was correct to dismiss Trump's claims with prejudice. Trump asks this Court to permit him to go forward with an amended complaint, but the amended complaint would still seek a remedy that the law does not allow in these circumstances, and so any amendment would be futile. *See Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) ("'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted.").

ARGUMENT

I. Trump's requested remedy is inconsistent with principles of equity.

The people of Pennsylvania have spoken. Over 6.8 million Pennsylvanians cast their votes. *See* Pa. Dep't of State, *2020 Presidential Election*, https://www.electionreturns.pa.gov/ (last visited Nov. 24, 2020). Leading news organizations declared Joseph Biden the winner of the presidential election in Pennsylvania. *See, e.g.*, Jonathan Lemire *et al.*, *Biden defeats Trump for White House, says 'time to heal,'* Associated Press (Nov. 7, 2020); Brooke Singman & Paul Steinhauser, *Biden wins presidency,*

Trump denied second term in White House, Fox News projects, Fox News (Nov. 7, 2020). The Pennsylvania Secretary of State determined that President-Elect Biden's margin of victory is large enough that she will not order a recount. *See* Joe Brandt, *Pennsylvania Won't Need a Recount to Certify Biden Victory, State Says*, NBC10 News (Nov. 13, 2020). And Pennsylvania has now certified the election results.

The Trump campaign's attempt to have a federal court nullify some or all of the votes cast in Pennsylvania and interfere with Pennsylvania's certification is inconsistent with principles of equity. That is true whether the principles of equity are described in terms of the Supreme Court's decision in *Purcell v. Gonzales* or the doctrine of laches. "Call it what you will—laches, the *Purcell* principle, or common sense": Courts will not overturn elections that already have occurred absent extraordinary reasons for doing so. *Crookston v. Johnson*, 841 F.3d 396, 398–99 (6th Cir. 2016). No such extraordinary reason exists here.

A. The reasons animating *Purcell* counsel against overturning the results of an election.

The reasoning behind the *Purcell* principle underscores why courts should not interfere with the process by which a state certifies the results of an election. *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006) (per curiam), held that "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) (per curiam). Federal courts also should ordinarily not find those rules invalid the morning after the election occurred, thereby invalidating the election. Indeed, the reasons that courts

avoid tinkering with election rules in the lead-up to an election counsel even more strongly against throwing out an election's results. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Here, Trump's requested relief, which would have a federal court insert itself into certifying the results of an election, would disenfranchise millions of voters and create voter confusion and disillusionment that would persist in future elections.

At a minimum, an order regarding certification would undermine "confidence in the integrity of [Pennsylvania's] election process," which the Supreme Court has said is "essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages participation in the democratic process."). Those concerns are particularly acute here, where the requested relief amounts to a requirement that Pennsylvania disregard the votes of many—or all—of its citizens, notwithstanding that they followed the rules that were in place when they voted. Telling voters that their votes did not matter could undermine confidence in the election process. It risks depress turnout in future elections, as voters wonder whether their votes will be discarded again. *See Purcell*, 549 U.S. at 4–5 (warning that judicially ordered changes to election rules in the lead-up to an election can result in "consequent incentive to remain away from the polls").

Numerous courts have recognized that the reasons why federal courts avoid changing election rules before an election have additional force after an election has begun. In *Williams v. Rhodes*, for example, after the Supreme Court held that a provision of Ohio law was unconstitutional, it refused to grant the plaintiffs' requested relief because it would create "serious disruption of the election process." 393 U.S. 23, 35 (1968). Specifically, "[i]t would be extremely difficult, if not impossible, for [the state] to provide still another set of ballots." *Id.* Likewise, in *Hunter v. Hamilton Cnty. Bd. of Elections*, the court of appeals explained how its calculus was affected "[b]ecause this election has already occurred." 635 F.3d 219, 244–45 (6th Cir. 2011). And again in *Memphis A. Philip Randolph Inst. v. Hargett*, the court explained that because "voting is well underway" and "early in-person voting had begun," it would not alter the rules of the election, even if the rules were mistakenly established by a lower court. 977 F.3d 566, 568–69 (6th Cir. 2020); *see also New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020) ("[W]e are not on the eve of the election—we are in the middle of it."); *Feldman v. Ariz. Sec'y of State*, 843 F.3d 366, 368 (9th Cir. 2016) (explaining that a key factor is whether "[t]he election process is []affected").

Because "[t]iming is everything," those concerns are multiplied many times over now that the election is already finished. *Crookston*, 841 F.3d at 398. The December 8 federal safe-harbor deadline for certification is fast approaching, and Pennsylvania could not possibly hold another election before that deadline. *Democratic Nat'l Comm. v. Wis. State Leg.*, ___ S. Ct. ___, No. 20A66, 2020 WL, 6275871, at *3

(U.S. Oct. 26, 2020) (opinion of Kavanaugh, J.) ("[R]unning a statewide election is a complicated endeavor."). Under these circumstances, the Sixth Circuit observed, "[c]ounting the ballots of qualified voters" is generally preferable where any error that occurred was no fault of their own; doing so "may enhance confidence in the integrity of our electoral processes, which is essential to the functioning of our participatory democracy." *Hunter*, 635 F.3d at 244–45 (alterations and quotations omitted).

"To disenfranchise citizens whose only error was relying on [state] instructions . . . . [is] fundamentally unfair." *Id.* at 243. The public has a "strong interest in exercising the 'fundamental political right' to vote." *Purcell*, 549 U.S. at 4 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)); *see also Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) ("There is a strong public interest in allowing every registered voter to vote."). "The possibility that qualified voters might be turned away" should "caution any [federal] judge." *Purcell*, 549 U.S. at 4. And the interests protected by *Purcell* are "best served" by "ensuring that qualified voters' exercise of their right to vote is successful." *Hunter*, 635 F.3d at 244.

This Court recently affirmed that principle. *Bognet v. Sec'y Pa.* invoked *Purcell* for the proposition that, even if "aspects of the now-prevailing regime in Pennsylvania are unlawful," "the electoral calendar was such that following it 'one last time' was the better of the choices available." ___ F.3d ___, No. 20-3214, 2020 WL 6686120 at *17 (3d Cir. Nov. 13, 2020). In *Bognet*, the plaintiffs sought to enjoin election offi-

cials from counting late-arriving mail-in ballots two weeks *before* Election Day. Asking a court to enjoin the state's rules for conducting the election two weeks *after* Election Day is even less reasonable.

The Trump campaign's requested relief is particularly unwarranted because, as explained more fully in the next section, they "delay[ed] in bringing this action." *Feldman*, 843 F.3d at 369. The "plaintiff brought the *Purcell* rule upon itself" by waiting to bring this lawsuit *after* the election was already held. *Common Cause Ind. v. Lawson*, No. 20-2877, 2020 WL 6255361, at *5 (7th Cir. Oct. 23, 2020) (per curiam); *see also Mi Familia Vota v. Hobbs*, Nos. 20-16932, 20-17000, 2020 WL 6044502, at *953 (9th Cir. Oct. 13, 2020) (per curiam) (explaining that plaintiffs' "extremely late filing" supports upholding state's rules).

B. Trump's claims are barred by laches

General principles of equity compel the same conclusion. *See Democratic Nat'l Comm. v. Wis. State Leg.*, ___ S. Ct. ___, No. 20A66, 2020 WL 6275871, at *13 (Oct. 26, 2020) (Kagan, J., dissenting) ("At its core, *Purcell* tells courts to apply, not depart from, the usual rules of equity."). The Trump campaign was aware of Pennsylvania counties' ballot-curing measures in October. It knew of Pennsylvania's general rules governing canvass watching prior to Election Day. And it became aware of how counties were implementing those canvass-watching rules on Election Day, at the latest. But it failed to seek any of the available remedies until it became apparent that Biden was the popular-vote winner in Pennsylvania. Only then, nearly a week *after*

Election Day, did Trump file this suit. The campaign now asks for a remedy that would retroactively disenfranchise voters. Basic principles of equity bar that result.

Claims seeking equitable relief under § 1983 are subject to the doctrine of laches. *See Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988); *Cannon v. Univ. Health Scis./The Chicago Medical School*, 710 F.2d 351, 358–59 (7th Cir. 1983); *Clyde v. Thornburgh*, 533 F. Supp. 279, 284 (E.D. Pa. 1982). Courts in § 1983 cases look to federal law in determining whether laches bars the requested relief. *See Cannon*, 710 F.2d at 358–59 (citing *Costello v. United States*, 365 U.S. 265, 282 (1961), to define laches defense). In the Third Circuit, laches applies when there is "'(1) an inexcusable delay in bringing the action and (2) prejudice.'" *In re Mushroom Transp. Co.*, 382 F.3d 325, 337 (3d Cir. 2004) (quoting *United States Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 208 (3d Cir. 1999)).

Laches has particular force in the context of election challenges. Indeed, laches often bars equitable relief in actions brought by tardy plaintiffs *prior* to the relevant election. *See Navarro v. Neal*, 904 F. Supp. 2d 812, 816-817 (N.D. Ill. 2012) (collecting cases); *see also Stein v. Boockvar*, Civ. No. 16-6287, 2020 WL 2063470, at *19 (E.D. Pa. Apr. 29, 2020). And for good reason. Plaintiffs who sleep on their rights only to bring last-minute challenges create "a situation in which any remedial order would throw the state's preparations for the election into turmoil." *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004). By strictly applying laches in the election setting, courts properly encourage parties to litigate their claims at the earliest possible time, resulting in the least disruption to the election and, ultimately, the voters. *See*

Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 998 (2005) ("Courts should see it as in the public interest in election law cases to aggressively apply laches so as to prevent litigants from securing options over election administration problems.").

The potential for chaos caused by tardy claims is only increased when, as here, the challenge is brought *after* the election and when the votes have already been counted. Voiding an election "is a drastic if not staggering remedy." *Soules*, 849 F.2d at 1180 (9th Cir. 1988) (internal quotation marks omitted). And the potential for sandbagging is particularly acute. Indeed, "failure 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." *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (internal quotation marks omitted); *see also Golden v. Gov't of the Virgin Is.*, Nos. 1:05-CV-00005RLFGWC, CIV.2005/0005, 2005 WL 6106401, at *5 (D.V.I. Mar. 1, 2005) (finding laches barred relief where plaintiffs "wait[ed] to see whether their candidate of choice won the one certified seat, before bringing a legal action"). Simply put, plaintiffs cannot sit on their rights and then, only when they have lost, seek to disenfranchise others who voted according to then-unchallenged state election procedures.

That is exactly what Trump seeks to do here. The campaign had every means to challenge counties' ballot-curing policies prior to initiating this lawsuit. It should

have been aware at least as early as the Pennsylvania Supreme Court's September 17 decision in *Pennsylvania v. Boockvar* that counties were potentially permitted to provide notice and opportunity to cure mail-in ballots. After all, the petitioners in that case asked the Pennsylvania high court to declare that counties were *required* to do so, and the court found they were not. No party asked the court to declare that counties were *precluded* from such practices, and so the court did not reach that question. *See Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, at *374 (Pa. Sept. 17, 2020). Thus, not only was the campaign on notice that the legality of ballot curing was an issue that should be addressed well before the election, but the Pennsylvania Supreme Court was available as a forum for settling exactly that question in an orderly way, and the campaign chose not to avail itself of it.

Similarly, the Trump campaign's own complaint alleged that Philadelphia County began contacting voters about curing their ballots before Election Day. First Am. Compl., ECF No. 125, ¶ 127. News reports from mid-October similarly reported that some counties in Pennsylvania were allowing voters to cure mail-in ballots while others were not.[3] The campaign further alleged that the Secretary of State "encouraged" ballot-curing measures, also prior to Election Day. First Am. Compl.

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[3] *See, e.g.*, Ryan Eldredge, *Some Pennsylvania Counties Offer Second Chances at Mail Ballots, Others Do Not*, WHP-TV (Harrisburg) (Oct. 15, 2020), https://local21news.com/news/local/some-pennsylvania-counties-offer-second-chances-at-mail-ballots-others-do-not

¶ 129. And even as to activities that occurred on Election Day, Pennsylvania law allows for expeditious same-day hearings, even going so far as to require the courts in each county to remain in "continuous session" for "so long . . . as it may appear that the process of said court will be necessary to secure a free, fair and correct computation" of the votes. 25 Pa. Cons. Stat. § 3046. Allowing Election-Day access to such procedures protects states'—and voters'—interest in having any arguable illegality in the voting system worked out prior to final tabulation of the results. *See Soules*, 849 F.2d at 1180 (describing the "extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity"). If the Trump campaign believed counties were engaged in unlawful activity on or prior to Election Day, it had every reason to file suit then—not lay in wait until it became clear that President-Elect Biden had won the popular vote in Pennsylvania.

While the campaign seeks to press claims related to canvass-watching policies that were not included in the operative First Amended Complaint, it also had ample means to get legal clarification or lodge those complaints prior to filing this lawsuit. Pennsylvania's election code itself provides that only "[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee and mail-in" during both canvassing and pre-canvassing. 25 Pa. Cons. Stat. § 3146.8(g)(1.1), (2). Guidance issued the week before Election Day underscored these limitations and imposed

a social-distancing requirement of six feet.[4] If the campaign felt, as it now alleges (First Am. Compl. ¶ 135), that it needed these rules to be construed and applied in a certain way to make it possible to "actually observe the ballots," the time to press that point was then, not after the election. And yet, apart from bringing isolated challenges regarding two counties, neither the Trump campaign nor the other plaintiffs availed themselves of those procedures. That failure dooms their broad-based attack on the election results now.

Trump's dilatory behavior is more than enough to bar the campaign's claims under laches. In similar contexts, courts have found that such "prejudicial and unnecessary delay alone provides ample grounds to deny" injunctive relief, *Stein v. Cortes*, 223 F. Supp. 3d 423, 437 (E.D. Pa. 2016). Indeed, "[c]ourts will consider granting post-election relief *only* where the plaintiffs were not aware of a major problem prior to the election or where by the nature of the case they had no opportunity to seek pre-election relief," *Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979) (emphasis added); *see also*, *e.g.*, *Soules*, 849 F.2d at 1182. That makes good sense. When a plaintiff sits on her rights until after she has lost the election and then seeks to overturn the results through litigation, it prejudices not just the winning candidate but also the voters, the democratic process, and the public's interest in the orderly

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[4] Pa. Dep't of State, *Guidance Concerning Poll Watchers and Authorized Representatives* (Oct. 28, 2020), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Poll%20Watcher%20Guidance%20Final%2010-6-2020.pdf.

administration of elections. *See* Samuel L. Bray, *System of Equitable Remedies*, 63 UCLA L. Rev. 530, 585 (2016) (explaining that laches "serves as a reminder to judges that an equitable remedy can have different effects at different points in time, and that this temporal variation invites opportunistic behavior by litigants"). For that reason alone, the Trump campaign's claims related to counties' ballot-curing and canvass-watching policies cannot sustain the relief it seeks.

II. The Trump campaign seeks an extreme and unprecedented remedy that, if granted, would undermine fundamental pillars of democracy.

A federal court order interfering in the certification of a state's election results would be unprecedented, and for good reason. Granting such relief would undermine public confidence in the democratic process. Indeed, it would invert the democratic process by having a court assume the authority to install a candidate who received fewer votes. It would also be inconsistent with basic principles of federalism, under which it is a state's prerogative—not the federal courts'—to declare that an election has failed. And it would disrupt the peaceful transfer of power.

A. Enjoining Pennsylvania's certification of its election results would invalidate millions of votes.

The Trump campaign's request to effectively nullify many or all of the votes in Pennsylvania violates "a proposition indisputable to our democratic process: that the lawfully cast vote of every citizen must vote." *Bognet*, 2020 WL 6686120, at *1 (3d Cir. 2020). It is also unprecedented in the history of the United States. The District Court was "unable to find any case in which the plaintiff has sought such a drastic

remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated." *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020). Indeed, to Amici's knowledge, no court in the history of the United States has enjoined state election officials from canvassing and certifying votes in a political election when a plaintiff alleged that some of the votes were cast illegally. "The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter," *id.* at *13 (quoting *Perles v. Cnty. Return Bd.*, 202 A.2d 538, 540 (Pa. 1964)), and the District Court was right not to break new ground here.

B. The campaign's desired remedy would violate foundational principles of judicial restraint, undermine public confidence in elections, and trample on state sovereignty.

Entering the campaign's desired order would subvert democracy by elevating Trump's preferred, partisan outcome over Pennsylvania law and democracy. That is not how the constitutional system works. *Cf. Donald J. Trump for President, Inc.*, 2020 WL 6821992, at *13 ("It is not in the power of this Court to violate the Constitution."). Entering the requested order would inevitably be perceived as the courts playing an inappropriately partisan role and second-guessing the will of the voters. But the strength of our governmental institutions depends on public faith in government institutions. "[C]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Bognet*, 2020 WL 6686120, at *17 (quoting *Purcell*, 549 U.S. at 4). That faith would be dangerously weakened if

courts cast aside an entire state's votes to achieve a different result. *Cf. Wood v. Raffensperger*, Civil Action No. 1:20-cv-04651, 2020 WL 6817513, at *8 (N.D. Ga. Nov. 20, 2020) (plaintiff's request to "call[] into question" "over one million absentee ballots" "could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process"). At bottom, the campaign's effort to change the rules and throw out the score after the game is over is a direct attack on public confidence in the democratic process. It should not succeed.

The relief sought here would also represent an unprecedented intrusion over state sovereignty in running elections. The power to certify a state's election results is a state power; the choice of whether electors are chosen by legislators or by the people themselves is a state choice. U.S. Const. Art. II, § 1, cl. 2; U.S. Const. Amend. XII; 3 U.S.C. § 6. The Constitution conveys to the states "'the broadest power of determination' over who becomes an elector." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)). "Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded." *McPherson*, 146 U.S. at 35.

Pennsylvania's legislature made its decision about how the Commonwealth's electors are to be chosen: by its citizens' votes. *See* 25 Pa. Cons. Stat. §§ 3158, 3159,

3166. Pennsylvania's voters made *their* decision, choosing Joseph Biden by a margin of over 80,000 votes. *See* Pa. Dep't of State, *2020 Presidential Election*, https://www.electionreturns.pa.gov/ (last visited Nov. 24, 2020). And the Secretary of State, carrying out one of her most important duties, has indicated that this margin suffices to determine the victor. *See* Joe Brandt, *Pennsylvania Won't Need a Recount to Certify Biden Victory, State Says*, NBC10 News (Nov. 13, 2020).

The campaign's request to cast aside all of those decisions cannot be squared with core principles of federalism and respect for state sovereignty. In substance, the campaign asks the federal courts to nullify Pennsylvania's election choices. It seeks an extraordinary exercise of federal power in a context where the role of the federal courts is limited, particularly when there is no claim that anyone's vote was denied or anyone's vote made more difficult. *See Bognet*, 2020 WL 6686120, at *1 ("The Elections Clause effectively gives state governments the 'default' authority to regulate the mechanics of federal elections.") (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). Federal court intervention that significantly disrupts the state electoral process is "not to be taken lightly" and "go[es] to the heart of our notions of federalism." *Page v. Bartels*, 248 F.3d 175, 195–96 (3d Cir. 2001).

C. Timely certification of election results is essential to an orderly transition of power.

Finally, an order regarding certification would undermine the smooth transition of power. The campaign would have this Court effectively jettison the statutorily established legal mechanism for determining the election winner—certification by

Pennsylvania officials based on the popular-vote winner—in favor of selection by a majority of state legislators. At a minimum, this would delay the declaration of a winner, as Pennsylvania's deadline for county boards of elections to file returns was yesterday, and Electoral College voting is now 20 days away, on December 14.

Delay in certifying the election winner interferes with the new administration's ability to carry out vital transition responsibilities. Indeed, the existence of this controversy has already done so. *See* Brian Naylor, *Trump Appointee Delays Biden Transition Process, Citing Need for 'Clear' Winner*, NPR (Nov. 10, 2020). That has serious consequences. The authors of the 9/11 Commission Report concluded that the shortened transition for George W. Bush's administration impaired its national security preparedness, and a co-author of the 9/11 report warned this month that transition delays open up "dangerous gaps in the security posture of the United States." Lucien Bruggerman, *Trump refusal to ease Biden transition opens 'dangerous gaps' in nation's security: Experts*, ABC News (Nov. 11, 2020). Timely and orderly transition is all the more urgent in light of the ongoing covid-19 global pandemic. *See* Adam Carncryn, *Transition delay hampers Biden's ramp-up of Covid-19 response*, Politico (Nov. 10, 2020). Disrupting timely certification derails the effective transition of power.

* * *

Never before have the courts faced a presidential candidate who refused to accept the declared result of a national election. The integrity of our democratic system demands that winners be determined by elections, not by the courts. There is no

good reason for the federal courts to be party to the disruption that would be created by granting the relief sought here.

Respectfully submitted,[5]

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[5] Counsel gratefully acknowledge the work of Hannah Mullen, a Clinical Fellow at Georgetown Law's Appellate Courts Immersion Clinic, and Areeba Jibril, a recent Michigan Law graduate, who played key roles in researching and writing this brief.

COMBINED CERTIFICATIONS

1. I am a member of the bar of the United States Court of Appeals for the Third Circuit. 3d Cir. L.A.R. 28.3(d).

2. This brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 4,755 words, excluding the parts of the brief exempted by Rule 32(f) and Third Circuit Local Appellate Rule 29.1(b).

3. I certify that today I served a copy of this brief on all counsel for the parties electronically through this Court's docketing system.

4. The text of the electronic brief is identical to the text in the paper copies. 3d Cir. L.A.R. 31.1(c).

5. The Avast Antivirus virus detection program, version 20.9.2437, has been run on this file and no virus was detected. 3d Cir. L.A.R. 31.1(c).

6. This brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in fourteen-point Equity font.

November 24, 2020

/s/ *Matthew Stiegler*
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