

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MIKE KELLY, SEAN PARSELL,
THOMAS A. FRANK, NANCY
KIERZEK, DEREK MAGEE, ROBIN
SAUTER, MICHAEL KINCAID, and
WANDA LOGAN,

Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, PENNSYLVANIA
GENERAL ASSEMBLY, THOMAS W.
WOLF, and KATHY BOOCKVAR,

No. 620 MD 2020

Respondents,

DNC SERVICES CORP. / DEMOCRATIC
NATIONAL COMMITTEE,

Proposed Intervenor-
Respondent.

**PROPOSED INTERVENOR-RESPONDENT'S PRELIMINARY
OBJECTIONS**

Proposed-Intervenor DNC Services Corp. / Democratic National Committee (“DNC”) hereby submits these Preliminary Objections to the November 21, 2020 Petition for Review (the “Petition”) of Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan (collectively, “Petitioners”). In support of these Preliminary Objections, DNC states the following:

INTRODUCTION

Petitioners’ lawsuit asks this Court to disenfranchise millions of Pennsylvanians by declaring, well after the election and on the eve of certification, that Act 77—a law passed by the General Assembly over a year ago, which allowed millions of Pennsylvanians to vote by mail in the recent general election and the June primary—is unconstitutional. This is but the latest attempt to disenfranchise these voters in Pennsylvania courts: just two days ago, Judge Brann of the United States District Court for the Middle District of Pennsylvania dismissed an action that similarly demanded wholesale disenfranchisement of those who voted by mail—a case in which Petitioners here attempted to intervene—noting that the court had “been unable to find any case in which a 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).

Petitioners’ draconian remedy is similarly unprecedented and suffers from numerous legal flaws. First, Petitioners provide no explanation for their decision to wait for more than a year, after two elections had been conducted under Act 77, and well after mail-in ballots have already been cast and counted in the general election, to bring this challenge, nor do they plead any facts to demonstrate that they have suffered an injury from Act 77. Even giving their Petition its most charitable reading

and inserting facts that Petitioners do not allege, their concerns with the law are nothing more than generalized grievances insufficient to give them standing to bring this action.

Beyond these preliminary defects, Petitioners' claims simply misread the Constitutional provisions that they assert prohibit Act 77's creation of mail-in voting. Pennsylvania's General Assembly has broad constitutional authority to pass any law not prohibited by the state or federal constitutions, and Petitioner points to no provision in either constitution that restricts the General Assembly from expanding access to the franchise in this manner; they merely assume that because the Constitution requires the General Assembly to provide absentee voting for certain classes of voters, the absence of a similar *requirement* for other voters precludes the General Assembly from allowing them to vote by mail. That is not how the Constitution works. A requirement that the General Assembly provide absentee voting for some says nothing about the legislature's authority to extend mail voting for others.

Finally, Petitioners' requested relief would violate the Pennsylvania and United States Constitutions and is an affront to democracy. It is incredible that a sitting United States congressman would allow such a claim to be brought in his name. Having filed this suit nearly three weeks after the general election, Petitioners seek to disenfranchise millions of Pennsylvanians by asking this Court to enjoin

certification of the election (scheduled to occur today) and to count only what Petitioners perceive as the “legal votes” in the election or, alternatively, to direct Pennsylvania’s General Assembly to appoint Pennsylvania’s presidential and vice presidential electors. This relief would eviscerate the constitutional rights of voters who relied on the procedures advertised and administered by the Commonwealth, pursuant to Act 77, in casting their ballots. *See Griffin v. Burns*, 570 F.2d 1065, 1075-76 (1st Cir. 1978) (holding state cannot, constitutionally, invalidate absentee and mail-in ballots the state had induced voters to use). Judge Brann of the Middle District of Pennsylvania summed up the absurdity of this request in his recent opinion, writing that a request to enjoin certification “would necessarily require invalidating the ballots of every person who voted in Pennsylvania. Because this Court has no authority to take away the right to vote of even a single person, let alone millions of citizens, it cannot grant [the] requested relief.” *Donald J. Trump for President, Inc.*, 2020 WL 6821992, at *13. Or, to put a finer point on it, “[t]his is simply not how the Constitution works.” *Id.* at *12.

There are myriad reasons to deny Petitioners’ requested relief, and like the dozens of courts around the country that have rejected similar baseless attempts to overturn the results of the election and nullify the will of the people, this Court should dismiss this case expeditiously.

SUMMARY OF ARGUMENT

1. Petitioners' claims are barred by the doctrine of laches. The General Assembly enacted Act 77 over a year ago, deferring its implementation to elections held after April 28, 2020. Yet Petitioners failed to bring their Petition until after two elections had occurred under the law's provisions. Rather than sue sometime in the *year* between Act 77's passage and the November general election, Petitioners opted to "lay by and gamble" on the results of the election, only to turn around and ask the Court "to undo the ballot results." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc) (quotation marks omitted). They now seek a remedy that would prejudice Respondents and the DNC, and, critically, disenfranchise millions of Pennsylvanians. In these circumstances, the equitable doctrine of laches requires the Court to deny Petitioners' requested relief and dismiss this action.

2. Petitioners lack standing to bring this action. They have not alleged *any* injury, much less one sufficiently concrete and particularized to obtain injunctive relief from this Court.

3. Even accepting all of Petitioners' factual allegations as true, dismissal is appropriate here because Act 77 is constitutional. It is axiomatic that Article II, § 1 of Pennsylvania's Constitution grants the General Assembly authority to pass any law not expressly or impliedly prohibited by another provision of the Pennsylvania Constitution or by the federal constitution. Petitioners' argument that the

Pennsylvania Constitution prohibits no excuse, mail-in voting misreads Article VII, § 1 and Article VII, § 14 of the Pennsylvania Constitution, and injects into these provisions nonexistent restrictions on the General Assembly’s authority.

4. Petitioners’ requested relief would also violate the Pennsylvania Constitution and the United States Constitution. Petitioners cite no authority to suggest that this Court can invalidate the votes of millions of Pennsylvanians *after* they have voted in reliance on procedures set forth in existing statutes and administrative guidance—and there is none. Such an unprecedented act of mass disenfranchisement would violate the Pennsylvania Constitution’s guarantee of “free and equal elections,” Pa. Const. art. I, § 5, equal protection, and due process, Pa. Const. art. I, §§ 1, 11, 26, as well as the U.S. Constitution’s guarantee of the fundamental right to vote, due process, and equal protection.

BACKGROUND

5. On November 21, 2020—almost three weeks after the November general election—Petitioners, who consist of candidates for federal and state office and individual voters, Pet. ¶¶ 2-9, filed this lawsuit challenging the procedures under which the Commonwealth’s general election was conducted. In particular, Petitioners claim the Pennsylvania General Assembly’s Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”) is unconstitutional.

6. Act 77 was signed into law and went into effect on October 31, 2019. Pet. ¶ 54. The Act allowed Pennsylvanians to “vote by mail without providing an excuse.” *Id.* at ¶ 55. The Act also contained omnibus amendments to Pennsylvania’s election code, including the creation of a 50-day mail-in voting period and permanent mail-in and absentee ballot lists, the addition of 15 extra days for voter registration, and the extension of the mail-in and absentee ballot submission deadline until 8:00 pm on Election Day. *See id.* (citing Press Release, Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting, Governor Tom Wolf (Oct. 31, 2019), <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>).

7. The June 2020 primary and the November general election were conducted under Act 77. *See* Pet. ¶¶ 61, 62.

8. Over 6.8 million Pennsylvanians voted in the general election, including up to 2.6 million using mail ballots. *See* PENNSYLVANIA DEPARTMENT OF STATE, *Unofficial Returns*, available at: <https://www.electionreturns.pa.gov/> (last visited Nov. 22, 2020).

9. The process of certifying the returns from that election is currently underway. Pet. ¶ 63. Today is the deadline for counties to certify their election results to Secretary Boockvar. 25 P.S. § 2642(k).

10. Petitioners seek a judgment declaring that Act 77 is void in its entirety and that any certification of results which includes mail-in ballots is void. Pet. at 22. Petitioners also seek an injunction prohibiting Respondents from certifying the results of the general election for any race that includes mail-in ballots, and requiring Respondents to certify the results of the election based solely on non-mail-in votes or, alternatively, directing the Pennsylvania General Assembly to appoint Pennsylvania's presidential and vice presidential electors. Pet. at 24.

11. Petitioners name as respondents the "Commonwealth of Pennsylvania," the "Pennsylvania General Assembly," Governor Wolf, and Secretary Boockvar. Pet. ¶¶ 10-11, 13-14.

12. Petitioners claim Act 77 is unconstitutional because it was passed without "following the necessary procedure," to provide for no-excuse mail-in voting, which they allege requires a constitutional amendment. Pet. ¶ 1; *see also* Pet. ¶¶ 27, 53.

13. Petitioners do not claim they were injured by Act 77's alleged unconstitutionality. *See generally* Pet.

PRELIMINARY OBJECTION I
Pa. R. Civ. P. 1028(a)(4) DEMURRER (LACHES)

14. The DNC incorporates the foregoing paragraphs as if set forth at length.

15. Petitioners could have brought this action at any time since October 31, 2019, when Act 77 was signed into law—over a year ago—but instead they chose

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.” *Toney*, 488 F.2d at 314 (internal quotation marks omitted). Basic principles of equity require the dismissal of Petitioners’ claims and the sound rejection of their gamesmanship.

16. “Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another.” *Stilp v. Hafer*, 553 Pa. 128, 132, 718 A.2d 290, 292 (1998) (citing *Sprague v. Casey*, 520 Pa. 38, 45, 550 A.2d 184, 187 (1988)). “[L]aches may bar a challenge to a statute based upon procedural deficiencies in its enactment.” *Stilp*, 553 Pa. at 136, 718 A.2d at 294. Here, the “relevant facts are not in dispute.” *Stilp*, 553 Pa. at 134, 718 A.2d at 293 (citing *Tudor Dev. Grp., Inc. v. U.S. Fidelity & Guaranty Co.*, 768 F. Supp. 493, 496 (M.D.Pa.1991)); *Holiday Lounge, Inc. v. Shaler Enterprises Corp.*, 441 Pa. 201, 204, 272 A.2d 175, 177 (1971) (“laches may be raised and determined by preliminary objection”).

17. Courts apply this equitable principle strictly in cases in which plaintiffs wait until after an election has been conducted to file suit, even in cases with much more egregious allegations than the ones at issue here. For example, in *Tucker v. Burford*, 603 F. Supp. 276 (N.D. Miss. 1985), the court refused to void an election where the defendants conceded that the districts were malapportioned because “to grant the extraordinarily relief of setting aside an election . . . would be to embrace

the hedging posture” that courts have discouraged. *Id.* at 279. This Court should likewise refuse to license Petitioners’ hedging and dismiss their belated claims

18. Thus, laches bars claims—including in the election context—when there has been “(1) a delay arising from [Petitioners’] failure to exercise due diligence and (2) prejudice to the [Respondents] resulting from the delay.” *Stilp*, 553 Pa. at 134, 718 A.2d at 293 (citing *Sprague*, 520 Pa. at 45, 550 A.2d at 187-88). Both elements are clearly met here.

19. *First*, Petitioners have been, or should have been, aware of both Act 77 and the procedures used to enact it since at least October 2019. *See Taylor v. Coggins*, 244 Pa. 228, 231, 90 A. 633, 635 (1914) (“The test is not what the plaintiff knows, but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him.”) (internal quotation marks and citations omitted); *see Stilp*, 553 Pa. at 135, 718 A.2d at 294 (same). Here, “the procedures used to enact [Act 77] were published in the Legislative Journal and available to the public,” and “[t]he provisions of the Constitution that the [Respondents] purportedly violated were also readily available” since at least October 2019. *See id.*; Pet. ¶¶ 54-55. In fact, the November general election was the *second* election administered under Act 77 that Petitioners Kelly, Parnell, and Logan ran in as candidates.

20. *Second*, Respondents, the DNC, and all Pennsylvanians will be severely prejudiced should Petitioners prevail. “Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during the period the complainant failed to act.” *Stilp*, 553 Pa. at 135, 718 A.2d at 294 (citation omitted). Here, the change in condition would be monumental. Respondents, including Secretary Boockvar, conducted a general election under the provisions of Act 77. Pet. ¶¶ 61-62. Millions of Pennsylvanians cast ballots in reliance on these same provisions. *See* PENNSYLVANIA DEPARTMENT OF STATE, *Unofficial Returns*, available at: <https://www.electionreturns.pa.gov/>. President-elect Joe Biden leads the presidential race in the Commonwealth by more than 80,000 votes and is set to receive its 20 electoral votes. *Id.* And as Petitioners admit, “[t]he process of certifying the returns and results of the General Election is currently underway.” Pet. ¶ 63. 25 P.S. § 2642(k). The resulting prejudice to Respondents, the DNC, and Pennsylvania voters if the Court were to grant the relief requested here could not be more severe.

21. A court’s “failure to require prompt pre-election action . . . as a prerequisite to post-election relief may 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.” *Toney*, 488 F.2d at 314 (internal quotation marks omitted). Accordingly, “[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).

22. Because Petitioners fail to offer *any* explanation for their year-long delay, and Respondents, the DNC, and all Pennsylvania voters would be severely prejudiced if Petitioners’ requested injunction were granted, the equitable doctrine of laches forecloses Petitioners’ claims and requires dismissal of this action.

PRELIMINARY OBJECTION II
Pa. R. Civ. P. 1028(a)(4) - DEMURRER (LACK OF STANDING)

23. The DNC incorporates the foregoing paragraphs as if set forth at length.

24. To have standing to sue, a plaintiff must have an interest in the litigation that is “substantial,” “direct,” and” immediate.” *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-81, 464 Pa. 168, 191 (1975). For an interest to be “substantial,” “there must be some discernible adverse effect to some interest other than the abstract interest of all citizens.” *Id.*, 464 Pa. at 195, 346 A.2d at 282. That is, “it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Id.*, 464 Pa. at 192, 346 A.2d at 280-81.

25. These requirements—that a litigant’s interest be substantial, immediate, and direct—mirror the federal requirements to maintain standing under

Article III. Indeed, “in determining issues of standing, [Pennsylvania courts] ha[ve] looked to the federal courts’ interpretation of Article III of the United States Constitution.” *Hous. Auth. of Cty. of Chester v. Pa. State Civil Serv. Comm’n*, 556 Pa. 621, 629, 730 A.2d 935, 939 (1999).

26. Petitioners lack standing to maintain this action because they have alleged no injury at all. *See generally Wm. Penn Parking Garage, Inc.*, 464 Pa. 168, 346 A.2d 269 (holding plaintiffs must assert and suffer an injury to have standing to sue). The Petition identifies Representative Kelly, Mr. Parnell, and Ms. Logan as candidates for office (hereinafter the “Candidate Petitioners”). Pet. ¶¶ 2-4. But the Petition does not allege that the Candidate Petitioners lost their races, are in jeopardy of losing their races, or were harmed in any way by Act 77; indeed, the Petition alleges Representative Kelly won re-election to Congress. *Id.* ¶ 2. The Candidate Petitioners thus have alleged no injury, and this Court cannot supply facts that were not pled. *See Linda Coal & Supply Co. v. Tasa Coal Co.*, 416 Pa. 97, 101-02, 204 A.2d 451, 454 (1964). Similarly, Mr. Frank, Ms. Kierzek, Mr. Magee, Mr. Kincaid, and Ms. Sauter (hereinafter the “Voter Petitioners”) simply identify themselves as qualified electors of Pennsylvania but make no attempt to explain how they are injured by Act 77. Pet. ¶¶ 5-9.

27. Thus, the Candidate and Voter Petitioners have done no more than allege that an act of the Pennsylvania General Assembly is unlawful. Pet. ¶¶ 65-87.

Even if that were true (which it is not), such an abstract injury would have been felt by all Pennsylvania voters equally and does not confer standing on any individual. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344, 348 (2006) (standing absent where plaintiff “suffers in some indefinite way in common with people generally”); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (holding the “generalized interest of all citizens in constitutional governance” is merely an “abstract injury” rather than the concrete injury that is essential to satisfy Art. III standing); *Bogner v. Sec'y of the Commonwealth of Pa.*, __ F.3d __, No. 20-3214, 2020 WL 6686120 at *8-12 (3d Cir. Nov. 13, 2020) (holding that voters’ generalized grievance that “unlawful” votes were counted is insufficient to support standing and that a candidate is not injured “in a particularized way when, in fact, all candidates in Pennsylvania, including [the plaintiff’s] opponent, are subject to the same rules”); *Stein v. Cortes*, 223 F. Supp. 3d 423, 432-433 (E.D. Pa. 2016) (holding candidate’s speculation that election’s integrity was compromised was too generalized to support standing).

28. Finally, to the extent the Candidate or Voter Petitioners intend to argue that their votes were diluted by “unlawful” mail-in ballots—putting aside the fact that they have made no such allegation—that argument has been rejected repeatedly as a basis for standing and would fail here for similar reasons. *See Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-966, 2020 WL 5997680 at *32 (W.D. Pa.

Oct. 10, 2020) (“claimed injury of vote dilution caused by possible voter fraud here is too speculative to be concrete”); *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 406-407 (E.D. Pa. 2016) (rejecting vote-dilution claim premised “on speculation that fraudulent voters may be casting ballots elsewhere” in the state).

29. For all of these reasons, the Petition should be dismissed for lack of standing.

PRELIMINARY OBJECTION III

Pa. R. Civ. P. 1028(a)(4) DEMURRER (FAILURE TO STATE A CLAIM)

30. The DNC incorporates the foregoing paragraphs as if set forth at length.

31. “The question presented by [] demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.” *N. Forests II, Inc. v. Keta Realty Co.*, 130 A.3d 19, 35 (Pa. Super. Ct. 2015). The law here is certain that no recovery is possible because Act 77 is not prohibited by the Pennsylvania or federal constitutions. Petitioners’ remedy, by contrast, asks this Court to violate both the Pennsylvania Constitution and the United States Constitution. Thus, the Petition should be dismissed for failure to state a claim.

32. Pennsylvania’s Constitution confers upon the General Assembly the authority to pass laws and to legislate on any matter not prohibited by the Pennsylvania or federal constitutions. *See Pa. Const. art. II, § 1* (granting “[t]he legislative power of this Commonwealth” to the General Assembly); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 147 (1853) (“If such Act be within the general

grant of legislative power, that is, if it be in its character and essence a law, and if it be not forbidden expressly or impliedly either by the state or federal constitution, it is valid.”).

33. It is thus axiomatic that the General Assembly may pass any law not prohibited by the state or federal constitutions. Act 77 does not violate any provision of either constitution. *See, e.g., Sharpless*, 21 Pa. at 147. Petitioners’ argument to the contrary rests on two provisions of Pennsylvania’s Constitution that they misread. First, Petitioners rely on Article VII, § 14, titled “Absentee Voting,” which provides that the General Assembly “shall, by general law, provide a manner in which” qualified voters who meet four defined qualifications that will make them unable to vote in person “may vote.” Petitioners read into this language (despite its absence from the text) a limitation that these are the *only* means by which the General Assembly can provide for voting that is not in-person absent a constitutional amendment.

34. Petitioners’ reading of Article VII, § 14 violates numerous bedrock rules of construction. First, “[w]hen the words of a [provision] are clear and unambiguous, ‘the letter of it is not to be disregarded under the pretext of pursuing its spirit.’” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (quoting 1 Pa. C.S. § 1921(b)). Here, the words of Article VII, § 14 provide simply that the General Assembly “shall” provide absentee voting as an option to certain

classes of voters. Nothing in the language proscribes the General Assembly from providing similar voting options to other classes of voters, and Petitioners offer no reason to suggest otherwise.

35. Moreover, even reaching outside the law's plain terms, Petitioners' interpretation is deeply flawed. When the General Assembly's intent is not clear from the plain language of its enactments, its intent must be ascertained by consulting the comprehensive list of factors set forth in 1 Pa. C.S. § 1921(c). *See also Pa. Associated Builders & Contractors, Inc. v. Commonwealth Dep't of Gen. Servs.*, 593 Pa. 580, 591, 932 A.2d 1271, 1278 (2007) (recognizing that when the "words of the statute are not explicit, the General Assembly's intent is to be ascertained by considering matters other than statutory language, like the occasion and necessity for the statute; the circumstances of its enactment; the object it seeks to attain; the mischief to be remedied; former laws; consequences of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations"). Petitioners offer no basis to conclude that the addition of Article VII, § 14 to the Pennsylvania Constitution in 1967 was meant to limit the class of voters who are permitted to vote by mail. Indeed, to the contrary, Petitioners acknowledge that the addition of Article VII, § 14 was meant to expand voting access. *See Pet. ¶ 21* (stating that the addition of Article VII, § 14 was meant "to expand the exceptions for which absentee voting would be allowed, beyond the

previously identified classes of active military and veterans”). Neither the plain language of Article VII, § 14, nor any inquiry into the General Assembly’s intent, reveals any prohibition on expanding voting by mail.

36. Petitioners only additional argument is that a “qualified elector” in Article VII, § 1 must have residence in the election district where they “offer to vote,” a phrase Petitioners baselessly contend requires in-person voting. *See* Pet. ¶¶ 68-69. Again, this interpretation finds no support in the text of Article VII, § 1 or any other provision of the Pennsylvania Constitution. A mail-in voter is no less a resident of their county than an in-person voter.

PRELIMINARY OBJECTION IV
Pa. R. Civ. P. 1028(a)(4) DEMURRER (LEGAL INSUFFICIENCY OF
REMEDY)

37. Beyond the fact that they have no basis for their restrictive interpretation of the law, Petitioners’ requested remedy—invalidating the votes of millions of Pennsylvanians—asks this Court to violate multiple provisions of Pennsylvania’s Constitution. Article I, § 5 of the Pennsylvania Constitution provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” The broad text of this provision “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’”

League of Women Voters v. Commonwealth of Pa., 645 Pa. 1, 178 A.3d 737, 804

(2018). The Pennsylvania Constitution also provides for equal protection of the laws and due process on similar terms to those provided by the federal constitution. *See Pa. Const. art. I, §§ 1, 11, 26; J.P. v. Dep’t of Human Servs.*, 170 A.3d 575, 580 (Pa. Commw. Ct. 2017); *Com. v. Albert*, 563 Pa. 133, 138, 758 A.2d 1149, 1151 (2000). Invalidating the votes of millions of Pennsylvanians after an election—who voted in reliance on facially valid Pennsylvania statutes and administrative guidance establishing procedures for mail-in ballots to be counted—would plainly violate these constitutional provisions.

38. In addition, Petitioners’ requested relief would violate the U.S. Constitution in multiple ways. First, it would eviscerate the right to vote, which includes the right to have one’s ballot counted. *See Reynolds*, 377 U.S. at 554. Second, it would violate the federal due process rights of the millions of Pennsylvanians who voted by mail in reliance on the procedures set forth in Act 77, which were adopted over a year ago. *See Griffin*, 570 F.2d at 1075-76 (holding state cannot, constitutionally, invalidate absentee and mail-in ballots the state had induced voters to use). And, third, it would plainly violate the equal protection rights of millions of Pennsylvanians who voted by mail to arbitrarily discard their votes. *See Donald J. Trump for President, Inc.*, 2020 WL 6821992, at *12 (holding a court cannot order a remedy involving “the withdrawal of a benefit [that] would necessarily violate the Constitution.”).

39. Petitioners are not entitled to relief because retroactively discarding all mail-in ballots weeks after the election violates both the Pennsylvania Constitution and the United State Constitution. For these reasons, too, Petitioners' lawsuit should be dismissed.

Dated: November 23, 2020

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**Motions for Admission Pro Hac Vice Forthcoming*

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Matthew I. Vahey
Matthew I. Vahey

CERTIFICATE OF SERVICE

I, Matthew I. Vahey, hereby certify that a true and correct copy of the foregoing document was served upon all counsel of record on November 23, 2020 by this Court's electronic filing system.

/s/ *Matthew I. Vahey*

Matthew I. Vahey