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68 MAP 2020

**IN THE SUPREME 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. 68 MAP 2020

Respondents,

DNC SERVICES CORP. / DEMOCRATIC  
NATIONAL COMMITTEE,

Proposed Intervenor-  
Respondent.

**[PROPOSED] JOINDER OF DNC TO APPLICATION OF RESPONDENTS  
COMMONWEALTH OF PENNSYLVANIA, GOVERNOR THOMAS W.  
WOLF, AND SECRETARY OF THE COMMONWEALTH KATHY  
BOOCKVAR FOR THE COURT TO EXERCISE EXTRAORDINARY  
JURISDICTION**

Pursuant to Pennsylvania Rule of Civil Procedure 2328, Proposed-Intervenor  
DNC Services Corp. / Democratic National Committee (“DNC”), by and through  
undersigned counsel, respectfully submits this [Proposed] Joinder to the Application  
of Respondents Commonwealth of Pennsylvania, Governor Thomas W. Wolf, and

Secretary of the Commonwealth Kathy Boockvar (collectively, “Respondents”) for the Court to Exercise Extraordinary Jurisdiction, and hereby states as follows:

## **I. INTRODUCTION**

Petitioners’ lawsuit asked the Commonwealth Court to disenfranchise millions of Pennsylvanians by declaring, well after the election, 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, and to bar the Commonwealth from certifying its election results as set forth under Pennsylvania law. Even though Petitioners’ claims are entirely meritless, the Commonwealth Court briefly entertained them, entering an order enjoining Pennsylvania from taking further steps to finalize its election results. The Commonwealth Court’s Order was wholly unjustified. Proposed Intervenor DNC urges this Court to grant the Respondents’ Application for Extraordinary Jurisdiction, stay the Commonwealth Court’s Order, and dismiss the Petition with prejudice.

## **II. STATEMENT OF JURISDICTION**

For the reasons discussed below and in Respondents’ Application, the Court has jurisdiction to take this case through its Extraordinary Jurisdiction. *See* 42 Pa.C.S. § 726; Pa.R.A.P. 3309.

### **III. STATEMENT OF THE CASE**

The DNC incorporates by reference the Background from the Preliminary Objections it filed in the Commonwealth Court, which are attached as Exhibit A. On November 25, 2020, Respondents filed their application for this Court to Exercise Extraordinary Jurisdiction. Petitioners filed their response on November 27, 2020.

### **IV. BASIS FOR EXTRAORDINARY JURISDICTION**

The Commonwealth Court's Order is an act of unprecedented judicial intervention in the Commonwealth's electoral processes. While it is unclear what processes, exactly, the court can even enjoin at this point, the Commonwealth Court's Order attempts to interfere with the ongoing certification of the Commonwealth's elections, doing so based on weak and contradictory constitutional arguments which Petitioners have prejudicially delayed in bringing to a judicial forum. Such last-minute judicial intervention would result in significant confusion, and it undermines the integrity of the Commonwealth's elections and reduces confidence in them. These concerns, which are of immediate and significant public concern, justify extraordinary jurisdiction in this matter. *See* 42 Pa.C.S § 726; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766–67 (Pa. 2018); *Bd. of Revisions of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2004); *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001).

Indeed, the need for immediate action to protect the public interest is particularly urgent here given the plain unconstitutionality of the remedies Petitioners seek, concerns which the DNC is uniquely situated to raise. Petitioners' requested remedies violate the Pennsylvania and federal Constitutions in four distinct ways. *First*, discarding mail ballots (which millions of Pennsylvania voters timely cast in accordance with procedures prescribed by the Pennsylvania legislature) would unduly burden the right to vote, which includes "the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). *Second*, Petitioners' requested relief would violate due process because disenfranchising nearly 38% of Pennsylvania's voters who cast their ballots lawfully—and did so in reliance on officials' assurances that votes cast by mail would be treated the same as votes cast in person—reaches and surpasses the point of "patent and fundamental unfairness." *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). *Third*, discarding these ballots would violate equal protection, as Petitioners' request to throw out all mail ballots would selectively disenfranchise voters who cast their ballots by mail. *Fourth*, Petitioners' requested relief violates the Free and Equal Elections Clause of the Pennsylvania Constitution, which requires that election procedures must "make . . . votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the

Commonwealth.” *League of Women Voters*, 178 A.3d at 804. Petitioners’ requested remedies would count the votes of similarly situated voters differently.

## **V. ARGUMENT**

Proposed-Intervenors’ arguments are set forth fully in their Commonwealth Court Preliminary Objections, attached as Exhibit A, their Commonwealth Court Amicus Brief in Support of Preliminary Objections, attached as Exhibit B, their Commonwealth Court Brief as *Amicus Curiae* in Opposition to Petitioners’ Motion for Emergency/Special Prohibitory Injunction, attached as Exhibit C, and their Supplemental Amicus Brief in Response to the Commonwealth Court’s November 25, 2020 Order, attached as Exhibit D.

## **VI. CONCLUSION**

For the foregoing reasons, as well as those set forth in Respondents’ Application, this Court should immediately take jurisdiction of this case, stay the Commonwealth Court’s Order and any further Commonwealth Court proceedings in their entirety, grant the DNC’s Preliminary Objections, and dismiss this action with prejudice.

Dated: November 27, 2020

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## **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

## **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 27, 2020 by this Court's electronic filing system.

/s/ *Matthew I. Vahey*

Matthew I. Vahey

# Exhibit A

**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,

Respondents,

DNC SERVICES CORP. / DEMOCRATIC  
NATIONAL COMMITTEE,

Proposed Intervenor-  
Respondent.

No. 620 MD 2020

**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:

# Exhibit A

## **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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## **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

# Exhibit B

**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 AMICUS BRIEF IN  
SUPPORT OF PRELIMINARY OBJECTIONS**

Proposed-Intervenor DNC Services Corp. / Democratic National Committee (“DNC”), pursuant to this Court’s order, hereby submits this amicus brief in support of its 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”).<sup>1</sup> In support of this amicus brief, DNC states the following:

## **INTRODUCTION**

More than a year after the General Assembly passed Act 77 with overwhelming bipartisan support, well after an election in which more than 2.6 million Pennsylvania voters voted by mail, and on the eve of certification of the results of that election, Petitioners bring this lawsuit asking this Court to disenfranchise millions of Pennsylvanians by declaring that Act 77, a law that allowed 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 all 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

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<sup>1</sup> The DNC hereby incorporates its Preliminary Objections into this brief by reference pursuant to Pa. R.C.P. No. 1019(g).

6821992, at \*1 (M.D. Pa. Nov. 21, 2020), appeal docketed, No. 20-3371 (3d Cir. Nov. 22, 2020).

Petitioners' shocking request is similarly unprecedented and suffers from numerous legal flaws, one of the most significant of which is the timing. First, Petitioners provide no explanation for their decision to wait for more than a year, after two elections had been conducted under Act 77, in which more than 4.4 million Pennsylvania voters cast ballots by mail, and well after mail-in ballots have already been cast and counted in the general election. This is not some simple flaw or slight delay that this Court may overlook. Petitioners request an injunction, which is fundamentally a remedy at equity, and their delay requires that they be denied an equitable remedy. Petitioners were well aware of Act 77 and the numerous flaws they allege here for more than a year, and did nothing. And that delay, if Petitioners requested remedy is granted, would have tremendous prejudicial costs for Respondents, the DNC, and all Pennsylvania voters. It would delay certification of the election, put on hold the people's representatives being seated and being able to conduct business, and shake the very foundations of democracy. It is a remarkable request and it is far from hyperbole to say that Petitioners' delay in bringing this litigation would result in unprecedented prejudice.

But the delay is just one of this Petition's many flaws. Petitioners also lack standing to pursue this litigation. They allege no injury from Act 77 and cannot assert

one. No Petitioner suffered injury from the provisions of the law, and the generalized grievance they allege from the functioning of a purportedly unconstitutional law is one that could be suffered by any citizen. This is hardly enough to meet the requirements to continue in this action under Pennsylvania standing law.

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 Pennsylvania's Constitution grants it specific authority to alter the method of elections. Petitioner points to no provision 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. Alternatively, they incoherently read an in-person voting requirement into sections of the Constitution that concern the qualifications of voters. That is not how statutory interpretation 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, and neither does a provision plainly about voting qualifications place any limitations on the permitted methods of voting.

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, and others who aspire to such office, would bring such a claim in their names. 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.

## **ARGUMENT**

### **A. Petitioners' unreasonable delay bars their requested injunction.**

Petitioners had a choice: at any point since October 2019, before millions of Pennsylvanians had voted by mail, they could have raised their assertion that Act 77 is unconstitutional and had it considered on a normal briefing schedule by the appropriate court. Or they could take their chances with the election and hope to benefit from the expansion of mail-in voting and encourage their voters to utilize it, as Petitioner Parnell at one point chose to do.<sup>2</sup> What they clearly may not do, however, is “‘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 v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc); *see also Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987) (“[T]he procedures leading up to an election cannot be questioned after the people have voted, but instead the procedures must be challenged before the election is held.”). Because they have chosen the path

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<sup>2</sup> See Pittsburgh City Paper, *Sean Parnell is suing Pa. over mail-in voting, even though he praised mail-in voting earlier this year*, <https://www.pghcitypaper.com/pittsburgh/sean-parnell-is-suing-pa-over-mail-in-voting-even-though-he-praised-mail-in-voting-earlier-thisyear/Content?oid=18413927> (last visited Nov. 23, 2020).

that principles of equity and well-settled jurisprudence forbid, their case must be dismissed.

“[L]aches may bar a challenge to a statute based upon procedural deficiencies in its enactment.” *Stilp v. Hafer*, 553 Pa. 128, 136, 718 A.2d 290, 294 (1998). It prevents parties from bringing claims 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.” *Id.* at 134, 718 A.2d at 293 (citing *Sprague v. Casey*, 520 Pa. 38, 45, 550 A.2d 184, 187-88 (1988) (“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.”)). The test for due diligence is what a party “*might* have known by the use of information within his reach.” *Stilp*, 553 Pa. at 135, 718 A.2d at 294 (emphasis added). “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.” *Id.* (citing *Tudor Dev. Grp., Inc. v. U.S. Fid. & Guaranty Co.*, 768 F. Supp. 493, 495-96 (M.D. Pa. 1991)). Both elements—delay and prejudice—are clearly present here.

The “relevant facts are not in dispute” here. *Stilp*, 553 Pa. at 134, 718 A.2d at 293 (citing *Tudor Dev. Grp., Inc.*, 768 F. Supp. 493, 496 (M.D. Pa. 1991)); *Holiday Lounge, Inc. v. Shaler Enter. Corp.*, 441 Pa. 201, 204, 272 A.2d 175, 177 (1971) (“[L]aches may be raised and determined by preliminary objection[.]”). *First*, the

Petition and motion for emergency injunction make clear that Petitioners *were* aware of the Act they challenge at least by October 31, 2019, when it was signed into law—and very likely by March 2019 when it was first introduced, *see* Pet. ¶ 54; Pet’rs’ Mem. at 17, 36. And, at the very least, they had “information within [their] reach” about the procedures used to enact Act 77 in 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).

Moreover, “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 Stilp*, 553 Pa. at 135, 718 A.2d at 294; Pet. ¶¶ 54-55. In fact, the November general election was the *second* election administered under Act 77 in which Petitioners Kelly, Parnell, and Logan ran as candidates.

Indeed, Petitioners’ deliberate bypass of prior opportunities to raise the challenges to mail-in voting they assert here is further demonstrated by the fact that this was not even the first lawsuit that one of the Petitioners has filed concerning the administration of mail-in ballots. On October 16—two weeks before the election—Petitioner Parnell alleged that the Allegheny County Board of Elections was

processing mail ballots in a manner that violated the United States Constitution. Amended Complaint, *Parnell v. Allegheny Cnty. Bd. of Elections*, No. 20-cv-1570 (E.D. Pa. Oct. 22, 2020), ECF No. 28. He even sought “immediate resolution” of his claims because such expedited relief was “required to ensure the correct and legal appropriate tabulation of all such ballots in Allegheny county for the 2020 General Election.” *Id.* ¶ 98. That case was resolved ten days later—still *before* the election—when Parnell entered into a consent decree with Allegheny County that outlined specific procedures that Allegheny County would employ (procedures which the county had already implemented) in segregating and processing certain categories of mail ballots that had been issued in error. *See Consent Order, Parnell v. Allegheny Cnty. Bd. of Elections*, No. 20-cv-1570 (E.D. Pa. Oct. 26, 2020), ECF No. 57.

Yet despite ample opportunity to challenge mail-in voting rules, and Parnell’s willingness to file pre-election challenges, Petitioners chose to take a “wait-and-see” approach, filing this lawsuit only after it had become abundantly clear that President Trump had lost the election in Pennsylvania and a mere *two days* before the State’s counties were to certify the election results to Secretary Boockvar. *See Stilp*, 553 Pa. at 133, 718 A.2d at 293 (citing *Schaeffer v. Anne Arundel Cnty.*, 338 Md. 75, 656 A.2d 751 (1995) (noting that “parties could not take a ‘wait and see’ approach and challenge ordinances many years after their enactment on procedural grounds”)); *see*

*also Stilp*, 553 Pa. at 136, 718 A.2d at 294 (affirming Commonwealth Court’s grant of summary judgment based on the defense of laches).

Basic principles of equity bar Petitioners’ requested relief given this delay. *Sprague*, 520 Pa. at 45, 550 A.2d at 188; *see also, e.g., Republican Party of Pa. v. Cortés*, 218 F. Supp. 396, 405 (E.D. Pa. 2016) (“There was no need for this judicial fire drill and Plaintiffs offer no reasonable explanation or justification for the harried process they created.”); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (“As time passes, the state’s interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made,” and an aggrieved individual becomes less credible by his having slept on his rights); *United States v. City of Phila.*, No. 2:06CV4592, 2006 WL 3922115, at \*2 (E.D. Pa. Nov. 7, 2006) (“[Plaintiff’s] undue delay precluded the City from structuring and implementing election procedures in a manner responsive to [Plaintiff’s] concerns in a timely fashion. Although this Court is acutely aware of the critical constitutional rights at stake here, we are constrained to consider that the City’s ability to correct any perceived defects in its procedures was severely hampered by [Plaintiff’s] tardy action.”); *cf. Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at \*14 (M.D. Pa. Nov. 21, 2020) (noting that amending complaint would interfere with the State’s deadline for counties to certify election

results to Secretary Boockvar, November 23, 2020, and “unduly delay resolution of the issues”).

*Second*, the prejudice to Respondents, the DNC, and all Pennsylvanians caused by this delay would be monumental. The general election was conducted, and over a million Pennsylvanians cast ballots, in reliance on mail-in voting. Pet. ¶¶ 61-62. Untold numbers of Pennsylvanians weighed their options, including the ability to vote by mail, and chose their method of voting based on what they understood the law to be. The United States Supreme Court has repeatedly cautioned courts against making drastic changes to election laws close to elections—and at times even weeks before election day—given the risk of voter confusion and distrust in the election process that such changes can engender. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (noting the wisdom of the Court's hesitancy to make “judicially created confusion” by altering election rules close to election day); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (noting that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”) These concerns are only heightened when a Court is asked, *after* an election, to change the rules retroactively and invalidate millions of votes. Indeed, a voter who had his or her right to the franchise taken away in this manner would

rightly question perhaps both the need to vote and whether he or she truly lives in a democracy at all.

Petitioners minimize the scope and consequent prejudice of the requested injunction, labeling it only a “slight delay,” Pet’rs’ Mem. at 24, but their requested relief could well prevent certification of election results on a Commonwealth-wide basis until it is too late for the results to be certified in time to meet the federal safe-harbor deadline for Pennsylvania’s electoral votes (December 8) or even the meeting of the electors to cast their votes (December 14). The Electoral College meets on December 14, and Petitioners’ suggestion that their injunction will not harm anyone, *id.* at 24-25, ignores the cascading consequences of the requested delay. Under Pennsylvania law, the last day for counties to certify their returns to the Secretary is *today*. See 25 P.S. § 2642(k). The purpose of the county certification deadline is to ensure that the Secretary of State has time to process and compute those returns as required under Pennsylvania law, which are then sent to the Governor, who will ascertain the number of votes given and issue certificates of election by December 8 based on the choice of Pennsylvania’s voters. See *id.* § 3166; 3 U.S.C. § 5 (establishing the federal “safe harbor” deadline of December 8, 2020); *Stein v. Cortes*, 223 F. Supp. 3d 423, 426 (E.D. Pa. 2016) (“Pennsylvania has opted into the federal ‘safe harbor’ that allows it to determine conclusively its Presidential Electors through state procedures. The safe harbor requires Pennsylvania to make a final

determination of its Electors at least six days before the Electoral College meets.”). Pennsylvania’s electors then must vote when the electoral college convenes on December 14. 3 U.S.C. § 7.

The prejudice to Respondents and the DNC is equally severe. Petitioners’ requested relief could well prevent certification of election results on a Commonwealth-wide basis. This could delay the seating of Pennsylvania’s General Assembly, whose members are constitutionally required to begin their service on December 1st. Pa. Const. art. II, § 2. It could leave Pennsylvanians unclear who their representatives are in Congress, and it could extend until it is too late for the results to be certified in time to meet the federal safe-harbor deadline for Pennsylvania’s electoral votes (December 8) or even the meeting of the electors to cast their votes (December 14).

Any intervention into state certification procedures based on an untimely lawsuit that could have been filed a year ago, would be wholly unwarranted. It is only in the rarest of circumstances that courts have taken such drastic measures to prevent or delay the certification of election results, and only where the evidence establishes that there was a fundamental failure of the election process. *Stein*, 223 F. Supp. 3d at 438 (collecting cases). Indeed, just four days ago, the Northern District of Georgia flatly refused to enjoin Georgia election officials from certifying results, concluding at the end of a hearing that “[t]o halt the certification at literally the 11th

hour would breed confusion and significant disenfranchisement.”<sup>3</sup> And last Friday, the Middle District of Pennsylvania rejected a similar request, noting that the court “ha[d] 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.*, 2020 WL 6821992, at \*1.

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). Accordingly, the DNC would suffer severe harm if election returns were not timely processed, and Pennsylvania’s 20 electoral votes were not awarded to the President-Elect, despite his leading in the Commonwealth by over 80,000 votes. *See* Pa. Dep’t of State, *Unofficial Returns*, <https://www.electionreturns.pa.gov/>. 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.

Because Petitioners have not come close to justifying the dramatically adverse consequences for Respondents, the DNC, and Pennsylvania voters were Petitioners’ injunction granted—not to mention their failure to offer *any* explanation for their

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<sup>3</sup> A. Judd, *Trump allies draw Georgia into election conspiracy claims*, The Atlanta Journal-Constitution, Nov. 19, 2020, <https://www.ajc.com/politics/election/judgerejects-trump-supporters-attempt-to-reject-electionresults/GMSGXDY4AZFEXOGBNOLGBZ45NI>; *see* Order, *Wood v. Raffensperger*, No. 1:20-cv-04651, ECF No. 52 (N.D. Ga. Nov. 19, 2020) (Minute Order denying request for temporary injunction).

year-long delay—principles of equity foreclose Petitioners’ request for relief and require dismissal of this action.

**B. Petitioners lack standing to bring this action.**

To establish standing, 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.

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).

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, or are in jeopardy of losing their races, because of mail-in voting, nor does it allege that they 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.

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); *Bognet 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).

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

**C. Petitioners cannot succeed on the merits of their action.**

As the DNC noted in its preliminary objections, Petitioners' arguments on the merits are entirely groundless, and no recovery or other relief is possible for their claims. *See N. Forests II, Inc. v. Keta Realty Co.*, 130 A.3d 19, 35 (Pa. Super. Ct. 2015) (holding a complaint requires demurrer when "on the facts averred, the law says with certainty that no recovery is possible.").

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 Phila.*, 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."). And the Constitution grants the General Assembly even greater explicit authority regarding the method of voting, specifically stating that "All elections by the citizens shall be by ballot *or by such other method as may be prescribed by law*: Provided, That secrecy in voting be preserved." Pa. Const. art. VII, § 4 (emphasis added). Act 77 fits easily within these broad grants of authority.

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.

Petitioners’ interpretation violates numerous principles of statutory construction. Principally, “[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. And, even were this Court to look beyond the words to legislative intent, 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.

Second, given the weakness of this argument, Petitioners’ request for preliminary relief appears to rest on their secondary (and equally baseless) argument that a “qualified elector” in Article VII, § 1 must have residence in the election district where they “offer to vote,” a phrase Petitioners contend requires in-person voting. There are at least four reasons why this is incorrect.

*First*, nothing in the statute’s language says—let alone suggests—so.

*Second*, the plain title of Article VII, § 1—“Qualifications of electors”—makes clear that it concerns the qualifications of voters, not the manner of voting. *See also Case of Metzger*, 2 Pa. D. 301, 303 (Pa. Com. Pl. 1893) (“the subject matter of this part of the constitution is the qualification of the voter”). Meanwhile, the section of the Constitution that addresses how votes are cast—Article VII, § 4 (“Method of elections; secrecy in voting”)—expressly grants the General Assembly broad authority to allow for almost any method of voting so long as secrecy is preserved. *See* Pa. Const. art. VII, § 4.

*Third*, Petitioners’ contention that one can only be a “qualified elector” if they vote in person is inconsistent with how that term is used elsewhere in Article VII

and would lead to an absurd result. Article VII, § 14 uses the term “qualified elector” in referencing who must be entitled to absentee vote because they are unable to vote in person. Petitioners’ reading of Article VII, § 1 would lead to the circular and absurd result that none of these voters, who are, of course, not presenting themselves in person, are qualified electors because they cannot vote in person. This simply cannot be if the provisions of the Constitution are to be read *in pari materia*.

*Fourth*, multiple cases reject Petitioners’ interpretation. *See, e.g., Case of Metzger*, 2 Pa. D. at 303-04 (holding that constitutional requirement that voter “shall have resided in the election district where he shall offer to vote” for at least two months prior to the election “means merely that the voter shall reside in the election district” where he intends to vote); *In re Election Instructions*, 1893 WL 3360, at \*1–2 (Pa. Com. Pl. 1893) (“The constitution simply prescribes the qualifications of the voter. It nowhere attempts to define and limit election districts, nor to locate polling places. Residence in a legally created election district for two months preceding the election is one of these qualifications. If the citizen possesses also the other three required in s 1 of art. VIII of the constitution, he is entitled to vote at such polling place as has been designated by law for his district. But the polling place is no part of the qualification of the voter. It is something outside of and distinct from him altogether.”).

In sum, Petitioners’ arguments on the merits are unfounded, and they have no chance of recovery at law. This too warrants dismissal of this action.

**D. Petitioners’ requested remedies requiring wholesale rejection of mail ballots would violate the U.S. and Pennsylvania Constitutions.**

**1. Discarding all mail ballots would unduly burden the right to vote.**

For decades, the U.S. Supreme Court has emphasized the importance, and the constitutional underpinnings, of the right to vote. “No right,” the Court has elaborated, “is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). That is because voting is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The right to vote, moreover, is not simply a “right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth.” *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). Rather, “[t]he right to vote includes the right to have the ballot counted.” *Id.* (emphasis added).

Any burden on the right to vote must be analyzed under a balancing test that weighs “the character and magnitude of the asserted injury” against “the precise interests put forward” to justify the burden and whether “those interests make it necessary” to impose that burden. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added), quoted in *Burdick v. Takushi*, 504 U.S. 428, 433(1992). “[T]he

rigorousness of [this] inquiry” depends on the extent of the burden because all election laws “impose some burden upon individual voters.” *Burdick*, 504 U.S. at 434. Crucially, when the right to vote is “subjected to ‘severe’ restrictions,” strict scrutiny applies. *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

That is the situation here, because discarding the millions of mail ballots cast in Pennsylvania would disenfranchise an unbelievably large number of voters who cast timely ballots using one of the voting methods the Pennsylvania legislature prescribed—and did so in reliance on officials’ assurance that votes properly cast using that method would be treated the same as votes cast in person. Petitioners’ requested remedies are thus unquestionably “severe” and “must be ‘narrowly drawn to advance a state interest of compelling importance,’” *Burdick*, 504 U.S. at 434 (quoting *Norman*, 502 U.S. at 289). The remedies Petitioners seek—again, the disenfranchisement of millions of qualified voters—are in no way “narrowly drawn.” *Id.* To the contrary, they would be “grossly overinclusive,” *Gallagher v. N.Y. State Bd. of Elections*, 2020 WL 4496849, at \*16 (S.D.N.Y. Aug. 3, 2020), denying the right to vote to huge numbers of qualified Pennsylvania voters who merely relied on official pronouncements that they could vote by mail and have their votes counted.

Federal courts have consistently upheld these foundational principles during this election cycle. In *Gallagher*, the court held that a request to discard thousands

of mail ballots—“constituting a significant percentage” of the ballots cast—would be “exceptionally severe,” particularly where, “in light of the ongoing COVID-19 pandemic, there was an uncommonly compelling reason for many voters to vote by absentee ballot.” *Gallagher*, 2020 WL 4496849, at \*16. The court also held—applying strict scrutiny under *Anderson* and *Burdick* because of the “exceptionally severe” burden—that the requested remedy was “not narrowly drawn,” because it “would result in timely cast votes being needless rejected.” *Id.* The court therefore rejected Petitioners’ “grossly overinclusive” and unnecessary request. *Id.* And just a few days ago, Judge Matthew W. Brann of the Middle District of Pennsylvania dismissed the Trump Campaign’s request for injunctive relief preventing certification of the Pennsylvania election results. *Donald J. Trump for President, Inc.*, 2020 WL 6821992. As Judge Brann explained, “a court may not prescribe a remedy unhinged from the underlying right being asserted,” and he had “no authority to take away the right to vote of even a single person, let alone millions of citizens.” *Id.* at \*12-13. The reasoning of these courts applies equally here. This Court should reject the astonishingly overbroad and unconstitutional remedy that Petitioners seek.

## **2. Discarding all mail ballots would violate due process**

Discarding mail ballots cast by Pennsylvania voters would also violate the substantive guarantees of the Due Process Clause because it would be fundamentally arbitrary and unfair to Pennsylvanians who timely cast their votes in a way that was

authorized by Pennsylvania’s legislature. What Petitioners request is far from “garden variety” judicial involvement with the electoral process, *Griffin*, 570 F.2d at 1075. Rather, widespread invalidation of millions of votes “reaches the point of patent and fundamental unfairness,” such that “a violation of the due process clause may be indicated.” *Id.* at 1077; *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008); *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998).

A post-election change in practices is fundamentally arbitrary and unfair “if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.” *Bennett*, 140 F.3d at 1226-27. Both elements are present here, as Petitioners seek to disenfranchise millions of Pennsylvanians who followed the Commonwealth’s established election procedures. Indeed, in the weeks leading up to the election, the homepage of Pennsylvania’s official voter-information website encouraged voters to vote by mail. *See Votes PA, Mail-In and Absentee Ballot* (last accessed Oct. 14, 2020) (“Voting by mail-in or absentee ballot is safe, secure, and easy.”). To disenfranchise nearly 38% of Pennsylvania’s voters under these circumstances would violate due process.

*Griffin v. Burns* is particularly instructive. There as here, state election officials in that case had advertised to voters that mail ballots would be counted, and the general practice in prior elections had been to count such ballots. 570 F.2d at 1067-68. Yet the Rhode Island Supreme Court invalidated mail ballots constituting nearly 10 percent of the votes cast in the primary election. *Id.* at 1067. The First Circuit stated that the state court’s “suppression” of “about ten percent of the total vote cast … amounted to more than a de minimis irregularity,” *id.* at 1075, and determined that such a remedy was “a broad-gauged unfairness that infected the results,” *id.* at 1078. Accordingly, the court held it was appropriate to intervene to protect the rights of those voters who had been disenfranchised. *Id.* The same is true here. Invalidating mail ballots after the fact—in contravention of “established election procedure,” *Bennett*, 140 F.3d at 1226—necessarily would result in “significant disenfranchise~~m~~ment” and would violate substantive due process, *id.* at 1227. *See also Gallagher*, 2020 U.S. Dist. LEXIS 138219, at \*55.

### **3. Discarding all mail ballots would violate equal protection**

Petitioners’ request to throw out all mail ballots would selectively disenfranchise voters who cast their ballots by mail, in violation of the Equal Protection Clause. The basic conception of political equality “can mean only one thing—one person, one vote.” *Reynolds*, 377 U.S. at 558. This bedrock principle rests on “[t]he idea that every voter is equal to every other voter in his State, when

he casts his ballot in favor of one of several competing candidates.” *Id.*; see also *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (every citizen “has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”). The Equal Protection Clause therefore prohibits an electoral system that through “arbitrary and disparate treatment, value[s] one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam).

Importantly, equal-protection principles extend not only to the “allocation of the franchise,” i.e., the right to vote, but also to “the manner of its exercise.” *Bush*, 531 U.S. at 104. The Equal Protection Clause therefore applies with equal force “when a state either classifies voters in disparate ways, or places restrictions on the right to vote.” *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (citations omitted).

Petitioners’ request to throw out all mail ballots would violate the foregoing principles by treating similarly situated voters differently. Pennsylvania chose to allow several means of casting a ballot. Voters who selected one method are similarly situated in all material respects to voters who selected another. Both groups of voters are (1) eligible voters residing in Pennsylvania and (2) cast their votes in a manner authorized by the Pennsylvania legislature. A voter who casts a mail ballot therefore votes “on equal terms” with voters who cast valid ballots in person. *Bush*, 531 U.S. at 104. And not surprisingly given the global pandemic,

millions of voters in Pennsylvania availed themselves of mail voting. Yet Petitioners would disenfranchise that entire category of voters based on an arbitrary characteristic—the means through which they cast a valid ballot. That violates core equal-protection principles. *See, e.g., Ne. Ohio Coal. v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012); *Obama for Am.*, 697 F.3d at 425; *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 236 (6th Cir. 2011).

**4. Discarding all mail ballots would violate the Free and Equal Elections Clause of the Pennsylvania Constitution.**

Finally, the relief Petitioners seek is foreclosed by the Free and Equal Elections Clause of the Pennsylvania Constitution, which is “distinct” from the federal Equal Protection Clause, *League of Women Voters*, 178 A.3d at 812. The Free and Equal Elections Clause states 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.” Pa. Const. art. I, § 5. “In accordance with the plain and expansive sweep of the words ‘free and equal,’” the Pennsylvania Supreme Court:

view[s] them as indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.

*League of Women Voters*, 178 A.3d at 804. Accordingly, election procedures must “make … votes equally potent in the election; so that some shall not have more

votes than others, and that all shall have an equal share in filling the offices of the Commonwealth.”” *Id.* (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)). As discussed, Petitioners’ requested remedies would count the votes of similarly situated voters differently, by counting only the votes of Pennsylvanians who went to the polls to vote on Election Day while discarding the votes who availed of Pennsylvania’s option to vote by mail, thereby “unfairly rendering [some] votes nugatory.” *Id.*

### **Conclusion**

For the reasons stated herein, as well as those contained in their Preliminary Objections, the DNC respectfully requests that this Court expeditiously dismiss this case.

Dated: November 23, 2020

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Respectfully submitted,

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## **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/ *Michael R. McDonald*  
Michael R. McDonald

## **CERTIFICATE OF SERVICE**

I, Michael R. McDonald, 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/ *Michael R. McDonald*

Michael R. McDonald

# Exhibit C

**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.

**BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PETITIONERS'  
MOTION FOR EMERGENCY/SPECIAL PROHIBITORY INJUNCTION**

Proposed-Intervenor DNC Services Corp. / Democratic National Committee (“DNC”) hereby submits this brief as *amicus curiae* in opposition to the November 22, 2020 Motion for Emergency/Special Prohibitory Injunction and accompanying Memorandum of Mike Kelly, Sean Parnell, Thomas A. Frank, Nancy Kierzek, Derek Magee, Robin Sauter, Michael Kincaid, and Wanda Logan (collectively, “Petitioners”). In support of their opposition to Petitioners’ Motion, DNC states the following:

## I. INTRODUCTION

Petitioners' request for an injunction to disenfranchise millions of their fellow Pennsylvanians is an affront to democracy that should be swiftly rejected. And, because of their considerable delay, the request is now moot. All 67 counties have certified their results, the Secretary of State has performed her statutory duties of tabulation, and just this morning Governor Wolf signed a Certificate of Ascertainment, which has been submitted to the Archivist of the United States. There is, simply, nothing to enjoin.

An injunction now would impose unnecessary confusion and significantly greater injury to the DNC, Respondents, and the public at large than any harm it would purportedly undo. Indeed, Petitioners have failed to identify any harm they would suffer, so there is simply nothing on that side of the scale. By contrast, the relief they seek would cast doubt on the electoral process, harming Respondents—public servants who have admirably conducted a successful election in the midst of a global pandemic—the DNC and its candidate President-elect Joe Biden, and the nearly seven million voters who cast a ballot in Pennsylvania. There is simply no reason for this Court to insert itself at this hour into what has been a remarkably successful election in the midst of a pandemic, and Petitioners provide none.

Moreover, Petitioners argument on the merits is baseless and their requested relief asks this Court to violate the United States and Pennsylvania Constitutions. For all these reasons, this Court should deny Petitioners' requested relief.

## **II. Legal Standard**

A party must establish six prerequisites in order to be entitled to a preliminary injunction: (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and (6) that a preliminary injunction will not adversely affect the public interest. *See Warehime v. Warehime*, 580 Pa. 201, 209-210, 860 A.2d 41, 46-47 (2004) (citing *Summit Towne Centre, Inc., v. Shoe Show of Rocky Mount Inc.*, 573 Pa. 637, 828 A.2d 995, 1002 (2003)). Petitioners satisfy none of these prerequisites.

### **III. Argument**

#### **A. Petitioners' request is moot.**

Petitioners have requested that this Court preliminarily enjoin certification of Pennsylvania's November 3, 2020 general election, but their delay in bringing this lawsuit has rendered this request moot. In their Motion, Petitioners ask this Court to enter an Order prohibiting Respondents "from taking official action to tabulate, compute, canvass, certify, or otherwise finalize the results of the November 3, 2020, General Election" and, specifically, to enjoin Secretary Boockvar and Governor Wolf from acting to certify the election or the slate of presidential electors. Motion at 7-8. But the actions Petitioners ask this Court to enjoin have already occurred: all 67 counties in Pennsylvania have now certified their results, Pennsylvania's Secretary of State has tabulated those results, and, just within the last few hours, Governor Wolf has signed the Certificate of Ascertainment for the slate of electors for President-elect Biden and Vice President-elect Harris and submitted the certificate to the Archivist of the United States.<sup>1</sup> The certification of the November 3, 2020 general election in Pennsylvania is complete. As a result, this Court should dismiss the request for emergency relief as moot.

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<sup>1</sup> See Press Release, Pa. Dep't of State, *Department Of State Certifies Presidential Election Results* (Nov. 24, 2020), available at <https://www.media.pa.gov/Pages/State-details.aspx?newsid=435>.

**B. Petitioners’ requested injunction would cause significantly greater harm to the other interested parties and the public than it would remedy.**

Even if this Court does not dismiss Petitioners’ motion as moot, this Court should still deny the preliminary injunction because of its vastly overbroad scope and the significant harm it would cause Respondents, the DNC, and the public at large. Were it not already moot, Petitioners’ requested relief could have potentially prevented Pennsylvania from meeting the federal safe-harbor deadline for Pennsylvania’s electoral votes (December 8) or even the meeting of the electors to cast their votes (December 14). It could have also thrown Pennsylvania’s General Assembly into chaos, as the Pennsylvania Constitution requires that those members begin their service on December 1st. Pa. Const. art. II, § 2. Petitioners repeatedly try to downplay the cascading consequences of the requested delay but they are undoubtedly significant.

The most pressing harm is to the public at large, and this alone requires denying the requested injunction. “[W]here an adverse effect upon the public will result from the issuance of a preliminary injunction, it should not be granted.” *McMullan v. Wohlgemuth*, 444 Pa. 563, 572, 281 A.2d 836, 841 (1971); *see also Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 49 (Pa. Commw. Ct. 2009) (“A preliminary injunction cannot run counter to the public interest.”). The public has voted, the election is complete, and millions of Pennsylvanians chose to exercise the franchise through mail-in voting. Indeed, this Court has previously denied

injunctions regarding elections to provide the public certainty in voting, an interest even more pronounced when the election has already occurred. *Costa v. Cortes*, 143 A.3d 430, 442-43 (Pa. Commw. Ct. 2016) (denying preliminary injunction because removing proposed constitutional amendment from ballot “[l]ess than one week before the Primary Election” is not in the public interest, “as it would only foment further uncertainty among the public as to whether they should vote on [the amendment] and whether, if they do, their votes will be counted”). Enjoining certification now based on a challenge Petitioners could have brought at any time over the past year would rightly cause voters to doubt the system. Similar to this Court’s ruling in *Costa*, the United States Supreme Court has also cautioned against making drastic changes to election laws close to elections for just that reason. See, e.g., *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (noting the wisdom of the Court’s hesitancy to make “judicially created confusion” by altering election rules close to election day); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (noting that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”) There is no doubt that the public would be tremendously disserved—and have their faith in democratic institutions shaken—were the Court to grant the requested relief.

Respondents and the DNC would have also suffered grave injuries if the requested relief were granted. Respondents, including Secretary Boockvar, conducted a general election under the provisions of Act 77, and President-Elect Biden has won the presidential race in the Commonwealth by more than 80,000 votes and is set to receive its 20 electoral votes. All counties have certified their results, and the Governor has signed the Certificate of Ascertainment. It is unclear what Petitioners can ask the Court to do now, but anything the Court orders could throw a wrench in the carefully calibrated state processes for a harm that—as the DNC noted in both its Preliminary Objections and amicus brief in support of those objections—Petitioners do not and cannot even identify. This is simply an insufficient and inappropriate basis to entitle Petitioners to the extraordinary remedy of a preliminary injunction.

Beyond the fact that Petitioners have not established that they would suffer any harm, let alone immediate and irreparable harm, absent an injunction, they have also inexcusably delayed in bringing this action. That unexplained delay in bringing this lawsuit and seeking injunctive relief also militates against their argument for this Court to take emergency action. *See, e.g., Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 409 (E.D. Pa. 2017), aff'd, 890 F.3d 1124 (3d Cir. 2018), and aff'd, 897 F.3d 518 (3d Cir. 2018)

**C. Petitioners have no likelihood of prevailing on the merits.**

As the DNC detailed in depth in its preliminary objections and amicus brief in support of those objections (and does not repeat at length here), Petitioners' constitutional argument is entirely baseless.<sup>2</sup> They purposefully misread Article VII, § 14 of the Pennsylvania Constitution—which requires that certain groups be allowed to absentee vote—to prohibit mail voting for everyone else, and try to alchemize Article VII, § 1 (which deals with voter qualifications) into a requirement of in-person voting. *Cf. Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at \*4 (M.D. Pa. Nov. 21, 2020) (“This claim, like Frankenstein’s Monster, has been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent.”) Neither argument has merit, and both violate numerous bedrock principles of statutory construction. Petitioners’ lack of likelihood of success on the merits dooms their request for emergency relief.

**D. Petitioners’ requested relief violates the Pennsylvania and United States Constitutions.**

Petitioners’ requested remedy—requiring wholesale rejection of mail ballots—violates the United States and Pennsylvania Constitutions. It does so in four distinct ways: First, discarding mail ballots would unduly burden the right to vote. That right includes “the right to have the ballot counted.” *Reynolds v. Sims*, 377 U.S.

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<sup>2</sup> The DNC incorporates those pleadings fully herein by reference pursuant to Pa. R.C.P. No. 1019(g).

533, 555 n.29 (1964). And discarding the mail ballots cast in Pennsylvania would disenfranchise millions of Pennsylvania voters who cast timely ballots using one of the voting methods the Pennsylvania legislature prescribed. *See Amicus Br.* at 22-24. Second, Petitioners' requested relief would violate due process. To disenfranchise nearly 38% of Pennsylvania's voters who cast their ballots lawfully—and did so in reliance on officials' assurances that votes cast by mail would be treated the same as votes cast in person—"reaches the point of patent and fundamental unfairness," such that "a violation of the due process clause may be indicated." *Amicus Br.* at 24-26 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)). Third, discarding these ballots would violate equal protection. Petitioners' request to throw out all mail ballots would selectively disenfranchise voters who cast their ballots by mail, in violation of the Equal Protection Clause. *See Amicus Br.* at 26-28. Finally, Petitioners' requested relief violates the Free and Equal Elections Clause of the Pennsylvania Constitution, which requires that election procedures must "'make . . . votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth.'" *Amicus Br.* at 28 (quoting *League of Women Voters*, 178 A.3d at 804). Petitioners' requested remedies, on the other hand, would count the votes of similarly situated voters differently. *See Amicus Br.* at 29.

## **Conclusion**

For the reasons stated herein, as well as those contained in its Proposed Preliminary Objections and Amicus Brief in support thereof, the DNC requests that this Court deny Petitioners' request for extraordinary relief.

Dated: November 24, 2020

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## **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

## **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 24, 2020 by this Court's electronic filing system.

/s/ *Matthew I. Vahey*

Matthew I. Vahey

# Exhibit D

**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 SUPPLEMENTAL AMICUS  
IN RESPONSE TO NOVEMBER 25, 2020 ORDER**

In light of this Court's order of November 25, 2020, Proposed-Intervenor DNC Services Corp. / Democratic National Committee ("DNC") hereby files this Supplemental Brief as Amicus Curiae in response to the Supplemental Emergency Application filed by Petitioners.

**I. INTRODUCTION**

1. In October 2019, the General Assembly enacted Act 77, which allowed millions of Pennsylvanians to vote by mail for the first time. Since Act 77 became

law, Pennsylvania has held two elections, in which over 4.4 million Pennsylvania voters cast ballots by mail.

2. Petitioners did not challenge the constitutionality of Act 77 in October 2019—or even by the date of Pennsylvania’s primary elections (June 2) or general election (November 3).

3. Instead, Petitioners filed this action on November 21, 2020—well after the results of the November 3 election were known and just two days before the deadline for counties to certify the results of the election to the Secretary of the Commonwealth. In other words, they “lai[d] by and gamble[d] upon receiving a favorable decision of the electorate and then, upon losing, s[ought] to undo the ballot results in a court action.” *Toney v. White*, 48 F.2d 310, 314 (5th Cir. 1973) (en banc) (quotation marks omitted).

4. This suit is now moot at least as to the presidential election. All 67 counties have certified their results, the Secretary has tabulated those results, and Governor Wolf has formally signed the Certificate of Ascertainment of Presidential Electors identifying the electors who will cast Pennsylvania’s electoral votes. The Governor has also transmitted the names of Pennsylvania’s electors to the Archivist of the United States, as required by 3 U.S.C. § 6.

5. Put simply, Respondents have no further role to play in the presidential election, and Petitioners cannot receive the relief they seek from this Court.

6. For this reason, DNC urges this Court to dismiss at least the portion of the litigation—and dissolve the portion of the temporary injunction issued November 25, 2020—that relates to the presidential election.

## **II. ARGUMENT**

### **The Supplemental Emergency Application Is Moot As A Matter Of Law At Least As To The Presidential Race**

7. The Pennsylvania Election Code articulates the specific steps to be completed before Pennsylvania’s electors are selected. All those steps have now been completed.

8. Specifically, (1) each county board canvasses the ballots, computes the votes, and certifies the results, 25 Pa. Stat. § 3154, (2) with respect to state-wide elections (including “elections of presidential electors”), each Board sends the Secretary of the Commonwealth a certificate showing the totals of the return, *id.* § 3158, (3) the Secretary tabulates the votes cast and then, when all results are received, “certif[ies] and file[s] in her office the tabulation thereof,” *id.* § 3159 and (4) the Secretary “on receiving and computing the returns of the presidential electors, [must] lay them before the Governor, who [must] … cause a certificate of election to be delivered to each person so chose,” *id.* § 3166.

9. There is no dispute that steps 1-3 have been followed. And while Petitioners suggest (Supp. Emergency App. ¶ 11) that the record is unclear about

whether the governor has actually caused a certificate of election to be delivered to each elector, that is simply incorrect.

10. The Governor has also undisputedly delivered the certified results of the presidential election to the archivist of the United States. *See* <https://www.media.pa.gov/pages/state-details.aspx?newsid=435> (press release from the Governor stating that the “Certificate of Ascertainment … was submitted to the Archivist of the United States.”); *see also* Supp. Emergency Application ¶ 4 (acknowledging submission).

11. As a matter of federal law, the fact that the Certificate was submitted means that electors have already been appointed. *See* 3 U.S.C. § 6 (“It shall be the duty of the executive of each State, as soon as practicable *after the conclusion of the appointment of the electors* in such State by the final ascertainment, … to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed[.]” (emphasis added)).

12. Petitioners are thus incorrect in asserting that the process of finalizing appointment of Pennsylvania’s slate of presidential electors is “far from complete.” As just explained, all of the “official actions” listed in paragraph 11 of petitioners’ Supplemental Application for Emergency Relief that apply to presidential electors are complete. *See* 25 Pa. Stat. §§ 3159; 3166.

13. The remaining “official actions” listed concern appointment of successful candidates to *different* offices. *See, e.g.*, 25 Pa. Stat. § 3160 (local and county officials); § 3163 (members of Congress); § 3164 (members of state legislature); § 3165 (state officials such as the Auditor General and State Treasurer). And section 2621 simply sets forth the general powers and duties of the Secretary of the Commonwealth. *See id.* § 2621.

14. Petitioners fare no better by claiming (Supp. Emergency App. ¶ 13) that, pursuant to 25 Pa. Stat. § 3160, “any … commissions already issued by respondents could be nullified.” As the title and text of section 3160 make perfectly clear, that provision applies only to elections of “county and local officers.” It concerns an entirely distinct certification process—one handled by the relevant county election board—than the already-complete certification process applicable to presidential electors. *See* 25 Pa. Stat. §§ 3159, 3166 (governing certification of presidential electors). There is no nullification provision comparable to section 3160 that applies to presidential electors already certified by the governor as having been elected.

15. Even if section 3160 applied to presidential electors, the predicate judicial proceeding required to decommission such an officer—as in the case of section 3160—would be an election contest. *See* 25 Pa. Stat. § 3160 (explaining that a new commission may issue only following “the decision of the proper

tribunal having jurisdiction of a contested election”). Plaintiffs have not initiated an election contest—nor could they, as the deadline for filing an election contest passed on November 23, 2020. *See id.* § 3456 (Class II election contests “shall be made and filed … within twenty days after the day of the … election”).

16. *Finally*, Petitioners contend (Supp. Emergency App. ¶ 12) that mootness could potentially be overcome by “join[ing] the slate of presidential and vice presidential electors as additional Respondents in this action,” in order that this Court then enjoin the electors from meeting to cast their votes on December 14, 2020. But a case or controversy requires “a real and not a hypothetical legal controversy.” *City of Philadelphia v. SEPTA*, 937 A.2d 1176, 1179 (Pa. Cmwlth. 2007). Once a case is moot, in other words, a plaintiff cannot revive it by seeking to join new defendants: “[A]n actual claim or controversy must be present *at all stages of the judicial process* for the case to be actionable or reviewable.”

*Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 203 (2005) (emphasis added); *see also id.* (“If events occur to eliminate the claim or controversy at any stage in the process, the case becomes moot.”); *accord In re Gross*, 476 Pa. 203, 382 A.2d 116 (1978) (mootness doctrine requires that “an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed”). Because this Court “cannot enter an order that has any legal force or effect” with regards to the presidential election, that portion of the case is

moot. *J.S.S. v. M.J.S.*, No. 850 WDA 2014, 2015 WL 7573389, at \*12 (Pa. Super. Ct. Jan. 20, 2015).

17. In short, the only step that remains is for the presidential electors to “assemble at the seat of government of this Commonwealth” on December 14, 2020, and cast their ballots. 25 Pa. Stat. Ann. § 3192. Petitioners suggest (Supp. Emergency App. ¶ 12) that “this court may … enjoin Respondents from permitting the electors to assemble at such location,” but they are mistaken. Respondents may not lawfully bar the electors from assembling in Harrisburg, or for that matter on the Capitol grounds, to “perform the duties enjoined upon them by the Constitution and laws of the United States.” 25 Pa. Stat. Ann. § 3192. Indeed, the Constitution itself requires the electors to assemble once they have been appointed, as they have been. *See* U.S. Const. amend. XII (“The Electors *shall meet* in their respective States” (emphasis added)); *see also* Pa. Const. art. I, § 20 (protecting citizens’ right to peaceably assemble); U.S. Const. amend. I (same).

### **III. CONCLUSION**

18. For these reasons, this Court should at a minimum dismiss the portion of the action—and dissolve the temporary injunction issued on November 25, 2020—as it relates to the presidential race.

Dated: November 25, 2020

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/s/ *Matthew A. White*

Matthew I. Vahey

## **CERTIFICATE OF SERVICE**

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/s/ *Matthew A. White*

Matthew I. Vahey