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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DARYL D. METCALFE, *et al.*,

Petitioners,

v.

THOMAS W. WOLF, *et al.*,

Respondents,

No. 636 MD 2020

**EXECUTIVE RESPONDENTS' BRIEF
IN SUPPORT OF PRELIMINARY OBJECTIONS
TO PETITIONERS' PETITION FOR REVIEW**

Pursuant to the Court’s Order dated December 8, 2020, Respondents Thomas W. Wolf, in his official capacity as Governor of the Commonwealth of Pennsylvania, and Kathy Boockvar, in her capacity as Secretary of the Commonwealth of Pennsylvania (together, “Executive Respondents”), submit the following Brief in support of their Preliminary Objections to Petitioners’ First Amended Complaint for Writ of Mandamus and Request for an Emergency Temporary Restraining Order and Injunctive Relief (the “Petition”).

I. INTRODUCTION

There is no claim here. Petitioners have set forth nothing more than a list of random grievances—with the Pennsylvania Supreme Court, with administrative decisions made years ago and never challenged, and with the mail-in voting statute that Petitioners themselves helped pass into law. But Petitioners do not, and cannot, explain how these grievances, in this case, entitle these Petitioners to relief. They do not attempt to allege that they, personally, have been harmed, or that they have standing to pursue their claim. They do not explain how the Court could possibly grant relief now—after all deadlines for challenges to the election have long since passed and the results have been certified. And they do not—and apparently cannot—allege any facts that could conceivably, under any circumstances, justify the unconscionable step of overturning an election. All they present to the Court is dissatisfaction with the state of Pennsylvania law, vague

speculation about unanswered election management questions, and unsupported accusations that Commonwealth and county officials acted with ill intent.

Petitioners, as elected officials, should know better. They have threatened the precious right to vote of their own constituents; have attempted to smear the efforts of election officials across the Commonwealth, with no basis for doing so; and have wasted the Court's, and Respondents', time. Finally, the filing of this petition on the eve of the Safe Harbor deadline of December 8 suggests an attempt to sow chaos and confusion based upon unfounded claims—including those already rejected by state and federal courts—in asking this Court to grant unprecedented relief.

The Court, and Pennsylvania's voters, deserve better. The Court should dismiss the Petition with prejudice.

II. STATEMENT OF JURISDICTION

Respondents object to the exercise of this Court's jurisdiction because jurisdiction to resolve election disputes "is founded entirely upon statute and cannot be extended beyond the limits defined by the General Assembly." *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Commw. Ct. 2007).

III. STATEMENT OF THE CASE¹

A. The General Assembly—Including Petitioners—Voted for Act 77

In 2019, with broad and bipartisan support, the Pennsylvania legislature enacted Act 77 of 2019, which made several important updates and improvements to Pennsylvania’s Election Code. Among these were provisions that, for the first time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. This historic change was a significant development that has undeniably made it easier for all Pennsylvanians—including Petitioners—to exercise their right to vote. Every one of the Petitioners in this case voted to pass Act 77.

B. The Results of the Presidential Election Have Been Canvassed, Certified, and Submitted in Accordance With the Pennsylvania Election Code

Pennsylvania held its general election on November 3, 2020. The Commonwealth’s voters turned out in record numbers, with 6,915,220 of them casting ballots in person or by mail. After the election, despite the challenges posed by the COVID-19 pandemic, election administrators’ adjustment to recent

¹ For purposes of the Preliminary Objections, Executive Respondents assume, but do not admit, the truth of the Petition’s well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but “need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

significant amendments to the Pennsylvania Election Code,² and an unusually heated political environment, the canvassing of the votes proceeded efficiently and without major incident.

The Election Code provides strict procedures and deadlines for those who seek to call election procedures or results into question through challenges to ballot applications, appeals of Board of Elections determinations, petitions for recounts or recanvasses, examination and challenge of provisional ballots. *See* 25 Pa. Stat. §§ 3050, 3146.2b, 3150.12b, 3154, 3157, 3261-3474. After the election, certain political parties and candidates availed themselves of some of these procedures, challenging certain ballot applications, provisional ballots, and decisions of county Boards of Elections. All of these disputes have been resolved. Certain litigants also filed a handful of federal court cases challenging election procedures. These cases, too, have been resolved. At no point, in all of this litigation, did anyone establish that any fraud had taken place in the Pennsylvania election. Indeed, no one, in all of the federal and state court cases relating to Pennsylvania's 2020 general election, has introduced any evidence of fraud.

The deadline to file a contest of the general election's results was twenty days after the election, or November 23, 2020. *See* 25 Pa. Stat. §§ 3456. November 23 was also the deadline for county Boards of Election to certify their

² *See* 25 Pa. Stat. § 2600 *et seq.*

election results to the Secretary of the Commonwealth. 25 Pa. Stat. § 2642(k). No one filed a contest, and the counties duly certified their results. On the morning of Tuesday, November 24, the Secretary “certified the results of the November 3 election in Pennsylvania for president and vice president of the United States,” “Governor Tom Wolf signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States,” and “[t]he certificate was submitted to the Archivist of the United States.” (*See* Exhibit A.)

C. The Allegations of the Petition

The Petition contains nothing more than a laundry list of grievances that have already been addressed and rejected, abandoned, or debunked. The heart of their Petition is that the Pennsylvania Supreme Court—in Petitioners’ view—incorrectly decided certain election cases. Petitioners do not argue that circumstances have changed, or that there is any other basis to revisit the Supreme Court’s rulings; they just state that the rulings were wrong. For example:

Ballot return locations. Petitioners assert that the Pennsylvania Supreme Court incorrectly ruled that the Election Code permits counties to receive mail-in or absentee ballots at drop boxes or other secure locations. Pet. ¶ 47; *see Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

Ballot receipt extension. Petitioners argue that the counties should not have been permitted to count ballots received between 8:00 p.m. on election day and the Friday after election day. Pet. ¶ 47. The Pennsylvania Supreme Court has also decided this issue, and a petition for certiorari is before the U.S. Supreme Court. *See Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), *petition filed*, No. 20-542 (U.S.). The number of ballots involved is, in any event, too small to make a difference to any election result. *Bognet v. Sec’y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120 (3d Cir. Nov. 13, 2020)

“Notice and cure.” Much of the Petition focuses on the claim that certain counties improperly gave voters notice that their ballot envelopes were flawed and allowed them to “cure” the issues. Pet. ¶¶ 48-69. A different group of plaintiffs, represented by Petitioners’ law firm, brought this same claim in U.S. District Court on the day after the election, citing the same “evidence” that they have put before this Court. *See Complaint in Barnette v. Lawrence*, No. 2:20-5477 (E.D. Pa.) filed on Nov. 3, 2020 (Dkt. 12) (attached without exhibits as Exhibit B). After a hearing, Petitioners’ law firm withdrew their Motion for Temporary Restraining Order, then dropped the case entirely. *Id.* Dkt. 42. A different group of plaintiffs then raised the issue in a different federal court, which soundly rejected their arguments. *See Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-2078, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020). The U.S. Court of Appeals for the

Third Circuit agreed, and pointed out that in any event the number of “cured” ballots was too small to have affected election results. *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020).

Signature verification and ballot sufficiency review. Petitioners dispute the Pennsylvania Supreme Court’s decisions that 1) county boards of elections could not rely on signature comparisons to reject absentee or mail-in ballots and 2) could not set aside ballots based on certain technical deficiencies on envelope declarations. Pet. ¶¶ 69, 85-88 (citing *In re November 3, 2020 General Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020); *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 29 WAP 2020, 2020 WL 6866415 (Pa. Nov. 23, 2020).

Canvassing observers. One particularly well-trodden issue after the general election was the contention that the representatives of certain candidates or parties were not able to “properly observe” the canvassing of ballots. Various parties have raised this issue with the Pennsylvania Supreme Court, the U.S. District Court for the Eastern District of Pennsylvania, and the U.S. District Court for the Middle District; no court has agreed that any county was required to do any more than it did. See *In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895 (Pa. Nov. 17, 2020); *Donald J. Trump for President, Inc. v. Boockvar*,

No. 4:20-2078, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020); *Donald J. Trump for President, Inc. v. Phila. County Bd. of Elections*, No. 20-5533 (E.D. Pa. filed Nov. 5, 2020). Nonetheless, Petitioners discuss the issue at length. Pet. ¶¶ 70-78.

What remains of the Petition is vague allegations of perceived irregularities at canvassing locations and unexplained anomalies in data. For example, Petitioners submit an unsworn letter, from a state legislator with no apparent expertise in data analysis or election administration, that identifies (Petitioners say) “significant and dispositive discrepancies and errors [that] call into question[] the results of the Presidential Election in Pennsylvania.” Pet. ¶ 89 & Ex. E. Another declarant asserts that he tried to observe canvassing procedures in Delaware County but was unable to figure out what was happening, and (in his view) county officials had not answered his questions adequately. *See* Pet. Ex. D. Other claims in the Petition have already been debunked.³

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Do Petitioners have standing to challenge the legality of the November 2020 election results, where Petitioners do not plead any facts showing any particularized, substantial interest in the matter, but rather assert, at most, only a generalized interest in compliance with the law?

Suggested answer: No.

2. Does the Court have jurisdiction to invalidate the results of the November 2020 election or enjoin certification of those results, where such relief is

³ Compare Pet. ¶ 45 with <https://www.msn.com/en-us/news/us/erie-postal-worker-admits-making-up-pennsylvania-ballot-tampering-claims-officials-say/ar-BB1aTpZ6>.

not provided for or contemplated in Pennsylvania’s Election Code?

Suggested Answer: No.

3. Have Petitioners stated a cause of action where the Complaint contains only one cause of action—sounding in mandamus—and Petitioners cannot establish any of the prerequisites to granting mandamus relief?

Suggested Answer: No.

4. Should the Court disenfranchise all Pennsylvania voters, despite the fact that the doctrine of laches prohibits courts from imposing a prejudicial remedy, such as disenfranchisement, where a petitioner has unduly delayed in bringing suit, as the Petitioners did here by waiting months or even years to challenge alleged “election violations and irregularities”?

Suggested Answer: No.

5. Can this Court order preliminary injunctive relief to prevent Respondents from certifying the 2020 Presidential and Vice-Presidential elections when the certification has already occurred?

Suggested Answer: No.

V. ARGUMENT

A. PRELIMINARY OBJECTION 1: PETITIONERS’ CLAIMS FAIL AS A MATTER OF LAW BECAUSE PETITIONERS LACK STANDING TO ASSERT THEM

The Petition is a textbook example of a pleading that fails for lack of standing. Petitioners “are all residents of and electors within the Commonwealth of Pennsylvania,” and bring this lawsuit in that capacity alone. Pet. ¶ 1. They allege no interest other than an interest in ensuring elections are conducted in accordance with their preferred interpretation of the law. It is well settled that, to have standing, “one who seeks to challenge governmental action must show a

direct and substantial interest.” *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 286 (Pa. 1975). The requirement of a “substantial interest” means that “there must be some discernible adverse effect to some interest *other than the abstract interest of all citizens in having others comply with the law.*” *Id.* at 282 (emphasis added); accord *Szoko v. Twp. of Wilkins*, 974 A.2d 126, 1219-20 (Pa. Commw. Ct. 2009) (“[A] plaintiff must have an interest in the matter that is distinguishable from the interest shared by other citizens; to surpass that common interest, the plaintiff’s interest must be substantial, direct and immediate. A substantial interest in the outcome of a dispute is an interest that surpasses the common interest of all citizens in seeking obedience to the law.” (internal citation omitted)). As Petitioners do not assert any facts showing a particularized, substantial injury, the Petition must be dismissed for lack of standing.

As this Court has repeatedly held, a plaintiff/petitioner cannot survive preliminary objections based on a lack of standing unless the party has “pleaded facts demonstrating [the requisite] direct, substantial and present interest in th[e] matter.” *Szoko*, 974 A.2d at 1220; *Com. Higher Educ. Assistance Agency v. State Employes’ Ret. Bd.*, 617 A.2d 93, 94 (Pa. Commw. Ct. 1992) (“[T]o have standing, a party must ... plead facts which establish a direct, immediate, and substantial interest.”), *aff’d sub nom. Com., Higher Educ. Assistance Agency (PHEAA) v.*

State Employees' Ret. Bd., 636 A.2d 629 (Pa. 1994). The Petition fails to meet this standard. It pleads *no facts whatsoever* showing any particularized, substantial interest held by any of the petitioners. Indeed, Petitioners' articulation of their supposed "injury" plainly demonstrates that the only interest the Petition alleges will be harmed is the "interest of all citizens in having others comply with the law," *Wm. Penn*, 346 A.2d at 282: "As Pennsylvania residents, Plaintiffs have a direct interest in ensuring that only lawfully-cast votes are included in Defendant Wolf's enumeration and ascertainment of votes for presidential electors." Pet. ¶ 93; *see also id.* ¶ 97 (asserting that "Plaintiffs will be irreparably harmed if Defendant Wolf certifies inaccurate election results obtained in direct violation of Pennsylvania's Election Code and prior to final judicial determination of the contested ballots and actions of the various county boards of elections"); *id.* ¶¶ 85-87 (detailing claimed violations of the Election Code and other "irregularities and improprieties" that occurred during the November 2020 election in Pennsylvania allegedly rendering it "impossible to certify the accuracy of the purported results."). The Petition identifies no other purported harms. These allegations are plainly insufficient to plead standing. *See Szoko*, 974 A.2d at 1220.

It is also worth noting that this conclusion is completely in keeping with federal jurisprudence on standing, which the Pennsylvania Supreme Court has repeatedly looked to in explicating the concept of standing under Pennsylvania

law. *See Hous. Auth. of Cnty. of Chester v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 939 (Pa. 1999). As explained by recent, thoroughly reasoned decisions on standing by the United States Courts of Appeals for the Third Circuit and Eleventh Circuit, allegations that the casting or counting of unlawful votes “dilutes” the influence of voters who cast lawful votes state only a generalized grievance that cannot, as a matter of law, confer standing. *See Bognet v. Sec’y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *12 (3d Cir. Nov. 13, 2020); *Wood v. Raffensperger*, No. , 2020 WL 7094866, at *4-5 (11 Cir. Dec. 5, 2020). Of course, Petitioners here do not *even* assert any such “vote-dilution” theory of harm. But even if they had, such allegations would fail to confer standing as a matter of law.

Because, as a threshold matter, the Petition fails to plead facts showing that Petitioners have a direct, substantial, and present interest in this matter, the Petition must be dismissed. *Szoko*, 974 A.2d at 1220.

B. PRELIMINARY OBJECTION 2: THE PETITION MUST BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION

Petitioners here seek to undo Governor Wolf’s certification of Pennsylvania’s November 2020 election results, and temporarily or permanently prevent further certification thereof, based on wholly unsubstantiated allegations of illegality in the casting of certain ballots. *See* Pet. at p. 29, Count I, WHEREFORE clause (asking Court to “issue a Writ of Mandamus directing Defendant Wolf to

withdraw the certification of the 2020 Presidential election; and, to withdraw the certificates of election issued to the Democratic electors as a result thereof”), *id.*, Count II (seeking temporary and permanent injunctive relief preventing Defendant Wolf from certifying unlawful election results and from certifying election results prior to judicial determination of Petitioners’ claims of illegality by certain Pennsylvania county boards of elections in carrying out the election). Because the Election Code does not provide for the type of relief Petitioners request, however, the Court lacks jurisdiction.

Because “[j]urisdiction to resolve election disputes is not of common law origin but is founded entirely upon statute,” it “cannot be extended beyond the limits defined by the General Assembly”—that is, the statutory provisions providing for the resolution of election disputes are “the exclusive means” by which such disputes may be pursued and resolved. *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Commw. Ct. 2007); *see also Election of Tax Collector, Horsham Twp.*, 51 A.2d 692, 693 (Pa. 1947) (“Elections and their regulations are exclusively for the legislature.”); *Brunwasser v. Fields*, 409 A.2d 352, 354, 357 (Pa. 1979) (“the proper remedies for violations of the Election Code are to be found within the comprehensive legislative framework of the Code itself”) (holding that where statutory procedure was found to be “fully effective to redress appellant’s grievances” regarding alleged campaign finance-related Election Code violations

by winning candidate, “it must follow that [the relevant statutory procedure] is the exclusive method by which [such violations] may be remedied”); *Tartaglione v. Graham*, 573 A.2d 679, 680 n.3 (Pa. Commw. Ct. 1990) (“election contest proceedings are wholly statutory, and jurisdiction must be found in the Code or in some other statute incorporating the Code by reference”) (citing *Reese v. County Board of Elections of Lancaster County*, 308 A.2d 154 (Pa. Commw. Ct. 1973)); *Lurie v. Republican Alliance*, 192 A.2d 367, 369 (Pa. 1963) (holding that where the Election Code provides a particular procedure for pursuing certain types of claims asserting Code violations, and “specifically designates” a particular court for hearing such claims, “complainants [a]re legally required to follow the Code’s prescriptions in” bringing such claims).

As this precedent makes clear, Petitioners cannot invoke this Court’s equity jurisdiction in an attempt to circumvent the statutory strictures of the Election Code. As shown above, there are prescribed avenues for challenging the results of an election after it has already taken place—including, in particular, an election contest under 25 P.S. § 3291 *et seq.* Because Petitioners have not availed themselves of these statutory forms of action, this Court lacks jurisdiction to adjudicate Petitioners’ claims.

Nor is this jurisdictional bar a mere matter of technical legal niceties. To the contrary, it serves paramount public interests embodied in statutory law. As

this Court has explained, once “returns have been officially certified”—as is the case here—“the *only* manner in which a complainant may challenge the election result is by way of an election contest.” *Rinaldi*, 941 A.2d at 77-78 (emphasis added) (citing *In re 2003 Gen. Election for Office of Prothonotary of Washington Cnty.*, 849 A.2d 230, 235 (Pa. 2004)). And an election contest must be filed “within twenty days after the day of the ... election.” 25 Pa. Stat. § 3456; *see also Election of Tax Collector*, 51 A.2d at (rejecting petition to overturn elections returns and revoke certificate of election because it was filed more than twenty days after election). That deadline plays a crucial role. It “reflects a clear intention of the General Assembly to expeditiously resolve election disputes and provide for the prompt certification of the vote.” *In re 2003 Election for Jackson Twp. Sup’r*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003) (citing *In re Petition of Jones*, 346 A.2d 260 (Pa. 1975)); *see also id.* (“The integrity of the election process requires immediate resolution of disputes that prevent certification.”). Put differently, the deadline exists to protect the finality of election results and to avoid precisely the sort of uncertainty that the Petition here seeks to sow.

Petitioners’ challenge to the elections results comes too late. Any election contest had to be filed by no later than November 23, 2020. *See* 25 Pa. Stat. § 3456. Yet Petitioners did not initiate this lawsuit until December 4, 2020. And the Petition fails to satisfy other essential prerequisites of a challenge to

presidential election results. The Petition is not joined by “at least one hundred electors,” *id.* § 3351, who are “registered electors who voted at the ... election so contested,” *id.* § 3457. Nor is the Petition “verified ... by the affidavits of at least five of the petitioners,” “set[ting] forth that the [subscribing petitioners] believe the facts stated [in the petition] are true, that according to the best of [the petitioners’] knowledge and belief, the primary or election was illegal and the return thereof not correct, and that the petition to contest the same is made in good faith.” *Id.* Nor have petitioners “file[d] a bond, signed by at least five of the said petitioners in such sum as the ... court shall designate, with two or more individual sureties or a corporate surety to be approved by the ... court or judge, conditioned for the payment of all costs which may accrue in said contested ... election proceeding, in case the said petitioners by decree shall be adjudged liable to pay said costs.” *Id.* § 3459. Nor does the Petition “set out a prima facie case”—as opposed to vague allegations of potential improprieties with unspecified effects—that the election result is invalid. *Id.* § 3458. Each of these requirements is designed to prevent exactly what Petitioners are trying to do here: delay finalization of the elections results and impugn the integrity of the democratic process based on unfounded allegations, innuendo, and conspiracy theories.

In sum, Petitioners cannot avoid the strictures of the Election Code—nor thwart the clearly expressed intentions of the General Assembly—by making a

freewheeling appeal to this Court's equitable jurisdiction (particularly where, as here, Petitioners' conduct violates every principle of equity). A fatally flawed election contest by any other name is just as fatally flawed. The Petition must be dismissed.

C. **PRELIMINARY OBJECTION 3: THE PETITION MUST BE DISMISSED BECAUSE PETITIONERS' CLAIMS ARE BARRED BY LACHES**

This case is why laches exists. "Laches bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). The two elements of laches are "(1) a delay arising from Appellants' failure to exercise due diligence and (2) prejudice to the Appellees resulting from the delay." *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (citing *Sprague*, 550 A.2d at 187-88). Petitioners were not diligent in bringing their claims and they seek to disenfranchise all Pennsylvania voters in the process. There is no better candidate for laches than this case.

First, Petitioners unduly delayed. They filed this suit alleging various "election violations and irregularities" on December 4, 2020, despite the fact that almost all the allegedly wrongful conduct they identify occurred long before Election Day. For example, they (wrongfully) allege Secretary Boockvar "provided select organizations with close ties to the Democratic Party" access to the SURE

system, back in 2018. Pet. ¶¶ 38-39. The allegedly unlawful actions of county boards of elections also happened months or weeks before November 3. *See id.* ¶¶ 41-54, 74-83. The same is true for Petitioners' claims concerning the Department of State's pre-election guidance. *Id.* ¶¶ 55-63. Even the purportedly wrongful post-election conduct set forth in Petitioners' unsubstantiated allegations occurred on Election Day, or shortly thereafter. *Id.* ¶ 41.

Petitioners could have brought some of their claims as early as 2018, and should have brought all of them sooner than December 4. Their inexplicable and burdensome delay is a quintessential failure to act diligently. *See Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004) (applying laches to challenge to ballot referendum because it was initiated “thirteen months following the election”). Moreover, Petitioners' grounds for challenging the so-called “election violations and irregularities” are no different today than they would have been when the “violations and irregularities” occurred, and Petitioners have no possible legitimate excuse for their delay. *See In re Mershon's Estate*, 73 A.2d 686, 687 (Pa. 1950) (“If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. 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.’” (citation omitted)).

Petitioners would also be hard pressed to find a way to prejudice more

people in a more significant manner. Now, more than a month after Election Day, Petitioners seek to bar the Commonwealth's electors from participating in the Electoral College, and in the process, disenfranchise every single voter who participated in the November 3, 2020 general election. *See* Pet. at 30.

Disenfranchising voters for no fault of their own is as prejudicial as it is antithetical to our democracy. *See In re Contest of Election for Office of City Treas. from Seventh Legis. Dist. (Wilkes-Barre City) of Luzerne County*, 162 A.2d 363, 365-66 (Pa. 1960) (holding that, in election contest, courts “cannot allow the carelessness or even fraud of the election officers to defeat the election and frustrate the will of the electorate.... the rights of voters are not to be prejudiced by the errors or wrongful acts of election officers”).

Recognizing the gravity of a remedy that “would result in the disenfranchisement of millions of Pennsylvania voters,” the Supreme Court of Pennsylvania recently applied laches to bar a suit belatedly challenging the constitutionality of Act 77. *Kelly et al. v. Boockvar et al.*, No. 68 MAP 2020, 2020 WL 7018314, at *2 (Pa., Nov. 28, 2020). Federal courts have done the same. *See, e.g., Public Interest Legal Found. v. Boockvar*, No. 20-2905 at *12, 14 (M.D. Pa. Oct. 20, 2020) (“[W]e decline to order such drastic action simply because Plaintiff elected to file its suit on the eve of the national election.... In an election where the margins may be razor-thin, we will not deprive the electorate of its voice without

notice or proper investigation on the basis of an ill-framed and speculative venture launched at this late date.”); *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 404-05 (E.D. Pa. 2016) (denying preliminary injunction based on, *inter alia*, prejudicial delay and proximity to election, where political party and voters waited until 18 days before election before moving for preliminary injunction prohibiting enforcement of county-residence restriction on poll watchers, and the “requested relief ... would alter Pennsylvania’s laws just five days before the election”); *Stein v. Boockvar*, No. 16-6287, 2020 WL 2063470, at *19-20 (E.D. Pa. Apr. 29, 2020) (laches barred relief where relief sought, namely, order requiring decertification, prior to November 2020 election, of voting machines used in Philadelphia and other counties, would “effectively disenfranchise” voters); *Maddox v. Wrightson*, 421 F. Supp. 1249, 1252 (D. Del. 1976) (lawsuit filed “a mere five weeks before the election” was barred by laches where plaintiffs “were aware of ballot access difficulties at least seven weeks before th[e] suit was filed”); *Dobson v. Dunlap*, 576 F. Supp. 2d 181, 187-88 (D. Me. 2008) (rejecting plaintiffs’ effort to excuse their delay in filing suit by pointing to pendency of lawsuit brought by another claimant; plaintiff “voters cannot have it both ways: they cannot disassociate themselves from the [prior] action for purpose of preclusion” while relying on the action to excuse their delay).

Applying laches here is also procedurally proper. Laches may be raised in

preliminary objections if its existence “clearly appears in the complaint.” *Siegel v. Engstrom*, 235 A.2d 365, 367 (Pa. 1967); accord *Meier v. Maleski*, 648 A.2d 595, 604 n.15 (Pa. Commw. Ct. 1994) (“[L]aches may be raised by preliminary objection[.]”). Here, there is no dispute that Petitioners knew or should have known about their legal claims, from the moment the alleged “election violations and irregularities” occurred. Nor is there any dispute that the relief Petitioners seek would disenfranchise every one of the almost seven million Pennsylvania voters who cast a ballot in the 2020 general election. *See, e.g.*, Pet. ¶ 87. It is thus clear on the face of the record that laches applies to Petitioners’ attempt to disenfranchise the voters of Pennsylvania.⁴

For the doctrine of laches to have any meaning, this Court must apply it here, and dismiss Petitioners’ petition for review.

D. PRELIMINARY OBJECTION 4: THE PETITION MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM

The Petition does not state a claim for relief. A complaint “must apprise the defendant of the claim being asserted and summarize the essential facts to support

⁴ The Court may also apply laches to a constitutional challenge, such as that of Petitioners, so long as the challenge is backwards looking. *See Stilp*, 718 A.2d at 293 (distinguishing case refusing to apply laches to constitutional challenges where plaintiff “sought to prevent an unconstitutional act from occurring rather than challenge an act that already occurred”). Here, Petitioners seek to challenge an act that already occurred: the November 3, 2020 presidential election. Pet. at 28-29. Applying laches is therefore proper under *Stilp*.

that claim. If a plaintiff fails to properly plead a separate cause of action, the cause he did not plead is waived.” *Steiner v. Markel*, 968 A.2d 1253, 1259 n.11 (Pa. 2009) (citation and quotation omitted). Petitioners identify only two “causes of action”: Mandamus (Count I) and Temporary and Permanent Injunction Relief (Count II). Each is deficient.

It should go without saying that “temporary and permanent injunction relief” is not a cause of action: An “injunction is a remedy, and not a cause of action[,] that can only be issued in response to a legal wrong.” *Associated Prop. Mgt., Inc. v. Cmmw., Off. of Atty. Gen.*, 280 M.D. 2017, 2018 WL 2406333, at *3 (Pa. Cmmw. Ct. May 29, 2018), *reargument denied* (June 26, 2018) (sustaining preliminary objection to improper request for injunctive relief).

Petitioners’ cause of action purporting to sound in mandamus is also fatally flawed. “Mandamus lies where there is a clear legal right in the plaintiff and a corresponding duty in the defendant, and the act requested is not discretionary but only ministerial, but mandamus will not lie to control an official’s discretion or judgment where that official is vested with a discretionary power.” *Porter v. Bloomsburg State College*, 301 A.2d 621, 622 (Pa. 1973) (cleaned up). “As a high prerogative writ, mandamus is rarely issued and never to interfere with a public official’s exercise of discretion.” *Smires v. O’Shell*, 126 A.3d 383, 387 (Pa. Cmwlt. Ct. 2015). Mandamus require establishing three elements: “(1) a clear

legal right to relief in the petitioner; (2) a corresponding duty in the respondent; and, (3) the lack of any other adequate and appropriate remedy.” *Baron v. Cmmw. Dept. of Human Services*, 169 A.3d 1268, 1272 (Pa. Cmmw. Ct. 2017), *aff’d*, 194 A.3d 563 (Pa. 2018). Petitioners’ mandamus claim fails to establish any of these requirements.

1. Petitioners have not established a clear legal right to relief

Petitioners cannot use mandamus to compel Governor Wolf to withdraw certification of the 2020 presidential election or issuance of certificates of election to Democratic electors. *See* Pet. at p. 30 (identifying acts sought via mandamus).

“A clear legal right to relief is shown where the right to require performance of the act is clear, and a corresponding duty is shown where the governing law contains directory language, requiring that an act shall be done.” *Philadelphia Firefighters’ Union, Loc. 22, Intern. Ass’n of Firefighters, AFL-CIO ex rel. Gault v. City of Philadelphia*, 119 A.3d 296, 304 (Pa. 2015) (citations omitted). There is no clear legal right to relief here.

Petitioners do not identify any provision of the Election Code that permits—let alone requires—Governor Wolf to withdraw certification of the election or issuance of certificates of election to electors based on allegations of illegality. The reason is simple. No such provision of the Election Code exists. Sections 3165 and 3166 of the Election Code govern election certification and the Governor’s

issuance of certificates. Neither provision discusses withdrawal. *See* 25 P.S. § 3165, 3166. The other provisions of the Election Code similarly do not create a mechanism by which the Governor may withdraw certification or electors' certificates.

The only way to challenge an election's certification is via an election contest, the deadline for which has passed. *See* 25 P.S. §§ 3291, 3456. There is "no legal basis" to vacate an election's results "after the result thereof ha[s] been certified.... The **only** procedure then for questioning the ultimate result [i]s an election contest, and such the appellant did not institute." *In re Ballot Boxes and Recount of Ballots Cast in Gen. Election on November 3, 1959, of J. of Peace and Tp. Com'r*, 159 A.2d 905, 906-07 (Pa. 1960) (emphasis added); *accord Gunnett v. Trout*, 112 A.2d 333, 335 (Pa. 1955) ("The way to impeach the final certificate of a county election board is by a direct contest as provided by statute.").

Petitioners' right to require performance of the at-issue acts, *i.e.*, withdrawal of certification and electors' certificates, is not "clear" when no law and no historical precedent establishes those acts are even possible. Because Petitioners "cite[] no other statute or precedent that authorizes [them] to seek" the requested relief, they "ha[ve] not established a clear legal right to relief." *Donahue v. State Civ. Serv. Commn.*, No. 84 M.D. 2020, 2020 WL 6155681, at *3 (Pa. Cmmw. Ct. Oct. 21, 2020) (per curiam).

2. Petitioners do not seek to compel a ministerial act

Even if Petitioners could identify a clear legal entitlement to withdrawing certification of the election and electors' certificates (they have not), taking those actions would necessarily require the Governor to exercise his discretion. "A ministerial act is one which a public officer is required to perform upon a given state of facts and in a prescribed manner in obedience to the mandate of legal authority. A writ of mandamus cannot issue to compel performance of a discretionary act or to govern the manner of performing [the] required act." *Philadelphia Firefighters' Union*, 119 A.3d at 303-04 (citations and quotations omitted). Because the at-issue acts are not ministerial, mandamus cannot lie.

As discussed above, Petitioners seek to compel Governor Wolf to withdraw his certification of the election and issuance of certificates to presidential electors. *See* Pet. at p. 30 (identifying acts sought via mandamus). According to Petitioners, the Governor must do so because "illegal [election] returns must be rejected[,]" Pet. ¶ 96, and Governor Wolf "has no discretion to determine whether to enumerate and ascertain the illegal returns." *Id.* Petitioners' contention, however, presupposes the illegality of the returns. Before the Governor can act on illegal returns, he must first exercise his discretion to determine whether returns are indeed illegal.

Petitioners’ complaint is a laundry list of unsupported, unconfirmed, and in many cases directly disproven, “illegal returns.” For example, among the alleged “illegal returns” identified by Petitioners are absentee and mail-in ballots (1) delivered to “locations other than the respective offices of the boards of election” or (2) received between “8:00 p.m. on Election Day to 5:00 p.m. on November 6, 2020.” Pet. ¶ 47. According to Petitioners, these ballots are illegal notwithstanding a decision of the Supreme Court of Pennsylvania, *see Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), because the Supreme Court “arguably usurped the powers of the General Assembly” by holding that the ballots must be counted. Pet. ¶ 47. Under Petitioners’ theory of “illegal” votes, the Governor would necessarily have to exercise discretion in deciding to ignore the Supreme Court and discount votes that the Court held to be lawfully cast.

The same is true of various other categories of alleged “illegal returns” identified by Petitioners. The Governor would have to exercise discretion to ignore the Supreme Court to exclude ballots casts in counties where Petitioners allege there were not adequate protections for canvass watchers, *compare* Pet. ¶¶ 70-72 *with In re Canvassing Observation*, --- A.3d ----, No. 30 EAP 2020, 2020 WL 6737895 (Pa. Nov. 17, 2020), just as the Governor would have to exercise discretion to ignore the Supreme Court to exclude ballots whose declaration envelopes had issues relating to signatures, addresses, and dates. *Compare* Pet. ¶¶

85, 88, with *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, --- A.3d ----, No. 29 WAP 2020, 2020 WL 6875017 (Pa. Nov. 23, 2020). The Governor would also have to exercise discretion in crediting various unconfirmed allegations, for example the (dubious) account of USPS employee Jesse Richard Morgan, who claims to have carried “completed Pennsylvania ballots” from New York to Pennsylvania, Pet. ¶ 45, as well as Petitioners’ disproven, uncorroborated assertion that they possess “evidence of possible backdating of ballots in the United States Postal facility at Erie, Pennsylvania.” *Id.* And the Governor would have to exercise discretion to credit Petitioners’ conclusory allegation, made “[u]pon information and belief, ... that in many predominantly Democratic counties, such as Montgomery County, county election officials routinely violated these provisions of the Election Code.” Pet. ¶ 84.

For Petitioners to be correct, and for the Court to grant mandamus relief, the Court would have to decide that any time there are uncorroborated, untested allegations of “illegal” voting—even where those assertions are directly contrary to decisions by the Supreme Court of Pennsylvania—the Governor must blindly and mechanically accept those allegations as true. But that radical position is simply wrong. For that reason, among others, mandamus relief cannot lie.

3. The Election Code provides—and Petitioners failed to pursue—other adequate and appropriate remedies

Petitioners also had multiple other appropriate remedies available to them, other than mandamus, and so their request for mandamus must fail. Courts must dismiss a mandamus action when the plaintiff “failed to timely pursue” statutory remedies. *Dotterer v. Sch. Dist. of City of Allentown*, 92 A.3d 875, 883 (Pa. Cmmw. Ct. 2014); accord *Grabowsky v. Borough of Whitehall*, 99 C.D. 2020, 2020 WL 6573128, at *4 (Pa. Cmmw. Ct. Nov. 10, 2020) (“[C]ourts may dismiss a mandamus action” when there was “a statutory remedy available”); *Fassman v. Skrocki*, 390 A.2d 336, 338 (Pa. Cmwlth. Ct. 1978) (proper dismissal of mandamus action for failure to exhaust an adequate statutory remedy). “[A] mandamus action may not be used to revive lapsed appeal rights.” *Howard v. Com., Dept. of Transp.*, 73 A.3d 648, 651 n.8 (Pa. Cmmw. Ct. 2013) (citing *Luke v. Cataldi*, 932 A.2d 45 (Pa. 2007)).

Here, Petitioners had numerous options—other than mandamus—to appeal or challenge the Election Results. First, Petitioners take issue with numerous decisions by the Supreme Court of Pennsylvania. See Pet. ¶¶ 47, 69, 70, 85. Petitioners could have intervened in those cases, but chose not to. Likewise, Petitioners could have intervened in the federal cases initiated by the Trump Campaign and other republican candidates raising issues that largely track the campaign here. See *Trump for Pres., Inc., et al. v. Boockvar, et al.*, 2:20-CV-966,

(W.D. Pa.); *Donald J. Trump for Pres., Inc., et al. v. Boockvar, et al.*, 4:20-CV-02078 (M.D. Pa.); *Barnette, et al. v. Lawrence, et al.* 2:20-cv-05477 (E.D. PA.).⁵

Second, Petitioners could have filed a petition to open or recanvass the votes, under 25 P.S. § 3263. Petitioners had until five days after a particular county completed its computation of votes to file a petition to open or recanvass. *Id.* § 3263(a)(1). And third, Petitioners could have filed an election contest, under 25 P.S. § 3291. Petitioners had until twenty days after Election Day to file an election contest. 25 P.S. § 3456. Petitioners failed to take advantage of any of these remedies within the time limits.

Petitioners cannot use mandamus to raise claims, which should have been brought under these procedures, as an end-run around the Election Code's time limitations for petitions to reopen or recanvass and election contests.⁶ *See Petsinger v. Dept. of Lab. & Indus., Off. of Vocational Rehab.*, 988 A.2d 748, 758-59 (Pa. Cmmw. Ct. 2010) (dismissing mandamus action where plaintiff could have

⁵ Some of Petitioners in this case sought to intervene in the Middle District of Pennsylvania case but the motion was denied as moot because it was pending at the time the district court dismissed the complaint. *See Donald J. Trump for Pres., Inc., et al. v. Boockvar, et al.*, 4:20-CV-02078 (M.D. Pa.) (ECF Nos. 200, 201, 203).

⁶ The Election Code's time limitations are jurisdictional. *See Appeal of Orsatti* 598 A.2d 1341, 1342 (1991) ("The timeliness of an [election contest] goes to the jurisdiction of the Court and may not be extended absent fraud or a breakdown in the court's operation due to a default of its officers." (citation omitted)).

achieved result had it timely pursued statutory rights). Because Petitioners filed their complaint “well beyond the applicable filing periods” for their repackaged claims under the Election Code, they “may not resort to mandamus to advance these claims.” *Id.*

E. PRELIMINARY OBJECTION 5: THE REQUEST TO STALL CERTIFICATION MUST BE DENIED AS MOOT

In addition, to the extent Petitioners seek to prevent Respondents from certifying the results of the 2020 General Election, their request is moot. The Petition asks for, *inter alia*, an injunction prohibiting the Secretary and the Governor from certifying the results of the November 2020 general election. Pet. ¶ 97. But, on November 24, 2020 the Secretary “certified the results of the November 3 election in Pennsylvania for president and vice president of the United States,” and “Governor Tom Wolf signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States,” and “[t]he certificate was submitted to the Archivist of the United States.” *Department of State Certifies Presidential Election Results*, (Nov. 24, 2020) <https://www.media.pa.gov/pages/state-details.aspx?newsid=435>. Accordingly, this element of the injunctive relief Petitioners seek is moot. *See, e.g., Overland Enterprise, Inc. v. Gladstone Partners, LP*, 950 A.2d 1015 (Pa. Super. Ct. 2008) (petition for preliminary injunction seeking to enjoin landlord from exercising possession was mooted when

tenant lost possession).

Therefore, to the extent Petitioners seek to enjoin a certification process that has already occurred, this Court should deny their Petition as moot.

VI. CONCLUSION

For the foregoing reasons, the Court should sustain Respondents' Preliminary Objections and dismiss the Petition with prejudice.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: December 8, 2020

By: /s/ Michele D. Hangle
Michele D. Hangle (ID No. 82779)
Robert A. Wiygul (I.D. No. 310760)
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*KRAMER LEVIN NAFTALIS & FRANKEL
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1177 Avenue of the Americas
New York, New York 10036
(212)715-9308
*(*Pro Hac Vice Motions to be Filed)*

Counsel for Respondents

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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.

Dated: December 8, 2020

/s/ Michele D. Hangley
Michele D. Hangley

EXHIBIT A

Department Of State Certifies Presidential Election Results

11/24/2020

Harrisburg, PA – Following certifications of the presidential vote submitted by all 67 counties late Monday, Secretary of State Kathy Boockvar today certified the results of the November 3 election in Pennsylvania for president and vice president of the United States.

Shortly thereafter, as required by federal law, Governor Tom Wolf signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States. The certificate was submitted to the Archivist of the United States.

The Certificate of Ascertainment included the following vote totals:

Electors for Democratic Party candidates Joseph R. Biden and Kamala D. Harris – 3,458,229

Electors for Republican Party candidates Donald J. Trump and Michael R. Pence – 3,377,674

Electors for Libertarian Party candidates Jo Jorgensen and Jeremy Spike Cohen – 79,380

"Today's certification is a testament to the incredible efforts of our local and state election officials, who worked tirelessly to ensure Pennsylvania had a free, fair and accurate process that reflects the will of the voters," said Gov. Wolf.

"We are tremendously grateful to all 67 counties who have been working extremely long hours to ensure that every qualified voter's vote is counted safely and securely. The county election officials and the poll workers are the true heroes of our democracy, enabling us to vote in record numbers, amid challenging circumstances, so that every eligible voter's voice could be heard," Sec. Boockvar said.

MEDIACONTACT: Wanda Murren, (717) 783-1621

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EXHIBIT B

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

KATHY BARNETTE and CLAY D. BREECE

(b) County of Residence of First Listed Plaintiff Montgomery (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Andrew Teitelman, Law Offices of Andrew Teitelman P.C., 380 Red Lion Rd Ste 103, Huntingdon Valley, PA 19006 267 255 6864

DEFENDANTS

KENNETH E. LAWRENCE, VALERIE ARKOOSH, MD, MPH. and FRAN DEAN

County of Residence of First Listed Defendant Montgomery (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) Josh M. Stein, County Solicitor, One Montgomery Plaza ste 800, Norristown, PA 19404 610-278-3033

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): United States Constitution - Fourteenth Amendment. Brief description of cause: Violation of equal protection clause as to voters of Montgomery County and Berks County, Pennsylvania

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 11/03/2020 SIGNATURE OF ATTORNEY OF RECORD Andrew Teitelman

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DESIGNATION FORM

(to be used by counsel or pro se plaintiff to indicate the category of the case for the purpose of assignment to the appropriate calendar)

Address of Plaintiff: C/O ANDREW TEITELMAN, ESQ., 380 RED LION RD. STE. 103, HUNTINGDON VALLEY, PA 19006

Address of Defendant: ONE MONTGOMERY PLAZA, STE 800, NORRISTOWN, PA 19404

Place of Accident, Incident or Transaction: MONTGOMERY COUNTY PA

RELATED CASE, IF ANY:

Case Number: _____ Judge: _____ Date Terminated: _____

Civil cases are deemed related when **Yes** is answered to any of the following questions:

- | | | |
|--|------------------------------|--|
| 1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action of this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |

I certify that, to my knowledge, the within case is / is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 11/03/2020 /s Andrew Teitelman PA 43545
 Attorney-at-Law / Pro Se Plaintiff Attorney I.D. # (if applicable)

CIVIL: (Place a ✓ in one category only)

A. Federal Question Cases:

- 1. Indemnity Contract, Marine Contract, and All Other Contracts
- 2. FELA
- 3. Jones Act-Personal Injury
- 4. Antitrust
- 5. Patent
- 6. Labor-Management Relations
- 7. Civil Rights
- 8. Habeas Corpus
- 9. Securities Act(s) Cases
- 10. Social Security Review Cases
- 11. All other Federal Question Cases
 (Please specify): olation of 14th Amendment to US Constituti

B. Diversity Jurisdiction Cases:

- 1. Insurance Contract and Other Contracts
- 2. Airplane Personal Injury
- 3. Assault, Defamation
- 4. Marine Personal Injury
- 5. Motor Vehicle Personal Injury
- 6. Other Personal Injury (Please specify): _____
- 7. Products Liability
- 8. Products Liability – Asbestos
- 9. All other Diversity Cases
 (Please specify): _____

ARBITRATION CERTIFICATION

(The effect of this certification is to remove the case from eligibility for arbitration.)

I, Andrew Teitelman, counsel of record or pro se plaintiff, do hereby certify:

- Pursuant to Local Civil Rule 53.2, § 3(c) (2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs:
- Relief other than monetary damages is sought.

DATE: 11/03/2020 /s Andrew Teitelman PA 43545
 Attorney-at-Law / Pro Se Plaintiff Attorney I.D. # (if applicable)

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Philadelphia Division)**

KATHY BARNETTE, individually and as a candidate for Pennsylvania's 4th Congressional District and on behalf of all citizen electors of Montgomery County and Berks County, Pennsylvania,

and

CLAY D. BREECE, individually and as an elector in that portion of Pennsylvania's 4th Congressional District located in Berks County, and on behalf of all citizen electors of Berks County, Pennsylvania within Pennsylvania's 4th Congressional District

Plaintiffs,

v.

KENNETH E. LAWRENCE JR., Chair of the Montgomery County Board of Elections and Vice Chair of the Montgomery County Board of Commissioners, in his official capacity,

VALERIE A. ARKOOSH, MD, MPH, Vice Chair of the Montgomery County Board of Elections and Chair of the Montgomery County Board of Commissioners, in her official,

FRANK DEAN, Mail-In Election Director for Montgomery County, in his official capacity.

Defendants.

COMPLAINT

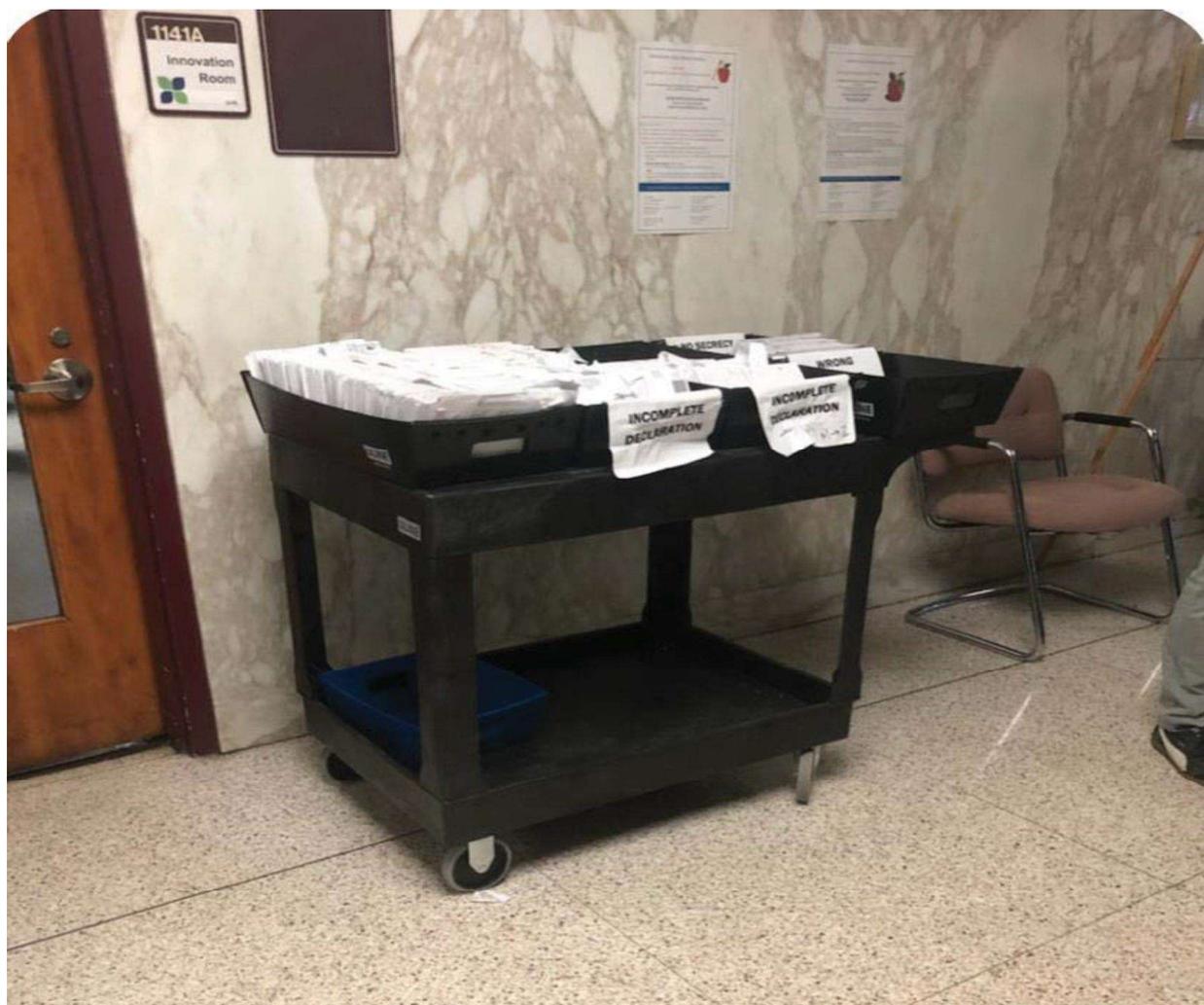
Civil Action No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

Not all counties in the Commonwealth of Pennsylvania are giving voters the same opportunity to vote, jeopardizing the integrity of the 2020 election. In Montgomery County, the

Board of Elections is not only deviating from the standards set forth in the Pennsylvania Election Code, they have substituted and are implementing their own arbitrary standards by illegally pre-canvassing mail-in ballots received before November 3rd and, in certain instances, providing the electors submitting such illegally pre-canvassed ballots that are found to be deficient an opportunity to *re-vote* on or before November 3rd. The photograph below shows some of the more than 3,900 pre-canvassed ballots literally sitting in the main public hallway of the Montgomery County Health and Human Services Building (where, in another part of the building, the *two* rooms being used for the canvassing of mail-in ballots is located):¹



¹ This “Ballots for Sale” photo was taken on 11/01/2020 by Robert Gillies during a tour of the Montgomery County mail-in ballot storage and canvass facility.

The ballots are near the main entrance of the building and are easily accessible by anyone entering or leaving the facility, whether county employees or members of the public. The Pennsylvania Election Code expressly prohibits counties from pre-canvassing any ballots, including absentee and mail-in ballots, before 7:00 a.m. on Election Day. 25 § P.S. 3146.8(g)(1.1). The Supreme Court of Pennsylvania stated: “[U]nlike in-person voters, mail-in or absentee voters are not provided an opportunity to cure perceived defects in a timely manner.” *In re: November 3, 2020 General Election*, No. 149 MM 2020, *12 (Pa. Oct., 23, 2020). Part of the Supreme Court’s rationale is tied to the equal treatment of voters. While Berks County, some of whose electors, including plaintiff Breece, share the Pennsylvania 4th Congressional District with the majority of Montgomery County electors, is adhering to the Election Code and the Supreme Court’s ruling, Montgomery County is pre-canvassing mail-in and absentee ballots, before 7 a.m. on Election Day, detecting defects in these ballots, and contacting some mail-in or absentee voters to change their ballots.

To make matters worse, the Montgomery County Board of Elections is restricting the ability of candidates and their representatives, the parties and their representatives and other legally constituted watchers (the “Canvass Watchers”) to observe the entire canvass process for the mail-in and absentee ballots by:

1. Using two rooms instead of one, but only allowing the Canvass Watchers to be in a tiny holding pen at the edge of the room where the ballots will be scanned. The holding pen does not even afford a sufficient view of all of the ballot scanners and operators and, at best a highly obstructed view of the room where the ballot envelopes are opened and no view of the area where a committee chosen by the Election Board will make the decisions about the legality/staleness of ballots - - affording the Canvass Watchers no opportunity to observe and

protect any objection(s) they may have.

2. Providing a single 40” flat screen television in the holding pen so the Canvass Watchers permitted to be in the pen can see views obtained from approximately 12 ceiling cameras located throughout the two rooms that are supposed to be a substitute for actually observing the entire canvass process.

3. The vast majority of the Canvass Watchers will not even be able to be in the holding pen and will be relegated to a remote “overflow room” that has two 40” flat screen televisions meant to be a substitute view for the entire canvassing process.

These blatant failures to adhere to Election Code were made known to the Board of Elections by plaintiff Barnette through her counsel’s letter dated November 1, 2020, a copy of which is attached hereto as Exhibit A. That letter followed Barnette’s letter of October 31, 2020, (attached hereto as Exhibit B), where she requested that the Board of Elections supply her with the written procedures they will employ regarding the handling, security, chain of custody and canvass of the mail-in and absentee ballots and, also requesting that they be permitted to make a video recording of the process, while painstakingly adhering to privacy and security concerns. Barnette’s requests were ignored, brushed off or red-taped into oblivion by the response of the Election Board *via* County Solicitor Josh Stein’s letter of November 2, 2020, a copy of which is attached hereto as Exhibit C, along with the email exchanges between the parties related thereto.

Montgomery County’s failure to comply with the Election Code and the Supreme Court’s holding results in the disparate treatment of voters in violation of the Equal Protection Clause of the Fourteenth Amendment. Equivalent votes in different counties and amongst similarly situated Montgomery County electors are being treated differently. Pennsylvania voters should not be treated differently based on the county where they are required to vote.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Kathy Barnette, is a resident of the Commonwealth of Pennsylvania, residing in Montgomery County, and is an elector therein and a candidate for the Fourth Congressional District in Pennsylvania.

2. Plaintiff, Clay D. Breece, is a resident of the Commonwealth of Pennsylvania, residing in Berks County, and is an elector for the Fourth Congressional District in Pennsylvania.

3. Defendant, Montgomery County Board of Elections is responsible for overseeing the conduct of elections in Montgomery County, including the conduct of election personnel at polling locations throughout the county.

4. Defendant, Kenneth E. Lawrence, Jr., is the Chairman of the Board of Elections and the Vice Chair of the Montgomery County Board of Commissioners and is sued in his official capacity.

5. Defendant, Valerie A. Arkoosh, MD, MPH, is the Vice Chair of the Board of Elections and Chair of the Montgomery County Board of Commissioners and is sued in her official capacity.

6. Defendant, Frank Dean, is the Montgomery County Director of Mail-In Voting and is sued in his official capacity.

7. This Court has jurisdiction of this matter pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201.

8. Venue is proper under 28 U.S.C. § 1391(b).

BACKGROUND

9. The Pennsylvania Election Code states: “The county board of elections shall meet no earlier than seven o’clock A.M. on election day to pre-canvass all ballots received prior to the

meeting.” 25 P.S. § 3146.8(g)(1.1.).

10. “The word ‘pre-canvass’ shall mean the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.” 25 P.S. § 102(q.1).

11. “A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website.” 25 P.S. § 3146.8(g)(1.1.).

12. And, “one authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.” *Id.*

13. During the pre-canvassing, the county board first “shall examine each ballot cast to determine if the declaration envelope is properly completed and to compare the information with the information contained in the ‘Registered Absentee and Mail-in Voters File.’” 25 P.S. § 3146.8(g)(3).

14. Then the board “shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.” 25 P.S. § 3146.8(g)(4)(i).

15. “If any of the envelopes on which are printed, stamped or endorsed the words ‘Official Ballot Election contain any text, mark or symbol which reveals the identity of the

elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void." 25 P.S. § 3146.8(g)(4)(ii).

16. Finally, the county board "shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes." 25 P.S. § 3146.8(g)(4)(iii).

17. The Montgomery County Board of Elections has verified that, in contravention of Pennsylvania's Election Code, Montgomery County officials began pre-canvassing before November 3, 2020, by inspecting newly received mail-in ballots and/or absentee ballots and noting any defects such as defects in declarations or a missing inner envelope also known as a "secrecy envelope." Email from Joshua M. Stein, Esquire to Julia Vahey, 10/31/20; Email from Frank Dean (Dean) to Lee Soltysiak and Josh Stein, 10/31/20 (hereinafter "Ex. D"); Excel spreadsheet attached to Email from Dean to Lee Soltysiak and Josh Stein, 10/31/20 (hereinafter "Ex. E").

18. Specifically, in his October 31, 2020 e-mail, Dean sent the "latest list of ballots with defects" to Lee Soltysiak and Josh Stein and wrote: "If the defect is an Incomplete Declaration or Missing Secrecy Envelope, the voter need only come to 1430 DeKalb Street, Norristown, PA 19401. They will be given the opportunity to correct their declaration or we will provide them with a secrecy envelope, which they can insert and reseal inside the Ballot Return Envelope." Ex. D.

19. Dean further wrote: "For the remainder of defects, the voter needs to go to Voter Services, One Montgomery Plaza, 425 Swede Street, Suite 602, Norristown, PA 19404 and request a Cancel/Replace." Ex. D.

20. The Supreme Court of Pennsylvania stated: "[U]nlike in-person voters, mail-in or absentee voters are not provided an opportunity to cure perceived defects in a timely

manner.” *In re: November 3, 2020 General Election*, No. 149 MM 2020, at *12.

21. The Excel spreadsheet attached to Dean’s October 31, 2020 e-mail indicates that Montgomery County began pre-canvassing as early as October 21, 2020, based on start and end times in the spreadsheet, and contacted some but not all voters with defects in their ballots. Ex. E.

22. Dean’s October 31, 2020 e-mail and Excel spreadsheet demonstrates that Montgomery County engaged in pre-canvassing prior to 7:00 a.m. on Election Day by inspecting absentee and/or mail-in ballots. Exs. A & B. Dean’s Excel spreadsheet specifically notes ballots have defective declarations and lack a secrecy envelope. Ex. E.

23. Montgomery County never provided public notice 48 hours prior to engaging in pre-canvassing.

24. Montgomery County deprived one authorized representative from each candidate, including Barnette, and each party from being in the room in which the mail-in and absentee ballots are pre-canvassed.

25. Montgomery County also essentially unlawfully disclosed a portion of a pre-canvass meeting prior to the close of the polls.

26. Montgomery County allowed voters to change their ballots by, for example, changing their declarations or adding a secrecy envelope in the Ballot Return Envelope.

27. Upon information and belief, Berks County has not deviated from the Election Code standards by adding their own language or engaging in pre-canvassing or limiting the ability of their Canvass Watchers to actually observe the entire canvass of the mail-in and absentee ballots in that county; and does not intend pre-canvass or canvass such ballots prior to 7:00 a.m. on Election Day. Unlike the Montgomery County Board of Elections, the Berks County Board

of elections has provided public notice and stated: “Due notice is hereby given that the pre-canvass of mail-in and absentee ballots will commence on November 3, 2020 at 7:00AM, Doubletree by Hilton Hotel Reading, 701 Penn Street, Reading, PA 19601.” Berks County Public Notice of Pre-Canvassing, <https://www.co.berks.pa.us/Dept/Elections/Pages/default.aspx> (last visited Nov. 2, 2020).

28. Berks County in Pennsylvania is following the Election Code by (a) refraining from pre-canvassing until 7:00 a.m. on Election Day and (b) not providing electors an opportunity to change their ballots after submitting the ballots to Berks County. They are also providing their Canvass Watchers a full and fair opportunity to observe the entire canvass process, unlike Montgomery County.

29. Montgomery County’s actions violate the Election Code of Pennsylvania, the Supreme Court of Pennsylvania’s holding, and the Equal Protection Clause of the Fourteenth Amendment.

30. As a result of Montgomery County’s actions, similarly situated voters are being treated differently based on the county where they are required to vote. In other words, equivalent votes in different counties are being treated differently.

31. In *Bush v. Gore*, 531 U.S. 98, 104-05 (2000), the Court determined that Florida’s disparate method of determining a legal vote amounted to an unconstitutional abridgment of the right to vote. The Supreme Court held that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”)).

32. At this juncture, in order to make sure that voters in Berks County and Montgomery County are treated equally, Defendants must set aside and declare void any ballots that have been submitted to Montgomery County and subsequently changed.

33. Currently, the Montgomery County Board of Elections has identified at least 1,200 electors as of Dean's October 31, 2020 e-mail, who submitted a defective mail-in or absentee ballot. Plaintiff does not challenge Montgomery County's actions with respect to any mail-in or absentee ballot that was not submitted by the voter.

34. Defendants have exalted Montgomery County mail-in and absentee voters over other voters such as voters in Berks County in the Commonwealth of Pennsylvania.

35. Plaintiff is running as the candidate in the 4th Congressional District for the Republican Party, and she will be at a significant disadvantage as the 4th Congressional District consists of both Montgomery County and Berks County. A vote that could count in Montgomery County will not count in Berks County because of the decisions made by Defendants in violation of Pennsylvania's Election Code and the Supreme Court of Pennsylvania's holding.

36. In short, the Montgomery County Board of Elections practice is unlawful and unconstitutional, and it should be stopped.

37. The standard being applied by Montgomery County Election Board will result in similarly situated electors in Montgomery County, whose ballots have the same kinds of disqualifying issues that would render them stale, but which are detected on or after November 3rd, from those whose ballots are shown in the Ballots for Sale photo who the county will permit to revote if they show up on or before November 3rd. And, the improper pre-canvass and opportunity to revote given to some Montgomery County electors is not being offered at all - -

and properly so, by the Berks County Board of Elections, resulting in their 4th Congressional District electors being treated differently from the Montgomery County electors whose ballots were pre-canvassed prior to 11/03. None of the electors from either county should be permitted to revote and none of their ballots should have been pre-canvassed in any event.

COUNT I
Violation of the Fourteenth Amendment of the Constitution of the United States of America

38. The allegations set forth in the foregoing paragraphs are incorporated herein as though set forth at length.

39. The Board's action presents not only a problem under Pennsylvania's Election Code but it violates the Equal Protection Clause of the Fourteenth Amendment. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”)

40. The Montgomery County Board of Elections has placed Montgomery County mail-in and absentee voters on a pedestal by engaging in pre-canvassing of absentee or mail-in ballots prior to 7:00 a.m. on Election Day, by contacting select voters to notify them that they may change their ballot, and by permitting select voters to change their ballots.

41. Plaintiff has no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court enter an Order:

- a. Enjoining the defendants and anyone acting on their behalf from pre-canvassing

ballots before 7:00 a.m., Tuesday, November 3, 2020.

- b. Enjoining the defendants and anyone acting on their behalf from contacting any elector whose mail-in ballot or absentee ballot contains perceived and actual defects and allowing the elector to change their ballot.
- c. Setting aside, sequestering and declaring spoiled any mail-in or absentee ballots that have been changed by an elector or otherwise not conforming with the Election Code;
- d. Declaring the defendants' conduct unconstitutional;
- e. Awarding Plaintiff's attorneys fees and costs under 42 U.S.C. § 1983, 1988; and
- f. Awarding Plaintiff any other appropriate relief.

Dated: November 3, 2020

Respectfully submitted,

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