Received 11/23/2020 11:19:05 PM Commonwealth Court of Pennsylvania

Filed 11/23/2020 11:19:00 PM Commonwealth Court of Pennsylvania
620 MD 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MIKE KELLY, SEAN PARNELL, 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 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").[1] 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

[1] 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.[2] 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

[2] *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 Enters. 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."[3] 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

[3] 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 disenfranchisement" 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

Respectfully submitted,

/s/ *Michael R. McDonald*

Marc E. Elias*
Uzoma Nkwonta*
Lalitha D. Madduri*
John M. Geise*
Christina A. Ford*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
MElias@perkinscoie.com
UNkwonta@perkinscoie.com
LMadduri@perkinscoie.com
JGeise@perkinscoie.com
ChristinaFord@perkinscoie.com

Adam C. Bonin
PA ID No. 80929
The Law Office of Adam C. Bonin
121 S. Broad St., Suite 400
Philadelphia, PA 19107
Phone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

Matthew A. White (Pa. Id. No. 55812)
Kahlil C. Williams (Pa. Id. No. 325468)
Michael R. McDonald (Pa. Id. No. 326873)
Matthew I. Vahey (Pa. Id. No. 315920)
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 864-8659
Facsimile: (215)864-8999
WhiteMA@ballardspahr.com
WilliamsKC@ballardspahr.com
McDonaldM@ballardspahr.com
VaheyM@ballardspahr.com

Seth P. Waxman*
Ari Holtzblatt*
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Seth.Waxman@wilmerhale.com
Ari.Holtzblatt@wilmerhale.com

Counsel for Proposed Intervenor Democratic National Committee

**Motions for Admission Pro Hac Vice Forthcoming*

CERTIFICATE OF COMPLIANCE

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

/s/ *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