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NOTICE TO PLEAD

Petitioner: You are hereby notified to file a written response to the enclosed Preliminary Objections within thirty (30) days from service hereof, or a judgment may be entered against you.

/s/ Michele D. Hangle

Michele D. Hangle
Attorney for Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DARYL D. METCALFE, *et al.*,

Petitioners,

v.

THOMAS W. WOLF, *et al.*,

Respondents,

No. 636 MD 2020

**RESPONDENTS' PRELIMINARY OBJECTIONS
TO PETITIONERS' PETITION FOR REVIEW**

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”), hereby present Preliminary Objections to the First Amended Complaint for Writ of Mandamus and Request for an Emergency Temporary Restraining Order and Injunctive Relief (the “Petition”) filed by Daryl D. Metcalfe, Russ Diamond, Dawn W. Keefer, Thomas R. Sankey, III, Robert W. Kauffman, Kathy L. Rapp, Stephanie P. Borowicz, James Mollick, Frank Scavo, Cris E. Dush, and Francis X. Ryan (“Petitioners”).

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND¹

1. 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 significant amendments to the Pennsylvania Election Code,² and an unusually

¹ For purposes of the Preliminary Objections, 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).

² See 25 Pa. Stat. § 2600 *et seq.*

heated political environment, the canvassing of the votes proceeded efficiently and without major incident.

2. 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. 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.

3. 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 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.”

II. PRELIMINARY OBJECTIONS

A. First Preliminary Objection: The Petition Must Be Dismissed Because Petitioners Lack Standing

4. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

5. The Complaint 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. (Am. Pet. ¶ 1.) They allege no interest other than an interest in ensuring elections are conducted in accordance with their preferred interpretation of the law.

6. 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)).

7. As Petitioners do not assert any facts showing a particularized, substantial injury, the Complaint must be dismissed for lack of standing.

8. 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 Employees’ 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).

9. 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.” Am. Pet. ¶ 98. (*See also* Pet. ¶ 102 (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.* ¶¶ 90-92 (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.

10. These allegations are plainly insufficient to plead standing. *See Szoko*, 974 A.2d at 1220.

11. 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).

12. 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).

13. 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.

14. 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.

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing the Complaint for lack of standing.

B. Second Preliminary Objection: Demurrer – Failure to State a Claim (Pa. R. Civ. P. 1028(a)(4))

15. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

16. Plaintiffs' amended complaint does not state a claim for relief.

17. A complaint “must apprise the defendant of the claim being asserted and summarize the essential facts to support 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).

18. Plaintiffs identify only two “causes of action”: Mandamus (Count I) and Temporary and Permanent Injunction Relief (Count II). Each is deficient.

19. 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).

20. Plaintiffs' cause of action purporting to sound in mandamus is also fatally flawed.

21. "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).

22. "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).

23. 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). Plaintiffs' mandamus claim fails to establish any of these requirements.

24. Plaintiffs 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* Compl. p. 30 (identifying acts sought via mandamus).

25. “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.

26. Plaintiffs 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.

27. 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.

28. 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 *Gunnnett 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.”).

29. Plaintiffs’ 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 Plaintiffs “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.*, 84 M.D. 2020, 2020 WL 6155681, at *3 (Pa. Cmmw. Ct. Oct. 21, 2020) (per curiam).

30. Even if Plaintiffs 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.

31. “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 303-04 (citations and quotations omitted). Because the at-issue acts are not ministerial, mandamus cannot lie.

32. As discussed above, Plaintiffs seek to compel Governor Wolf to withdraw his certification of the election and issuance of certificates to presidential electors. *See* Compl. p. 30 (identifying acts sought via mandamus).

33. According to Plaintiffs, the Governor must do so because “illegal [election] returns must be rejected[,]” Compl. ¶ 96, and Governor Wolf “has no discretion to determine whether to enumerate and ascertain the illegal returns.” *Id.* Plaintiffs’ 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.

34. Plaintiffs’ complaint is a laundry list of unconfirmed, and in many cases directly disproven, “illegal returns.”

35. For example, among the alleged “illegal returns” identified by Plaintiffs 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.” Compl. ¶ 47. According to Plaintiffs, 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. Compl. ¶ 47. Under Plaintiffs’ 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.

36. The same is true of various other categories of alleged “illegal returns” identified by Plaintiffs.

37. The Governor would have to exercise discretion to ignore the Supreme Court to discount ballots casts in counties where Plaintiffs allege there were not adequate protections for canvass watchers, *compare* Compl. ¶¶ 70-72 *with In re Canvassing Observation*, --- A.3d ----, 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 discount ballots whose declaration envelopes had issues relating to signatures, addresses, and dates. *Compare* Compl. ¶¶ 85, 88 *with In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, --- A.3d ----, 29 WAP 2020, 2020 WL 6875017 (Pa. Nov. 23, 2020).

38. The Governor would also have to exercise discretion in crediting various unconfirmed allegations of illegality, for example the (dubious) account of USPS employee Jesse Richard Morgan, who claims to have carried “completed

Pennsylvania ballots” from New York to Pennsylvania, Compl. ¶ 45, as well as Plaintiffs’ uncorroborated assertion that they possess “evidence of possible backdating of ballots in the United States Postal facility at Erie, Pennsylvania.” *Id.*

39. And the Governor would have to exercise discretion to credit Plaintiffs’ 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.” Compl. ¶ 84.

40. For Plaintiffs 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.

41. If the Court disagrees with that radical position, and instead determines the Governor, in his discretion, can decide whether to credit allegations

such as those made by Plaintiffs before acting on the alleged “illegality,” then it follows that mandamus relief cannot lie.

42. Finally, Plaintiffs also had multiple other appropriate remedies available to them, other than mandamus, and so their request for mandamus must fail.

43. 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. Cmwlt. 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)).

44. Here, Plaintiffs had numerous options—other than mandamus—to appeal or challenge the Election Results.

45. First, Plaintiffs take issue with numerous decisions by the Supreme Court of Pennsylvania. See Compl. ¶¶ 47, 69, 70, 85. Plaintiffs could have intervened in those cases, but chose not to. Likewise, Plaintiffs 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.).³

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

47. Plaintiffs 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.⁴ *See*

³ Some of Plaintiffs 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).

⁴ 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)).

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 achieved result had it timely pursued statutory rights).

48. Because Plaintiffs 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.* Accordingly, because Petitioners’ claims are legally insufficient, the claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection for legal insufficiency of the pleading and dismiss the Complaint with prejudice.

C. Third Preliminary Objection: The Petition is Barred Because This Court Lacks Jurisdiction

49. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

50. 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 allegations of illegality in the casting of certain ballots. *See* Compl. 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).

51. Because the Election Code does not provide for the type of relief Petitioners request, however, the Court lacks jurisdiction.

52. 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).

53. 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.

54. 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.

55. Nor is this jurisdictional bar a mere matter of technical legal niceties. To the contrary, it serves paramount practical goals 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)).

56. 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).

57. 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, it exists to protect the finality of election results and to avoid precisely the sort of

uncertainty that the Petition here seeks to sow.

58. Petitioners' challenge to the elections results is plainly untimely. Any election contest had to be filed by no later than November 23, 2020. *See* 25 Pa. Stat. § 3456. And the Petition fails to satisfy other essential prerequisites of a challenge to presidential election results.

59. 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.

60. 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.*

61. 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.

62. 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.

63. 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 invoking 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.

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing the Complaint because this Court lacks jurisdiction.

D. Fourth Preliminary Objection: The Petition is Barred by the Doctrine of Laches (Pa. R. Civ. P. 1028(a)(5))

64. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

65. “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); *see also Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (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.” (citing *Sprague*, 550 A.2d at 187-88)).

66. Petitioners were not diligent in bringing their claim and they seek to disenfranchise millions. There is no better candidate for laches than this case.

67. 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 wrongful conduct they identify occurred long before Election Day. For example, they allege Secretary Boockvar “provided select organizations with close ties to the Democratic Party” access to the SURE system 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 occurred on Election Day, or shortly thereafter. *Id.* ¶ 41.

68. 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 Est.*, 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)).

69. Petitioners would also be hard pressed to find a way to prejudice more people in a more significant manner.

70. 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 Off. 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”).⁵

⁵ Because of the substantial prejudice disenfranchisement causes to voters, courts in Pennsylvania and across the country have applied laches in election cases to avoid late changes to election law that would deprive Americans of the right to

71. Applying laches here is also procedurally proper. Laches may be raised in preliminary objections if its “existence ... is clear on the face of the record.” *In re Marushak’s Estate*, 413 A.2d 649, 651 (1980); *accord Meier v. Maleski*, 648 A.2d 595, 604 fn.15 (Pa. Cmmw. Ct. 1994) (“[L]aches may be raised by preliminary objection[.]”).

72. Here, there is no dispute that Petitioners knew or should have known about their legal claims, from the moment the alleged “election violations and

vote. *See Kelly et al. v. Boockvar et al.*, 2020 WL 7018314, at *2 (Pa., Nov. 28, 2020); *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).

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.⁶

73. For the doctrine of laches to have any meaning, the Court must apply it here.

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing the Complaint as barred by the doctrine of laches.

E. Fifth Preliminary Objection: Mootness

74. To the extent Petitioners seek to prevent Respondents from certifying the results of the 2020 General Election, their request is moot.

75. 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

⁶ 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 only seek to challenge an act that already occurred: the November 3, 2020 presidential election. Pet. for Review at 28-29.

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>.

76. 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).

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

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection and dismiss the request for injunctive relief described above as moot.

III. CONCLUSION

For the foregoing reasons, the Court should sustain Respondents' Preliminary Objections.

Respectfully submitted,

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Dated: December 8,
2020

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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
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