No. 20-3371

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Donald J. Trump for President, Inc.; Lawrence Roberts; David John Henry,
Plaintiffs-Appellants,

v.

Secretary, Commonwealth of Pennsylvania et al.,
Defendants-Appellees;

DNC Services Corporation/Democratic National Committee,
Intervenors-Defendants-Appellees; and

NAACP-Pennsylvania State Conference, et al.,
Intervenors-Defendants-Appellees.

On Appeal from the U.S. District Court for the Middle District of Pennsylvania

RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PENDING APPEAL BY INTERVENOR-DEFENDANTS-APPELLEES NAACP-PENNSYLVANIA STATE CONFERENCE, BLACK POLITICAL EMPOWERMENT PROJECT, COMMON CAUSE PENNSYLVANIA, LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, JOSEPH AYENI, LUCIA GAJDA, STEPHANIE HIGGINS, MERIL LARA, RICARDO MORALES, NATALIE PRICE, TIM STEVENS, AND TAYLOR STOVER

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INTRODUCTION

Having failed to plead a claim that could survive dismissal, Plaintiffs now ask this Court to take the extraordinary step of nullifying the certification of the Presidential election results—disenfranchising millions of Pennsylvanians, including the Voter Intervenors.[1]

Joseph Ayeni is a 77-year-old Philadelphian and registered voter. Voter Intervenors' Supplemental Appendix ("Voters' Supp. App.") 33, ¶¶ 4–5. The mail-in ballot Mr. Ayeni received did not include a secrecy envelope, so he returned his ballot in mid-October without the required envelope. *Id.* ¶¶ 6–9. The day before Election Day, election officials called Mr. Ayeni and informed him that his ballot was rejected. *Id.* ¶ 8. Mr. Ayeni went to the elections office, where officials told him to vote in person on Election Day. *Id.* ¶ 9. He did so, casting a provisional ballot, as is permitted under Pennsylvania's Election Code. *Id.* ¶ 10.

Appellants call Mr. Ayeni's vote "illegal" and say it should be "set aside." Emergency Mot. at 12.

Natalie Price is a 73-year-old resident of Montgomery County who votes in every election. Voters' Supp. App. 30–31, ¶¶ 2–5. She voted by mail-in ballot this

[1] "Voter Intervenors" refers to Intervenor-Defendants-Appellees NAACP-Pennsylvania State Conference, Black Political Empowerment Project, Common Cause Pennsylvania, League of Women Voters of Pennsylvania, Joseph Ayeni, Lucia Gajda, Stephanie Higgins, Meril Lara, Ricardo Morales, Natalie Price, Tim Stevens, and Taylor Stover.

year to avoid unnecessary exposure to crowds on Election Day. *Id*. ¶ 6. A day or two before the election, Ms. Price was notified that her ballot had been rejected. *Id*. ¶ 8. After traveling to Norristown and visiting two different sites in the pouring rain, Ms. Price learned that her ballot was rejected because she did not write her name and address on the ballot declaration, which seemed unnecessary to her because these were pre-printed on the envelope. *Id.* ¶¶ 8–11, 15. Ms. Price added this duplicative information to her ballot. *Id.* ¶ 13.

Appellants say Ms. Price's vote, too, should be "set aside." Emergency Mot. at 12.

Ricardo Morales, Meril Lara, and Taylor Stover have similar stories. Voters' Supp. App. 29, 35–39. All were committed to voting, were told they made mistakes that invalidated their ballots, and diligently obtained replacement ballots or voted provisionally to ensure their votes would be counted and their voices heard. *Id.* Appellants call their votes "illegal" and demand that they not be counted.

Several other Voter Intervenors, who voted by mail due to concerns about the COVID-19 pandemic, did not even make any mistakes that had to be cured. Lucia Gajda voted by absentee ballot because she has an autoimmune disorder that increases the health risk from contracting COVID-19. Voters' Supp. App. 27–28, ¶¶ 3-6. Stephanie Higgins, a Philadelphian in the third trimester of a high-risk pregnancy with similar concerns, successfully voted by absentee ballot. Voters'

Supp. App. 25–26, ¶¶ 6–9. Tim Stevens, a lifelong Allegheny County resident and long-time civil rights leader in Pittsburgh, voted by mail because of his age and concerns about the disproportionate impact of COVID-19 on Black people, and he complied with every requirement. Voters' Supp. App. 11–14, ¶ 2. Appellants do not dispute that Ms. Gajda, Ms. Higgins, and Mr. Stevens complied with every requirement and cast valid votes. But because of allegations about how their counties administered the election, Appellants suggest that their votes should be deemed presumptively invalid and potentially thrown out based on a statistical expert's guess as to whether they are defective. *See* Emergency Mot. at 23.

These are just a few of the Pennsylvanians whom Appellants seek to disenfranchise. The organizational Voter Intervenors (NAACP-Pennsylvania State Conference, Black Political Empowerment Project, Common Cause Pennsylvania, and League of Women Voters of Pennsylvania), represent nearly 50,000 other such voters. Voters' Supp. App. 1–10, ¶ 7; 15–19, ¶ 5; 20–24, ¶ 7. To even arguably support Appellants' quest to throw away these votes, Appellants would need to put forward compelling evidence of massive fraud. They have utterly failed to do that, as the District Court recognized. App. 62.

Instead, Appellants rely on an incoherent conspiracy theory. They hypothesize that certain counties restricted where observers could stand, not to protect election workers from a raging pandemic, but to count defective ballots in

secret. Appellants do not explain why, if these counties had conspired to count defective ballots, they would then go out of their way to help voters fix their mistakes and cast *non-defective* ballots. Appellants then complain that the counties designed this cure procedure "to favor Biden," Emergency Mot. at 15, ignoring the use of similar notice-and-cure protocols in several counties where voters favored President Trump: Wyoming County (67%-32%), Lebanon County (65%-33%), York County (62%-37%), and Luzerne County (57%-42%).[2]

Appellants further find it suspicious that there was a "lower rejection rate" for ballots in the General Election than in the Primary. Emergency Mot. at 18. But this is entirely unsurprising given extensive recent efforts of the organizational Voter Intervenors, other organizations, and the Commonwealth to educate the public on how to vote by mail in Pennsylvania.[3] And even if, for example, Philadelphia had rejected ballots at the same 3.9% rate as in the primary,[4] that would be nowhere near

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[2] *See* Voters' Supp. App. 89, 93; Angela Couloumbis & Jamie Martines, *Republicans Seek to Sideline Pa. Mail Ballots That Voters Were Allowed to Fix*, Spotlight PA (Nov. 3, 2020), https://www.spotlightpa.org/news/2020/11/pennsylvania-mail-ballots-republican-legal-challenge-naked-ballots-fixed-cured/.

[3] *See, e.g.*, Voters' Supp. App. 1–10, ¶ 13; 11–14, ¶ 7; 15–19, ¶ 9; 20–24, ¶ 17; *see also, e.g.*, Pa. Dep't of State, Press Release, Mail Voting Steps For The Nov. 3 General Election Explained (Oct. 1, 2020), https://www.media.pa.gov/pages/state-details.aspx?newsid=406.

[4] *See* Christina A. Cassidy and Frank Bajak, *In Battlegrounds Like Pa., Absentee Ballot Rejections Could Rise, Affecting Close Races* (Sept. 8, 2020), https://www.pennlive.com/news/2020/09/in-battlegrounds-like-pa-absentee-ballot-rejections-could-rise-it-could-be-pivotal-in-close-races.html.

the rate of 10% that Appellants guess would be "sufficient to overturn reported results." Emergency Mot. at 12 n.9.

Appellants' logic is absurd, but the injunction they request is deadly serious. Appellants are asking the Court to suspend the normal operation of Pennsylvania law and nullify the certification of the presidential election results. Once they secure that extraordinary injunction, Appellants demand to inspect the outside envelopes of 1.5 million ballots in certain counties they have cherrypicked, and ask a statistical expert to guess how many were "improperly counted" and who those voters might have voted for, so that the courts can "declare Trump the winner." Emergency Mot. at 12. Alternatively, if allowed to amend their complaint, Appellants will seek an injunction "that the results of the 2020 presidential general election are defective and providing for the Pennsylvania General Assembly to choose Pennsylvania's electors." App. 482, ¶ 327.

Everything about this is wrong. We did not establish a representative democracy to ask courts or legislatures to "declare" who wins our elections. Emergency Mot. at 12. We did not march for civil rights so that voters in "urban counties" could be casually denigrated. Dkt. 183, at 5.[5] And we did not establish the principle of "one person, one vote," *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), to decide elections based on the losing candidate's "statistical expert analysis,"

[5] All "Dkt." references are to documents filed in the District Court.

Emergency Mot. at 12. Mr. Ayeni, Ms. Price, Ms. Stover, Ms. Lara, Mr. Morales, Ms. Gajda, Ms. Higgins, and Mr. Stevens did their civic duty and are entitled to have their votes counted. They deserve better than disenfranchisement. So do 6.8 million other Pennsylvanians.

LEGAL STANDARD

Motions for temporary injunctive relief under Federal Rule of Appellate Procedure 8(a) seek an "extraordinary" remedy. *United States v. Cianfrani*, 573 F.2d 835, 846 (3d Cir. 1978). While the factors relevant to a request for emergency relief under Rule 8(a) are the same as those considered on a motion for preliminary injunction, motions for injunctive relief pending appeal are "rarely granted." *Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 2013 WL 1277419, at *1 (3d Cir. Feb. 8, 2013).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Only if the first two factors are established must the court consider the remaining two. *Greater Phila. Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 133 (3d Cir. 2020).

The burden of making these showings rests firmly on Appellants. *Stein v. Cortés*, 223 F. Supp. 3d 423, 431 (E.D. Pa. 2016). Appellants cannot meet their burden if there is "no record evidence to support" their assertions; "attorney argument" is not enough. *Bullock v. Carney*, 463 F. Supp. 3d 519, 524 (D. Del.), *aff'd*, 806 F. App'x 157 (3d Cir. 2020).

ARGUMENT

Appellants fall far short of the showing needed to justify the extraordinary relief they seek: judicial nullification of Pennsylvania's certification of the 2020 presidential election results.

I. Appellants Have No Reasonable Likelihood Of Success On The Merits.

To succeed in their brazen attempt to undo the results of the election, Appellants must first "demonstrate that [they] can win on the merits"—that is, that they have at least a "reasonable chance" of success. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 & n.3 (3d Cir. 2017). Appellants do not come close. The District Court dismissed their complaint because Appellants lacked standing and failed to state a valid claim for relief. Those correct rulings confirm that Appellants have no chance of success on the merits.

Voter Intervenors focus here on further, independent grounds why Appellants have no likelihood of success on the merits: *First*, Appellants' claims are untimely; and *second*, even if the notice-and-cure procedures and treatment of observers by

certain county boards were legally erroneous—and they were not—any error on the part of the *counties* could not legally justify mass disenfranchisement of *voters*.

A. Appellants' Claims Are Barred By Laches.

The doctrine of laches prohibits a party from asserting a claim when (1) the party failed to exercise diligence in raising the claim, and (2) the delay prejudiced the party's opponent. *See Costello v. United States*, 365 U.S. 265, 282 (1961). This rule applies with particular force to election law. "In the context of elections, [laches] means that any claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990). After an election, courts are especially loath to entertain claims that could have been raised before, lest they "permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983). Laches will thus generally bar Appellants from raising post-election challenges they could have raised before the election. *See, e.g.*, *Wood v. Raffensperger*, No. 1:20-cv-04651, 2020 WL 6817513, at *7–8 (N.D. Ga. Nov. 20, 2020) (laches barred plaintiff's attempt to prevent certification of Georgia presidential election results); *see also, e.g.*, *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988).

As Voter Intervenors' merits brief explains, Appellants' notice-and-cure claims are all barred by laches. *See* Voter Intervenors Br. at 26-36. Appellants failed to raise their notice-and-cure claims before Election Day, even though they knew or should have known about those claims from the press coverage given to, and the government communications concerning, this issue in the weeks and days before Election Day. Appellants' delay prejudiced not only the governmental Appellees but also the Voter Intervenors (both individually and through their members), whose already-cast votes Appellants seek to nullify.[6]

Appellants' motion also complains about the lack of access provided to canvass observers in certain counties. Even setting aside the facts that the operative complaint does not include any claims based on observer access and that the Supreme Court of Pennsylvania has rejected the merits of Plaintiffs' argument, any claims based on this issue would be barred by laches as well. The Trump Campaign should have known before Election Day how many of their representatives would be allowed to observe the pre-canvass and canvass of mail ballots—and under what conditions they could do so. The Election Code clearly states that "[o]ne authorized representative" of each candidate and political party may "remain in the room"

[6] Though Appellants belatedly seek to shift the focus of their case to declarations missing a date or voter address, the Supreme Court of Pennsylvania confirmed that such ballots are properly counted. *See In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 General Election*, Nos. 29, 31–35 EAP 2020, 2020 WL 6866415 (Pa. Nov. 23, 2020).

where those ballots were pre-canvassed and canvassed, 25 P.S. § 3146.8(g)(1.1), (2), and Secretary Boockvar issued similar guidance before the election. Voter Intervenors Br. at 11. Certainly, the Campaign knew about those conditions as soon as pre-canvassing started early on Election Day. The time to sue was then, when the Campaign could have sought an order modifying those restrictions while ballots were being pre-canvassed and canvassed, rather than seeking after-the-fact disenfranchisement of anyone whose ballot was counted under those procedures. *Id.* at 11–13. In fact the Trump Campaign *did* sue in Philadelphia and reached an accommodation, which as Chief Justice Saylor pointed out, ensured any access concerns were quickly remedied. *See In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *9 (Pa. Nov. 17, 2020) (Saylor, C.J., dissenting). If Appellants had similar concerns in other counties, they could have taken similar action. Likewise, Appellants' new argument that an October 23 Pennsylvania Supreme Court decision about observer access and ballot challenges violates Due Process, Emergency Mot. at 9, could have been litigated when the decision was issued a month ago.

In the District Court, Appellants did not dispute that their claims are subject to laches defenses; that laches generally bars claims that could have been raised before an election from being raised afterwards; or that they knew or should have known about their notice-and-cure claims before Election Day. *See* Dkt. 170, at 26–

28. Nor did Appellants offer any substantive response to Voter Intervenors' arguments on prejudice. Appellants argued instead that their delay was excusable because their claims were not "ripe" until injury accrued once votes were counted. Dkt. 170, at 26–27. This is flatly incorrect. A claim is ripe as soon as there is "danger of imminent injury." *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 147 (3d Cir. 2000). Whatever injury Appellants claim to have suffered, there was clearly an imminent risk of it before Election Day.

Because the Appellants cannot overcome a laches defense, they cannot demonstrate a likelihood of success on the merits. *See AM Gen. Corp. v. Daimler Chrysler Corp.*, 311 F.3d 796, 822 (7th Cir. 2002) (negligible likelihood of success where movant "demonstrated no chance of overcoming [defendant's] affirmative defense of laches"); *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 601 (8th Cir. 1999) (laches properly considered as part of likelihood of success).

B. Appellants' Requested Remedies Are Unavailable.

Appellants are also unlikely to succeed on the merits because the relief they seek is legally unavailable. Appellants nowhere allege—much less present any supporting *evidence*, as required to obtain an injunction—that a single absentee or mail-in ballot was fraudulently cast. Even if Appellants were correct that the county Appellees erred in certain aspects in how they administered the election, or that county-to-county variation in election procedures could give rise to constitutional

claims (and Appellants are wrong on both scores), no authority justifies their attempt to disenfranchise millions of qualified Pennsylvania electors because of these alleged errors.

As the District Court held, an alleged Equal Protection Clause violation—the only count at issue in the operative complaint—can be remedied by "leveling up" or "leveling down." App. 91. Rather than leveling up, Appellants asked to level down "and in doing so, they ask the Court to violate the rights of over 6.8 million Americans." App. 92. "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 Appellants' requested relief." *Id.*

The District Court was entirely correct. At most, Appellants contend that certain counties erred in technical aspects of election administration; but officials' errors would provide no basis to discount ballots cast by qualified voters. *See Appeal of Simon*, 46 A.2d 243, 246 (Pa. 1946) ("[T]he rights of voters are not to be prejudiced by [officials'] errors."). "[S]hort of demonstrated fraud, the notion that presumptively valid ballots cast by the Pennsylvania electorate would be disregarded based on isolated procedural irregularities that have been redressed—thus disenfranchising potentially thousands of voters—is misguided." *In re Canvassing Observation*, 2020 WL 6737895, at *9 (Saylor, C.J., dissenting).

Appellants stake their case on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), but to no avail. That decision involved a state senate race tainted by "massive absentee ballot fraud, deception, intimidation, harassment and forgery." *Id.* at 887. Here, Appellants have presented no evidence that even a single vote was fraudulently cast. Nor do Appellants present any evidence to support their provocative attempts to impugn the integrity of the officials who administered the election, and even the honesty of entire counties.

II. The "Irreparable Harm" Asserted By Appellants Is Not Cognizable.

Even if they were likely to succeed on the merits, Appellants must make a "clear showing of immediate irreparable injury." *Cont'l Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980). They have not. Seeking to set dangerous election law precedent, they ask the Court to conclude that any losing candidate can establish irreparable harm by simply proclaiming that there is some discrepancy in election administration, and that nullifying certification *could* uncover a factual or legal basis to change the result. *See* Emergency Mot. at 24. That is not the law, nor should it be. Losing candidates should not be allowed to block an election's certification and disrupt our democratic system by merely speculating about the possibility of voter fraud.

First, a campaign or candidate cannot establish that it would be irreparably harmed where the moving party has not shown that the alleged irregularities are

substantial enough to change the outcome. Losing candidates seeking the extraordinary remedy of a stay of certification must establish that "*but for*" the challenged acts, "they *would have been elected*." *Samuel v. Virgin Islands Joint Bd. of Elections*, No. 2012-0094, 2013 WL 106686, at *8 (D.V.I. Jan. 6, 2013) (emphasis added).

Appellants have made no such showing. They offer no evidence for the claim that "tens of thousands of votes" were "defective" and should not be counted. Emergency Mot. at 16–17 & n.14. And they have not alleged with particularity how many ballots with minor declaration defects were determined by the county boards to be valid. Instead, they speculate that "statistical analysis is expected to evidence that over 70,000 mail and other ballots which favor Biden were improperly counted." Emergency Mot. at 21. To support this unfounded speculation, they cite only to their own proposed complaint. But that is not evidence that can support a request for an injunction. *See Bullock*, 463 F. Supp. 3d at 524. Similarly, Appellants' complaints about canvass observers are devoid of any evidence suggesting that any invalid ballots were cast. Indeed, other than gesturing at a "statistical expert," Appellants present no evidence on how the Trump Campaign could possibly overcome a deficit of more than 80,000 votes.

Second, a candidate cannot demonstrate irreparable harm without evidence of conduct so egregious, intentional, and fraudulent that the results of the election may

no longer reflect the will of the collective electorate. *See Marks*, 19 F.3d at 887 (judicial intervention available only where there is "substantial wrongdoing"—*i.e.*, "massive absentee ballot fraud, deception, intimidation, harassment and forgery" that "render[s] the apparent result an unreliable indicium of the will of the electorate").

This is *far* from that case. Appellants admit that they allege no fraud, much less massive fraud. Their objection to "curing" focuses on ballots that *by definition* meet all applicable requirements. And their objections to ballots with alleged declaration defects have been rejected by the Supreme Court of Pennsylvania. *See In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 General Election*, Nos. 29, 31–35 EAP 2020, 2020 WL 6866415 (Pa. Nov. 23, 2020).

Appellants have also gone outside the operative complaint to object to a lack of "meaningful access" for canvass observers, demeaning the Commonwealth's predominantly Black urban centers as not "honest" places. Hr'g Tr. (Nov. 17, 2020), at 25:6. But if Appellants want injunctive relief, they need evidence, not innuendo. Appellants "have not made out" and cannot make out "even the possibility—much less the likelihood—that any vote tampering" or casting of fraudulent ballots occurred in this election." *Stein*, 223 F. Supp. 3d at 441–42 (rejecting unsupported contentions with respect to 2016 election). As in *Stein*, Appellants "have certainly not made the required clear showing of immediate irreparable injury." *Id.*

Third, courts routinely refuse to credit dilatory assertions of irreparable harm. *See Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 410 (E.D. Pa. 2016) (finding no irreparable harm where "the emergent nature of this suit is the Plaintiffs' own doing"). By sitting on their claims—choosing to see how the election played out instead of bringing a pre-election suit challenging the county-by-county "notice and cure processes" or timely raising all of their concerns about observer access (*see* Section I.A)— Appellants created the purported emergency they now ask this Court to redress with a precedent-shattering injunction.

III. The Balance of Equities And Public Interest Weigh Decisively Against An Injunction.

Even if Appellants could establish likelihood of success and irreparable harm, the Court would still need to "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief," paying "particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24.

The equities and public interest strongly favor denying Appellants' request for unprecedented relief. Appellants misleadingly minimize their request as one for only a "short stay, and not past December 8." Emergency Mot. at 24. But they are asking the Court to set aside Pennsylvania law and "stay" the "legal effect of certification" of Pennsylvania's election results. *Id*. at 14, 24.

As an initial matter, such a novel injunction would cast an unjustified pall of illegitimacy over the election results and diminish public confidence in the electoral process. *See Wood*, 2020 WL 6817513, at *13 (preventing certification of Georgia election results would "breed confusion," "undermine the public's trust in the election," and "potentially disenfranchise" more than one million voters). In the meantime, Pennsylvanians who exercised their fundamental right to vote in extraordinary numbers would face uncertainty about whether their votes would ultimately be counted. These voters, unsurprisingly, are devastated by the prospect that their votes might not be counted. Ms. Higgins, for instance, found it "particularly important" as a mother-to-be to cast a ballot in an election that "will affect my child's future" and "would be extremely upset if my vote was not counted and my voice was silenced despite the fact that I did everything I was supposed to do in order to safely vote." Voters' Supp. App. 25–26, ¶ 9; *see also id*. at 35–37, ¶ 11 ("A denial of my vote would tell me that I'm not an equal citizen of the United States, that my voice doesn't matter."); 11–14, ¶ 2; 27–28, ¶¶ 8–9; 29, ¶ 10; 30–31, ¶ 15; 33–34, ¶ 11; 38–39, ¶ 10.

Moreover, Appellants' request for a supposedly "short stay" must be viewed against the ultimate relief they seek. Appellants intend to ask the District Court, upon any remand, to "set aside" the votes of thousands or millions of Pennsylvanians and "declare Trump the winner." Emergency Mot. at 12. Alternatively, Appellants

will ask the courts to enter a judgment "that the results of the 2020 presidential general election are defective and providing for the Pennsylvania General Assembly to choose Pennsylvania's electors." App. 482, ¶ 327. Either way, the end result is the same: the mass disenfranchisement of qualified Pennsylvania voters.

The equities and public interest weigh overwhelmingly against disrupting the electoral process in order to aid this effort to disenfranchise voters. The Trump Campaign endorsed this common-sense proposition when it argued four years ago, successfully opposing similar relief sought by presidential candidate Jill Stein, that injunctions are especially injurious to the public interest when they would "disrupt[] . . . state electoral processes" for the certification of vote totals that are "already underway." Voters' Supp. App. 76–77. The Court agreed, holding that the "public interest conclusively weigh[ed] against" an injunction given the "real risk" that it "would disenfranchise six million Pennsylvanians" and "abrogate" their right to "select their President and Vice President." *Stein*, 223 F. Supp. 3d at 442. Countless decisions recognize that an "injunction that risks such disenfranchisement is against the public interest." *Donald J. Trump for President, Inc. v. Way*, No. CV2010753MASZNQ, 2020 WL 5912561, at *15 (D.N.J. Oct. 6, 2020).[7]

[7] To the extent the Trump Campaign now disputes this, any such argument should be rejected not only on the merits but also on grounds of judicial estoppel. *See Ryan Operations GP v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3rd Cir. 1996) (doctrine of judicial estoppel bars "a litigant from asserting a position inconsistent

Finally, the equities and public interest weigh against an injunction because Appellants have not provided a shred of evidence of fraudulent conduct on the part of voters, or of votes being cast by ineligible electors. *See* Sections I.B & II. Those votes Appellants challenge include voters such as Mr. Morales, whose ballot was rejected for unknown reasons, possibly because he could not write his full Hispanic name in the "very small" space provided on the ballot envelope, and who therefore cast a provisional ballot on Election Day. Voters' Supp. App. 29, ¶ 7. Ms. Price did not write her name and address on her ballot declaration because they were pre-printed on the envelope. *Id.* 30–31, ¶ 11. Other voters did not include the secrecy envelope that the Supreme Court of Pennsylvania only recently confirmed was necessary. *Id.* 33–34, ¶ 7; 35–37, ¶ 7.

In lieu of any actual evidence, Appellants seek to throw out an unquantified number of mail-in and absentee votes based on a statistical analysis that they promise will be conducted in the future. This "extrapolation" would necessarily disregard votes that were entirely proper, even under Appellants' unsupported theory. Those might include, for instance, Mr. Stevens, who leads the Black Political Empowerment Project, and voted by mail because he faces increased COVID-19 exposure due to his age and race. Voters' Supp. App. 11–14, ¶¶ 2–3; *see also id.* at

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with one that she has previously asserted in the same or in a previous proceeding," "to prevent litigants from playing fast and loose with the courts") (internal citations and quotation marks omitted).

1–10, ¶ 15 (describing similar voters). Mr. Stevens did everything right, but because he voted in a county that supported Mr. Biden, Appellants want to discard his ballot.

On the other side, no equities favor massive disenfranchisement and electoral chaos; that is the *least* equitable position imaginable. As discussed above, Appellants suffer no cognizable irreparable harm. *See* Section II. And Appellants have not shown the "reasonable diligence" necessary to support injunctive relief. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam); *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010) (denying motion for emergency injunction pending appeal when Appellants' claimed "'emergency is largely one of their own making"). *See* Section I.A.

In sum, the equities and public interest confirm what common sense dictates: the Court should not grant Appellants the unprecedented relief of nullifying the results of the presidential election, just to give Appellants the time to concoct evidence that they would use to seek to disenfranchise countless Pennsylvania voters. These voters exercised their fundamental right to vote, following the instructions of state and county election officials. Their votes must be counted, and Appellants' motion should be denied.

CONCLUSION

The Court should deny Appellants' Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify under Local Appellate Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit having been duly admitted on August 31, 2020.

/s/ David M. Zionts
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME AND VIRUS DETECTION REQUIREMENTS

In accordance with Fed. R. App. P. 32(g) and 3d Cir. L.A.R. 31.1(c), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,790 words (*i.e.*, no more than 5,200 words). As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate. This brief complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. I further certify, in accordance with 3d Cir. L.A.R. 31.1(c), that the text of this brief is identical to the text of the paper copies that will be submitted to this Court, and that virus detection software (Symantec Endpoint Protection, version 14.2.770.0 (updated Nov. 24, 2020)), has been run on the file and no virus was detected.

/s/ David M. Zionts
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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, I filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ David M. Zionts
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