No. 20-845

In the Supreme Court of the United States

DONALD J. TRUMP FOR PRESIDENT, INC.,
Petitioner

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents

RESPONSE IN OPPOSITION TO MOTION FOR EXPEDITED CONSIDERATION

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The Pennsylvania Office of Attorney General, on behalf of the Secretary of the Commonwealth Kathy Boockvar, respectfully files this response to Petitioner's motion for expedited consideration of the petition for writ of certiorari. The petition for writ of certiorari purports to consolidate three separate cases involving different sets of separately-represented respondents. Petitioner in each case is Donald J. Trump for President, Inc. (the Trump Campaign), the official campaign committee for President Trump's failed reelection efforts. Secretary Boockvar is a respondent in only one of these cases: *In re November 3, 2020 Gen. Election*, No. 149 MM 2020 (October 23, 2020), reported at 240 A.3d 591 (Pa. 2020). For the following reasons, Secretary Boockvar respectfully requests that the motion to expedite be denied.

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This action follows on the heels of a series of attempts to have this Court disenfranchise large swaths of Pennsylvania's electorate, or otherwise disqualify all of Pennsylvania's voters. *See Republican Party of Pennsylvania v. Kathy Boockvar, Secretary of Pennsylvania*, 20-542; *Joseph B. Scarnati, III v. Pennsylvania Democratic Party*, 20A53; *Mike Kelly v. Pennsylvania*, 22A98; *Texas v. Pennsylvania*, 22O155. In one of these cases filed before the election, this Court specifically denied a motion for expedited consideration, in part, because there was simply not enough time to decide the case before Election Day. *Republican Party of Pennsylvania v. Boockvar*, No. 20-542, 592 U.S. ___, ___ S.Ct.___, 2020 WL 6304626, at *2 (Oct. 28, 2020) (Alito, J., statement). This latest attempt by the Trump Campaign to compel expedited review of its petition in an effort to overturn the results of the November

3, 2020 presidential election, now seven-weeks in the past, is similarly lacking in merit, and is devoid of any urgency.

On October 23, 2020, the Pennsylvania Supreme Court determined that nothing in the plain language of Pennsylvania's Election Code compels or allows a county board of elections to disqualify a mail-in ballot based on a signature analysis of a voter's mail-in ballot declaration. *In re November 3, 2020 Gen. Election*, 240 A.3d 591, 609 (Pa. 2020).[1] Instead of moving expeditiously, as it now claims circumstances require, the Trump Campaign waited until Sunday, December 20 to file the present petition for writ of certiorari and motion to expedite. That is more than eight weeks after the Pennsylvania Supreme Court's decision and seven weeks after Election Day. The Trump Campaign's own conduct belies any claim of emergency that now compels or supports expedited consideration.

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The Trump Campaign attempts to justify its unreasonable delay by baldly claiming, in a footnote, that its petition "did not fully ripen" until this Court denied injunctive relief in *Kelly v. Pennsylvania*, 20A98, and the motion to file a bill of complaint in *Texas v. Pennsylvania*, 22O155. Motion at 1 n.1. The Trump Campaign's contention is profoundly incoherent.

Both the *Kelly* and *Texas* actions were initiated after Election Day, and well after the Pennsylvania Supreme Court's October 23 decision in this case. Further,

[1] The Trump Campaign also filed suit in the United States District Court for the Western District of Pennsylvania raising the same signature issue. *Donald J. Trump for President, Inc. v. Boockvar*, 2:20-CV-966, 2020 WL 5997680, at *9 (W.D. Pa. Oct. 10, 2020). District Judge J. Nicholas Ranjan examined the Election Code and independently determined that Pennsylvania law does not require signature comparison for mail-in and absentee ballots or ballot applications. *Id.* at *52-58. Tellingly, the Trump Campaign did not appeal that decision.

when the Trump Campaign sought to intervene in *Texas*, it implicitly recognized that Texas lacked standing. *See* Motion to Intervene. It makes little sense that the Trump Campaign would wait for actions initiated by other parties after Election Day before pursuing its challenge to the Pennsylvania Supreme Court's pre-Election Day decision here. The questions presented in the Trump Campaign's petition ripened months ago when the Pennsylvania Supreme Court issued its decision.

The election is now over. It has been four weeks since the Pennsylvania Governor signed a certificate of ascertainment certifying the Election for President-Elect Biden, and one week after Pennsylvania's Electoral College formally cast its votes in favor of President-Elect Biden.[2] Time has run out for the Trump Campaign and its acolytes to continue their baseless efforts to overturn the results of this election. With each ensuing attempt, the applicants have become more desperate and more disconnected from the law and reality. As Justice Scalia once observed, "[i]nsanity, it has been said, is doing the same thing over and over again, but expecting different results. Four times is enough." *Sykes v. United States*, 564 U.S. 1, 28 (2011) (Scalia, J. dissenting), *overruled by Johnson v. United States*, 576 U.S. 591 (2015).

In support of its explanation of its "need for expedited consideration," the Trump Campaign points to January 6, 2021, when Congress will count the electoral votes, and January 20, 2021, when President-Elect Biden and Vice President-Elect

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[2] Contrary to the Trump Campaign's assertion that "[t]he outcome of the election for the Presidency of the United States hangs in the balance" of this case, Motion at 3, it does not. President-elect Joseph Biden conclusively won the Electoral College. Even if Pennsylvania's 20 electoral votes were somehow eliminated, it would not ultimately affect the outcome of the election.

Harris will be inaugurated. Motion at 4. But the Trump Campaign offers no coherent legal argument in support of its assertion that its petition could have any bearing on those events.

In support of this latest effort to have this Court anoint the next President of the United States, the Trump Campaign points to a group of individuals purporting to be an alternate slate of presidential electors who convened an alternate electoral college, and attempts to rely upon the historical examples of the 1876 and 1960 elections. Pet. at 29-30. The Trump Campaign cannot manufacture an election dispute simply by empaneling its own slate of shadow electors with none of the required documentation signed by the Governor and Secretary of State, and the 1876 and 1960 elections lend absolutely no support to the Trump Campaign's effort to get this Court to recognize these self-anointed electors.

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The disputed 1876 election led directly to the Electoral Count Act. *See* 3 U.S.C. § 1 *et seq.*; *see also* Stephan A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541 (2004). That Act established the process by which *Congress*—not this Court—resolves disputed Electoral College results. Although "[t]he power to judge [] the legality of the votes is a necessary consequent of the power to count," under both the Twelfth Amendment and 3 U.S.C. § 15, that counting and judging belongs to Congress, not the Court. 18 Cong. Rec. 30 (1886) (remarks of Rep. Caldwell). Thus, the questions the Trump Campaign raises are political and are "not properly suited for resolution by" the Court. *Rucho v.*

Common Cause, ___ U.S.___, 139 S.Ct. 2484, 2491 (2019); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962).

The Commonwealth has certified the results of the election. The voters' chosen electors have met and cast their votes for President-Elect Joe Biden. U.S. CONST. Amend. XII; 3 U.S.C. § 7; 25 P.S. § 3192. All that remains is the counting of electoral votes in Congress. There is simply no dispute as to Pennsylvania's electoral votes. But even if there were, it would be for Congress alone to resolve.

In 1960, Hawaii sent two slates of certified electors to Congress after a re-count changed the election results in that State. *See* 107 Cong. Rec. 288-91 (1961). Initially, a slate of Nixon electors had been certified and sent to Congress. *Ibid.* After a court-ordered recount revealed that Kennedy had won the state, however, the Governor of Hawaii sent another officially certified slate of electors to Congress to cast votes in favor of Kennedy. *Ibid.* Nixon, who was the sitting Vice President at the time, and thus presided over the counting of electoral votes as President of the Senate, *see* 3 U.S.C. § 15, directed that the Kennedy-slate of electors be counted. 107 Cong. Rec. 288-91. There was no objection to that determination. *Ibid.*

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The present election bears no resemblance to what happened in 1876 or 1960. President-Elect Joe Biden won Pennsylvania by more than 80,000 votes. The Secretary of the Commonwealth certified those results, *see* 25 P.S. § 3159, and the Governor of Pennsylvania then signed a single Certificate of Ascertainment, *see* 25 P.S. § 3166. Pursuant to that process, the Commonwealth of Pennsylvania certified only one slate of electors, and no Commonwealth entity—legislative, judicial, or

executive—has sanctioned the alternative slate that the Trump Campaign seeks to create. Simply calling yourself a presidential elector does not make you one.

The Trump Campaign threatens that "if this matter is not timely resolved, not only Petitioner, but the Nation as a whole may suffer injury from the resulting confusion." Motion at 5. But it is the Trump Campaign that has manufactured this confusion through its baseless attacks on the election, and now seeks to rely on that confusion to obtain relief. The Trump Campaign may seek refuge by constructing an alternative reality with alternative electors, but this Court should not indulge that effort. In courts of law, facts, evidentiary standards, legal doctrines, and the constitutionally prescribed method for electing the President of the United States are fundamental. As is deference to the will of the voters. Pennsylvania voters have made their choice for President, and that choice was ratified by the only Electoral College that actually exists.

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CONCLUSION

The Court should deny the motion for expedited consideration of the petition for writ of certiorari.

Respectfully submitted,

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