

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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; FRANCIS X. RYAN,

Petitioners,

v.

THOMAS W. WOLF, in his official
capacity as Governor of the
Commonwealth Pennsylvania; KATHY
BOOCKVAR, in her official capacity as
Secretary of the Commonwealth of
Pennsylvania; and, all in their capacity as
Democratic presidential electors, NINA
AHMAD, VAL ARKOOSH, CINDY
BASS, RICK BLOOMINGDALE, RYAN
BOYER, PAIGE GEBHARDT
COGNETTI, DAISY CRUZ, KATHY
DAHLKEMPER, JANET DIAZ,
VIRGINIA MCGREGOR, CHARLES
HADLEY, JORDAN HARRIS,
MALCOLM KENYATTA, GERALD
LAWRENCE, CLIFFORD LEVINE,
NANCY MILLS, MARIAN
MOSKOWITZ, JOSH SHAPIRO,
SHARIF STREET, and CONNIE
WILLIAMS,

Defendants,

ORIGINAL JURISDICTION

No. 636 MD 2020

**DEMOCRATIC ELECTORS' RESPONSE TO PETITION FOR REVIEW
AND ANSWER TO PETITIONERS' FIRST AMENDED EMERGENCY
MOTION FOR A TEMPORARY RESTRAINING ORDER
AND INJUNCTIVE RELIEF**

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U.S.C. § 59

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Defendants Nina Ahmad, Val Arkoosh, Cindy Bass, Rick Bloomingdale, Ryan Boyer, Paige Gebhardt Cognetti, Daisy Cruz, Kathy Dahlkemper, Janet Diaz, Virginia McGregor, Charles Hadley, Jordan Harris, Malcolm Kenyatta, Gerald Lawrence, Clifford Levine, Nancy Mills, Marian Moskowitz, Josh Shapiro, Sharif Street, and Connie Williams (collectively, “Democratic Electors”) file this response and answer to the Petition for Review and First Amended Emergency Motion for a Temporary Restraining Order and Injunctive Relief. For the reason stated below, the petition and motion should be denied and dismissed.

INTRODUCTION

Courts around the country, including in the Commonwealth, have repeatedly and decisively rejected the unprecedented and baseless attempts to disenfranchise tens of millions of registered voters across numerous states in lawsuits brought by President Trump and his allies. Undaunted by a historic string of losses, the President and his surrogates have persisted with these apparently bottomless efforts.

Petitioners’ lawsuit attempts to end-run around Pennsylvania’s statutory procedure for election contests. Petitioners never filed such a contest yet now ask this Court for equivalent relief on an “emergency” basis. But the fire drill is one of Petitioners’ own making. And this Court need not wade into the thicket of Petitioners’ conspiratorial complaint to end this latest chapter in the post-election saga, as Petitioners’ claims are barred in the first instance by any number of legal

and equitable doctrines, including, laches, mootness, and standing. Petitioners also fail to show that they are entitled to any injunctive relief. Their last-ditch attempt to interfere with the election should be denied.

BACKGROUND

The statutory deadline for an election contest was November 23, more than two weeks ago. On that date, every Pennsylvania county certified its election results. And the following day, Secretary of the Commonwealth Kathy Boockvar certified the results of the Commonwealth's presidential election.¹ Shortly thereafter, Governor Tom Wolf signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president of the United States and Kamala D. Harris as vice president of the United States, and the certificate was submitted to the Archivist of the United States. The Certificate of Ascertainment reflected an 80,555-vote final margin of victory for the Biden-Harris ticket.²

Eleven days later—after the close of business on Friday, December 4, and with the federal “safe harbor” date a mere two business days away—Petitioners filed this lawsuit, requesting an “emergency” temporary restraining order. Despite the supposed emergency, Petitioners did not serve any Defendants. Instead, just

¹ Press Release, *Department of State Certifies Presidential Election Results*, Pa. Pressroom (Nov. 24, 2020), <https://www.media.pa.gov/pages/State-details.aspx?newsid=435>.

² *Id.*

yesterday, they filed a First Amended Complaint (“Complaint”) and an amended “emergency” motion for injunctive relief, which likewise apparently remain unserved.

ARGUMENT

The Complaint is replete with “what might be described as scattershot allegations.” *Stein v. Cortés*, 223 F. Supp. 3d 423, 429 (E.D. Pa. 2016). It recycles claims already rejected by the Pennsylvania Supreme Court and other courts;³ repeatedly speculates—based on “information and belief”—about various conspiracies, and disparages several recent Pennsylvania Supreme Court decisions. And despite effectively seeking to disenfranchise nearly seven million Pennsylvania voters—a “startling” request unprecedented until this election cycle—Petitioners’ filings are filled with “strained legal arguments and speculative accusations” rather than the “factual proof of rampant corruption” and “compelling legal arguments” that might be expected from such a brazen request. *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020), *aff’d sub nom. Donald J. Trump for President, Inc.*, 2020 WL 7012522. The Complaint should be dismissed.

³ See *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020) (noting that “earlier lawsuits have rejected” claims regarding how close poll watchers may stand, whether to count ballots with minor defects, and whether to let voters cure those defects).

I. The Court should dismiss this case because Petitioners lack standing.

Petitioners lack standing to bring their claims. Petitioners have not satisfied, and cannot satisfy, their “most important” requirement: that the relief they seek, if granted, would prevent them from experiencing injury-in-fact. When voters simply seek “relief that no more directly and tangibly benefits [them] than it does” any other voter, they lack standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992); *Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Commw. 2000); see also *Martel v. Condos*, --- F. Supp. 3d ---, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (explaining that “[i]f every voter suffers the same incremental dilution of the franchise” caused by the participation of certain voters, “then these voters have experienced a generalized injury”).⁴

A claim resting solely on the ground that “the law . . . has not been followed” is “precisely the kind of undifferentiated, generalized grievance about the conduct of government” that cannot give rise to a cognizable injury. *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Petitioners expressly rely on such a generalized grievance to establish standing, asserting they possess a “direct interest” “[a]s Pennsylvania residents . . . in ensuring that only lawfully-cast votes are included in Defendant

⁴ The Pennsylvania Supreme Court has explained that “federal decisions on standing” are “helpful” to Pennsylvania courts in determining whether the parties before them claim a cognizable injury. *Fumo v. City of Phila.*, 972 A.2d 487, 500 n.6 (Pa. 2009).

Wolf’s enumeration and ascertainment of votes for presidential electors.” Compl. ¶ 98 (emphasis added). But in Pennsylvania, “it is hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to herself, lacks standing to attack the validity” of state action. *Mixon*, 759 A.2d at 452.

Petitioners allege they are all “residents of and electors within the Commonwealth of Pennsylvania,” but none of them suggest their votes were compromised, corrupted, or not counted. Compl. ¶ 1.⁵ Instead, Petitioners make bald assertions “upon information and belief” that county election officials in certain counties violated provisions of the Election Code. But they fail to even state whether Petitioners are residents of these counties. The implication of their diaphanous allegations is that they have been injured simply by residing in a state with counties that allegedly violated Election Code provisions—an argument that entirely disregards the requirement for a redressable injury and turns long-held principles of standing on their head.

To the extent Petitioners imply they are injured due to *other* eligible Pennsylvanians’ participation in this election, that is also a generalized and hence

⁵ While each Petitioner was a candidate on the November 3, 2020 ballot, none claims standing on that basis, nor does any Petitioner claim his or her own ostensible election to the General Assembly was compromised on the basis of their allegations herein.

insufficient grievance. Any voter could make the same claim, in any election. For this reason, the Western District of Pennsylvania rejected a lawsuit predicated on a similar theory of injury by Representative Michael Kelly and other Republican candidates on standing grounds earlier this year. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *59 (W.D. Pa. Oct. 10, 2020).⁶

Moreover, none of the Defendants can provide Petitioners the relief they seek, and their claims therefore also fail the redressability prong of the standing inquiry. *See Lujan*, 504 U.S. at 568. The Complaint asks this Court to (1) direct “Defendant Wolf to withdraw the certification of the 2020 Presidential election”; and (2) “prohibit Defendants from casting votes . . . based upon election results that cannot be certified as accurate.” Compl. ¶¶ 99, 104. Petitioners fail to explain how the Governor has the power to withdraw the certification of the election to achieve these requests when the Certificate of Ascertainment has already been transmitted and received by the Archivist of the United States. *See Nat’l Archives*, 2020 Electoral College Results, <https://www.archives.gov/electoral-college/2020> (last accessed Dec. 8, 2020) (linking to Pennsylvania’s Certificate of Ascertainment, indicating it

⁶ *See also Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

has already been sent to and received by the Archivist of the United States). As a result, the remedy Petitioners seek would do nothing to prevent the injuries they claim.

II. The Complaint should be dismissed because it is an untimely attempt to contest the election.

Even if Petitioners had standing—they do not—their Complaint should be rejected as an improper and untimely election contest. Petitioners attempt to evade the Commonwealth’s robust election contest procedural requirements and deadlines while effectively seeking the same remedy: to overturn the election by claiming its results cannot be trusted. Petitioners seek “breathtaking” relief that is “grossly disproportionate to the procedural challenges raised.” *Donald J. Trump for President, Inc.*, 2020 WL 7012522, at *1, *7. But Pennsylvania sensibly requires much more of a would-be election contestant who requests such a drastic remedy than a mere complaint: “To initiate an election contest, one hundred or more voters must file a petition in the Pennsylvania Commonwealth Court within twenty days after Election Day and supplement that petition with at least five affidavits that the ‘election was illegal and the return thereof not correct.’ 25 P.S. §§ 3456–3457. The petitioners must also post a bond ‘conditioned for the payment of all costs which may accrue in said contested nomination or election proceeding.’ *Id.* § 3459.” *Stein*, 223 F. Supp. 3d at 427.

Petitioners seek to overturn the election without meeting any of these requirements. Their petition is not backed by one hundred or more voters, and it lacks the required five affidavits. They have not posted a bond. And, of course, they have filed well beyond the statutory deadline. Petitioners hope to evade all these requirements by repackaging an election contest into a complaint by another name. This Court should not permit Petitioners to disguise what is a contest proceeding as an action for mandamus and injunctive relief simply to avoid the intentionally robust procedural constraints of a contest,⁷ especially now that the deadline for timely filing such a contest has lapsed. Petitioners had ample opportunity under state law procedures to marshal the substantiating evidence necessary to vindicate their claims of election irregularities and failed to do so.

The Complaint must also be dismissed and the request for injunctive relief denied because “they have inexcusably waited well past the eleventh hour to seek it.” *Stein*, 223 F. Supp. 3d at 437. Petitioners do not even try to explain why they waited until the evening hours of December 4, 2020—a full month after the election,

⁷ Indeed,

where the contest is predicated on charges which do not specify fraud with precision and clearness, the court cannot lend itself to a seemingly futile and fruitless inquiry, engaging the parties in protracted litigation, casting doubt on the title to public office, involving the disfranchisement of many honest voters, not only as to the office involved but all the other offices voted for, and conceivably tainting the title of other elected officers unconcerned in the contest.

In re Contest of Election of Gollomar, 175 A. 510, 513 (Pa. 1934).

eleven days after the deadline to bring an election contest, ten days after Secretary Boockvar certified the results, and just two business days before the federal safe harbor date of December 8, *see* U.S.C. § 5—to bring this lawsuit. Their delay is certainly not justified by the pleadings, which rely on activities from as far back as 2018 as “evidence” of wrongdoing. *See, e.g.*, Compl. ¶¶ 38-41 (discussing a “Performance Audit Report” from 2019); *id.* ¶ 44 (discussing Rock the Vote’s voter-registration efforts in 2018); *see also Stein*, 223 F. Supp. 3d at 436 (Plaintiffs’ action based on electronic voting machines that were in use “well before the 2016 election”). Nor is the delay justified by the exhibits Petitioners attach to the Complaint, many of which involve events that occurred on or before either election day or the November 23 deadline to bring an election contest. *See, e.g.*, Compl. Ex. 1 (Performance Audit Report, dated December 2019); Compl. Ex. 2 (transcript dated November 20, 2020, relating to events that allegedly occurred on October 21); Compl. Ex. 3 (declaration dated November 9, 2020).

Petitioners *could* have timely filed an action before the election to raise their concerns about the Performance Audit. They *could* have timely filed a petition for recount or recanvass. They *could* have timely filed an election contest by November 23. But they *cannot* lie in wait while those deadlines lapse and then, on the eve of the safe-harbor deadline, seek to disenfranchise the millions of Pennsylvanians who voted in the 2020 general election. That is why “Courts have repeatedly held that

such prejudicial and unnecessary delay alone provides ample grounds to deny the emergency injunctive relief [Petitioners] seek.” *Stein*, 223 F. Supp. 3d at 437; *see also In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 307 (Pa. 1974) (“Compliance with statutorily imposed time limitations is especially important in election cases.”).

For the same reasons, Petitioners’ delay also defeats their request for emergency injunctive relief. A party seeking a temporary restraining order must be able to show that he or she will suffer irreparable harm if the court does not grant relief. *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1385 (Pa. 1978). But “in election law cases as elsewhere,” “a party requesting a preliminary injunction must generally show reasonable diligence” and cannot sleep on its rights. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). By their own allegations, Petitioners could have brought this action weeks if not months ago.⁸

⁸ In 2016, then President-elect Trump sought to intervene in *Stein* to argue against allowing a recount on the eve of the safe-harbor deadline and made numerous arguments and statements that undercut his surrogates’ efforts here, including:

[I]f [Petitioners’] motivation for this recount was truly to ensure election integrity, [they] could have raised these issues before the election. And if [they] had specific concerns about what had occurred during Pennsylvania’s election on November [3], [they] could have raised these concerns on November [4], immediately following the election. Pennsylvania law allows for such a challenge. . . .

(cont’d next page...)

III. Petitioners' claims are barred by laches and are moot

a. Laches bars Petitioners' claims.

Petitioners' claims are independently barred by laches, which applies when there has been "(1) a delay arising from [Petitioners'] failure to exercise due

[They] now [have] the audacity to argue that the entire recount and election-contest process under the Pennsylvania Election Code is unconstitutional, and that this Court should intervene on an emergency basis.

This could disenfranchise millions of Pennsylvania voters, all while robbing the presidential and vice-presidential candidates of the added electoral heft that Pennsylvania's twenty electoral votes would provide. Because this morass could have been easily avoided by a prompt filing of [Petitioners'] claims, laches independently bars [their] requested relief. . . .

Intervenors, Defendants, and all citizens of Pennsylvania face almost certain irreparable harm if a preliminary injunction is entered, as it would run the risk of preventing Pennsylvania from meeting state and federal deadlines for participating in the Electoral College. . . . And to order it creates the very real possibility of disenfranchising every Pennsylvania voter who exercised their right to vote on election day.

[Trump's] law-defying efforts to enlist this Court's assistance in upsetting an election [he] could not possibly win prompts the question: What is the reason for [Trump's] request? . . . All we know for certain is that [h]e is using it to line [h]is pockets with funds donated from those [h]e has scared into believing that Pennsylvania's electoral process was hijacked by nameless foreign entities. It would be bad enough if [h]e were wasting only [his] own time and resources as part of [his] electoral farce. But [h]e is also wasting millions of dollars in taxpayer money and calling into doubt Pennsylvania's ability to meet the deadline for certifying its electors in accordance with federal and state law.

Opp. to Mot. for Preliminary Injunction, *Stein v. Cortés*, 2016 WL 8828229 (E.D. Pa. Dec. 8, 2016)

diligence and (2) prejudice . . . resulting from the delay.” *Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998) (citation omitted). Both elements—delay and prejudice—are assuredly present here.⁹

First, Petitioners’ filings make clear that they knew about the factual basis of the Complaint well before the election, and certainly before Pennsylvania’s November 23 deadline for bringing an election contest. *See, e.g.*, Compl. ¶¶ 38-41, 44; *id.* Exs. 1-3. Petitioners had “information within [their] reach” weeks, if not months, ago about the actions they now challenge. *See Taylor v. Coggins*, 90 A. 633, 635 (Pa. 1914).

In the election context, any delay is prejudicial, but a month-long delay in bringing a post-election lawsuit is particularly damning. *See Stein*, 223 F. Supp. 3d at 437; *see also, e.g., Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *1 (Pa. Nov. 28, 2020) (“[I]t is beyond cavil that [Republican] Petitioners” who waited until November 21 to sue to invalidate Pennsylvania’s election “failed to act with due diligence in presenting the instant claim”); *Sprague v. Casey*, 550 A.2d 184 187-88 (Pa. 1988). “[Petitioners’] delay is inequitable, and

⁹ Laches can be applied at this stage because none of the relevant facts are in dispute. *See Stilp*, 718 A.2d at 293 (citing *Tudor Dev. Grp. v. U.S. Fid. & Guar. Co.*, 768 F. Supp. 493, 496 (M.D. Pa. 1991)); *see also Holiday Lounge, Inc. v. Shaler Enters. Corp.*, 272 A.2d 175, 177 (Pa. 1971) (“[L]aches may be raised and determined by preliminary objection[.]”).

further delay would wreak further inequity.” *Donald J. Trump for President, Inc.*, 2020 WL 7012522, at *8.¹⁰

Second, the Democratic Electors and all Pennsylvanians would be greatly prejudiced by Petitioners’ calculated delay. Almost seven million Pennsylvanians voted in the presidential election. Those voters reasonably expected that their votes would count, that the results of those votes would be certified. Worse, Petitioners seek relief that goes beyond merely delaying certification: they ask the Court to *decertify* results which have already been finalized. *See* Compl. at 30 (asking the Court to “direct[] Defendant Wolf to withdraw the certification of the 2020 Presidential election”).

And the prejudice could have ripple effects well beyond this election. The Supreme Court has cautioned courts not to make drastic changes to election laws close to elections, in part because such changes can decrease trust in electoral

¹⁰ *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 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. 2:06-CV-4592, 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.”); *Kistner v. Simon*, No. A20-1486, slip op. at 3-4 (Minn. Dec. 4, 2020) (dismissing two counts of post-election challenge on basis of laches because procedures plaintiffs complaint of were publicly known well before election).

institutions. *See, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). That risk is even greater in the post-election context. *See Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513, at *8 (N.D. Ga. Nov. 20, 2020) (post-election interference will “erode [] confidence in the electoral process”); *Kistner*, No. A20-1486, slip op. at 4 (such relief would “cast an unacceptable degree of uncertainty over the election”). “Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.” *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003). “Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. . . . The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.” Order, *Wis. Voters All. v. Wis. Elections Comm’n*, No. 2020AP1930-OA, at 3 (Wis. Dec. 4, 2020) (Hagedorn, J., concurring). Petitioners’ attempts to change the rules of the election after the election is over should be rejected out of hand.

b. Petitioners’ unjustified delay has rendered the case moot.

The case should also be dismissed because Petitioners’ unjustified delay has mooted their claims. Petitioners ask the Court to decertify the election. But that “ship has sailed”; the results of Pennsylvania’s presidential election have been certified for weeks. *See King v. Whitmer*, No. CV 20-13134, 2020 WL 7134198, at *5 (E.D.

Mich. Dec. 7, 2020) (noting that the “ship has sailed” and the case is moot because “[t]he time has passed to provide most of the relief Plaintiffs request [and] the remaining relief is beyond the power of any court”). Indeed, Petitioners offer no explanation of how this Court could grant the relief they seek. The judiciary “cannot turn back the clock and create a world in which the 2020 election results are not certified.” *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, at *6 (11th Cir. Dec. 5, 2020); *King*, 2020 WL 7134198, at *5. Because there is no longer any case or controversy to resolve, the case is not justiciable, and it should be dismissed. *See In re Gross*, 382 A.2d 116, 119-20 (Pa. 1978); *Rogers v. Lewis*, 656 A.2d 1368, 1369 (Pa. 1995) (“It is well settled that [the] Court will not decide moot questions.”).

The Complaint does not fall within any exception to the mootness doctrine. For example, it does not raise issues that are “capable of repetition but likely to evade review.” *Cf. In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *5 n.7 (Pa. Nov. 17, 2020). As noted, Pennsylvania has enacted a specific statutory mechanism through which registered electors can raise post-election challenges for up to twenty days after the election. *See* 25 P.S. § 3456. Petitioners’ concerns could have been raised before the election, or through a timely election contest. Hence, this is not the sort of dispute where an issue, *if* properly and timely raised, would be capable of repetition while evading review. *See Wood*, 2020 WL 7094866, at *7 (courts do not apply mootness exception “if there is some alternative vehicle through

which a particular policy may effectively be subject to complete review” (internal quotation marks omitted)).

IV. Petitioners’ request for emergency injunctive relief lacks merit and fails on the equities.

Petitioners’ request for emergency injunctive relief should also be denied for two additional reasons.

No clear right to relief. First, Petitioners have not shown a clear right to relief under common law or the Pennsylvania Election Code. *See New Castle Orthopedic Assoc.*, 392 A.2d at 1385 (noting that injunctive relief “should never be awarded except when the rights of the plaintiff are clear” (quoting *Herman*, 141 A.2d at 577)). The code has carefully crafted processes for recounts and contests. *See* 25 Pa.C.S. Ch. 14, Art. XVII; *Brunwasser v. Fields*, 409 A.2d 352, 354, 357 (Pa. 1979) (“[T]he proper remedies for violations of the Election Code are to be found within the comprehensive legislative framework of the Code itself.”). Petitioners’ request for the Court to circumvent these processes at the post-certification stage has no legal basis. This failure, too, bars their request for emergency injunctive relief.

Petitioners also have no chance of succeeding on their mandamus claim. A mandamus petitioner must identify that the government has a mandatory duty to act and that she has a clear legal right to its performance. *See Sanders v. Wetzel*, 223 A.3d 735, 739 (Pa. Commw. 2019) (“A mandatory duty 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.’” (quoting *Filippi v. Kwitowski*, 880 A.2d 711, 713 (Pa. Commw. 2005)). Petitioners fail to identify any source in Pennsylvania’s statutory or decisional law that provides the Governor with the authority—let alone the non-discretionary duty—to “decertify” the defendant electors.

The balance of the equities and the public interest do not favor Petitioners. Second, “greater harm [would be] worked by the issuance of this injunction than would result from its denial.” *New Castle Orthopedic Assocs.*, 392 A.2d at 1385. Petitioners effectively seek to throw out over 3.4 million ballots cast by Pennsylvanians for the Biden-Harris ticket. This could “abrogate the right of millions of Pennsylvanians to select their President and Vice President”—meaning the requested relief “may thus be unconstitutional.” *Stein*, 223 F. Supp. 3d at 442 (citing *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam)); see *United States v. Mosley*, 238 U.S. 383, 386 (1915) (describing as “unquestionable” that the right to vote involves not just “the right to put a ballot in a box,” but also “the right to have one’s vote counted”). “In these circumstances the equities and public interest conclusively weigh against granting [Petitioners’] Motion.” *Stein*, 223 F. Supp. 3d at 442.

CONCLUSION

For the reasons above, Petitioners' Complaint should be dismissed with prejudice and their Emergency Motion for a Temporary Restraining Order and Injunctive Relief should be denied.

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**Applications for admission Pro Hac Vice forthcoming*

**CERTIFICATION PURSUANT TO PENNSYLVANIA RULE OF
APPELLATE PROCEDURE 127**

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/ Adam C. Bonin

Adam C. Bonin

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CERTIFICATE OF SERVICE

I, Adam C. Bonin, certify that on this day, I caused a true and correct copy of the foregoing brief to be served on counsel for Petitioners and Defendants via this Court's electronic filing system.

Date: December 8, 2020

/s/ Adam C. Bonin

Adam C. Bonin

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