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Docket No. 676 MAL 2020

DNC Services Corporation/Democratic National Committee's Answer to the Emergency Petition for Allowance of Appeal by Donald J. Trump for President, Inc.

Answer to Emergency Petition for Allowance of Appeal from the Order of the Commonwealth Court entered November 25, 2020, at No. 1191 CD 2020, Affirming the Order of The Honorable Judge Robert O. Baldi, In the Court of Common Pleas of Bucks County, Dated November 19, 2020 at Docket No. 20-05786-35

Marc Elias*
Jacob D. Shelly**
PERKINS COIE LLP
700 13th Street, NW, Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Matthew Gordon*
Laura Hill**
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, Washington 98101-3099
206-359-8000

**Admitted Pro Hac Vice*
***Pro Hac Vice Application Forthcoming*

Kahlil C. Williams
(Pa. Id. No. 325468)
Michael R. McDonald
(Pa. Id. No. 326873)
Matthew I. Vahey
(Pa. Id. No. 315920)
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 665-8500
Facsimile: (215) 864-8999
WilliamskC@ballardspahr.com
McdonaldM@ballardspahr.com
VaheyM@ballardspahr.com

Attorneys for Intervenor-Defendant DNC Services Corp. / Democratic National Committee

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INTRODUCTION

Donald J. Trump for President, Inc.'s (the "Campaign") "emergency" petition to this Court is yet another volley in an apparently bottomless effort to disenfranchise registered Pennsylvania voters. The Commonwealth Court, following this Court's decision in the consolidated appeals from Philadelphia and Allegheny Counties, already rejected the Campaign's effort to invalidate 1,995 ballots that were timely cast by registered Bucks County voters and that had not a hint of fraud or impropriety. Nine days later, the Campaign filed its Petition, again seeking to void the same ballots, this time by shifting to a theory—equal protection—that the Commonwealth Court *already held was waived* because the Campaign never raised it in the Court of Common Pleas.

The Campaign's request is not only waived; it's also moot. And the Campaign lacks standing to bring this claim to this Court. The votes have been counted and certified—in Bucks County and statewide. President-elect Biden won Pennsylvania by more than 80,000 votes. The Campaign would have this Court 'un-count' 1,995 Bucks County votes, but even if those 1,995 voters were retroactively disenfranchised—and even if every one of those voters had voted for the President-elect—it would not help the Campaign because it would not change the outcome of the presidential election.

For all these reasons, this Court should deny the Petition. To be clear: the court's decision below resolved this elections dispute, and the number of ballots at issue makes clear that, even prior to that resolution, it was not the type of contest or challenge that could bring into doubt the winner of the presidential election or the slate of electors who will represent Pennsylvania at the Electoral College. Still, the Campaign's decision to wait nearly a week and a half to file this "emergency" petition appears to be an attempt to set up a later argument that Pennsylvania did not meet the "safe harbor" that assures the counting of Pennsylvania's electoral votes because this appeal was still pending as of the December 8 deadline set by 3 U.S.C. § 5. Though the argument will be incorrect as a matter of law, fidelity to federal and state election law has not been a hallmark of the Campaign's 2020 legal strategy. When it was faced with a similar effort in 2016 by Jill Stein, however, the Campaign successfully sought cessation of state post-election proceedings before the safe harbor date.[1] The same result should follow here. This Court should accordingly deny the petition straightaway in order to avoid setting the stage for yet another meritless and cynical attack on the results of Pennsylvania's presidential election.

STATEMENT OF QUESTIONS INVOLVED

1. Whether this Court should grant the Campaign's emergency petition for allowance of appeal where the Campaign's basis for appeal was held

[1] *See* Brief of Donald J. Trump for President, Inc. in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Stein v. Cortes*, No. 16-CV-06287, ECF No. 38-1 at 4-5 (E.D. Pa. Dec. 8, 2016); *Stein v. Cortes*, 223 F. Supp. 3d 423 (E.D. Pa. 2016).

to be waived by the Commonwealth Court, where the Campaign's claim is moot, and where the Campaign lacks standing because it has not identified a justiciable injury.

Suggested Answer: No.

STATEMENT OF THE CASE[2]

I. The Board's decision.

On November 7, 2020, pursuant to 25 P.S. § 3146.8(g), the Bucks County Board of Elections (the "Board") held a canvass meeting in the presence of authorized representatives from both the Republican and Democratic parties to consider whether declarations on the outer envelopes of certain ballots were "sufficient." *See* Ex. A, Commonwealth Court Opinion ("CCO") at 2. The Campaign subsequently filed a petition for review with the Bucks County Court of Common Pleas, challenging ballots accepted by the Board in the categories below. In each category, the issue identified is the only alleged irregularity.

- Category 1: 1,196 ballots with no date or a partial date handwritten on the outer envelope;
- Category 2: 644 ballots with no handwritten name or address on the outer envelope;

[2] Because this Court recently reviewed the statutory framework and administrative guidance relevant to county review of mail-in and absentee ballots, that background is not repeated here. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, No. 29 WAP 2020, 2020 WL 6875017 (Pa. Nov. 23, 2020).

- Category 3: 86 ballots with a partial handwritten address on the outer envelope;
- Category 5: 69 ballots with "unsealed" privacy envelopes.

Ex. A, CCO at 2-3.[3]

The Campaign's petition for review nowhere mentions equal protection and does not contend that the Board's decision violated equal protection.

II. What is *not* at issue in this case.

The Campaign admitted and stipulated to the following facts:

A. No fraud, misconduct, impropriety, or undue influence.

There is no allegation or evidence of any fraud, misconduct, impropriety, or undue influence in connection with the challenged ballots. Ex. B, Stipulated Facts ¶¶ 27–30.

B. No ineligible voters, deceased voters, or impersonations.

There is no allegation or evidence that any elector was ineligible to vote. *Id.* ¶ 33. There is no allegation or evidence that any of the challenged ballots were cast by, or on behalf of, a deceased person or by someone other than the elector whose signature is on the outer envelope. *Id.* ¶¶ 34–35.

[3] Although the Campaign initially challenged ballots in two other categories (identified as Category 4 and Category 6 in the stipulated facts), the Campaign orally withdrew their challenges to those categories at the hearing before the Court of Common Pleas. Ex. A, CCO at 3.

C. No missing signatures or naked ballots.

There is no allegation or evidence that the Board counted any ballots without signatures on the outer envelope or counted "naked ballots" (ballots that did not arrive in a secrecy envelope). *Id.* ¶¶ 31–32.

When the challenged ballots were received by the Board, each was inside a privacy envelope, and the privacy envelope was inside a sealed outer envelope with a voter's declaration signed by the elector. *Id.* ¶ 45. With respect to Category 5 (the 69 ballots in "unsealed" privacy envelopes), the Campaign agrees that the Board was unable to determine whether the privacy envelopes were initially sealed by the elector but later became unsealed. *Id.* ¶ 46.

D. No challenge to electors' applications for absentee or mail-in ballots.

The Campaign did not challenge the electors' applications for the absentee or mail-in ballots on or before the Friday before the November 3rd election. *Id.* ¶ 36.

E. The ballots were timely cast and received.

No mail-in or absentee ballots were mailed to electors before October 7, 2020 and each of the challenged ballots was timely received by the Board before 8:00 p.m. on Election Day, November 3, 2020. *Id.* ¶¶ 37–38. Consequently, each of the challenged ballots was completed, and the outer envelope signed, between October 7 and November 3, 2020.

F. No notice has been provided to the electors whose ballots are being challenged.

The Campaign never notified the electors whose ballots are at issue that it is seeking to have their votes invalidated and not counted. *Id.* ¶ 47.

III. The Court of Common Pleas decision.

On November 17, 2020, the parties participated in an evidentiary hearing before the Court of Common Pleas. Not once during that hearing did the Campaign even mention equal protection or disparate treatment, let alone raise such a claim.

On November 19, 2020, the Court of Common Pleas denied the petition in full. In its written decision, the court noted that the Campaign did not allege fraud, misconduct, impropriety, or undue influence as to the challenged ballots, and that all of the challenged ballots were timely received. Ex. C, Court of Common Pleas Order ("CCPO") at 9. As to the first category of ballots (the 1,196 ballots with no date or with a partial date handwritten on the outer envelope), the court found that ballots with partial dates complied with statutory requirements and that the Campaign had waived its right to challenge the undated ballots. *Id.* at 15–16. The court also found that the second and third categories of ballots (644 ballots with no handwritten name or address on the outer envelope and 86 ballots with a partial handwritten address on the outer envelope) should be counted because they involved "ministerial, technical errors," not "error[s] of law." *Id.* at 19. The court reasoned that a handwritten name and address were "not necessary to prevent fraud," and that

counting the ballots would not undermine any other significant interest. *Id.* Finally, the court found that the fifth category of ballots (69 ballots with "unsealed" privacy envelopes) should be counted because no evidence showed that they "had not been sealed by the elector prior to" canvassing, and it was possible that the seal had failed through no fault of the voter. *Id.* at 20.

IV. This Court's November 23 Opinion.

While the Court of Common Pleas' Order was pending on appeal at the Commonwealth Court, this Court issued an opinion on November 23 that effectively affirmed the Board's decision to accept nearly all the ballots at issue. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 2020 WL 6875017. Resolving consolidated appeals arising out of decisions by the boards of elections in Philadelphia and Allegheny Counties to accept many of the same categories of ballots contested here, the Opinion Announcing the Judgment of the Court ("OAJC") explained, "the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." 2020 WL 6875017, at *1.[4]

[4] This Court unanimously agreed that the Election Code does not prohibit counting ballots in envelopes without a handwritten name or address. As for envelopes missing a date, this Court was divided. In his concurring opinion, Justice Wecht agreed with the outcome but opined that in *future elections*, election officials should

The OAJC expressly recognized that the Bucks County Court of Common Pleas "appropriately applied this Court's precedent" when it "affirmed the counting of the ballots even though the declarations had not been filled out in full." *Id.* at *15, n.6.

V. The Commonwealth Court's Opinion.

On November 25, the Commonwealth Court affirmed the Court of Common Pleas. The court explained that it was "bound by the Supreme Court's decision, and applying that decision, there was no error in common pleas rejecting Appellant's challenges to Categories 1 through 3." Ex. A, CCO at 6 (footnote quoting the Supreme Court's approval of the Bucks County common pleas decision omitted). The court further determined that the category of ballots in unsealed secrecy envelopes, which was not before this Court in the consolidated appeals from Philadelphia and Allegheny Counties, also should not be invalidated. *Id.* at 14. The court explained that while the Election Code requires secrecy envelopes to be sealed, this interpretation should be applied only prospectively. *Id.* The court noted the "tremendous challenges presented by the massive expansion of mail-in voting, and the lack of precedential rulings on the requirement of a 'securely sealed' secrecy envelope"; the parties' stipulation that the "instructions on the outer envelope for the elector stated only that the ballot should be placed in the secrecy envelope and did

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disqualify ballots where the declaration is missing a date, but that this rule should not apply retroactively to the 2020 election. 2020 WL 6875017, at *24 (Wecht, J., concurring and dissenting).

not specify that the envelope needed to be securely sealed or the consequences of failing to strictly adhere to that requirement"; the fact that, "in this case, it cannot be established that the electors did not seal the secrecy envelope"; and, "[i]mportantly . . . there are absolutely **no allegations** of any fraud, impropriety, misconduct, or undue influence, that anyone voted who was not eligible to vote, or that the secrecy of the ballots cast was jeopardized." *Id.* (emphasis original).

The court expressly declined to adjudicate for the first time on appeal the Campaign's perfunctory reference to "equal protection":

> To the extent Appellant seeks to "incorporate" Equal Protection arguments into this case that were raised in other cases, **Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them.** Pennsylvania Rule of Appellate Procedure 302(a), Pa. R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.").

Id. at 6, n.7 (emphasis added).

VI. Pennsylvania Certifies Election Results.

Meanwhile, every Pennsylvania county, including Bucks County, certified election results by November 23, and the following day, Secretary Boockvar certified the results of the Commonwealth's presidential election.[5] Shortly thereafter, Governor Tom Wolf signed the Certificate of Ascertainment for the slate

[5] 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.

of electors for Joseph R. Biden as president 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 President-elect Biden.[6]

VII. The Campaign's appeal.

On December 4, 2020—nine days after the Commonwealth Court issued its decision and ten days after Pennsylvania certified its statewide vote tally—the Campaign filed its "emergency" petition for allowance of appeal from the Commonwealth Court's decision, arguing that the Board's acceptance of the challenged ballots violated the constitutional right to equal protection of the laws.[7]

ARGUMENT

I. The Campaign has waived its basis for appeal.

The Petition should be denied at the outset because the Commonwealth Court *already held* that the Campaign waived the sole ground for appeal it raises with this Court. Remarkably, the Campaign does not acknowledge that holding to this Court—nowhere in its 25-page petition is there any mention that the Commonwealth Court already ruled against the Campaign.

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[6] *Id.*

[7] The Campaign's Petition never identifies why it is an "emergency" and does not request expedited hearing. In any event, the DNC urges the Court to deny the petition apace given the imminent statutory safe harbor deadline.

The sole issue stated in the Campaign's petition is an alleged equal protection violation, but as the Commonwealth Court expressly recognized, the Campaign has waived this claim. The Campaign claims that "neither the trial court nor the Commonwealth Court addressed or resolved this [equal protection] issue." Pet. at 21. The Campaign is half right: the trial court did not address the issue because the Campaign never raised it. But while the Commonwealth Court did not "resolve[]" the issue on the merits, it "addressed" it by rejecting the Campaign's attempt in its appellate brief to "incorporate" equal protection arguments made in a separate appeal out of Allegheny County, holding that the new line of argument came entirely too late:

> To the extent Appellant seeks to "incorporate" Equal Protection arguments into this case that were raised in other cases, Appellant did not raise such claims before common pleas and, therefore, the Court will not consider them. Pennsylvania Rule of Appellate Procedure 302(a), Pa. R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.").

Ex. A, CCO at 6, n.7.

The Campaign does not even attempt to argue that the Commonwealth Court got it wrong. Nor could it, because the Commonwealth Court was right—the Campaign made no mention of the issue prior to its appellate brief. Nothing in the Campaign's petition in the Court of Common Pleas mentioned equal protection, and the 197-page transcript of the merits hearing reveals that the Campaign's counsel

did not once mention "equal protection," "disparate treatment," or anything remotely related to the argument now being pressed in this Court.

Rule 302(a) of the Pennsylvania Rules of Appellate Procedure is mandatory: "Issues not raised in the trial court *are waived* and *cannot be raised* for the first time on appeal." Pa.R.A.P. 302(a) (emphasis added). This Court treats it is as such, enforcing its command even in capital cases, *see, e.g, Commonwealth v. Powell*, 598 Pa. 224, 245 (2008), and reversing grants of appeal when it discovers that an issue accepted for review has been waived, *see, e.g., Commonwealth v. Brown*, 645 Pa. 160, 162 (2018). Indeed, this case illustrates the wisdom behind requiring claims to first be aired in the trial court so that, among other things, parties can develop the factual record necessary to adjudicate its merits. The Campaign *now* alleges that voters across the state have been treated differently because "[w]hen Bucks County voted to accept ballots with missing or partial dates, or missing or partial names or addresses, or unsealed privacy envelopes, it applied a standard different than that applied in Pennsylvania's other counties." Pet. at 19. The Campaign repeats this assertion—that things were different in Bucks County—numerous times throughout its brief. But it never once identifies any evidence that any other counties did anything differently. And there was no such evidence presented at any point in this case. Indeed, there was no discovery or factfinding on this issue, and the extensive stipulated facts negotiated among counsel make no mention of it. Moreover, the

parallel litigation in Philadelphia and Allegheny Counties reveal that other counties followed the *same* interpretation of the Election Code as Bucks County for determining the sufficiency of a voter's completion of the declaration on the outer envelope. Nevertheless, the Campaign would have this Court find an equal protection violation, and order the disenfranchisement of nearly 2,000 Bucks County voters, *without a single pled allegation, much less a shred of evidence of disparate treatment*.

This case presents no reason for exception to waiver, and the Campaign does not even try to muster one. As the Commonwealth Court held, any equal protection argument is foreclosed, and the Campaign's appeal should be dismissed for that reason alone.

II. This case is moot.

Even if this Court were inclined to overlook the Campaign's clear waiver, the Petition should still be denied because the case is moot. For a case to be justiciable, an actual controversy must exist at all stages of the case, including on appeal. *See In re Gross*, 476 Pa. 203, 209 (1978) (noting that "a legal question can become moot on appeal as a result of an intervening change in the facts of the case"). And "[i]t is well settled that [the] Court will not decide moot questions." *Rogers v. Lewis*, 540 Pa. 299, 302 (1995) (lawsuit relating to a mayor's right to occupy his office mooted when the mayor's term expired).

The sole issue the Campaign raises in the Petition is plainly moot. The Campaign asks the Court to order the 'un-counting' of 1,995 absentee and mail-in ballots that were cast in Bucks County during the 2020 general election. *See* Pet. at 29 (asking the Court to direct that the 1,995 ballots at issue "not be counted as void"). But the general election has been over for weeks. Bucks County certified its vote tally on November 23, in accordance with Pennsylvania law. All other Pennsylvania counties likewise certified their results by the statutory deadline. Secretary Boockvar certified statewide results on November 24, and Governor Wolf then signed the Certificate of Ascertainment and submitted it to the Archivist of the United States. There is no longer any controversy to resolve because the votes have been counted, and the count has been certified. *See, e.g.*, *Wood v. Raffensperger*, 20-14418, 2020 WL 7094866, *6 (11th Cir. Dec. 5, 2020) ("We cannot turn back the clock and create a world in which the 2020 election results are not certified." (cleaned up)). Thus, the Court should deny the Petition because the issues it raises are moot.

The Petition 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," which can sometimes arise in the post-election context. *Cf. In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *5 n.7 (Pa. Nov. 17, 2020). As the Campaign acknowledges, both the Commonwealth Court and this Court have granted prospective relief this election cycle on issues related to the

treatment by county boards of mail and absentee ballot envelopes. *See In Re: Canvass of Absentee and Mail-In Ballots, et al.*, J-118A-2020, J-118B-2020, J-118c-2020, J-118D-2020, J-119E-2020 and J-118F-2020 (Pa. Nov. 23, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 1191 C.D. 2020 (Commw. Ct. Nov. 23, 2020) (Br. at 1, 5-6). Appropriate plaintiffs remain free to raise future pre-election challenges to state and county election procedures before the next election. 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" (quotation and internal quotation mark omitted)).

Nor does the Campaign raise an issue of great public importance (or one that would fall within any other possible exception to the mootness doctrine). Instead, the Campaign raises a discrete—and ultimately meritless—challenge to 1,995 ballots that, even if invalidated, would have no effect on the outcome of the election. President-elect Biden won Pennsylvania by more than 80,000 votes, more than 40 times the number of ballots the Campaign now challenges. And the Campaign inexplicably waited ten days to bring this Petition, even though it knew the federal safe harbor deadline (December 8) and Electoral College vote (December 14) were fast approaching, a delay that further undercuts any argument on public importance.

III. The Campaign lacks standing.

The Campaign has failed—again—to raise an equal protection claim that it has standing to pursue. To establish standing, a plaintiff must have an interest in the litigation that is "substantial," "direct," and "immediate." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 191 (1975). For an interest to be "substantial," "there must be some discernible adverse effect to some interest other than the abstract interest of all citizens." *Id.*, 464 Pa. at 195, 346. That is, "it is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procuring obedience to the law." *Id.*, 464 Pa. at 192. These requirements—that a litigant's interest be substantial, immediate, and direct—mirror the federal requirements to maintain standing under Article III. Indeed, "in determining issues of standing, [Pennsylvania courts] ha[ve] looked to the federal courts' interpretation of Article III of the United States Constitution." *Hous. Auth. of Cnty. of Chester v. Pa. State Civil Serv. Comm'n*, 556 Pa. 621, 629-30 (1999) (recognizing "the federal courts may entertain suits only where a plaintiff alleges a particularized, concrete injury *to himself* which is causally traceable to the complained-of action by the defendant and which may be redressed by the judicial relief requested."). *Id.*

A. The Campaign has not suffered a redressable injury.

The Campaign lacks standing to maintain this action because its new equal protection argument fails to allege any injury at all, let alone one that is redressable by this Court. As the Third Circuit recently explained, to show a cognizable injury, the Campaign must show "that a greater proportion of [defective] ballots" were cast for President-elect Biden. *Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *8 (3d Cir. Nov. 13, 2020). And to establish redressability, the Campaign would have to show that the votes at issue here were cast in "sufficient . . . number[s] to change the outcome of the election to [Trump's] detriment." *Id.*

The Campaign can clear neither hurdle. The Campaign does not even suggest that invalidating the ballots at issue here would net President Trump a single vote. And even if it somehow turned out that every one of the 1,995 contested ballots had been cast for President-elect Biden, invalidating those ballots would do nothing to alter an election that he won by 80,555 votes. *See Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013) ("even if the Court granted the requested relief, Sibley would still fail to satisfy the redressibility element [of standing] because enjoining defendants from casting the . . . votes would not change the outcome of the election") (quoted in *Bognet*, 2020 WL 6686120, at *8).

Further, if the Campaign were concerned by county-by-county variations for accepting absentee and mail-in ballots across the Commonwealth, suing only *one* of

Pennsylvania's 67 county boards of elections could not possibly remedy that variation unless Bucks County were the *only* county to accept these categories of disputed ballots. But the only indication before this Court suggests the opposite: at least three counties—Bucks, Allegheny, and Philadelphia—accepted ballots contained in outer envelopes that lacked a handwritten name, date, or address, and there is no evidence that any county took a different approach. Even if such evidence were a part of this record, the Campaign could redress the "injury" of differential treatment only by joining *every* county board that tallied votes against the Campaign's wishes, or by suing a statewide officer with authority over the boards' decision-making. The Campaign did neither, and so this solitary action is incapable of eliminating alleged statewide discrepancies in how counties may have interpreted the Election Code's requirements for the ballots at issue. Absent a redressable injury, there is no standing.

B. The Campaign cannot assert an injury on behalf of others.

Rather than anywhere asserting any injury the Campaign suffered itself, the Petition's only suggestion of mistreatment is that "[v]oters in Bucks County whose non-conforming ballots the Bucks County Board of Elections has decided to count are being afforded greater voting strength than similarly-situated voters in counties which have decided" not to count ballots enclosed in an unsealed secrecy envelope or in an outer envelope where the declaration is missing a handwritten name, date,

or address. Pet. at 22. It thus appears the Campaign seeks to adopt as its own an injury allegedly suffered by voters outside of Bucks County whose ballots were not counted (and, according to the Campaign, should not have been counted). But no theory of standing permits this.

It is entirely unclear (because this claim has never before been raised in this litigation) which, if any, doctrine of candidate- or third-party standing the Campaign intends to assert. The most likely argument may be "associational standing," which allows an entity to bring suit on behalf of members upon a showing that, among other requirements, "its members would otherwise have standing to sue in their own right," and "the interests it seeks to protect are germane to the organization's purpose." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1997). The Campaign cannot satisfy either prong.

1. The Campaign does not have members who have standing to bring this claim in their own right.

First, individuals outside Bucks County whose ballots were discarded would not have standing to sue the Bucks County Board of Elections to discard the ballots challenged in Bucks County, as the Campaign seeks. If these non-Bucks County voters' ballots were lawfully discarded—as the Campaign believes—then they suffered no injury at all; and if their votes were unlawfully discarded, then the Bucks County Board neither caused nor could possibly redress that injury. *See Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at

*6 (M.D. Pa. Nov. 21, 2020) (rejecting standing based on the cancellation of votes because "[n]one of Defendant Counties received, reviewed, or discarded Individual Plaintiffs' ballots. Even assuming that Defendant Counties unconstitutionally allowed *other* voters to cure their ballots, that alone cannot confer standing on Plaintiffs who seek to challenge the denial of *their* votes."), *aff'd sub nom. Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020).

The Campaign claims that "every illegal vote that is counted in an election undermines democracy and disenfranchises an American citizen who cast a legal vote [sic]." Pet. at 17. It is unclear if this is just distracting rhetoric or an attempt at identifying a justiciable injury, but if the latter, it fails. An abstract interest in "democracy" is a non-justiciable "generalized grievance" that is common to all members of the public. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992). And as the Third Circuit recently explained, an illegal vote "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." *Bognet*, 2020 WL 6686120, at *12. Even if we assume that 1,995 Bucks County voters somehow received an undeserved benefit by having their votes counted, any resulting harm is "is shared in substantially equal measure by a large class of citizens, [and therefore] is not a

particularized injury" necessary to support standing. *Wood*, 2020 WL 7094866, at *5.

2. The Campaign's "purpose" is re-election, not defending voters' alleged rights to equal protection.

Second, any constitutional interests of individual voters to have their votes treated equally with other votes cast across the state are not germane to the Campaign's "purpose." *Hunt*, 432 U.S. at 343. As courts consistently have held, the Campaign "represents only Donald J. Trump and his 'electoral and political goals' of reelection." *Boockvar*, 2020 WL 6821992, at *8, quoting *Donald J. Trump for President, Inc. v. Cegavske*, No. 220CV1445JCMVCF, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (noting "[b]y statutory definition, a federal election candidate's 'principal campaign committee' is simply a reserve of funds set aside for that campaign. *See* 52 U.S.C. § 30102"). As a result, "while the Trump Campaign might achieve its purposes through its member voters, the 'constitutional interests of those voters are wholly distinct' from that of the Trump Campaign." *Boockvar*, 2020 WL 6821992, at *8 (quoting *Cegavske*, 2020 WL 5626974, at *4).

Simply put, the Campaign cannot assert associational standing on this claim. Nor can it succeed on other theories that are far afield: it does not have "competitive standing," because this case does not seek "to challenge the *inclusion of an allegedly ineligible rival on the ballot*," *id.* (collecting cases); or "prudential standing," because there is no "'hindrance' to the [voters'] ability to protect [their] own

interests," *Bognet*, 2020 WL 6686120, *7, quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); or any other doctrine of third-party standing the Campaign may have asserted had this claim been raised and briefed in the Court of Common Pleas.[8]

CONCLUSION

For all of these reasons, the Campaign's emergency motion for allowance of appeal should be denied.

[8] Other recent cases where the Campaign's equal protection claims were dismissed for lack of standing include *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020); and *Cegavske*, No. 2020 WL 5626974, at *2.

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Respectfully submitted,

/s/ *Michael R. McDonald*

Marc Elias*
Jacob D. Shelly**
PERKINS COIE LLP
700 13th Street, NW, Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Matthew Gordon*
Laura Hill**
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, Washington 98101-3099
206-359-8000

**Admitted Pro Hac Vice*
***Pro Hac Vice Application Forthcoming*

Kahlil C. Williams (Pa. Id. No.325468)
Michael R. McDonald (Pa. Id. No. 326873)
Matthew I. Vahey (Pa. Id. No. 315920)
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 665-8500
Facsimile: (215) 864-8999
WilliamskC@ballardspahr.com
McdonaldM@ballardspahr.com
VaheyM@ballardspahr.com

Attorneys for Intervenor-Defendant DNC Services Corp. / Democratic National Committee

CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 1115(f), I hereby certify that this PETITION FOR ALLOWANCE OF APPEAL has a word count of 5,185 words, as counted by Microsoft Word's word count tool.

/s/ *Michael R. McDonald*
Michael R. McDonald

CERTIFICATE OF COMPLIANCE WITH CONFIDENTIAL INFORMATION RULE

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

/s/ *Michael R. McDonald*
Michael R. McDonald

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Allowance of Appeal was served upon counsel of record, on the 7th day of December, 2020, by Electronic Mail as follows:

Virginia Spencer Scott, Esq.
Allegheny County Law Department
445 Fort Pitt Blvd
Pittsburgh, PA 15219-1327

Andrew Francis Szefi, Esq.
Allegheny County Law Department
445 Fort Pitt Blvd
Pittsburgh, PA 15219-1327

Matthew Hermann Haverstick, Esq.
Kleinbard, LLC
1717 Arch St 5th Fl
Philadelphia, PA 19103

Shohin Hadizadeh Vance, Esq.
Kleinbard, LLC
1717 Arch St 5th Fl
Philadelphia, PA 19103

/s/ *Michael R. McDonald*
Michael R. McDonald