DISTRICT OF COLUMBIA
COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
AD HOC HEARING COMMITTEE

In the Matter of Rudolph W. Giuliani, Esq.
Bar No.: 237255

Respondent,

A Temporarily Suspended Member of the Bar of the District of Columbia Court of Appeals.

Admitted: December 2, 1976

BDN: 22-BD-027

DDN: 2020-D253

RESPONDENT RUDOLPH W. GIULIANI'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION AS TO SANCTION

INTRODUCTION[1]

Rudolph Giuliani ("Respondent") was the attorney representing former President Trump on the Second Amended Complaint (herein, "SAC') that was sought to be filed in *Trump v. Boockvar*, 502 F.Supp.3d 899 (M.D. PA. 2020). Disciplinary Counsel contends that the SAC was frivolous and without basis in law or fact; based on the SAC and Respondent's oral argument, he seeks to disbar

[1] References to Respondent's Exhibits are prefaced by "RX." Disciplinary Counsel's exhibits are prefaced by "DCX." Hearing transcripts are prefaced by "Tr." References to Disciplinary Respondent's Proposed Findings of Fact are prefaced by "DCFF." Respondent's Proposed Findings of Fact are prefaced by "RFF." Hearing Committee Exhibits are prefaced by "HCX."

Respondent based on alleged violations of Pennsylvania Rules of Professional Conduct 3.1 and 8.4(d) (Tr. 1033-1034).

It is Respondent's contention that there was a reasonable basis for the arguments made by Respondent. The claims based on the denial of equal protection and due process were properly pled and were certainly not frivolous. They were based on the numerous declarations, the information given to Respondent by attorneys, and other members of the Trump campaign team.

Respondent's representation must be viewed in the context of what had occurred and transpired during what was a chaotic situation in a compressed and truncated period. Respondent was representing a client in a fastmoving election law challenge that did not permit him to investigate fully his client's position as he would normally do in any other case. Respondent received information and reviewed documents provided to him at the time, which arguably made the case that Republicans, as opposed to Democrats, were systemically prevented from observing, inspecting, and verifying the legitimacy of hundreds of thousands of mail-in votes. There was certainly a non-frivolous basis to raise an equal protection and a due process argument based on the disparate treatment in Democratic versus Republican Counties and the disparate use of the notice and opportunity to cure procedure of defective ballots.

Based on the documents Respondent was able to read and the information received within this short window of opportunity in a fast-moving election law case, it was reasonable for Respondent to draw an inference and make an argument that the vote count was illegal and contrary to law. In addition, Respondent was duty bound as an advocate to advance his client's position in the light most favorable to his client. The fact that Respondent was not permitted to advance those arguments in court to further argue what impact the voting irregularities and unequal treatment had in overturning the election, should not be used to sanction Respondent for violating the rules of professional conduct.

Disciplinary counsel failed to present clear and convincing evidence at the hearing held on December 5-8 and 15, 2022 before the Ad Hoc Committee, that respondent violated Pennsylvania Rules of Professional Conduct 3.1 and 8.4(d). Assuming *arguendo* that if any violation of a rule occurred, the sanction imposed should be an informal admonition or reprimand. In the event the Committee feels that a more serious sanction must be imposed, we argue that a suspension of no more than 30 days should be imposed.

PROPOSED FINDINGS OF FACT

1. The 2020 Presidential Election was held on November 3, 2020. This was an unprecedented election. There was a tremendous increase in mail-in/absentee ballots from every previous election, e.g., in Pennsylvania, there were 2,653,688

absentee/mail-in ballots cast compared to 266,208 cast in the 2016 election, an increase of 896.85% (RX06-4, ¶19).

2. The Legislature enacted a law allowing no excuse absentee voting contrary to the limited categories permitted by the Pennsylvania Constitution, Art.7, §14. This was of dubious legality until 2022 when *McLinko*, 279 A.3d 539 was decided (RX21), reversing 270 A.3d 1243 (statutes governing state's no-excuse mail-in voting system violated state constitution) (RX22).

3. On November 4, 2020, then President Trump placed Respondent in charge of coordinating the campaign litigation nationally. (Tr. 878, Tr. 42-43)

4. Respondent went to the "war room" in Arlington, Virginia where the Trump For Campaign headquarters was located and met with attorneys associated with the Trump campaign where he began setting up ligation teams for various states including Pennsylvania. (Tr. 799, Tr. 45)

5. Information was coming in from various states and the White House. The understaffed legal team was faced with the enormous task of gathering information from different sources. The investigative team was headed by Bernie Kerik (Tr. 828).

6. On November 5, 2020, Former Attorney General of Florida Pam Bondi and Corey Lewandowski were sent to Pennsylvania to oversee the counting of the ballots (Tr. 736-738). They asked Respondent to come to Philadelphia as there was

a complete inability to observe the counting of the ballots by Republican inspectors (Tr. 736, Tr. 882).

7. Lewandowski and Biondi were denied access to the Convention Center even though they were representatives of the Trump campaign (Tr. 738-739). They reported that despite a court order by Judge Fizzano-Cannon on November 5, 2022, ordering that observation of the counting of the ballots by the poll watchers and Trump campaign representatives would be permitted as close as six feet (RX16), the Philadelphia election officials and the Sheriff were not obeying the court order and threatened their arrest (Tr. 742-743).

8. Despite a further consent order by a federal judge, Lewandowski stated that observation was not allowed until November 6, 2020, when the ballots had already been separated from the envelopes and nearly all the ballots were counted (Tr. 747). The room where access was granted was extremely large and no meaningful observation was possible. Nothing could be seen (Tr. 747, 749; see also Mercer's affidavit, RX03-3, RX03-15).

9. Upon arrival in Philadelphia, Respondent confirmed that watchers were not allowed to meaningfully observe the opening of the envelopes containing the official absentee and mail-in ballots, or for the counting and recording of these ballots as required by law (Tr. 887-893).

10. Respondent went to Philadelphia on November 4th or 5th (Tr. 741-742).

11. Respondent and the Trump campaign team were informed that the notice and opportunity to cure procedure was being utilized in Democratic counties and was not offered or permitted in Republican counties. See e.g., RX1: declarations of Jodi Anderson (RX01-2) (Huntingdon County, 11-7-2020); Lancaster County: David Henry (RX01-206) (11-8-2020), Lynne Keller (RX01-266) (11-7-2020); Westmoreland County: Michael Kochis (RX01-268) (11-10-2020); Glenn Lessig (RX01-291) (11-10-2020); Lebanon County: Lloyd Smith (RX01-469) (11-11-2020); York County: Raymond Woods (RX01-608) (11-11-2020).

12. Respondent was informed that Ronald Hicks, Jr. was an experienced attorney and knowledgeable in Pennsylvania election law and federal court litigation (Tr. 484-489). In fact, Hicks was the attorney in *Pierce v. Allegheny County Board of Elections*, 324 F. Supp.2d 684 (W.D. Pa 2003), a challenge that resulted in a limited injunction based on an equal protection clause violation alleging a lack of uniform standards in determining the legality of votes in a statewide election (cited by Hicks repeatedly in the original complaint and subsequently by Plaintiffs in their various papers).

13. Hicks drafted the original complaint in *Trump et al. v Boockvar et al*. (M.D. Pa) (T486). Respondent relied greatly on Hicks whom Respondent was told was a fine lawyer (Tr. 488).

14. Respondent edited the several paragraphs specifying a lack of observation of the counting of ballots as he was informed that this was occurring in several heavily Democratic cities; he wanted to be able to combine the litigations in other states via a multi-state litigation should the Supreme Court decide to hear these cases (See DCX05 and 09-original complaint and proposed SAC; DCX08-0017-18). Respondent added the allegations that the Republican inspectors had been herded aside and put into pens (Tr. 487). This was determined to be done in discussions in the" war room" in Arlington prior to the arrival of Christina Bobb on November 12, 2020. (Tr. 793) Respondent's contribution to the original complaint was minor (Tr. 53, 57, 58, 162, 174, 490).

15. The Plaintiffs were Donald Trump for President, Inc., the campaign committee for then President Trump; Lawrence Roberts, a resident and qualified elector of Fayette County Pennsylvania; and David John Henry, a resident and qualified elector of Lancaster County Pennsylvania (DCX5-0009-0010).

16. On November 9, 2020, the original complaint was filed by Hicks, Carolyn McGee and Linda Kerns (DCX05-0084-85).

17. Judge Brann noted the procedural history and the comings and goings of the attorneys involved: On November 12, 2020, Hicks and McGee moved to withdraw and two Texas attorneys, John Scott and Doulas Hughes joined as co-

counsel to Linda Kerns (DCX14-0009). Hicks withdrew because of pressure from his law firm and threats to his family (Tr. 64).

18. On November 15, 2020, Plaintiffs, by attorneys Kerns and Scott, filed the First Amended Complaint ("FAC") (DCX06 and DCX14-0010).

19. Defendants filed motions to dismiss on November 16, 2020 (DCX14-0010).

20. On the same day, less than 24 hours before oral argument was to begin, Kerns, along with Scott and Hughes, requested the Court's permission to withdraw from the litigation (DCX14-0010).

21. Scott and Hughes' motion to withdraw was granted as they had only been in the case for 72 hours. Kerns application was not granted as she had been one of the original attorneys with Hicks and oral argument was scheduled for the next day, November 17, 2020. Judge Brann wanted to have someone to be able to answer questions as he had indicated at the oral argument (DCX14-0010, DCX08-0031-32).

22. On the evening of November 16, 2020, Marc Scarinci entered a notice of appearance for Plaintiffs and requested a postponement of the previously scheduled oral argument and evidentiary hearing The continuance application was denied given the emergency nature of the proceeding and the approaching deadline for Pennsylvania counties to certify the election results on November 23, 2020 (DCX14-0010).

23. On November 17th, the morning of the argument, Respondent made an application to appear Pro Hac Vice and entered his appearance on behalf of the plaintiffs (DCX14-0010).

24. Oral argument was held on the FAC which contained two claims sounding in a violation of the Equal Protection and Elections and Electors Clauses of the US Constitution (14th Amendment; Articles I, §4 and II, §1) (DCX14-0010; DCX08-0001-0172).

25. Respondent worked on preparing the SAC at the last minute with Joseph DiGenova and Vicky Toensing while their associate wrote the core of the complaint (Tr.899-900). The SAC relied greatly on Hicks' original complaint (Tr. 55, Tr. 491).

26. On November 21, Judge Brann granted defendants' motion to dismiss the FAC with prejudice and denied the motion to file a SAC, stating that the deadline for counties in Pennsylvania to certify their election results to the Secretary of State is November 23, 2020, and an amendment would unduly delay resolution of the issues (DCX14-0017). The SAC was based on Hicks' original complaint (Tr. 491).

27. The Court held, *inter alia*, that the individual plaintiffs lacked standing, and the Trump campaign lacked competitive standing relying on the Third Circuit decision in *Bognet v. Secretary of the Commonwealth* (980 F.3d 336; RX36), issued days before on November 13, 2020 (DCX14-0011). This unrelated *Bognet* decision

addressed issues of standing and equal protection relevant to the claims raised in the FAC being considered by Judge Brann as well as the SAC.

28. Plaintiffs made clear at the outset that they disagreed with *Bognet* and implied that they were contemplating an ultimate appeal to the Supreme Court. (DCX13-0017) ("Plaintiffs believe *Bognet* was wrongly decided and maintain their Electors Clause claim to preserve it for appellate review.") Appellant in *Bognet,* sought certiorari from the Supreme Court two days after Respondent moved to file the SAC (ECF 172; 11-18-2020).

29. The Supreme Court granted Bognet's petition for writ of certiorari, vacated the judgment and remanded to the Third Circuit with instructions to dismiss the case as moot (*Bognet v. Degraffenreid*, 141 S. Ct. 2508; 4-19-2021; RX35-1).

30. Respondent and Scarinci stated that they intended to file a SAC (DCX08-0153, DCX08-0155-0156). The Court noted that Respondent's client was unpopular and so was his cause, but also noted that representation was warranted (DCX08-0161-0162).

31. The filing of the FAC makes the original complaint a nullity.

32. Plaintiffs appealed only Judge Brann's denial of their motion to file a SAC. ("Campaign appeals on a very narrow ground: whether the District Court abused its discretion in not letting the Campaign amend its complaint a second time.": DCX16-0005) The Third Circuit affirmed on the ground articulated by the

District Court, namely undue delay (830 Fed. Appx. 377). Any other ground discussed by the Third Circuit may be viewed as dicta (DCX16-0008). Disciplinary Counsel does not base its charges on the Third Circuit appeal (Tr. 1032).

33. Thus, the proposed SAC was not permitted to be filed by the Court.

34. In any event, the SAC sounded not in fraud, but in non-frivolous claims of violations of Due Process and Equal Protection under the 14th Amendment (DCX 09-0012-0124) (Summary: COUNT I: Fourteenth Amendment U.S. Const. Art. I §4, cl. 1; Art. II, §1, cl. 2; Amend. XIV, 42 U.S.C. §1983; Right to Vote, Due Process is Denied When the State Violates the Legislative Procedure Enacted to Prevent Disenfranchisement; Inability to observe opening and counting of ballots by Republican poll watchers and representatives of Trump campaign; COUNT II: Fourteenth Amendment U.S. Const. Amend. XIV, 42 U.S.C. §1983; U.S. Const. Art. I §4, cl. 1; Art. II, §1, cl. 2; Amend. XIV, 42 U.S.C. §1983; Right to Vote, Equal Protection is Denied When the State Violates the Legislative Procedure Enacted to Protect the Integrity of the Voting Process, including Counting Ballots Designed to Favor Biden Over Trump; Inability to observe opening and counting of ballots by Republican poll watchers and representatives of Trump campaign; Inability to observe opening and counting of ballots by Republican poll watchers and representatives of Trump campaign; COUNT III: U.S. Const. Art. I, §4, cl. 1 & Art. II, §1, cl. 2 Violation of the Electors & Elections Clauses Denial of Observer;

Inability to observe opening, counting, and recording of ballots by Republican poll watchers and representatives of Trump Campaign; COUNT IV: Fourteenth Amendment U.S. Const. Amend. XIV, 42 U.S.C. §1983: Denial of Equal Protection Disparate Treatment of Absentee/Mail-In Voters Among Different Counties Designed to Favor Biden Over Trump; Disparate Use of Notice and Opportunity to Cure Ballots in Democratic County BOEs versus nonuse and complying with law in Republican County BOEs; COUNT V: U.S. Const. Art. I, §4, & Art. II, §1 Violation of the Electors & Elections Clauses; Unauthorized Notice and Opportunity to Cure; Disparate Use of Notice and Opportunity to Cure Ballots in Democratic County BOEs versus nonuse and complying with law in Republican County BOEs; COUNT VI: Fourteenth Amendment Equal Protection Clause U.S. Const. Amend. XIV, 42 U.S.C. §1983; Denial of Due Process; Disparate Treatment of Absentee/Mail-In Voters Among Different Counties Designed to Favor Biden Over Trump; COUNT VII: Fourteenth Amendment; U.S. Const. Art. I §4, cl. 1; Art. II, §1, cl. 2; Amend. XIV, 42 U.S.C. §1983; Due Process is Denied When the Voting Protections Are Denied; Inability of Republican poll watchers and Trump campaign to observe opening, counting and recording of absentee and mail-in ballots; COUNT VIII: Fourteenth Amendment Equal Protection Clause U.S. Const. Amend. XIV, 42 U.S.C. §1983; Equal Protection is Denied When the Voting Protections Are Denied; Inability of Republican poll watchers and Trump campaign to observe opening,

counting and recording of absentee and mail-in ballots in Philadelphia County BOE; waist-high fence that blocked access to observe any closer than 15-18 feet; COUNT IX: U.S. Const. Art. I, §4, & Art. II, §1; Violation of the Electors & Elections Clauses When the Voting Protections Are Denied; Inability of Republican poll watchers and Trump campaign to observe opening, counting and recording of absentee and mail-in ballots in Philadelphia County BOE; waist-high fence that blocked access to observe any closer than 15-18 feet.)

35. In *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (9-17-2020), the Secretary of State opposed the Democratic Party's petition to require the county boards of elections to impose a notice and opportunity to cure procedure to correct defective ballots arguing that there was no statutory or constitutional basis to do so. The Court held that there was no such requirement in the Election Code. ("[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the "notice and opportunity to cure" procedure sought by Petitioner.) The Court went on to state:

> To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting

> of ballots, all of which are best left to the legislative branch of Pennsylvania's government. (RX 20-20)

Thus, it was not an unreasonable position for Respondent to take that the notice and cure procedure was not allowed to be implemented by the Executive Branch of government (Secretary of State), and only the Legislature could enact such a procedure.

36. Notwithstanding that the SAC contained no claims sounding in fraud, it did contain allegations of fraud (e.g., ¶¶125, 129, 130, 132, 133 of DCX09-0065-67) and there were declarations in RX1 in the Trump Campaign's possession that contain allegations of fraud (e.g. Northampton County: Jason Banonis (RX01-9), Jennifer Martinez (RX01-311), Eric Van Hoven (RX01-551), Matthew W. Walter(RX01-560): Philadelphia County: Kimberly Chernick (RX01-61), Matthew Silver (RX01-467), Timothy Long (RX01-303), Deneen Bellino (RX01-28); Delaware County: Michael Martin (RX01-309), Patricia Ercole (RX01-140); Alleghany County: Nicole Hertzig (RX01-208), Robert Ward (RX01-586); Centre County: Tracy Massaglia (R0X1-316).

37. Disciplinary Counsel cites in his Proposed Findings of Fact that Respondent had no factual basis of the allegations made in the complaint (DCFF pages 17-21). There were in fact declarations supporting these allegations in RX1 as indicated below:

Trump poll watchers observed numerous instances of election workers failing to follow required procedures (1) when a voter sought to "spoil" a mail-in ballot and vote in-person, and (2) about a voter's right to vote provisionally when a mail-in ballot had been received but not cast. DCX 05 at 0005; DCX 09 at 0017.

(1) Lisa Hill (RX01-188), Paul Regiec (RX01-430), Karen Stefancin (RX01-492), Matthew Walter (RX01-560), Kathleen Brill (RX01-44), Kimberly Dugery (RX01-130).

(2) Lorraine Havrilla (RX01-204), Lynne Keller (RX01-261).

Certain, unnamed election boards mailed an unspecified number of mail-in ballots for which voters had not applied. DCX 05 at 0005; DCX 09 at 0018.

- Patrick Bakaysa (RX 01-6) James D. Brown (RX01-47), Allan Carlson (RX01-52), Jennifer Decker (RX01-105), Michelle Dill (RX01-117), David Driscoll (RX01-122), Carmel Mattia (RX01-319), Gabriella Mattia (RX01-320), Debra McClelland (RX01-325), Laura Mitchell (RX01-345), Shelly Peterson (RX01-409), Ayla Skinner (RX01-468), Larry Sparano (RX01-486), Cory Taylor (RX01-532).

Fayette County, which was not a defendant, had a problem with the software system before the primary election that caused an unspecified number of voters to receive duplicate ballots for the general election. DC05 at 0026; DCX 09 at 0041.

- Laura Chesslo (RX01-68), Linda Diamond (RX01-113).

"Numerous" voters reported receiving mail-in ballots for which they had not applied. DCX 05 at 0047; DCX 09 at 0063.

- Patrick Bakaysa (RX01-6), James D. Brown (RX01-47), Allan Carlson (RX01-52), Jennifer Decker (RX01-105), Michelle Dill (RX01-117), David Driscoll (RX01-122), Carmel Mattia (RX01-319), Gabriella Mattia (RX01-320), Debra McClelland (RX01-325), Laura Mitchell (RX01-345), Shelly Peterson (RX01-409), Ayla Skinner (RX01-468), Larry Sparano (RX01-486), Cory Taylor (RX01-532).

"Numerous" voters reported receiving "multiple" mail-in ballots for which they had not applied. DCX 05 at 0047; DCX 09 at 0064.

- Patrick Bakaysa (RX01-6), James D. Brown (RX01-47), Allan Carlson (RX01-52), Jennifer Decker (RX01-105), Michelle Dill (RX01-117), David Driscoll (RX01-122), Carmel Mattia (RX01-319), Gabriella Mattia (RX01-320), Debra McClelland (RX01-325), Laura Mitchell (RX01-345), Shelly Peterson (RX01-409), Ayla Skinner (RX01-468), Larry Sparano (RX01-486), Cory Taylor (RX01-532).

An unspecified number of voters had to vote provisionally because there was a record of their applying for mail-in ballots, which they denied applying for or receiving. DCX 05 at 0047; DCX 09 at 0064.

- Maria Arena (RX01-4), Andrea Candi Koen (RX01-260), Allan Carlson (RX01-52), Julia Collello (RX01-70), Tara Coleman (RX01-71), Shelley Darhower (RX01-101), Michele Dill (RX01-117), David Driscoll (RX01-122), Heather Evans (RX01-149), Emily Falvey-Smith (RX01-151), Richard Gibney (RX01-167), Sherry Guldin (RX01-181), Denise Ann Gregor (RX01-174), Lorraine Havrilla (RX01-204), Michael Darren Kincaid (RX01-265), Moses Klock (RX01-267), Christine Klock (RX01-266), Carmel Mattia (RX01-319), Gabriella Mattia (RX01-320), Joseph Mazzarella (RX01-321), Tiziana Mazzarella (RX01-323), Debra McClelland (RX01-325), Theodore McKenny (RX01-329), John Mehalich (RX01-339), Eric J. Miller (RX01-343), Angela Naughton (R01-378), Francis Naughton (RX01-361), Claudia Nodds (RX01-118), Jeffrey S. Nodds (RX01-119), Mary Elizabeth Norkus (RX01-396), Carina Yvette Ortiz-Tineo (RX01-397), Donna Peterson (RX01-408), Lesia Petrizio (RX01-410), Darryl Philbin (R01-418), Jennifer Schadler(RX01-450), Jennifer Severini-Kresock (RX01-456), Barbara Ann Shaffer(RX01-457), Lizanne Shepman (RX01-519), Cathy Swearingen (RX01-520), Harry J. Symes (RX01-521), Corey Taylor (RX01-532), David Ward (RX01-563), Deborah Weisbrod (RX01-579), Rebecca Wheeler (RX01-600), Ellyn Zaia (RX01-618), Angela Zimmerman (RX01-621).

An unspecified number of voters had to vote provisionally even when they appeared at the polls with un-voted mail-in ballots. DCX 05 at 0047-48; DCX 09 at 0064.

- Allan Carlson (RX01-52), Tara Coleman (RX01-71), Shelley Darhower (RX01-101), Michele Dill (RX01-117), Lorraine Havrilla (RX01-204), Harry J. Symes (RX01-521), Corey Taylor (RX01-532), Rebecca Wheeler (RX01-600).

There were reports that an unspecified number of voters were solicited at their homes to vote by mail, received mail-in ballots they did not apply for, and were told they had voted by mail when they appeared at the polls. In two "documented" instances, two such voters were permitted to vote in person. DCX 05 at 0048; DCX 09 at 0064-65.

- Linda Irwin (RX01-244), Debra Mclelland (RX01-325).

One voter, who was required to vote provisionally because the records showed he or she had requested a mail-in ballot, was told by an Allegheny County election officer that a large number of Republican voters had had the same experience. DCX 05 at 0048; DCX 09 at 0065.

- Laura Mitchell (RX01-345).

In "numerous" counties, poll watchers saw poll workers placing mail-in ballots brought to the polling place in unsecured containers rather than "spoiling" them properly. DCX 05 at 0049; DCX 09 at 0065-66.

- Matthew Silver (RX01-467).

In one case, a voter brought a secrecy envelope to the polling place after realizing that he or she had failed to include it with the mail-in ballot. The voter was not permitted to vote provisionally. DCX 05 at 0049; DCX 09 at 0066.

- Lynne Keller (RX01-261).

In Centre County, a poll worker reported that voters identified themselves as New Jersey voters but were allowed to vote provisionally. DCX 05 at 0049; DCX 09 at 0066; Tr. 931-32.

- Lauren Danks (RX01-100).

In Chester County, a poll watcher reported 15% of the mail-in ballots were damaged in the mechanical opening process. DCX 05 at 0050. (This allegation was omitted in the SAC.)

- Robert Ward (RX01-586).

In Chester County, an observer reported that in "numerous" instances, an election worker altered "over-voted" ballots (presumably ballots marked for more than one candidate for the same office) to change votes that had been cast for former-President Trump. DCX 05 at 0050; DCX 09 at 0066-67; Tr. 171-74 (Giuliani).

- Robert Ward (RX01-586).

In Delaware County, an observer reported that mail-in ballots were scanned four or five times before being counted, reportedly because of defective bar codes. DCX 05 at 0050; DCX 09 at 0067; Tr. 935.

- Leah Hoopes (RX01-218).

In at least seven locations in Delaware County, "numerous" voters were given regular ballots even though they had "registered" to vote by mail and were not made to sign the registration book. DCX 05 at 0050; DCX 09 at 0067.

- Gregory Stenstrom (RX01-496).

In Erie County, which was not a defendant, a mail carrier reported "multiple" instances in which ballots for different voters were addressed to a single address where the voters did not live. Other ballots were mailed to vacant homes, vacation homes, empty lots, and non-existent addresses. DCX 05 at 0051; DCX 09 at 0067-68; Tr. 936-37.

- Shannon Hart (RX01-194).

In Delaware County, an observer was told by the County Solicitor that ballots received on November 4, 2020, were not separated from ballots received on November 3. DCX 05 at 0059; DCX 09 at 0076.

- Elizabeth Kayser (RX01-259).

In Delaware County, an observer witnessed a delivery on November 5 of v-cards or USB drives in a plastic bag with no seal and no accompanying paper ballots. The observer could not see what was done with them. DCX 05 at 0059; DCX 09 at 0077.

- Leah Hoopes (RX01-218).

Project Veritas reported that mail carriers were instructed to collect, separate, and deliver all mail-in ballots to a supervisor who would hand- stamp them. DCX 05 at 0051; DCX 09 at 0068; Tr. 937-38.

- Richard Hopkins (RX01-222).

38. The SAC sought to have the ballots discounted if they were unverified by observation. See 25 P.S.§3146.8(g)(4).

39. The investigative team obtained affidavits that were to be utilized at an anticipated evidentiary hearing on the request for an injunction that did not occur (DCX28-0004).

40. At the hearing, Disciplinary Counsel called Professor Daniel Ortiz as its expert on civil procedure and election law (Tr. 532).

41. Ortiz never represented a client in a state or federal matter where a client was a candidate in an election or was challenging another candidate in an election (Tr. 656).

42. Ortiz agreed with the reasoning of Judge Brann's decision (Tr. 673).

43. Ortiz agreed that if Judge Brann, in rendering his decision, had interpreted a case incorrectly, or if a case relied upon by Judge Brann was reversed, his decision was in error and Ortiz would possibly be in error as well (Tr. 673-674).

44. Although Ortiz had been asked to give his opinion and was provided with the cases and other documents nearly a year before the hearing, he was unaware that the *Mecinas* case relied upon by Judge Brann was reversed by the Ninth Circuit Court of Appeals and reaffirmed its broad concept of competitive standing and rejected the narrow interpretation that Judge Brann ascribed to the *Townley* decision. Had Ortiz been aware of this, it might have changed his opinion as to whether there was a nonfrivolous basis for the competitive standing claim (Tr. 677-679).

45. Ortiz was unfamiliar with the standing argument in the District Court in *Marks v. Stinson* (Tr. 682) and conveniently didn't remember *Pierce v. Allegheny County Board of Elections,* (Tr.692) cited repeatedly in Plaintiffs' papers in Pennsylvania relating to denial of equal protection.

46. Ortiz testified that there was no central actor who could have assured uniformity in the way ballots were declared valid (Tr. 718).

47. Ortiz recognized that the Supreme Court sometimes reverses recent precedent (Tr. 730).

48. Ortiz acknowledged that plaintiffs' relief request for "[a]ny and such further relief sought that this court deemed equitable and just of which plaintiffs might be entitled" was legally permissible and not frivolous." (Tr. 706-707).

RESPONSE TO DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Dispute the last two sentences of the paragraph as there was no meaningful observation of the opening, counting and recording of the ballots as required by statute.

5. Dispute the characterization of the holding in *Pennsylvania v. Boockvar*. The Court held that it was up to the Legislature to allow Notice and Cure.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed but meaningful observation did not occur until after the ballots were separated from the secrecy envelopes and nearly all the ballots had been counted.

10. Undisputed that it was so reported.

11. Undisputed.

12. Undisputed.

13. Undisputed, but Respondent's contribution to the drafting of the complaint was minor.

14. Undisputed, but Respondent's contribution to the complaint was minimal.

15. Dispute the reason why Respondent did not sign the complaint. Hicks was the drafting attorney.

16. Undisputed.

17. Undisputed, but the SAC was based on the initial complaint.

18. Undisputed.

19. Undisputed.

20. Undisputed, except disputes the imputation of why the Third Circuit did not discuss fraud.

21. Undisputed.

22. Disputed.

23. Undisputed.

24. Dispute the first sentence.

25. Undisputed.

26. Undisputed.

27. Disputed.

28. Disputed.

29. Disputed.

30. Disputed, but agrees that is what the Third Circuit stated. Respondent had no way of knowing whether those numbers are accurate without conducting discovery.

31. Disputed, but agrees that there was no meaningful observation of opening, counting and recording the ballots as required by law.

32. Undisputed.

33. Disputed, except as to the sentence in parentheses.

34. Disputed, see paragraph 37 of RFF.

35. Disputes all except the first sentence. Respondent drafted the SAC with others based on Hicks initial complaint.

36. Undisputed.

37. Undisputed.

38. Undisputed.

39. Undisputed, but notes that if a hearing were to be granted, evidence and declarations would be presented.

40. Disputed.

41. Undisputed, but in the legal papers submitted by Plaintiffs other cases were cited.

42. Disputes that RX01 was not in possession of Respondent or the Trump campaign team.

43. Undisputed.

44. Undisputed, but notes that the campaign had much material that Respondent was aware of at the time of the court proceeding, but Respondent had lost track of all the information at the time production was turned over to Disciplinary Counsel. E.g., Respondent knew of Katherine Freiss' report as evidenced by DCX38-0027 and RX04-27 and yet did not have it in his actual possession when material was turned over to Disciplinary Counsel.

CONCLUSIONS OF LAW

Regarding dismissal of the FAC which would equally apply to the SAC, we would argue that there is a good faith basis that Plaintiffs had standing and a good faith basis that the claim alleging a violation of equal protection, both of which were cited by Judge Brann for grounds for dismissal, arguably had merit and was supported by caselaw or an extension of the law. In addition, the due process argument was a proper attempt to extend the law in what was an unprecedented election.

Although the United States Supreme Court later granted a writ of certiorari and vacated the Third Circuit's judgment in *Bognet* at 141 S. Ct. 2508 (4-19-2021) RX35-1), Judge Brann relied on *Bognet* in granting the defendants' motion to dismiss on the issue of standing and equal protection grounds.

Respectfully, there was a good faith argument that then President Trump had standing – both competitive and associative, and that there was a violation of equal protection and due process in the manner which the election was conducted and in which votes were counted.

I. STANDING

Respondent testified during the hearing that he proceeded on the reasoned belief that, as long as *any* plaintiff had Article III standing, the lawsuit could proceed. Indeed, the 'one-plaintiff rule' – described as a technical "exception to the standing requirement" which "holds that a court entertaining a multiple-plaintiff case may dispense with inquiring into the standing of each plaintiff as long as the court finds that one plaintiff has standing" – is regularly applied by courts and accepted by commenters. *See* Aaron Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 Duke L. J. 481, 484 (2017) ("The one-plaintiff rule is applied with considerable frequency. It has been invoked in more than two dozen Supreme Court cases and probably hundreds of cases in the lower federal courts, and it has figured in several

of the highest-profile cases of the last several years."). Disciplinary counsel cited no contrary cases or authorities of which Respondent could have been aware prior to the SAC.

To find that Respondent's standing arguments were frivolous, therefore, Disciplinary Counsel must prove that there was no basis in law and fact to find that any Plaintiff had standing. But that was not so. Indeed, there was ample basis in law and fact to find that *all* of the Plaintiffs had standing (although just one Plaintiff would have sufficed).

A. COMPETTIVE STANDING

In the SAC, the Trump Campaign asserted "'competitive standing' based upon disparate state action leading to the 'potential loss of an election.'" See DCX13-0019 (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)); DCX9-0023. In a three-paragraph discussion, Judge Brann rejected this theory, holding that "competitive standing" was strictly limited to "the notion that a candidate or his political party has standing to challenge the *inclusion of an allegedly ineligible rival on the ballot*[.]". *Donald J. Trump for President, Inc. v. Boockvar ("DJT")*, 502 F.Supp.3d 899, 915 (M.D. Pa. 2020) DCX14-0013 (emphasis in original; citation and internal quotation marks omitted). Because there was "no allegation that [Joe Biden], or any other candidate, was ineligible to appear on the ballot," Judge Brann concluded that the "competitive standing" cases cited by Plaintiffs were inapposite.

Disciplinary Counsel relied on Judge Brann's rejection of this theory and Professor Ortiz's opinion to argue that the SAC was frivolous.

However, Judge Brann cited no cases contradicting the Trump Campaign's argument. Instead, he merely distinguished – or purported to distinguish – the extensive authority *supportive* of the Trump Campaign's position. Whatever the accuracy of Judge Brann's legal reasoning, the mere fact that authority may be distinguishable does not make reliance on that authority frivolous. Indeed, as explained below, reasonable jurists could disagree with Judge Brann's cabined reading of the Trump Campaign's cited cases. Chairman Bernius is correct that Judge Brann's opinion stands, yet this does not mean that there does not exist another reasonable interpretation.

The Ballot Access Cases Discussed by Judge Brann Can, In Good Faith, Be Read to Support a Broader Theory of Competitive Standing

Judge Brann summarized the competitive standing doctrine as follows: "competitive standing 'is the notion that a candidate or his political party has standing to challenge the *inclusion of an allegedly ineligible rival on the ballot*, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election.'" *DJT*, 502 F.Supp.3d at 915; DCX14-0013 (emphasis in original; internal quotation marks omitted) (quoting *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013)). (DCX14-0013; fn at DCX14-0021)

Reasonable jurists might disagree. It is true that many of the cases cited by the Trump Campaign and Judge Brann found competitive standing in the context of challenges regarding the eligibility of a rival candidate to appear on the ballot. But it is reasonable to read those cases as finding that the cognizable injury consists of "increased competition" *broadly speaking* and affirming that the improper inclusion of a rival candidate on the ballot is *one possible mechanism* through which "increased competition" can occur. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (upholding the district court's finding that plaintiff "would suffer an injury in fact because it 'would need to raise and expend additional funds and resources to prepare a new and different campaign'" as a result of the last-minute inclusion of a rival candidate on the ballot); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) ("Had Judge Cholakis improperly afforded relief to the Libertarian Party, then the Conservative Party … stood to suffer a concrete, particularized, actual injury – competition on the ballot from candidates that … were able to 'avoid complying with the Election Laws'"); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) ("On account of the decision by the Indiana officials to allow the two major political parties on the ballot, [plaintiff candidates] faced increased competition which no doubt required additional campaigning and outlays of funds. Without the Republicans and Democrats on the ballot, [plaintiffs] would have gained additional press exposure and could have conceivably won the Indiana election[.]").

Judge Brann read *Tex. Democratic Party*, *Schulz*, and *Fulani* as "limiting the use of [the competitive standing doctrine]." *DJT*, 502 F.Supp.3d at 916 DCX14-0013. That is incorrect. Those opinions do not state or even imply that competitive standing applies *only* in the context of ballot access challenges. And any such implication, as discussed below, would run contrary to the law in at least one other Circuit, i.e., the Ninth Circuit.

The Trump Campaign Accurately Characterized Ninth Circuit Law, and Judge Brann Mischaracterized It

As the Trump Campaign correctly argued, under Ninth Circuit law, "the 'potential loss of an election' [is] an injury-in-fact sufficient to give a local candidate and Republican party officials standing," even outside of the context of challenging a candidate's eligibility to appear on the ballot. (HCX15-0018) (quoting *Drake*, 664 F.3d at 783 (quoting *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981)). (DCX Ex 13-0018) In *Owen*, the plaintiffs alleged that the Postal Service enforced its rates and regulations in a discriminatory manner that benefited a rival candidate. That case had nothing to do with the candidate's eligibility to appear on the ballot. Nevertheless, the court had no difficulty holding that the plaintiffs had Article III standing:

> The Postal Service asserts that the only threatened Injury to the plaintiffs is the potential loss of an election caused by the Postal Service's alleged wrongful act in enabling their opponents to obtain an unfair advantage. The Postal

> Service argues that this injury is "too remote, speculative and unredressable to confer standing."

This argument has been uniformly rejected." *Owen*, 640 F.2d at 1132.

Owen was reaffirmed – albeit distinguished on its facts – in *Drake*, *see*, 664 F.3d at 783, which the Trump Campaign properly cited. DCX Ex 13-0019.[2]

In concluding that competitive standing was limited to ballot access challenges, Judge Brann cited two cases from within the Ninth Circuit: *Townley v. Miller* 722 F.3d 1128 (9th Cir. 2013) and *Mecinas v. Hobbs*, 468 F.Supp.3d 1186 (D. Ariz. 2020). (DCX14-0021) But the passage it cited from *Townley* was dictum and – like *Tex. Democratic Party*, *Schulz*, and *Fulani—Townley* did not conclusively say that competitive standing only applies to challenges to candidate eligibility. *Townley*, 722 F.3d at 1135 (assuming without deciding that the potential loss of an election due to the appearance of a "None of these candidates" option on the ballot could fulfill standing's injury-in-fact requirement).

Even worse, *Mecinas*, the other case cited by Judge Brann, was *reversed* by the Ninth Circuit on precisely the issue for which Judge Brann cited it. *Mecinas v.*

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[2] *Drake* found the candidate-plaintiffs lacked standing because, by suing after the election had already concluded, they did not have "an interest in a fair competition at the time the complaint was filed." 664 F.3d at 783. *Drake*'s reasons for declining to find standing have no application here. Although the Trump Campaign's lawsuit was brought after Election Day 2020, it was before Pennsylvania's certification of its electors. In *Drake*, by contrast, "[t]he original complaint was filed on January 20, 2009, at 3:26pm. Pacific Standard Time, after President Obama was officially sworn in as President" 664 F .3d at 783.

Hobbs, 30 F.4th 890 (9th Cir. 2022) – something inexplicably overlooked by Professor Ortiz, Disciplinary Counsel's expert. *Mecinas* was a lawsuit brought by the Democratic Party challenging the manner in which candidates were ordered on the ballot; it did not challenge the eligibility of any particular candidate to appear on the ballot. In holding that the plaintiffs had Article III standing, the Ninth Circuit reaffirmed its broad concept of competitive standing and specifically rejected Judge Brann's narrow interpretation of *Townley*. *Mecinas* is worth quoting at length:

> Competitive standing recognizes the injury that results from being forced to participate in an "illegally structure[d] competitive environment," *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005), *a type of harm that we have identified in a variety of different contexts*, *see, e.g., City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019) ("[The] inability to compete on an even playing field constitutes a concrete and particularized injury."); *Preston v. Heckler*, 734 F.2d 1359, 1365 (9th Cir. 1984) ("[W]hen challenged agency conduct allegedly renders a person unable to fairly compete for some benefit, that person has suffered a sufficient 'injury in fact' and has standing ...."). Accordingly, a number of our sister Circuits have come to the same conclusion as we do here in similar cases involving ballot order statutes. *See Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (per curiam) (political committees, including the DSCC, had standing to challenge Minnesota's ballot order statute "insofar as it unequally favors supporters of other political parties"); *Green Party of Tenn. V. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (political parties had standing to challenge ballot order statute because they were "subject to the ballot-ordering rule" and supported candidates "affected by" the law); *see also Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir. 2021) (candidate had

> standing to challenge ballot order statute that "allegedly injure[d] his chances of being elected").
>
> […] The district court characterized the *Townley* decision as "narrow[ing] the scope of competitive standing," stating that this Court "declined to find competitive standing" on the ground that the "inclusion of an 'NOTC' was not the [impermissible] *inclusion of a candidate* on the ballot." *This was in error. Rather than narrowing competitive standing as a basis for injury in fact, Townley reasserted this Court's long-held position that the "potential loss of an election" may give rise to standing.* 722 F.3d at 1135–36 (quoting *Drake*, 664 F.3d at 783–84)." *Mecinas,* 30 F.4th at 898-99 (emphases added).

Parenthetically, *Mecinas* illustrates a principle that should be obvious: the standing arguments brought by the Trump Campaign (like all of its arguments) were not inherently "pro-Democratic" or "pro-Republican." In *DJT*, an expansive theory of candidate standing benefitted Republicans; in *Mecinas*, it benefitted Democrats. A finding of professional misconduct against Respondent for bringing these arguments will chill effective advocacy on both sides of the political aisle.

Mecinas makes clear that there is no principled reason in law or logic to limit the competitive standing doctrine to the "inclusion of a candidate on the ballot." At minimum, reasonable jurists might have disagreed with Judge Brann's contrary view.

Judge Brann Hastily and Wrongly Discounted *Marks v. Stinson*

The Trump Campaign's competitive standing argument was an accurate statement of the law in the Ninth Circuit. As long as there was a good faith basis to

extend this law to the Third Circuit, the Trump Campaign's argument could not have been frivolous. Indeed, Judge Brann cited no contrary Third Circuit cases, and the Trump Campaign reasonably relied on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (RX 19-1) to argue that the principles discussed above were consistent with the law of the Third Circuit. DCX13-0019.

In *Marks*, Bruce Marks, a Republican candidate for the Pennsylvania Senate, sued, *inter alia*, his Democratic opponent and the Philadelphia County Board of Elections (which had certified Stinson as the winner), alleging violations of the Voting Rights Act and Civil Rights Act. The District Court found that Board of Elections officials "conspired" with Stinson "to cause numerous illegally obtained absentee ballots to be cast." (RX19-3). Specifically, the Stinson campaign, with the assistance of Board members and staff, directly encouraged voters to fill out improper absentee ballot applications. The Board also allowed the Stinson campaign to personally deliver blank absentee ballots to voters. In many cases, Stinson workers executed the voters' absentee ballots for them. The District Court granted Marks' motion for a preliminary injunction, which enjoined Stinson from serving as a state senator *pendente lite*, and ordered that Marks be certified the winner. The Third Circuit affirmed the injunction unseating Stinson but vacated the portion of the order requiring that Marks be certified.

The defendants in *Marks* did not challenge Article III standing in the appeal and the Third Circuit's decision contains no discussion of it. Nevertheless, the Trump Campaign cited *Marks* as an example of a case involving "competitive standing." DCX13-0019 ("[A]s in *Marks v. Stinson*, Plaintiff Trump Campaign has 'competitive standing' based upon disparate state action leading to the 'potential loss of an election.'"). *Marks* supported the Trump Campaign's broad conception of competitive standing because – similar to *Owen* – it had nothing to do with challenging a rival candidate's inclusion on the ballot.

Nevertheless, Judge Brann found *Marks* was inapposite because it "does not contain a discussion of competitive standing or any other theory of standing applicable in federal court." (502 F.Supp.3d at 916). But Judge Brann and Ortiz overlooked that the district court in *Marks did* expressly find "candidate" standing. *Marks v. Stinson*, 1994 WL 47710, at *11 (E.D. Pa. 2-18-1994) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).[3] Perhaps Disciplinary Counsel believes the better practice would have been for the Trump Campaign to cite the District Court's opinion in *Marks* rather than the Third Circuit's affirmance, but this oversight hardly amounts to professional misconduct, especially since the District Court's opinion was easily retrievable by Judge Brann and Professor Ortiz (Tr. 682).

[3] In *Anderson,* the Supreme Court entertained a challenge by independent presidential candidate John Anderson to Ohio's ballot access provisions, which resulted in his exclusion from the ballot.

Moreover, Judge Brann and Ortiz overlooked that federal courts must assure themselves of Article III jurisdiction, even where, as in *Marks*, the defendant does not challenge standing itself. *See McCray v. Fidelity Nat. Title Ins. Co.*, 682 F.3d 229, 243 n.13 (3d Cir. 2012) ("Although Appellees do not address standing, 'we are required to raise issues of standing *sua sponte* if such issues exist.'") (quoting *Steele v. Blackman*, 236 F.3d 130, 134 n.4 (3d Cir. 2001)). Thus, in declining to dismiss the appeal *sua sponte*, the Third Circuit at least impliedly determined that Marks had Article III standing. At a minimum, it was reasonable and non-frivolous for the Trump Campaign to suggest that it had done so.

Judge Brann suggested that, even if the plaintiff had "candidate" standing in *Marks*, the theory allowing him to sue might have been different from the theory of "competitive standing" asserted by the Trump Campaign. *(*502 F.Supp.3d at 916) ("Simply pointing to another case where a competitor in an election was found to have standing does not establish *competitive standing* in this matter.") (emphasis in original). Disciplinary Counsel's expert testified to similar effect on cross-examination. Those statements are puzzling. Neither the District Court nor Ortiz explained what other theory of standing could have possibly operated in *Marks* besides competitive standing. *Marks* involved a plaintiff whose only concrete and particularized injury was the "threatened loss of political power." *Drake*, 664 F.3d at 783 (quoting *Tex. Democratic Party*, 459 F.3d at 587). That is precisely the same

injury articulated by the Trump Campaign in *DJT*. HCX15-0018). Regardless of whether one uses the moniker "competitive standing" (as the Trump Campaign did) or "candidate" standing (as the district court did in *Marks*), the essence of these theories is the same – "the 'potential loss of an election.'"

B. VOTER-DILUTION STANDING

Roberts and Henry had standing.

In *Reynolds v. Sims*, the Supreme Court explained that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964). In *Trump v. Boockvar*, Plaintiffs alleged unlawful voter dilution in the FAC. (DCX6-0039 and DCX6-0041). The Plaintiff voters asserted that "Pennsylvania's grossly unequal application of ballot-validity rules based on the happenstance of geography" diluted their votes and constituted "a judicially cognizable injury under the Equal Protection Clause." See Plaintiffs' Opposition Brief to Defendants' Motion to Dismiss FAC (HCX 14-0007-0008). Plaintiffs also attempted to distinguish *Bognet v. Secretary Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020). (DCX36-1 et seq.). *Bognet*, decided two days earlier, rejected the argument that "dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots" was not a concrete and particularized injury sufficient to confer standing to challenge Pennsylvania's deadline extension for mail-in ballots.

Following oral argument, Plaintiffs filed their SAC, which likewise incorporated a voter-dilution theory. (DCX09-0013, 17, 18, 61, 63, 68, 75, 82, 83, 86, 129, 133, 173, 180, 187)

Judge Brann dismissed Plaintiffs' voter-dilution standing arguments in a single footnote, holding that that, "[t]o the extent Plaintiffs may still argue that votes have been unconstitutionally diluted … "those claims are barred by the Third Circuit's decision in *Bognet* [*v. Secretary Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020)]." (DCX14-0019, n.37). Disciplinary counsel may cite Judge Brann's rejection of Plaintiffs' dilution theory to argue that the assertion of individual voter standing was frivolous. But Plaintiffs made clear on the outset that they disagreed with *Bognet* and implied that they were contemplating an ultimate appeal to the Supreme Court. (DCX13-0017) ("Plaintiffs believe *Bognet* was wrongly decided and maintain their Electors Clause claim to preserve it for appellate review."). Even if *Bognet* were controlling and non-distinguishable, an attorney may argue in good faith that the precedent should be abrogated. *See* Pa. R.P.C. 3.1. To do that, Respondent would have needed to preserve the claim in the District Court and Third Circuit in contemplation of an ultimate appeal to the Supreme Court.

This strategy was especially reasonable in the context of the case. The appellant in *Bognet* still had time to seek certiorari from the Supreme Court, and in fact did so just two days after Respondent moved for leave to file the SAC. ECF 172

(Nov. 18, 2020); Pet. for Writ of Certiorari in *Bognet v. Boockvar*, No. 20-740 (Nov. 20, 2020); Because appeals had not yet been exhausted in *Bognet*, the Third Circuit's decision in those proceedings was far from unimpeachable. Rebuking the *Bognet* decision while its appeal was still in flux ought not to be viewed as professional misconduct. *See* Pa. R.P.C. 3.1 cmt 1 ("[I]n determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change"). In fact, the writ of certiorari was granted in *Bognet* and the Third Circuit's judgment was vacated by the Supreme Court, 141 S. Ct. 2508 (4-19-2021). (RX35-1). Disciplinary counsel's own expert conceded on cross-examination that it might not be frivolous for Respondent to challenge *Bognet* if appeals in that case had not yet been exhausted.

If Roberts and Henry had sued their own counties, who they believed were following the law, they would not have gained any relief. They sued the counties that employed the notice and cure procedure which they thought was improper. Even if mistaken, this was a novel approach, and not frivolous, and was employed by Hicks at the outset of the litigation (Tr. 511-512).

Indeed, many celebrated cases, including cases originating in Pennsylvania, became accepted in law that heretofore were without precedent or even contrary to existing precedent. For example, just one month after Judge Brann's decision was handed down in this case, the Pennsylvania Supreme Court granted an appeal in

Commonwealth v. Alexander, 243 A.3d 177 (Pa. 2020), overruling its own precedent from 2014 to hold that the Pennsylvania Constitution "affords greater protection to [Pennsylvania] citizens than the Fourth Amendment." *Id.* at 181 (overruling *Commonwealth v. Gary*, 625 Pa. 183 (Pa. 2014)). That victory for civil liberties would not have been possible if Pennsylvania counsel were prohibited from arguing for a good faith departure from precedent – including in the lower courts to preserve the appeal. *See Commonwealth v. Alexander*, 2019 WL 1056832, at *3 (Pa. Super. 2019) (noting defendant-appellant called for binding precedent to be overruled "only to preserve the argument for further review."). And in 2019, the Supreme Court decided *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019), a case originating in the Middle District of Pennsylvania in which counsel successfully persuaded the Supreme Court to overrule 24 years of precedent limiting property owners' rights to bring Takings Clause claims in federal court. There, too, Disciplinary Counsel's harsh view of Pa. R.P.C. 3.1 would have meant that the prevailing counsel in *Knick* was committing professional misconduct by making arguments in the lower court foreclosed by then-binding precedent. The Supreme Court has itself overruled recent precedent (see e.g., *United States v. Dixon*, 113 S. Ct. 2849 (1993) applying same elements test and overruling *Grady v Corbin*'s (110 S. Ct. 2084[1990] same conduct test to determine whether a successive prosecution is barred by double jeopardy.); *Crawford v. Washington*, 541 US 36 (2004) overruling *Ohio v. Roberts*,

448 US 56 (1980) (Only method to test reliability of out of court statement is through the "crucible of cross examination" overruling admissibility test of reliable hearsay).

II. EQUAL PROTECTION

The SAC contained reasonable denial of equal protection arguments: that the named Democratic counties utilized a notice and cure procedure of mail in or absentee ballots while the Republican counties were constrained not to do so, and that Democratic counties imposed unreasonable physical boundaries on candidate representatives observing the counting of votes that Republican counties did not impose.[4] Both of these disparities resulted in discrimination between different Pennsylvania counties – and, by extension, discrimination amongst their respective residents and voters. And because that geographic discrimination corresponded heavily with partisan leaning, a partisan discrimination occurred by proxy, injuring the Trump Campaign itself. Contrary to Disciplinary Counsel's contention, attorneys for President Trump provided caselaw that supported these arguments.

[4] Even if Democratic and Republican observers were treated similarly *within* each county – that is to say, even if a Democratic observer within, e.g., Philadelphia County enjoyed the same (non-)privileges as a Republican observer – that is beside the point; but see e.g. declaration of Beverly Honchorek (RX01-217). There was unequal treatment of observers *between* the counties, and Respondent had a nonfrivolous basis in fact to assert that the political leanings of these counties corresponded heavily with the Democratic and Republican parties.

In *Pierce v. Allegheny County Board of Elections*, 324 F. Supp.2d 684, 698-699 (W.D. Pa 2003), the District Court found that different counties across the commonwealth employed different standards to determine whether an absentee ballot should be counted and considered a legal vote. The court held this disparate treatment implicated the equal protection clause because uniform standards will not be used statewide to discern the legality of a vote in a statewide election. Notably, the court held that plaintiffs had standing and properly had an equal protection claim in capacity as voters and issued a limited injunction.[5] Judge Brann did not distinguish or even acknowledge *Pierce* in his decision. This case was repeatedly cited in Plaintiffs' papers in D*JT*.

In another case cited by Plaintiffs, *Charfauros v. Board of Elections*, 249 F.3d 941, 945, 953 (9th Cir. 2001), the Ninth Circuit found that the Board of Elections created two classes of challenged voters: Republican voters (whose eligibility was challenged by the Democratic Party and considered before the election) and Democratic voters (whose eligibility was challenged by the Republican Party and considered after the election). The Court held that such a procedure clearly

[5] We note that one of the plaintiffs' attorneys was the same Ronald Hicks who drafted the initial complaint in this case. Parenthetically, the District Court exercised supplemental jurisdiction over the plaintiffs' state law claims that defendant violated the Pennsylvania Election Code.

established a violation of plaintiffs right to equal protection under the law. Like *Pierce*, *Charfauros* went completely unmentioned in Judge Brann's decision.

And in *Bush v. Gore*, 531 US 98, 105 (2000), the Court "determined that the recount process mandated by the Florida Supreme Court was 'inconsistent with the minimum procedures necessary to protect the fundamental right of each voter' in the statewide recount." *Id.* at 105. The Fourteenth Amendment's guarantee of equal protection of the laws means that a "State may not, by [ ] arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-105 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)).

Notwithstanding language in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 373 (Pa. 2020) (RX20-20) clearly indicating that whether to provide notice-and-cure procedures is a task addressed to the legislature, Judge Brann interpreted the Pennsylvania Supreme Court's opinion to mean that such a procedure resided within the discretion of each County Board of election. Even if Judge Brann's interpretation was correct (and not precluded by the Electors and Elections Clauses, U.S. Const. Art. I, §4; Art. II, §1), that reading of *Pennsylvania Democratic Party v. Boockvar* would implicate the equal protection principles in *Bush v. Gore*. Importantly, Respondent's argument in this case did not necessarily hinge on the theory that *any* non-uniform treatment between counties renders an election process unconstitutional. As the Supreme Court stated in *Bush v. Gore* at 109:

> The question … is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount *with minimal procedural safeguards*. When a court orders a statewide remedy, there must be at least *some assurance that the rudimentary requirements of equal treatment and fundamental fairness* are satisfied. (emphasis added).

The Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party v. Boockvar*, as interpreted by Judge Brann, permissively allowed counties to allow notice-and-cure procedures on a discretionary basis without statewide uniformity. Like the state court in *Bush v. Gore*, *that* ruling would have failed to provide the necessary "minimal procedural safeguards" to "assure[] that the rudimentary requirements of equal treatment and fundamental fairness" were satisfied. Respondent had a reasonable basis for asserting this claim. In any event, this was not frivolous.

III. DUE PROCESS

In *Bush v. Gore*, the United States Supreme Court determined that the implementation of different standards throughout the Florida recount procedure was not conducted in compliance with not only equal protection, but also due process. 531 U.S. at 110. And in *Black v. McGuffage*, 209 F.Supp.2d 889, 900 (N.D. Illinois 2002), the District Court found that the use of disparate voting procedures in different parts of the state was a violation of due process. There, African American

and Latino voters alleged, in action against state and county election officials, that they suffered injury when they voted in the 2000 general election in precincts using deficient ballot systems that recorded a substantial and disproportionate number of undervotes and that resulting vote dilution was impacting African American and Hispanic groups disproportionately, thus sufficiently stating a claim against the election officials for violation of their substantive due process rights. The crux of the matter was not that the plaintiffs sought to mandate a certain level of accuracy, but rather that a law allowed significantly inaccurate systems of vote counting to be imposed upon some portions of the electorate and not others without any rational basis. As the court explained, "it would appear that the right to vote, the right to have one's vote counted, and the right to have one's vote given equal weight are basic and fundamental constitutional rights incorporated in the due process clause of the Fourteenth Amendment to the Constitution of the United States."

It was certainly reasonable for Respondent to extend the reasoning of that case to the situation present here. Disciplinary Counsel cited no controlling cases to the contrary of which Respondent could have been aware. Although Disciplinary Counsel's expert in these proceedings stated that Plaintiff cited no cases to support the argument that there was a due process violation based on the inability to observe the opening and counting of the ballots, this was an unprecedented election in terms of the amount of mail-in and absentee ballots in Pennsylvania. It is undisputed that

there were more than 2,650,000 mail-in/absentee ballots in 2020 compared to only 266,208 cast in the 2016 presidential election, an increase of nearly 900%. Republicans were not allowed to meaningfully observe the process. Thus, it was reasonable for the attorneys in the Pennsylvania litigation to argue that there was a due process violation in their inability to observe the opening and the counting of the mail-in and absentee ballots. If the vote was not verified, a reasonable argument can be made that it should not be counted. "[A}bsentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004; Judge Posner).

IV. FEDERAL COURT VERSUS STATE COURT PROCEEDING

Respondent was criticized by Disciplinary Counsel for not bringing a state court proceeding challenging the election results. There is nothing inherently improper in commencing an election law challenge in federal court (see e.g., *Carson v. Simon*, 978 F.3d 1051 [8th Cir. 10-29-2020]; RX21-1) especially where a denial of equal protection is alleged (see e.g., *Pierce v. Allegheny County Board of Elections*, 324 F. Supp.2d 684, 698-699 [W.D. Pa 2003]). Neither is it incorrect to seek redress in the federal courts on a constitutional issue even when a state highest court has ruled on an issue (see e.g., *Trump v. Boockvar*, 493 F.Supp.3d 331 (W.D. Pa 2020) and *In Re November 3, 2020, General Election*, 240 A.3d 591 (2020) (Signature verification of mail-in/absentee ballots). Thus, plaintiffs due process and

equal protection challenges before Judge Brann and Respondent's oral argument were patently proper even though the Pennsylvania Supreme Court, on that same day, held that being in the "room" satisfies the various provisions of the Election Code, no matter how far away stood the candidates, their representatives, and the watchers. (*In Re Canvassing Operation*, 241 A.3d 339 (11-17-2020) reversing 2020 WL 6551316 (Commonwealth Ct. 11-5-2020) ("[R]equiring that all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. §2650 and/or 25 P.S. §3146.8 and be permitted to observe all aspects of the canvassing process within 6 feet, while adhering to all COVID-19 protocols, including, wearing masks and maintaining social distancing.".) (RX16-3).

Two judges dissented. Chief Justice Saylor stated:

> The Commonwealth Court reasonably directed election officials in Philadelphia to move restrictive barriers in the Convention Center closer to the ballot-canvassing operations, which had been staged up to thirty-five yards from the areas to which the statutorily authorized candidate representatives were confined. Under the Commonwealth Court's order, these representatives could then observe whether ballots were being counted lawfully to the best of their ability, consistent with health and safety restrictions. The record -- as well as publicly available video recordings from the Convention Center -- amply demonstrate that this simply wasn't the case previously.

Judge Mundy:

> In denying Appellee's initial motion, the trial court concluded '[Appellee]'s argument that the Board of Elections was not providing observers the opportunity to 'meaningfully observe' the canvassing of ballots' failed because "[Appellee] was unable to point to any statutory language or case law using the word 'meaningful' or elaborating on what constitutes 'meaningful observation.'" Trial Court Op. at 3. The Commonwealth Court reversed noting "the relegation of those representatives to a position where meaningful observation of the processes they are present to observe is a practical impossibility would be an absurd interpretation of the Election Code[.]" Cmwlth Ct. Op. at 6. I agree." (RX17-9-10).

Clearly plaintiffs had no ability to bring a state court action as there was no opportunity to meaningfully observe the opening and counting of the ballots that would allow the campaign to determine whether the defendants Board of Elections were following lawful procedure.

The Pennsylvania Election Code permits "[o]ne authorized representative of each candidate" and "one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed." 25 P.S. §3146.8(g)(1.1). Similarly, during canvassing, the Election Code permits "[o]ne authorized representative of each candidate" and "one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are canvassed." 25 P.S. §3146.8(g)(2). The Election Code provisions pertaining to the "pre-canvass" and "canvass" do not make any separate reference to

poll watchers, instead referring only to the "authorized representatives" of parties and candidates. See 25 P.S. §3146.8.

It also provides that poll watchers may be present "at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines under" the Code. 25 P.S. §2650. Additionally, one poll watcher for each candidate, political party, or political body may "be present in the polling place ... from the time that the election officers meet prior to the opening of the polls ... until the time that the counting of votes is complete and the district register and voting check list is locked and sealed." 25 P.S. §2687(b). During this time, poll watchers may raise objections to "challenge any person making application to vote." Poll watchers also may raise challenges regarding the voters' identity, continued residence in the election district, or registration status. 25 P.S. §3050(d). Also, after an elector marks their absentee or mail-in ballot and secures it in a secrecy envelope, the elector is to place that envelope into the return envelope on which is printed a "declaration of the elector" that "[t]he elector shall then fill out, date and sign." 25 P.S. §3146.6(a) (absentee ballots), 3150.16(a) (mail-in ballots).

In Re 2020 Canvass of Absentee and Mail-In Ballots of the November 3, 2020, General Election, 241 A.3d 1058 (11-23-2020) (DCX21-0001), a 4-3 opinion decided days after Judge Brann's decision is of dubious value in light of Supreme

Court criticism cited below. In *Re 2020 Canvass of Absentee and Mail-In Ballots of the November 3, 2020,* a voter's failure to handwrite name and/or address under the full paragraph of the declaration on the back of the outer envelope of an absentee or mail-in was not found to be a material violation of statutory directive to "fill out" the declaration). Contrary to Disciplinary Counsel's interpretation of this case (Tr. 420-421), four judges held that this was a material violation and that in future elections the date and sign statutory requirement would be enforced. (Judge Wecht although concurring with the majority result, agreed with the three dissenting judges that the statutory requirement that voters date and sign the voter declaration in an absentee or mail-in ballot was not a minor irregularity which could be overlooked and thus, in future elections, the omission of either item would be sufficient, without more, to invalidate the ballot in question.)

Moreover, the Supreme Court in *Ritter v. Migliori*, 143 S.Ct. 297 (10-11-2022) (RX28-1) granted the writ of certiorari and vacated the Third Circuit judgment (36 F.4th 153). The facts are explained in Justice Alito's dissent joined by Justices Thomas and Gorsuch denying a stay pending certiorari in *Ritter v. Miliori*, 142 S. Ct. 1824 (6-9-2022) (RX29-0001-0003):

> The Pennsylvania Supreme Court has held that the inclusion of the date on which the ballot was filled out is mandatory and that undated ballots cannot be counted, see *In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election*, —— Pa. ——, 241 A.3d 1058 (2020), but the Third Circuit held that this state-law rule is

> preempted by 52 U.S.C. § 10101(a)(2)(B) because the inclusion of a date is not material to the question whether a person is qualified to vote. Can that possibly be correct? One may argue that the inclusion of a date does not serve any strong purpose and that a voter's failure to date a ballot should not cause the ballot to be disqualified. But §10101(a)(2)(B) does not address that issue. It applies only to errors or omissions that are not material to the question whether a person is qualified to vote. It leaves it to the States to decide which voting rules should be mandatory. The problem with the Third Circuit's interpretation can be illustrated by *considering what would happen if it were applied to a mail-in voting rule that is indisputably important, namely, the requirement that a mail-in ballot be signed.* Pa. Stat. Ann., Tit. 25, §3150.16(a). *Suppose a voter did not personally sign his or her ballot but instead instructed another person to complete the ballot and sign it using the standard notation employed when a letter is signed for someone else: "p. p. John or Jane Doe." Or suppose that a voter, for some reason, typed his or her name instead of signing it. Those violations would be material in determining whether a ballot should be counted, but they would not be "material in determining whether such individual is qualified under State law to vote in such election." Therefore, under the Third Circuit's interpretation, a ballot signed by a third party and a ballot with a typed name rather than a signature would have to be counted.* (Emphasis added).

Thus, Justice Alito's statements about the importance of a valid signatures on an absentee/mail-in ballot demonstrates that it was not frivolous for plaintiffs to argue that it was an error for the various board of elections not to do a signature comparison/verification of signatures on mail-in/absentee ballots to voter

registration signatures when such a verification was mandated for those persons voting in person.

V. SUPPLEMENTAL JURISDICTION (28 USC§1367) OVER THE PLAINTIFF'S STATE LAW CLAIMS THAT DEFENDANTS VIOLATED THE PENNSYLVANIA ELECTION CODE

Assuming that Respondent had a reasonable basis to raise the due process and equal protection claims, then the District Court could have considered the state law claims, including the argument that the opening and the counting of the ballots were conducted without observation in violation of P.S. 25 §3146.8(b) providing:

Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

VI. REMEDY

It would be highly unusual to sanction an advocate for the remedy sought in the complaint (even one that seeks the maximum relief possible). That is particularly true where the remedies sought included and subsumed more modest and undisputedly permissible remedies. Indeed, at an early stage of litigation, it would border on malpractice not to request the maximum relief possible and which the facts reasonably likely to be discovered could support.

In attacking the remedies sought by Respondent, Disciplinary Counsel attempts to portray those remedies as dramatic and out-of-step with the supposedly low quantum of proof of fraud or other misconduct that Respondent presented. But that is the wrong framework. It is important to distinguish the *preliminary* relief that Plaintiffs requested in their motion for a TRO from the *ultimate* relief that they prayed for in the SAC. Plaintiffs' motion for a TRO requested an order, "barring Defendants from certifying the results of the November 3, 2020, election until further order from this Court." DCX10. The purpose of that relief, like all preliminary relief, was to preserve the status quo. This relief was not as dramatic as the ultimate relief sought in the SAC, which contemplated that additional evidence and proof would be provided. The relief requested in the TRO motion was proportional to the prima facie evidence of unauthorized conduct during the 2020 election that Respondent alleged in the SAC.

Turning to the relief requested in the SAC – which, we emphasize, and as Respondent affirmed in his testimony, contemplated a more fulsome opportunity to present proof at a hearing – Respondent was hardly the first counsel to request an injunction precluding certification and/or ordering certification based on the legal votes. *See Krieger v. Peoria, City of*, 2014 U.S. Dist. LEXIS 117235 (D. Ariz. Aug. 22, 2014); *Bolden v. Potter*, 452 So.2d 564, 567 (Fla. 1984) (invalidating election where the "fraud … was not inconsequential. It was blatant and corrupt and it

permeated a substantial part of the absentee-election process."); *Baber v. Dunlap*, 349 F.Supp.3d 68 (D. Me. 2018) (in challenge to Maine's ranked-choice voting system, unsuccessful request by plaintiffs, represented by the experienced law firm Wiley Rein LLP, to declare a candidate the winner based on the first-round vote); *see also Griffin*, 570 F.2d at 1077 ("There is precedent for federal relief where broad-gauged unfairness permeates an election….").

Notably in *Wisconsin Voters Alliance v. Wisconsin Commission*, No. 2020 AP 1930-OA (12-4-2020), the petitioners sought a declaration that the Presidential Election in Wisconsin was null and void; an injunction enjoining the certification of the election so that the state legislatures can lawfully appoint the electors and requiring the Governor to certify the electors appointed by the legislature; and any other relief the court deems appropriate. The three-judge minority noted "[h]istorically we often do not provide all the relief requested." The minority also noted with apparent approval that one form of relief sought by petitioners is, "any other relief the court deems appropriate."

VII. SANCTION

Pennsylvania Rule of Professional Conduct 3.1 provides, in relevant part, that: "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing

law." Pa. RPC 3.1. The purpose of this rule is to prevent lawyers from "abus[ing] legal procedure." *Id.* cmt 1. What constitutes an 'abuse' must necessarily take into account the fact that no advocate has the unilateral power to seize the relief they request. The ultimate gatekeeper is the neutral and detached judge presiding over the proceedings. No lawsuit brought, even by a 'frivolous' litigant, can succeed without judicial assent. The overriding aim of Rule 3.1 is not to filter out unmeritorious claims, but only those claims that are so unimpeachably lacking in merit that they can only serve to waste the court's time or vexatiously harass another party.

As the commentary to the Rule makes clear, "the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." *Id.* cmt 1. Thus, "the mere fact that a legal position is 'creative' or contrary to existing law does not make that position frivolous." Ronald D. Rotunda, John S. Dzienkowski, Law. Deskbk. Prof. Resp. §3.1-1 (2021-2022 ed.).

Furthermore, "[t]he filing of an action … is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." *Id.* cmt 2. "Discovery, after all, normally comes *after* the complaint is filed, not before." Rotunda & Dzienkowski, *supra.* And an action may be nonfrivolous "even though the lawyer believes that the client's

position ultimately will not prevail," Pa. R.P.C. 3.1 cmt 2 – though Respondent fully expected to succeed on the merits here. "It is obvious that the drafters of the rules acknowledged that when lawyers prepare and file pleadings in civil actions, they routinely make factual allegations in support of their theories of liability and assert defenses thereto, some of which ultimately provide to be unsubstantiated." Rotunda & Dzienkowski, *supra* (quoting *Lawyer Disciplinary Board v. Neely*, 207 W.Va. 21, 528 S.E.2d 468, 473 (1998)).

The foregoing principles apply in all cases but are especially acute in the election context. Indeed, Pennsylvania's Rules of Professional Conduct *require* attorneys to "make reasonable efforts to expedite litigation consistent with the interests of the client." Pa. R.P.C. 3.2. It is undisputed that election disputes often occur (and *must* occur) during an extraordinarily compressed timeframe. Those exigencies require skilled lawyers to make tradeoffs in determining what arguments to assert. Respondent testified that he made those tradeoffs; indeed, he contemplated, but ultimately did not include in the Pennsylvania action, certain additional claims of wrongdoing.

It is important to emphasize that before Respondent can be sanctioned for any misconduct, the Committee must first be convinced that Disciplinary Counsel has fulfilled his burden of establishing by "clear and convincing evidence" (D.C. Court

of Appeals, Board of Professional Responsibility Rule 11.6 (2020)), that Respondent violated Rules 3.1 and 8.4(d) of the Pennsylvania Rules of Professional Conduct.

In determining whether an attorney has filed a frivolous claim, the D.C. Court of Appeals has held that certain factors should be applied, e.g., the clarity or ambiguity of the law; the plausibility of the position taken; and the complexity of the issue under consideration, *In re Spikes*, 881 A.2d 1118, 1125 (2005). In addition, the Court has held that it should consider whether a "reasonable attorney would have concluded that there was not even a 'faint hope of success in the legal merits' of the action considered." *Id.* quoting *Slater v. Biehl*, 793 A.2d 1268 at 1278.

In applying those standards to Respondent's conduct, the Committee should consider the complexity of the law in this case and the fact that Respondent sought the assistance of attorneys with expertise in this area. As Chairman Bernius notes, Respondent "engaged local counsel who purported to be experts in election law…" (Tr. 1073).

In addition, the Committee should consider this short window of opportunity within which Respondent had to file the second amended complaint. Chairman Bernius also noted that when a "lawyer is under the gun" with "time pressure," there may be a reason to give an attorney more "leeway" with regard to his pre-filing investigation of the claim being raised (Tr. 1056).

The D.C. Court has also noted that "the distinction between a weak claim and a frivolous or meritless one can be difficult to pinpoint…" *In re Yelverton*, 105 A.3d 413, at 424 (2014). Chairman Bernius also pointed out the difficulty in drawing the line between zealous representation and the question whether a claim is, in fact, frivolous. (Tr. 1073).

Finally, the Committee should consider that the filing of the FAC makes the original complaint a nullity. ("[T]he amended complaint 'supersedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading.'" (quoting *Boelens v. Redman Homes, Inc.,* 759 F.2d 504, 508 (5th Cir. 1985).

The proposed SAC was not permitted to be filed by the Court and Respondent should not be disciplined as it had no legal effect. (The failure to obtain leave of the court results in an amended complaint having no legal effect. *US ex rel Mathews v. Health South Corp*, 332 F.3d 293 (5th Cir. 2003); *in accord Murray v. Archambo,* 132 F.3d 609, 612 (10th Cir. 1998); *Hoover v. Blue Cross and Blue Shield of Alabama,* 855 F.3d 1538, 1544 (11th Cir. 1988)).

Based on the above, we argue that Disciplinary Counsel has not met his burden of establishing a violation of Rule 3.1 or 8.4(d). Assuming, *arguendo*, that the Committee find that this burden has been met, it must then determine the appropriate sanction to recommend to the Board.

In determining an appropriate sanction, the D.C. Court has enunciated seven factors that must be evaluated: (1) the seriousness of the conduct; (2) any prejudice to the client; (3) whether the conduct involved dishonesty; (4) violation of other disciplinary rules; (5) the attorney's disciplinary history; (6) whether the attorney has acknowledged his or her wrongful conduct; (7) mitigating circumstances. *In re Tun*, 286 A.3d 538 (2022).

The Committee should initially take note that Respondent has no disciplinary history prior to any matters relating to the 2020 election and D.C. Counsel did not offer any evidence of prior discipline (Tr. 1211).

With respect to mitigating circumstances, the Respondent refers the Committee to evidence of the Respondent's distinguished career in public service which was presented as part of the mitigation portion of the hearing. (Tr. 859-875).

We also emphasize that the D.C. Court has stressed the importance of consistency in the imposition of sanctions. See *In re Yelverton*, 105 A.3d 413, at 428. In *Yelverton*, the Court took note that District of Columbia Bar Rules XI, §9, stresses the goal of consistency in dispositions of disciplinary matters of comparable conduct.

The goal of consistency with respect to violations of Rule 3.1 is somewhat elusive because the D.C. Court never imposed a sanction for a violation of Rule 3.1 until 2005, in *In re Spikes*, 881 A.2d 1118 (2005). In that matter, the Court imposed

a sanction of 30 days. Similarly, in *In re Yelverton*, 105 A.3d 413 (2014), the Court imposed a sanction of 30 days. Finally in *In re Pearson*, 228 A.3d 417 (2020), the Court imposed a 90 day suspension.

It is important to understand that the Court chose to impose the more severe sanction of 90 days in *Pearson*, because of certain aggravating factors that were not present in *Spikes* and *Yelverton*. One of the aggravating factors was Pearson's "accusations against Disciplinary Counsel, the Board, the Hearing Committee, and this Court." *Id.* at 428. Here, Respondent cooperated with the investigation from the outset and agreed to Disciplinary Counsel's invitation to be questioned on February 21, 2022. (R05-1).

Finally, we wish to note that Disciplinary Counsel, in recommending Respondent's disbarment, has attempted to sway this Committee by making political statements that have no support in the record. Counsel has gone so far as to analogize Respondent's conduct to that of Theresa Squillacote, an attorney who was disbarred by the D.C. Court in 2002 after being convicted of attempted espionage. Ms. Squillacote was sentenced to prison for 22 years after spying on behalf of the then Soviet Union.

In arguing for disbarment, Disciplinary Counsel states that Respondent, like Squillacote and "[l]awyers who betray their country must be disbarred." DCFF43.

As Chairman Bernius said to Counsel at the hearing, "So from 90 days [Pierson] to disbarment is quite a leap, isn't it?" (Tr. 1233).

The Committee must consider only what is contained in the record and not the political overlay that was injected by the Disciplinary Counsel in his closing argument and written submission.

Thus, we argue that in the event the Committee finds a violation of Rule 3.1 or 8.4(d), that it recommends an informal admonition or reprimand. In the event the Committee believes that a more serious sanction be imposed, we argue that a suspension of no more than 30 days be imposed.

VIII. CONCLUSION

Disciplinary counsel failed to present clear and convincing evidence at the hearing held before the Ad Hoc Committee that Respondent violated Pennsylvania Rules of Professional Conduct 3.1 or 8.4(d). There was a reasonable basis under the law that the Plaintiffs had standing and that there were arguably non-frivolous claims that the procedures employed in the Pennsylvania election were violative of equal protection and due process. In the event the Committee finds a violation of either rule, we argue that the Committee recommend an informal admonition or reprimand. In the event the Committee believes that a more serious sanction be imposed, we argue that a suspension of no more than 30 days be imposed.

Dated: March 1, 2023
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CERTIFICATE OF COMPLIANCE

This document complies with the length and format requirements of Board Rules 19.8(c) because it contains 13,831 words, double-spaced, with one-inch margins, on 8½ x 11-inch paper. I am relying on the word-count function in Microsoft Word in making this representation.

John M. Leventhal, Esq.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2023, I caused a copy of the foregoing to be filed electronically with the Board of Professional Responsibility by email to CaseManager@dcbpr.org, and to be served on Disciplinary Counsel by email to Hamilton P. Fox, III, at FoxP@dcodc.org.

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