

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



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<b>In the Matter of</b>	:	<b>Board Docket No. 22-BD-027</b>
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<b>RUDOLPH W. GIULIANI,</b>	:	<b>Disciplinary Docket No. 2020-D253</b>
	:	
<b>Respondent,</b>	:	
	:	
<b>A Temporarily Suspended Member</b>	:	
<b>Of the Bar of the District of</b>	:	
<b>Columbia Court of Appeals.</b>	:	
<b>Bar Registration Number: 237255</b>	:	

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**DISCIPLINARY COUNSEL’S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDATION AS TO  
SANCTION**

**I. INTRODUCTION**<sup>1</sup>

Respondent Rudolph W. Giuliani is charged with violating Pennsylvania Rules of Professional Conduct 3.1 and 8.4(d), based on his involvement in a lawsuit brought in Pennsylvania immediately after the 2020 presential election. A hearing was held on December 5-8 and 15, 2022, before an Ad Hoc Hearing Committee.

The evidence adduced at the hearing shows by clear and convincing evidence

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<sup>1</sup> References to Disciplinary Counsel’s Exhibits shall be “DCX.” References to Respondent’s exhibits shall be “RX.” References to the hearing transcripts shall be “Tr.” References to Disciplinary Counsel’s Proposed Findings of Fact shall be “PFF.”

that Mr. Giuliani violated Rule 3.1 by filing a lawsuit seeking to change the result of the 2020 presidential election when he had no factual or legal basis for doing so. Mr. Giuliani’s lawsuit sought to disenfranchise more than half a million Pennsylvania voters and undermine the basic premise of our democratic form of government—that our leaders are chosen by the voters in free and fair elections. Mr. Giuliani’s pursuit of the lawsuit was an abuse of his privilege to practice law and seriously undermined the administration of justice in violation of Rule 8.4(d). He should be disbarred.

## **II. PROPOSED FINDINGS OF FACT**

1. Respondent Rudolph W. Giuliani is a member of the Bar of the District of Columbia Court of Appeals. He was admitted by motion on December 2, 1976, and assigned Bar Number 237255. DCX 01. Mr. Giuliani took inactive (non-practicing) status on December 12, 2002. DCX 02 at 0001. On June 24, 2021, the Supreme Court of New York, Appellate Division, First Judicial Department, suspended him from the practice of law pending final disposition of disciplinary proceedings in that jurisdiction. *Matter of Giuliani*, 146 N.Y.S.3d 266, 283 (2021). On July 7, 2021, the D.C. Court of Appeals temporarily suspended Mr. Giuliani based on the New York suspension. DCX 02 at 0001-02 (¶ 1); DCX 04 at 0001 (¶ 1).

## **2020 Election Litigation in Pennsylvania**

2. In 2019, the Commonwealth of Pennsylvania enacted Act 77, which permitted any registered voter who so requested to vote by mail with no requirement that the voter provide a reason for not voting in person. Act of Oct. 31, 2019, Pub. L. No. 552, sec. 8, § 1310-D, 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421); Tr. 552 (Ortiz).

3. In 2020, because of the COVID-19 pandemic, many Pennsylvania voters chose to vote by mail. Tr. 553-54 (Ortiz), 138 (Giuliani). Of nearly seven million Pennsylvanians who voted in the November 3, 2020 general election, more than one third did so by mail. DCX 16 at 0007.

4. To vote by mail, voters were required to submit an application. When the application was approved, the county election board sent the voter a ballot package. The package contained a ballot and two envelopes: a smaller, secrecy envelope marked “Official Election Ballot”; and a larger, outer envelope which was preprinted with a bar code and voter declaration. Voters were instructed to mark their ballot, seal it in the smaller envelope, and then seal that envelope in the larger envelope. Voters then filled out, dated, and signed the declaration printed on the larger envelope and placed it in the mail or deposited in a drop box. On election day, officials canvassed the mail-in ballots to verify that the appropriate information was on the outside of the larger envelope and that nothing was written on the secrecy

envelope that would reveal the identity of the voter, the voter’s political affiliation, or the voter’s candidate preference. The secrecy ballot was then opened, and the ballot was counted. DCX 17 at 0021; DCX 18 at 0028-29; DCX 21 at 0009; Tr. 110-15 (Giuliani).

5. Following the enactment of Act 77, several lawsuits were filed to clarify or challenge the new procedures. Tr. 554 (Ortiz). In *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Supreme Court of Pennsylvania held that if a county election board determined from the outside envelope that a mail-in ballot was deficient—for example, if the voter failed to sign the declaration—the Act did not require the county board to notify the voter and provide an opportunity to correct the mistake (“Notice and Cure”). DCX 17 at 0019-21; Tr. 554-55 (Ortiz), 134-35 (Giuliani).

6. In the wake of that decision, the Pennsylvania Secretary of State encouraged county election boards to voluntarily adopt Notice and Cure procedures. Some counties chose to do so; others did not. DCX 14 at 0009; Tr. 135-36 (Giuliani).

7. In a second case, *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020), the Pennsylvania Supreme Court held that (a) Act 77 does not permit election boards to make comparisons between the signatures on mail-in ballot envelopes and voter registration forms; and (b) the Act does not permit election observers to

challenge mail-in ballots during the canvassing process. DCX 19 at 0012-13; Tr. 556-57 (Ortiz), 136-38 (Giuliani).

8. In a case brought by the Trump campaign, *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331 (W.D. Pa. 2020), a federal court held that the campaign lacked standing to challenge various Pennsylvania election procedures on a vote dilution theory, which included challenges based on the Electors and Election Clauses of the U.S. Constitution. DCX 18 at 0036-40. In the alternative, the court held that the absence of a signature-comparison process for mail-in ballots did not violate equal protection or substantive due process. DCX 18 at 0052-60; Tr. 557-61 (Ortiz).

9. On election day, officials in Philadelphia positioned observational barriers to enforce pandemic-related social distancing requirements between election observers and election workers who were canvassing mail-in ballots. The Trump campaign objected to the barriers, but a state trial court denied the campaign's request to allow the observers closer access. An intermediate appellate court reversed that decision and remanded for an order requiring that the observers be permitted to observe all aspects of the canvassing process within six feet. *In re Canvassing Observation*, No. 1094, 2020 WL 6551316, at \*4 (Pa. Commw. Ct. Nov. 5, 2020) (RX 16 at 3); Tr. 562-63 (Ortiz). On further appeal, the Pennsylvania Supreme Court upheld the procedures and reversed the intermediate appellate

court's order. *In re Canvassing Observation*, 241 A.3d 339, 351 (Pa. 2020) (DCX 20 at 0009); Tr. 563-64 (Ortiz), 141-47 (Giuliani). In the interim, a federal judge worked out an informal settlement to allow observers closer proximity. Tr. 564-65 (Ortiz).

### **The Post-Election Trump Campaign Litigation**

10. President Biden won Pennsylvania by a margin of more than 80,000 votes. DCX 14 at 0009.

11. The day after the election, November 4, 2020, then-President Trump asked Mr. Giuliani to take charge of post-election litigation. Tr. 42-43, 45, 481-82, 877-78 (Giuliani). Mr. Giuliani left the White House and went to the campaign headquarters in Northern Virginia, where he immediately began preparations to bring litigation in approximately ten states, including Pennsylvania, with the idea of combining these cases into a consolidated lawsuit that could eventually make its way to the Supreme Court of the United States. Tr. 42-46, 49, 53-54, 483-84, 879, 1188-90 (Giuliani). He engaged a chief investigator on November 4 (Tr. 457 (Giuliani), 800 (Bobb), 821-22, 824-25 (Kerik)) to try to find evidence of voting improprieties or fraud. Tr. 854 (Kerik). An attorney from the campaign also engaged John Droz, who had degrees in physics but described his career as “trying to defend science” (Tr. 752-55 (Droz)), to find statistical anomalies, apparently to support the claims of fraud that the campaign intended to allege. Tr. 758-60, 764, 769-70 (Droz).

12. Mr. Giuliani began working on litigation in Pennsylvania after receiving a telephone call from a campaign official about the observational boundaries in Philadelphia during the mail-in ballot canvassing. Tr. 46-47, 49, 882-86 (Giuliani), 740-42 (Lewandowski).

13. He worked with Ronald Hicks of Porter, Wright, Morris & Arthur, LLP to draft a complaint to file in federal court. DCX 34 at 0141-42; *see* DCX 05 at 0084; Tr. 51-53, 486-88 (Giuliani). They chose not to follow the established state procedures for election contests, which would have required them to sue in state court. Tr. 52-54, 513-16 (Giuliani); DCX 40 at 0006 & n.2. The campaign had brought other cases unsuccessfully in state court, and “they felt it was a lost cause . . . to litigate this in a Philadelphia court or a local court.” Tr. 515 (Giuliani).

14. Mr. Giuliani helped prepare a complaint on behalf of Donald J. Trump for President, Inc. and two voters who had filed defective mail-in ballots but had not been given the opportunity to cure them. DCX 05; Tr. 55-56 (Giuliani). The complaint contained seven counts, which asserted violations of the plaintiffs’ civil rights under 42 U.S.C. § 1983 and of the Electors and Elections Clauses of the U.S. Constitution. The defendants were the Secretary of State and the election boards of seven counties which had returned substantial majorities for President Biden. DCX 05; Tr. 56-57 (Giuliani), 566 (Ortiz).

15. The initial complaint was filed on November 9, 2020 in the Middle District of Pennsylvania. DCX 05; Tr. 59 (Giuliani); 566 (Ortiz). Mr. Giuliani was not admitted to practice in the Middle District and therefore did not sign the complaint. Tr. 57, 59, 489 (Giuliani); *see* DCX 07.

16. Mr. Hicks and his law firm withdrew their appearance after the complaint was filed. DCX 09 at 0003; Tr. 61-62 (Giuliani). On November 15, 2020, plaintiffs filed a First Amended Complaint, which eliminated all but two of the seven original counts. DCX 06; Tr. 61, 490 (Giuliani). Mr. Giuliani was not involved in drafting the First Amended Complaint and did not agree with its approach. Tr. 60-63 (Giuliani).

17. Mr. Giuliani was admitted to practice *pro hac vice* in the Middle District of Pennsylvania on November 17, 2020. DCX 07 at 002. That same day, he argued the plaintiffs' opposition to a motion to dismiss before Judge Matthew Brann of that court. DCX 08. Mr. Giuliani had prepared a Second Amended Complaint because he believed that the First Amended Complaint omitted allegations about election fraud that were central to the case. During the argument, he alerted Judge Brann that he intended to seek leave to file this complaint. DCX 08 at 0013; Tr. 71-72 (Giuliani). (Under Federal Rule of Civil Procedure 15(a), a plaintiff may amend a complaint once as a matter of course within 21 days of serving



it, but subsequent amendments require consent of the opposing party or leave of court.)

18. The day after the argument, plaintiffs sought leave to file the Second Amended Complaint, which was prepared and signed by Mr. Giuliani. DCX 09. The Second Amended Complaint reintroduced allegations from the original Complaint and added additional counts. *Id.*; Tr. 491 (Giuliani). The nine counts were all based either on Section 1983 or the Electors and Elections Clauses. DCX 09. The next day, November 19, 2020, plaintiffs sought a temporary restraining order or preliminary injunction barring defendants from certifying the result of the 2020 election. DCX 10-11; Tr. 569 (Ortiz).

19. On November 21, 2020, Judge Brann dismissed the First Amended Complaint for lack of standing and failure to state a claim upon which relief could be granted, and he denied the motion for leave to file the Second Amended Complaint. He also denied plaintiffs' request for temporary injunctive relief. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp.3d 899, 923 (M.D. Pa. 2020) (DCX 14 at 0017). He found that plaintiffs had presented the court presented "with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence." *Id.* at 906 (DCX 14 at 0008); DCX 40 at 0008.

20. Plaintiffs filed a Notice of Appeal on November 22, 2020, which Mr. Giuliani signed. DCX 15. The only issue plaintiffs appealed was whether Judge Brann had abused his discretion by denying leave to file the Second Amended Complaint. DCX 16 at 0005; Tr. 594 (Ortiz). The Third Circuit affirmed. *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 Fed. Appx. 377, 382 (3d Cir. 2020) (DCX 16 at 0005). The court held that the Second Amended Complaint “never alleges that any ballot was fraudulent or cast by an illegal voter. It never alleges that any defendant treated the Trump campaign or its votes worse than it treated the Biden campaign or its votes. Calling something discrimination does not make it so.” *Id.* at 391 (DCX 16 at 0012). The court held that the complaint did not meet the requirement of Federal Rule of Civil Procedure 8(a)(2) to contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” and thus the court did not discuss the complaint’s failure to meet the heightened standards for alleging fraud under Rule 9(b). Tr. 643-44 (Ortiz); DCX 16 at 0008; DCX 40 at 0008-09.

### **Legal Basis for the Complaints**

21. In summary, the complaints filed in the Middle District of Pennsylvania challenged: the use of two procedures during the 2020 election (Notice and Cure and the observational barriers); under two theories of relief (the Electors and Election Clauses and 42 U.S.C. § 1983); based on alleged violations of two constitutional

provisions (Fourteenth Amendment equal protection and substantive due process); on behalf of two sets of clients (the Trump campaign and two voters who were not offered Notice & Cure); and sought injunctive relief that ranged from preventing the certification of the results of the 2020 election to ordering the Pennsylvania General Assembly to choose new electors. *See* DCX 05, 06, 09.

22. Despite their multiplicity of claims, none of the complaints included a non-frivolous legal basis for relief or contained a good-faith argument for an extension, modification, or reversal of existing law.

23. Under the Electors and Election Clauses, Mr. Giuliani's argument was that the Constitution empowers only the state legislature to establish procedures for the conduct of elections and that the seven defendant county election boards went beyond the legislature's authorization by implementing Notice and Cure procedures and observational boundaries. DCX 05 at 0071-73 (initial Complaint Count III), 0077-79 (Count V), 0081-83 (Count VII); DCX 06 at 0059-61 (First Amended Complaint Count II); DCX 09 at 0093-95 (Second Amended Complaint Count III), 0118-22 (Count IX).

24. That claim was doomed under both longstanding principles and specific recent precedent on standing, including a Third Circuit decision issued shortly before Mr. Giuliani's oral argument, which affirmed that a political candidate lacked standing to bring an action under the Electors and Election Clauses. *Bognet v. Sec'y*

*Commonwealth of Pennsylvania*, 980 F.3d 336, 348-52 (3d Cir. 2020) (RX 36 at 12-14); DCX 08 at 0012-13; Tr. 637-39 (Ortiz). Mr. Giuliani stated at the argument that he was not proceeding on those claims but would preserve them for appeal. DCX 08 at 0012-13. On appeal, however, Mr. Giuliani raised only the “very narrow ground” of the denial of leave to amend and did not raise the Electors or Election Clauses issues. *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 Fed. Appx. at 381 (DCX 16 at 0005); Tr. 594, 637-39 (Ortiz).

25. The rest of Mr. Giuliani’s claims were brought under 42 U.S.C. § 1983. Section 1983 imposes liability on a person acting under color of state law to deprive persons of “any rights, privileges, or immunities secured by the Constitution and laws [of the United States]” 42 U.S.C. § 1983; Tr. 537-38 (Ortiz).

26. Mr. Giuliani therefore required a legal basis to claim that the Secretary of State and the seven election boards, acting under color of state law, implemented procedures that deprived the two plaintiff voters and the Trump campaign of rights under the Constitution or laws of the United States.

27. Mr. Giuliani did not plead any violation of federal statutory law (*see* DCX 05, 06, 09) and lacked a legal basis to claim a violation of the Constitution. The Constitution places the primary responsibility for the conduct of elections—including whether and how to permit mail-in voting (and procedures involved in canvassing mail-in votes)—with the states. Tr. 533-36 (Ortiz); U.S. Const. Art. I, §

4, Cl. 1. There is no constitutional requirement that governs mail-in voting procedures or that requires that states provide for poll watchers or vote canvassing observers, much less a constitutional right that such observers be within a certain distance of election workers. Tr. 535, 540-42 (Ortiz), 125 (Giuliani). Whether proper election procedures have been followed is likewise a matter of state law, to be resolved by state courts, and does not support a claim under Section 1983. Tr. 536-37, 543, 703 (“I’m unaware of any successful Due Process claim challenging the nuts and bolts of garden-variety election administration.”) (Ortiz); *see Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 394 (W.D. Pa. 2020) (DCX 18 at 0049).

28. Nor was there any legal basis for the complaints’ claims that the Notice and Cure procedures or the observation barriers violated the Equal Protection Clause or substantive due process under the 14th Amendment. The initial Complaint and the Second Amended Complaint (the “Giuliani complaints”) made both claims for both procedures. *See* DCX 05 at 0062-71, 0073-77, 0079-81; DCX 05 at 0056-59; DCX 09 at 0079-0093, 0096-109, 0105-118). The claim that the defendants violated the individual plaintiffs’ rights under the Equal Protection Clause by implementing Notice & Cure procedures is nonsensical. The individual plaintiffs mailed defective ballots in counties that did not adopt Notice and Cure, so their votes were not counted. DCX 05 at 0010 (¶¶ 19 & 20), 0076 (¶ 211); DCX 06 at 0006-07 (¶¶ 15 &

16), 0058-59 (¶ 158); DCX 09 at 0023-25 (¶¶ 22 & 23), 0096-103 (Count IV), 0105-109 (Count VI). But they did not sue the boards of elections in the counties that disqualified their ballots; they sued seven other county boards that did offer Notice and Cure to their voters. DCX 05 at 0001; DCX 06 at 0001; DCX 09 at 0001; DCX 14 at 0011-12; Tr. 176, 495-502, 510-12 (Giuliani). There is no logical way to claim that a county board violates the rights of voters in other counties by offering its own voters a way to cure defective mail-in ballots. The complaints did not clearly state whether they intended to assert an equal protection claim on behalf of the Trump campaign or articulate any basis for such a claim.

29. Mr. Giuliani also lacked a legal basis for the relief he requested for the equal protection claims: disqualifying all the mail-in ballots in the seven defendant counties where the plaintiffs did not attempt to vote, a remedy that would have disenfranchised at least 680,000 voters. Tr. 178-79 (Giuliani); *see* DCX 08 at 0134 (Giuliani citing “680,770” mail-in ballots in two of the seven defendant counties). There is no argument that disqualifying votes in counties where the plaintiffs did not attempt to vote would remedy any injury they may have suffered from the lack of Notice and Cure procedures in the counties where they did attempt to vote.

30. The complaints likewise lacked a nonfrivolous legal basis for their Section 1983 claims that the Notice and Cure procedures violated the Trump campaign’s right to substantive due process. Those claims were a variation on the

Electors and Election Clause claims; that is, that the procedures were not authorized by the state legislature. But the complaints did not allege that Notice and Cure violated any federally protected right of the Trump campaign. *See* DCX 05 at 0079-81 (Count VI); DCX 09 at 0105-09 (Count VI). Nor was there any basis to claim the Trump campaign was injured by Notice and Cure. Of the seven counties sued, four, including the three most populous, estimated that they offered notice and cure to only 6,500 voters. The Third Circuit concluded that even if the total number of such voters in the seven defendant counties were 10,000, and if all of those votes were for President Biden, and if they all were disqualified, it would not have affected the President Biden’s 80,000-vote margin of victory. *See* DCX 16 at 0011.

31. The Giuliani complaints lacked any legal basis to claim that the observational barriers established by the defendant election boards violated either equal protection or substantive due process because those claims were premised on the unsupported assumption that observational barriers led to fraudulent counting of the mail-in ballots to favor President Biden over former-President Trump. DCX 05 at 0064 (“Invalid or fraudulent votes ‘debase[]’ and ‘dilute’ the weight of each validly cast vote.”), 0070 (“Consequently, Defendants created a system whereby it was physically impossible for the candidates and the political parties to view the ballots and verify that illegally cast ballots were not open and counted.”); DCX 09 at 0080 (“Defendant County Election Boards carried out this scheme knowing that

the absentee and mail ballots which should have been disqualified would overwhelmingly favored Biden.”), 0088 (same), 113 (“Plaintiffs have been harmed by the dilution of their vote.”), 0118 (same); Tr. 306 (Giuliani) (“Fraud is part of a violation of Due Process or a violation of Equal Protection.”).

32. Each complaint sought injunctive relief, ranging from a prohibition on certifying the results of the 2020 general election (DCX 05 at 0084; DCX 06 at 0062; DCX 09 at 0020, 0122-23; Tr. 577-79 (Ortiz as to DX 09)) to ordering the Pennsylvania General Assembly to choose the electors (DCX 09 at 0020, 0023, 0123; Tr. 579-81 (Ortiz)). The complaints were accompanied by motions for emergency relief, including for temporary restraining orders or preliminary injunctions. DCX 10-13. Plaintiffs’ Motion for Leave to File the Second Amended Complaint provided, “Ultimately, Plaintiffs will seek the remedy of Trump being declared the winner of the legal votes cast in Pennsylvania . . . and, thus, the recipient of Pennsylvania’s electors.” DCX 09 at 0008-09; Tr. 576 (Ortiz).

### **Factual Allegations of the Initial and Second Amended Complaints**

33. Neither of the Giuliani complaints alleged facts to support a claim that the observational barriers led to actual election fraud. They pled facts to establish that such barriers existed, but not that election fraud resulted. DCX 05; DCX 09. (The First Amended Complaint did not charge any violation based on the observational barriers. *See* DCX 06 at 0056-61.)



34. The factual allegations that the Giuliani complaints did assert provided no factual basis for their legal claims. Aside from the paragraphs alleging the existence of observational barriers (and the existence or absence of Notice and Cure), the Giuliani complaints contained the following 26 factual allegations:

a. 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.

b. 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.

c. 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. DCX 05 at 0026; DCX 09 at 0041.

d. Fayette County discovered that two voters received already filled-in mail-in ballots and found two ballots opened at the election bureau without secrecy envelopes. DCX 05 at 0026; DCX 09 at 0042.

e. Luzerne County, which also was not a defendant, found nine military ballots in a trash bin, seven of which had been cast for former President Trump. DCX 05 at 0026-27; DCX 09 at 0042.

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

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

h. 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.

i. 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.

j. 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.

k. An unspecified number of voters received mail-in ballots they did not apply for, but the records showed no ballots had been sent. DCX 05 at 0048; DCX 09 at 0065.

l. 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.

m. In Montgomery County, a poll watcher saw a Judge of Elections pull unregistered voters aside and tell them to vote later under another name. DCX 05 at 0048-49; DCX 09 at 0065.

n. 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.

o. 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.

p. There were reports that in Allegheny County, poll workers could see which candidate provisional voters voted for. DCX 05 at 0049; DCX 09 at 0066.

q. 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 (Giuliani).

r. 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 Second Amended Complaint.)

s. 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).

t. 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 (Giuliani).

u. 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.

v. 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 (Giuliani).

w. In Delaware County, the number of reported mail-in ballots increased between November 4 and November 8. DCX 05 at 0058; DCX 09 at 0076.

x. 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.

y. 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.

z. 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.

### **The November 17, 2020 Oral Argument**

35. When Mr. Giuliani argued the motion to dismiss before Judge Brann, the operative complaint was the First Amended Complaint, which had eliminated the counts of the initial Complaint based on the observational barriers and did not allege fraud. Tr. 60, 71, 490 (Giuliani), 573 (Ortiz); *compare* DCX 05 *with* DCX 06. Mr. Giuliani, however, had already drafted the Second Amended Complaint,

which contained several counts based on the observational barriers and which did allege fraud. Tr. 71-72, 944 (Giuliani). Much of his argument focused on election fraud. DCX 08 at 0012-18; Tr. 71-73 (Giuliani), 582-83 (Ortiz).

36. Mr. Giuliani told Judge Brann, “[o]ne of the problems that we have in this case and why we had to amend is because as compared to last week, we have twice as much evidence this week.” DCX 08 at 0022.

37. Mr. Giuliani argued that all 682,770 mail-in ballots in Philadelphia and Allegheny counties were illegal and should not be counted because the election observers were not close enough to the canvassers to read the ballot envelopes. DCX 08 at 0023-26; Tr. 383-85, 388-89 (Giuliani).

38. Mr. Giuliani acknowledged that the observation barriers applied to the Democratic observer as well. DCX 08 at 0026-27; Tr. 194-95 (Giuliani).

39. Mr. Giuliani asserted that “they stole an election, at least in this Commonwealth” (DCX 08 at 0027) and that, “[w]e have hundreds of affidavits, Your Honor” (DCX 08 at 0028). The only evidence he offered to the court were some photographs showing that observers could not see the details of canvassing in Philadelphia and Allegheny Counties (DCX 08 at 0029-31).

40. Mr. Giuliani did not produce any evidence of fraudulent votes being cast or counted. Tr. 381-82 (Giuliani), 593 (Ortiz); DCX 40 at 0013-27; *see* DCX 08.

41. In his argument, Mr. Giuliani relied on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (RX 19), the facts of which he agreed were “a far cry from the ones here.” Tr. 399 (Giuliani). He also relied on *Bush v. Gore*, 531 U.S. 98 (2000) (RX 37), which he agreed the Supreme Court had limited to circumstances of the 2000 election (Tr. 400-401 (Giuliani)), and which no court has ever applied to overturn a state-wide election (Tr. 401 (Giuliani)). *See also* Tr. 544-51, 717-19 (Ortiz).

### **No Factual Basis for Mr. Giuliani’s Claim of Election Fraud**

42. The record of this disciplinary proceeding contains all of the available written evidence gathered by Mr. Giuliani and his co-counsel to support his claim of election fraud. It includes: (a) all documents in the possession of Mr. Hick’s firm, Porter Wright Morris & Arthur (DCX 23 & 24); (b) all documents in the possession of Linda Kerns, who signed the initial complaint along with Mr. Hicks (DCX 05 at 0084-85) as well as the First Amended Complaint (DCX 6 at 0063) (DCX 25 & 26); (c) all documents in the possession of Scaringi & Scaringi, one of whose members signed the Second Amended Complaint (DCX 09 at 0124) (DCX 27 & 28); (d) all documents in the possession of Mr. Giuliani (DCX 32, 35, 36, 37; Tr. 506-10 (Giuliani)); and (e) the transcript of a legislative “hearing” that Mr. Giuliani participated in on November 25, 2020 (DCX 29), which he claimed “demonstrated a pattern in Pennsylvania of so many gross irregularities that it not only raises the

specter of fraud, but presents a very solid evidentiary base, direct and circumstantial, supporting responsible allegations of voter fraud.” (DCX 32 at 0002).

43. Mr. Giuliani introduced another set of declarations and affidavits in support of his claims, RX 01, and some related emails and text messages, RX 02. Tr. 85-86 (Giuliani). Mr. Giuliani’s testimony raised the possibility that some statements may have been lost or not turned over, but the only “missing” document he could think of initially was actually included, albeit without an unknown number of affidavits he “thought” were attached to that document. Tr. 90-94, 210-14 (Giuliani); DCX 32 at 0072-75. He subsequently testified that there might be other missing statements, but if they concerned “an illegal voter, it’s one or two.” Tr. 298-99 (Giuliani).

44. Mr. Giuliani offered the testimony of two witnesses who compiled reports purporting to show that he believed he had a basis for his claims of election fraud. Tr. 751-87 (Droz) (RX 11); Tr. 810-57 (Kerik); RX 40-43. The documents from Mr. Kerik were not included in Mr. Giuliani’s responses to Disciplinary Counsel’s request for evidence in his possession on which he based his claims. DCX 32, 35, 36, 37; Tr. 97-98 (Giuliani). Nor were the Kerik documents included in the production from the three law firms. DCX 24, 26, 28. None of these materials was cited in the oral argument before Judge Brann (DCX 08), and neither witness “testified” at the November 25, 2020 legislative “hearing” (DCX 29).



### **III. CONCLUSIONS OF LAW**

Pennsylvania's Rules of Professional Conduct apply because Mr. Giuliani's conduct occurred in connection with a matter pending in Pennsylvania. D.C. Rule of Professional Conduct 8.5(b)(1). The Middle District of Pennsylvania follows the Pennsylvania Rules. L.R. 83.23.2 (adopting Pennsylvania Rules of Professional Conduct). Pennsylvania Rule 3.1 states: "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." By its text, the rule requires a lawyer to have both (1) a nonfrivolous basis in law and (2) a basis in fact for bringing a proceeding or for arguing an issue in such a proceeding. Pennsylvania's Rule 8.4(d) forbids a lawyer from "engag[ing] in conduct that is prejudicial to the administration of justice."

Mr. Giuliani violated Rule 3.1 by bringing a proceeding attempting to overturn the result of the 2020 presidential election in Pennsylvania without a nonfrivolous legal or factual basis for doing so. That conduct seriously interfered with the administration of justice in violation of Rule 8.4(d), not just because Mr. Giuliani wasted judicial resources and clogged the court with a frivolous lawsuit, but also because he attempted to use the courts to disenfranchise more than half a million voters and subvert the democratic principles that underly our form of government

and make the administration of justice possible.

**A. Mr. Giuliani Had No Factual Basis for the Claims He Asserted.**

The most glaring defect of Mr. Giuliani’s complaints and the arguments he advanced in the Pennsylvania litigation was the complete absence of a factual basis to support them. Both Judge Brann and the Third Circuit remarked on the absence of a factual basis. Judge Brann stated that Mr. Giuliani had offered “speculative accusations . . . unsupported by evidence.” *See* PFF 19. And the Third Circuit observed that Mr. Giuliani “never alleges that any ballot was fraudulent or cast by an illegal voter.” PFF 20.

Because the Constitution delegates the manner of conducting elections to the states, challenges to election procedures are generally matters of state law, appropriately decided by state courts. Mr. Giuliani, however, attempted to make a federal issue out of what were state court claims. On the day after the election, at the behest of former President Trump, and before he had gathered any facts, Mr. Giuliani determined to bring federal cases in approximately ten states with the object of somehow combining them with the ultimate goal of reaching the Supreme Court. He embarked on this course, potentially undermining the trust of millions of citizens in the legitimacy of a Presidential election, before he knew whether he had a factual basis for doing so; his strategy was file first and then hunt for supporting facts. PFF 11. Specifically with respect to Pennsylvania, Mr. Giuliani has admitted that he did

not raise his claims in state court because he did not believe he would prevail. PFF 13.

Mr. Giuliani's complaints were premised on two causes of action: the Electors and Election Clauses of the U.S. Constitution and 42 U.S.C. § 1983. The Electors and Election Clauses claims were foreclosed by well established precedent on standing. Even before the initial Complaint was filed, a federal court ruled directly that the campaign did not have standing to raise such claims. PFF 8. When that decision was affirmed, Mr. Giuliani abandoned the claims and did not raise them on appeal. PFF 23-24.

The remaining claims were brought under Section 1983. PFF 24. To support those claims, Mr. Giuliani had to aver that the state procedures he challenged—Notice and Cure and the observational barriers—violated some constitutionally protected right of the plaintiffs. PFF 26, 28. And because he sought injunctive relief applicable to the election in general (rather than individual relief such as damages for the plaintiffs), Mr. Giuliani had to show that the challenged procedures had a systematic effect; that is, that they diluted the votes of the Pennsylvania voters and thereby deprived them of equal protection or substantive due process. And the only way Mr. Giuliani could assert vote dilution was by proving that the procedures led to fraud—either voting by persons ineligible to vote or miscounting the vote. But Mr. Giuliani alleged only scattered, imprecise allegations of isolated election

irregularities; he did not have or allege any evidence of actual fraud, much less fraud that would offset a Biden margin of victory that exceeded 80,000 votes.

Indeed, no factual basis could have supported the claims based on the Notice and Cure procedures. Those procedures affected at most 10,000 votes in the defendant counties, not all of which were cast for President Biden. But even if all of the votes were for President Biden, they could not have sufficiently diluted the vote to affect the 80,000-vote margin by which the election was decided and thereby justify the remedies that Mr. Giuliani sought. PFF 28-30. Nor was any factual basis possible to support a claim that Notice and Cure resulted in election fraud. That procedure allowed eligible voters to cure defects in their mail-in ballots so they could be counted. There is no way to argue that permitting legitimate voters to have their votes counted was fraud.

Mr. Giuliani's claims therefore turned on the existence of evidence that the observational barriers resulted in fraudulent voting or the fraudulent counting of the vote. He argued that the observational barriers deprived voters of an accurate count of only eligible voters, which arbitrarily impaired the legitimate voters' right to vote in violation of substantive due process and possibly equal protection. But Mr. Giuliani did not allege in his complaints or otherwise have any factual basis to claim that the observational barriers resulted in fraud. PFF 32, 34, 36.

The factual allegations Mr. Giuliani included in the complaint asserted facts

about the existence of the barriers, but none that would support a conclusion that they caused election fraud. At most, they show that it was possible to commit fraud without being seen by election observers, not that fraud occurred. The other facts Mr. Giuliani alleged about the 2020 Pennsylvania general election had nothing to do with the barriers. They are set out in PFF 34. There are 26 of them—sub-paragraphs a through z. Mr. Giuliani claimed that some of the allegations were allegations of fraud that he pled in the Second Amended Complaint. Tr. 929-42, 956-71 (Giuliani). Many are repetitive—different ways of saying the same thing or specific examples of more general statements, *e.g.*, b, f, g, h, i, j, k, o, u. Some concerned acts in counties that were not parties to the litigation, *i.e.*, c, d, e, v. Some allege failures to follow proper procedures, but with no allegations that these failures resulted in fraud, *e.g.*, a, n, p, u, x, y. Some have nothing to do with mail-in ballots, *e.g.*, m, p, q, s, y. Some are just incomprehensible, *i.e.*, s, w, z. PFF 34.

Only two allege activity that was adverse to the Republican candidate— *i.e.*, l and s—and neither makes much sense. With regard to the first, it is entirely unclear how an election official would know that more Republican voters (presumably than Democratic voters) received unrequested mail-in ballots, and why that matters if it is true. Second, it is entirely unclear how many voters in Chester County voted for more than one presidential candidate (although presumably not many), and how many of those were allegedly altered by one election worker in some way to

disadvantage former-President Trump. Perhaps most importantly, there is no suggestion or basis to believe that the purportedly suspicious incidents would have been prevented if observational barriers were not in place.

The documentary evidence produced at the Hearing shows that Mr. Giuliani did not have any factual basis for his claims which he did not mention in the complaints. It is impossible because of word and space limitations to discuss every such piece of documentary “evidence” in the record, but on their face, the documents do not support Mr. Giuliani’s fraud claims. They are largely of the same ilk as the incidents cited in the complaints—unsupported stories of purported irregularities unconnected to observational barriers. At the hearing, Mr. Giuliani testified about the statements and declarations he attached to his March 10, 2021 letter in which he attempted to persuade Disciplinary Counsel that there was no basis to bring charges against him. DCX 32; Tr. 197-224 (Giuliani). One would expect that he would put forth his best evidence in that context, although he testified it was just a “representative sample.” Tr. 198-99 (Giuliani). One of the attachments did contain some allegations about an elaborate scheme of election fraud based on an unnamed “whistleblower,” but this was so unreliable that it was not made part of the case Mr. Giuliani eventually brought. DCX 32 at 0073-75; Tr. 210-14 (Giuliani). These examples suffered from the same defects as the ones cited in the pleadings: they did not demonstrate actual fraud.

Even after the evidence concluded in the disciplinary proceeding, Mr. Giuliani was unable to offer any basis for his claim of election fraud when he received permission to re-take the stand to testify about his pre-filing investigation. Tr. 1158-60; 1163-1202 (Giuliani). Disciplinary Counsel has put into the record all the materials that Mr. Giuliani purportedly had to support his claim of election fraud. PPF 41-43. None of them shows Mr. Giuliani's claim of widespread fraud or provides a factual basis for the Pennsylvania litigation. The only possible conclusion is that Mr. Giuliani brought suit without factual basis for his claims.

Although Mr. Giuliani testified that his role was to plead allegations and not evidence, (*e.g.*, Tr. 956-57 (Giuliani)), Rule 3.1 required him to have a non-frivolous factual basis to bring the proceeding and contest the issues. And when alleging fraud, Fed R. Civ. P. 9(b) required him "to state with particularity the circumstances constituting fraud." If a lawyer has no evidence of fraud, then he is not entitled to allege it. Mr. Giuliani took a contrary approach, testifying that "[y]ou have to plead fraud with specificity within reason, within what you have, what's available." Tr. 171 (Giuliani). That approach violates both the requirement to plead fraud with specificity, and Rule 3.1's prohibition against bringing a case without a basis in fact.

#### **B. Mr. Giuliani Had No Legal Basis for the Claims He Asserted.**

Rule 3.1 requires a lawyer to have both a factual basis for his claims and also a legal basis, which may include "a good faith argument for an extension,

modification, or reversal of existing law.” Rule 3.1.

Here, the standing issues presented an impenetrable barrier to the claims based on the Electors and Election Clauses. Those claims were essentially a dispute about whether the Pennsylvania entities who carried out the legislature’s mandate as expressed in Act 77 exceeded their authority. PFF 23. That is a separation of powers issue that private citizens have no standing to raise because it raises only an “undifferentiated, generalized grievance about the conduct of government.” *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (holding that voters did not have Article III standing to challenge state supreme court’s decision to redraw legislative districts as a violation of Elections Clause because “[t]he only injury plaintiffs allege is that the law . . . has not been followed”). The United States Supreme Court has “consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (collecting cases).

Moreover, the federal court in the Western District of Pennsylvania had already ruled that the campaign lacked standing to bring an action under the Electors and Election Clauses before the initial Complaint was filed in the Middle District.



PFF 8. After the Third Circuit affirmed in *Bognet*, Mr. Giuliani did not pursue these claims in his case. Although he represented to Judge Brann that he was preserving the issue for appeal—a gesture to a claim that he had a good-faith basis for seeking reversal of existing law—he in fact did not do so, implicitly acknowledging that this was a frivolous argument. PFF 24.

Once the Electors and Election Clauses counts are eliminated, the remaining counts are all Section 1983 claims. Section 1983 is intended to provide persons who have been denied their Constitutional or other federally-protected rights a cause of action to redress their injuries. Here, the right in question was the right to vote.

The Section 1983 claim based on Notice and Cure was, as Mr. Giuliani acknowledged at the hearing, primarily an equal protection claim. Tr. 175 (Giuliani). The two plaintiffs were not given the same opportunity for Notice and Cure as the voters in the seven defendant counties. To the extent there could be any claim based on those facts, it was against the counties who did not permit the plaintiffs to cure their defective ballots. Mr. Giuliani, however, sued the election boards in seven counties where the plaintiffs did not live, did not attempt to vote, and which were not involved in the plaintiffs' home counties' decision not to implement Notice and Cure.

Mr. Giuliani likewise lacked any legal basis to claim that the disqualification of more than 680,000 votes in those counties would remedy the claimed violation.

For obvious reasons, the denial of the two citizens' right to vote would not be remedied by disenfranchising 680,000 other voters. PFF 29. Yet Mr. Giuliani attempted to use Section 1983—a civil rights statute—to deprive those citizens of their civil rights.

Section 1983 was designed to “enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto” while providing “a remedy, to be broadly construed, against all forms of official violation of federally protected rights.” *Dennis v. Higgins*, 498 U.S. 439, 444-45 (1991) (cleaned up) (holding that suits for violations of the Commerce Clause could be brought under Section 1983 and citing legislative history showing that the statute should be “beneficently construed”). The purpose for which Mr. Giuliani sought to employ Section 1983 would have turned the statute's purpose entirely on its head because it would have abrogated a right rather than protect and enforce it.

Nor does the use of observational barriers for purposes of social distancing, to protect the health of election workers and observers during a pandemic, impair anyone's civil rights. Before Judge Brann, Mr. Giuliani admitted that these barriers applied to Democratic observers as well as Republican observers. DCX 08 at 0026. Federal law generally does not require states to have observers present during the canvassing of mail-in or absentee ballots. PFF 27. Thus, even if Pennsylvania law had not permitted *any* observers—representatives of the candidates and political

parties—to be present during vote canvassing, but had relied instead on the integrity of the election volunteers, no federally-protected right would have been violated. Pennsylvania did allow the presence of observers, but the balance between the opportunity for observers to be present and the preservation of safety was an issue of state law. This issue was appropriately resolved by the state courts, balancing the role of the observers, which did not include the right to compare the signatures on the ballot envelopes with registration forms or the right to challenge a ballot (PFF 7), with serious public health concerns. Accordingly, there was no legal basis to claim that the presence of observation barriers violated any rights of the individual plaintiffs or the Trump campaign.

Nor does the authority Mr. Giuliani relied on before Judge Brann provide a legal basis for his claims in the Pennsylvania lawsuit. *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (RX 19), concerned an election for the Pennsylvania state senate that was decided by 420 out of about 40,000 votes that were cast. *Marks v. Stinson*, 1994 WL 146113, at \*24 (E.D. Pa. Apr. 26, 1994) (RX 18 at 18). The federal case was proceeded by state proceedings establishing an elaborate conspiracy to misuse absentee ballots, which at that time were available only for certain limited purposes. The conspiracy included paying campaign workers to solicit voters to illegally obtain absentee ballots, which the election officials delivered directly to the campaign, not the voters. 19 F.3d at 877-81 (RX 19 at 4-7). Three statistical experts

agreed that but for the use of illegal absentee ballots, the losing candidate (Stinson) would have won. RX 18. Mr. Giuliani’s lawsuit is not remotely comparable. As the Third Circuit concluded, the “facts [in *Marks v. Stinson*] were a far cry from the ones here.” *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 Fed. Appx. at 388 (DCX 16 at 0010).

The second case Mr. Giuliani cited was *Bush v. Gore*, 531 U.S. 98 (2000) (RX 37), which arose from a recount, supervised by the Florida Supreme Court, of the 2000 presidential election results in Florida. There, the U.S. Supreme Court found a violation of equal protection because the Florida court offered no standards as to how the ballots were to be evaluated, resulting in arbitrary treatment of voters. In reaching this result, the Court stated that local entities may develop different systems for implementing elections without violating the Constitution, but that when a single entity (the Florida Supreme Court) ordered a state-wide recount, there must be some assurance that “the rudimentary requirements of equal treatment and fundamental fairness are satisfied.” *Id.* at 109. The Supreme Court also stated that its ruling was limited to the present circumstances, not for the problem of equal protection in election processes generally. *Id.* Again, Mr. Giuliani’s claims about Notice and Cure and the observational barriers do not remotely resemble the circumstances of *Bush v. Gore*, and the case did not provide a legal basis to bring those claims in Pennsylvania.

### **C. Mr. Giuliani Violated Pennsylvania Rules 3.1 and 8.4(d).**

Rule 3.1 provides that “[a] lawyer shall not bring . . . a proceeding, or assert . . . 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.” When a lawyer has a good-faith basis to argue for an extension, modification, or reversal of existing law, one would expect the lawyer to acknowledge the conflicting precedent and announce his intention to have it reversed or modified. This did not occur. The rule requires a lawyer to have a basis in law *and* fact. Having a basis in law *or* a basis in fact alone is insufficient.

A claim is frivolous when it lacks a basis in law and fact, *Adams v. Dep’t of Pub. Welfare*, 781 A.2d 217, 220 (Pa. Commw. Ct. 2001), and bringing such a claim violates Rule 3.1. *See, e.g., Off. of Disciplinary Couns. v. Gannon*, 123 DB 2017 (D. Bd. Rpt. 9/21/2018) (Pa. S.Ct. Order 12/21/2018) (violations of Rule 3.1 for filing lawsuit in one case after expiration of statute of limitations, and in another case filing lawsuit with allegations that had no basis in fact and with claims that were procedurally barred). An objective test is employed to determine whether a claim is frivolous. Pa. R. Prof. Conduct 3.1 (Explanatory Comment). The District of Columbia similarly employs an objective test to determine a violation of D.C. Rule 3.1, and that test considers various factors such as the clarity of the law, the plausibility of the positions taken, and the complexity of the issues under

consideration. *In re Spikes*, 881 A.2d 1118, 1125 (D.C. 2005).

Here, Mr. Giuliani had no legal or factual basis for the positions he took in the *Boockvar* litigation before the Middle District of Pennsylvania. The law was objectively clear that no plaintiff had standing to pursue claims under the Electors and Election Clauses, and the claims based on Notice and Cure and the observational barriers objectively did not present a civil rights violation (and, in the case of Notice and Cure, were clearly brought against the wrong defendant counties). Despite thousands of pages of documentary “evidence” collected by Mr. Giuliani and the Trump Campaign, there was zero factual support for the claim of voter fraud sufficient to alter the outcome of the general election in Pennsylvania. At best, Mr. Giuliani had evidence of minor election irregularities that are not uncommon, and which various state procedures are designed to address. Election irregularities, without more, simply do not indicate election fraud. Although Mr. Giuliani has argued that all the “evidence” is circumstantial proof of fraud (Tr. 67, 74 (Giuliani)), such an inference is not reasonable because it is based purely on speculation or conjecture. *See Rabadi v. Great Wolf Lodge of the Poconos LLC*, No. 3:15-cv-00101, 2016 WL 4238638, at \*8-10 (M.D. Pa. Aug 9, 2016). Under these circumstances, there was no objective hope for success on the claims Mr. Giuliani brought or for the breathtaking remedies he sought.

There should be no concerns that a disciplinary case like this one undermines

creative and zealous advocacy. A lawyer's obligation to represent a client zealously and diligently does not override his obligation to have a good faith basis in law and fact before he brings a case. Comment [1] to Pennsylvania Rule 1.3 makes clear that, when representing his client, a lawyer may only pursue "lawful and ethical measures." A lawyer with "excessive and misplaced zeal" risks running afoul of his ethical obligations, such as when overzealous advocacy leads the lawyer to litigate a meritless case without any legal and factual basis. *Off. of Disciplinary Couns. v. Malloy*, 178 DB 2014 (D. Bd. Rpt. 4/26/2016) (Pa. S.Ct. Order 6/30/2016). That is exactly what happened here.

Rule 8.4(d) prohibits a lawyer from engaging in conduct that seriously interferes with the administration of justice. Clogging the courts with unnecessary and frivolous cases is such a violation. *See, e.g., Off. of Disciplinary Couns. v. Altman*, 228 A.3d 508 (Pa. 2020) (violations of Rule 8.4(d) for filing meritless request for attorney's fees and motion for protective order). Our Court has characterized frivolous cases as imposing an "unnecessary burden" on the judicial system, which includes wasting the time and resources of the court, delaying the hearing of cases with merit, and causing unwarranted expense to other litigants. *Spikes*, 881 A.2d at 1127 (violation of D.C. Rule 8.4(d) for filing meritless defamation action based on privileged communication to Disciplinary Counsel). Mr. Giuliani brought and argued a case that was patently meritless in terms of its factual

and legal bases. It caused an incredible waste of judicial resources in a compressed time frame involving thousands of pages of briefing among numerous lawyers representing different defendants.

#### **IV. RECOMMENDED SANCTION**

Disciplinary Counsel recommends that Mr. Giuliani be disbarred. Although he violated the Pennsylvania Rules, District of Columbia law applies when determining the appropriate sanction. *See In re Tun*, No. 22-BG-054, 2022 WL 17839869, at \*4 (D.C. Dec. 22, 2022). The case law sets forth a number of standard factors to be considered in determining an appropriate sanction, including (1) the nature and seriousness of the misconduct; (2) the prejudice to the client; (3) whether the conduct involved dishonesty or misrepresentation; (4) whether multiple rules were violated; (5) the lawyer's disciplinary history; (6) whether the lawyer has acknowledged his misconduct; and (7) circumstances in aggravation or mitigation. *See, e.g., In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013). The Court also considers "the moral fitness of the attorney and the need to protect the public, the courts, and the legal profession." *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (cleaned up). Finally, the sanction should be consistent with that imposed upon comparable misconduct, D.C. Bar R. XI, § 9(h)(1), while recognizing that "each case must be decided on its particular facts." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc) (cleaned up). The primary purposes of a sanction include deterring



other lawyers from engaging in similar conduct. *Id.*; see also *In re Cater*, 887 A.2d 1, 17 (D.C. 2005).

It would be wrong, however, to apply this formulation mechanically to misconduct intended to undermine the basic premise of a democratic form of government: the winner of the majority of the votes is elected to office. Since John Adams set the precedent in 1800, no presidential candidate—not Nixon in 1960 nor Gore in 2000—has refused to accept defeat. No lawyer until 2020 has tried to use the courts to undermine the principle that the voters elect the president. No lawyer has tried to use the civil rights statutes to deprive hundreds of thousands of voters of their votes. *Bush v. Gore* was hotly contested, but it was contested appropriately in a state recount proceeding of a state-wide election decided by 537 votes. There was a genuine basis in fact and law for the case; it was not based in spurious claims of fraud. And when the Supreme Court stopped the recount, the lawyers shook hands, and Vice President Gore conceded.

Beginning on November 4, 2020, Mr. Giuliani sought and continues to seek to undermine the integrity of the presidential election. He began this process before he had any evidence to support his position, and he continued it even after his *post hoc* efforts to find evidence failed utterly. This has done tremendous damage. Eight prominent conservatives, who spent “most of our adult lives working to support the Constitution and conservative principles upon which it is based” have written,

“Repetition of these false charges causes real harm to the basic foundations of the country, with 30 percent of the population lacking faith in the results of our elections.” Danforth, Ginsberg, Griffiths, Hoppe, Luttig, McConnell, Olson, & Smith, *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*, at 1, 3 (July 2022), <https://lostnotstolen.org/wp-content/uploads/2022/07/Lost-Not-Stolen-The-Conservative-Case-that-Trump-Lost-and-Biden-Won-the-2020-Presidential-Election-July-2022.pdf>. “To have 30 percent of the country lack faith in election results based on unsubstantiated claims of a ‘stolen’ election is not sustainable in a democracy.” *Id.* at 6.

Mr. Giuliani’s determination to file lawsuits with no basis for doing so was part of what the January 6th Committee has labeled, “The Big Lie,” the first in a series of steps to deny the election results and to use every available weapon to perpetuate a losing incumbent in power. *See* Final Report of the Select Comm. to Investigate the January 6th Attack on the United States Capitol, 117th Cong. H.R. Rep. 117-663, at 208-10 (Dec. 22, 2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>. Mr. Giuliani testified that he embarked on a strategy to file lawsuits in multiple states, including Pennsylvania, on November 4, 2020, the day after the election. The press did not even declare that President Biden had won Pennsylvania, and thereby the majority of the electoral vote, until November 7. *Id.* at 206. Even by that date, Mr. Giuliani had no evidence

of election fraud; he had just started the process of trying to find some. Yet he had already begun drafting complaints.

The Court—indeed, the country—cannot tolerate a lawyer misusing his law license in this way. All of us practice law within the structure of a democratic form of government constrained by the Constitution. This structure has stood for more than 230 years, longer than any other democracy, but it is still an experiment in a form of government rarely seen in history. It will not survive if people lose faith in election results. As a member of the D.C. Bar, Mr. Giuliani swore an oath that he would “support the Constitution of the United States of America.” As a Department of Justice officer and an elected official, he undoubtedly took variations of that oath. He betrayed those oaths and, in doing so, his country. Lawyers who betray their country must be disbarred. *See generally In re Squillacote*, 790 A.2d 514, 521 (D.C. 2002) (Board report appended) (lawyer disbarred following convictions for espionage, misconduct which harms “the security of our republic” and where the victim “is not one person but the entire nation”).

This Hearing Committee is not a court, and unlike a court, it does not impose a final judgment or a sentence or even a sanction on a lawyer. Its job is merely to recommend a sanction, and because it merely recommends, it should be free to suggest an appropriate sanction for this extraordinary case without being overly constrained by the normal considerations. That recommendation can and should

diverge from the sanction imposed in a garden variety Rule 3.1 case. In stark contrast to the lawyer who filed a frivolous lawsuit over a lost pair of pants, *In re Pearson*, 228 A.3d 417 (D.C. 2020), Mr. Giuliani sought to undermine the results of a democratic election for president of the United States. The misconduct here is simply not comparable to that in *Pearson*. If it is really necessary in this context to apply the normal factors, emphasis should be given to the nature and seriousness of this misconduct, which is unparalleled; the prejudice not to his client, but to his country; and to Mr. Giuliani's utter lack of recognition of the wrongful nature of what he has done—as his testimony overwhelmingly established. Moreover, while he has not engaged in dishonesty in the normal sense, violating an oath is certainly a form of dishonesty.

His conduct following the September 11 attacks, while estimable, does not excuse the most serious sanction under these circumstances. Despite his 9/11 heroics and with a resume few could match—U.S. Attorney, Associate Attorney General, Mayor of New York City—Mr. Giuliani could offer but one character witness, his own lawyer. Yet his counsel had announced an intention to offer character testimony (Tr. 27-28 (Leventhal)), and Disciplinary Counsel stated that there was no objection to submitting character references in writing (Tr. 1133 (Fox)), making it easier for the witnesses to come forward. *See* Tr. 1198-99 (Giuliani) (“Even character witnesses have been unwilling to testify because of repercussions

from their law firms.”)

The Hearing Committee should recommend that the Court of Appeals disbar Mr. Giuliani because the integrity of the legal profession demands it. The Court must send a message that lawyers who misuse their law licenses to undermine our constitutional form of government cannot continue to practice law. One hopes that no other lawyer will ever engage in comparable misconduct. Alas, as divided as the country is and as distrustful as many of us are in the basic institutions of our democracy—a distrust that Mr. Giuliani fostered and continues to foster—that may be a forlorn hope. But at the very least, the bar needs to know clearly that the consequences of such a betrayal of one’s oath to support the Constitution is the loss of the privilege to practice law.

### **CONCLUSION**

For the reasons set forth above, Disciplinary Counsel requests the Hearing Committee find Mr. Giuliani violated Rules 3.1 and 8.4(d) of the Pennsylvania Rules of Professional Conduct, and recommend that he be disbarred.

Respectfully submitted,

*s/ Hamilton P. Fox, III*

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### **CERTIFICATE OF COMPLIANCE**

This document complies with the length and format requirements of Board Rule 19.8(c) because it contains 10,960 words, double-spaced, with one-inch margins, on 8 1/2 by 11-inch paper. I am relying on the word-count function in Microsoft Word in making this representation.

*s/ Hamilton P. Fox, III*  
Hamilton P. Fox, III  
Disciplinary Counsel

### **CERTIFICATE OF SERVICE**

I hereby certify that on 30th day of January, 2023, I caused a copy of the foregoing to be filed electronically with the Board on Professional Responsibility by email to [CaseManager@dcbpr.org](mailto:CaseManager@dcbpr.org), and to be served on Respondent's counsel by email to John M. Leventhal, Esq., at [judgeleventhal@aidalaw.com](mailto:judgeleventhal@aidalaw.com), and to Barry Kamins, Esq., at [judgekamins@aidalaw.com](mailto:judgekamins@aidalaw.com).

*s/ Hamilton P. Fox, III*  
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