Legal Arguments on Behalf of Respondent Rudolph W. Giuliani at DC Disciplinary Hearing by John Leventhal, Esq. and Barry Kamins, Esq.

"[T]he mere fact that a legal position is 'creative' or contrary to existing law does not make that position frivolous. Existing law often has ambiguities and, even if it is clear, there is always the potential for change." Ronald D. Rotunda, John S. Dzienkowski, LAW. DESKBK. PROF. RESP. § 3.1-1 (2021-2022 ed.)

"[T]he problem of equal protection in election processes generally presents many complexities." Bush v. Gore, 531 U.S. 98, 109 (2000)

As stipulated by the parties on the record during the December 7, 2022 proceedings in this matter, counsel for respondent respectfully submits this legal addendum to respondent's summation, which is intended to be incorporated therein. Respondents reserves in full its right to submit written proposed findings of facts and conclusions of law in these proceedings.

STANDING

Mr. Giuliani testified during the hearing that 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 Mr. Giuliani could have been aware prior to the action.

To find that Mr. Giuliani'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 would suffice).

I. Competitive Standing

In the Second Amended Complaint, the Trump Campaign asserted "'competitive standing' based upon disparate state action leading to the 'potential loss of an election.'" See DCX 13-0019 (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)); DCX 9-0023. 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*, 502 F.Supp.3d 899, 915 (M.D. Pa. 2020) DCX 14-0013 (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. *Id.* Disciplinary counsel relied on Judge Brann's rejection of this theory and Professor Ortiz's opinion to argue that the Second Amended Complaint 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.

iii. 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; DCX 14-0013 (emphasis in original; internal quotation marks omitted) (quoting *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013)). DCX 14-0013; fn at DCX 14-0021.

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 DCX 14-0013. 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: the Ninth Circuit.

ii. 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. ECF 170, at 11 (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 in 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.[1]

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). (DCX 14-0021) 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 in 2022 on precisely the issue for which Judge Brann cited it. *Mecinas v. Hobbs*, 30 F.4th 890 (9th Cir. 2022)—something overlooked by professor Ortiz. *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 the narrow interpretation of *Townley* that Judge Brann subscribed to. *Mecinas* is worth quoting at length:

> Competitive standing recognizes the injury that results from being forced to participate in an "illegally structure[d] competitive

[1] *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 3:26 pm. Pacific Standard Time, after President Obama was officially sworn in as President." 664 F.3d at 783.

> 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").
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> […] 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 Mr. Giuliani 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.

iii. 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) (R Ex 19-1 to 19-16) to argue that the principles discussed above were consistent with the law of the Third Circuit. DCX 13-0019.

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." 19 F.3d at 875. 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 (which concerned other legal issues), 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." DCX 13-0019 ("[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." *DJT*, 502 F.Supp.3d at 916. But Judge Brann overlooked that the district court in *Marks* ***did*** expressly find "candidate" standing. *Marks v. Stinson*, No. CIV A. 93-6157, 1994 WL 47710, at *11 (E.D. Pa. Feb. 18, 1994) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).[2] 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.

Moreover, Judge Brann 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 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. *See DJT*, 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 Mr. 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*. ECF 170 at 11. 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.'"

[2] 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.

II. Voter-Dilution 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 *DJT*, Plaintiffs alleged unlawful voter dilution in the Amended Complaint. (DC Ex 6-0039 and DC Ex 6-0041). 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 First Amended Complaint, Docket 126 # (ECF) 126, at 2-3 (not an Exhibit). Plaintiffs also attempted to distinguish *Bognet v. Secretary Commonwealth of Pa.*, 980 F.3d 336 (3d Cir. 2020). (DCX 36-1 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 Second Amended Complaint, which likewise incorporated a voter-dilution theory. (DCX 09-0013,17, 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)]." *DJT*, 502 F.Supp.3d at 910 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. (DCX 13-0017) ("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, Mr. Giuliani 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 Mr. Giuliani moved for leave to file the Second Amended Complaint. ECF 172 (Nov. 18, 2020); Pet. for Writ of Certiorari in *Bognet v. Boockvar*, No. 20-740 (Nov. 20, 2020); Sup. Ct. R. 13(1) (allowing 90 days after entry of judgment to petition for certiorari from the Supreme Court). 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). (R Ex 35-1). Disciplinary counsel's own expert conceded on cross-examination that it might not be frivolous for Mr. Giuliani to challenge Bognet if appeals in that case had not yet been exhausted.

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.

EQUAL PROTECTION

The Second Amended Complaint contained reasonable denial 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.[3] 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. Attorneys for President Trump provided caselaw that supported these arguments.

In *Pierce v. Allegheny County Board of Elections*, 324 F. Supp 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.[4] Judge Brann did not distinguish or even acknowledge *Pierce* in his decision.

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

[3] 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. There was unequal treatment of observers *between* the counties, and Mr. Giuliani had a nonfrivolous basis in fact to assert that the political leanings of these counties corresponded heavily with the Democratic and Republican parties.

[4] 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.

And in *Bush v. Gore*, 531 US 98 (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, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)).

Notwithstanding language in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) clearly indicating that whether to provide notice-and-cure procedures is a task addressed to the legislature, *id.* at 373, 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 were 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, respondents' 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*:

> 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.

531 U.S. at 109 (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. Mr. Giuliani had a reasonable basis for asserting this claim.

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, sufficiently stated 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." *Id.* at 900.

It was certainly reasonable for Mr. Giuliani to extend the reasoning of that case to the situation present here. **Disciplinary counsel cited no controlling cases to the contrary** of which Mr. Giuliani 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 2,600,000 mail-in ballots that were counted in Pennsylvania, while Republicans were not allowed to meaningfully observe the process. In Pennsylvania, there were 2,653,688 absentee/mail in ballots cast compared to only 266,208 cast in the 2016 presidential election, an increase of 896.85%. 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.

Respondent was criticized by DC Disciplinary Counsel in not bringing a state court proceeding challenging the irregularities or fraud alleged. We posit that plaintiff had no ability to bring a state court action when there was no opportunity

to observe in a meaningful way 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 Election Code provides that, 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). But see, *In Re 2020 Canvass of Absentee and Mail-In Ballots of the November 3, 2020 General Election*, 241 A.3d 1058 (11-23-2020) (DCX 21-0001) which is of dubious value in light of *Ritter v. Migliori*, __S. Ct. __,2022 WL 6571686 (10-11-2022) (R 28-1) which granted writ of certiorari and vacated Third Circuit judgment (36 F.4th 153) facts explained in *Ritter v. Miliori*, 142 S.Ct. 1824 (6-9-2022) (R 29-0001-0003).

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 Mr. Giuliani, 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 Mr. Giuliani 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 Second Amended Complaint. 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." DCX 10. 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 Second Amended Complaint, 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 Giuliani alleged in the Second Amended Complaint.

Turning to the relief requested in the Second Amended Complaint—which, we emphasize, and as Mr. Giuliani affirmed in his testimony, contemplated a more

fulsome opportunity to present proof at a hearing—Mr. Giuliani 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….").

CONCLUSION

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 Mr. Giuliani 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. Mr. Giuliani testified that he made those tradeoffs; indeed, he contemplated, but ultimately did not include in the Pennsylvania action, certain additional claims of wrongdoing.

It was disciplinary counsel's burden to show, "by clear and convincing evidence," D.C. COURT OF APPEALS, BOARD OF PROFESSIONAL RESPONSIBILITY RULE 11.6 (2020), that Mr. Giuliani violated Rules 3.1 and 8.4(b) of the Pennsylvania Rules of Professional Conduct. For all of the foregoing, the evidence and argument presented by disciplinary counsel at the hearing did not meet that stringent burden. Respondent should not be disciplined.