



illegally diluted by invalid ballots and that the election is free and fair.” DCX 09 at 0013.<sup>2</sup> He further alleged that the county boards of elections “stuff[ed] the ballot box” with illegal Biden votes. *Id.* at 0080. Among other relief, Respondent requested that the federal district court declare the 2020 presidential election in Pennsylvania “defective” and permit the Pennsylvania General Assembly to choose Pennsylvania’s electors. *Id.* at 0123. Alternatively, Respondent requested that the court enjoin election certification on a Commonwealth-wide basis, or enjoin election certification that included ballots canvassed without observation and/or ballots that were allowed to be cured under local “Notice and Cure” procedures in those counties. *See id.*; DCX 05 at 0084; DCX 06 at 0149.

In that federal lawsuit, Respondent focused his arguments on two types of allegedly “illegal” mail-in ballots: (1) those ballots where voters were notified of and allowed to cure defects that would have otherwise prevented the ballots from being counted (“the Notice and Cure claims”); and, (2) those ballots that were canvassed without close supervision by partisan observers (“the Observational Barrier claims”).

The Hearing Committee concluded that the Notice and Cure claims themselves were not frivolous because they alleged that different counties treated defective ballots differently (some allowed them to be cured, and some did not).

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<sup>2</sup> Disciplinary Counsel’s and Respondent’s exhibits are designated “DCX” and “RX,” respectively. “FF” indicates the Hearing Committee’s Findings of Fact. The Hearing Transcript is designated as “Tr.”

However, the Hearing Committee concluded that Respondent did not have a faint hope of success that the Notice and Cure claims would support the most extreme requested relief, enjoining certification of the election results, because there were not enough cured ballots to change the election results even if all of the cured ballots were deemed to be Biden ballots.

The Hearing Committee concluded that the Observational Barrier claims were frivolous because no facts supported the claim that there was a scheme to illegally inflate Biden votes, or even that any illegal mail-in votes were counted. The Hearing Committee concluded that the Observational Barrier claims were “premised on a conclusive presumption of irregularity, *i.e.*, the wholly unfounded supposition that observational boundaries necessarily led to fraudulent counting of mail-in ballots to favor President Biden.”

The Hearing Committee concluded that Respondent’s frivolous arguments sought to disenfranchise Pennsylvania voters, and were part of an effort to undermine the integrity of the 2020 presidential election that “has helped destabilize our democracy.” The Hearing Committee recommended that Respondent be disbarred.

Respondent takes exception to the Hearing Committee’s recommendations, arguing that he did not engage in misconduct, and that even if the Board concludes that he violated the Rules, he should not be disbarred after considering his career of public service and the sanctions imposed in other frivolous litigation cases. Disciplinary Counsel supports the Hearing Committee’s recommendations.

The Board agrees with the Hearing Committee that Disciplinary Counsel proved by clear and convincing evidence that Respondent violated Pennsylvania Rules of Professional Conduct 3.1 and 8.4(d). With respect to sanction, we agree with the Hearing Committee that Respondent should be disbarred.

We recognize that disbarment has not been imposed in other frivolous litigation cases, but none of those cases involve the aggravating factors presented here. Respondent alleged that the elections boards in seven Pennsylvania counties were engaged in a deliberate scheme to change the outcome of the 2020 Presidential election in Pennsylvania by counting mail-in ballots that should not have been counted. He urged a federal judge to disenfranchise hundreds of thousands of Pennsylvania voters even though he had no objectively reliable evidence that any such scheme existed, or even that any illegal mail-in ballots had been counted. No prior disciplinary cases involving frivolous litigation are remotely comparable to this case. We conclude that disbarment is the only sanction that will protect the public, the courts, and the integrity of the legal profession, and deter other lawyers from launching similarly baseless claims in the pursuit of such wide-ranging yet completely unjustified relief.

## **II. FINDINGS OF FACT**

Respondent took exception to several of the Hearing Committee's factual findings, arguing that there are "(1) clear errors that are substantiated by straightforward evidence in the record; and (2) erroneous factual findings resulting from improper conclusions." Having reviewed the record, we disagree.

Respondent's objections to the Hearing Committee's factual findings are either legal arguments (Exceptions to Findings 4, 12, 40, 48 and 49), or arguments about the weight to be given the evidence presented during the hearing (Exceptions to Findings 7, 14, 21, 34, 43 and 47). We address each of Respondent's objections below.

We reject Respondent's invitation to reweigh the evidence that was presented to the Hearing Committee because the "weight, value and effect of the evidence" is for the Hearing Committee to decide. *In re Johnson*, 298 A.3d 294, 310 (D.C. 2023) (quoting *In re Temple*, 629 A.2d 1203, 1208 (D.C. 1993)); *In re Speights*, 173 A.3d 96, 102 (D.C. 2017) (per curiam) (weight of the relevant evidence is "within the ambit of the Hearing Committee's discretion"); Board Rule 11.3 ("[T]he Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies."). Instead, we "must accept the Hearing Committee's evidentiary findings, including credibility findings, if they are supported by substantial evidence in the record," *In re Johnson*, 275 A.3d 268, 275 (D.C. 2022) (per curiam), "even though there may also be substantial evidence in the record to support a contrary finding." *In re Godette*, 919 A.2d 1157, 1163 (D.C. 2007). Substantial evidence in turn "means enough evidence for a reasonable mind to find sufficient to support the conclusion reached." *In re Thompson*, 583 A.2d 1006, 1008 (D.C. 1990) (per curiam).

Having carefully reviewed the record, including all of the evidence that Respondent offered to support the claims made in the Pennsylvania litigation, we adopt the Hearing Committee's factual findings because they are supported by

substantial evidence in the record as a whole. *See* Board Rule 13.7. We summarize those findings below and where we have made additional findings of fact by clear and convincing evidence, we have included citations to the record. *Id.*

#### **A. 2020 Election Law in Pennsylvania**

In 2019, the Commonwealth of Pennsylvania enacted Act 77, which permitted any registered voter to vote by mail upon request. The liberalized vote-by-mail procedures, combined with the COVID-19 pandemic, led to an increase in Pennsylvania mail-in ballots from 266,208 in the 2016 election to 2,653,688 in 2020 (more than one third of the votes cast). FF 2.

Those voting by mail received a package that contained a ballot and two envelopes: a smaller, “secrecy” envelope marked “Official Election Ballot” and a larger, outer envelope preprinted with a bar code and voter declaration. Voters were instructed to place the completed ballot in the secrecy envelope, place the secrecy envelope in the larger outer envelope and then fill out, date, and sign a declaration printed on the larger outer envelope, and then mail or deliver it in person to their county board of elections. On Election Day, officials “pre-canvassed” the mail-in ballots to verify that the appropriate information was on the outside of the larger envelope, and that nothing written on the secrecy envelope would reveal the voter’s identity, political affiliation, or candidate preference.<sup>3</sup> The secrecy ballot was then opened, and the ballot was counted. FF 3.

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<sup>3</sup> The process of “pre-canvassing” is “the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots

Act 77 provided that “watchers” were to be “permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened . . . counted and recorded” (25 Pa. Stat. § 3146.8(b)) and were to “be permitted to remain in the room” when the absentee and mail-in ballots were “pre-canvassed” and canvassed. 25 Pa. Stat. § 3146.8(g)(1.1)-(2). However, Act 77 did not address whether observers must be permitted to be within any particular distance of the canvassing and counting operations. *See* FF 7.

Prior to the election on November 3, 2020, the Pennsylvania Supreme Court decided *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020), which held that Act 77: (a) does not permit elections boards to compare the signatures on mail-in ballot envelopes with those on voter registration forms; and (b) does not permit partisan election observers to challenge mail-in ballots during the canvassing or counting process.<sup>4</sup> FF 5; *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 610-11. This decision was issued on October 23, 2020.

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from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 595 n.3 (Pa. 2020) (quoting 25 Pa. Stat. § 2602(q.1)).

The process of “canvassing” is “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* (quoting 25 Pa. Stat. § 2602(a.1)).

<sup>4</sup> Act 77 permitted challenges to mail-in ballot applications. *In re Nov. 3, 2020 Gen. Election*, 240 A.3d at 605-06.

Several weeks earlier, on September 17, 2020, that same court had rejected a request from the Pennsylvania Democratic Party to require elections boards with knowledge of an incomplete or incorrectly completed ballot and the voter’s contact information, to contact the voter and provide them the opportunity to cure the facial defect, a process referred to as “Notice and Cure.” The Pennsylvania Supreme Court declined to order Notice and Cure across the Commonwealth because it was not required by Act 77. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020); *see* FF 4. The court noted that “although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the ‘notice and opportunity to cure’ procedure.” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d at 374. The court further noted that “[t]o the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements . . . the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.* The decision was best left to the Legislature, the court reasoned,

particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.

*Id.* However, the court did not prohibit counties from implementing Notice and Cure, and some counties gave mail-in voters notice and an opportunity to cure, while others did not. FF 4.



Defective mail-in ballots could be “cured” by casting replacement mail-in ballots before Election Day or provisional ballots on Election Day. *See* DCX 09 at 0071. Respondent takes exception to the Hearing Committee’s conclusion that *Boockvar* did not prohibit Notice and Cure. R. Br. at 8-9. We agree with the Hearing Committee, and disagree with Respondent, but this disagreement is not material, because we agree with the Hearing Committee that Respondent had a faint hope of success in arguing that cured ballots should not have been counted.

**B. 2020 Election Canvassing Operations**

In order to implement pandemic-compelled social distancing between election workers canvassing mail-in ballots and partisan observers in November 2020, at least some of the defendant county boards of elections erected barriers tailored to the physical layouts of individual canvassing sites. FF 7. The Trump campaign objected that the barriers did not permit satisfactory observation of the canvassing process, but a state trial court denied its request to allow its observers closer access. An intermediate appellate court reversed that decision on November 5, 2020. *In re Canvassing Observation*, No. 1094, 2020 WL 6551316, at \*4 (Pa. Commw. Ct. Nov. 5, 2020). In that decision, the judge determined that observers had a right to more closely observe the canvassing operations, even though Act 77 did not permit challenges to individual votes during canvassing, concluding that “this matter involves the issue of the right of observation, not the right to challenge.” While

litigation on this issue continued, a federal judge worked out an informal settlement to allow observers in Philadelphia closer proximity to canvassing operations. FF 7.<sup>5</sup>

On November 17, 2020, the day Respondent argued before Judge Matthew Brann in the federal district court for the Middle District of Pennsylvania (as discussed below), the Pennsylvania Supreme Court rejected challenges to the observational barrier placements, holding that “the Election Code does not specify minimum distance parameters for the location” of observers, and the court was not going to rewrite the statute to impose a minimum observation distance that the legislature did not include. *In re Canvassing Observation*, 241 A.3d 339, 350-51 (Pa. 2020); FF 7.

The Pennsylvania Supreme Court concluded that “the absence of proximity parameters [in Act 77] . . . reflect[ed] the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections.” *In re Canvassing Observation*, 241 A.3d at 350. The court noted that the Elections Board in Philadelphia County had established its observational distancing requirements based “on its perceived need for protecting its workers’ safety from COVID-19” as well as from “physical assault” by “individuals who have contact with its workers; ensuring security of the ballots; efficiently processing large numbers of ballots; protecting the privacy of voters; and ensuring campaign access to the canvassing proceedings . . . .”

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<sup>5</sup> Respondent takes exception to the “implied conclusion” in Finding of Fact 7 that the federal court’s informal settlement rectified concerns over meaningful observation of the opening and counting of the ballots. R. Br. at 9. We saw no such implied conclusion in Finding of Fact 7.

*Id.* at 346-47. The opinion also concluded that even with observational barriers, poll watchers:

had the opportunity to observe the mechanics of the canvassing process. [Poll watchers] witnessed Board employees inspecting the back of ballot envelopes containing the voter's declaration, before sending them on for processing; witnessed ballots being removed from their secrecy envelopes, and naked ballots which had been delivered to the Board without a secrecy envelope being segregated from ballots which arrived within such envelopes; [they] saw that the ballot processing methods utilized by the Board were not destroying the ballot envelopes containing the voter's declaration; and perceived that the ballot secrecy envelopes were being preserved during their processing.

*Id.* at 350. The court acknowledged that the observers "could not view the actual declarations on the ballot envelopes, nor examine individual secrecy envelopes for improper markings," but "this information would only be necessary if [they] were making challenges to individual ballots," which "are not permissible under the Election Code." *Id.* at 351.

### **C. A Chronology of Respondent's Involvement in Post-Election Litigation**

President Biden won Pennsylvania by a margin of more than 80,000 votes. FF 8. The day after the election, November 4, 2020, then-President Trump asked Respondent to take charge of post-election litigation challenging the voting results. Respondent went to a war room in Arlington, Virginia, where he immediately met with other attorneys to prepare to bring litigation in approximately ten states (including Pennsylvania). Respondent intended the cases in those ten states to raise similar claims so they could be consolidated in a single lawsuit that could eventually be heard in the U.S. Supreme Court. FF 9. Respondent started to work on litigation

specific to Pennsylvania after receiving a telephone call complaining about observational barriers in Philadelphia during the mail-in ballot canvassing there. FF 11.

Election challenges based on state law were required to be brought in state court. The Trump campaign had lost other cases in the Pennsylvania state courts, and local counsel “felt it was a lost cause” to bring post-election challenges there. Respondent consequently worked with Pittsburgh attorney Ronald Hicks to prepare a case asserting federal claims to be filed in Pennsylvania federal court. FF 12.<sup>6</sup>

Together with Mr. Hicks, Respondent helped draft a Complaint (the “Initial Complaint”) on behalf of Donald J. Trump for President, Inc. and two individual voters who had submitted defective mail-in ballots but had not been given the opportunity to cure them.<sup>7</sup> The Initial Complaint contained seven counts asserting

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<sup>6</sup> In his brief, Respondent suggests that the Hearing Committee found that it was improper to bring election law challenges in federal court. R. Br. at 9-10 (taking exception to Finding of Fact 12). We do not understand the Hearing Committee to conclude that there is anything inherently improper with bringing an election law challenge in federal court, where, as here, that challenge was based on alleged violations of the Constitution of the United States and/or federal law.

<sup>7</sup> Respondent argues that the Hearing Committee erred in concluding that he drafted a “meaningful portion (up to 30%),” FF 14, of the Initial Complaint. Instead, he asserts that he only drafted 10-20% of the pleading. R. Br. at 10. Respondent does not explain why the difference between drafting 30% of the pleading or only 10-20% is material to any issue before the Board. However, we note that in reaching this conclusion, the Hearing Committee relied on Respondent’s own testimony where he corrected an earlier estimate that he had only contributed 10-20%, and

violations of the Plaintiffs’ civil rights under 42 U.S.C. § 1983<sup>8</sup>—for violating the Plaintiffs’ rights to Due Process and the Equal Protection of the Law guaranteed by the Fourteenth Amendment<sup>9</sup>—and the Electors and Elections Clauses of the U.S. Constitution.<sup>10</sup> DCX 05; FF 13. The Initial Complaint was filed on November 9, 2020, in the United States District Court for the Middle District of Pennsylvania,

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testified that it may have been 15 or 30 percent. Tr. 899. Thus, the Hearing Committee’s factual finding is supported by substantial evidence in the record.

<sup>8</sup> 42 U.S.C. § 1983 provides in relevant part that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

<sup>9</sup> The Fourteenth Amendment provides in relevant part that

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>10</sup> The Elections Clause, art. I, § 4, cl. 1, provides in relevant part that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .”

The Electors Clause, art. II, § 1, cl. 2, provides in relevant part that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” for the election of the President and Vice President.

against the Pennsylvania Secretary of State and the elections boards of seven counties that had returned majorities for President Biden. FF 13-14. Because Respondent was not admitted to practice in the Middle District, he did not sign the Initial Complaint. FF 14. After filing the Initial Complaint, Mr. Hicks immediately withdrew his appearance. FF 15.

The Initial Complaint alleged that using observational barriers and permitting Notice and Cure violated the Electors and Elections Clauses of the U.S. Constitution because county elections boards are not permitted to set their own rules for canvassing observation or determine on their own to allow defective ballots to be cured (Counts III, V, and VII). These decisions, the Initial Complaint alleged, were reserved for the Pennsylvania legislature. DCX 05 at 0071-73, 0077-79, 0081-83.

The Initial Complaint further alleged that the defendant county boards of elections placed limits on canvassing observation while other counties permitted observation without limitation, and that by using observational barriers that other counties did not use, the “Defendants created a system whereby it was physically impossible for the candidates and political parties to view the ballots and verify that illegally cast ballots were not opened and counted,” in violation of the Due Process and Equal Protection Clauses (Counts I and II). *Id.* at 0068, 0070; *see generally id.* at 0062-0071. Finally, the Initial Complaint alleged that use of Notice and Cure violated the Due Process and Equal Protection Clauses because ballots with similar defects were treated differently, depending on the voter’s county of residence

(Counts IV and VI).<sup>11</sup> *Id.* at 0073-77, 0079-0081. The Initial Complaint requested that the federal court enjoin election certification on a Commonwealth-wide basis. In the alternative, it sought to enjoin election certification that included ballots canvassed without observation and/or ballots that were allowed to be cured. *Id.* at 0084.

On November 15, 2020, Plaintiffs filed the First Amended Complaint, which was authored by another group of lawyers. The First Amended Complaint eliminated the Observational Barrier claims and two of the Notice and Cure claims, leaving only two Counts based on Notice and Cure, alleging violations of the Equal Protection Clause and the Electors and Elections Clauses. FF 15; DCX 06 at 0056-0061; *see* DCX 06 at 0127-0148. The First Amended Complaint sought the same relief as the Initial Complaint, except for the requested injunction against election certification including ballots canvassed without close observation. DCX 06 at 0149. *Compare* DCX 05 at 0084, *with* DCX 06 at 0062. Respondent did not work on the First Amended Complaint and did not agree with its more circumscribed approach. FF 15.

On November 17, 2020, the court admitted Respondent *pro hac vice*. That same day, he personally argued in opposition to a motion to dismiss the First Amended Complaint. By the time of the argument, Respondent had drafted a

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<sup>11</sup> Respondent's individual clients submitted defective ballots, but their county elections board did not offer Notice and Cure. FF 13. Thus, their votes were not counted. FF 31, 45. Because they believed that Notice and Cure was not permitted, they did not argue that they should have been given a chance to cure. FF 31, 45.

Second Amended Complaint, but had not yet sought leave to file it. He believed that the First Amended Complaint wrongly deleted allegations about widespread election fraud that were important to his national litigation strategy. FF 16; Tr. 67 (Respondent testified before the Hearing Committee that his “role was to show how Pennsylvania involved [the] same set of eight or ten suspicious actions [occurring elsewhere in the country], illegal actions, whatever you want to call it, irregular actions that could not have been the product of just accidents”).

On November 18, 2020, Respondent moved for leave to file the Second Amended Complaint, which reintroduced allegations from the original Complaint and added additional counts. FF 17. On November 19, 2020, Plaintiffs represented by Respondent sought a temporary restraining order barring Defendants from certifying the result of the 2020 election. *Id.*

On November 21, 2020, Judge Brann dismissed the First Amended Complaint and denied leave to file the Second Amended Complaint. He also denied Plaintiffs’ request for injunctive relief. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 923 (M.D. Pa. 2020); FF 18.

On November 22, 2020, Plaintiffs filed a Notice of Appeal, signed by Respondent. The only issue raised on appeal was whether Judge Brann properly denied leave to file the Second Amended Complaint. FF 19.

On November 27, 2020, the Third Circuit affirmed dismissal of the case, concluding that the Second Amended Complaint did not contain a sufficient factual



basis to state a facially plausible claim to relief. *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377, 382 (3d Cir. 2020); FF 20.

**D. Respondent’s Arguments in Favor of Amending the First Amended Complaint**

In his November 18, 2020, motion for leave to file the Second Amended Complaint, Respondent requested permission to “restore claims which were inadvertently deleted from their Amended Complaint,” including the Observational Barrier claims, “and to add claims based on newly learned facts, including the Pennsylvania Supreme Court’s November 17, 2020 decision[, *In re Canvassing Observation*, 241 A.3d 339].” DCX 09 at 0001; *see* FF 7. During argument on the motion to dismiss the First Amended Complaint the day before, Respondent told Judge Brann that a second amendment was justified because “we have twice as much evidence this week. And it’s not just here, all over the country.” DCX 08 at 0022; FF 16, 24; *see* FF 25; DCX 08 at 0013; DCX 08 at 0015 (arguing to Judge Brann that the conduct alleged in the Second Amended Complaint was part of “widespread, nationwide voter fraud,” which occurred “in at least ten other jurisdictions”).<sup>12</sup>

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<sup>12</sup> This echoed his argument to Judge Brann the day before that

[T]his is not an accident. You’d have to be a fool to think this was an accident. You’d have to be a fool to think that somebody woke up in Philadelphia and in Pittsburgh and in Milwaukee and in Detroit and in Phoenix and all the way in Las Vegas and then way back in Atlanta and they decided, oh, we’re going to shut out all the Republicans today, we’re not going to let them see a single absentee ballot.

DCX 08 at 0018.

Respondent represented to Judge Brann that he had hundreds of supporting affidavits. FF 27.

Respondent argued to Judge Brann that the Defendants were stealing the election:

If this is allowed without serious sanction, meaning the canceling of these ballots, this will become an epidemic. I mean, you give them an inch, they're going to take a mile. They've already taken a mile. They take a mile, they're going to take a whole city. This cannot be allowed.

And what did they steal, really? Well, they stole, they stole an election, at least in this Commonwealth. These [unobserved] votes are way more than enough to overturn the results of the election. . . .

We have ten times more votes than we need, and we're still getting complaints. It would overturn the results of the election. . . .

DCX 08 at 0027-28. He argued in his motion that after limited discovery, and through statistical analysis,

Plaintiffs intend to show that a substantial portion of the 1.5 million mail votes received in the Defendant Counties were counted in violation of Pennsylvania law (including the exclusion of Trump and Republican watchers from the canvass of mail ballots and approving mail ballots which did not comport with Pennsylvania's signature, date, and other requirements, *see* 25 P.S. §§ 3146.6(a), 3150.16(a)).

DCX 09 at 0008.<sup>13</sup> Finally, he argued that "Plaintiffs will seek the remedy of Trump being declared the winner of the legal votes cast in Pennsylvania in the 2020 General Election, and, thus, the recipient of Pennsylvania's electors." *Id.* at 0008-09.

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<sup>13</sup> In the Second Amended Complaint, Respondent alleged "[t]he Trump Campaign believes that statistical analysis will evidence that over 70,000 mail and other mail

## **E. The Claims Alleged and Relief Requested in the Second Amended Complaint**

*The Second Amended Complaint's Legal Claims*—The Second Amended Complaint contained nine Counts. DCX 09 at 0079-0122. It added back the claims that had been included in the Initial Complaint but subsequently dropped from the First Amended Complaint. FF 17. *Compare* DCX 09 at 0190-0224, *with* DCX 06 at 0127-0148. It alleged that the use of observational barriers violated the Due Process Clause (Counts I and VII), the Equal Protection Clause (Counts II and VIII), and the Electors and Election Clauses (Counts III and IX). It also alleged that the use of Notice and Cure violated the Equal Protection Clause (Count IV), the Electors and Election Clauses (Count V), and the Due Process Clause (Count VI).

It also added the specific allegation that the defendant county boards of elections were engaged in a deliberate scheme to “stuff[] the ballot box” with illegal Biden votes:

167. Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination to favor presidential candidate Joseph Biden over Donald J. Trump by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce requirements that the declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes as required by 15 PA.S 3146.6(a) and 3150.16(a) in order to count absentee and mail ballots which should have been disqualified.

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ballots which favor Biden were improperly counted – sufficient to turn the election . . . .” DCX 09 at 0021.

168. Defendant County Election Boards carried out this scheme knowing that the absentee and mail ballots which should have been disqualified would overwhelmingly favor Biden because of the registrations of the persons who voted by mail, as well as because of their knowledge and participation in the Democrat/Biden election strategy, which favored mail voting, compared to the Republican/Trump strategy, which favored voting in person at the polls. As a result, Defendant County Election Boards deliberately favored Biden with votes that should not have been counted, effectively stuffing the ballot box in his favor with illegal votes in violation of *Reynolds, Bush v. Gore, Snowden v. Hughes*, 321 U.S. 1 (1943), and *Marks v. Stinson*. Upon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have been counted, and the vast majority favored Biden, thus resulting in returns indicating Biden won Pennsylvania.

DCX 09 at 0079-0080 ¶¶ 167-68 (Count I). The Second Amended Complaint repeated these allegations three other times. *See* DCX 09 at 0087-88 ¶¶ 193-94 (Count II), at 0096-97 ¶¶ 222-23 (Count IV), at 0106-07 ¶¶ 252-53 (Count VI); *see also* FF 17, 27; Tr. 76 (Respondent testifying to the Hearing Committee that the challenged practices “were intended to defeat Trump and elect Biden”).

*The Second Amended Complaint’s Requested Relief*—Like the Initial Complaint, the Second Amended Complaint requested that the federal court enjoin election certification on a Commonwealth-wide basis. In the alternative, it sought to enjoin election certification that included ballots canvassed without close observation and/or ballots that were allowed to be cured. DCX 09 at 0123; *see* DCX 05 at 0084. In addition to arguing that a “substantial portion” of 1.5 million mail-in votes were illegal, and should not be counted, Respondent argued that

680,770 ballots that were processed by the Allegheny and Philadelphia County Boards of Elections should not be counted because Trump poll watchers had not closely observed those votes being canvassed. DCX 09 at 0075, 0080, 0088, 0097, 0106; *see* FF 28; HC Rpt. at 26-27.

In addition, the Second Amended Complaint requested that the federal court find that the 2020 Pennsylvania presidential election was “defective,” throw out all of the votes cast and have the Pennsylvania General Assembly decide who would receive Pennsylvania’s electors:

327. Alternatively, that, as a result of Defendants’ violations of the United States Constitution and violations of other federal and state election laws, this Court should enter an order, declaration, and/or injunction that the results of the 2020 presidential general election are defective and providing for the Pennsylvania General Assembly to choose Pennsylvania’s electors.

DCX 09 at 0123. This relief had not been explicitly requested in the Initial Complaint or the First Amended Complaint. *See id.* at 0225; DCX 05 at 0084; DCX 06 at 0062.

### **Facts Alleged in Support of the Legal Claims in the Initial Complaint and the Second Amended Complaint**

The Hearing Committee observed that the “chief factual objective of the hearing” was to determine “whether Disciplinary Counsel proved by clear and convincing evidence” that Respondent “lacked material evidence to support his claims that observational boundaries and Notice and Cure procedures facilitated widespread, systemic voter fraud and justified the nullification of hundreds of

thousands of votes in Pennsylvania.” FF 36. In other words, did Disciplinary Counsel prove that there was no factual support for Respondent’s allegation that the Defendants were counting illegal mail-in ballots and were using the observational barriers to avoid detection?

Disciplinary Counsel identified allegations in the Initial Complaint and Second Amended Complaint that purported to provide the factual basis for the legal arguments and requested relief discussed above. Respondent did not contest Disciplinary Counsel’s assertions in this regard before the Hearing Committee or before the Board. These allegations are set forth below.<sup>14</sup>

- a. Trump poll watchers allegedly 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 allegedly 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, allegedly 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.

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<sup>14</sup> Although this paragraph identifies the following list as allegations, given that the recitation of these allegations takes up several pages of this report, we have added the word “allegedly” to each of these claims as a reminder that the assertions were allegations which had not been proven. For ease of reading, we have not included “allegedly” in brackets.

- d. Fayette County [(not a named defendant)] allegedly discovered that two voters received already filled-in mail-in ballots and allegedly 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, allegedly 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 allegedly receiving mail-in ballots for which they had not applied. DCX 05 at 0047; DCX 09 at 0063.
- g. “Numerous” voters allegedly 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 allegedly 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 allegedly 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 allegedly 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 allegedly 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 allegedly required to vote provisionally because the records showed he or she had requested a mail-in ballot, was allegedly 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 allegedly 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 allegedly 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 allegedly 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 allegedly not permitted to vote provisionally. DCX 05 at 0049; DCX 09 at 0066.
- p. There were allegedly reports that in Allegheny County, poll workers allegedly could see which candidate provisional voters voted for. DCX 05 at 0049; DCX 09 at 0066.
- q. In Centre County, a poll worker allegedly 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 allegedly 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 allegedly 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 allegedly 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 allegedly 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 allegedly reported “multiple” instances in which ballots for different voters were allegedly addressed to a single address where the voters did not live. Other ballots were allegedly 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 allegedly increased between November 4 and November 8. DCX 05 at 0058; DCX 09 at 0076.
- x. In Delaware County, an observer was allegedly 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 allegedly 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 allegedly 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.

ODC Br. to HC at 17-21; *see* R. Br. to HC at 14-21, 25.

In considering whether Disciplinary Counsel had carried its burden, the Hearing Committee concluded that the record before it contained “all the material evidence gathered by Mr. Giuliani, and on his behalf, to support his claims in the Pennsylvania litigation.” FF 39; *see also* FF 37-38 (identifying the relevant exhibits as DCX 23, 24, 25, 26, 27, 28, 29, 32, 35, 36 and 37, as well as RX 01 and 02). RX 01 alone consists of over 600 pages of affidavits and declarations in support of the facts alleged immediately above. *See* R. Br. to HC at 14-21 ¶ 37 (identifying documents in RX 01 as supporting the factual allegations in the Second Amended Complaint). Respondent does not contest this conclusion. The Hearing Committee reviewed all of the material evidence identified above, gathered by Respondent, and on his behalf, cited in support of his claims in the Pennsylvania litigation.

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

#### **A. The Pennsylvania Rules Govern This Case.**

Respondent’s conduct in this case is governed by Pennsylvania’s Rules of Professional Conduct because his conduct took place before the United States District Court for the Middle District of Pennsylvania. *See* D.C. Rule of Professional Conduct 8.5(b)(1) (“For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the

tribunal sits, unless the rules of the tribunal provide otherwise . . . .”); *See* M.D. Pa. L.R. 83.23.2 (adopting the Pennsylvania Rules).

The Hearing Committee concluded that Disciplinary Counsel proved that Respondent violated Pennsylvania Rules 3.1 and 8.4(d). We review those conclusions *de novo*. *In re Yelverton*, 105 A.3d 413, 420 (D.C. 2014).

## **B. Pennsylvania Rule 3.1**

Pennsylvania Rule 3.1 states 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.” *See also* D.C. Rule 3.1 (same). Like its D.C. counterpart, Pennsylvania Rule 3.1 sets forth an objective test to determine whether there was a non-frivolous basis in fact or law for the contentions at issue. *Adams v. Dept. of Pub. Welfare*, 781 A.2d 217, 220 n.2 (Pa. Commw. Ct. 2001). The parties directed the Hearing Committee to *In re Spikes*, 881 A.2d 1118 (D.C. 2005) as a guide to its analysis. As both the Pennsylvania and D.C. Rules contain identical language, and both apply an objective test, we agree with the parties and the Hearing Committee, and look to *Spikes* and other cases decided by the D.C. Court of Appeals.

*Spikes* recognized that in determining whether a claim is frivolous, “consideration should be given to the clarity or ambiguity in the law,” as well as the “plausibility of the position taken and the complexity of the issue.” *Id.* at 1125 (quoting *District of Columbia v. Fraternal Order of Police*, 691 A.2d 115, 119 (D.C.

1997)). *Spikes* held that a claim is frivolous if, after undertaking “an ‘objective appraisal of merit’ . . . a reasonable attorney would have concluded that there was not even a ‘faint hope of success on the legal merits’ of the action being considered.” 881 A.2d at 1125 (first quoting *Tupling v. Britton*, 411 A.2d 349, 352 (D.C. 1980); and then quoting *Slater v. Biehl*, 793 A.2d 1268, 1278 (D.C. 2002)).

*Spikes* recognized that “the law is not always clear and never is static,” and that the prohibition of frivolous litigation should not chill zealous advocacy on behalf of a client to press for change and reform in the law. *Id.* (quoting D.C. Rule 3.1, cmt. [1]); *see also* Pa. Rule 3.1, cmt. [1]. However, *Spikes* warned that this “safe harbor” requires a position that is reasoned and supported. *Id.*; *see also* Pa. Rule 3.1, cmt. [1] (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.”); D.C. Rule 3.1, cmt. [1] (same).

Rule 3.1 applies to claims for relief as well as to theories of liability: where claims for relief are “utterly frivolous, implausible to the point of having ‘not even a faint hope of success,’” they too violate Rule 3.1. *In re Pearson*, 228 A.3d 417, 426 (D.C. 2020) (per curiam) (quoting *Spikes*, 881 A.2d at 1125).

**C. Respondent is Susceptible to Disciplinary Prosecution for Claims Alleged in the Initial Complaint and the Second Amended Complaint.**

Respondent argues that he cannot be disciplined for allegations and assertions in the Initial Complaint because it was superseded by the First Amended Complaint, and that he cannot be disciplined for the allegations and assertions in the Second

Amended Complaint because Judge Brann denied leave to file it.<sup>15</sup> In support of this argument, Respondent cites Ninth Circuit cases that address the impact of a later-filed complaint on the allegations contained in an earlier complaint. In *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981), *overruled in part by Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012), the court noted that “a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint.”<sup>16</sup> He also cites cases that support the proposition that when it is necessary to obtain leave of court to file an amended complaint, the amended complaint is “without legal effect” until the court allows amendment. *See, e.g., Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir. 1998).

None of the cases Respondent cites discuss Rule 3.1, and none preclude Respondent’s prosecution here because none address the issue raised in this disciplinary proceeding: whether an advocate brought a proceeding, or asserted or controverted an issue therein, without a non-frivolous basis in fact or law for doing so. The issues addressed by Respondent’s cases might be germane if we were considering whether Respondent’s clients could assert claims raised in the Initial

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<sup>15</sup> Disciplinary Counsel argued that Respondent has waived this argument because he did not raise it with the Hearing Committee. ODC Br. at 22. However, Respondent points out in his Reply that he raised this argument in his opening statement and in his brief to the Hearing Committee. R. Reply Br. at 2.

<sup>16</sup> *Lacey* limited the waiver to those claims that had been voluntarily dismissed, not those that had been dismissed with prejudice without leave to amend. *Lacey*, 693 F.3d at 928. *Lacey*’s narrowing of *London* is not material to our consideration of Respondent’s argument.

Complaint that were not later included in the First Amended Complaint, or prosecute the claims in the Second Amended Complaint until the court accepted it for filing. But those issues are not before the Board.

Thus, we consider the merits of the charges against Respondent.

**D. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Violated Pennsylvania Rule 3.1.**

The question before the Board is whether there is clear and convincing evidence that, after an objective appraisal of the merits, a reasonable lawyer would have concluded that there was not a faint hope of success on the claims that the observational barriers and the Notice and Cure process were part of scheme to stuff the ballot box with more than 80,000 illegal Biden votes, enough to change the outcome of the election. We agree with the Hearing Committee that Disciplinary Counsel has met its burden because Respondent alleged a scheme to steal the Pennsylvania election without the slightest factual basis.

**1. *The Causes of Action***

As discussed above, Respondent made claims under the Elections and Electors Clauses of the Constitution, and the Due Process and Equal Protection Clauses of the 14th Amendment. We briefly address each of the claims that Respondent made.

**a. *Electors and Elections Clauses***

Respondent argued that the Electors and Elections Clauses did not permit county elections boards to set their own rules for canvassing observation or determine on their own to allow defective ballots to be cured. These decisions,

Respondent argued, were reserved for the Pennsylvania legislature. *See, e.g.*, DCX 09 at 0093-95, 0103-05, 0118-0122. He acknowledged to Judge Brann that the Third Circuit had recently ruled that candidates and voters lacked standing to bring suit under the Elections and Electors Clauses, and asserted that he was preserving the issue for appeal. *See* HC Rpt. at 23-24, 28-29; *see also Bognet v. Sec’y Commonwealth of Pennsylvania*, 980 F.3d 336, 348-353 (3d Cir. 2020), *cert. granted, judgment vacated as moot sub nom. Bognet v. Degraffenreid*, — U.S. —, 141 S. Ct. 2508 (2021).

**b. Due Process Clause**

In the Second Amended Complaint, Respondent alleged that “[t]he Fourteenth Amendment Due Process Clause protects the right to vote from conduct by state officials that seriously undermines the fundamental fairness of the electoral process. *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994); *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978).” DCX 09 at 0083 ¶ 177. This is a correct statement of the law, but it highlights the limited reach of the Due Process Clause in state election matters. *Marks* cautioned that “local election irregularities, including even claims of official misconduct, do not usually rise to the level of constitutional violations where adequate state corrective procedures exist.” *Marks*, 19 F.3d at 888 (quoting *Griffin*, 570 F.2d at 1077). A due process clause violation exists and relief under Section 1983 is available where “the election process itself reaches the point of patent and fundamental unfairness.” *Id.* (quoting *Griffin*, 570 F.2d at 1077). However, “[s]uch a situation must go well beyond the ordinary dispute over the

counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane,” yet “precedent for federal relief exists where *broad-gauged unfairness permeates an election*, even if derived from apparently neutral action.” *Id.* (emphasis added) (quoting *Griffin*, 570 F.2d at 1077).

Thus, the question before the Board is whether Disciplinary Counsel proved by clear and convincing evidence that Respondent did not have a faint hope of success in arguing that “broad-gauged unfairness permeated” the 2020 Pennsylvania election. As discussed below, we find that Disciplinary Counsel has carried its burden.

**c. *Equal Protection Clause***

The Equal Protection Clause “keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Second Amended Complaint frequently cited to *Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684 (W.D. Pa. 2003) on the application of the Equal Protection Clause to election matters. *See, e.g.*, DCX 09 at 0077. We agree with Respondent that *Pierce* provides a good summary of the applicable law establishing that: “[t]he right of qualified electors to vote in a state election is recognized as a fundamental right under the equal protection clause of the Fourteenth Amendment”; “[t]he right to vote extends to all phases of the voting process, from being permitted to place one’s vote in the ballot box, . . . to having that vote actually counted.” *Pierce*, 324 F. Supp. 2d at 694-95 (W.D. Pa. 2003) (internal citations omitted). The right to vote “applies equally to the ‘initial



allocation of the franchise’ as well as ‘the manner of its exercise.’” *Id.* at 695 (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)). As the court in *Pierce* noted, “[o]nce the right to vote is granted, a state may not draw distinctions between voters that are inconsistent with the guarantees of the Fourteenth Amendment’s equal protection clause.” *Id.*; see also *Bush*, 531 U.S. at 104-05 (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”).

The Hearing Committee concluded that Disciplinary Counsel had failed to prove a Rule 3.1 violation arising out of Respondent’s argument that disparate use of Notice and Cure violated the Equal Protection Clause.<sup>17</sup> HC Rpt. at 31. Disciplinary Counsel does not meaningfully contest this conclusion, and we see no reason to disturb the Hearing Committee’s conclusion.

## ***2. The Facts Alleged to Support the Existence of a Scheme to Favor Biden over Trump***

The Hearing Committee examined the materials ostensibly supporting Respondent’s allegations of widespread and systemic voter fraud, and concluded that the documentary evidence was “fundamentally vague, speculative, or facially incredible.” FF 40; see also FF 41-49. The Hearing Committee further found that

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<sup>17</sup> The Hearing Committee concluded that Disciplinary Counsel had not proven a Rule 3.1 violation based on Respondent’s arguments that Notice and Cure should not have been allowed. However, as discussed further below, it concluded that there was not a faint hope of success that disqualification of the cured ballots would change the outcome of the election because the number of cured ballots was much less than the margin of victory. HC Rpt. at 31-33.

if proven true, the allegations “identify a handful of isolated election irregularities, [but] they completely fail to demonstrate that the observational boundaries or Notice and Cure procedures facilitated any meaningful fraud or misconduct that could have possibly affected the outcome of the presidential election.” FF 40. The Hearing Committee concluded that Respondent “based the Pennsylvania litigation only on speculation, mistrust, and suspicion.” FF 36.

In his brief to the Board, Respondent takes exception to the Hearing Committee’s finding that his allegations were “fundamentally vague, speculative, or facially incredible,” but he does not even attempt to identify factual support for his argument. R. Br. at 12; *see* R. Br. at 11-14. Instead of identifying the facts to support his allegation that the Defendants used the observational barriers and Notice and Cure as part of a scheme to hide election fraud and “stuff[] the ballot box” for Biden, Respondent argues only that he “made a novel argument regarding the lack of meaningful observation of the opening and counting of the ballots in an unprecedented election where there was an 896% increase in absentee ballots cast before the an [sic] election,” that “[n]o one had previously made the argument that a lack of meaningful observation was a violation of election law statutes,” and that as an attorney pleading in federal court he was “entitled to his opinion.” R. Br. at 12, 14. An argument about the novelty of a legal argument does not in any way address the Hearing Committee’s finding that Respondent’s widespread election fraud theory was unsupported by any facts. Moreover, neither “novelty” nor a perceived entitlement to “opinion” permit pleading facts and assertions without

adequate basis, or excuse a lawyer from objectively assessing whether claims for relief have even a faint hope of success. *See Pearson*, 228 A.3d at 425-26 (“the lack of a definitive holding precluding a legal theory does not mean that it cannot be frivolous”).<sup>18</sup>

Respondent acknowledged that all observers were kept behind the observational barriers, and thus, did not allege that individual observers were treated differently based on party affiliation, or any other factor. However, he argued that the use of observational barriers violated the Equal Protection Clause because observers in all counties did not receive an equal opportunity to observe. Factually he is correct: each of the counties counted mail-in ballots in different locations, with its own unique layouts and physical limitations. But Respondent cites no authority to support the underlying proposition that each county must employ identical counting processes. The Equal Protection Clause requires that states use uniform standards to “discern the legality of a vote in a statewide election.” *Pierce*, 324 F. Supp. 2d at 699. But “counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state.”

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<sup>18</sup> In other words, even when making a novel legal argument, a lawyer still must rest that argument on some facts that support the argument. In this case, Respondent made a number of factual assertions, discussed above. Yet even after considering all the documentary evidence that purportedly supported his assertions, the Hearing Committee found that the Respondent did not actually have facts to support his novel approach. We agree. And as detailed below, for some of his claims he had no legal support for his novel approach.

*Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389 (W.D. Pa. 2020) (citing cases). The district court noted that in *Bush*,

the Supreme Court took pains to clarify that the question before it was “not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” *Bush*, 531 U.S. at 109, 121 S.Ct. 525; *see also id.* at 134, 121 S.Ct. 525 (Souter, J. dissenting) (“It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters’ intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.”); *Bullock*, 491 F.Supp.3d at 386, (“[T]he Supreme Court was clear in *Bush v. Gore* that the question was not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”) (cleaned up).

*Id.* at 390. While Respondent speculates that the disparate use of observational barriers was part of a plot to conceal the counting of defective ballots, he does not allege facts that support this speculation. Instead, the only facts alleged to support the unremarkable proposition that different counties took different approaches was the fact that different counties used different social distancing measures as ballots were being canvassed. Respondent’s speculation aside, he has proffered no evidence that this was part of a plan to treat differently people who are the same.

Respondent also argues more broadly that “[t]he democracies of the world would not certify a contested election in a foreign country where the opening and the counting of the ballots were not observed by representatives of both contestants.” R. Br. at 12-13. But that argument does not address the facts presented here, nor state a violation of the Constitution or federal law. Indeed, the Pennsylvania

Supreme Court had already approved of the access given to observers, even with the observational barriers, noting that they were able to observe the mechanics of the canvassing process. *In re Canvassing Observation*, 241 A.3d at 350-51. The court had already rejected the Second Amended Complaint’s argument that closer observation was warranted, concluding that closer observation “would only be necessary if [they] were making challenges to individual ballots,” which is “not permissible under the Election Code.” *Id.* at 351.

Finally, Respondent takes issue with Pennsylvania election law. He argues that the legislation allowing universal absentee voting was contrary to the Pennsylvania Constitution, and that the legality of universal mail-in voting was not decided until 2022. R. Br. at 21 (citing *McLinko v. Department of State*, 279 A.3d 539 (Pa. 2022) (upholding the constitutionality of Act 77)). This argument is of no moment because Respondent did not challenge the legality of universal mail-in voting in the Initial Complaint or the Second Amended Complaint. That issue was raised in a different proceeding filed on November 21, 2020, in Pennsylvania state court by eight petitioners who sought a declaration that universal mail-in voting was “unconstitutional and void *ab initio*,” as well as injunctive relief prohibiting the certification of the 2020 results. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020). The Pennsylvania Supreme Court dismissed the petition “with prejudice based upon Petitioners’ failure to file their facial constitutional challenge in a timely manner” (they waited until more than a year after Act 77 was passed, and after the election had taken place). *Id.* The fact that the Pennsylvania Supreme Court

considered and upheld the Constitutionality of Act 77 in *McLinko* in 2022 has no bearing on our consideration of whether Respondent had a faint hope of success on the merits on his efforts to change the outcome of the 2020 election.

Respondent also takes exception to Finding of Fact 43, where the Hearing Committee found that information provided by former New York City Police Commissioner Bernard Kerik (Respondent’s chief investigator, FF 10), “d[id] not show any connection between observational boundaries or Notice and Cure procedures and election fraud.” FF 43. In his Brief, Respondent asserts that Mr. Kerik’s documents showed that deceased people voted in the 2020 Pennsylvania election, and this evidence “was admitted for Mr. Giuliani’s state of mind as to the existence of fraud.” R. Br. at 13; *see id.* at 14. While Mr. Kerik’s evidence may bear on Respondent’s state of mind, we agree with the Hearing Committee that this evidence—unrelated to mail-in voting—does not support Respondent’s argument that Notice and Cure and the observational barriers were part of a scheme to illegally count mail-in votes.

Respondent takes exception to Finding of Fact 47, in which the Hearing Committee found that there were no facts to support the assertion that Notice and Cure was part of a scheme to harm the Trump campaign. However, here again he cites no record evidence of such a scheme to support his exception to this Finding of Fact. Instead, he argues only that he “is entitled to his opinion why certain counties utilized the Notice and Cure procedure and other counties did not as it was thought to be unlawful to do so.” R. Br. at 14. Thus, without any actual evidence of the

widespread scheme he decried, Respondent attempted to substitute his opinion for facts. But “factual allegations [in a complaint] must be enough to raise a right to relief above the speculative level . . . .” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).<sup>19</sup>

We agree with the Hearing Committee that the Pennsylvania litigation was based “only on speculation, mistrust, and suspicion.” FF 36. In other words, Respondent proffered no facts to support the claims he made and his opinion that election impropriety occurred does not meet the requirements for filing a lawsuit. Given this, after an objective appraisal of the merits, a reasonable lawyer would have concluded that there was not a faint hope of success of prevailing on the argument that the Defendants engaged in a scheme to steal the Pennsylvania election by counting defective ballots, or that the observational barriers were used to avoid detection of the alleged scheme.

### **3. *The Requested Relief***

Respondent argues that we should not focus on the most extreme requested relief because he “had no way of knowing at the initial stage of the litigation how

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<sup>19</sup> *Twombly* and *Iqbal* set the pleading standard required to survive a motion to dismiss. We are applying a standard we believe is more rigorous and applicable to the question at hand: whether, after an objective appraisal of the merits, a reasonable attorney would have concluded that there was not a faint hope of success. We cite *Twombly* and *Iqbal* as general background on the requirement to plead facts, not speculation.

many ballots had been cured in those counties that had utilized the Notice and Cure procedure” and that no one could state for certain that there were not more than 80,000 cured ballots. R. Br. at 24-25. He asks us to focus on what he characterizes as “more modest and undisputedly permissible remedies,” and to consider the more extreme relief as akin to the prosaic request for “[a]ny and such other further relief that this Court deems equitable and just or to which Plaintiffs might be entitled.” R. Br. at 25, 27-28.

We disagree. Respondent argued to Judge Brann that there was “widespread, nationwide voter fraud,” DCX 08 at 0015, that the Pennsylvania election had been stolen, and that ballots counted without close supervision from partisan observers should be cancelled. *Id.* at 0027. He told Judge Brann that he had already identified “ten times more votes that we need” to change the election result, and asserted that he was still getting complaints. *Id.*<sup>20</sup> Respondent made the scope of the requested

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<sup>20</sup> Respondent argues that we should consider the compressed time frame of the underlying events when considering the charges against him: “It would be an impractical burden to place on an advocate who enters an appearance at the twelfth hour in a [fast] moving election law case to investigate each and every allegation.” R. Brief at 36. But Respondent did not admit to any uncertainty regarding the relevant facts in his argument before Judge Brann. He did not suggest that he *might* uncover evidence that the election had been stolen, and that there *might* be a basis to argue that votes canvassed without close inspection should not be counted. There was no such caution in the Second Amended Complaint or in his argument. At a minimum, he wanted Judge Brann to throw out 680,770 ballots that were processed by the Allegheny and Philadelphia County Boards of Elections because Trump poll watchers had not closely observed those votes being canvassed. FF 28; *see* DCX 08



relief clear during argument before Judge Brann. It is worth quoting at length Respondent's own words used in the representations and arguments he made to the federal district court. The lack of factual or legal support for the legal claims advanced and the relief sought are apparent throughout.

Respondent conflated and misstated the law regarding Notice and Cure and observational barriers:

We're asking that the votes that were counted without inspection,<sup>21</sup> which are approximately 680,000 votes, be deemed null and void, as you would with any violation of the absentee ballot requirement.

And it always is somewhat unfair to the person who hasn't [sic] canceled, but if there's something wrong with an absentee ballot, that ballot is not counted.

DCX 08 at 0107.

Respondent asserted widespread premeditated misconduct with no factual basis:

And in this particular case, Your Honor, it was a plan that was carried out in two different jurisdictions, not in others, to make certain that uniformly Republicans got no opportunity to observe the count.

The conduct was egregious. The conduct was premeditated. The conduct was planned. They have to have gotten those barriers beforehand. They couldn't have just done it on the spur of the moment.

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at 0112, 0134. The tight time frame therefore does not excuse Respondent's conduct.

<sup>21</sup> It is important to note that when Respondent referred to the need for "inspection," he was talking about close observation by partisan observers.

And the purpose was to have those ballots examined in secret so that only a Democratic officeholder would get to see it in just two counties and no place else in the state.

*Id.* at 0107-08.

Despite his arguments now, Respondent did in fact ask the court to invalidate hundreds of thousands of ballots based on supposedly egregious conduct, even though he had no evidentiary support:

I heard the representative of Chester County, I believe it was, or was it Delaware, I'm not sure, say that that didn't happen in their county. If that's the case, we would consider dropping that county from the lawsuit.

But the reality is that we're not asking for the entire vote to be canceled, we're asking that the remedy be the remedy that is usually applied when there's a violation of the rules with regard to absentee ballots. And this is an egregious violation, a planned violation, and the remedy is really required and is draconian because their conduct was egregious. Whoever heard of 600,000, 700,000 absentee ballots not being examined? It never happened in American history.

So the scope of the remedy is because of the scope of the injury. We're not asking the entire election be reversed. But these ballots were not examined, and that is not just a state issue, that's a due process issue.

*Id.* at 0108.

Respondent repeatedly combined factually unsupported claims with inaccurate conflation of legal standards:

We would contend that one of the fundamental tenets of a fair election in the United States is the ability to inspect, particularly, mail-in ballots, which are seen as inherently difficult, fraudulent. You can go to all the authorities, we've been afraid of that for 20 years.

Now we have it, and the only way we can police these ballots, there's only one way, there's the inspection. If you're going to make a mockery of the inspection, I don't know where we're going to go. I mean, as far as we're concerned, Your Honor, those ballots could have been for Micky Mouse. We have no idea, have no idea. This has never happened before.

*Id.* at 0108-09.

Respondent argued factually unsupported claims of a premeditated scheme (for which he had no factual basis) that extended to multiple jurisdictions and targeted Republicans, even expanding the number of votes he sought to have invalidated:

And it didn't -- and the reason I point it out, that it happened in other states for which I was personally criticized, is because there was a connection here. There's a connection between Philadelphia and Pittsburgh. And then exactly the same thing happened in Detroit at the same time and exactly the same thing in Milwaukee and exactly the same thing in Nevada.

Republicans were uniformly refused the almost obvious right to inspect an absentee ballot. I've never heard of that before, that an absentee ballot wasn't examined, and it was done for a specific purpose.

If that ballot were a perfectly fine ballot, Your Honor, why wouldn't they have invited the 18 Republican inspectors -- there were 20 or 30 that they were keeping in a pen -- hey, take a look at it, it's a real good ballot.

And then if you look at where they were and where they came, they started the process 800,000 votes, 700,000 votes behind, and they caught up in counting a lot of those ballots very furiously. Some of our witnesses will say that they saw them not even look at the envelope,

just throw it in a bin, throw it in a bin, throw it in a bin, throw it in a bin.

*Id.* at 0109-0110. In short, Respondent tried to convince Judge Brann that he had evidence that would change the result of the presidential election in Pennsylvania.

As discussed further below, we agree with the Hearing Committee that Disciplinary Counsel proved by clear and convincing evidence that an objective review of the record shows that there was no evidence that the defendant county boards of elections engaged in a scheme to count illegal mail-in votes, or that illegal mail-in votes were cast or counted in amounts sufficient to change the outcome of the election, and thus, a reasonable lawyer would have concluded that there was no likelihood of disenfranchising hundreds of thousands of Pennsylvania voters and changing the result of the Pennsylvania election.

#### **4. *The Notice and Cure Ballots***

Respondent does not contest the estimate that there were no more than 10,000 cured ballots, in an election decided by 80,000 votes. FF 48; *see* R. Br. at 14-15. Therefore, even assuming that Notice and Cure were determined to be unlawful, and the cured votes would not be counted, and further assuming that all cured votes were considered Biden votes, there is no evidence that there were enough cured votes to change the outcome of the election.<sup>22</sup>

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<sup>22</sup> Respondent asserts that the Hearing Committee erred in concluding in Finding of Fact 21 that Notice and Cure was not linked to widespread improper voting. But he offers nothing other than his belief that Notice and Cure was improper, and that an

In an effort to reduce the 70,000-vote gap, Respondent argues for the first time before the Board that he should have sued the counties that did not offer Notice and Cure, claiming that he failed to catch Mr. Hicks' mistake in not making these claims: "[a]dding the estimated 6,500 to 10,000 of cured ballots to an unknown number of ballots that were not allowed to be cured, produces an unknown number of ballots. Thus, an argument that this could have affected the Pennsylvania election result would not be frivolous." R. Br. at 14-15 (disputing Findings of Fact 48 and 49).

But arguing that he should have made a different argument is not a defense to the charge that the argument he did make was frivolous. In addition, this new argument directly contradicts Respondent's testimony to the Hearing Committee that "Mr. Hicks didn't want to sue those counties [that did not allow Notice and Cure] because those counties were following the letter of the law, and it's the counties that allowed the cure that weren't. So, his thinking was that they were the ones creating the injury." Tr. 497. When asked why his clients did not sue to have

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"unknown number" of cured ballots were counted. We see no reason to disturb the Hearing Committee's conclusion.

Respondent engages in a cribbed reading of Finding of Fact 34, to argue that the Hearing Committee should not have concluded that "despite the lack of proof, [Respondent] sought an order prohibiting the defendants from counting ballots that had been 'cured.'" R. Br. at 11. In context, it is clear that the Hearing Committee concluded that despite the lack of proof of fraud, Respondent sought to disenfranchise hundreds of thousands of voters. *See* FF 32 ("pre-litigation investigation unearthed no evidence of systemic fraud," no "credible proof that observational boundaries or Notice and Cure procedures facilitated widespread fraud").

their votes counted, Respondent testified that they did not believe that their counties had acted improperly in not counting their ballots. Tr. 499-500. Respondent's new argument also contradicts an argument he makes later in his brief, which was consistent with his hearing testimony, that his clients who were denied Notice and Cure sued the counties who allowed it because the clients thought Notice and Cure was improper. R. Br. at 24-25. This was not a mistake that Respondent failed to catch, this was a considered decision.

Moreover, it is difficult to see how Respondent could have sued those counties that did not offer Notice and Cure because the Pennsylvania Supreme Court had already ruled that Notice and Cure was not required. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d at 374. Indeed, Respondent quotes *Boockvar* on this very point on page 18 of his brief:

[T]he Election Code . . . does not provide for the “notice and opportunity to cure”. . . . To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, *we agree that the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature.*”

*Id.* (alterations and emphasis added by Respondent). We therefore reject Respondent's attempt to disclaim responsibility for the Notice and Cure claims, and to recast them as Mr. Hicks' error.

## **5. The Observational Barriers**

Respondent argues that he had a reasonable basis for arguing “that those ballots which were not observed when opened and counted should be invalidated,”

because observation was required under Pennsylvania law and “the democratic ideal and premise that free and fair elections should be observed.” R. Br. at 23-24. But the Pennsylvania Supreme Court had already ruled that the observation at issue complied with Act 77. Respondent’s argument that Pennsylvania should have permitted closer inspection does not present a Constitutional issue. Also, Respondent had no evidence from anyone that illegal ballots were cast and counted.

Respondent argues that he “was hardly the first counsel to request an injunction precluding certification and/or ordering certification based on the legal votes.” R. Br. at 26-27. However, the cases cited in support of this argument only serve to highlight the factual deficiencies supporting Respondent’s Pennsylvania arguments.

*Bolden v. Potter*, 452 So.2d 564, 567 (Fla. 1984), the only cited case addressing allegations of fraud, involved absentee vote-buying in a local school board primary election. The Florida Supreme Court invalidated all absentee ballots based on *evidence* of blatant election fraud that “permeated a substantial part of this absentee-election process”—including that over ten percent of the absentee voters admitted that their votes had been bought (46 out of 381). In the instant matter, Respondent does not identify any illegal mail-in ballots, or any other facts, showing that fraud permeated a substantial part of the mail-in voting process.

In *Krieger v. City of Peoria*, 2014 WL 4187500 (D. Ariz. Aug. 22, 2014), a candidate was accidentally omitted from two versions of absentee ballots, and to remedy that issue the city council decide that a third, correct ballot would be mailed

to all voters, and that votes cast on the first or second (incorrect) ballots would be counted unless the voter submitted the third ballot. *Id.* at \*1. The court ordered a new election, after finding that an election conducted with ballots that omitted a candidate’s name was “fundamentally unfair.” *Id.* at \*6-7.

Finally, *Baber v. Dunlap*, 349 F. Supp. 3d 68 (D. Me. 2018) provides no support to Respondent. There, the plaintiffs challenged the constitutionality of Maine’s ranked choice voting system and requested that the candidate with the most first place votes on ballots be declared the winner, without application of the ranked choice procedure. *Id.* at 73-74. There were no allegations of fraud, and no argument that voters should be disenfranchised.

None of these cases support Respondent’s argument here.

## **6. *The Limited Reach of Rule 3.1***

Before closing our discussion of Rule 3.1, we are compelled to reiterate our conclusion in *In re Pearson*—where the respondent’s prosecution of a lawsuit seeking over \$67 million in damages for a lost pair of pants violated Rule 3.1—that Rule 3.1 does not chill zealous advocacy:

It is important to stress, however, that this is a narrow conclusion we reach on these particular facts. It should not be read to limit the right of counsel to argue in good faith, creatively, to expand the law. Courts cannot reinterpret the law if no one constructively raises new and novel legal issues. The full development of the law requires as much. Generations of lawyers have been inspired by such litigation, and rightly so. The Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), eliminated the “separate but equal” doctrine, but when *Brown* was filed, *Plessy v. Ferguson*, 163 U.S. 537 (1896), was good law. More recently, *Obergefell v. Hodges*, 135 S. Ct.



2584 (2015), opened marriage to same-sex couples. Merely asserting a claim that conflicts with existing law is not sanctionable for that reason alone; Rule 3.1 recognizes that a lawyer can permissibly advocate for a “good-faith . . . extension, modification, or reversal of existing law.” *Brown, Obergefell*, and a host of more mundane cases appropriately fall within the permissive scope of the Rule. Lawyers who seek to change or redefine the law act pursuant to one of the most noble traditions of our profession. We applaud that practice.

*In re Pearson*, Board Docket No. 15-BD-031, at 14-15 (BPR May 23, 2018), *recommendation approved*, 228 A.3d 417. To further illustrate this point, we note that since the *Pearson* Board Report six years ago, the Supreme Court overturned what legal scholars, lawyers and the courts accepted as settled law, specifically *Roe v. Wade* and *Planned Parenthood v. Casey*, in *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

More specifically to the instant matter, there is nothing inherently improper in challenging election results, even in a Presidential election. Political candidates, like anyone else, are entitled to seek assistance from learned counsel to obtain relief from the judicial system. Counsel are entitled to make arguments to advance their client’s interest, to include putting forth novel arguments in support of their position, without regard to how that interest might be perceived by others, provided that those arguments are supported by law and fact. Respondent violated Rule 3.1 not because he challenged the results of the Pennsylvania election, and not because he did so in federal court, but rather, because he did so without the requisite factual basis. He did not argue for an extension of the law; he argued without a basis in fact.

**E. Disciplinary Counsel Proved by Clear and Convincing Evidence that Respondent Violated Pennsylvania Rule 8.4(d).**

Pennsylvania Rule 8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. Frivolous litigation is prejudicial to the administration of justice. *See, e.g., Office of Disciplinary Counsel v. Altman*, 228 A.3d 508, 513-14 (Pa. 2020) (violations of Rule 8.4(d) for filing meritless request for attorney’s fees and motion for protective order to preclude discovery). Respondent does not argue otherwise, and asserts only that the Board should not find a Rule 8.4(d) violation if it does not find Rule 3.1 violation. We agree with the Hearing Committee that Disciplinary Counsel proved by clear and convincing evidence that Respondent’s frivolous filings were prejudicial to the administration of justice.

**IV. SANCTION**

The Hearing Committee recommended that Respondent be disbarred. Disciplinary Counsel supports that recommendation. Respondent argues that he should not be disbarred, but does not advocate for any specific sanction.

Although Respondent violated the Pennsylvania Rules, District of Columbia law fixes the sanction to be imposed on him. *See In re Tun*, 286 A.3d 538, 543 (D.C. 2022).

**A. Respondent’s Due Process Argument**

Before we address Respondent’s sanction, we first consider his argument that he was denied due process because the Hearing Committee “based its sanction of disbarment, at least in part, on the uncharged claim that he undermined democracy

and engaged in a civil conspiracy to undermine the legitimacy of the election.” R. Br. at 28. In support of this argument, Respondent relies on Disciplinary Counsel’s closing argument, in which it asserted that the Pennsylvania federal court litigation was “part of a larger action to sort of discredit the results of the 2020 election,” Tr. 1038, that Respondent engaged in a “civil conspiracy” by deciding “on November 4 . . . to challenge the results of this election, *before they had any evidence*,” Tr. 1231 (emphasis added by Respondent), that Respondent “attempted to undermine the legitimacy of a presidential election, without a basis to do so,” Tr. 1236, and arguing that this “was a coordinated effort to undermine the legitimacy of the election. And if . . . we don’t believe in elections in this country, we’ve lost our democracy,” Tr. 1239. R. Br. at 28-29. Respondent objected to this argument at the hearing noting that: “Nowhere in the charges does it charge [Respondent] with undermining democracy, with destroying democracy,” adding that “it’s a little unfair . . . for that to be a factor in your calculus of the appropriate sanction.” R. Brief at 29 (quoting Tr. 1247).

Respondent complains that the Hearing Committee improperly based its sanction recommendation on uncharged conduct of engaging in a civil conspiracy and undermining democracy, citing the following in the Hearing Committee Report:

“We cannot blind ourselves to the broader context in which [Respondent]’s misconduct took place. It was calculated to undermine the basic premise of our democratic form of government: that elections are determined by the voters. The Pennsylvania claims were carefully calibrated to blend into a nationwide cascade of litigation intended to overturn the presidential election. . . .

[Respondent]’s effort to undermine the integrity of the 2020 presidential election has helped destabilize our democracy. His malicious and meritless claims have done lasting damage and are antagonistic to the oath to ‘support the Constitution of the United States of America’ that he swore when he was admitted to the Bar.”

R. Brief at 29-30 (omission in original) (quoting HC Rpt. at 36-37).

Respondent is correct that he is entitled to notice of the alleged misconduct. *In re Francis*, 137 A.3d 187, 190 (D.C. 2016) (“[T]he specification of charges . . . [must] be ‘sufficiently clear and specific to inform the attorney of the alleged misconduct.’” (quoting D.C. Bar R. XI, § 8(c))). The Specification of Charges here put him on notice that Disciplinary Counsel alleged that he attempted to overturn the presidential election results in Pennsylvania. *See* Amended Spec. at 2 ¶ 5 (alleging that “with Respondent’s assistance, Plaintiffs filed a lawsuit that sought to overturn the results of the Pennsylvania presidential election”), 7 ¶ 16(e) (alleging that Respondent sought “[a]n order, declaration, and/or injunction that the results of the 2020 presidential election were defective and providing that the Pennsylvania General Assembly should choose the state’s electors”), 7 ¶ 16(f) (alleging that Respondent sought “[a] declaration that Donald Trump was the winner of the legal votes cast in Pennsylvania in the November 3, 2020, election and thus the recipient of Pennsylvania’s electors”).

Disciplinary Counsel did not charge Respondent with violating the oath he took as a member of the D.C. Bar to “support the Constitution of the United States.” *See* D.C. Bar R. XI, § 2(b) (conduct that “violate[s] the attorney’s oath of office” constitutes misconduct and is grounds for discipline). Yet Disciplinary Counsel

argued in opening that Respondent “weaponized his law license to bring a frivolous action in an attempt to undermine the Constitution to which he, like all members of the District of Columbia Bar, took an oath to support.” Tr. 31. Disciplinary Counsel repeated this theme in closing, Tr. 1233-35, and invited the Hearing Committee to consider the larger “continuum” into which Respondent’s conduct fits, even though that evidence was outside the record:

And look -- I mean, you . . . cannot be oblivious to what has gone on in this country since November 3rd of 2020, and the harm that [Respondent] initiated, which is part of a continuum. It goes from filing lawsuits that are all unsubstantiated to . . . efforts to get the vice president not to certify the results of the election, to what we started --

CHAIRMAN BERNIUS: We’re getting a little beyond the record here, though right? . . .

MR. FOX: I don’t think it’s beyond the record . . . to look at the events that everybody in this country knows occurred, and this was part of the continuum. I think it was a harm -- a fundamental harm to the fabric of the country that could well be irreparable. But it certainly is something . . . that this hearing committee, the Board and all through the court ought to say cannot be tolerated; that certainly in the future any lawyer that engages in this kind of misconduct, harming the country as this has done, has at least got to realize that his or her law license is at risk. And, yes, it’s unprecedented but I think the harm that was done is unprecedented.

Tr. 1234-35.

We agree with the Hearing Committee Chair that evidence of a “continuum” stretching from November 3, 2020, to January 6, 2021 (and perhaps beyond) is outside the record presented to the Hearing Committee. Indeed, the Specification of

Charges focuses on the very limited window of time from November 3, 2020 (Election Day) to November 27, 2020 (when the Third Circuit affirmed Judge Brann’s order denying leave to amend the First Amended Complaint). The relatively limited scope of the facts and charges alleged in the Specification of Charges, and the absence of evidence regarding a “continuum” of alleged misconduct necessarily limits our review because “an attorney can be sanctioned only for those disciplinary violations enumerated in formal charges,” *In re Smith*, 403 A.2d 296, 300 (D.C. 1979), and our consideration is limited to the evidence presented to the Hearing Committee. Board Rule 13.7 (“Review by the Board shall be limited to the evidence presented to the Hearing Committee, except in extraordinary circumstances determined by the Board.”).

We are, of course, aware of other efforts to change the outcome of the 2020 Presidential election, the persistent disagreements over the integrity of that election, and the disconcerting distrust of election processes among some voters. However, Disciplinary Counsel has not shown why our sanction analysis should consider other events intended to change the outcome of the election. Most importantly, consideration of such evidence would not change our recommendation. As discussed below, we recommend disbarment despite our more limited inquiry because Disciplinary Counsel proved by clear and convincing evidence that Respondent sought to disenfranchise hundreds of thousands of Pennsylvania voters without the slightest factual basis for doing so.

## **B. The Sanction Analysis**

The sanction imposed in an attorney disciplinary matter must protect the public and the courts, maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. *See, e.g., In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc); *In re Martin*, 67 A.3d 1032, 1053 (D.C. 2013); *In re Cater*, 887 A.2d 1, 17 (D.C. 2005). “In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney.” *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc) (citations omitted); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). In a sanction determination, the Court typically assesses (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client resulting from the misconduct; (3) whether the misconduct involved dishonesty; (4) violations of other provisions of the disciplinary rules; (5) previous disciplinary history; (6) whether or not the attorney acknowledges his misconduct; and (7) circumstances in aggravation or mitigation. *See, e.g., Martin*, 67 A.3d at 1053. Finally, the sanction must comply with the comparability standard of D.C. Bar R. XI, § 9(h)(1), which provides that the sanction must not “foster a tendency toward inconsistent dispositions for comparable conduct” or “otherwise be unwarranted.” *See In re Murdter*, 131 A.3d 355, 359 n.1 (D.C. 2016) (per curiam) (appended Board Report); *see also Hutchinson*, 534 A.2d at 923-24.

## 1. *The Seriousness of the Conduct at Issue*

The seriousness of Respondent's misconduct cannot be overstated. Relying "only on speculation, mistrust, and suspicion," FF 36, not facts, he attempted to deprive hundreds of thousands of Pennsylvanians of their right to vote. Before the Hearing Committee he asserted that hundreds of thousands of mail-in votes should not be counted because partisan observers did not closely witness their canvassing, even without evidence that any voter had done anything wrong: "if [ballots] weren't verified properly, they're not counted. The [voter] might not have done anything wrong but the person counting did something wrong and therefore they're not counted." Tr. 334-35. He had argued to Judge Brann that "the votes that were counted without inspection, which are approximately 680,000 votes, be deemed null and void, as you would with any violation of the absentee ballot requirement." DCX 08 at 0107. But there was no violation of Act 77. The Pennsylvania Supreme Court had already ruled that close observation was not necessary and that individual ballot challenges were not permitted during canvassing. *In re Canvassing Observation*, 241 A.3d at 350-51.

Respondent was not making an argument regarding the precise contours of Act 77. Relying on his legally unsupported belief that a ballot that was not closely observed during canvassing could not be counted, Respondent launched a full-throated attack on the integrity of the Pennsylvania election, telling Judge Brann that the election had been stolen. In his argument to Judge Brann, Respondent recognized that his request to invalidate hundreds of thousands of votes was



“draconian,” DCX 08 at 0108, but argued that it was required because the Defendants’ misconduct (of which there was no evidence) was “egregious”:

If this is allowed without serious sanction, meaning the canceling of these ballots, this will become an epidemic. I mean, you give them an inch, they’re going to take a mile. They’ve already taken a mile. They take a mile, they’re going to take a whole city. This cannot be allowed.

*Id.* at 0027.

In considering the seriousness of Respondent’s effort to disenfranchise hundreds of thousands of Pennsylvania voters, we consider the Supreme Court’s observation that “for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.” *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote is a foundational right “that helps to preserve all other rights.” *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996). The “right to vote is cherished in our nation because it ‘is preservative of other basic civil and political rights.’” *Pierce*, 324 F. Supp. 2d at 695 (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

The evidence clearly and convincingly establishes that Respondent sought to deprive hundreds of thousands of Pennsylvania voters of this most precious, cherished, foundational right, without the factual basis for doing so. He did so, even

though he acknowledged that the voters themselves might not have done anything wrong. We need not consider Disciplinary Counsel’s argument that this was part of a larger continuum, in order to conclude that Respondent’s misconduct in the Pennsylvania litigation was of the utmost seriousness.

**2. *Prejudice to the Client***

There was no prejudice to Respondent’s client here.

**3. *Whether the Conduct Involved Dishonesty***

Disciplinary Counsel did not charge Respondent with violating Pennsylvania Rule 8.4(c), which prohibits “conduct involving dishonesty, fraud, deceit, or misrepresentation.” The Hearing Committee concluded that there was not clear and convincing evidence that Respondent “intentionally lied to the District Court in connection with the Pennsylvania litigation,” and it recognized that “he was not charged with doing so.” HC Rpt. at 35. However, the Hearing Committee concluded that Respondent’s “hyperbolic claims of election fraud and the core thesis of the Pennsylvania litigation were utterly false, and recklessly so.” *Id.* As discussed above, we agree with the Hearing Committee that Respondent had no factual basis to assert that the election had been stolen as part of a scheme by the defendant county boards of elections, and that hundreds of thousands of ballots should be discarded. Due to the absence of a specific charge that Respondent was dishonest, and to avoid any suggestion that we considered uncharged misconduct in our sanction recommendation, we do not consider whether Respondent’s baseless arguments constituted dishonesty. However, the absence of a specific dishonesty charge in the

Specification of Charges does not in any way diminish the seriousness of Respondent's conduct.

**4. *Violations of Other Provisions of the Disciplinary Rules***

Respondent violated Rules 3.1 and 8.4(d).

**5. *Previous Disciplinary History***

Respondent has no record of prior discipline.

**6. *Whether or Not the Attorney Acknowledges his Misconduct***

As the Hearing Committee discussed, Respondent does not appreciate the seriousness of his misconduct. He testified that “under the circumstances,” he and others “did the best possible job we could do” and that he was “shocked and offended that this is happening to me.” Tr. 343. He portrayed himself as a defense lawyer who takes on unpopular cases, Tr. 1257, and he suggested that this disciplinary prosecution is part of a three-to-four-year campaign of persecution, including “false charges brought against [him] by the federal government that have now been dismissed, a false claim brought against [him] for January 6th that was dismissed by the Court.” Tr. 68. Before the Hearing Committee, Respondent acknowledged that “[i]t is a terrible attack on democracy to unfairly attack an election.” Tr. 1254-55. He followed that with his observation that “[i]t’s an even worse attack on a democracy to allow an election to be stolen and not respond to it.” Tr. 1255. Nothing in the record supports Respondent’s contention that his conduct in Pennsylvania was an attempt to repel an attack on democracy, and his testimony

before the Hearing Committee shows that he does not even begin to realize the seriousness of his conduct.

**7. *Circumstances in Aggravation or Mitigation***

In mitigation of sanction, Respondent “refers the Board to evidence of his distinguished career in public service which was presented as part of the mitigation portion of the hearing (Tr. 859-875).” R. Br. at 40; *see also id.* at 40-43. The Hearing Committee considered Respondent’s conduct following the September 11 attacks as well as his prior service in the Department of Justice and as Mayor of New York City. Recognizing the significance of Respondent’s prior service, the Hearing Committee observed that “all of that happened long ago,” and concluded that “[t]he misconduct here sadly transcends all his past accomplishments.” HC Rpt. at 37-38.

We agree with Respondent and the Hearing Committee that Respondent’s career reflects exemplary service to the nation and specifically to the City of New York. However, no amount of prior good works is sufficient to mitigate Respondent’s efforts to disenfranchise hundreds of thousands of Pennsylvania voters.

**8. *Sanctions in Cases Involving Comparable Misconduct***

The Court has imposed suspensions of between thirty and ninety days in cases involving violations of Rules 3.1 and 8.4(d). *See, e.g., Spikes*, 881 A.2d at 1127-28 (thirty-day suspension); *In re Thyden*, 877 A.2d 129, 142-45 (D.C. 2005) (thirty-day suspension); *In re Yelverton*, 105 A.3d at 427 (thirty-day suspension with fitness for the respondent’s “pattern of abusive litigation” and his frivolous litigation during the

disciplinary proceedings); *Pearson*, 228 A.3d at 429 (ninety days). Although those cases all involved the Rule violations found here, the facts in those cases are not remotely comparable to those present here.

*Yelverton* involved the respondent's frivolous filings seeking a mistrial in a criminal assault case (on behalf of a client who was merely a witness) after the defendant had been acquitted. 105 A.3d at 417. In *Pearson*, the respondent sought \$67 million in damages from a dry cleaner for losing a pair of pants, and alleged violations of consumer protection statutes based on signs representing "satisfaction guaranteed" and "same day service." 228 A.3d at 420-22. The respondent in *Spikes* filed a frivolous defamation claim and burdened the federal trial and appellate courts in more than a de minimis way. 881 A.2d at 1126-27. *Thyden* involved a frivolous action in a bankruptcy proceeding that burdened the administration of justice, as well as neglect of a client matter. 877 A.2d at 142-45. Given these factual differences, these cases are not useful in our comparability analysis. See D.C. Bar R. XI, § 9(h) (requiring consistency between cases involving comparable misconduct).

Lacking factually comparable cases, we focus our sanction analysis on the need to maintain the integrity of the legal profession, and deter the respondent and other attorneys from engaging in similar misconduct. See *Hutchinson*, 534 A.2d at 924; *Martin*, 67 A.3d at 1053; *Cater*, 887 A.2d at 17. In *In re Addams*, the en banc Court emphasized "that the principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general." 579 A.2d 190, 194 (D.C. 1990) (en banc) (quoting *In re Wilson*, 409 A.2d 1153,

1155 (N.J. 1979)). In *In re Pels*, the Court recognized that in *Addams*, the Court had weighed the concern of seemingly unjust application of a categorical sanction to misappropriation cases against its “concern . . . that there not be an erosion of public confidence in the integrity of the bar.” 653 A.2d 388, 398 (D.C. 1995) (quoting *Addams*, 579 A.2d at 198).

After weighing these competing concerns, *Addams* held that lenient treatment of embezzlers would undermine public confidence in the legal profession. The Court categorized the act of misappropriation as embezzlement and observed that “[w]hen a member of the bar is found to have betrayed his high trust by embezzling funds entrusted to him, disbarment should ordinarily follow as a matter of course.” *Addams*, 579 A.2d at 193; *see also In re Gray*, 224 A.3d 1222, 1234-35 (D.C. 2020) (per curiam) (reiterating that “[t]he rule of *Addams*” in misappropriation cases “is designed to protect all clients, to enhance public trust and confidence in the integrity and trustworthiness of all lawyers” in such cases of misappropriation).

Although this is not a misappropriation case, the nature of Respondent’s conduct here is grave. Like the *Addams* Court, we conclude that the appearance of a tolerant attitude toward lawyers who attempt to disenfranchise hundreds of thousands of voters without a factual basis “would give the public grave cause for concern and undermine public confidence in the integrity of the profession and of the legal system.” *Addams*, 579 A.2d at 193. In order to maintain public confidence in the integrity of the profession, and to deter others who might be inclined to similar

frivolous attempts to deprive their fellow citizens of the right to vote, we recommend that Respondent be disbarred.

## V. CONCLUSION

For the foregoing reasons, the Board concludes that Respondent violated Pennsylvania Rules 3.1 and 8.4(d), and we recommend that he be disbarred from the practice of law in the District of Columbia. We further recommend that Respondent's attention be directed to the requirements of D.C. Bar R. XI, § 14, and their effect on eligibility for reinstatement. *See* D.C. Bar R. XI, § 16(c).

### BOARD ON PROFESSIONAL RESPONSIBILITY

By: *Bernadette C. Sargeant*  
Bernadette C. Sargeant, Chair

All members of the Board concur in this report and recommendation.