IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*, Plaintiffs, v. KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, *et al.*, Defendants.	Civil Action No. 2:20-cv-00966-NR Judge J. Nicholas Ranjan

SECRETARY OF THE COMMONWEALTH KATHY BOOCKVAR'S RESPONSE TO PLAINTIFFS' NOTICE OF REMAINING VIABLE CLAIMS AND PROPOSED DISPOSITION PLAN

The Commonwealth and the counties are working hard to prepare to manage the upcoming election consistent with the Election Code and the definitive interpretations of the Code recently provided by the Pennsylvania Supreme Court. Instead of accepting the Pennsylvania Supreme Court's recent rulings, Plaintiffs' September 20 notice seeks to keep their claims alive by suggesting an impermissibly narrow view of the Supreme Court's rulings, distorting the nature of their current claims, and ignoring the substantial jurisdictional, justiciability, and merits hurdles that have plagued their claims from the outset. Simply put, Plaintiffs seek to prosecute a case in federal court against state election officials based on speculation that those officials will intentionally violate the Election Code and that the Commonwealth's use of ballot dropboxes (which the Pennsylvania Supreme Court has held are permissible) will nonetheless invite voter fraud and other hypothetical criminal activity, thereby theoretically diluting validly cast votes. These claims cannot survive as a matter of fact or law. It is time for these claims to be put to rest and permit the Commonwealth to focus on the upcoming election.

This case is one of several cases that have been brought addressing voting issues in Pennsylvania. In its two prior decisions, this Court appropriately abstained from addressing several Election Code provisions, instead deferring to the then-ongoing proceedings in state court. *See* Aug. 23, 2020 Abstention Op. (ECF No. 409); Sept. 8, 2020 Op. Denying Prelim. Inj. (ECF No. 444). In doing so, the Court made various (and accurate) predictions as to the effect of the Pennsylvania Supreme Court's decision on the claims in this federal forum, namely that it would likely limit or moot Plaintiffs' claims in this case. *See* ECF No. 444 at 14-15 n.6.

On September 17, the Supreme Court of Pennsylvania issued a well-reasoned decision, finding, as most relevant here, that (i) counties are permitted under the Election Code to establish alternate ballot collection sites beyond just their main county office location, *see* Pa. Sup. Ct. Op. (ECF No. 446-1) at 17-20, (ii) ballots lacking inner secrecy envelopes ("naked" ballots) should not be counted, *see id.* at 48-53, and (iii) the Commonwealth's long-standing county residency requirement for poll watchers was constitutional, *see id.* at 58-62. The first ruling was consistent with Secretary of the Commonwealth Kathy Boockvar's August 19 guidance regarding the return of mail-in and absentee ballots, ECF No. 415-19, and the Secretary accepted the Supreme Court's second ruling and promptly directed all Pennsylvania counties that "naked" ballots should not be counted, *see* Ex. 1 (Sept. 17, 2010 Email from Deputy Secretary Jonathan Marks to all County Boards of Elections). That should end the matter as it relates to those issues. And as to other issues Plaintiffs believe persist, the Court should address the Secretary's and other parties' pending motions to dismiss and put an end to (or at least substantially narrow) this dispute.

Against that background, the Secretary proposes the following path forward to conclude this litigation. *First*, the Court should resolve the threshold jurisdictional, justiciability, and Rule 12(b)(6) issues that the Secretary briefed on multiple occasions (including in her motions to

dismiss and opposition to Plaintiffs' preliminary injunction motion, *see* ECF Nos. 263-64, 336, 424). *Second*, the Court should establish a schedule for motions for summary judgment regarding any claims that survive the pending motions to dismiss. There is no need for further discovery at this point; substantial discovery already took place and any remaining claims have been unquestionably narrowed by the Supreme Court's rulings. *Third*, the Secretary will address Plaintiffs' futile and prejudicial request to amend their Complaint pursuant to a schedule set by the Court, but for the reasons set forth herein, the Court need not delay resolution of this case because of Plaintiffs' futile amendment request.

PLAINTIFFS' REMAINING CLAIMS

On the three main issues relevant to this proceeding, the Pennsylvania Supreme Court unambiguously held as follows:

(i) **Dropboxes.** "[T]he Election Code permits county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes." ECF No. 446-1 at 20.

(ii) **"Naked" Ballots.** "[T]he mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid." *Id.* at 53.

(iii) **Poll Watchers. "**[T]he poll watcher residency requirement does not violate the state or federal constitutions," such that "the poll watcher residency requirement set forth in Section 2687(b) of the Election Code, 25 P.S. § 2687(b), [is] constitutional." *Id.* at 62.

Accordingly, there can be no doubt—and Plaintiffs do not dispute—that Plaintiffs' claims that drop-boxes are not allowed (Count I; First Am. Compl. ("FAC," ECF No. 234) ¶ 201) and that the poll watcher residency requirement is unconstitutional (Counts IV and V; FAC ¶¶ 223-36) are no longer viable, and their claim that "naked" ballots may not be counted is moot (Count I; FAC ¶ 201).

These three issues have always been at the forefront of litigation between these parties in both federal and state court, and the Pennsylvania Supreme Court's resolution should end this

federal litigation as well. Plaintiffs' September 20 notice, however, identifies a series of claims they still believe merit this Court's attention. While Plaintiffs grouped them in six categories, *see* Pls.' Notice ("Notice," ECF No. 448) at 2-11 (§ I.A-F), they are more properly grouped into just three buckets:

(1) Claims based on the potential for counties' "non-compliant" and "unequal" treatment of several absentee/mail-in ballot and ballot-application requirements. In subsections I.B, C, D, and F (and in the new ballot-signature claim they propose to add upon amendment, *see* Notice at 12-13), Plaintiffs assert claims that turn entirely on state law, predicting that the Secretary and counties will violate various Election Code provisions and disregard the Pennsylvania Supreme Court's recent decision in ways that will result in vote-dilution. Specifically, Plaintiffs suggest election officials will ignore requirements for absentee/mail-in ballots and/or ballot applications, and/or that counties will interpret and implement the Election Code in dissimilar ways that might result in unequal treatment of mail-in ballot applications and ballots themselves. Plaintiffs specifically cite Election Code provisions governing:

(i) the counting of "naked" ballots (which Plaintiffs suggest some or all counties may count notwithstanding the Supreme Court's recent and well-publicized ruling and the Secretary's notification of that ruling to all counties);

(ii) the counting of ballots cast by non-disabled voters that will allegedly be delivered by third parties (which Plaintiffs apparently believe is still a live issue notwithstanding this Court's prior observation that "everyone now agrees that the election code forbids third-party ballot delivery, and Secretary Boockvar has issued updated guidance clarifying that counties should only permit voters to return 'their own voted absentee and mail-in ballots,'" ECF No. 444 at 17 (emphasis & citation omitted);

(iii) the counting of ballots containing text, markings, or symbols on the secrecy envelope that reveal the elector's identity, political affiliation, or candidate preference (something Plaintiffs have never contended the Secretary has authorized);

(iv) the counting of ballots that do not contain a completed declaration that is signed and dated by the voter (same);

(v) the processing of ballot applications that Plaintiffs predict will not be verified in accordance with their view of Pennsylvania law (a purely state-law issue about which the Secretary has already issued guidance and for which Plaintiffs never sought an interpretation from Commonwealth courts); and

(vi) the predicted mishandling of voters who requested a mail-in/absentee ballot but who later attempt to vote in person on Election Day (a claim for which Plaintiffs' FAC blatantly mischaracterized the state of the Election Code during the June 2020 primary election based on changes which were not even in effect in the June 2020 primary and are not to take effect until November).

(2) Dropbox-related claims. Notwithstanding the Pennsylvania Supreme Court's conclusive finding that dropboxes are permitted under the Election Code, Plaintiffs claim in subsection I.A that three species of claims related to dropboxes remain: (i) that dropboxes (which are widely used throughout the country) are impermissible under the federal constitution because they enable hypothetical fraud and election tampering; (ii) allegedly "uneven use and implementation" of dropboxes (which the Pennsylvania Supreme Court made clear could be used in every county across the Commonwealth) violates Equal Protection; and (iii) the prediction that various counties will fail to comply with the Election Code's notice and site selection requirements (which Plaintiffs insist, without any statutory support, apply to dropboxes). *See* Notice at 2-4.

(3) Poll-watcher-related claims. Ignoring the Pennsylvania Supreme Court's clear finding that "the poll watcher residency requirement does not violate the state or federal constitutions," ECF No. 446-1 at 62, Plaintiffs attempt in subsection I.E of their notice to cabin the scope of that ruling to only their *facial* challenge to that requirement, and not to their *as-applied* challenge (which was based on nothing more than a statistical comparison of party registration in various Pennsylvania counties and premised on the wholly speculative notion that the absence of poll watchers of one's party will lead to unspecified in-person voter fraud at the polls). *See* Notice at 9-10. Plaintiffs also insist that their claims requesting poll watchers at dropbox locations survive and that the Election Code's silence on that issue is unconstitutional. *See id.* at 10.

PROPOSED PROCESS FOR RESOLVING THE REMAINING CLAIMS

If any of Plaintiffs' claims survive the Pennsylvania Supreme Court's rulings, those claims suffer from a host of flaws that this Court would need to address before entertaining any further measures, let alone an evidentiary hearing. The Secretary therefore respectfully requests that the Court apply the following procedure:

1. The Court should first resolve the pending motions to dismiss.

The Secretary's Motion to Dismiss the Amended Complaint for lack of jurisdiction and for failure to state claims remains unresolved. *See* ECF Nos. 263-64 (Motion & Memorandum), 336 (Reply). Before abstaining, this Court expressly declined to address the justiciability and merits arguments advanced by the Secretary, *see* ECF No. 409 at 12 n.3, and deferred those challenges again in denying Plaintiffs' request for a preliminary injunction, *see* ECF No. 444 at 12 n.5. But the flaws in Plaintiffs' claims—identified in the Secretary's prior motions—persist, and in fact some of those flaws are even more pronounced now that the Pennsylvania Supreme Court has definitively interpreted crucial provisions of the Election Code. In particular:

Plaintiffs lack standing because they allege only generalized grievances. The crux of most of Plaintiffs' remaining claims, including all of their claims pertaining to absentee/mail-in ballot and ballot-application requirements as well as their dropbox-related claims related to notice and site requirements, require this Court to predict whether state actors will comply with the Election Code. These are nothing more than generalized and hypothetical grievances that fall well short of Article III injury. *See FEC v. Akins*, 524 U.S. 11, 23-24 (1998) (observing that a general "interest in seeing that the law is obeyed" is not an injury-in-fact, and collecting cases); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (similar); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (explaining the Court's "reluctance" to entertain suits "claiming only harm to [the plaintiff's] and every citizen's interest in proper application of the Constitution

and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." (brackets in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992))). This Court has already made clear that "the mere possibility that individual county officials might disobey unambiguous state election code requirements does not rise to the level of federal constitutional concern." ECF No. 444 at 17-18 (citing *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020)). And just this past Friday, another federal district court dismissed similar claims brought by some of very same Plaintiffs (including the Trump Campaign and Republican National Committee) in a sister state, finding that "Plaintiffs' allegations are 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that fail to confer Article III standing." *Donald J. Trump for President, Inc. v. Cegavske*, --- F. Supp. 3d ----, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (quoting *Lance*, 549 U.S. at 442). Plaintiffs likewise have no right to persist with claims here where all they are seeking is to have state actors comply with the Pennsylvania Supreme Court's decision and the Election Code.

Nor do abstract predictions of "vote dilution" satisfy Article III's particularity requirement. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016) ("the injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete *and* particularized'") (emphasis in original). Again, the same district court that recently dismissed the Trump Campaign and RNC's similar claims observed: "Even if accepted as true, plaintiffs' pleadings allude to vote dilution that is impermissibly generalized. The alleged injuries are speculative as well, but their key defect is generality." *Trump*, 2020 WL 5626974, at *4 (citation omitted)); *see also id.* ("[P]laintiffs' claims of a substantial risk of vote dilution 'amount to general grievances that cannot support a finding of particularized injury as to [p]laintiffs.'" (brackets in original) (quotation and internal citation

omitted)). Plaintiffs have no right to persist in a lawsuit where all they are seeking is to have state actors comply with the Election Code in the future.

Plaintiffs fail to identify any impending, non-speculative injury. Even if Plaintiffs' claimed injuries amounted to anything more than generalized harm to the public at large, Plaintiffs have failed to allege that such injuries are "certainly impending," as Article III requires. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis & citations omitted); *accord City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Again, focusing first on Plaintiffs' claims based on the various ballot and ballot-application requirements, the entire premise of Plaintiffs' claims are that the Secretary and/or Pennsylvania's counties will ignore the Election Code and the recent Pennsylvania Supreme Court ruling and count ballots in a manner prohibited by the Code and contrary to that ruling. But the Court should not indulge such a presumption of illegality on the part of state actors.

Take, for example, Plaintiffs' curious insistence that their claims based on the illegal counting of "naked" ballots remain viable. Notice at 6-8 ("[A]ll of Plaintiffs' federal and state constitutional claims of voter dilution as they relate to non-compliant absentee and mail-in ballots remain viable."). Such claims necessarily imply that Defendants will refuse to comply with the Pennsylvania Supreme Court's ruling. But this is a wholly speculative proposition, particularly as the Secretary promptly withdrew her August 19 guidance that counties should count such ballots on the same day the Pennsylvania Supreme Court issued its decision. Ex. 1. Plaintiffs' only rejoinder is to opine that "[w]hat such removal means and whether the County Election Boards will follow suit remains an open question," Notice at 12, but such an "open question" is not enough to sustain federal claims, as this Court already recognized. *See* ECF No. 444 at 14-15 n.6 ("[I]f the Secretary's guidance is declared either lawful or unlawful by the Pennsylvania Supreme Court,

and the correct interpretation of the election code is then implemented uniformly across the counties, nothing remains of Plaintiffs' related federal claims in this case."); ECF No. 409 at 27 ("[A]ssuming Plaintiffs' equal-protection theory is legally viable, any such violation could be cured by adopting either Plaintiffs' interpretation or Defendants' interpretation of each disputed election-code provision. So long as that interpretation is shared and applied equally by all of Pennsylvania's counties, there would be no uneven treatment." (emphasis omitted)).

The same goes for Plaintiffs' unfounded fears that some counties might count ballots cast by non-disabled electors that were delivered by third parties. Again, this Court has already observed that such fears are unfounded:

> [E]veryone now agrees that the election code forbids third-party ballot delivery, and Secretary Boockvar has issued updated guidance clarifying that counties should only permit voters to return "***their own*** voted absentee and mail-in ballots."
>
> Given this, it appears that state law will afford Plaintiffs full protection from the "harm" of counties accepting in-person delivery of mail-in or absentee ballots by individuals other than the voter. Plaintiffs have not presented evidence that any Pennsylvania county is "likely" to disobey the unambiguous election code or the Secretary's clarifying guidance forbidding third-party delivery. And without such evidence, the mere possibility that individual county officials might disobey unambiguous state election code requirements does not rise to the level of federal constitutional concern.

ECF No. 444 at 17-18 (citations omitted) (emphasis in original). Again, for Plaintiffs to continue to suggest that the Secretary and counties will ignore this universal "agree[ment]" and guidance is pure speculation—and such speculation does not establish a justiciable claim under Article III.

Plaintiffs' ongoing challenges to dropboxes fare no better. As an initial matter, as this Court has recognized, Plaintiffs did not assert a facial challenge to the use of dropboxes. *See* ECF No. 409 at 26-27 n.6. Plaintiffs' remaining as-applied theories are instead based primarily on the suggestion that such dropboxes "enable ballot harvesting, third-party delivery, and/or fraud or other illegal casting or tampering of absentee and mail-in ballots." Notice at 2. But that assertion

again relies entirely on predictions that third parties will engage in criminal acts such as voter fraud, ballot harvesting, or the willful destruction of ballots and government property. *See Clapper*, 568 U.S. at 409-11; *Lyons*, 461 U.S. at 101-02. Again, that forecast is a bridge too far. *See Trump*, 2020 WL 5626974, at *4 (observing that "alleged injuries are speculative as well" and citing *Lujan*, 504 U.S. at 560). Indeed, there is a reason that Plaintiffs must rely on snippets of dicta from decades-old Supreme Court cases to make their case that the federal constitution permits the kind of *preemptive* federal intrusion into state election procedures that they seek in this case based on the mere *possibility* of voter fraud. *See, e.g.*, FAC ¶¶ 4, 23 (citing Supreme Court cases from 1962, 1963, 1964, and a plurality opinion from 2008). That is because there is almost no precedent for the idea that *theoretical* vote dilution based on the *potential* for voter fraud justifies the ceding of control over state elections to the federal courts.[1]

Finally, Plaintiffs' predictions that counties will misapply the rules related to circumstances in which voters who request mail-in or absentee ballots but later wish to vote in person underscores the extent to which they implore this Court to engage in unbridled speculation over the application of state election procedures. The FAC's core basis for this claim is Plaintiffs' contention that certain unidentified counties engaged in "misadministration" of the rules in this circumstance during the June 2020 primary. Notice at 10-11. But Plaintiffs ignore the dispositive fact that the relevant provisions of the Election Code on which they press their claims *were not even in effect during the June 2020 primary*. Rather, by the terms of Act 77, those provisions (which are

[1] Plaintiffs' challenge to the poll-watcher residency requirement is likewise premised on unfounded fears of unspecified fraud—in that case *in-person* voter fraud. That is, Plaintiffs' claims are not premised on a desire to actually serve as poll watchers themselves (such as in a county outside their residence), but instead on the speculative notion that conducting an election without sufficient poll watchers (as they claim they are unable to muster from their own party) would open the door to fraud. But again, Plaintiffs do not allege any such in-person voter fraud in the first place, let alone fraud that could be cured by having more in-person poll watchers.

undisputed) are not effective until November—at which time Plaintiffs predict counties will roundly ignore them in the very first election they will be in effect. At bottom, any such potential irregularities do not remotely rise to the level of a federal constitutional violation, *see infra* 11-12, but even supposing they did, it is entirely speculative that any such "misadministration" will occur, and the Court should not credit Plaintiffs' hypothetical claims of injury at this time.[2]

Plaintiffs' allegations fail to state actionable constitutional claims related to the election process. Plaintiffs' claims also merit dismissal pursuant to Rule 12(b)(6) for failing to state a plausible, actionable claim: even taken as true, Plaintiffs' claims amount to nothing more than "garden variety" election irregularities, which do not remotely rise to the level of federal constitutional violations. Even if one were to surmise for purposes of a motion to dismiss that one or more counties might deviate from the Election Code relating to certain of the ballot or ballot-application requirements cited by Plaintiffs, such "violations" are not actionable *federal* claims. *See, e.g.*, *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) ("If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss."); *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 643 (E.D. Pa. 2018) ("'[G]arden variety election irregularities' are not actionable under § 1983."); *Samuel v. V.I. Joint Bd. of Elections*, 2013 WL 842946, at *7 (D.V.I. Mar. 7, 2013) (collecting

[2] Recognizing the misstep in the Amended Complaint's allegations regarding the June primary, Plaintiffs now seek to amend their complaint for the second time, including to remove any allegations that counties improperly administered provisional ballots during the primary. *See* ECF No. 451-2 (Proposed Redline at ¶¶ 283-85). While the Secretary disputes that a second amendment at this stage is appropriate, Plaintiffs' argument in their notice that their provisional ballot claim remains alive is disingenuous in light of their concession in the proposed Second Amended Complaint that no wrongdoing related to this claim occurred during the Primary.

cases indicating that "garden variety" election differences do not violate the Constitution). That is, absent any allegations that rise to the level of "fundamental unfairness," Plaintiffs' challenges to the implementation of such provisions must be dismissed. *See, e.g.*, *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (observing that "[s]everal appellate courts . . . have held that an election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair," and collecting cases). Indeed, if Plaintiffs want to raise these garden-variety issues, the place to do so would be in state court (assuming they had actual evidence to support them), something this Court acknowledged in its abstention opinion. ECF No. 409 at 26 ("[A] state court could grant Plaintiffs the exact relief they seek here by enjoining any conduct that violates the election code, without further consideration of whether that conduct also violates the Constitution.").[3]

Plaintiffs' Equal Protection allegations likewise fail to state an actionable federal or state constitutional violation, particularly those allegations related to the alleged "arbitrary, disparate, and/or uneven use and implementation of drop boxes and other ballot-collection sites," Notice at 2. Dispositively, Plaintiffs fail to offer any allegations as to what is "arbitrary," "disparate," or "uneven" about the "use and implementation" of dropboxes, which alone dooms their Equal Protection claims under *Iqbal* and *Twombly*. More fundamentally, Plaintiffs' claims fail because they are premised on the mistaken notion that use of a voting mechanism like dropboxes must be strictly identical across diverse localities. This position ignores both Pennsylvania's longstanding

[3] It bears noting that Plaintiffs failed to pursue *any* of the avenues that this Court advised nearly a month ago in its abstention opinion for Plaintiffs to seek guidance on the state-law issues at the heart of their Complaint, including (1) seeking to expedite the pending state-court litigation involving many of the same parties and issues, or (2) filing a new case in state court asserting the same state-law claims. ECF No. 409 at 31-33. Having failed to seek any relief or clarification in state court, Plaintiffs cannot now ask this federal Court to engage in garden-variety administration of the state Election Code.

vesting of discretion in local county boards of elections to tailor and establish election procedures for each jurisdiction (including the number and location of polling places), *see, e.g.*, 25 Pa. Cons. Stat. § 2726, as well as well-settled precedent that such local distinctions in voting procedures do not rise to the level of federal constitutional concerns. *See, e.g.*, *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (rejecting Equal Protection challenge to state vote-by-mail law that adopted different policies for different counties); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635-36 (6th Cir. 2016) (rejecting Equal Protection challenge even where "plaintiffs presented uncontested evidence that, in determining whether to reject a given ballot, the practices of boards of elections can vary, and sometimes considerably"); *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006) (rejecting Equal Protection challenge to "manual recount procedures, which vary by county according to voting system"); *Paher v. Cegavske*, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) (rejecting Equal Protection challenge at preliminary injunction stage where a county's "Plan may make it easier or more convenient to vote in [that] County, but does not have any adverse effects on the ability of other voters in other counties to vote"); *Tex. Democratic Party v. Williams*, 2007 WL 9710211, at *3-4 & n.4 (W.D. Tex. Aug. 16, 2007) (rejecting Equal Protection challenge because one county's choice to use particular "eSlate machines [does] not treat voters arbitrarily or disparately compared to Texas voters using other voting technologies"); *see also Bush v. Gore*, 531 U.S. 98, 134 (2000) (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."). Plaintiffs' "uneven" use allegations (which are lacking in any event) fail to state a valid Equal Protection claim.

Certain of Plaintiffs' claims remain unripe. At least two of Plaintiffs' claims—their claim related to allegedly improper noticing of alternate ballot collection locations, and their as-applied challenge to the county residency requirement for poll watchers—also remain unripe. With regard to noticing dropboxes, even presuming that the rules related to noticing of "polling places" apply to dropboxes (which makes no sense and which the Secretary does not concede), Plaintiffs' claim is still unripe given the Election Code's requirement that notice, even if required, be provided only 20 days prior to the election (a date which has yet to pass). *See* 25 Pa. Cons. Stat. § 2726(c). And with regard to poll watchers, Plaintiffs' FAC fails to identify a single county where they have been unable to locate sufficient poll watchers to monitor voting in the upcoming election. Despite being on notice of this infirmity since at least July 24, *see* Sec'y Boockvar's Mem. in Supp. of Mot. to Dismiss (ECF No. 185) at 9-10, Plaintiffs failed to include in their FAC any allegations whatsoever curing this black letter pleading deficiency, *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-99 (2009), and refused to respond to discovery requests concerning poll-watcher recruitment.

Plaintiffs' claims remain barred by the Eleventh Amendment. The majority of Plaintiffs' remaining claims, even as re-framed by Plaintiffs themselves, seek nothing more than to require the Secretary and Defendant counties to comply with state law, something the Eleventh Amendment plainly prohibits. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). At the very outset, Counts III, V, VII, and VIX in the FAC clearly merit dismissal because every theory of irregularity asserted in each of those claims is based purely on state law. *See* ECF No. 264 at 11. But even for those supposed irregularities to which Plaintiffs attempt to affix a federal constitutional label (Counts I, II, IV, VI, and VIII), the Court should look past that misnomer and recognize that Plaintiffs' entire lawsuit is simply an attempt to force Commonwealth officials to abide by Plaintiffs' own interpretation of the Election Code, masquerading as a federal

constitutional violation. In other words, though nominally a "federal constitutional claim," Plaintiffs' various claims of vote dilution are, at bottom, only attempts to have this federal court enjoin Commonwealth election officials to comply with Plaintiffs' preferred interpretation of the Election Code. Once again, Plaintiffs could have sought relief against state officials in state court, but chose not to. Their claims as brought here are barred by the Eleventh Amendment.

Plaintiffs cannot assert claims based on the Elections or Presidential Electors Clauses. Finally, Plaintiffs' various references to the "Elections Clause and related Presidential Electors Clause of the United States Constitution" do not salvage their otherwise defective claims. *See* Notice at 2, 5-6, 8. Put simply, that is not a viable path for Plaintiffs. As the Secretary previously argued, if those claims belong to anyone, it is the General Assembly, not Plaintiffs. *See* ECF No. 264 at 8 n.3; *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 799-804 (2015). Plaintiffs thus lack standing to assert these claims, and this Court lacks jurisdiction to adjudicate them. They should likewise be dismissed pursuant to Federal Rule 12(b)(1).

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Together, these reasons and the others set forth in the Secretary's prior motions to dismiss briefing make clear that, at the very least, this Court should address the Secretary's threshold justiciability and merits arguments prior to moving forward with any further case activities, including any additional discovery (which, as set forth below, is unnecessary in any event).

2. The Court should permit and resolve motions for summary judgment.

If the pending motions to dismiss do not completely dispense with Plaintiffs' claims (and they should), the Court should promptly permit the filing of summary judgment motions to resolve any lingering claims not ripe for resolution on the pleadings themselves. While the Secretary will

reserve her right to address all claims that might remain following the resolution of Rule 12 motions, she would be prepared to address at least the following in summary judgment briefing:

There is no evidence that any county is going to ignore the Election Code or the Pennsylvania Supreme Court. As set forth above, numerous of Plaintiffs' remaining claims and theories depend upon the notion that one or more counties will go "rogue" and simply ignore the Secretary's existing guidance, the Election Code, and/or the Pennsylvania Supreme Court's recent decision. But Plaintiffs have no evidence whatsoever that counties will do so, and therefore cannot make out any claim based on so-called "non-complian[ce]" or "uneven" treatment.

There is no evidence of voter fraud related to the challenged issues. As set forth above, an inherent part of Plaintiffs' claimed illegality as it relates to dropboxes and the need for poll watchers at dropbox locations and a sufficient number of in-person poll watchers is that rampant voter fraud and/or ballot harvesting will occur if dropboxes are permitted and adequate poll watchers are not present. But for all of their rhetoric regarding the ever-present boogeyman of voter fraud, Plaintiffs have failed to come forward with material evidence of voter fraud related to dropboxes[4] and no such evidence as it relates to the supposed lack of poll watchers monitoring in-person voting. Election officials and political actors in Pennsylvania and around the country have long been vigilant to uncover, investigate, and publicize those rare instances of voter fraud; if dropboxes permitted the types of rampant voter fraud or ballot tampering that Plaintiffs foretell,

[4] The only evidence of so-called ballot harvesting or voter fraud pertaining to dropboxes that Plaintiffs have identified consist of a small handful (3-4) photographs where a voter appears to be inserting—at most—two ballots into a dropbox. But Plaintiffs conceded in discovery that they did not know (i) the circumstances of those photos, including whether the other voter was standing right beside the depositing party (who could have been a spouse or sibling), (ii) whether the other voter was disabled, or (iii) who any of the voters were, or more. In some cases, the photographs identified by Plaintiffs did not even show the voter depositing multiple ballots himself. In any event, these isolated events do not remotely rise to the level of a federal constitutional violation that would justify the wholesale prohibition of a voting mechanism that state law allows for.

one would expect Plaintiffs to have more evidence of it from the June 2020 primary election or other prior elections here or elsewhere. That Plaintiffs lack such evidence dooms their claims and would justify summary judgment in the Secretary's favor. In particular, the failure to adduce any evidence of "harvesting," "ballot tampering" or "voter fraud" at this late date is itself a tell, in light of Plaintiffs' admission that they surveilled dropboxes in the Pennsylvania 2020 primary election.

The poll watcher residency requirement is rational. Plaintiffs contend that the Pennsylvania Supreme Court only resolved their *facial* challenge to the requirement that a poll watcher reside in the county in which he or she wishes to watch polls, but did not resolve Plaintiffs' *as-applied* challenge to that requirement. Notice at 9-10. But the same analysis would underlie both claims: as the Secretary explained, there is no constitutional right to poll watch or to have the polls watched, such that the requirement is subject only to rational basis review. *See* ECF No. 264 at 15-17; ECF No. 336 at 4 n.2; *see, e.g.*, *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 408, 413-14 (E.D. Pa. 2016); *Dailey v. Hands*, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right protected by the First Amendment."); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983) ("Plaintiffs have cited no authority . . . , nor have we found any, that supports the proposition that [the plaintiff] had a first amendment right to act as a pollwatcher."). And for all the same reasons that the Pennsylvania Supreme Court (and others before it) determined that the requirement was rational with regard to Plaintiffs' facial challenge, the same rationales would apply to their as-applied challenge.

* * * * *

Once again, the Secretary submits that the entirety of Plaintiffs' claims should fall away following resolution of the pending motions to dismiss, but should any claims persist, this is just a sampling of the issues that the Secretary would be prepared to put before the Court in immediate summary judgment briefing, if necessary following resolution of motions to dismiss.

3. Discovery is unnecessary and unwarranted at this stage.

The Court should deny Plaintiffs' requests to re-open discovery as to the Secretary and other employees of the Department of State (including by way of a supplemental deposition of the Secretary). Plaintiffs have already exhausted day-long depositions of Secretary Boockvar and Deputy Secretary for Elections and Commissions Jonathan Marks, the most senior election officials in the Department of State. As set forth above, there are various jurisdictional and justiciability hurdles that Plaintiffs are unable to overcome in this case, and neither the Secretary nor other members of the Department should be subjected to still-more discovery at this stage. In any event, having already deposed the Secretary and Deputy Secretary, additional efforts at depositions (including of subordinate state public officials employed by the Department) or other forms of discovery on the Department or other parties and non-parties would be nothing more than a fishing expedition that would only serve to distract the Secretary, the Department of State, and county Defendants of the important work of preparing for the election, including overseeing the processing of what will be an unprecedented number of mail-in and absentee ballots and preparations for in-person voting in the midst of a pandemic.[5]

4. Amendment of Plaintiffs' Complaint would be prejudicial and futile.

Likewise, the Court should deny Plaintiffs' attempt to assert still-additional state-law-based claims just six weeks before Election Day. Per Plaintiffs' September 20 notice, the primary basis for the amendment would be to allow Plaintiffs to assert claims based on the Secretary's

[5] Of course, if Plaintiffs are permitted to further depose the Secretary "to address the events which have occurred since the taking of her August 21, 2020 deposition," as they propose, Notice at 14, the Secretary should be entitled to depose the representative of the Trump Campaign and RNC regarding events or information since he sat for his deposition on August 20. And such depositions (and any additional discovery the Court may permit) should only take place after resolution of the pending motions to dismiss and should be tailored to only those claims that survive such motions.

guidance related to examination of absentee and mail-in ballots, and specifically whether the Election Code permits counties to set aside ballots based solely on signature analysis. Notice at 12-13.[6] Claims based on this issue fail for all the same reasons as set forth above—Plaintiffs assert at most a generalized grievance pertaining to a garden variety of state election law; any injury is speculative; there is no allegation of inconsistent treatment by the counties on this issue; and this Court cannot compel state actors to comply with state law—as well as for an additional reason: resolution of this issue turns on a disputed interpretation of state law for which this Court should abstain in favor of state courts, just as it did previously with regard to the issues in the FAC. To that end, the Secretary presently intends to petition the Supreme Court of Pennsylvania to also resolve this issue, just as it expediently did with regard to the issues before the Supreme Court last week. As such, any amendment would be futile and should be denied.

Furthermore, amendment at this stage would be highly prejudicial. The Secretary has engaged in this litigation and parallel proceedings in state court in good faith, promptly participating in motions practice, providing substantial discovery, and litigating Plaintiffs' claims, all while busily preparing for the upcoming General Election. Election Day is now just six weeks away and the Secretary and Department of State are engaged in the important work of ensuring a free, fair, and transparent election, notwithstanding the unprecedented challenges of the COVID-19 pandemic, as well as repeated and unfounded attacks on the integrity of the election system by the lead Plaintiff in this case. *See, e.g.*, Egan, Laura, "Trump doubles down on

[6] While the Secretary was preparing her response to Plaintiffs' September 20 notice, Plaintiffs transmitted a draft Second Amended Complaint and sought the Secretary's and other Defendants' position before Plaintiffs were to seek leave to amend earlier today. As reflected in Plaintiffs' motion for leave to file, the Secretary opposes that request, ECF No. 451 at ¶ 20, and will set forth the full bases for her opposition should the Court request it. The Secretary likewise reserves the right to move to dismiss the Second Amended Complaint should the Court grant leave to file it.

encouraging supporters to vote twice, which is illegal," *NBC News*, Sept. 2, 2020 (President Donald J. Trump at Latrobe, PA rally: "These mail-in ballots are a disgrace and they know it.") (available at https://www.nbcnews.com/politics/2020-election/trump-doubles-down-encouraging-supporters-vote-twice-which-illegal-n1239265). The time to invent and press new theories of alleged election misconduct has passed, and the Court should not permit Plaintiffs' attempt at further distraction from the election preparation process.

5. An evidentiary hearing is likewise unnecessary, but if required as a last resort, should be handled on a less expedited and more focused basis.

For all the reasons set forth herein, the Court can and should promptly resolve Plaintiffs' remaining claims in the Secretary's favor. The Secretary submits that such resolution can and should occur on the papers alone, or, if necessary, following oral argument from counsel. There is no need to hear live evidence. If, after resolving the pending motions to dismiss and requested motions for summary judgment, the Court believes that one or more of Plaintiffs' claims remain pending and warrant consideration, it could seek witness statements and conduct an evidentiary hearing limited only as to those issues and only at that time. In any event, Plaintiffs' request for a hearing in less than two weeks (October 5 and 6) with expedited discovery beforehand is designed to preempt this Court's fundamental threshold jurisdictional and merits determinations. The Secretary respectfully submits that the Court should refrain from establishing any hearing date until such time as the case is properly scoped to any remaining viable claims.

Dated: September 22, 2020

Respectfully submitted,

KIRKLAND & ELLIS LLP

By: */s/ Daniel T. Donovan*
Daniel T. Donovan
Michael A. Glick
Susan M. Davies
Kristen L. Bokhan
1301 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 389-5000 (telephone)
(202) 389-5200 (facsimile)
daniel.donovan@kirkland.com
michael.glick@kirkland.com
susan.davies@kirkland.com
kristen.bokhan@kirkland.com

Madelyn A. Morris
Sara S. Tatum
601 Lexington Avenue
New York, NY 10022
(212) 446-4800 (telephone)
(212) 446-4900 (facsimile)
madelyn.morris@kirkland.com
sara.tatum@kirkland.com

PENNSYLVANIA OFFICE OF ATTORNEY GENERAL

By: */s/ Karen M. Romano*
Karen M. Romano
Keli M. Neary
Howard G. Hopkirk
Nicole Boland
Stephen Moniak
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-2717 (telephone)
(717) 772-4526 (facsimile)
kromano@attorneygeneral.gov
kneary@attorneygeneral.gov
hhopkirk@attorneygeneral.gov
nboland@attorneygeneral.gov
smoniak@attorneygeneral.gov

MYERS BRIER & KELLY LLP

By: *Daniel T. Brier*
Daniel T. Brier
Donna A. Walsh
425 Spruce Street, Suite 200
Scranton, PA 18503
(570) 342-6100 (telephone)
(570) 342-6147 (facsimile)
dbrier@mbklaw.com
dwalsh@mbklaw.com

Counsel for Kathy Boockvar
Secretary of the Commonwealth of Pennsylvania

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties who have appeared in this action via the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Daniel T. Donovan
Daniel T. Donovan

Counsel for Kathy Boockvar
Secretary of the Commonwealth of
Pennsylvania

EXHIBIT 1

From: Marks, Jonathan <jmarks@pa.gov>
Sent: Thursday, September 17, 2020 4:02 PM
To: Marks, Jonathan
Subject: Important DOS Update re: Litigation

Importance: High

Good afternoon everyone.

The Pennsylvania Supreme Court ruled today that the Pennsylvania Election Code allows county boards of election to accept hand-delivered mail-in ballots at drop boxes and designated locations other than their office addresses. Based on the expected number of Pennsylvanians opting to use mail-in ballots during the pandemic, the Court also granted a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on election day. The Court also concluded that the poll watcher residency requirement in the Election Code is valid and constitutional.

In addition, the Court ruled that a mail-in ballot that is not enclosed in the secrecy envelope must be disqualified. The Secretary's guidance on the secrecy envelope is therefore withdrawn.

The county boards of election are obligated to comply with these important rulings and should plan accordingly.

The Secretary anticipates issuing formal Guidance consistent with these rulings.

Kind regards,

Jonathan M. Marks
Deputy Secretary for Elections & Commissions
Pennsylvania Department of State
302 North Office Building | Harrisburg, PA 17120
☎ 717.783.2035 🖷 717.787.1734
✉ jmarks@pa.gov

pennsylvania
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