

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

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

**SECRETARY OF THE COMMONWEALTH KATHY BOOCKVAR’S  
CROSS-MOTION FOR SUMMARY JUDGEMENT AND  
OPPOSITION TO PLAINTIFFS’ MOTION FOR SUMMARY JUDGEMENT**

KIRKLAND & ELLIS LLP  
Daniel T. Donovan  
Michael A. Glick  
Susan M. Davies  
Kristen L. Bokhan  
Caroline Darmody  
1301 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 389-5000 (telephone)  
(202) 389-5200 (facsimile)

PENNSYLVANIA OFFICE OF  
ATTORNEY GENERAL  
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)

Madelyn A. Morris  
Sara S. Tatum  
Jaywin Singh Malhi  
601 Lexington Avenue  
New York, NY 10022  
(212) 446-4800 (telephone)  
(212) 446-4900 (facsimile)

MYERS BRIER & KELLY LLP  
Daniel T. Brier  
Donna A. Walsh  
425 Spruce Street, Suite 200  
Scranton, PA 18503  
(570) 342-6100 (telephone)  
(570) 342-6147 (facsimile)

*Counsel for Kathy Boockvar  
Secretary of the Commonwealth of  
Pennsylvania*

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>INTRODUCTION.....</b>	<b>1</b>
<b>PROCEDURAL BACKGROUND .....</b>	<b>5</b>
<b>STATEMENT OF FACTS.....</b>	<b>10</b>
<b>I. <u>Relevant Pennsylvania Election Code History and Background</u> .....</b>	<b>10</b>
A. Pennsylvania’s County-Based Election System .....	10
B. Act 77.....	11
C. The COVID-19 Pandemic.....	13
D. Act 12.....	13
E. The June 2020 Primary Election.....	14
F. Preparations for the General Election.....	15
<b>II. <u>Facts Specific to Plaintiffs’ Remaining Challenges</u> .....</b>	<b>16</b>
A. Ballot Drop Boxes.....	16
B. Poll Watchers.....	28
1. County Residency Requirement .....	28
2. Plaintiffs’ Request for Poll Watchers “to Be Present in all Locations Where Votes are Cast” .....	33
3. Plaintiffs’ Request for Poll Watchers to Be Present at Pre-Canvass and Canvass Meetings.....	34
C. Signature Comparisons for Absentee, Mail-In, and In-Person Voting.....	35
<b>LEGAL STANDARD .....</b>	<b>39</b>
<b>ARGUMENT.....</b>	<b>40</b>
<b>I. <u>DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’ DROP BOX-RELATED CLAIMS</u>.....</b>	<b>40</b>
A. Plaintiffs’ Drop-Box Claims Are Generalized And Speculative Grievances That Are Not Justiciable In Federal Court.....	41

- B. The Federal Constitution Does Not Bar The Commonwealth From Employing Mail-In Drop Boxes Permitted By The Election Code. .... 50
  - 1. Drop Boxes Do Not Infringe the Right to Vote. .... 50
  - 2. Distinctions Among Counties’ Use of Drop Boxes Are Not Discriminatory. .... 54
  
- II. THE COURT SHOULD DISMISS OR GRANT DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS’ VARIOUS POLL WATCHER CLAIMS..... 58**
  - A. Plaintiffs’ “As-Applied” Challenge To The County Residency Requirement Remains Unripe, Is Not Based On Any Cognizable Injury, And Lacks Merit. .... 60
  - B. This Court Should Abstain From Deciding Where The Election Code Permits Poll Watching To Occur. .... 66
  - C. Whether Poll Watchers Are Permitted To Attend Canvass Sessions Is Also A Question Of State Law And One For Which Plaintiffs Lack Standing. .... 71
  
- III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON SIGNATURE-MATCHING CLAIMS..... 73**
  - A. Plaintiffs’ Effort To Enforce Their Preferred Interpretation Of The Election Code Is Barred By The Eleventh Amendment, And This Court Should At Least Abstain. .... 73
  - B. Plaintiffs’ Signature-Related Challenges Similarly Present Only Generalized Grievances Lacking A Concrete, Particularized Injury..... 78
  - C. The Secretary’s Signature-Matching Guidance Does Not Violate The Federal Constitution..... 79
    - 1. The Federal Constitution Does Not Require That Mail-In Voting and In-Person Voting Be Subject to the Exact Same Procedures. .... 80
    - 2. Mail-in Voters Are Not Subject to Standard-less Treatment..... 82
  
- CONCLUSION ..... 83**

## INTRODUCTION

The record in this case makes clear that Secretary of the Commonwealth Kathy Boockvar and Pennsylvania's 67 counties have been unwavering in their commitment to election integrity, and that there is no indication that the 2020 General Election will be anything but free and fair. Notwithstanding substantial discovery in this case as well as their own independent efforts to surveil Pennsylvania's June 2020 Primary Election, Plaintiffs have come up empty-handed in their quest to substantiate their allegations of looming voter fraud in connection with mail-in voting, including through the use of ballot drop boxes authorized under Pennsylvania's Election Code. Even if this lawsuit is justiciable consistent with Article III—and it is not—the record is devoid of any evidence demonstrating that Act 77 is being construed erroneously, or that mail-in voting will lead to ballot fraud, vote dilution, or any other supposed threat to the integrity of the upcoming election. In fact, the record has confirmed just the opposite: that the Secretary and counties are properly applying the Election Code and in a manner that promotes voter inclusivity and enfranchisement without any of the ills Plaintiffs predict. Accordingly, the Court should dismiss Plaintiffs' remaining claims, enter judgment in favor of the Secretary and other Defendants, and reject Plaintiffs' efforts to suppress votes on the basis of unsubstantiated fears.

Pennsylvania has a long and proud history of conducting safe, free, and fair elections. Elections in the Commonwealth are administered in a manner that promotes voter turnout and participation in the democratic process. In the past year, the Commonwealth enacted Act 77 and Act 12 as part of a bipartisan effort to modernize the Commonwealth's election processes. In addition to continuing to allow citizens to vote in-person on Election Day and by absentee ballot, Pennsylvania now offers all voters the ability to cast their vote by way of no-excuse mail-in ballot.

The 2020 General Election is imminent. The Commonwealth of Pennsylvania and its 67 county election boards are working hard to prepare for the highly-anticipated upcoming election,

and are executing preparations and practices to continue to provide Pennsylvania voters with the highest standards of election integrity, security, and accessibility. While those preparations have been underway, the Secretary has also been engaged in several election-related proceedings in Pennsylvania state and federal courts, including this dispute. In two prior decisions in this case, this Court appropriately abstained from addressing several Election Code provisions, instead deferring to ongoing proceedings in state court. *See Donald J. Trump for President, Inc. v. Boockvar*, --- F. Supp. 3d ----, 2020 WL 4920952 (W.D. Pa. Aug. 23, 2020) (“*Boockvar I*”); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5407748 (W.D. Pa. Sept. 8, 2020) (“*Boockvar II*”). In doing so, the Court deferred its ruling on certain threshold Article III and Eleventh Amendment issues that have plagued Plaintiffs’ Complaints in this matter from the very outset, as the Secretary and others have raised in prior motions to dismiss.

On September 17, the Supreme Court of Pennsylvania issued a well-reasoned decision pertaining to several key issues in this proceeding. *Pa. Democratic Party v. Boockvar*, --- A.3d ----, 2020 WL 5554644 (Pa. Sept. 17, 2020). While the Secretary hoped that would put an end to this sprawling federal action, Plaintiffs have persisted, and have in fact amended their Complaint to challenge still more election issues, with the apparent goal of disenfranchising more voters, and have demanded still more discovery from the Department of State and others, taking significant time away from election preparations.

That discovery is now complete, and it is time for this lawsuit to end. The parties agree that the Pennsylvania Supreme Court resolved and this Court dismissed or abstained as to 7 of Plaintiffs’ 12 claims, and Plaintiffs’ summary judgment motion withdrew their challenge to one more. As for the remaining claims, the record only confirms that which has been clear since the outset of this lawsuit: each of Plaintiffs’ remaining challenges is either non-justiciable in this

Federal Court (either because Plaintiffs lack standing, the claims are unripe, or the Eleventh Amendment bars this Federal Court's resolution of them) or lack merit based on the undisputed factual record. Although Plaintiffs' remaining claims in this case seem to be the proverbial moving target, at this stage, the Secretary understands Plaintiffs to be challenging three aspects of Pennsylvania election practice. Each such challenge fails:

**Use of Authorized Drop Boxes.** Notwithstanding the Pennsylvania Supreme Court's unambiguous ruling just two weeks ago that drop boxes are authorized by the Commonwealth's Election Code, Plaintiffs nonetheless assert that "unmanned" drop boxes—which have been used across the country to facilitate voting for years—invite hypothetical (and would-be criminal) voter fraud or ballot tampering to such an extent that they dilute votes, and that counties' supposedly "uneven" use of these drop boxes is discriminatory. These generalized and conjectural grievances do not justify Article III standing and, in any event, Plaintiffs' speculation that "unmanned" drop boxes will lead to voter fraud remains unsupported. Simply put, there is no basis to justify this Federal Court's abolishing an election practice that the Commonwealth's highest court has just held is perfectly legal. Likewise, Plaintiffs' equal protection claim ignores both Pennsylvania's historic delegation of county control over election procedures, as well as consistent precedent that such local distinctions in voting procedures do not rise to the level of federal constitutional concerns.

**Poll Watchers.** Plaintiffs' various (and ever-changing) challenges regarding poll watchers likewise fail. *First*, Plaintiffs' assertion that the Commonwealth's long-standing county residency requirement for poll watchers—a requirement that mirrors the rules in at least eight other states—is unconstitutional as applied to the upcoming election is both not ripe and meritless. Not only have Plaintiffs failed to produce any evidence that they are unable to find sufficient poll watchers

(including in counties in which there are over 100,000 registered Republican voters), but their claimed injury—that in the hypothetical absence of sufficient poll watchers, in-person voting in certain counties will be marked by rampant fraud—is both non-cognizable, purely speculative, and unsupported by the record. And, of course, the Pennsylvania Supreme Court and a sister federal district court have already held that the county residency requirement is rational and therefore constitutional. *Second*, Plaintiffs’ insistence that the Commonwealth allow for poll watchers “in all locations where votes are cast” (including at drop box sites and county boards of elections offices) finds no home in the Election Code, and indeed, the Court has already abstained from resolving claims related to whether such sites constitute “polling places” under the Code. More fundamentally, however, this claim is incorrect as a matter of law, as the Federal Constitution does not regulate the use of poll watchers or otherwise mandate their presence at any location whatsoever during an election. *Finally*, Plaintiffs lack standing to advance their plea that poll watchers be permitted to attend pre-canvass and canvass meetings in various counties because they cannot identify any injury they would suffer related to this issue—the Election Code already provides in unambiguous terms that “authorized representatives” of each party *and* each candidate (which would include six of the Plaintiffs in this case) can attend such canvassing, and Plaintiffs fail to identify any county where such representatives will be excluded. Plaintiffs’ suggestion that still more “poll watchers” need be present—in addition to the “authorized representatives” provided for by the Election Code—lacks merit. In any event, again, this challenge presents a pure issue of state law: if Plaintiffs believe they will be excluded from attending the canvass meetings in one or more counties, their remedy is to sue those counties in state court, not to manufacture a federal case over this issue and request relief that the Eleventh Amendment bars this Court from ordering.

**Signature-Related Claims.** Finally, Plaintiffs' broad challenges to the Commonwealth's rules regarding the review of voters' signatures lack merit. For one, Plaintiffs' assertion that the Secretary's recent guidance regarding signature analysis does not comport with state law presents an issue of state-law interpretation from which this Court should abstain. And Plaintiffs' claim that the Secretary's guidance violates the Federal Constitution by subjecting mail-in voters to supposedly less burdensome procedures than in-person voters fails, as courts have repeatedly recognized that distinctions between in-person and absentee voters are inevitable yet entirely appropriate.

At bottom, each of Plaintiffs' remaining challenges is non-justiciable, lacking in merit based on the undisputed material facts, or both. At this point, the Secretary and 67 counties are preparing for the election in earnest, and Pennsylvania voters have started voting. The time has come for citizens, not lawyers, to be heard. The Court should grant the Defendants summary judgment on each remaining claim, deny summary judgment as requested by Plaintiffs, and put an end to this dispute.

### **PROCEDURAL BACKGROUND**

Plaintiffs initiated this lawsuit on June 29, 2020, alleging that various Commonwealth policies related to mail-in and absentee voting contravene the Election Code and will violate the Federal and State Constitutions. *See* ECF No. 4. Plaintiffs also challenged Pennsylvania's county residency requirement for in-person poll watchers, acknowledging that the Election Code unambiguously imposed such a requirement, but arguing that such limitation was unconstitutional.

The Secretary, county boards of elections, and various intervenors promptly moved to dismiss the Complaint, citing a host of procedural and substantive flaws, including that several of Plaintiffs' claims were barred by the Eleventh Amendment; Plaintiffs lacked standing to assert speculative and unripe claims; the dispute turned on unsettled issues of state law warranting



*Pullman* abstention; and Plaintiffs failed to state a cognizable constitutional violation. *See, e.g.*, ECF Nos. 184-85. Rather than oppose, Plaintiffs filed an Amended Complaint, which modified certain allegations and added two counts challenging alleged “improper” in-person voting for electors who previously requested mail-in ballots but later desire to vote in-person. ECF No. 234 at Counts VIII & VIX. Again, the Secretary and others also moved to dismiss, raising the same jurisdictional and substantive objections. *See, e.g.*, ECF Nos. 263-64.

While this Federal Court proceeding was ongoing, the Secretary and others petitioned the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction to resolve certain disputed issues of state law, including those at the center of this case. *See* ECF No. 388-1. Plaintiffs did not join in that petition, and in fact opposed it. *See* ECF No. 418-1. Notwithstanding Plaintiffs’ opposition, on September 1, the Pennsylvania Supreme Court granted the Secretary’s application, exercised its extraordinary jurisdiction, and ordered expedited briefing. *See* ECF No. 418-3.

While the Secretary’s application was still pending, on August 23, this Court abstained from adjudicating Plaintiffs’ claims, reasoning that the majority of Plaintiffs’ claims turned on unsettled questions of state law currently under review in the state courts. *Boockvar I*, 2020 WL 4920952. In doing so, the Court declined to address any of Defendants’ jurisdictional or merits arguments. *Id.* at \*7 n.3. The Court instead stayed the case pending resolution of these state-law issues by the Commonwealth courts, *id.* at \*21, and counseled Plaintiffs as to a variety of alternative routes they might pursue to attempt to resolve their claims, including by filing an action in state court or participating in the on-going Commonwealth court proceedings, *id.* at \*18-19.

Notwithstanding the abstention and stay order, and having failed to pursue any of the state-court avenues advised by this Court, on August 28, Plaintiffs moved to “modify” the stay and for a preliminary injunction seeking this Federal Court’s intervention before the Commonwealth

courts could rule. ECF No. 414. On September 8, this Court denied Plaintiffs' request, holding that Plaintiffs had failed to demonstrate they would suffer irreparable harm absent an injunction. *Boockvar II*, 2020 WL 5407748, at \*1. Again, the Court did not address the Secretary's and other parties' jurisdictional or merits arguments. *Id.* at \*6 n.5

On September 17, the Pennsylvania Supreme Court issued its 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, including ballot drop boxes, *see Pa. Democratic Party*, 2020 WL 5554644, at \*5-10; (ii) ballots lacking inner secrecy envelopes ("naked" ballots) should not be counted, *see id.* at \*20-26; and (iii) the Commonwealth's long-standing county residency requirement for poll watchers was constitutional, *see id.* at \*26-32.

The same day, this Court lifted its stay and directed the parties to file pleadings addressing the path forward in this case, including what claims remained and what procedural mechanisms the Court should employ to adjudicate them. ECF No. 447. Plaintiffs filed a submission taking a substantially broad view of their remaining claims, ECF No. 448, and the Secretary and other parties filed submissions explaining why Plaintiffs' view of their remaining claims was incorrect, arguing again that none of Plaintiffs' claims are justiciable, and requesting that the Court rule on the pending motions to dismiss, *e.g.*, ECF No. 452. Concurrently, Plaintiffs moved to amend their complaint again, including to introduce a new issue related to the Secretary's September 11 guidance regarding voter signature analysis. ECF No. 451.

On September 23, this Court filed two orders, which collectively: (i) dismissed Plaintiffs' allegations with respect to the counting of "naked ballots" and third-party delivery of ballots, *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5658392, at \*3-4 (W.D. Pa. Sept. 23, 2020) ("*Boockvar III*"); (ii) abstained from adjudicating Plaintiffs' claims pertaining to the

noticing requirements for drop boxes, other “polling place” claims, and in-person mail-in ballot application verification claims that each turn on interpretations of state law, *id.* at \*3; ECF No. 460 at 1; (iii) granted Plaintiffs’ request to file a Second Amended Complaint, *Boockvar III*, 2020 WL 5658392, at \*2; (iv) allowed for certain additional discovery, *id.* at \*2-3; and (v) established a procedure for resolving Plaintiffs’ remaining claims, including that all Defendants answer the new complaint regardless of whether they still intended to press certain arguments under Federal Rule of Civil Procedure 12, *id.* at \*2-5. The next day, Plaintiffs filed their Second Amended Complaint (“SAC”), ECF No. 461, and the Court denied Defendants’ then-pending motions to dismiss the First Amended Complaint as moot, ECF No. 464.

Both before the Court’s August 23 abstention order and following the Court’s September 23 orders regarding the procedure for resolving the remaining claims, the parties have engaged in expedited but substantial discovery. As pertinent here, the parties have participated in sixteen depositions (including two depositions of the Secretary, a deposition of the Deputy Secretary, a deposition of a Rule 30(b)(6) designee of the Trump Campaign and Republican National Committee Plaintiffs, and seven depositions of county boards of elections representatives, among others), have made substantial document productions (including more than 750 documents produced by the Secretary alone), and have responded to numerous interrogatories. The parties also exchanged a total of eight expert reports—two submitted by Plaintiffs, one by the Secretary, and five collectively by Intervenors.

Through the various orders and submissions, the Court and the parties have identified and discussed the remaining claims and issues in the case. In particular, in its first August 23, 2020 Order, the Court identified twelve issues that “it appears . . . Plaintiffs intend to press forward on,” *Boockvar III*, 2020 WL 5658392, at \*1-2, but in the same Order (and in the Order issued later that

day, ECF No. 460), the Court dismissed and/or abstained from deciding certain of those issues. Subsequent to that, in discovery correspondence submitted to the Court on September 28, Plaintiffs themselves characterized “the claims that remain to be resolved by this Court” as being limited to the following four<sup>1</sup> claims (using the corresponding numbers and descriptions from the Court’s August 23 order):

- (1) Whether Defendants violate the Constitution by using “unmanned” drop-boxes that, according to Plaintiffs, enable unlawful third-party ballot delivery;
- (2) Whether Defendants violate the Constitution through the uneven use of “unmanned” drop boxes that allegedly enable unlawful third-party ballot delivery;
- (10) Whether, as applied to the facts of this case, Pennsylvania’s county residency requirement for poll watchers violates the Constitution; and
- (12) Whether the Secretary’s September 11, 2020 guidance regarding signature comparison violates the Constitution by treating in-person voting differently than mail-in voting.

Secy.’s App. Ex. 20, Sept. 28, 2020 Letter from R. Hicks to Hon. Ranjan at 2-3.<sup>2</sup>

The Secretary now moves to dismiss and/or for summary judgment regarding these remaining issues. In doing so, because the first and second issues both relate to drop boxes, the Secretary addresses them together in this brief (while separately addressing both theories presented

---

<sup>1</sup> Plaintiffs’ September 28 letter actually identified a fifth issue, which was Issue 11 in the Court’s September 23 order: “Whether Secretary Boockvar’s guidance as to provisional, in-person voting by voters who have already obtained mail-in ballots violates the Constitution.” *Boockvar III*, 2020 WL 5658392, at \*1. However, in their memorandum in support of their summary judgment motion, Plaintiffs “agree[d] to withdraw that claim from those that still are being pursued.” ECF No. 509 at 15-16 n.4. Because the issue appears to be moot, the Secretary does not address that issue here, but requests judgment be entered in her favor on it.

<sup>2</sup> References to the Appendix in Support of Secretary of the Commonwealth Kathy Boockvar’s Cross-Motion for Summary Judgment and Opposition to Plaintiffs’ Motion for Summary Judgment, filed contemporaneously herewith, shall be indicated as “Secy.’s App. Ex.”.

by Plaintiffs). Additionally, because Plaintiffs’ Second Amended Complaint and summary judgment brief advances several assertions and makes several requests relating to poll watchers that seem to go beyond their “as-applied” challenge to the county residency requirement, the Secretary addresses those issues as well out of an abundance of caution. Finally, the Secretary does not endeavor to address any of the other issues identified in the Court’s September 23 Orders for which the Court has dismissed Plaintiffs’ claims or otherwise abstains (including with regard to “naked” ballots, ballots that may be delivered by third parties, ballots that contain marks and identifying information, ballots that lack a completed voter declaration, challenges to noticing or selection requirements for drop box locations, and challenges related to the approval and verification of absentee and mail-in ballot applications). *Boockvar III*, 2020 WL 5658392, at \*3-4; ECF No. 460 at 1. The Secretary does, however, respectfully request that the Court’s dismissal and/or abstention regarding those issues (or the portions of Plaintiffs’ claims pertaining to those issues) be reflected in a formal order of the Court, and the Secretary’s proposed order reflects the same.<sup>3</sup>

## STATEMENT OF FACTS

### I. Relevant Pennsylvania Election Code History and Background

#### A. Pennsylvania’s County-Based Election System

1. In 1937, the Commonwealth first enacted the Election Code, which established a county-based scheme to administer elections in accordance with local needs.

2. Specifically, the Code provides that “[t]here shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of

---

<sup>3</sup> A full chart of the status of Plaintiffs’ claims, as the Secretary understands them, is attached as Exhibit 1 to the Secretary’s Appendix.

primaries and elections in such county, in accordance with the provisions of [the Code].” 25 Pa. Cons. Stat. § 2641(a).

3. The Election Code vests county boards of elections with significant discretion to conduct elections and to implement procedures that ensure the “honest[y], efficien[cy], and uniform[ity]” of the elections. *Id.* §§ 2641(a), 2642(g).

**B. Act 77**

4. In October 2019, the Pennsylvania General Assembly passed, and Governor Wolf signed, Act 77, bipartisan legislation that reformed the Commonwealth’s Election Code. SAC (ECF No. 461) ¶¶ 91-92; 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (“Act 77”).

5. As relevant to this litigation, Act 77 made several changes to the Election Code, but one of the most consequential was the extension of no-excuse mail-in voting to all qualified electors. Under Pennsylvania’s prior “absentee” voting rules, a voter could only cast an absentee ballot if he or she met one of certain specified criteria, including that the voter would be away from his or her municipality on Election Day. 1998 Pa. Legis. Serv. Act. 1998-18 (H.B. 1760), § 14. However, Act 77 introduced a “mail-in” component to the Election Code, whereby a voter could cast a “mail-in” ballot without any excuse—that is, for any reason or no reason at all. *See* Act 77, §§ 1, 8 (eff. October 31, 2019) (codified at 25 Pa. Cons. Stat. §§ 2602(z.6), 3150.11). In so doing, Act 77 brought the Commonwealth in line with the mail-in voting system of the vast majority of the country (34 states). Secy.’s App. Ex. 11, Stein Report at 6.

6. In all material respects, the rules related to “mail-in” voting, as introduced by Act 77, mirror the rules applicable to “absentee” voting. Secy.’s App. Ex. 4, Aug. 21, 2020 Boockvar Dep. 73:25-74:8 (“It just expanded -- it is new, because mail-in voting did not exist until Act 77. It existed for absentee voters, but it did not exist for mail-in voters.”).

7. Notably, both Pennsylvania’s no-excuse mail-in voting system and its continuing absentee voting system remain “opt-in” systems. That is, in order to vote by mail (whether “mail-in” or “absentee”), a qualified Pennsylvania voter must request a ballot from the Secretary or his or her county board of elections. *See* 25 Pa. Cons. Stat. §§ 3146.2(a), 3150.12(a). In doing so, the voter must provide, among other information, his or her name, date of birth, voting district (if known), length of time a resident in the voting district, and party choice in case of a primary. *See id.* §§ 3146.2(b), 3150.12(b). Additionally, voters must provide proof of identification in the form of the voter’s driver’s license number, or, in the case of a voter who has not been issued a current and valid driver’s license number, the last four digits of the voter’s Social Security number, or, in the case of a voter who has not been issued a current and valid driver’s license or Social Security number, a copy of another form of approved identification. *See* 25 P.S. § 2602(z.5)(3).

8. In that regard, Pennsylvania’s “opt-in” system, as codified in Act 77, is materially different from practices in other states whereby the state (or a political sub-division such as a county) automatically mails every registered voter a ballot without the voters having to request it, a practice commonly referred to as “universal mail-in voting.” Secy.’s App. Ex. 11, Stein Report at 6; Secy.’s App. Ex. 2, Boockvar Decl. ¶ 64

9. Of note, during the September 29, 2020 Presidential debate, President Donald Trump (the candidate for the lead Plaintiff in this case) stated that “solicited ballots,” those that a voter must apply to receive before mailing them in (as in Pennsylvania), are “okay,” and that he has voted that way: “You’re soliciting, you’re asking they send it back, you send it back. I did that.” Secy.’s App. Ex. 21, *Read the Full Transcript from the First Presidential Debate between Joe Biden and Donald Trump*, USA Today (Sept. 30, 2020) at 38. The President expressed similar support previously for “Vote by Mail” systems in other states where, as in Pennsylvania, the voter

is required to initiate and follow a process requesting the ballot to be mailed in. Secy.'s App. Ex. 15, Aug. 4, 2020 12:55 p.m. @realDonaldTrump Tweet; *see also* Secy.'s App. Ex. 18, Sept. 21, 2020 Florida GOP Newsletter.

**C. The COVID-19 Pandemic**

10. Beginning in early 2020, the COVID-19 pandemic engulfed the United States (including Pennsylvania), exposing Americans to a novel, communicable virus and necessitating safety precautions to minimize transmission. *See* Secy.'s App. Ex. 8, Burke Report ¶¶ 31-34.

11. As of October 2, 2020, 208,536 Americans have passed away due to COVID-19, including 8,254 Pennsylvanians. *See Covid in the U.S.: Latest Map and Case Count*, The New York Times (Oct. 2, 2020), *available at* <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited Oct. 2, 2020). Additionally, approximately 166,000 Pennsylvanians are reported to have tested positive for the virus. *See id.*

12. The COVID-19 pandemic is unlikely to abate by the General Election and could worsen, as recent Pennsylvania statistics show. *See* Secy.'s App. Ex. 8, Burke Report ¶ 67; *see COVID-19 Data for Pennsylvania*, Pennsylvania Department of Health, *available at* <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last visited Oct. 3, 2020).

**D. Act 12**

13. In March 2020, the Commonwealth enacted Act 12. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (“Act 12”). Like Act 77, Act 12 was bipartisan legislation passed by the General Assembly with a majority from one party and signed by the Governor of another party, and made certain other changes to modernize the election process.



**E. The June 2020 Primary Election**

14. In early June 2020, Pennsylvania conducted its primary elections for the 2020 federal elections, which were the first elections with Act 77's changes in effect. Secy.'s App. Ex. 2, Boockvar Decl. ¶ 24.

15. Responding to Act 77's expansion to allow no-excuse mail-in voting as well as the ongoing and unprecedented global pandemic, more than 1.8 million voters applied for a mail-in or absentee ballot, and nearly 1.5 million voters cast their vote by mail-in or absentee ballots. SAC ¶¶ 112-13; Secy.'s App. Ex. 2, Boockvar Decl. ¶ 24..

16. In recognition of the increase in absentee/mail-in voting following Acts 77 and 12, and in light of the ongoing COVID-19 pandemic, several counties deployed secure ballot receptacles, or drop boxes, for the first time for the June 2020 primary. Secy.'s App. Ex. 2, Boockvar Decl. ¶ 36. As described more fully below, these receptacles or drop boxes provided voters with a safe and convenient means to return their ballots directly to their county board of elections, and provided alternatives to returning the ballot by mail and/or to voting in-person at their polling place on Election Day. *Id.*

17. None of the at least 24 counties that used drop boxes during the June primary reported significant issues with those drop boxes, including any attempts to tamper or vandalize the drop boxes or the ballots within them. *Id.* ¶ 41.

18. As required by statute, on August 1, 2020, the Pennsylvania Department of State, under the direction of Secretary Boockvar, prepared and published a report regarding the Primary Election. *See* 71 Pa. Cons. Stat. § 279.6. As part of the report, the Secretary reported:

[D]espite the changes and challenges, Pennsylvanians voted safely and peacefully in the primary, embracing the new mail-in voting option, and the new voting systems performed well. Reports of significant incidents were fewer than reported in many comparable prior elections, and our overall turnout was far higher than in

2012, the last time a presidential primary was not contested on both sides of the aisle.

Pls.’ App. Ex. 53, Act 35 Report (ECF No. 504-53) at 4.

19. The Secretary also acknowledged that the Department of State “also learned some valuable lessons from the primary that we can use to ensure an even smoother voting experience in the general election in November.” *Id.*

**F. Preparations for the General Election**

20. Since the June primary, the Secretary, the county boards of elections, and other election officials in the Commonwealth have been preparing for the General Election.

21. Consistent with her duty to ensure free and fair elections, *see generally* 25 Pa. Cons. Stat. § 2621, the Secretary has issued various guidance documents implementing the dictates of the Election Code.

22. Each guidance documents issued by the Department is disseminated to the county boards of elections and published on the Department’s public website. *See Election Administration Tools*, Pennsylvania Department of State, *available at* <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Pages/Election-Administration-Tools.aspx> (last visited Oct. 2, 2020).

23. As relevant to the use of drop boxes, the Secretary has published the following guidance documents (discussed more fully below):

- Applications and Balloting Guidance: Mail-In and Absentee Ballots and Voter Registration Changes dated January 10, 2020, Pls.’ App. Ex. 21 (ECF No. 504-21);
- Absentee and Mail-In Ballot Return Guidance dated August 19, 2020, Pls.’ App. Ex. 23 (ECF No. 504-23); and
- Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures dated September 28, 2020, Pls.’ App. Ex. 25 (ECF No. 504-25).

24. As relevant to the issue of signature analysis, the Secretary has published the following guidance documents (discussed more fully below):

- Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes dated September 11, 2020, Pls.’ App. Ex. 24 (ECF No. 504-24); and
- Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures dated September 28, 2020, Pls.’ App. Ex. 25 (ECF No. 504-25).

25. Additionally, the Secretary previously issued two guidance documents relevant to other procedures at issue in the Second Amended Complaint, including (i) August 19, 2020 guidance pertaining to “naked ballots,” and (ii) a January 30, 2020 guidance document setting forth the procedures for in-person voting for electors who previously requested a mail-in ballot.

26. The Secretary has withdrawn both guidance documents (or they have been superseded by later guidance) in light of changes to the Election Code (including through Act 12) or the Pennsylvania Supreme Court’s recent decision. The Department has notified all counties of such withdrawal and has removed that prior guidance from the Department’s public website, *see Election Administration Tools*, Pennsylvania Department of State, *available at* <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Pages/Election-Administration-Tools.aspx> (last visited Oct. 2, 2020).

## **II. Facts Specific to Plaintiffs’ Remaining Challenges**

### **A. Ballot Drop Boxes.**

27. Authority of County Boards of Election. In addition to granting general authority to county boards of elections to “have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Code],” 25 Pa. Cons. Stat. § 2641(a), the Election Code empowers county boards of elections to “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors,” *id.* § 2642(f).

28. As part of that discretion and authority, the Election Code requires county boards of elections to “purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines,” *id.* § 2642(c), and to “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . electors.,” *id.* § 2642(f).

29. The Pennsylvania Supreme Court’s Unambiguous Authorization of Drop Boxes. On September 17, 2020, the Pennsylvania Supreme Court held that “the Election Code permits county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.” *Pa. Democratic Party*, 2020 WL 5554644, at \*10; *see id.* at \*9 (“[W]e need not belabor our ultimate conclusion that the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.”).

30. In doing so, the Pennsylvania Supreme Court noted “the clear legislative intent underlying Act 77 . . . to provide electors with options to vote outside of traditional polling places.” *Id.* at \*9. In particular, the court noted that such a construction of the Election Code “favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.” *Id.*

31. Under the Election Code, as confirmed by the Pennsylvania Supreme Court, every Pennsylvania county is therefore permitted to use drop boxes, in a manner determined by the county board of elections, pursuant to the discretion vested in each board by the Election Code. 25 Pa. Cons. Stat. §§ 2641(a), 2642(f)-(g).

32. Pennsylvania’s Practice Comports with Other States. The Commonwealth’s use of drop boxes to facilitate mail-in voting is consistent with 34 states and the District of Columbia (including the majority of states that allow mail-in voting), where voters are authorized to submit

their mail-in ballots in person at sites other than their county (or other local) election board, including drop boxes. Secy.'s App. Ex. 11, Stein Report at 8.

33. Such drop boxes have been used to facilitate mail-in voting in the United States for years. *See* Secy.'s App. Ex. 23, *Ballot Drop Box Usage by Year*, Washington Secretary of State (reflecting significant drop box usage as far back as 2012, when tracking began).

34. During the 2016 general election, around 16% of all voters nationwide cast their ballot using drop boxes. *See* Secy.'s App. Ex. 16, *The Rise of Ballot Drop Boxes Due to the Coronavirus*, The Lawfare Inst. (Aug. 27, 2020). In some states, the vast majority of voters cast their ballots using drop boxes in that election. *See id.* (indicating that 75% of all voters in Colorado and 56.9% of all voters in Washington cast their ballot using drop boxes in the 2016 general election).

35. The use of drop boxes around the country has been steadily rising over the last several years. *See id.*; Secy.'s App. Ex. 23, *Ballot Drop Box Usage by Year*.

36. The Department's Guidance Related to Use of Drop Boxes Before the June 2020 Primary. On January 10, 2020, the Secretary issued guidance documents pertaining to, among other things, mail-in and absentee ballots. Pls.' App. Ex. 21, *Appl. and Balloting Guidance: Mail-In and Absentee Ballots and Voter Registration Changes* (ECF No. 504-21) at 3, 5-6.

37. The Secretary issued that guidance to all counties so that every county in the Commonwealth received guidance (i) stating that the Election Code permitted the use of drop boxes, and (ii) setting forth best practices regarding their use. *Id.* at 2, 5-6.

38. In particular, the guidance advised that “[i]n addition to [county election offices], counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots,” and that “[i]f a county

decides to provide for other ballot collection locations, the county should consider [certain] best practices.” *Id.* at 5.

39. Among other recommended best practices, the Secretary advised the counties to:

- ensure and document the security and chain of custody of mail-in and absentee ballots retrieved from ballot collection locations;
- utilize secure receptacles designed for this specific purpose;
- designate official sworn county personnel to remove the ballots from the receptacles; and
- provide clear signage designating the locations of such drop boxes and explaining their proper use.

*Id.* at 6.

40. The guidance also advised counties to contact the Department of State for additional guidance on documenting security and chain of custody as well as facts, best practices, and examples of secure receptacles. *Id.*

41. Prior to the primary, upon outreach from various counties, the Department advised counties contemplating the use of drop boxes regarding such best practices.

42. Use of Drop Boxes During the June 2020 Primary. During the June 2020 primary, at least 24 counties used drop boxes to facilitate the return of absentee and mail-in ballots. Secy.’s App. Ex. 28, Pennsylvania Drop Box Practices by County.

43. Consistent with Pennsylvania’s statutory delegation of discretion over election equipment to county boards of elections, each county decided for itself whether to have drop boxes and, if so, what kind of drop boxes to use, among other factors. Secy.’s App. Ex. 2, Boockvar Decl. ¶¶ 57-58; *see* 25 Pa. Cons. Stat. § 2642(b)-(c) (providing county boards of elections discretion to “select and equip polling places that meet the requirements of this act” and “purchase,

preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines, and to procure ballots and all other supplies for elections”).

44. Additional Departmental Guidance Pertaining to Drop Boxes Since the Primary Election. On August 19, 2020, the Department issued additional (and more comprehensive) guidance regarding the use of drop boxes, including related to where to locate them, Pls.’ App. Ex. 23, Absentee and Mail-In Ballot Return Guidance (ECF No. 504-23) at 3, how to publicize them, *id.* at 4, how to secure them (and the ballots therein), *id.* at 5-6, what signage should accompany them, *id.*, and best practices regarding ballot collection and chain-of-custody procedures, *id.* at 7-8.

45. The Department developed this guidance through the work of numerous subject matter experts within the Department as well as a review of the policies, best practices, and laws in other states where drop boxes are deployed. *See* Secy.’s App. Ex. 6, Degraffenried Dep. 23:14-22.

46. With regard to security, the guidance advised that, if used, drop boxes should (i) have an opening slot too small to allow tampering with (including pouring any liquids on) ballots; (ii) be secured (to a stationary surface, immovable object, etc.) and made of durable material to prevent vandalism and removal; (iii) be secured by a lock and sealed with a tamper-evident seal to protect the integrity of ballots; (iv) be adequately lit when in use; and (v) when feasible, be monitored by a video surveillance system, to be retained for 60 days after the certification deadline. *See* Pls.’ App. Ex. 23, Absentee and Mail-In Ballot Return Guidance (ECF No. 504-23) at 5-6.

47. With regard to signage, the guidance recommended that, if used, drop boxes should display signage stating that: (i) counterfeiting, forging, tampering with, or destroying ballots is a

crime (a second-degree misdemeanor) under the Election Code; (ii) third-party ballot return is prohibited unless the person returning the ballot is rendering assistance to a disabled or emergency absentee voter (in which case the returning individual is required to have a declaration signed by the voter); and (iii) citizens should immediately notify county officials if the drop box is full, damaged, or failing to function (and shall provide contact information to do so). *See id.*

48. With regard to ballot collection and chain of custody following collection, the guidance advised counties that, if they used drop boxes, ballots should be: (i) collected at least every 24 hours by designated election officials who carry identification and have signed declarations affirming they will timely and securely collect ballots and prevent tampering; (ii) transported immediately to the county board of elections in a secure transfer container; (iii) recorded with the identification number of the drop box, time of retrieval, and time of arrival; and (iv) inspected for evidence of tampering. *See id.* at 7.

49. Amber McReynolds, a respected expert on election practice retained in this case by the NAACP Intervenors, testified in her report that the Secretary's recommendations regarding security and signage in particular were consistent with best practices. *See Secy.'s App. Ex. 9, McReynolds Report ¶ 35.*

50. Counties' Plans to Use Drop Boxes for the November 2020 General Election. Consistent with the discretion that the Election Code has historically afforded them, counties are continuing to finalize their plans for the use of drop boxes during the November 2020 General Election.

51. At this time, the Secretary understands that at least 24 counties plan to use drop boxes during General Election. The plans, as the Secretary understand them at this time based on the discovery record in this proceeding, are summarized at Exhibit 1 to the Secretary's Appendix.



52. As reflected in the summary chart, approximately nine of the counties that the Secretary understands intend to use drop boxes intend to staff them, and approximately 17 intend to have video surveillance. The Secretary does not understand at this time that *any* county that plans to use drop boxes will not have either staffing or video surveillance. *Id.*

53. Numerous of the counties that have produced photographs of their planned drop boxes reflect signage of the sort recommended by the Secretary with regard to the prohibition of third-party ballot delivery. Secy.'s App. Ex. 30, Hagan Dep. Ex. 16; Secy.'s App. Ex. 31, Soltysiak Dep. Ex. 20.

54. Undisputed Evidence Pertaining to Benefits of Drop Boxes. Drop boxes provide voters a direct and convenient way to deliver their cast ballots to their county boards of elections, thereby increasing turnout. *See* Secy.'s App. Ex. 2, Boockvar Decl. ¶¶ 24, 37-38; Secy.'s App. Ex. 11, Stein Report at 10-11.

55. In light of the ongoing COVID-19 pandemic, many voters understandably do not wish to cast their votes in person at their polling place on Election Day, which may require voters to be in close proximity to strangers, indoors, and for an extended period of time (depending on lines). *See* Secy.'s App. Ex. 2, Boockvar Decl. ¶ 39; Secy.'s App. Ex. 11, Stein Report at 10.

56. Additionally, while depositing a voter's ballot in person at a voter's county board of election would likely require the voter to spend less time indoors than voting at a polling place on Election Day, many county boards of elections are located within crowded municipal buildings offering numerous services. *See* Secy.'s App. Ex. 2, Boockvar Decl. ¶ 36.

57. Depositing a ballot in a drop box generally does not require that a voter come in close proximity to other members of the public, compared to in-person voting or personally delivering a mail-in ballot to a public office building. As such, drop-box voting reduces the

individual health risk to the voter and the public health risk to the community. Secy.'s App. Ex. 8, Burke Report ¶ 95.

58. Moreover, ten counties in Pennsylvania cover more than 1,000 square miles, and two-thirds of Pennsylvania's 67 counties (45 of them) cover more than 500 square miles. *See* Secy.'s App. Ex. 29, Pennsylvania Land Area County Rank. As a result, depending on where voters reside within a county, a voter could be required to drive dozens of miles (and perhaps in excess of 100 miles) if he or she wished to deposit his or her mail-in ballot in person at the main county board of elections office.

59. As part of the Department's August 2020 guidance, the Department advised counties to consider choosing drop box locations that, among other things: (i) serve heavily populated urban/suburban areas, as well as rural areas; (ii) are near heavy traffic areas such as commercial corridors, large residential areas, major employers, and public transportation routes; (iii) are easily recognizable and accessible within the community; (iv) are in areas in which there have historically been delays at existing polling locations; and (v) take into account the distance a time a voter must travel to get there. Pls.' App. Ex. 23, Absentee and Mail-In Ballot Return Guidance (ECF No. 504-23) at 3.

60. With regard to transmitting mail-in or absentee ballots by mail, on July 29, 2020, the General Counsel of the U.S. Postal Service sent the Secretary a letter stating that due to the interplay between the deadline provided in the Election Code for requesting an absentee or mail-in ballot and the date by which all ballots must be received by the county election boards, "to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your

election rules and returned promptly, and yet not returned in time to be counted.” Secy.’s App. Ex. 13, July 29, 2020 Letter from U.S.P.S. to Secretary Boockvar.

61. In addition to that, various well-respected news organizations have publicized issues regarding the timeliness and reliability of U.S. Postal Service mail delivery in recent weeks that could justifiably dissuade voters from wanting to rely upon the Postal Service for return of their mail-in or absentee ballot. *See, e.g.*, Secy.’s App. Ex. 14, *Mail Delays Are Frustrating Philly Residents, and a Short-staffed Postal Service Is Struggling to Keep Up*, The Philadelphia Inquirer (Aug. 2, 2020); Secy.’s App. Ex. 17, *‘Like somebody turned off a switch’: Small businesses say USPS delays are hitting them hard*, USA Today (Sept. 11, 2020); *see also* Secy.’s App. 2, Boockvar Decl. ¶¶ 42-43.

62. Mail-in voting also lessens the cost to counties of administering elections, reducing or eliminating expenditures for location rental fees, voting machines, and personnel. Secy.’s App. Ex. 11, Stein Report at 11. 24-hour secure ballot drop boxes are also cost-effective measures for counties, as they do not have to be staffed by election judges. Secy.’s App. Ex. 9, McReynolds Report ¶ 34.

63. The Federal Department of Homeland Security (“DHS”), through its Cybersecurity and Infrastructure Security Agency Elections Infrastructure Government Coordinating Council, has released guidance affirming that “[a] ballot drop box provides a secure and convenient means for voters to return their mail ballot.” Secy.’s App. Ex. 24, DHS Ballot Drop Box Paper at 1.

64. DHS suggests having one drop box for every 15,000-20,000 registered voters, and concludes that “[i]n high-demand areas where votes are or will be cast primarily by mail, installing a permanent ballot drop box—one that can be accessed by voters 24/7—is a good solution.” *Id.* at 2, 5.

65. DHS notes that “[s]ome voters prefer to deliver their mail ballots to a drop box rather than sending them back through the mail.” *Id.* at 1. Indeed, research shows that drop boxes *increase* voter confidence in elections, reflecting an important reason for their use. Secy.’s App. Ex. 11, Stein Report at 12-13.

66. Lack of Evidence Regarding Problems with Drop Boxes. It is illegal in the Commonwealth to counterfeit, forge, tamper with, destroy, or deface ballots. 25 Pa. Cons. Stat. §§ 3516, 3517. Such offenses are punishable by a fine of up to \$5,000 and imprisonment of up to two years. *Id.*

67. It is likewise a crime to “tamper with or injure or attempt to injure any voting machine to be used or being used at any primary or election,” or to “prevent or attempt to prevent the correct operation of such machine.” *Id.* § 3518. Such tampering or attempts to tamper are similarly punishable by a fine of up to \$5,000 and imprisonment of up to two years. *Id.*

68. Plaintiffs admit they are unaware of any attempts to tamper with or destroy any drop box during the June 2020 Primary Election. Secy.’s App. Ex. 3, Fitzpatrick Dep. 124:11-21, 125:24-126:4.

69. The lack of evidence with respect to drop box or ballot tampering from the June 2020 Primary in Pennsylvania is consistent with the experience of other states that have used drop boxes, where there has been almost no evidence whatsoever of ballot tampering or other types of voter fraud associated with the use of drop boxes in the many years they have been in operation. Secy.’s App. Ex. 11, Stein Report at 4, 15; Secy.’s App. Ex. 9, McReynolds Report ¶ 45 (“In all my work as an election official and a consultant, I am unaware of any incident of tampering with ballot boxes.”). The DHS report similarly makes no mention of voter fraud, and again, affirms

that “[a] ballot drop box provides a secure and convenient means for voters to return their mail ballot.” Secy.’s App. Ex. 24, DHS Ballot Drop Box Paper at 1.

70. More broadly, there is no evidence of systemic ballot-harvesting resulting in voter fraud in Pennsylvania. Secy.’s App. Ex. 10, Minnite Report at 29-35; Secy.’s App. Ex. 11, Stein Report at 15. In the last 20 years in the entire state of Pennsylvania, there have been fewer than a dozen confirmed cases of fraud involving a handful of absentee ballots. Secy.’s App. Ex. 10, Minnite Report at 3-4.

71. During discovery, Plaintiffs identified a small number (approximately five in aggregate) of photos, social media posts, or videos where they allege that the individuals shown may have deposited—at most—two mail-in or absentee ballot into a drop box, and Plaintiffs allege that this amounts to “ballot harvesting.” Secy.’s App. Ex. 25, P002067; Secy.’s App. Ex. 26, P002068; June 2, 2020 Elk Cty. Video Clip Still Shots (ECF No. 415-31). Notably, Plaintiffs also admitted to engaging in surveillance of drop boxes during the primary election, but did not identify any such instances of multiple ballot deposits from those efforts. Secy.’s App. Ex. 3, Fitzpatrick Dep. 162:3-163:18, 165:14-21.

72. Of the very small number of photos Plaintiffs have pointed to, they (i) could not identify who the voters were or whose ballots they were depositing (and whether that person was simply outside the photo frame); (ii) admitted to not being there when the photos were taken; (iii) could not say whether the voters were dropping off a ballot for a disabled voter; (iv) could not say whether certain of the voters had actually dropped two ballots in the drop box; and (v) admitted they made no effort to report the individuals to authorities. *Id.* at 156:24-158:12, 159:17-161:12, 163:24-165:12.

73. Similarly, the limited surveillance video from Elk County (and Plaintiffs’ selected snapshots therefrom) does not establish whether the individuals deposited two ballots into the drop box or whether they deposited one ballot and one other type of document, *e.g.*, an affidavit of disability. June 2, 2020 Elk Cty. Video Screenshots (ECF No. 415-31)

74. Additionally, this type of two-ballot depositing—which, again, Plaintiffs refer to as “ballot harvesting”—could (and likely does) happen with regularity—and without detection—for voters returning their ballots through the U.S. Postal Service, whether through an official U.S. Postal Service collection box, a voter’s own mailbox or work mailroom, or other places mailings are initiated. Secy.’s App. Ex. 11, Stein Report at 17-19; Secy.’s App. Ex. 2, Boockvar Decl. ¶¶ 51, 56 (noting that drop boxes contain signage reminding voters they may only deposit their own ballot). In fact, the Rule 30(b)(6) designee for the Trump Campaign and Republican National Committee Plaintiffs admitted that there were no protections in place to stop a person from harvesting ballots and placing those ballots in a U.S. Postal Service mail collection box, most of which are “unmanned” and unmonitored. Secy.’s App. Ex. 3, Fitzpatrick Dep. 134:14-135:1.

75. The U.S. Postal Service reports that there are over 141,900 blue mail collection boxes in use in the United States. *See* Postal Facts, *available at* <https://facts.usps.com/size-and-scope> (last visited Oct. 2, 2020). For the 2020 General Election, Pennsylvania is pre-paying postage related to mail-in or absentee ballots.

76. Plaintiffs’ Rule 30(b)(6) designee and their expert identified various theoretical scenarios related to drop boxes. Secy.’s App. Ex. 3, Fitzpatrick Dep. 123:22-126:23; Pls.’ App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 17. But neither the designee (who has served as the Trump Campaign’s Election Day Operations Director since before the June 2020 primary) nor the expert has not identified a single occasion of any of those hypothetical occurrences from the

June primary or any other election in any of the many jurisdictions drop boxes have been employed for years. **[Again, I think we have this in argument section.]**

77. Plaintiffs have not identified any specific type (or brand) of drop box that is going to be used in any Pennsylvania county during the November 2020 General Election, nor have they identified evidence regarding whether such type or brand of box is susceptible to any of the theoretical scenarios they have identified. *E.g.*, Pls.’ App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 17 (“A cardboard box monitored at all times by a sworn election official is still unacceptable but far preferable to an unmonitored, tamperproof receptacle.”).

**B. Poll Watchers.**

1. County Residency Requirement

78. The Requirement and its History. For many years, the Pennsylvania Election Code required that poll watchers serve only within their “election district,” which the Code defines as “a district, division or precinct, . . . within which all qualified electors vote at one polling place.” 25 Pa. Cons. Stat. § 2687(b) (eff. to May 15, 2002) (watchers “shall serve in only one district and must be qualified registered electors of the municipality or township in which the district where they are authorized to act is located”); 25 Pa. Cons. Stat. § 2602(g). In other words, poll watching was limited to a more limited geographic reach than one’s county, as counties are themselves made up of many election districts.

79. In 2004, the General Assembly amended the relevant poll-watcher statute to provide that a poll watcher “shall be authorized to serve in the election district for which the watcher was appointed and, when the watcher is not serving in the election district for which the watcher was appointed, in any other election district in the county in which the watcher is a qualified registered elector.” 25 Pa. Cons. Stat. § 2687(b) (eff. Oct. 8, 2004).

80. This county residency requirement is in line with (or is, in some cases, more permissive than) the laws of at least eight other states, which similarly require prospective poll watchers to reside in the county in which they wish to serve as a watcher or (similar to the pre-2004 Pennsylvania statute) limit poll watchers to a sub-division of the county. *See, e.g.*, Fla. Stat. Ann. § 101.131 (Florida); Ind. Code Ann. § 3-6-8-2.5 (Indiana); Ky. Rev. Stat. Ann. § 117.315 (Kentucky); N.Y. Elec. Law § 8-500 (New York); N.C. Gen. Stat. Ann. § 163-45 (North Carolina); Tex. Elec. Code Ann. § 33.031(a) (Texas); S.C. Code Ann. § 7-13-860 (South Carolina); Wyo. Stat. Ann. § 22-15-109 (Wyoming).

81. Additionally, at least one state (West Virginia) does not provide for poll watchers at all. *See* W. Va. Code Ann. § 3-1-37; W. Va. Code Ann. § 3-1-41

82. The General Assembly has not amended the poll-watcher statute since 2004, even though some lawmakers have advocated for the repeal of the residency requirement. *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 402 (E.D. Pa. 2016) (observing that legislative efforts to repeal the poll-watcher residency requirement have been unsuccessful).

83. In recent years, some lawmakers have advocated the repeal of the residency requirement, but the General Assembly as a whole has declined to do so. *See* Legislative History of H.B. 29, Gen. Assemb., Reg. Sess. (Pa. 2015-2016), *available at* [https://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2015&sind=0&body=H&type=B&bn=29](https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2015&sind=0&body=H&type=B&bn=29) (last visited Oct. 2, 2020) (Pennsylvania House of Representatives); Legislative History of H.B. 171, Gen. Assemb., Reg. Sess. (Pa. 2017-2018), *available at* [https://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2017&sind=0&body=H&type=B&bn=171](https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2017&sind=0&body=H&type=B&bn=171) (last visited Oct. 2, 2020) (Pennsylvania Senate).



84. In 2016, a judge in the U.S. District Court for the Eastern District of Pennsylvania denied a request for a preliminary injunction of the county residency requirement brought by the Republican Party of Pennsylvania. *Cortés*, 218 F. Supp. 3d 396. In doing so, the court held that the poll watcher residency requirement in 25 Pa. Cons. Stat. § 2687(b) places no burden on the fundamental right to vote, and so it “need only withstand rational-basis review.” *Id.* at 408-09. The court observed that, “in 1937, the General Assembly enacted a county-based scheme to manage elections within the state, and consistent with that scheme the legislature endeavored to allow county election officials to oversee a manageable portion of the state in all aspects of the process, including in credentialing poll watchers.” *Id.* at 409. And the court affirmed that “[t]he legislature’s decision to allow county election officials to credential only poll watchers from their own county is rationally related to the state’s interest in maintaining its county-run election system . . . .” *Id.*

85. Most recently, as part of its September 17 decision, the Pennsylvania Supreme Court expressly agreed with the decision in *Cortés* and likewise upheld the requirement. *Pa. Democratic Party*, 2020 WL 5554644, at \*29-30. The Pennsylvania Supreme Court reasoned, like the *Cortés* court had, that the residency requirement “imposes no burden on one’s constitutional right to vote and, accordingly, requires only a showing that a rational basis exists to be upheld.” *Id.* at \*30. The Pennsylvania Supreme Court readily concluded that the residency requirement serves a rational purpose, namely that because the “General Assembly chose a county-based scheme for conducting elections, it is reasonable that the Legislature would require poll watchers, who serve within the various counties of the state, to be residents of the counties in which they serve.” *Id.*

86. Requiring poll watchers to reside in the county where they serve makes it substantially more likely that the poll watcher will be familiar with local rules, candidates, and voters. Secy.'s App. Ex. 2, Boockvar Decl. ¶ 78.

87. Additionally, requiring poll watchers to reside in the county reduces the risk of voter intimidation during in-person voting. *Id.* ¶ 79; Secy.'s App. Ex. 7, Barreto Report ¶ 52.

88. The Election Code permits candidates to appoint two poll watchers for each election district. 25 Pa. Cons. Stat. § 2687(a). The Election Code permits political parties and bodies to appoint three poll watchers for each election district. *Id.*

89. The Pennsylvania Department of State's website provides updated statistics regarding party registration by county. *See Voting & Election Statistics*, Pennsylvania Department of State, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx> (last visited Oct. 3, 2020). As of September 28, 2020 (the most recent available report), there were 125,710 registered Republican voters in Philadelphia County (the only county Plaintiffs focus upon regarding the poll watcher residency requirement in the SAC, *see* SAC ¶ 204). *Id.*<sup>4</sup> Based on certified election results, Donald Trump received 108,748 votes in Philadelphia County in the 2016 General Election. *See* 2016 Gen. Pres. & V. Pres. Election Results, available at <https://www.philadelphiovotes.com/en/resources-a-data/ballot-box-app>.

90. By Plaintiffs' allegations, there are 66 voting wards and 1,686 divisions in Philadelphia County. SAC ¶ 204.

---

<sup>4</sup> The Election Code does not limit poll watchers to just members of a particular party; an unaffiliated voter who supports a candidate (including President Trump) may serve as a poll watcher for that party or candidate. *See* 25 Pa. Cons. Stat. § 2687(b).

91. In Allegheny County (which Plaintiffs' expert identifies as a county in which a hypothetical shortfall of poll watchers may occur, *see* Pls.' App. Ex. 20, Lockerbie Report (ECF No. 504-20) ¶ 11), there are 259,541 registered Republicans, *Voting & Election Statistics*, Pennsylvania Department of State, *available at* <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx> (last visited Oct. 3, 2020), and President Trump received 259,125 votes in Allegheny County in the 2016 General Election. *See* Allegheny County 2016 General Election, *available at* <https://results.enr.clarityelections.com/PA/Allegheny/63905/Web02.193333/#> (last visited Oct. 3, 2020).

92. Allegheny County will have over 1,300 voting precincts for the November 2020 General Election. *See* Secy.'s App. Ex. 5, Voye Dep. 15:1-3.

93. Although Plaintiffs allege that "Democrats [are] at a disadvantage in staffing polling places with Democratic poll watchers" in certain counties, SAC ¶ 205, no Democratic candidate or party is challenging the county residency requirement in this election. *See* Secy.'s App. Ex. 3, Fitzpatrick Dep. 262:9-13 ("Q: But the Democrats or the Biden campaign aren't bringing a challenge to this residency requirement as part of this litigation or any other litigation that you're aware of, correct, sir? A: Not to my knowledge.").

94. During his deposition, at a time when poll-watcher recruiting activities were already underway, the Trump Campaign and RNC's Rule 30(b)(6) designee was unable to identify a single county where Plaintiffs will not be able to obtain full coverage of poll watchers. Secy.'s App. Ex. 3, Fitzpatrick Dep. 261:21-25 ("Q: Which counties does the Trump campaign or the RNC contend that they will not be able to obtain what you refer to as full coverage of poll watchers for the November 2020 election? A: I'm not sure. I couldn't tell you a list."); *id.* at 269:2-10 ("[W]e

anticipate having issues in [some] counties but aren't -- aren't sure yet as to which specific counties"); *id.* at 265:2-11 (“Q: Did you initiate your poll-watcher recruitment efforts for the general election yet [as of August 20, 2020]? A: We -- we have --we have a website . . . [a]nd we have engaged volunteers in — throughout the state to help us recruit poll watchers.”).

95. Nor do Plaintiffs’ declarations in support of their summary judgment motion set forth their efforts to recruit poll watchers, nor articulate any county in which they claim to have attempted to recruit poll watchers, but fallen short, instead expressing only general concerns. *See, e.g.,* Pls.’ App. Ex. 2, Fitzpatrick Decl. (ECF No. 504-2) ¶ 25 (“The Trump Campaign is *concerned* that . . . it will not have enough poll watchers in certain counties.” (emphasis added)); Pls.’ App. Ex. 4, Thompson Decl. (ECF No. 504-4) ¶ 19 (“[I]t can be challenging to find enough volunteers to serve as poll watchers.”); Pls.’ App. Ex. 7, Joyce Declaration (ECF No. 504-7) (making no reference to any even possible shortage of poll watchers).

2. Plaintiffs’ Request for Poll Watchers “to Be Present in all Locations Where Votes are Cast”

96. The Pennsylvania Election Code sets forth the rules for where and when poll watchers are permitted to be present.

97. The Election Code provides that poll watchers may be present “at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines under” the Code. 25 Pa. Cons. Stat. § 2650.

98. Additionally, one poll watcher for each candidate, political party, or political body may “be present in the polling place . . . from the time that the election officers meet prior to the opening of the polls . . . until the time that the counting of votes is complete and the district register and voting check list is locked and sealed.” 25 Pa. Cons. Stat. § 2687(b).

99. Although Pennsylvania has historically allowed absentee ballots to be returned by U.S. Postal Service or by in-person delivery to a county board of elections office, the Election Code does not provide (and has never provided for) any right to have poll watchers in locations where absentee voters fill out their ballots (which may include their home, office, or myriad other locations), nor where those votes are mailed (which may include their own mailbox, an official U.S. Postal Service collection box, a work mailroom, or other places U.S. Postal Service mail is collected), nor at county board of elections offices. Secy.'s App. Ex. 2, Boockvar Decl. ¶¶ 86-90.

3. Plaintiffs' Request for Poll Watchers to Be Present at Pre-Canvass and Canvass Meetings

100. Prior to Act 77, absentee ballots were held in election districts rather than centralized at the county board of elections. *See* 25 Pa. Cons. Stat. § 3146.8 (eff. Mar. 14, 2012 to Oct. 30, 2019) (“In all election districts in which electronic voting systems are used, absentee ballots shall be opened at the election district, checked for write-in votes in accordance with section 1113-A and then either hand-counted or counted by means of the automatic tabulation equipment, whatever the case may be.” (footnote omitted)). At such time (again, before Act 77), poll workers opened those absentee ballots at each polling place after the close of the polls. *Id.* (“Except as provided in section 1302.1(a.2), the county board of elections shall then distribute the absentee ballots, unopened, to the absentee voter’s respective election district concurrently with the distribution of the other election supplies. Absentee ballots shall be canvassed immediately and continuously without interruption until completed after the close of the polls on the day of the election in each election district. The results of the canvass of the absentee ballots shall then be included in and returned to the county board with the returns of that district.” (footnote omitted)).

101. With the enactment of Act 77, processing and counting of mail-in and absentee ballots is now centralized in each county board of elections, with all mail-in and absentee ballots

in such county held and counted at the county board of elections (or such other site as the county board may choose) without regard to which election district those ballots originated from. 25 Pa. Cons. Stat. § 3146.8(a) (eff. Mar. 27, 2020); Secy.’s App. Ex. 2, Boockvar Decl. ¶ 81.

102. Under Act 12, counties are permitted to “pre-canvass” mail-in or absentee ballots received before Election Day beginning at 7:00 a.m. on Election Day. 25 Pa. Cons. Stat. § 3146.8(g)(1.1). Counties are further permitted to “canvass” ballots received after that time beginning “no earlier than the close of the polls on the day of the election and no later than the third day following the election.” *Id.* § 3146.8(g)(2).

103. The Election Code permits “[o]ne authorized representative of each candidate” and “one representative from each political party” to “remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed.” 25 Pa. Cons. Stat. § 3146.8(g)(1.1). Similarly, during canvassing, the Election Code permits “[o]ne authorized representative of each candidate” and “one representative from each political party” to “remain in the room in which the absentee ballots and mail-in ballots are canvassed.” *Id.* § 3146.8(g)(2). That is, if 15 Republican candidates appear on ballots within a particular county (between state and federal elections), up to 16 “authorized representatives” related to the Republican Party could be present (one for each candidate and one for the party as a whole).

104. The Election Code provisions pertaining to the “pre-canvass” and “canvass” do not make any separate reference to poll watchers, instead referring only to the “authorized representatives” of parties and candidates.

### **C. Signature Comparisons for Absentee, Mail-In, and In-Person Voting.**

105. In order to obtain a mail-in or absentee ballot, a qualified Pennsylvania elector must fill out an application. Secy.’s App. Ex. 2, Boockvar Decl. ¶ 64.

106. On the application for a mail-in ballot, Pennsylvania voters must provide, among other things (as set forth below), their name, date of birth, length of time a resident of voting district, voting district if known, party choice in case of primary, address to which they want their ballot sent. 25 Pa. Cons. Stat. § 3150.12(b).

107. Mail-in ballot applications also require “proof of identification.” “Proof of identification” for purposes of mail-in electors is defined by statute as only: the elector’s driver’s license number, the last four digits of the elector’s Social Security number, or certain documents for persons with a religious objection to being photographed or who do not have a driver’s license or Social Security number. 25 Pa. Cons. Stat. § 2602(z.5)(3). A signature is not proof of identification. *See id.*

108. The current form of the Pennsylvania Application for Mail-In Ballot implements the identification requirement by instructing: “In order to apply for a mail-in ballot, you must supply your PA Driver’s License or PennDOT issued photo ID card number in the Identification section. If you do not have a PA Driver’s License or PennDOT issued photo ID card, you must supply the last four (4) digits of your Social Security number. If you do not have a valid form of either of these types of identification, please check the box titled ‘I do not have a PA driver’s license or a PennDOT ID card or a Social Security number’ in the Identification section. If you choose this option, you must enclose a photocopy of an acceptable ID.” Secy.’s App. Ex. 27, Pa. Appl. for Mail-In Ballot at PADOS000759.000002.

109. Mail-in ballot applications also contain a declaration requiring the voter to declare that: “I am eligible to vote by mail-in ballot at the forthcoming primary or election; that I am requesting the ballot of the party with which I am enrolled according to my voter registration record; and that all of the information which I have listed on this mail-in ballot application is true

and correct.” *Id.* at PADOS000759.000001. An applicant must sign the declaration on his or her application or, if the applicant is unable to sign the application because of illness or disability, must make a statement to that effect in the presence of a witness who then may sign the application on behalf of the applicant. 25 Pa. Cons. Stat. § 3150.12(c)-(d).

110. Applications for mail-in ballots are evaluated to determine the qualifications of the applicant by verifying the proof of identification provided by the elector on the application and by comparing the information provided on the application with the information contained on the applicant’s permanent registration card. 25 Pa. Cons. Stat. § 3150.12b(a).

111. Once the application has been processed, approved, mailed to the voter, and received, the voter must fill out the ballot consistent with the Election Code’s requirements, including the requirement that the “elector shall . . . fill out, date and sign the declaration printed on [the outer] envelope,” prior to returning it. *See* 25 Pa. Cons. Stat. §§ 3146.6 (absentee voting), 3150.16 (mail-in voting).

112. When the county board of elections meets to pre-canvass or canvass absentee ballots and mail-in ballots, the Election Code provides that “the board shall examine the declaration on the envelope of each ballot,” which contains the elector’s name and address, and “shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File,’ whichever is applicable.” 25 Pa. Cons. Stat. § 3146.8(g)(3).

113. Thereafter, “[i]f the county board has verified the proof of identification” (*i.e.*, the elector’s driver’s license number, the last four digits of the elector’s Social Security number, or certain qualifying documents who do not have a driver’s license or Social Security number) and if the county board “is satisfied that the declaration is sufficient and the information contained in the



‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’ verifies his right to vote,” the Code provides that “the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.” 25 Pa. Cons. Stat. § 3146.8(g)(3).

114. The Code does not characterize the voter’s signature on his or her declaration as “information” to be verified by the county board. *Id.*

115. The Election Code does not direct that signatures be compared between the various declarations, as the voter’s declaration does not serve an identification purpose. Rather, the specific forms of identification are prescribed by statute. 25 Pa. Cons. Stat. §§ 2602(z.5)(3), 3146.8(g)(3). Additionally, the only challenges that may be made to mail-in ballots under the Election Code are challenges to the qualifications of the elector, 25 Pa. Cons. Stat. § 3148(g)(4), and those challenges must be made before 5:00 pm on the Friday before election day, 25 Pa. Cons. Stat. § 3150.12b(a)(2), (3).

116. On September 11, 2020, the Secretary issued guidance clarifying that “the Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” Pls.’ App. Ex. 24 (ECF No. 504-24) at 3. There is no provision in Pennsylvania law authorizing counties to reject a ballot due to a perceived variation in the voter’s signature over time, and such a process could result in unjustified and arbitrary disenfranchisement of thousands of voters.

117. To obtain a definitive interpretation on this issue of pure state law, the Secretary intends to soon petition the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction subject to 42 Pa. Cons. Stat. § 726, to confirm the Election Code’s requirements with respect to

the verification requirements for mail-in and absentee ballots. Secy.'s App. Ex. 2, Boockvar Decl. ¶ 70.

### LEGAL STANDARD

A court must grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see* Fed. R. Civ. P. 56(a). “Although the non-moving party receives the benefit of all factual inferences in the court’s consideration of a motion for summary judgment, the nonmoving party must point to some evidence in the record that creates a genuine issue of material fact.” *Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006). Therefore, summary judgment is warranted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. To that end, “a defendant in a civil case . . . may meet its initial burden merely by pointing to the absence of evidence supporting essential elements of the non-moving party’s case.” *Duquesne Light Holdings, Inc. & Subsidiaries v. Comm’r*, 861 F.3d 396, 403-04 (3d Cir. 2017) (citing, *inter alia*, *Celotex*, 477 U.S. at 322-23). In such case, “[t]he moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” *Celotex*, 477 U.S. at 322-23.

In addition to moving for summary judgment, the Secretary moves to dismiss for lack of subject-matter jurisdiction, namely based on Plaintiffs’ lack of standing to assert certain of their claims. *See* Fed. R. Civ. P. 12(b)(1); *see also* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”). Whether

cast as an initial motion to dismiss under Rule 12(b)(1) or a suggestion of lack of subject-matter jurisdiction under Rule 12(h)(3), such motion may be made at any time. *See, e.g., Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011); *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). In response to such a challenge, Plaintiffs bear the burden of proving each element of standing “with the manner and degree of evidence required at the successive stages of the litigation.” *Pa. Prison Soc’y v. Cortés*, 508 F.3d 156, 161 (3d Cir. 2007).

In evaluating whether Plaintiffs have done so, this Court is not limited to the allegations in the SAC. Rather, Plaintiffs “can no longer rest on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken to be true.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citing Fed. R. Civ. P. 56(e)). And this Court may consider the factual record when ruling on jurisdiction at the summary judgment stage: “[W]hen a question of federal jurisdiction is raised either by a party as here, or by the court on its own motion, the court may inquire, by affidavits or otherwise, into the facts as they exist.” *Tanzymore v. Bethlehem Steel Corp.*, 457 F.2d 1320, 1323 (3d Cir. 1972).

## ARGUMENT

### I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’ DROP BOX-RELATED CLAIMS.

Just sixteen days ago, the Pennsylvania Supreme Court unambiguously held that the Election Code permits the use of mail-in or absentee ballot drop boxes, which are consistent with the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Pa. Democratic Party*, 2020 WL 5554644, at \*9-10 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)). Nevertheless, Plaintiffs accuse the Commonwealth of violating the Federal Constitution through the “uneven” use of “unmanned” drop boxes, and seek an order or declaration from this Court prohibiting them. But whether cast under a vote-dilution or equal-protection

theory, Plaintiffs’ drop-box-related claims are both legally unsound and factually unsubstantiated, and Defendants are entitled to summary judgment.

**A. Plaintiffs’ Drop-Box Claims Are Generalized And Speculative Grievances That Are Not Justiciable In Federal Court.**

The Court should dismiss (or grant Defendants summary judgment on) Plaintiffs’ drop-box theories at the outset because Plaintiffs lack standing to assert them. Article III and the Supreme Court’s precedents interpreting it are clear: a plaintiff must have standing to invoke federal jurisdiction, which requires that the plaintiff demonstrate it has suffered an injury-in-fact that is concrete and particularized, and actual or imminent; fairly traceable to the defendant’s challenged conduct; and likely to be redressed by a favorable judgment. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016); *see also Lujan*, 504 U.S. at 559-61. Such standing considerations place important limits on federal judicial authority and have “an extensive history in the context of challenges to election practices.” *Martel v. Condos*, --- F. Supp. 3d ----, 2020 WL 5755289, at \*4 (D. Vt. Sept. 16, 2020) (expressing hesitancy of federal courts to extend standing “to parties who have not themselves suffered discrimination or other individualized injury” such as through direct regulation in the voting process). Where, like here, “the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *Lujan*, 504 U.S. at 562 (citations omitted).

Plaintiffs here fail with regard to both the “particularized” (as opposed to generalized) and “imminent” (as opposed to speculative) requirements of the Article III standing inquiry:

First, Plaintiffs’ challenge to the use of “unmanned” drop boxes is the quintessential generalized objection to a state election policy. But “the Supreme Court continues to decline to extend standing to plaintiffs asserting generalized objections to state election laws.” *Martel*, 2020 WL 5755289, at \*4 (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). The premise of

Plaintiffs' challenge is that the use of "unmanned" drop boxes may lead to the casting of illegal ballots or voter fraud, which will dilute what they believe are validly cast ballots. But just as the plaintiffs in *Gill* failed to establish a "concrete and particularized" injury based on supposed vote dilution (in that case due to partisan gerrymandering), 138 S. Ct. at 1934, so too is Plaintiffs' "vote dilution due to potential voter fraud" claim non-cognizable in this Federal Court. That is because all Pennsylvania voters stand to suffer the same vote dilution if a fraudulent or illegal vote is counted and, absent allegations of a specific fraud, the injury is not particularized to Plaintiffs. Multiple federal courts have concluded as much in substantially similar cases in recent weeks and months, including ruling against some of these very same Plaintiffs. *See Donald J. Trump for President, Inc. v. Cegavske*, --- F. Supp. 3d ----, 2020 WL 5626974, at \*4 (D. Nev. Sept. 18, 2020) ("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." (citation omitted)); *Martel*, 2020 WL 5755289, at \*4-5; *Paher v. Cegavske*, --- F. Supp. 3d ----, 2020 WL 2089813, at \*5 (D. Nev. Apr. 30, 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury."); *see also Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[] [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."). Indeed, in dismissing similar claims brought by the Trump Campaign and Republican National Committee just two weeks ago, a sister federal district court found that "Plaintiffs' allegations are 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that fail to confer Article

III standing.” *Trump for President*, 2020 WL 5626974, at \*4 (quoting *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam)). Such is the case here too.

Plaintiffs’ claimed vote-dilution injury also has an “imminence problem,” which discovery has only confirmed. *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 981-82 (6th Cir. 2020) (per curiam) (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013)). Predictions of vote dilution due to voter fraud or other criminal activity are the prototypical “conjectural” or “hypothetical” injury that are not justiciable under Article III. *Lujan*, 504 U.S. at 560 (citations omitted); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983). Indeed, federal courts have not shied away from dismissing plaintiffs’ claims where they allege only speculative injuries. See, e.g., *Shelby Advocs.*, 947 F.3d at 981-82; *Heindel v. Andino*, 359 F. Supp. 3d 341, 351-54 (D.S.C. 2019), judgment vacated & appeal dismissed, 2019 WL 7781470 (4th Cir. Nov. 5, 2019); see also *Trump for President*, 2020 WL 5626974, at \*4 (observing that “alleged injuries” based on voter fraud “are speculative as well” (citing *Lujan*, 504 U.S. at 560)); cf. *Cook Cty. Republican Party v. Pritzker*, 2020 WL 5573059, at \*3 (N.D. Ill. Sept. 17, 2020).

It is Plaintiffs’ burden to establish they suffer from a justiciable injury in order to invoke this Federal Court’s jurisdiction. See *Lujan*, 504 U.S. at 561 (“Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.”). Plaintiffs have now amended their complaint twice, yet have been unable to add any additional allegations to bolster their generalized and speculative claim that illegal ballots may dilute legal ballots and infringe their right to vote.

Nor have they “followed up with the requisite proof.” *Gill*, 138 S. Ct. at 1923; *see also Lujan*, 504 U.S. at 561 (“In response to a summary judgment motion . . . , the plaintiff can no longer rest on . . . ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken to be true.” (citing Fed. R. Civ. P. 56(e))). To establish non-speculative future injuries, Plaintiffs must plead facts that establish a “‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper*, 568 U.S. at 414 n.5). But the factual record developed during discovery confirms what the Secretary has argued all along: Plaintiffs cannot identify a “*certainly impending*” injury in fact to justify Article III standing, and their “[a]llegations of *possible* future injury are not sufficient.” *Clapper*, 568 U.S. at 409 (brackets in original) (citations omitted). Indeed, a simple CTRL+F survey of Plaintiffs’ various and repeated references to the boogeyman of “voter fraud” in their summary judgment memorandum confirms that their concerns are with the *mere specter or potential for* such fraud, not actual or impending injury. *See, e.g.*, ECF No. 509 at 2 (noting the “*possibility* of voter fraud”); *id.* at 4 (asserting “that it will be *easy to commit* voter fraud [in the future]”); *id.* at 7, 70 (“foster an environment *ripe for* voter fraud”); *id.* at 18 (“*open the door to* voter fraud”); *id.* at 18 n.5 (“*raises the suspicion of* voter fraud”); *id.* at 59 (“flagging . . . *possible* voter fraud”) (all emphasis added). Such unfounded predictions are insufficient. *Clapper*, 568 U.S. at 410 (holding that a “theory of standing” that “relies on a highly attenuated chain of possibilities” fails to “satisfy the requirement that threatened injury must be *certainly impending*”); *accord Lyons*, 461 U.S. at 107 n.8.<sup>5</sup>

---

<sup>5</sup> It also bears noting that Plaintiffs substantially water down the definition of “voter fraud” so as to unreasonably expand its scope. It is axiomatic that state of mind is inherent in, and essential to, the very concept of fraud.

*See Fraud*, *Black’s Law Dictionary* (11th ed. 2019) (defining “fraud” as requiring a “*knowing* misrepresentation or *knowing* concealment of a material fact” (emphasis added)). As such, “voter

After Plaintiffs themselves repeatedly attempted to avoid discovery by insisting that their claims did not depend at all on voter fraud and refused to produce evidence of such supposed fraud, *see, e.g.*, Secy.’s App. Ex. 12, Pls.’ Objs. and Answers to Def.’s 1st Interrogs. (objecting on relevance grounds to the Secretary’s interrogatory asking them to “identify each and every instance of actual or suspected voter fraud or any other impropriety with respect to absentee or mail-in ballots” in the June 2020 primary and asserting that “Plaintiffs’ Amended Complaint raises purely legal questions”); ECF No. 320 at 47 (“[V]oter fraud is not an element of Plaintiffs’ constitutional claims.”); ECF No. 373 at 3 (“the actual commission of fraud is not an element of any claim or defense in this action”), this Court specifically directed Plaintiffs to do so, *see* Order Granting Mots. to Compel (ECF No. 374) ¶ 2. But it is easy to see why Plaintiffs initially attempted to argue that voter fraud is irrelevant to their claims: they possess virtually no evidence of any meaningful voter fraud or other ballot misconduct associated with the use of drop boxes in the Commonwealth or anywhere else that such drop boxes have been used for years. *See* SF ¶¶ 17, 42-43, 71-73.<sup>6</sup>

Still, in the SAC and their summary judgment brief, Plaintiffs persist in their claim that “voter fraud” or other misconduct will occur with such drop boxes, essentially focusing on two aspects of drop boxes that they view as constitutionally problematic: (i) that drop boxes could be

---

fraud” is reasonably defined as the “*intentional* corruption of the voting process by voters.” Secy.’s App. Ex. 10, Minnite Report at 3 (emphasis added). But Plaintiffs try to rid the term of any intentionality by defining it simply as “the casting and/or counting of ballots in violation of a state’s election code.” Pls.’ App. Ex. 19, Riddlemoser Rpt. (ECF No. 504-19) at 2; *see also* Secy.’s App. Ex. 3, Fitzpatrick Dep. 365:6-18. In so doing, Plaintiffs attempt to support their claims of widespread “voter fraud” through otherwise innocent examples where voters merely fail to comply strictly with the letter of the Election Code, but do so without any ill-intent. That is improper.

<sup>6</sup> Citations to “SF” are to the numbered paragraphs from Secretary’s Boockvar’s Statement of Facts.



the target of hypothetical vandalism leading to the destruction of votes, *see, e.g.*, Secy.’s App. Ex. 3, Fitzpatrick Dep. 123:22-126:23; Pls.’ App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 17-18; and (ii) that they could be a source for illegal third-party ballot delivery, which Plaintiffs refer to as “ballot harvesting,” *see, e.g.*, Pls.’ App. Ex. 2, Fitzpatrick Decl. (ECF No. 504-2) ¶ 10; Pls.’ App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 16-18.

Neither theory presents a viable constitutional concern here. First, while imagining creative events that could hypothetically lead to the criminal destruction of ballots, neither Plaintiffs nor their expert identify *any* such occurrences that have *ever* occurred with regard to drop boxes, whether in Pennsylvania during the June 2020 primary or *anywhere else in the United States* where drop boxes have been used for years. For instance, Plaintiffs’ expert hypothesizes that ballots could be destroyed by “dumping liquids into the box, lighting the ballots on fire by gasoline and matches, or even removing the box itself.” Pls.’ App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 17; *see also* Secy.’s App. Ex. 3, Fitzpatrick Dep. 123:22-126:23 (speculating as to similar possibilities and referring to the comments reflected in Pls.’ App. Ex. 57 (ECF No. 504-57)). Not only do Plaintiffs fail to allege that any single Pennsylvania county is going to use a type of ballot drop box that would even physically allow such illegal tampering, there is simply no evidence that those obviously criminal acts have ever transpired anywhere drop boxes have been used over the past decade. *See* SF ¶¶ 66-67 (detailing penalties for ballot destruction and tampering with voting machines); Secy.’s App. Ex. 3, Fitzpatrick Dep. 123:22-126:23 (admitting, on behalf of the Trump Campaign and RNC, that he is not aware of any occurrences of the hypothetical events he identified). Indeed, Plaintiffs’ summary judgment memorandum openly recognizes—as Plaintiffs must—the unprecedented nature of the injuries they predict and on which they premise their request for federal jurisdiction. *See* ECF 505 at 25 n.9 (acknowledging that “no

such ballot destruction has occurred in the past”). To be blunt, Plaintiffs’ assertion that “there is a first time for everything” is not a cognizable basis on which to premise federal judicial authority. As experts for the Secretary and certain Intervenors have testified, there is no evidence that this sort of criminal destruction or tampering has ever having taken place in the United States. SF ¶¶ 68-70. In the absence of such evidence, Article III does not cater to a presumption of illegality. See *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (referring to the “presumption of innocence” as “the bedrock, axiomatic and elementary principle” (alterations and internal quotation marks omitted)); cf. *In re Sci. Applications Int’l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 26 (D.D.C. 2014) (“The Supreme Court, however, has held that an ‘objectively reasonable likelihood’ of harm [from illegal conduct] is not enough to create standing, even if it is enough to engender some anxiety.”).<sup>7</sup>

With regard to third-party ballot delivery, this Court has already observed that the law is clear and that “[t]here is no allegation that the Secretary or any other county plans to defy the [Pennsylvania] Supreme Court” in accepting such ballots. *Boockvar III*, 2020 WL 5658392, at \*3; see *id.* at \*4 (“[B]ecause there is no reason to believe Defendants plan to violate what they themselves now agree the law requires, Plaintiffs’ claims are premature and speculative.”). Plaintiffs nonetheless insist that “unmanned” drop boxes are ripe for third-party delivery, ECF No. 509 at 70 (seeking order prohibiting unmanned drop boxes “to prevent third-party delivery”), but again, their assertions and evidence fail to remotely rise to the level of a federal constitutional violation. This is particularly true given the traditional and well-settled use of similar forms of

---

<sup>7</sup> Using Plaintiffs’ logic, one questions why they limit their fears to just destruction of ballot drop boxes. In the same vein, a would-be arsonist intent on destroying mail-in or absentee ballots could target an entire county board of elections office where such ballots are held—again, something that has never happened in Pennsylvania or elsewhere. But obviously the Federal Constitution does not prohibit the storage of such ballots in those offices, and the same must be true here.

absentee ballot transmission (such as U.S. Postal Service mail collection boxes), which present the very same hypothetical concern that a single voter could deposit more than one ballot without detection. When asked what protections are in place to stop a person from delivering someone else's ballot to any U.S. Postal Service mailbox, Plaintiffs' Rule 30(b)(6) designee responded: "The protections that are in place are just as any other protections. I mean, it's against the law; therefore, we expect individuals to . . . follow the laws of the state. So – the protection is that it's illegal and that . . . there's a penalty for breaking the law." Secy.'s App. Ex. 3, Fitzpatrick Dep. Tr. 133:23-134:12. Mr. Fitzpatrick then doubled down on this response:

Q. Other than presuming that people will follow the law, are there any other protections in place that you're aware of to stop a person from harvesting ballots and placing those ballots in a U.S. Postal Service mail collection box?

A. No, I think that the people need to be expected to follow the law. It's against the law, so we -- hopefully people won't break the law.

Q. And, again, you're not challenging the time-honored practices of returning absentee or mail-in ballots through the mail as part of this case, correct?

A. No.

*Id.* at 134:14-135:1.

As supposed evidence of this third-party delivery risk, Plaintiffs have identified approximately five examples—out of over 1.5 million mail-in or absentee ballots cast in the June 2020 Primary Election, SF ¶ 15—where it appears that a single voter is depositing (at most) two ballots into a ballot receptacle. SF ¶¶ 71-73. But for even those few examples, Plaintiffs (i) could not authenticate the photos or identify who the voters were (including whether the second ballot belonged to a spouse who was present but outside the photo frame); (ii) could not say whether the voter was dropping off a ballot for a disabled voter (which would be permissible); and (iii) could not say in certain instances whether the photographed voter had actually dropped both ballots in

the drop box. SF ¶¶ 71-73. This is hardly the sort of evidence on which to premise a federal constitutional violation and invalidate an election mechanism recently approved by the Commonwealth’s highest court. Indeed, as the Secretary and Dr. Robert Stein (an elections expert)—not to mention the Trump Campaign and RNC’s own designee—have noted, this sort of innocuous multiple-ballot delivery could happen with regularity (and without detection) through the use of U.S. Postal Service mail collection boxes (of which there are thousands in the Commonwealth, most of them “unmanned”) as well as anywhere else mail is collected (such as personal mailboxes, corporate mailrooms, and the like). SF ¶ 74. Yet the Commonwealth (and every other state) has accepted absentee ballots through the mail for years without issue or challenge to the “unmanned” nature of most mailings, and Plaintiffs certainly do not challenge that practice here. *See* Secy.’s App. Ex. 3, Fitzpatrick Dep. 134:22-135:1.<sup>8</sup>

Plaintiffs’ inability to produce evidence to substantiate their predictions of rampant voter fraud should sound the death knell for their challenge to mail-in ballot drop boxes for lack of standing. The distinction between a jurisdictional and merits ruling is not academic: because

---

<sup>8</sup> Plaintiffs’ expert tries to contest the analogy to U.S. Postal Service mailboxes, *see* Pls.’ App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 17-18, but notably cannot distinguish the two types of ballot receptacles with regard to the risk of third-party ballot delivery. Instead, Plaintiffs’ expert only attempts to distinguish the two types of ballot collection devices by posing hypotheticals regarding the supposed “ability to destroy” ballots by “intentionally targeting a drop box” in a manner that would destroy more ballots than an attack on a U.S. Postal Box would. *Id.* But again, there is no evidence at all of such criminal destruction related to ballot drop boxes; that fear is purely imaginary. With respect to Plaintiffs’ second fear—of illegal third-party ballot delivery—neither Plaintiffs nor their expert can distinguish U.S. Postal Service mailboxes (the majority of which are, again, “unmanned”) with specialized ballot drop boxes on grounds that one prevents third-party delivery better than the other. Indeed, there is no such distinction. If anything, in light of the Secretary’s guidance that ballot drop boxes should feature signage reiterating that third-party ballot return is prohibited unless the person returning the ballot is rendering assistance to a disabled voter or it is an emergency, *see* SF ¶¶ 47, 53—guidance that numerous counties have heeded, *see, e.g.*, SF ¶ 53—ballot drop boxes are arguably *more* protective against third-party delivery than U.S. Postal Service mailboxes, which contain no such warning.

Plaintiffs’ lack of evidence of a cognizable injury fails to establish “a real need” for this Federal Court “to exercise the power of judicial review” in order to protect Plaintiffs’ interests, this Court’s involvement to regulate the use of drop boxes and “oversee legislative or executive action ‘would significantly alter the allocation of power . . . away from a democratic form of government.’” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (ellipsis in original) (citations omitted). “A federal court is not ‘a forum for generalized grievances,’ and the requirement of such a personal stake ‘ensures that courts exercise power that is judicial in nature.’” *Gill*, 138 S. Ct. at 1929 (citation omitted). Plaintiffs’ challenge to the use of drop boxes should therefore be dismissed outright because Plaintiffs have failed to carry their burden to show that this Federal Court has authority or a need to adjudicate it.

**B. The Federal Constitution Does Not Bar The Commonwealth From Employing Mail-In Drop Boxes Permitted By The Election Code.**

Defendants are also entitled to summary judgment because Plaintiffs’ claims that the Commonwealth’s use of “unmanned” drop boxes violate the Constitution is meritless and factually unsupported. Far from violating the Constitution, the use of “unmanned” drop boxes promotes voters’ confidence that their ballots will be received on time, facilitates voting during an unprecedented pandemic when voters might be hesitant to vote in-person, and reduces Election Day lines and costs for the counties who use them. Against those benefits, Plaintiffs’ theory that the use of “unmanned” drop boxes will infringe their right to vote and the principle of equal treatment is incorrect as a matter of law.

1. Drop Boxes Do Not Infringe the Right to Vote.

Plaintiffs first claim that “unmanned” drop boxes infringe the individual right to vote by allowing dilution of validly cast votes through criminal activities such as “voter fraud,” ballot tampering, or ballot harvesting. For all the reasons cited above, Plaintiffs’ fears of fraud and other

irregularities are speculative and unfounded, but even if they were not, Plaintiffs' challenge fails to meet the controlling standard for such alleged vote dilution.

Faced with a constitutional challenge to a state election law or policy like the use of “unmanned” drop boxes, a court “must first consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“[T]he rigorosity of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”). If—and only if—the law or policy burdens any voting rights, the court “must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson*, 460 U.S. at 789. And even then, if the law or policy “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (citations omitted). That is because not every law or policy that affects voting rises to the level of constitutional concern; “Election laws will invariably impose some burden upon individual voters.” *Id.* at 433. Federal courts must therefore be careful not to find infringements of the right to vote too readily, lest they “tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.*

Here, the Commonwealth’s use of drop boxes—whether “manned” or “unmanned”—does not infringe anyone’s right to vote at all. In fact, it is undisputed that drop boxes make it easier for many people to vote and raise the confidence of those who take advantage of them. SF ¶¶ 54, 63, 65. And as stated above, Plaintiffs have not produced any material evidence that unmanned drop boxes invite a constitutionally significant amount of voter fraud or other criminal activity that might dilute other citizens’ votes. But even if Plaintiffs had credible evidence of voter fraud in the

Commonwealth that rose to the level of a constitutionally significant burden on the right to vote (they do not), that still does not mean that “unmanned” drop boxes violate the Constitution. Instead, this Court would have to weigh the magnitude of the burden on Plaintiffs’ right to vote against the Commonwealth’s interest in allowing such drop boxes.

Here the Commonwealth has weighty—and certainly rational—interests in the use of drop boxes because they facilitate voting and enhance voter confidence, particularly (i) in the midst of a global pandemic when voters have legitimate fears of voting in-person or returning their ballot to a staffed office, *see* SF ¶ 55, and (ii) in light of recent and well-publicized issues with the U.S. Postal Service (including a concession from the agency’s own general counsel that certain ballots may not arrive on time, *see* SF ¶ 60) that would reasonably lead voters to desire to return their ballots directly to the county boards of elections and not through a postal intermediary, *see* SF ¶ 61. Courts have long recognized a state’s interests in both “[s]afeguarding [v]oter [c]onfidence” in the electoral process, *Crawford v. Marion County Board of Elections*, 553 U.S. 181, 197 (2008), as well as “protecting the health and safety of [its] voters and . . . safeguard[ing] the voting franchise,” *Paher*, 2020 WL 2089813, at \*1, \*7. Because the use of unmanned drop boxes is a “nondiscriminatory law . . . supported by valid neutral justifications,” *Crawford*, 553 U.S. at 204, these “regulatory interests” (among others) are sufficient to justify their use, *Burdick*, 504 U.S. at 434 (citations omitted); *see also Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003) (“[I]t is the job of democratically-elected representatives to weigh the pros and cons of various [election] systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing.” (footnote omitted)).

Nor does the use of unmanned mail-in drop boxes in the Commonwealth implicate “rudimentary requirements of . . . fundamental fairness.” *Bush v. Gore*, 531 U.S. 98, 109 (2000).

Federal courts do not intervene to remedy “garden variety” election irregularities like the few instances Plaintiffs identify of a voter depositing two ballots. *Cf. Broyles v. Texas*, 618 F. Supp. 2d 661, 694-95 (S.D. Tex. 2009) (irregularities surrounding provisional ballots do not rise to level of constitutional violation), *aff’d*, 381 F. App’x 370 (5th Cir. 2010) (per curiam); *see id.* at 693-95 (cataloguing scenarios courts have identified as “garden variety” versus those that are fundamentally unfair); *Samuel v. V.I. Joint Bd. of Elections*, 2013 WL 842946, at \*7 (D.V.I. Mar. 7, 2013) (collecting cases indicating that “garden variety” election differences do not violate the Constitution); *see also Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (finding “irregularities caused by mechanical or human error and lacking in invidious or fraudulent intent” insufficient). “If every election irregularity or contested vote involved a federal violation, the court would ‘be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.’” *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (citations omitted). It is only when “the election process itself reaches the point of patent and fundamental unfairness[] [that] a violation of the due process clause may be indicated.” *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 645 (E.D. Pa. 2018) (citation omitted); *see also id.* at 645-46 (“Relief is warranted” only where “an officially-sponsored election procedure . . . in its basic aspect, [is] flawed.” (alterations in original) (citation omitted)). Indeed, the federal courts have historically intervened in state elections only where there has been “purposeful or systematic discrimination against voters of a certain class, geographic area, or political affiliation,” or “willful conduct which undermines the organic processes by which candidates are elected.” *Hennings*, 523 F.2d at 864 (collecting cases) (citations omitted). Plaintiffs have established nothing of the sort with respect to “unmanned” drop boxes.



Finally, Plaintiffs’ theory, if correct, would invite the federal courts to seize control of state elections in an unprecedented and unmanageable way. Absent a constitutional violation, this Court is without authority to direct state officials how to conduct their elections, such as to require specified levels of staffing or surveillance, as Plaintiffs demand here. Doing so would intrude on the Commonwealth’s constitutional authority to set the “Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. Const. art. I, § 4, cl. 1; *see, e.g., Thompson v. Dewine*, 959 F.3d 804, 812-13 (6th Cir. 2020) (per curiam) (observing that federal courts “cannot ‘usurp[] a State’s legislative authority by re-writing its statutes’ to create new law” (brackets in original) (citation omitted)); *Esshaki v. Whitmer*, 813 F. App’x 170, 172 (6th Cir. 2020) (per curiam) (holding the “compulsory aspect of the preliminary injunction was not justified” because “federal courts have no authority to dictate to the States precisely how they should conduct their elections”). Such monitoring of details of particular election mechanisms is beyond the reach of this Federal Court’s competency, and falls squarely within the legislature’s purview. As the Pennsylvania Supreme Court properly held, the Election Code (enacted by the General Assembly) authorizes drop boxes; this Federal Court should not meddle in how they are used.

2. Distinctions Among Counties’ Use of Drop Boxes Are Not Discriminatory.

Defendants are also entitled to summary judgment on Plaintiffs’ claim that “uneven” use of drop boxes throughout the Commonwealth will violate the Federal and State Constitutions. *Boockvar III*, 2020 WL 5658392, at \*1 (Issue 2). Simply put, “uneven” use of drop boxes throughout the Commonwealth’s 67 counties does not violate the U.S. Constitution’s various prohibitions on discriminatory treatment of voters.<sup>9</sup>

---

<sup>9</sup> Plaintiffs also claim that unequal treatment violates the Pennsylvania Constitution’s Equal Protection and Free and Equal Elections Clauses (Count III). The Eleventh Amendment bars that claim. Even so, the legal standard for claims under the Equal Protection Clauses are substantially

As a threshold matter, Plaintiffs failed in discovery to identify what supposed differences about the counties’ use of drop boxes constituted an equal protection violation, insisting only that the mere use of drop boxes—which they (wrongfully) insisted violated the Election Code—was the sole harm. *See* Secy.’s App. Ex. 3, Fitzpatrick Dep. 88:11-92:3.

But even looking past Plaintiffs’ failure to define their own claim, it is well-settled that states may treat voters differently in ways that do not infringe the right to vote, so long as the state’s policy or law is rational. *See, e.g., Obama for America v. Husted*, 687 F.3d 423, 428 (6th Cir. 2017) (“If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.”); *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004) (applying rational basis where there was no showing of an “infringement on the fundamental right to vote”). Moreover, in Pennsylvania, which is a commonwealth, the election system is—and always has been—county-based. SF ¶¶ 1-3. Consistent with that, the Election Code has long afforded county boards of elections “jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Election Code],” 25 Pa. Cons. Stat. § 2641(a), as well as specifically offering them discretion to “make and issue such rules, regulations and instructions . . . as they may deem necessary for the guidance of voting machine

---

similar to the federal standard. *See Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 678 F. Supp. 517, 536 (E.D. Pa. 1988) (“[J]udicial scrutiny of programs challenged under [Pa. Const. art. I, § 28] is at least as searching as that employed in an equal protection analysis.”); *Applewhite v. Commonwealth*, 2014 WL 184988, at \*24 (Pa. Commw. Ct. Jan. 17, 2014). And Pennsylvania courts often evaluate claims under the Free and Equal Elections Clause, “which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process,” under a legal standard that is similar to the federal standard. *Pa. Democratic Party*, 2020 WL 5554644, at \*17 (citation omitted); *see id.* at \*26 & n.32, \*30-31 & n.35 (treating Free and Equal Elections Clause claims “as co-extensive” with federal claims). Because Plaintiffs’ federal equal protection claims fail for the reasons described in this section, so too does their state-law equal protection challenge.

custodians, elections officers and electors,” *id.* § 2646, as well as to “purchase . . . and maintain primary and election equipment of all kinds, including . . . ballot boxes,” *id.* § 2642(c).

Allowing counties to exercise their statutory discretion to carry out the General Election and determine whether and to what extent to use drop boxes does not violate the Constitution’s equal-treatment principle. To the contrary, it is well settled that local distinctions in voting procedures do not rise to the level of federal constitutional concerns. *See 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 (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 “[p]lan may make it easier or more convenient to vote in [that] [c]ounty, 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 \*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*, 531 U.S. at 134 (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.”). Indeed, “few (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause.” *Trump v. Bullock*, --- F. Supp. 3d ----, 2020 WL 5810556, at \*14 (D. Mont. Sept. 30, 2020).

In arguing to the contrary, Plaintiffs appear to conflate “two separate strands of equal protection doctrine: suspect classifications and fundamental rights.” *Short*, 893 F.3d at 678. “The first strand bars a state from codifying a preference for one class over another, but it prescribes heightened scrutiny only where the classification is drawn from a familiar list—race, gender, alienage, national origin.” *Id.* at 678-79 (citation omitted). None of those classifications are at issue here. At most, Plaintiffs’ expert suggests (without citation or references to any particular instances or conditions on the ground) that drop boxes open the door to discrimination and partisan politics. Pls.’ App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 17-18. But there is no evidence whatsoever that drop boxes are being used for such nefarious purposes, and the Court need not assume any.

Instead, Plaintiffs’ claims are based on the “second strand” of equal-treatment doctrine, which “bars a state from burdening a fundamental right for some citizens but not for others.” *Short*, 893 F.3d at 679. However, “[a]bsent some such burden . . . legislative distinctions merit no special scrutiny.” *Id.* (citing *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 806-08 (1969)). As explained, the use of drop boxes across the Commonwealth does not burden any fundamental right; it simply offers voters in those counties who choose to make drop boxes available an additional option for the return of their mail-in or absentee ballot, and it does so without limitation to voters in that jurisdiction or non-drop box jurisdictions using all the non-drop box voting options previously made available to them (including returning their ballot in-person to the county board

of elections, mailing it, or voting an in-person ballot on Election Day). The implementation of drop boxes is therefore subject only to rational basis review and therefore easily passes muster. Plaintiffs do not dispute that every county in Pennsylvania has the right under the Election Code, as confirmed by the Pennsylvania Supreme Court, to authorize the use of drop boxes to help enfranchise voters. *Pa. Democratic Party*, 2020 WL 5554644, at \*9-10. That certain counties may be choosing not to do so (or are not doing so precisely in the same manner as other counties) is of no moment. To the contrary, Pennsylvania's delegation to its counties to determine their own local needs with regard to whether and how to use drop boxes (including by taking account of such factors as county size, resources, metropolitan/suburban/rural split, transportation characteristics and traffic patterns, education levels, and more) is perfectly rational and should be upheld.

## **II. THE COURT SHOULD DISMISS OR GRANT DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' VARIOUS POLL WATCHER CLAIMS.**

Plaintiffs' various claims related to poll watchers fail for a host of reasons, including that certain of Plaintiffs' claims are unripe, are barred by the Eleventh Amendment, Plaintiffs' lack standing to assert them, and/or the claims are again unsupported by the evidentiary record. As described above, following discovery and in light of the SAC and Plaintiffs' summary judgment brief, the Secretary understands Plaintiffs to still be asserting and/or requesting relief from this Court related to three challenges pertaining to poll watchers: (i) an "as-applied" challenge to the county residency requirement, (ii) a demand that poll watchers be permitted to be "present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots" (which they

argue includes ballot drop box locations), ECF No. 503-1 at 3, and (iii) a request that poll watchers be permitted to attend county boards of elections' pre-canvassing and canvassing meetings.<sup>10</sup>

The Secretary addresses each of Plaintiffs' poll-watcher theories in detail below, but at their core, each of these theories suffers from the fundamental flaw that there is no constitutional right to serve as a poll watcher or to have the polls watched, as courts in Pennsylvania and elsewhere have uniformly held. *See Cortés*, 218 F. Supp. 3d at 413-14 (collecting cases) (“Plaintiffs do not cite any authority for the proposition that ‘poll watching’ is a fundamental right under the First Amendment, and the Court has found no support for such a proposition.”); *id.* at 408 (“[T]here is no individual constitutional right to serve as a poll watcher, but rather the right is conferred by statute.” (citation omitted)); *Pa. Democratic Party*, 2020 WL 5554644, at \*30 (“Respondent does not claim that poll watching involves a fundamental constitutional right or that a level of scrutiny other than rational basis needs to be shown regarding the regulation of poll watcher qualifications.”); *see also Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984) (per curiam) (“While it would be desirable for each candidate to have persons looking out for his interests at the poll, we are not persuaded that this interest is a vital one for constitutional access to the voting process.”); *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.”);

---

<sup>10</sup> This set of items is of course broader than the Court's description of Plaintiffs' remaining claims in its September 23 Order, which only described a single claim related to poll watchers: “Whether, as applied to the facts of this case, Pennsylvania's county residency requirement for poll watchers violates the Constitution.” *Boockvar III*, 2020 WL 5658392, at \*1 (Issue 10). The Secretary nonetheless addresses each of these theories out of an abundance of caution given her desire for final resolution.

*Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007) (“poll watching . . . has no distinct First Amendment protection”). In fact, the Pennsylvania Election Code did not even provide for poll watchers until 1937 and, to this day, at least one other state makes do without poll watchers at all. *See, e.g.*, W. Va. Code Ann. § 3-1-37. In the absence of a fundamental constitutional right to have such watchers present, Plaintiffs must concoct other theories to support their poll watcher claims. These theories fail at every turn.

**A. Plaintiffs’ “As-Applied” Challenge To The County Residency Requirement Remains Unripe, Is Not Based On Any Cognizable Injury, And Lacks Merit.**

While readily conceding that the Pennsylvania Supreme Court’s September 17 decision forecloses their “facial” challenge to the poll-watcher residency requirement, ECF No. 448 at 10 (“Plaintiffs’ facial challenge to the county residency requirement under 25 P.S. § 2687 is no longer a viable claim.”), Plaintiffs insist that their “as-applied” challenge to the constitutionality of that 16-year old law remains viable. They are wrong, and Plaintiffs’ challenge fails on several fronts:

*Plaintiffs’ challenge is not ripe.* Even if cast as an “as-applied” challenge, Plaintiffs’ contesting of the county residency requirement remains unripe because Plaintiffs *still* have not identified a single county in Pennsylvania where they have attempted to recruit sufficient poll watchers unsuccessfully because of the county residency requirement. Under well-settled Supreme Court precedent, Plaintiffs, “as the party invoking federal jurisdiction,” bear the burden of showing they have standing to sue, which again requires them to show injury in fact, causation, and redressability. *Spokeo*, 136 S. Ct. at 1547. Yet despite being on notice that their poll-watcher allegations are deficient on this score since the Secretary first raised this issue in her motion to dismiss on July 24, 2020, *see* Secretary’s Mem. in Supp. of Mot. to Dismiss Compl. (ECF No. 185) at 9-10, Plaintiffs have failed to produce any evidence whatsoever establishing that they have unsuccessfully attempted to recruit poll watchers in any county because of this requirement.

Indeed, the Rule 30(b)(6) designee for the Trump Campaign and RNC could not identify a single county in which the Trump Campaign or RNC contended they were unable to obtain poll watchers for the November 2020 General Election, stating only that he “anticipate[d]” they would run into problems doing so but “[wasn’t] sure yet as to which specific counties.” SF ¶¶ 94-95 (Fitzpatrick Dep 261:21-262:3, 263:8-19, 265:16-266:3, 269:2-10).

To be sure, that deposition was held in late August, but (i) Plaintiffs reported during that deposition that their poll-watching recruiting activities were under way at that time, *see* SF ¶ 94, and (ii) even after the Court’s stay was lifted discovery and resumed, Plaintiffs failed to produce any documents or evidence on this point notwithstanding that they bear the burden on this point. In fact, even in his post-discovery declaration filed just with Plaintiffs’ motion for summary judgment, Mr. Fitzpatrick could only state that the Trump Campaign “is concerned” it will not have enough poll watchers. *See* Pls.’ App. Ex. 2, Fitzpatrick Decl. (ECF No. 504-2) ¶ 25. Surely, if the Trump Campaign had endeavored to find poll watchers and yet were still experiencing an actual shortage barely a month from the election, Mr. Fitzpatrick (the campaign’s director for Election Day Operations) would have been able to say so under oath. And in fact, none of the four Congressmen Plaintiffs (Representatives Joyce, Kelly, Reschenthaler, and Thompson) could identify any actual poll watcher shortages in their Congressional districts either in their depositions or their post-discovery declarations, instead referring to general concerns just as Mr. Fitzpatrick did. *See* SF ¶ 95; Pls.’ App. Exs. 4-7 (ECF Nos. 504-4 to -7). And while Plaintiffs pay lip service to the supposed challenges of recruiting poll watchers in the wake of the COVID-19 pandemic (an argument that only bolsters the need for ballot drop boxes, as set forth above), in the absence of actual evidence that Plaintiffs tried but have actually failed to field poll watchers in any particular county (due to COVID-19 or any other reason), Plaintiffs plainly fail to meet their burden of



demonstrating an injury in fact, let alone one caused by the county residency requirement. *Summers*, 555 U.S. at 496 (holding that “some day” intentions to engage in conduct that might lead to an injury “without any description of concrete plans” do not give rise to an Article III injury (citation omitted)); *see also Pa. Prison Soc’y*, 508 F.3d at 165-66 (“Such allegations of injury at some indefinite future time—where the acts necessary to make the injury happen are within the prisoner plaintiffs’ own control—lack the high degree of immediacy required to constitute injury in fact and provide Article III standing.”).

Nor do Plaintiffs’ citation to certain voter registration “imbalances” or “gaps” between Democratic and Republican voter registrations in certain counties suffice. SAC ¶ 203; Secy.’s App. Ex. 3, Fitzpatrick Dep. 261:21-263:7. For one, the Supreme Court could not be clearer that allegations of a “statistical probability” that some plaintiffs “are threatened with concrete injury” is not enough to invoke federal jurisdiction. *Summers*, 555 U.S. at 497-500. In any event, the relevant statistics here do not support Plaintiffs’ claim that they will be unable to find poll watchers within particular counties they have identified. While Plaintiffs point to the ratio of Republican registrants to Democratic registrants in certain counties, such comparison is irrelevant; what matters is the ratio of Republican registrants *to the number of election districts* required to be staffed. That is, just because it is statistically easier for Democrats than Republicans to find poll watchers in certain counties,<sup>11</sup> it does not mean Republicans cannot do so in those counties, especially once you assess the number of registered Republicans. For instance, Plaintiffs point to Philadelphia in their SAC as a county where Democrats outweigh Republicans. *See* SAC ¶ 204. But according to the most recent statistics published by the Department of State, there are still

---

<sup>11</sup> Of course, looking at voter registration statistics for other counties in Pennsylvania, it should be comparatively more difficult for Democrats to recruit poll watchers than Republicans—at least according to those statistics.

125,710 active registered Republicans in Philadelphia County—or roughly 75 voters for each of the election divisions identified in the SAC. *See id.*; SF ¶¶89-90.<sup>12</sup> And the statistics in Allegheny County (the one county called out by Plaintiffs’ expert, *see* Pls.’ App. Ex. 20, Lockerbie Report (ECF No. 504-20) ¶ 11) are even worse for Plaintiffs: there are 259,541 registered Republicans compared to approximately 1,300 election districts, or approximately 200 registered Republicans per election district. *See* SF ¶¶ 91-92.<sup>13</sup>

In sum, Plaintiffs’ failure to identify an actual injury caused by the county residency requirement—either through documentary evidence, deposition testimony, or even statistics—renders their “as-applied” challenge unripe and deprives them of standing.

***Plaintiffs fail to identify any particularized, non-speculative injury they stand to suffer from the hypothetical lack of poll watchers in certain counties.*** Even if Plaintiffs could establish that they were unable to staff all polling places in certain counties, they failed to identify any non-speculative injury that they will suffer from their inability to do so. Here, Plaintiffs’ theory of harm—and purported explanation for why the Federal Constitution regulates poll watching—is even more tenuous than their theory for why it regulates drop boxes. According to Plaintiffs, the

---

<sup>12</sup> Plaintiffs’ citation to the fact that “Republicans are not a majority of registered voters in any ward in Philadelphia County,” *id.*, is likewise irrelevant, including for the fact that, since 2004, poll watchers are not limited by voting ward, but rather can serve as a poll watcher in any election district in the county. Likewise, Plaintiffs’ assertion in their summary judgment memorandum that they need even more poll watchers because of the use of ballot drop boxes, ECF No. 505 at 33, is simply wrong because, as described below, the Election Code does not provide for poll watchers at such locations (and for good reason).

<sup>13</sup> Moreover, the Election Code does not limit a party’s or candidate’s poll-watcher appointees to just members of their party, as the Trump Campaign Election Day Operations Director conceded. *See* 25 Pa. Cons. Stat. § 2687(a); Secy.’s App. Ex. 3, Fitzpatrick Dep. 267:23-268:4. Either the RNC or Trump Campaign could recruit unaffiliated voters (or even Trump-supporting Democrats) to serve as watchers in these or other counties, thus even further increasing the ratio of potential poll watchers to election districts in various counties.

county residency requirement “unjustifiably burden[s] their attempts to locate available, qualified registered electors who can serve as poll watchers,” SAC ¶ 206, which in turn leads to poll watcher shortages, which in turn will render the counties powerless to prevent unspecified voter fraud and other irregularities at in-person polling places, which in turn will result in vote dilution to such a degree that it will (in their view) constitute a violation of their federal and state constitutional rights. To state the obvious, this generalized, speculative chain of events is a bridge too far. *See, e.g., Clapper*, 568 U.S. at 409 (“[W]e have repeatedly reiterated that ‘threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.” (second set of brackets in original) (citation omitted)). Indeed, this was precisely what the court found in *Cortés* when the Republican Party of Pennsylvania (among others) challenged the same requirement in advance of the 2016 election. *Cortés*, 218 F. Supp. 3d at 407 (finding plaintiffs’ “vote-dilution theory” failed as a matter of law because it was based on “the unproven assumption” that speculative instances of voter fraud “would be prevented by the affected poll watchers were they not precluded from [poll watching]”). Plaintiffs’ vague reference to the need to “ensur[e] the transparency, defensibility, and integrity of the election process” does not salvage their claims. ECF No. 509 at 30.

In any event, such generalized injury would be wholly insufficient. Plaintiffs here have not identified one iota of evidence of in-person voter fraud that might have been corrected by adequate poll watchers, but even if they had, Plaintiffs’ abstract predictions of “vote dilution” do not satisfy Article III’s particularity requirement. *See Spokeo*, 136 S. Ct. at 1545 (“the injury-in-fact requirement requires a plaintiff to allege an injury that is both ‘concrete *and* particularized’” (citation omitted)); *Trump for President*, 2020 WL 5626974, at \*4 (“[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.” (second set of brackets in original) (citation omitted)). Plaintiffs’ challenge can therefore be resolved on this basis alone.

***The residency requirement does not violate the Constitution, even as applied to the upcoming General Election.*** Even beyond the substantial (indeed, insurmountable) justiciability hurdles, Plaintiffs’ as-applied challenge simply fails to state a constitutional claim. As an initial matter, Plaintiffs fail to provide any justification for applying any more of a heightened standard of scrutiny to their “as-applied” challenge than the *Cortés* court applied to a similar challenge to this residency requirement in 2016, and the Pennsylvania Supreme Court applied to Plaintiffs’ facial challenge just two weeks ago—indeed, there are none. While Plaintiffs attempt to cabin their challenge to an “as-applied” challenge to just the upcoming election (ostensibly because of the COVID-19 pandemic, although their allegations are not clear), the pandemic does not change the fact that, as set forth above, poll watching (and having the polls watched in one’s election) is not a fundamental constitutional right. Accordingly, and because the requirement also does not regulate a suspect classification (such as race, sex, or national origin) the state need only provide a rational basis for its imposition. *Pa. Democratic Party*, 2020 WL 5554644, at \*30.

Under this legal standard, the residency requirement again easily passes constitutional muster as a rational election regulation, just as it did in *Cortés* and it did recently before the Pennsylvania Supreme Court. In *Cortés*, for instance, the court properly reasoned that the Pennsylvania legislature’s “decision to allow county election officials to credential only poll watchers from their own county is rationally related to the state’s interest in maintaining its county-run election system.” 218 F. Supp. 3d at 409. Likewise, the Pennsylvania Supreme Court reasoned that the Pennsylvania legislature’s selection of a “county-based scheme for conducting elections”

is “a clear rational basis for the county poll watcher residency requirement.” *Pa. Democratic Party*, 2020 WL 5554644, at \*30.

Other evidence in the record supports this rational approach. As Secretary Boockvar’s declaration describes, poll watchers who reside in the county are substantially more likely to be familiar with local rules, candidates, and voters, thereby facilitating the election monitoring process. SF ¶ 86. Moreover, as both Secretary Boockvar and Dr. Matthew Barreto (an expert retained by one of the Intervenors) have testified, limiting poll watchers to citizens who reside in the county reduces the risk of voter intimidation during in-person voting. SF ¶ 87. For those reasons and those set forth in *Cortés* and *Pennsylvania Democratic Party*, the Court should find the poll watcher residency requirement rational, and therefore constitutional, even as applied to the November 2020 General Election.

Finally, it would be especially problematic for this Federal Court to strike down the residency requirement (even as applied to just the upcoming General Election) because the General Assembly has been attentive to this issue, yet time and again refused to repeal the residency requirement. *See* SF ¶¶ 82-83. It would be strange indeed if federal courts possessed the authority to do just that in the teeth of legislative inaction—based entirely on speculative hypotheses regarding supposed fraud. If Plaintiffs are concerned that the residency requirement disables them from recruiting sufficient poll watchers, their path is through the General Assembly, not this Federal Court.

**B. This Court Should Abstain From Deciding Where The Election Code Permits Poll Watching To Occur.**

The Court should abstain from the second flavor of poll-watcher-related relief requested by Plaintiffs: that poll watchers be permitted “to be present in all locations where votes are cast.”

SAC at 81 (Prayer for Relief at I). Specifically, in the proposed order accompanying their Motion for Summary Judgment, Plaintiffs cast a remarkably broad net:

Plaintiffs shall be permitted to have watchers present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots, including without limitation any satellite or early voting sites established by any county board of elections.

ECF No. 503-1, ¶ 3. Setting aside for the moment that Plaintiffs’ request to be present at “all locations” where voters undertake such activities would, as written, give them carte blanche to rove the Commonwealth and invade private property, such request turns squarely on a question of state law regarding where the Election Code permits poll watchers to be present.

As set forth above, the right to have poll watchers comes from state statute, not the Federal Constitution, which is why at least one state does not allow poll watchers at all. *See* W. Va. Code Ann. § 3-1-37. And just as the state can determine whether to permit poll watchers at all, it can regulate—again, through state law—where and when those poll watchers are permitted and what rights they have when performing their duties. Here, Pennsylvania’s Election Code prescribes specific rules regarding the rights of poll watchers, and Plaintiffs’ request is nothing more than a request for compliance with the Code, as they interpret it. However, the Eleventh Amendment bars federal courts from adjudicating state-law claims asserted against un-consenting state officials in their official capacities except within the narrow exception to sovereign immunity established by *Ex Parte Young*. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). That exception to sovereign immunity applies only when a plaintiff alleges an ongoing violation of *federal* law and seeks prospective injunctive relief. *See Waterfront Comm’n of N.Y. Harbor v. Governor of N.J.*, 961 F.3d 234, 238 (3d Cir. 2020). Unless a state has waived immunity or Congress has validly abrogated it, the Eleventh Amendment confines federal courts to the “precise situation” of “command[ing] a state official to do nothing more than refrain from violating federal

law.” *Id.* (internal quotation marks omitted) (quoting *Va. Office for Prot. & Advocacy*, 563 U.S. at 255). In other words, Plaintiffs cannot, consistent with the Eleventh Amendment, assert claims based on an alleged violation of the state Election Code here in federal court—including claims regarding where and when the Election Code supposedly permits them to have poll watchers. *See Pennhurst*, 465 U.S. at 120-21; *Balsam v. Sec’y of N.J.*, 607 F. App’x 177, 183-84 (3d Cir. 2015).

And even if Plaintiffs’ claim were not barred by sovereign immunity, this Court should abstain from deciding whether the Election Code limits where poll watchers can function, just as it properly abstained from determining the related question of whether drop boxes are “polling places” subject to the Election Code’s notice and site selection requirements. *Boockvar III*, 2020 WL 5658392, at \*3 (“The Court will continue to abstain under *Pullman* as to Plaintiffs’ claim pertaining to the notice of drop box locations and, more generally, whether the ‘polling place’ requirements under the Election Code apply to drop-box locations. As discussed in the Court’s prior opinion, this claim involves unsettled issues of state law.”). In fact, the Trump Campaign filed a Complaint just two days ago (on October 1) in the Court of Common Pleas of Philadelphia seeking just such access. *See Secy.’s App. Ex. 22, Verified Compl. in Equity*. But even if they had not, whether there is presently a parallel state-court proceeding related to a particular question is irrelevant to the abstention decision. *Boockvar III*, 2020 WL 5658392, at \*3 (citing *Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006)); *see also Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 149 (3d Cir. 2000).

Nor can Plaintiffs transform this state-law squabble into a federal constitutional cause of action. In advancing such a constitutional theory here, Plaintiffs essentially incorporate their parade of hypothetical horrors from their drop box and county residency requirement challenges: that prohibiting poll watchers on behalf of parties and candidates at each of these types of locations

will once again invite unspecified voter fraud and other criminal activity at those sites. SAC ¶ 256. will once again invite unspecified voter fraud and other criminal activity at those sites. SAC ¶ 256. The upshot of this theory is that there is a potential federal constitutional violation every time an elector casts a vote outside the presence of a poll watcher because (so it goes) the Constitution requires that poll watchers be permitted anywhere ballots are cast, and laws disabling them from being present (or simply not authorizing them to be present) there are unconstitutional. Such a position proves far too much.

Once again, the state is well-within its rights to rationally limit official poll watchers to specified locations on Election Day (or, as West Virginia's example illustrates, not to be present anywhere at all). For one, as set forth above, it is simply impossible for poll watchers to be permitted to be "present at all locations where voters are . . . returning . . . absentee or mail-in ballots" without trampling privacy and property rights. ECF No. 503-1, ¶ 3. This is an unavoidable aspect of absentee or mail-in voting: electors apply for mail-in or absentee ballots in myriad places (including online), cast their votes from places other than traditional polling locations and outside the eyes of poll watchers, and return them in such places as well. Indeed, as one GOP election official acknowledged earlier this week, "[w]e don't give someone a poll watcher certificate to . . . watch somebody fill out their ballot at their kitchen table." See Ellie Rushing, et al., *Philadelphia Inquirer*, "'Bad things happen in Philadelphia,' Trump says at debate, renewing false claim about poll watchers," Sept. 29, 2020, available at <https://www.inquirer.com/politics/election/trump-poll-watchers-philadelphia-early-voting-20200929.html>. The Federal Constitution does not invalidate mail-in voting regimes simply because such systems inherently allows votes to be cast and returned outside the presence of poll watchers. If Plaintiffs dislike this feature of mail-in voting, again, their audience should be the General Assembly, not the federal courts.



Moreover, as with the county residency requirement for poll watching, it is rational for the Election Code to prohibit poll watchers from county boards of elections offices and drop box locations. There are countless private and public locations where absentee and mail-in ballots may be applied for and filled out, and delivered, including in Pennsylvanians' homes, workplaces, U.S. Postal Service mailboxes in thousands of shopping centers and communities, and mail drop-off locations in buildings of all sizes and types. With respect to county boards of elections offices, such offices may be limited in size, such that allowing poll watchers on behalf of each party would present substantial logistical issues. And more importantly, there is little need for poll watching in this environment, where county board personnel are themselves trained and familiar with election practices in the county. And with respect to drop box locations, assigning poll watchers to such locations (where their activities cannot be monitored by official poll workers, as they can be at polling places on Election Day) risks substantial voter intimidation or misinformation by such poll watchers under the guise of officiality.<sup>14</sup> The Constitution does not require the state to open the door to such activity.<sup>15</sup> Furthermore, party and candidate representatives are permitted to submit good faith challenges to voters' qualifications after they apply for their mail-in or

---

<sup>14</sup> Plaintiffs argue that the Election Code creates an "arbitrary distinction" between "representatives" of parties and candidates who may attend county pre-canvass and canvass meetings and who need not be county residents versus "poll watchers" who are subject to the residency requirement. But the distinction is by no means arbitrary, as such representatives serve entirely different roles than poll watchers; those representatives are only present for the canvassing and counting of votes (which after Act 77 occurs at a central county location, not at polling places), and notably do not interact with (and would not have an opportunity to intimidate) actual voters.

<sup>15</sup> Notably, Plaintiffs do not limit their request for relief to places where drop boxes are located, instead asking this Court to order that poll watchers be permitted at "all" locations where votes are cast or returned. SAC at 81 (Prayer for Relief at I); ECF No. 503-1, ¶ 3. But in any event, there is no reason to treat drop boxes any differently than other mail-in ballot receptacles, including private mailboxes and U.S. Postal Service collection boxes, as there is simply no evidence to suggest that drop boxes are more susceptible to voter fraud or other criminal activity. SF ¶¶ 74, 77.

absentee ballots, and they are not losing that right just because they are not able to watch the application and delivery process, which has never been permitted under Pennsylvania law.

**C. Whether Poll Watchers Are Permitted To Attend Canvass Sessions Is Also A Question Of State Law And One For Which Plaintiffs Lack Standing.**

Finally, Plaintiffs' indeterminate request for poll-watcher access to county boards of elections' pre-canvass and canvass meetings are similarly barred by the Eleventh Amendment (or else merit abstention) and again cannot be transformed into federal constitutional violations. In any event, Plaintiffs cannot identify any cognizable injury from poll watchers being barred from such meetings in light of Election Code provisions that already provide them access to those canvassing meetings.

As part of the SAC, Plaintiffs "seek an order, declaration, and/or injunction that permits poll watchers to be present in all locations where votes are cast or counted, including without limitation all locations where absentee or mail-in ballots are being returned, pre-canvassed, and/or canvassed." SAC ¶ 209; *see also id.* at 81 (Prayer for Relief at I). This was no idle request: in the supplemental discovery period this past week, Plaintiffs pressed each of the county board of elections to address, among other things, "whether poll watchers will be permitted to be present during any pre-canvass and canvass meeting." *See Secy.'s App. Ex. 19, Sept. 26, 2020 Email from C. McGee to Counsel at 6.*

Once again, this is a pure question of state Election Code interpretation, for which relief cannot and should not be ordered by this Court. That is, even if a particular county indicated its intention to act inconsistent with Plaintiffs' preferred interpretation of the Code, this Court could not (consistent with the Eleventh Amendment) force that county to act in compliance with state law. *See Pennhurst*, 465 U.S. at 120-21. And to the extent the Code is unclear as to whether poll watchers could attend such meetings, the Court should abstain and allow state courts to resolve

that question. Finally, any such violation here does not remotely rise to the level of a federal constitutional violation. Rather, if Plaintiffs now believe, based on the discovery record, that one or more counties will deny them access to the pre-canvass or canvass (which cannot begin until the morning of November 3 anyway, 25 Pa. Stat. § 3146.8(g)(1.1), (g)(2)), Plaintiffs should sue those individual counties in state court to obtain access on grounds that the specific counties do not intend to follow Plaintiffs' views of state law. There is simply no need to make a federal case of it.

Finally, and in any event, none of the Plaintiffs stand to suffer any injury from the supposed exclusion of party-appointed "poll watchers" from the pre-canvass or canvass meetings because the Election Code already permits each of the Plaintiffs entry to those meetings through their "authorized representatives." SF ¶ 103. Specifically, the Election Code permits "one authorized representative of each candidate" and "one representative from each political party" during each of pre-canvassing and canvassing. 25 Pa. Cons. Stat. § 3146.8(g)(1.1), (g)(2). Thus, as candidates in the upcoming General Election, the Trump Campaign and the four Congressmen Plaintiffs already have access to the pre-canvass and canvass meetings through their "authorized representative[s]," as does the RNC as a "political party." *Id.* Those candidates and parties do not stand to suffer anything from the alleged exclusion of "poll watchers," which are separately described from the "authorized representatives" who are unambiguously permitted to attend the pre-canvass and canvass meetings; those Plaintiffs' "authorized representatives" will already be there to protect their interests and there is no allegation they could not do so sufficiently. That leaves only the two remaining individual Plaintiffs, Ms. Patterson and Mr. Show. But their appointment to serve as poll workers comes from the party itself, which, as set forth above, is already sufficiently represented in the canvassing meetings. Plaintiffs therefore lack injury from

any prospective exclusion, which deprives them of standing, and is yet another reason to dispense with Plaintiffs' canvass-related requests.

### **III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON SIGNATURE-MATCHING CLAIMS.**

Finally, Defendants are entitled to summary judgment on Plaintiffs' various challenges to the Secretary's guidance that the Election Code does not permit counties to set aside absentee or mail-in ballots based on signature analysis or comparison. Plaintiffs' argument appears to be that (i) the Election Code requires that signatures on mail-in or absentee ballots be matched with other voter records on file during the pre-canvass and canvass, (ii) failure to match signatures on mail-in or absentee voters creates unconstitutional distinctions as compared to in-person voters, and (iii) failure to signature match uniformly across the Commonwealth violates equal protection.<sup>16</sup> The first theory is barred by the Eleventh Amendment (or the Court should abstain), and Defendants are entitled to summary judgment on the latter two.

#### **A. Plaintiffs' Effort To Enforce Their Preferred Interpretation Of The Election Code Is Barred By The Eleventh Amendment, And This Court Should At Least Abstain.**

In what is just their latest attempt to smuggle a dispute over the correct interpretation of the Election Code into this Federal Court, Plaintiffs now take the position that the Secretary's guidance is "contrary to the Election Code." ECF No. 509 at 15-19. Despite ostensibly asserting that the *Federal Constitution* requires this Court to enjoin the Secretary's guidance with respect to signature matching, Plaintiffs spill the most ink briefing the requirements of the Election Code

---

<sup>16</sup> Again, Plaintiffs' arguments go beyond the issue identified by this Court, which is "[w]hether Secretary Boockvar's September 11, 2020, guidance regarding signature comparison violates the Constitution by treating in-person voting differently than mail-in voting." *Boockvar III*, 2020 WL 5658392, at \*2 (Issue 12). Again, out of an abundance of caution, the Secretary addresses what appear to be Plaintiffs' other additional arguments that signature matching is compelled by the Election Code and that signatures must be matched uniformly across the Commonwealth.

with respect to signature matching, delving deeply into their view of the intricate requirements that state law prescribes for obtaining a mail-in ballot and the opening and counting of ballots. *Id.* Plaintiffs’ disagreement with the Secretary’s and counties’ implementation of the Election Code is properly addressed to a Commonwealth court (and, as described below, the Secretary is preparing to do just that before the Pennsylvania Supreme Court). As a result, this Court should promptly put an end to yet another of Plaintiffs’ attempts to litigate the requirements of the Election Code in federal court, either because the Eleventh Amendment bars such claims or because prudence counsels abstention where the only question is whether official action complies with state law.

To begin, as explained repeatedly above, the Eleventh Amendment bars federal courts from directing that state officials comply with state law. *See Pennhurst*, 465 U.S. at 117, 121. But that is exactly what Plaintiffs seek here with respect to the Secretary’s guidance that rejection of ballots based on signature comparison is not authorized, arguing as the primary support for their challenge that the Secretary’s guidance is “contrary to” the Election Code. ECF No. 509 at 15-19. Indeed, the only relief that Plaintiffs seek is compliance with the Election Code: they request that this Court order Defendants to “immediately comply with the procedures set forth in the Pennsylvania Election Code for both the approval and rejection of absentee and mail-in ballot applications, and the examination and verification of the voted absentee and mail-in ballots, as they relate to the comparison and analysis of the signatures on the applications or voted ballots to the voter’s permanent registration record.” ECF No. 503-1, ¶ 1(b). Even if the Election Code could be read as Plaintiffs propose—and it cannot—the Eleventh Amendment bars that relief, and Plaintiffs’ claim should be dismissed for that reason alone.

But Plaintiffs cannot bootstrap what is, at most, a disagreement over the proper interpretation of the Election Code into a federal constitutional claim based on alleged “voter fraud.” Because the only relief Plaintiffs seek from this Court is various orders and injunctions directing state officials to comply with state law, it is clear that “state law” provides the “relief they seek.” *Balsam*, 607 F. App’x at 183-84. Creative pleading—alleging that a violation of state-law ballot-counting procedures somehow creates a federal constitutional claim—cannot allow an end-run around *Pennhurst*. See *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 741 (5th Cir. 2020); *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1205 (11th Cir. 2019). Indeed, Plaintiffs’ strategy of simply asserting that a supposed state Election Code violation is, standing alone, a federal constitutional violation would sap the Eleventh Amendment of all meaning. The Eleventh Amendment therefore bars Plaintiffs’ requested relief, and Plaintiffs’ claim should be dismissed for that reason alone.

At the very least, this issue is another obvious (and compelling) candidate for *Pullman* abstention, which applies with equal force here as the Court’s prior abstention orders. See *Boockvar I*, 2020 WL 4920952; *Boockvar III*, 2020 WL 5658392; ECF No. 460. While the Secretary firmly submits that the Election Code does not provide authority to reject nor challenge absentee and mail-in ballots based on signature comparison alone, at the very least “there are two plausible, competing interpretations of the state statute,” *Boockvar I*, 2020 WL 4920952, at \*12. Indeed, to confirm her interpretation and provide clarity in advance of the General Election, the Secretary is preparing to again petition the Pennsylvania Supreme Court to exercise its extraordinary (or “King’s Bench”) jurisdiction (as the Secretary previously previewed was her intention, see ECF No. 452 at 19). This Court should therefore abstain from this issue at least pending the Pennsylvania Supreme Court’s ruling on the Secretary’s forthcoming application and,

if granted, pending a final decision. That is because, as with the original abstention decision, Plaintiffs' federal constitutional claims are inextricably intertwined with the state-law question of whether the Election Code requires or permits signature matching in the first instance. Specifically, Plaintiffs' constitutional claims depend almost entirely on their position that the Secretary's guidance is "contrary to" the Election Code. *See also Boockvar I*, 2020 WL 4920952, at \*15 ("[A]ny analysis of Plaintiffs' claims would begin with an interpretation of the election-code provision that Plaintiffs allege Defendants have violated. But it could also end there."). If the Pennsylvania Supreme Court finds that the Secretary's guidance was correct (*i.e.*, that mail-in or absentee ballots cannot be set aside based on signature comparison alone), Plaintiffs' claims for compliance with their view of state law would fall apart; and if the Pennsylvania Supreme Court ruled that the Secretary's guidance was incorrect (*i.e.*, that the Election Code requires signature matching), the Secretary would be prepared to withdraw her September 11 guidance (just as she promptly did with her prior "naked" ballot guidance after the last Pennsylvania Supreme Court ruling). Either way, both (i) Plaintiffs' claim based on alleged non-compliance with the Election Code, and (ii) their federal equal protection claim would be entirely obviated because the Pennsylvania Supreme Court will have "conclusively interpreted Pennsylvania law," there would be no plausible argument that counties were going to ignore such ruling, and if they did, "state law [would] afford[] Plaintiffs a total, unambiguous remedy (*i.e.*, enforcement through state-court proceedings)." *See Boockvar III*, 2020 WL 5658392, at \*3.

Simply put, Plaintiffs' challenge to the Secretary's guidance will be moot if the state court holds that signature comparison is mandated by the Election Code, just as this Court determined that Plaintiffs' "naked ballots" and third-party delivery claims are moot. *See id.* at \*3-4. For these reasons, the Court should either dismiss Plaintiffs' challenge to the Secretary's September 11

and 28 guidance as entirely improper under the Eleventh Amendment or, at the very least, abstain and direct Plaintiffs to the proper venue for their objections—state court—just as it has done before.<sup>17</sup>

---

<sup>17</sup> While the Secretary does not believe this is the proper forum to resolve issues regarding the proper interpretation of the Election Code, the Secretary’s interpretation, as set forth in her September 11 guidance, *is* accurate, as the Election Code does not require or contemplate rejection of ballot applications or voted ballots based on signature analysis or comparison either by county officials or in any challenge process. Rather, the Election Code directs that a qualified elector may apply for an official mail-in ballot by completing an application form that requires the elector’s name, address, date of birth, voting district and length of time residing in the voting district. 25 Pa. Cons. Stat. § 3150.12(a), (b)(1)-(2). The application form includes a declaration that (barring a disability) must be completed verifying the applicant’s eligibility to vote and the truthfulness of the information supplied on the application. 25 Pa. Cons. Stat. § 3150.12(d). Upon receipt of a completed application, the county board of elections determines the qualifications of the applicant by verifying the “proof of identification and comparing the information provided on the application with the information contained on the applicant’s permanent registration card.” 25 Pa. Cons. Stat. § 3150.12b(a). Critically, “Proof of identification” for qualified absentee and mail-in electors is specifically defined in the Election Code as one of (1) the elector’s driver’s license number, (2) the last four digits of the elector’s Social Security number, (3) a valid-without-photo driver’s license, or (4) an identification card and a specified form of photo identification. 25 Pa. Cons. Stat. § 2602(z.5)(3). Under the plain language in the Code, therefore, identity for purposes of ballots is verified through these specific means only.

In addition, the Election Code details the procedures by which absentee and mail-in ballots are to be pre-canvassed and/or canvassed. *See* 25 Pa. Cons. Stat. § 3146.8(a). Per the Code, pre-canvassing consists of examining the voter’s declaration on the envelope, which contains the elector’s name and address, and comparing that “information” with the name and address on the list of approved absentee and mail-in voters. 25 Pa. Cons. Stat. § 3146.8(g)(3). These are the only permitted examinations under the Code. The Code then goes on to provide that, if (i) the county board of election has verified the proof of identification required by 25 Pa. Cons. Stat. § 3150.12b—*i.e.*, the elector’s driver’s license number, the last four digits of the elector’s Social Security number, a valid-without-photo driver’s license or identification card, or a specified form of photo identification—(ii) the voter declaration on the outer envelope is sufficient, and (iii) the voter’s name and address appear in the lists of approved absentee and mail-in voters, the ballot may be counted. 25 Pa. Cons. Stat. § 3146.8(g)(3), (4). The only exception is for mail-in ballots subject to challenge, but even then, the challenge may only be based on the elector’s qualifications, not a signature comparison. 25 Pa. Cons. Stat. §§ 3146.8(g)(4), 3150.12b.

To be sure, the Election Code does not permit, let alone require, county election officials to reject voted mail-in ballots based on signature analysis or comparison, and the provisions of the Election Code cited by Plaintiffs on page 46 of their memorandum do not authorize or even



**B. Plaintiffs' Signature-Related Challenges Similarly Present Only Generalized Grievances Lacking A Concrete, Particularized Injury.**

The Court should also reject Plaintiffs' challenge to the Secretary's signature guidance because, as with their drop box and poll-watcher claims, Plaintiffs assert a non-justiciable generalized objection to the Commonwealth's election procedures and have not identified a concrete, particularized injury caused by the Secretary's guidance. *Spokeo*, 136 S. Ct. at 1547-48. Like their other challenges, Plaintiffs' theory is that if the counties comply with the guidance and do not match signatures, there will be voter fraud and vote dilution. As the Secretary explained, that is a generalized, speculative injury that is not cognizable in this Federal Court. In fact, the only relief that Plaintiffs seek is an order directing that election officials comply with their interpretation of the law, the hallmark characteristic of a generalized grievance. ECF No. 503-1, ¶ 1(b).

Moreover, Plaintiffs have not produced any evidence whatsoever of rampant signature forging and voter fraud. At this stage in the litigation, Plaintiffs can no longer rely on "mere allegations," but must 'set forth' by affidavit or other evidence 'specific facts'" that establish they have standing to assert their claims. *Lujan*, 504 U.S. at 561 (citing Fed. R. Civ. P. 56(e)). During discovery, Plaintiffs elicited testimony regarding various counties' practices prior to issuance of the Secretary's guidance, but no evidence whatsoever that counties would defy a definitive ruling from the court on that issue. And the portion of Plaintiffs' expert report regarding this subject is based entirely on his unsupported view that failure to match signatures is "erroneous and allow[s] voter fraud to occur, undermining voter confidence in the election process and the election outcomes." Pls.' App. Ex. 19, Riddlemoser Report (ECF No. 504-19) at 11. That same expert

---

mention signature analysis. But again, whatever Plaintiffs' argument is, it is best made to a Commonwealth court.

provided no quantitative (or even meaningful qualitative) data about the prevalence of fraudulent signatures. Instead, there is simply an absence of evidence with respect to Plaintiffs' claim that individuals routinely engage in criminal activity by casting ballots containing fraudulent signatures, confirming that Plaintiffs are unharmed by the Secretary's guidance that the Election Code does not permit ballots to be set aside based on signature comparisons alone.

Moreover, Plaintiffs' equal-treatment-across-counties claim is speculative and not ripe for this Federal Court's review, and it is not caused by the Secretary's guidance in any event. The Secretary has issued clear guidance that the Election Code does not permit the setting aside of mail-in ballots based on signature comparison, and that is the uniform policy of the Commonwealth. SF ¶ 115; Pls.' App. Ex. 24, Guidance Concerning Exam. of Absentee and Mail-In Ballot Return Envelopes (ECF No. 504-24). If Plaintiffs fear that certain counties will violate that uniform standard and treat them unequally, that injury is not caused by the Secretary's guidance, and the proper remedy is to proceed in state court against those counties that have asserted they do not intend to do so.

**C. The Secretary's Signature-Matching Guidance Does Not Violate The Federal Constitution.**

Defendants are also entitled to summary judgment if the Court reaches the merits of Plaintiffs' federal constitutional challenges to the Secretary's guidance. Subjecting in-person and mail-in voters to different procedures does not violate the Equal Protection Clause, as those voting methods are inherently different and, in any event, any voter in the Commonwealth may choose to vote either in-person or by mail so there is no unconstitutional classification of voters. Nor does the Secretary's guidance violate the First or Fourteenth Amendment's protection against supposed vote dilution, which is implicated only in the complete absence of any standards whatsoever for the counting of ballots.

1. The Federal Constitution Does Not Require That Mail-In Voting and In-Person Voting Be Subject to the Exact Same Procedures.

Plaintiffs’ assertion that the Secretary’s guidance creates an “unconstitutional distinction” between mail-in/absentee and in-person voters, ECF No. 509 at 50-53, is simply incorrect as a matter of law. Rather, it is well settled that variations between procedures for in-person voting and mail-in voting do not burden the right to vote (for either method of voting) or result in unequal treatment in a way that warrants a heightened standard of scrutiny under the *Anderson-Burdick* framework. See *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1321-23 (10th Cir. 2008) (applying *Anderson-Burdick* and holding that distinctions between mail-in voting and in-person voting with respect to identification requirements “do not amount to a substantial burden on a person’s right to vote”); see also *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830-31 (S.D. Ind. 2006) (“Indeed, it is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters.”), *aff’d sub nom. Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008); see also *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 191 (1999) (“States . . . have considerable leeway to protect the integrity and reliability of . . . election processes generally.”); *cf. Gonzalez v. Arizona*, 2007 WL 9724581, at \*2 (D. Ariz. Aug. 28, 2007) (“Because early voting and voting at the polls are different types of voting, it is not a violation of [federal statutory law] to employ different ‘standards, practices, or procedures’ to these two types of voting.” (citation omitted)).

The Election Code’s treatment of signatures across the two different methods of voting is entirely rational. “Absentee [and mail-in] voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures.” *ACLU of N.M.*, 546 F.3d at 1320. As relevant here, absentee and mail-in voters have to complete a critical additional step before casting their ballot that in-person voters do not: they have to

complete an application requesting their ballot. 25 Pa. Cons. Stat. §§ 3146.2, 3150.12. And, in doing so, Pennsylvania’s absentee/mail-in ballot application requires voters to supply either their PennDOT identification number or the last four digits of their Social Security number, which county elections staff then verify through the PennDOT database or national Social Security database, as well as checking the voter against their voter record, before mailing the voter their absentee or mail-in ballot. Secy.’s App. Ex. 27, Pa. Appl. for Mail-In Ballot; Secy.’s App. Ex. 2, Boockvar Decl. ¶ 64. That process creates an additional measure of security not present in the in-person voting system where a voter may simply walk up to the polls and assert their identity without having to provide proof of identification.<sup>18</sup> Moreover, it is entirely rational to restrict signature comparisons to those instances where the individual whose signature is challenged is physically present to provide additional identification, cure the signature, or otherwise protect his right to vote when challenged (such as by producing a witness to make affidavit of his or her identity or by casting a provisional ballot). By contrast, the use of stringent signature comparisons for mail-in ballots raises a host of constitutional concerns and may even require additional and burdensome procedures to implement, which the Commonwealth may rationally choose to avoid by prohibiting the practice. *See, e.g., Frederick v. Lawson*, --- F. Supp. 3d ---, 2020 WL 4882696, at \*15 (S.D. Ind. Aug. 20, 2020) (holding that “Plaintiffs have established that the signature verification requirement, both facially and as applied to the individual Plaintiffs, is violative of the Fourteenth Amendment Due Process Clause for lack of any notification of the ballot rejection to the affected voter or opportunity to challenge the rejection,” and permanently enjoining the

---

<sup>18</sup> Consistent with the Help America Vote Act, 52 U.S.C. § 20901, *et seq.*, only first-time Pennsylvania voters who are voting for the first time in their precinct are required to show identification, but in-person voters who are not voting for the first time in their district are not required to do so.

practice of signature matching under Indiana law); *Lewis v. Hughs*, --- F. Supp. 3d ----, 2020 WL 4344432, at \*2, \*15 (W.D. Tex. July 28, 2020) (suggesting Texas signature-matching regime violates due process and denying the State’s motion to dismiss complaint), *aff’d and remanded on other grounds*, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) (per curiam).

And in any event, at a more basic level, the Election Code’s treatment of mail-in voting and in-person voting with respect to signature comparisons cannot be an equal-treatment violation because “all registered voters in [Pennsylvania] have the option of voting in-person or by absentee [or mail-in] ballot” and “voters may choose which set of procedures to follow.” *ACLU of N.M.*, 546 F.3d at 1320. That is, voters can opt-in to the mail-in/absentee voting system or they can cast their ballot in-person on Election Day; both options are open to all voters such that the Commonwealth’s procedures simply do not burden anyone’s right to vote, nor do they infringe the Equal Protection Clause.

## 2. Mail-in Voters Are Not Subject to Standard-less Treatment

The Secretary has issued clear guidance that the Election Code does not permit the setting aside of mail-in ballots based on signature comparison alone, and that is the uniform policy of the Commonwealth. “The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.” *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). While “the problem of equal protection in election processes generally presents many complexities,” this is simply not the rare situation where the Commonwealth has instituted a state-wide procedure with “minimal procedural safeguards,” or where the procedures are “inconsistent with the minimum procedures necessary to protect the fundamental right of each voter . . . .” *Bush*, 531 U.S. at 109.

Indeed, here, it is *Plaintiffs'* suggestion that signature matching is constitutionally compelled (absent explicit statutory directives and procedures in place to guide official discretion) that invites arbitrary and standard-less treatment. *E.g.*, *Democratic Exec. Comm. of Fla.*, 347 F. Supp. 3d at 1030 (cautioning that signature matching absent procedural safeguards risks “arbitrary and unreasonable decisions by canvassing boards to reject ballots based on signature mismatches”); *Frederick*, 2020 WL 4882696, at \*17 (same); *Saucedo*, 335 F. Supp. 3d at 223.

If Plaintiffs fear, based on evidence developed in the future, that certain counties will disregard the Commonwealth’s uniform standard in contravention of the Election Code, the proper remedy is for Plaintiffs to proceed in state court against those counties in order to ensure compliance with the Secretary’s uniform guidance.

#### **CONCLUSION**

For the foregoing reasons, the Court should grant judgment in favor of Defendants on all of Plaintiffs’ claims and deny Plaintiffs’ motion for summary judgment and request for injunctive relief.

Dated: October 3, 2020

Respectfully submitted,

KIRKLAND & ELLIS LLP

PENNSYLVANIA OFFICE OF  
ATTORNEY GENERAL

By: /s/ Daniel T. Donovan  
Daniel T. Donovan  
Michael A. Glick  
Susan M. Davies  
Kristen L. Bokhan  
Caroline Darmody  
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  
caroline.darmody@kirkland.com

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

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

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 October 3, 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*