No. 20-3371

In the United States Court of Appeals for the Third Circuit

DONALD J. TRUMP FOR PRESIDENT, INC.; LAWRENCE ROBERTS; and DAVID JOHN HENRY,

Plaintiffs-Appellants,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; ALLEGHENY COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; DELAWARE COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS; and PHILADELPHIA COUNTY BOARD OF ELECTIONS.

Defendants-Appellees.

DEMOCRATIC NATIONAL COMMITTEE; NAACP PENNSYLVANIA STATE CONFERENCE; COMMON CAUSE PENNSYLVANIA; LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; BLACK POLITICAL EMPOWERMENT PROJECT; LUCIA GAJDA; STEPHANIE HIGGINS; MERIL LARA; RICHARDO MORALES; NATALIE PRICE; TAYLOR STOVER; JOSEPH AYENI; TIM STEVENS;

Intervenor Defendants-Appellees,

On Appeal from the United States District Court for the Middle District of Pennsylvania in Case No. 20-cv-2078, Judge Matthew W. Brann

SECRETARY OF THE COMMONWEALTH KATHY BOOCKVAR'S BRIEF

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PRELIMINARY STATEMENT

The narrow question presented in this appeal is whether the district court abused its discretion in denying Appellants' motion for leave to amend their complaint (for the second time) to revive claims that they had previously raised in their original Complaint but deliberately withdrew from their First Amended Complaint. The answer to that question is straightforward: No. The district court did not abuse its discretion, and its denial of leave to amend should be affirmed, for three independent reasons.

First, Appellants were on notice of the deficiencies infecting its original Complaint (including their lack of Article III standing), but nevertheless failed to cure those deficiencies in their First Amended Complaint. The District Court therefore rightly rejected Appellants' belated effort to obtain a third bite at the apple. *Second*, Appellants engaged in undue delay that resulted in substantial prejudice to Defendants. This Court should not reward Appellants' dilatory tactics by granting them yet another opportunity to sow confusion and doubt in the Commonwealth's electoral process. And *third*, amendment would be futile because the proposed Second Amended Complaint fails to remedy threshold standing defects and otherwise fails to state any claim for which relief can be granted.

For all these reasons, the District Court's decision denying Appellants' motion for leave to amend should be affirmed, and Appellants' relentless campaign to

undermine the integrity of the presidential election and to disenfranchise millions of Pennsylvania voters should be brought to a swift and well-deserved end.

JURISDICTIONAL STATEMENT

Like the District Court, this Court is without jurisdiction because Appellants lack standing to pursue constitutional claims challenging alleged counting of ballots in violation of state law. To establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is traceable to the conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Bognet v. Secretary of the Commonwealth of Pa.*, --- F.3d ---, 2020 WL 6686120, at *6 (3d Cir. Nov. 13, 2020). As the District Court correctly concluded, Appellants failed to establish standing.

With respect to their claims under the Electors and Elections Clauses, Appellants admittedly lack standing to sue over alleged usurpation of the General Assembly's authority to regulate elections. This Court made clear in *Bognet* that only the General Assembly has standing to bring such claims. *Id.* at *7. Appellants conceded as much in the District Court. Their allegations under the Elector and Elections Clauses are intended to "preserve the claim for appellate review." Resp. to Defs. Mot. to Dismiss at 2, n.1, App. 349. In short, Appellants maintain that *Bognet* was wrongly decided.

Bognet also compels the conclusion that Appellants lack standing to pursue claims under the Equal Protection Clause. With regard to the individual voters, David John Henry Lawrence Roberts, Appellants allege that their ballots were rejected by their home counites (Fayette and Lancaster County, respectively) and that their votes were not counted because they failed to comply with statutory requirements. Am. Compl. ¶¶ 15-16, APP 197-98. Significantly, however, Appellants are not seeking in this action to have their votes counted. In fact, they did not even name their home counties as defendants. Instead, Appellants seek to invalidate the votes of *all other* Pennsylvania voters on a vote dilution theory—*i.e.* that the seven counties named as defendants allowed voters to cure defective ballots and counted ballots that should have been rejected and that this resulted in the "unlawful dilution or debasement of the weight of vote[s]" of *other* voters in *other* counties who legally cast their ballots. *See*, *e.g.*, Am. Compl. ¶ 102, APP 232. "[V]ote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet*, 2020 WL 6686120, at *11. Further, a vote counted illegally "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." *Id.* at *12 (citation and internal quotation marks omitted). As a result, vote dilution is not a

"particularized injury in fact sufficient to confer Article III standing on every other voter." *Id.* at *14.

The District Court correctly determined that, if Messrs. Henry and Roberts had challenged the rejection of their votes, they would nonetheless lack standing because such injury—failure to count their votes—is neither traceable to the challenged conduct of any Appellee nor likely to be redressed by the statewide disenfranchisement that Appellants seek in this case. Secretary Boockvar encouraged counties to implement procedures to cure ballot defects consistent with the Election Code, slip op. at 17, APP 077, and "the answer to invalidated ballots is not to invalidate millions more," *id.* at 18, APP 078. The District Court properly concluded that the individual voters lack standing to pursue claims against Appellees premised on alleged rejection of their votes. *Id.* Because this is the individual voters' only pretense of standing and they have not challenged the District Court's decision on standing in this appeal, the individual voters' appeal must be dismissed for lack of standing.

The Trump Campaign lacks standing to assert a constitutional claim premised on alleged vote dilution for the same reasons as the individual voters. Under *Bognet*, this "conceptualization of vote dilution—state actors counting ballots in violation of state election law"—is not a cognizable harm for purposes of the Equal Protection Clause and any such challenge to implementation of the election laws is a

generalized grievance insufficient to confer standing. *Bognet*, 2020 WL 6686120, at *11. Nor does the Trump Campaign possess standing to challenge application of the election laws as a candidate representative. Even if associational standing were properly pled, and it was not, the Trump Campaign fails to plead a cognizable injury to Trump as a candidate because all candidates were subject to the same county procedures the Trump Campaign seeks to challenge and because the Trump Campaign has not alleged and cannot allege that the number of votes purportedly counted illegally would have changed the outcome of the election. *Id.* at *8. Further, as the District Court determined, the notion of "competitive standing" does not apply because there is no issue of ballot access or ballot placement. Slip op. at 20-22, APP 080-82. Appellants have not briefed or challenged this decision either.

Appellants lack standing to pursue their constitutional claims and the District Court properly dismissed this action for lack of subject matter jurisdiction. This appeal should be dismissed for the same reason.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether it was a proper exercise of discretion for the District Court to deny leave to amend a second time where Appellants were on notice but failed to cure pleading deficiencies in the their First Amended Complaint, the proposed amendment would have reinstated claims that Appellants strategically removed from the original Complaint, leave to amend was sought after the District Court heard oral argument on motions to dismiss the First Amended Complaint and another amendment would have unduly delayed disposition of this time-sensitive election matter?

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases and proceedings in this Court or in any state or federal court.

STATEMENT OF THE CASE

Appellants in this matter are Donald J. Trump for President, Inc. ("the Trump Campaign") and two voters, John Henry and Lawrence Roberts, who seek to enjoin Appellees Secretary of the Commonwealth Kathy Boockvar and seven county boards of election from certifying the results of the 2020 General Election on a Commonwealth-wide basis, *see* 1st Am. Compl. at p. 62, APP 253, and instead "declare Trump the winner" even though his opponent received more votes. *See, e.g.*, Emergency Motion of Plaintiffs-Appellants Under FRAP 8 For TRO and Prelim. Inj. Pending Appeal to Stay Effect of Certification and Expedited Resp., No. 43-1, at 12. Their claims lack any basis in fact or law and their request for relief is outrageous. They have not identified a single vote cast by an elector who was not qualified to vote or a single vote that should not have been counted. Their proposed constructions of the Pennsylvania Election Code have been consistently rejected by the state courts and their pre-election challenges to election procedures have likewise been categorically rejected.

A. Pre-Election Day Litigation

On October 31, 2019, Governor Wolf signed Act 77 of 2019 (Act 77) into law, amending the Election Code to permit, for the first time, no-excuse mail-in voting for all qualified electors. 25 P.S. § 3150.11. This prompted an array of

litigation, instituted by both the Trump Campaign and others, both prior to and following the November 3, 2020 General Election.

Most relevant here, in a September 17, 2020 decision issued in response to an application for exercise of extraordinary jurisdiction filed by Secretary Boockvar, the Pennsylvania Supreme Court held that "there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is conferred by statute," *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 385 (Pa. 2020), and that claims of "heightened election fraud involving mail-in voting" necessitating enhanced poll watcher authority were "unsubstantiated." *Id.* In that same decision, the Supreme Court addressed a request by the Pennsylvania Democratic Party that would have affirmatively required Pennsylvania's counties to implement procedures to notify voters of defects in their mail-in ballots and offer them an opportunity to cure such defects. *Id.* at 372-74. In resolving that question, the Court held that county boards "are not ***required*** to implement a 'notice and opportunity to cure' procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly." *Id.* at 374 (emphasis added). Notably, the Court did not determine—nor was it asked to determine—whether counties were *permitted* to provide such notification even if the Election Code and state constitution did not affirmatively *require* it. *Id.*

On October 10, 2020, the Honorable J. Nicholas Ranjan of the U.S. District Court for the Western District of Pennsylvania issued a 138-page opinion dismissing an action brought by the Trump Campaign and others against Secretary Boockvar and Pennsylvania's 67 county boards of elections alleging that the Commonwealth's implementation of mail-in voting gave rise to a host of federal and state constitutional violations. *Donald J. Trump for President, Inc. v. Boockvar*, --- F. Supp.3d ---, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020). In that matter, plaintiffs alleged, *inter alia*, that Pennsylvania's county residency requirement for poll watchers would prohibit the campaign from staffing every in-person polling location, which would lead to rampant voter fraud and, in turn, vote dilution. *Id.* at *71. Judge Ranjan determined that the Trump Campaign and the other plaintiffs lacked standing to raise any of the asserted claims, including claims of violations of the Equal Protection Clause, and that, even if the plaintiffs had standing, their claims all failed on the merits. *Id.* at **1-2. With respect to the poll-watcher claim, Judge Ranjan stated that "there [was] no authority to support a finding of burden based solely on a speculative, future possibility that election irregularities might occur" in the absence of poll watchers. *Id.* at *71. The Trump Campaign did not appeal Judge Ranjan's decision. And Appellants' claims in this matter are no less speculative than they were pre-election.

B. Election Day Administration

Pursuant to the Election Code, the pre-canvassing of those ballots began at 7:00 a.m. on Election Day. 25 P.S. § 3146.8(g)(1.1). To prepare for the pre-canvass, counties administratively processed mail-in ballots in the days leading up to Election Day and in doing so recognized defects with some ballot return envelopes and inquired of the Department of State as to whether they were permitted to inform voters of the defects. ECF No. 43-2, Ex. 1. In response, on November 2, the Department of State advised all 67 counties that, during the pre-canvassing period, county boards were permitted to provide candidate and party representatives with information regarding voters whose mail-in ballots were rejected. *Id.* All counties received the notice and were encouraged them to provide such notification. *Id.* The notice to counties referenced guidance issued on October 21, 2020 which explained—consistent with the Pennsylvania Constitution's commitment to protecting the franchise—that voters whose completed mail-in ballots were rejected for reasons unrelated to the voter's qualifications may vote by provisional ballot[1] at the polls on election day. ECF No. 43-2, Ex. 4.

Consistent with the Commonwealth's Election Code, the pre-canvassing of mail-in and absentee ballots commenced in the defendant counties on or after 7:00

[1] The Election Code provides that "[a]n elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot under [25 P.S. § 3050]." 25 P.S. § 3150.16(b)(2).

a.m. on election day, 25 P.S. § 3146.8(g)(1.1), followed by the canvassing of such ballots which began at the close of the polls on election day, *id.* § 3146.8(g)(2). Under the Election Code, one authorized representative of each candidate and one representative of each political party were "permitted to remain in the room in which the absentee ballots and mail-in ballots" were pre-canvassed and canvassed in each county. *Id.* §§ 3146.8(g)(1.1), (2).

C. Post-Election Litigation

On Election Day, the Trump Campaign initiated actions in the Courts of Common Pleas of Philadelphia County and Bucks County seeking to enjoin county officials from identifying voters whose ballots were defective and allowing them to vote by provisional ballot or otherwise cure the defects. The Trump Campaign's challenges were uniformly denied. *See In Re: General Election Pre-Canvas, C.C.P. Phila. Cnty., Case No. 7501 of 2020; In Re: Pre-Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election,* C.C.P. Bucks Cnty., Case No. 2020-05627-0000.

The Trump Campaign also initiated an action in Philadelphia County challenging the level of access afforded to its canvass observers and requesting closer observation of the canvassing process. The Philadelphia Court of Common Pleas denied that request. *In Re: Canvassing Observation*, C.C.P. Phila. Cnty., Case No. 7003 of 2020. The Commonwealth Court reversed that determination,

permitting observation from six feet away, rather than the twelve feet the county had been permitting. *In Re: Canvassing Observation, Pa. Commw. Ct.*, 1094 CD 2020 (Pa. Cmwlth. Nov. 5, 2020). Philadelphia County petitioned the Pennsylvania Supreme Court for allowance of appeal. On November 17, 2020, the Pennsylvania Supreme Court vacated the order of the Commonwealth Court and reinstated the trial court's order. *In re Canvassing Observation*, --- A.3d ---, 2020 WL 6737895 (Pa. Nov. 17, 2020). The Supreme Court ruled that the county election board "did not act contrary to law in fashioning its regulations governing the positioning of candidate representatives during pre-canvassing and canvassing process, as the Election Code does not specify minimum distance parameters for the location of such representatives" and that the board's regulations at issue in that case were "reasonable in that they allowed candidate representatives to observe the Board conducting its activities as prescribed under the Election Code." *Id.* at *9.

While the state court proceedings regarding poll watchers' access in Philadelphia County were pending, the Trump Campaign filed an emergency application in the U.S. District Court for the Eastern District of Pennsylvania seeking enforcement of the Commonwealth Court order. *See Donald J. Trump for President, Inc. v. Philadelphia Court of Elections*, No. 20-cv-5533 (E.D. Pa.). Following an emergency hearing in which the Trump Campaign's lawyer conceded that "there [was] a nonzero number of [Trump Campaign representatives]" in Philadelphia

County's counting room, ECF No. 93-8, the parties reached agreement and the Court denied the Trump Campaign's emergency motion without prejudice. *See* E.D. Pa. No. 20-cv-5533, at Dkt. 5.

On November 23, 2020, the Pennsylvania Supreme Court rejected the same argument that the Trump Campaign presents in this case—that county election boards were required to disqualify mail-in or absentee ballots submitted by qualified electors without a handwritten name, address or date. *In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 General Election, Appeal of Donald J. Trump for President, Inc.*, --- A.3d ---, 2020 WL 6875017 (Pa. Nov. 23, 2020). The Supreme Court held that, "while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters."

D. Procedural History of the Instant Matter

Almost a week after the election, on November 9, 2020, Appellants commenced this action asserting seven separate claims for relief, specifically that: (1) their right to Due Process was violated as a result of alleged invalid enactment of regulations affecting the observation and monitoring of the election; (2) their right to Equal Protection was violated as a result of those same regulations; (3) it was a violation of the Electors and Elections Clauses to deny observers the opportunity to

have meaningful access to the canvassing process; (4) their right to Equal Protection was violated as a result of purported disparate treatment of mail-in and absentee voters in different counties; (5) it was a violation of the Electors and Elections Clauses for the defendant counties to create procedures to cure defective ballots; (6) their right to Due Process was violated based upon the alleged disparate treatment of mail-in and absentee voters in different counties; and (7) it was a violation of the Electors and Elections Clauses for county boards to implement notice and cure procedures.[2] APP 103.-188.

In light of the emergency nature of the relief sought, on November 10, 2020, the District Court issued a scheduling order setting expedited deadlines for the parties to file their respective motions and briefs. ECF No. 35. The District Court also scheduled oral argument for November 17, 2020 and, if necessary, an evidentiary hearing for November 19, 2020. This schedule allowed sufficient time for a final decision in advance of the November 23, 2020 deadline for Pennsylvania counties to certify their election results. *See* 25 P.S. § 2642(k).

In accordance with the District Court's scheduling order, Secretary Boockvar filed her motion to dismiss the original Complaint and supporting brief on November 12, 2020. APP 046, 047. Appellants filed a Motion for Temporary Restraining Order and Preliminary Injunction and supporting brief on that same date. APP 047.

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[2] Counts V and VII in the original Complaint are identical.

On November 13, 2020, this Court issued its precedential opinion in *Bognet v. Boockvar*, --- F.3d ---, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), concluding that individual voters and a political candidate lacked standing to seek to enjoin the counting of ballots allegedly cast in violation of state election law on the grounds that doing so usurps the authority of the state legislature in violation of the Electors and Elections Clauses or dilutes their votes or constitutes differential treatment in violation of the Equal Protection Clause. *Id.* at *18. Secretary Boockvar immediately notified the District Court of the supplemental authority in support of her motion to dismiss. ECF No. 120, APP 051.

Pursuant to the schedule set by the District Court, Appellants' response to the various motions to dismiss was due on November 15, 2020. APP 040. Rather than respond, Appellants instead filed a "First Amended Verified Complaint for Declaratory and Injunctive Relief" on November 15, 2020. APP 051. The First Amended Complaint included only two claims: (1) a single count alleging violation of the Equal Protection Clause based on alleged disparate treatment of mail-in and absentee voters in different counties; and (2) a single count alleging violation of the Electors and Elections Clauses also relating to the notice and cure issue. APP 247-252. Appellees acknowledged that their Electors and Elections Clauses claim was effectively foreclosed by *Bognet* and they included the claim strictly to preserve it for appeal. *See* Resp. to Defs.' Mot. to Dismiss, APP 349, at 2, n.1. Appellants

excised all claims relating to access to canvassing, including the Due Process claims alleged in the original Complaint. The Trump Campaign admitted that the deletions were deliberate and were intended to avoid the effect of this Court's ruling in *Bognet*. The Trump Campaign said the following about the amendment in a press release issued on November 16, 2020:

> On Sunday night, the Washington Post ran a complete mischaracterization of the Trump campaign's litigation in Pennsylvania, erroneously claiming the campaign had dropped the claim of nearly 700,000 ballots processed illegally and in secret. The campaign did no such thing. In fact, because of a Friday ruling by the Third Circuit Court of Appeals in an unrelated case, the campaign strategically decided to ***restructure its lawsuit*** to rely on claims of violations of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

(Emphasis in original.)[3] The revisionist claim in this Court that the First Amended Complaint "incorrectly omitted" the Due Process claims is a desperate effort to put more time on the clock. Appellants strategically filed the First Amended Complaint in an effort to dodge *Bognet*'s fatal bullet.

On November 15, Secretary Boockvar moved to dismiss the First Amended Complaint. APP 051. She filed her reply brief in support of the motion to dismiss

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[3] *See* *Setting the record straight on Trump campaign's Pennsylvania litigation | Donald J. Trump for President*, available at https://www.donaldjtrump.com/media/setting-the-record-straight-on-trump-campaigns-pennsylvania-litigation/ (last visited November 24, 2020).

the original Complaint or, the in the alternative, the First Amended Complaint the next day, November 16. APP 052.

Late in the evening on November 16, Appellants moved to continue the oral argument scheduled for the next day and indicated in their motion that they planned to "seek[] leave to file a second amended complaint" but did not attach a copy of their proposed pleading. ECF No. 152. The District Court denied the motion for a continuance, APP 053, and heard oral argument as scheduled on November 17, 2020. At the conclusion of the oral argument, the District Court cancelled the evidentiary hearing scheduled for November 19, 2020. APP 054. The District Court also entered an Order setting deadlines for the filing of additional briefs and motions. *Id.*

On November 18, Appellants filed a motion for leave to file a second amended complaint. ECF No. 173. They also filed a motion for extension of time until November 19 to file their motion for preliminary injunction. APP 055. The District Court granted the motion for extension and adjusted the other filing deadlines accordingly. APP 055.

On November 20, 2020, the District Court issued its Memorandum Opinion and Order, dismissing the First Amended Complaint due to lack of standing and failure to state a claim upon which relief can be granted and denying Appellants' motion for leave to file a second amended complaint because Appellants already

amended once as of right, they sought to effectively reinstate their initial complaint and claims and allowing amendment would unduly delay resolution of these issues. APP 061. Appellants filed a notice of appeal on November 21, 2020. APP 100.

SUMMARY OF THE ARGUMENT

It is beyond time for this baseless litigation to come to an end. The District Court properly exercised its discretion in denying leave to amend a second time. That is true for several, independently sufficient reasons: Plaintiffs were on notice but failed to cure pleading deficiencies through their first amendment; their proposed amendment would have reinstated claims that Appellants had abandoned for tactical reasons; leave to amend was sought after the District Court heard oral argument on motions to dismiss the First Amended Complaint and would have substantially prejudiced Appellees; and further amendment would have been futile and resulted in unnecessary delay of this time-sensitive election matter. Accordingly, the district court did not abuse its discretion, and its decision to deny leave to amend should be affirmed.

ARGUMENT

A. Standard of Review

The Court reviews a district court's decision to deny a motion to amend the complaint for abuse of discretion. *Krantz v. Prudential Investments Fund Mgmt., LLC*, 305 F.3d 140, 144 (3d Cir. 2002).

B. The District Court Properly Exercised Its Discretion in Denying Leave To Amend Where Appellants Were On Notice of the Deficiencies in Their Complaint And Failed To Correct Them.

The law in this Circuit in clear: a district court has discretion to deny leave to amend where the plaintiff was on notice of the deficiencies in his complaint and failed to correct them. *Krantz*, 305 F.3d at 144. Under such circumstances, courts routinely deny leave to amend. *U.S. ex rel. Schulmann v. Astrazeneca Pharms. L.P.*, 769 F.3d 837, 849 (3d Cir. 2014); *Davis v. Abington Mem. Hosp.*, 765 F.3d 236, 244 (3d Cir. 2014); *California Pub. Emps. Retirement Sys. v. Chubb*, 394 F.3d 126, 166 (3d Cir. 2004). And those are exactly the circumstances here.

Appellants filed their initial complaint on November 9. APP 103. The District Court issued an order the next day scheduling a status conference for November 11. APP 039. At the conference, the District Court issued a scheduling order, including deadlines for filing motions to dismiss and briefs in support and opposition. APP 040. The District Court also scheduled oral argument on the motions to dismiss for November 17 and, if necessary, an evidentiary hearing on November 19. Appellees filed their motions to dismiss and supporting briefs as directed on November 12. This Court issued its decision in *Bognet* on November 13. In lieu of responding to the pending motion to dismiss on the merits, Appellants filed their First Amended Complaint just minutes before the 12:00 pm deadline on November 15. The First Amended Complaint excised five of the seven claims in

the original Complaint, including two separate claims alleging due process violations, and consolidated the remaining allegations into two claims for relief: (1) denial of equal protection (Count I); and (2) violation of the Electors & Elections Clauses (Count II). Appellants also opposed the pending motions to dismiss on November 15, characterizing their own original pleading as "inoperative," "moot" and "a nullity," and touting the Amended Complaint as "the blueprint for the future course of [the] lawsuit." APP 348-49.

There is no doubt that Appellants were "on notice" of the defects in their original Complaint when they filed their Amended Complaint—including their lack of standing—on November 15. To that end, in her brief in support of motion to dismiss filed on November 12, Secretary Boockvar detailed the numerous jurisdictional and substantive defects in the original Complaint, including lack of standing to assert claims under the Equal Protection or Due Process Clauses and failure to state a plausible claim for violation of any constitutional provision. ECF No. 93. And, on November 15, Secretary Boockvar notified the District Court of *Bognet*'s dispositive effect on Appellants' claims. ECF No. 130. Appellants were thus on notice of the deficiencies in their original Complaint before they filed their First Amended Complaint, but they chose to abandon their due process claims in a haphazard but intentional strategy to avoid *Bognet*.

Given Appellants' notice of the deficiencies in their original complaint, and their subsequent failure to correct those deficiencies in the First Amended Complaint, the District Court properly exercised its discretion to deny Appellants leave to amend a second time. In doing so, the District Court properly noted that "Plaintiffs have already amended once as of right." Slip op. at 36. The failure of the First Amended Complaint to correct these standing and merits deficiencies is in and of itself sufficient to justify denial of leave to amend. *See Krantz*, 305 F.3d at 145 (affirming order of district court dismissing complaint and denying leave to amend "where the plaintiff was put on notice as to the deficiencies in his complaint, but chose not to resolve them"); *see also Schulmann*, 769 F.3d at 849 (3d Cir. 2014) (same); *Davis*, 765 F.3d at 244 (same); *California Pub. Emps. Retirement Sys. v. Chubb*, 394 F.3d 126, 165 (3d Cir. 2004) ("The District Court's decision to prevent Plaintiffs from having yet another chance to revise their complaint was properly within its discretion."). The District Court did not abuse its discretion in denying Appellants yet another opportunity to correct the deficiencies in their first two complaints.

C. The District Court Also Relied on Other Grounds in Denying Leave To Amend.

Whether to allow an amendment is entrusted to the discretion of the district court. *Krantz*, 305 F.3d at 144. Leave to amend may properly be denied if the plaintiff's delay in seeking amendment is undue, motivated by bad faith or

prejudicial to the other party or where the proposed amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993). All grounds exist here.

Appellants incorrectly contend that the District Court denied leave to amend "on the sole basis of 'undue delay,'" Br. at 24. Instead, the District Court denied amendment for three reasons: (1) Appellants already amended once; (2) their proposed amendment would have reinstated claims excised from the original complaint; and (3) permitting another amendment would unduly delay disposition of this matter. Slip op. at 36. It was well within the District Court's broad discretion to deny another amendment for these reasons.

Appellants contend that the District Court denied leave to amend "on the sole basis of 'undue delay,'" Br. at 24, but this is not the sole basis for the District Court's ruling. Rather, the District Court denied amendment for three reasons: (1) Appellants already amended once; (2) their proposed amendment would have reinstated claims excised from the original complaint; and (3) permitting another amendment would unduly delay disposition of this matter. Slip op. at 36, APP 096. It was certainly within the District Court's discretion to deny another amendment for these reasons.

As the District Court noted, the proposed amendment would have "effectively reinstated" Appellants' original Complaint which they strategically

withdrew after *Bognet* was decided. Slip op. at 36, APP 096. While Appellants now incredulously maintain that the Due Process claims were eliminated in error, Br. at 18, 26, they represented otherwise to the District Court, asserting that their "core allegations" were the claims under Elections and Electors Clauses and the Equal Protection Clause, *see* Pls.' Resp. to Notice of Suppl. Auth., ECF 124, at 1, and that these claims in the First Amended Complaint were "the blueprint for the future course of [the] lawsuit," Pls.' Br. in Opp'n to Mot. To Dismiss at 1, ECF No. 126, at 1. Abandoning the Due Process allegations in the original Complaint was a tactical decision to circumvent the standing obstacles posed by *Bognet* and to avoid responding to the other case-dispositive arguments advanced by Appellees in their motions to dismiss. *See* Pls.' Resp. to Defs.' Motions To Dismiss, APP 348, at 1 ("Defendants' motions should be dismissed as moot because they target a complaint that is no longer operative."). Appellants should be judicially estopped from advancing irreconcilably different rationales, one purposeful and one accidental, for their decision to drop the Due Process claims. The District Court appropriately relied on Appellants' representation that the First Amended Complaint set forth the "core" of Appellants' claims.

Appellants' assertion that the Due Process claims were deleted in error is not credible given the redlined version of the amended pleading, which confirms that the due process allegations were eliminated altogether and that the allegations

concerning poll watchers and poll observers were reorganized to fall within the Equal Protection or Electors or Elections Clause claims. *See, e.g.*, ECF No. 172-3 at 62-68, 84-87. The District Court acknowledged "the tortured procedural history" of this litigation, specifically noting that leave to file a second amendment was sought only after the third substitution of counsel for Appellants. Slip Op. at 7, 10-11 & n.36, APP 067, 071. It was not an abuse of discretion to deny further amendment in light of the obvious gamesmanship. *See Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 274 (3d Cir. 2001) (affirming decision denying leave to amend where plaintiffs delayed seeking amendment based on "misplaced confidence" in their original legal theory).[4]

Further, Appellants' delay in seeking to reinstate their original complaint caused Secretary Boockvar and the county defendants to suffer substantial prejudice. As the District Court noted, the deadline for counties in Pennsylvania to certify their election results was November 23, 2020. Slip op. at 36, APP 096. The District Court established a schedule that allowed for full briefing and argument and, if necessary, an evidentiary hearing with sufficient time for a final decision in advance of the

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[4] Appellants insinuate that the due process allegations were inadvertently omitted after the Trump Campaign's "main counsel" withdrew on November 13 "[a]fter receiving threats from opposing counsel." Br. at 26. This is not accurate. There was never any "threat" from opposing counsel. The communication was characterized by the District Court as "mockery" and "not sanctionable." Tr. at 160, 162, 171. And the communication at issue was not directed at Porter Wright, who withdrew days before the call at issue was placed. APP 050.

November 23, 2020 deadline. *Id.* at 7-8, APP 067-68. Appellants' attempted second amendment occurred midstream—after Secretary Boockvar briefed her motion to dismiss the First Amended Complaint and after the District Court heard oral argument on the pending motions to dismiss the First Amended Complaint. To allow another amendment to reinstate the withdrawn claims at that late stage in the proceedings would have required additional briefing and oral argument and would have prolonged disposition of this matter well beyond November 23 to the substantial detriment of the parties, to election officials and to the voters who cast ballots in the general election and are entitled to have those votes properly and timely counted. The District Court articulated the prejudice that would ensue if another amendment were allowed—"the Court would need to implement a new briefing schedule, conduct a second oral argument, and then decide the issues"—and concluded that amendment would not be permitted for this additional reason. Slip op. at 36, APP 096. This was a proper exercise of discretion. *See generally Cureton*, 252 F.3d at 274 (affirming decision denying leave to amend where "the proposed amendment would essentially force the [parties] to begin litigating this case again"); *Cornell & Co., Inc. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 826 (3d Cir. 1978) (affirming decision denying amendment which would have "completely changed the nature" of the claims asserted). Indeed, the District Court's

concern with Pennsylvania's certification deadline was well justified. Earlier today, Pennsylvania certified the results of the presidential election.

D. Amendment Would Have Been Futile.

The District Court did not err in dismissing the First Amended Complaint without affording another opportunity to amend because the proposed amendment would have been futile. *Averbach v. Rival Mfg. Co.*, 879 F.2d 1196, 1203 (3d Cir. 1989). The proposed Second Amended Complaint lacks any arguable basis in law or in fact and would be subject to dismissal for lack of standing and failure to state a claim. As a result, leave to amend was properly denied on futility grounds.

1. Plaintiffs plainly lack standing.

The central theory underlying all of Appellants' claims—that election officials counted ballots in violation of state election laws—is not a concrete injury in fact sufficient to confer Article III standing on either the individual voter Appellants or the Trump Campaign. If Appellants' First Amended Complaint is like Frankenstein's Monster, "haphazardly stitched together from . . . distinct theories in an attempt to avoid controlling precedent," Slip op. at 11, APP 071, their proposed second amended complaint is Frankenstein's Monster's Monster, randomly re-cobbled together, even more illogical and haphazard than the first. This Court's precedential decision in *Bognet v. Secretary of the Commonwealth of Pa.*, --- F.3d -

--, 2020 WL 6686120 (3d. Cir. Nov. 13, 2020), categorically precludes Appellants from establishing standing to pursue any of their shifting theories.

Electors and Elections Clauses. In their proposed Second Amended Complaint, Appellants assert that county elections boards violated the Electors[5] and Elections[6] Clauses of the United States Constitution by (a) denying Plaintiffs "meaningful access to observe and monitor the electoral process," Proposed 2d Am. Compl., Count III, ¶¶ 211-220, APP 452-54; *id.* at Count IX, ¶¶ 304-23, APP 477, 481, and to permit voters to cure ballot defects, *id.*, Count V, ¶¶ 240-250, APP 462-64. They contend that the U.S. Constitution "reserves for state legislatures the power to set the time, place, and manner of holding elections for Congress and the President" and that state election officials "have no authority to unilaterally exercise that power, much less flout existing legislation." First Am. Compl. ¶ 31, APP 387; *see id.* ¶¶ 217, 247, APP 454, 463.

Binding precedent precludes Plaintiffs from establishing Article III standing to pursue these claims under the Elections and Electors Clauses. In *Lance v.*

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[5] The Electors Clause of the U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2.

[6] The Elections Clause of the U.S. Constitution provides that the "Legislature[s]" have authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." U.S. Const. art. I, § 4 cl. 1.

Coffman, 549 U.S. 437 (2007) (per curiam), the Supreme Court held that private citizens lack standing to sue for alleged violation of the Elections Clause because the alleged harm—that the law was not followed—is an "undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the least." *Id.* at 442. And applying *Lance*, this Court held in *Bognet* that voters and political candidates "lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses." *Bognet*, 2020 WL 6686120, at *7 (noting "considerable similarity" of the two clauses in standing analysis). Appellants thus lack standing to sue under the Elections or Electors Clauses.

Due Process. In their proposed Second Amended Complaint, Appellants allege that they were denied a meaningful opportunity to observe canvassing "in order to conceal" decisions by county election boards not to enforce Election Code requirements with regard to ballots. SAC, Count I, ¶¶ 166-191, APP 438-446, Count VI, ¶¶ 251-263, APP 464-68. The alleged injury—election officials' failure to comply with the Election Code—is the quintessential "generalized grievance" that cannot support voter standing. *Bognet*, 2020 WL 6686120 at *12.[7] Further, the

[7] The cases cited by Appellants are not on point. *Reynolds* is a "'routine' vote-dilution" case involving a reapportionment plan that was alleged to have resulted in some votes being weighed less compared to others. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).. In *Bognet*, this Court found reliance on *Reynolds* "misplaced" where plaintiffs allege that election officials failed to follow state law in counting votes.

Trump Campaign does not and cannot allege that any observer restriction injured it in a particularized way when all candidates were subject to the same rules. *Id.* at *8. And the Trump Campaign does not identify even a single vote that was improperly counted, much less plausibly allege that improper votes were counted in sufficient number to change the outcome of the election in Pennsylvania.[8] *Id.* at *8. Nor can the Trump Campaign credibly allege competitive standing. As the District Court correctly held, competitive standing has been recognized only in relation to claims involving ballot access and ballot placement, neither of which is an issue here. Slip op. at 20-22, APP 080-82.

All cases cited by Appellants, Br. at 20, are inapposite. In *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), the plaintiffs alleged that election officials conspired with one of two candidates to cause fraudulently obtained ballots to be cast. Plaintiffs do not, and cannot, allege such "substantial wrongdoing" here, *see id.* at

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Bognet, 2020 WL 6686120 at *13. Appellants' reliance on *Marks* is likewise misplaced. The language they cite is actually from the Second Circuit's in *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), and merely recognized that the remedy sought there—like the remedy sought here—is inappropriate because it would deny voters the right to have their votes counted. Neither case supports Appellants' theory of vote dilution or outlandish attempt to disenfranchise all Pennsylvania voters.

[8] Former Vice President Biden's certified popular vote lead in Pennsylvania is at over 80,000 votes. *See* Department of State Certifies Presidential Election Results, available at https://www.media.pa.gov/Pages/State-details.aspx?newsid=435 (last visited Nov. 24, 2020).

887, and, as the District Court pointed out, the *Marks* decision does not address the federal requirements for standing, Slip. Op. at 22. *Marks* is of no help to Appellants in establishing standing. Appellants also rely on the Eighth Circuit's decision in *Carson* which held that candidates had standing to challenge a state-court consent decree extending the receipt deadline for mail-in ballots. *Carson v. Simon*, No. 20-3139, 2020 WL 6335967 (8th Cir. Oct. 29, 2020). In *Bognet*, this Court rejected the reasoning in *Carson* because it is based on a misreading of *Bond v. United States*, 564 U.S. 211 (2011). 2020 WL 6686120, at *8 n.6. *Bognet*, not *Carson*, is controlling here.

Equal Protection. Appellants allege that county election boards violated the Equal Protection Clause by failing to adhere to the Election Code in deciding whether to count mail-in and absentee ballots. Proposed 2d Am. Compl., Count IV, ¶¶ 221-239, APP 455-462; *id.* at Count VIII, ¶¶ 284-303, APP 473-77. "This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet*, 2020 WL 6686120, at *11. Further, any such claim is a "paradigmatic generalized grievance that cannot support standing." *Id.* at *12. As Chief Judge Smith made plain, "when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of

those ballot on the grounds that the course of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause." *Id.* at * 18. *Bognet* sounds the death knell for Appellants' equal protection claim. Appellants did not brief or challenge the District Court's decision that they lack standing and therefore waived any such argument on appeal. *United States v. Pellulo*, 399 F.3d 197, 201 n.2 (3d Cir. 2005) ("Where, as here, an appellant fails to raise an issue in an appellate brief, even if it was listed in the Notice of Appeal, it is deemed waived."); *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003) (recognizing that if a party fails to raise an issue in his opening brief, the issue is waived); *Laborers' Intern. Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes 'a passing reference to an issue . . . will not suffice to bring that issue before this court.'").

2. Appellants Fail To State a Claim for Violation of the Equal Protection Clause.

Appellants also failed to address and therefore waived any challenge to the District Court's decision that they failed to state a plausible claim for violation of the Equal Protection Clause. In any event, the District Court's decision is undeniably correct for at least three reasons.

First, Appellants' basic complaint—that state election laws were not uniformly enforced across the Commonwealth, *see, e.g.*, Am. Compl. ¶¶ 6, 125-26,

APP 194, 238-39, is not a cognizable equal protection violation. "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). This Court reaffirmed as much in *Bognet*, holding that "state actors counting ballots in violation of state election law [] is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet*, 2020 WL 6686120 at *11; *see also id.* at *6 ("[f]ederal courts are not venues for plaintiffs to assert a bare right to have the Government act in accordance with law").[9]

Appellants suggest that any variation in county election procedures constitutes an equal protection violation under *Bush v. Gore*, 531 U.S. 98 (2000), Br. at 18, but that is not what that case says. *Bush v. Gore* is not a magical "get out of defeat free card" that justifies disenfranchising millions of Pennsylvania voters in order to flip an election.[10] *Bush* is expressly "limited to [its] present circumstances," which

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[9] In their papers, Appellants accuse election officials of a broad conspiracy against Republican voters and candidates, *see*, *e.g.*, Br. at 11, 12, but they do not and cannot allege that candidates or voters were subject to different treatment based on their political affiliation. Their allegations are entirely unsupported.

[10] Appellants also cite *Bush v. Gore* as support for the proposition that a federal court "may independently interpret Pennsylvania law and not sustain"—in other words, may reverse—decisions of the Pennsylvania Supreme Court interpreting the Pennsylvania Election Code. *See* Emergency Mot. of Plaintiffs-Appellants Under

involved a state court order requiring a manual recount without a uniform standard. *Id.* at 109. *Bush* was concerned with differences in the ***treatment*** of votes, not differences in county election ***procedures***. *Id.* at 103. Here, Appellants complain that counties implemented different procedures that afforded some voters more opportunities to vote, but all votes were weighed the same. That makes the alleged harm in this case "categorically different from the harm at issue in *Bush*." *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5997680, at *41-46 (W.D. Pa. Oct. 10, 2020). Indeed, the Supreme Court emphasized in *Bush* that it was ***not*** addressing "whether local entities, in the expertise, may develop different systems for implementing elections." 531 U.S. at 109.

Variations in county election procedures are perfectly permissible. "[C]ounties may, consistent with equal protection, employ entirely different election

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FRAP 8 for TRO and Prelim. Inj. Pending Appeal to Stay Effect of Certification and Expedited Resp., No. 43-1, at 26. This is not a correct statement of the law. Appellants' citation is actually to Chief Justice Rehnquist's concurring opinion in support of the Court's decision on the merits. *See Bush v. Gore*, 531 U.S. 98, 112-22 (2000). Justice Rehnquist's concurring opinion, which was joined by Justice Scalia and Justice Thomas, does not reflect the views of a majority of the Justices and is not binding precedent. Moreover, even on its own terms, Chief Justice Rehnquist's concurrence only proposes a role for federal courts if a state court interpretation "significantly departed from the statutory scheme," an issue Appellants have, of course, not alleged here. Rather, Supreme Court precedent directs that "the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law . . . ." *West v. Am. Tel & Tel. Co.*, 311 U.S. 223, 236 (1940).

procedures and voting systems within a single state." *Boockvar*, 2020 WL 5997680, at *44-45 (citing cases); *see also, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635-36 (6th Cir. 2016) (rejecting equal protection challenge even where "plaintiffs presented uncontested evidence that, in determining whether to reject a given ballot, the practices of boards of elections can vary, and sometimes considerably"); *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006) ("Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, local variety in voting systems can be justified by concerns about cost, the potential value of innovation, and so on."). In fact, local variety in voting systems is justified by a state's strong interest in election security, resource allocation, innovation, and administrability. *See* Dist. Ct. 36 ("Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations."). The fact that some counties implemented mail-in voting in a manner that offered a cure mechanism to assist voters simply does not give rise to an Equal Protection Clause violation. *See Trump v. Bullock*, --- F.3d ----, 2020 WL 5810556, at *14 (D. Mont. Sept. 30, 2020) ("[F]ew (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause.").

Second, the Amended Complaint fails to allege any burden on the right to vote. Allowing voters to cast provisional ballots or cure ballot defects did not prevent anyone from voting or in any way burden anyone's right to vote. Instead, such procedures made voting easier. This is not an Equal Protection violation. *See Short v. Brown*, 893 F.3d 671 (9th Cir. 2018) (affirming denial of preliminary injunction for alleged Equal Protection violation where some California counties automatically mailed ballots to registered voters and other counties did not); *see also Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 145 (5th Cir. 2020) (finding it a "mystery" how the "expansion of voting opportunities burdens anyone's right to vote"); *Boockvar*, 2020 WL 5997680, at *41-43 (holding that counties' differential use of drop boxes did not give rise to equal protection violation because there was no burden on right to vote); *Paher v. Cegavske*, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) (rejecting equal protection challenge to plan that "ma[d]e it easier or more convenient to vote in [one] County, but [did] not have any adverse effects on the ability of voters in other counties to vote").

Since there is no burden on the right to vote, rational basis review applies. *See Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004). The counties had a rational basis for notifying voters and allowing them to cast provisional ballots sufficient to satisfy

the *Anderson-Burdick* balancing test.[11] The "longstanding and overriding policy" in the Commonwealth of Pennsylvania is to "protect the elective franchise." *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004). The Pennsylvania Supreme Court has repeatedly directed that "ballots containing minor irregularities should only be stricken for compelling reasons." *Id.*; *see also In re Gen. Election Nov. 6, 1971*, 296 A.2d 782, 784 (Pa. 1972); *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963). The "goal must be to enfranchise and not to disenfranchise." *In re Luzerne County Returns Bd.*, 290 A.2d 108, 109 (Pa. 1972). Providing notice to voters when their ballots are rejected and an opportunity to cast provisional ballots or otherwise cure defects is most certainly rationally related to this legitimate and important state interest. Accordingly, Appellants cannot prevail under the *Anderson-Burdick* framework. Because no fundamental right was burdened and

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[11] Betraying their desperate disregard for the truth, Appellants continue to misrepresent guidance issued by Secretary Boockvar concerning the handling of so-called "naked ballots" lacking the inner secrecy envelope. Br. at 13 & n.7. In fact, Secretary Boockvar issued guidance on September 28, 2020 advising counties as follows: "The Pennsylvania Supreme Court held on September 17, 2020, that any ballot that is not returned in the official ballot envelope (secrecy envelope) must be set aside and declared void. . . . In accordance with that ruling, all ballots that are not returned within the inner envelope ***must be set aside and may not be counted***. . . ." *See* Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, September 28, 2020 at 5 (emphasis added), APP 620. Finally, there is no evidence that any county counted so-called "naked" ballots.

there was a rational basis for providing notice and cure options, there was no constitutional violation.

Third, Appellants' proposed poll-watcher and poll-observer claims similarly fail. As a threshold matter, there is no federal constitutional right to be a partisan poll watcher or to observe the counting of ballots. *Republican Party of Pennsylvania v. Cortés*, 218 F. Supp. 3d 396, 414 (E.D. Pa. 2016) ("State law, not the Federal Constitution, grants individuals the ability to serve as poll watchers . . . ."). The Pennsylvania Supreme Court has also rejected Plaintiffs' similar claims under state law. *See In re Canvassing Observation*, 2020 WL 6737895, at *8 (Pa. Nov. 17, 2020). Fatally, Appellants do not allege—in either the operative complaint or their proposed amendment—that Republican poll watchers were treated differently than Democratic poll watchers. *See* Dist. Ct. 34 ("None of these allegations . . . claim that the Trump Campaign's watchers were treated differently than the Biden campaign's watchers. Simply alleging that poll watchers did not have access or were denied access to some areas does not plausibly plead unequal treatment."). Therefore, Appellants fail to allege that the denial of a "meaningful" opportunity to poll watchers—either because of their location or their unobstructed view of the canvass—violates the federal constitution.

3. Appellants fail to state a plausible due process violation.

In the election context, due process is violated where alleged election misconduct affects the fundamental fairness of an election and the right of citizens to vote in the election. *Afran v. McGreevey*, 115 F. App'x 539, 544 (3d Cir. 2004) (per curiam) (stating that "a claim under § 1983 will . . . lie where state or local election infractions work a denial of substantive due process rights in violation of the Fourteenth Amendment" but concluding that plaintiffs' substantive due process rights were not violated). Here, Appellants allege that election officials in some counties maladministered the election by not properly enforcing Pennsylvania Election Code requirements as Appellants interpret them. This does not rise to the level necessary to support federal court interference. *Welker v. Clarke*, 239 F.3d 596, 597 n.3 (3d Cir. 2001). Further, there is no dispute that the supposed violations of the election laws could have been and, in fact, were addressed in state court actions. Pennsylvania state courts have rejected Appellants' theories that state law required rejection of ballots without a handwritten name, address or date, *In re: Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election Appeal of Donald J. Trump for President, Inc.*, --- A.3d ---, 2020 WL 6866415 (Pa. Nov. 23, 2020), that observers had a statutory right to "meaningfully . . . see the process" rather than just "be present," *In re Canvassing Observation*, --- A.3d ---, 2020 WL 6737895 (Pa. Nov. 17, 2020), and that mail-in and absentee voters should not have been permitted to cast provisional ballots or otherwise cure defective ballots, *see In*

Re: General Election Pre-Canvas, C.C.P. Phila. Cnty., Case No. 7501 of 2020; *In Re: Pre-Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election,* C.C.P. Bucks Cnty., Case No. 2020-05627-0000. Regardless of the Trump Campaign's lack of success, the existence of state remedies makes it impossible to assert claim that a due process violation occurred. *Welker*, 239 F.3d at 597 n.3 (rejecting constitutional claim where plaintiffs did "not argue[] that the supposed violation of the election laws could not have been remedied in a state court action"). In addition, the Election Code provides a forum to expeditiously challenge the conduct of an election through an election contest, 25 P.S. § 3456, a remedy the Trump Campaign tellingly declined to pursue. The due process claims are thus futile.

4. The injunctive relief sought is unavailable.

For a host of reasons, federal intervention by way of injunctive relief after the election has been certified is also inappropriate.[12] For one, Appellants have failed to pursue available state remedies through an election contest. 25 P.S. §§ 3456-

[12] Appellants accuse the District Court of misconstruing the certification deadline, Br. at 27, and the remedy they sought, *id.* at 29, but the District Court was right on both. The deadline for counties to certify their election results was November 23. Slip op. at 6-7, APP 066-67; *see also* 25 P.S. § 2642(k). And Appellants have consistently sought to enjoin the Secretary "from certifying the results of 2020 presidential election in Pennsylvania on a statewide basis." Proposed 2d Am. Compl. at p. 97, APP 414; 1st Am. Compl. at p. 85, APP 253; Br. at 23.

3473. Moreover, their request for a injunctive relief is not tailored to their asserted claims, but instead would unconstitutionally disenfranchise millions of voters. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) ("If a less drastic remedy . . . was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.") (citations omitted); *see also Perles v. Cty. Return Bd. of Northumberland Cty.*, 415 Pa. 154, 159 (1964) ("The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."); *Pa. Democratic Party*, 238 A.3d at 361 ("[I]t is well-settled that, although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote . . . to enfranchise and not to disenfranchise the electorate.") (citation and internal punctuation marks omitted); *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 596 (E.D. Pa. 2012) (declining to issue a temporary restraining order in an election case when doing so would mean that "Pennsylvania voters could be disenfranchised"). And courts in other states have rejected similar efforts by the Trump Campaign to enjoin the certification process, concluding that doing so would be an "unprecedented exercise of judicial activism." Opinion & Order 11 in

Costantino v. City of Detroit, No. 20-014780-AW (Mich. 3d Judicial Cir. Ct. Nov. 13, 2020) (Ex. A.)[13]

5. Appellants' claims are moot.

Appellants brought this action to enjoin "the Defendant County Boards of Elections and Defendant Secretary Boockvar from certifying the results of the 2020 General Election in Pennsylvania on a Commonwealth-wide basis" or, alternatively, to enjoin them "from certification the results of the General Election which include tabulation of absentee and mail-in ballots which Defendants improperly permitted to be cured." 1st Am. Compl. at Prayer for Relief, APP 253; *see also* Proposed 2d Am. Compl. at Prayer for Relief. On November 24, 2020, Secretary Boockvar certified the results of the November 3, 2020 election in Pennsylvania for president and vice-president of the United States. *See* Department of State Certifies Presidential Election Results, available at https://www.media.pa.gov/Pages/State-details.aspx?newsid=435 (last visited Nov. 24, 2020). This material "change in circumstances that prevailed at the beginning of the litigation" has "forestalled any occasion for meaningful relief." *Rendell v.*

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[13] As Chief Justice Saylor aptly recognized in his dissenting opinion in the poll observer case, "short of demonstrated fraud, the notion that presumptively valid ballots cast by the Pennsylvania electorate would be disregarded based on isolated procedural irregularities that have been redressed—thus disenfranchising potentially thousands of voters—is misguided." *In re Canvassing Observation Appeal*, --- A.3d ---, 2020 WL 6737895, at *9 (Pa. Nov. 13, 2020) (Saylor, C.J., dissenting).

Rumsfeld, 484 F.3d 236, 240 (3d Cir. 2007). Accordingly, this action must be dismissed as moot.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's decision denying leave to amend.

November 24, 2020

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I certify pursuant to Local Rule 46.1 that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Daniel T. Brier

Date: November 24, 2020

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VIRUS SCAN CERTIFICATION

I, Daniel T. Brier, hereby certify as follows:

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/s/ Daniel T. Brier
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Date: November 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, a copy of the foregoing Brief of Appellee 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.

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