IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

DONALD J. TRUMP FOR PRESIDENT, INC., *et al.* Plaintiffs, vs. KATHY BOOCKVAR, *et al.* Defendants.	:	Civil Action No. 2:20-cv-966 The Honorable J. Nicholas Ranjan

DEFENDANT'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1)

Introduction

Defendant Adams County Board of Elections ("Defendant"), by and through undersigned counsel, respectfully submits that this dispute does not belong in this Court. Defendant asks this Court to dismiss the above-captioned matter for lack of standing, due to Plaintiff's failure to establish injury in fact or a causal connection to Adams County. Defendant further asserts that due to parallel state litigation pending the Commonwealth Court of Pennsylvania[1], this Court should abstain from exercising subject matter jurisdiction in this matter (1) pursuant to the *Pullman* doctrine, (2) in accordance with its substantial discretion under the Declaratory Judgment Act, and (3) transfer this case to the state courts in accordance with Pennsylvania's enabling statute, 42 Pa.C.S. § 5103.

[1] *Pennsylvania Democratic Party, et al. vs. Kathy Boockvar, et al.,* PA Commonwealth Court, docket no. 407 MD 2020.

1. Plaintiffs have failed to meet their burden of establishing injury in fact or a causal connection to Adams County, necessary for Article III standing.

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for lack of subject matter jurisdiction. *See* Fed.R.Civ.P. 12(b)(1). A Rule 12(b)(1) motion can challenge the sufficiency of the pleadings to establish jurisdiction (facial attack), or a lack of any factual support for subject matter jurisdiction despite the pleading's sufficiency (factual attack). See generally, *Hartig Drug Company Inc v. Senju Pharmaceutical Co. Ltd,* 836 F.3d 261, 268 (3d. Cir. 2016). Plaintiffs have the burden of establishing jurisdiction, which includes standing. *See Kokkonen v. Guardian Life Ins. Co.* 511 U.S. 375, 377 (1994). Plaintiffs must meet the "irreducible constitutional minimum of Article III standing", see *id.* at 269, which requires establishment of three elements: First, they must establish that he has suffered an "injury in fact," meaning a concrete and particularized invasion of a legally protected interest. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Second, they must establish a "causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* Third, they must show a likelihood "that the injury will be redressed by a favorable decision." *Miller v. Nissan Motor Acceptance Corp.,* 362 F.3d 209, 221 n. 16 (3d Cir. 2004). These three elements necessary for standing must be established by Plaintiffs for every claim made. *DaimlerChrysler Corp., v. Cuno,* 547 U.S. 332, 352 (2006) ("[A] plaintiff who raises multiple causes of action 'must demonstrate standing for each claim he seeks to press.'").

A. Injury In Fact

Plaintiffs' Complaint is completely devoid of facts sufficient to establish concrete and particularized injury and to support their claims of widespread voter fraud due to drop boxes, the residency requirements imposed on poll watchers, or the counting of ballots not enclosed in secrecy ballots. See generally, Complaint, Counts I through VII. These claims amount to mere speculation or conjecture, but such conjecture by Plaintiffs is not sufficient to establish injury in fact. *Clapper v. Amnesty Intern. USA,* 568 U.S. 398, 410 (2013). Defendant will address each Count in order below.

Counts I through III of the Complaint alleges that the use of unmonitored or unsecured drop boxes violates the right to vote because it "increase[s] the potential for ballot fraud or tampering…". See Complaint, Count 1, paragraph 155. The apparent factual support for this claim offered by Plaintiffs are reports from the Department of State and Philadelphia that drop boxes were in fact used to collect ballots. See Complaint, paragraph 103, 104, and 105. However, absent additional evidence, it does not logically follow that the mere use of drop boxes by counties thereby increases any risk of fraud. To be sure, the reports cited by Plaintiffs do not in *any* way indicate that the drop boxes used were "unsecured" or "unmonitored" (both terms left undefined by Plaintiffs), nor do those reports provide a factual basis for asserting that the use of particular types of drop boxes actually or likely resulted in any voter fraud. Plaintiffs broadly claim that "Pennsylvania is not immune to voter fraud," and while likely true, the few examples cited in the Complaint range from 5 to 20 years ago, well before Act 77's enactment, and none appear to have involve the measures Plaintiffs seek to enjoin. See Complaint, paragraph 68.

Counts IV and V assert that the statutory residency restriction on poll watchers somehow make the elections less secure. Specifically, Plaintiffs argue that the residency restriction, which

limits poll watchers to their county of residence, prevents the parties and candidates from ensuring "that they have poll watchers at all locations that ballots are cast." Complaint, paragraph 180. However, Plaintiffs provide no factual basis for asserting that (1) in-county residents are insufficient in number to represent the candidates or campaigns as poll watchers, or that (2) the residency restrictions are responsible for any insufficiencies. Instead, Plaintiffs rely solely on statistical party breakdowns in certain counties to suggest or speculate that parties/candidates in which they are the minority may have trouble finding poll watchers. See Complaint, paragraphs 129-131. Moreover, it should be noted that similar arguments made by Plaintiffs regarding the residency requirement of poll watchers have already been recently rejected by the District Court for the Eastern District of Pennsylvania, due to its speculative nature. See *Republican Party of PA v. Cortes,* 218 F.Supp. 3d 396 (E.D. Pa. 2016). As in the 2016 case, the Plaintiffs' claims remain similarly speculative.

Counts VI and VII contend that insufficient notice was given by every defendant to voters about the location of drop boxes and that the locations violated site selection requirements for polling places. Complaint, paragraph 194. Even assuming that Plaintiffs are correct that the 20-day notice requirement for "polling places" applies to drop boxes (which Defendant disputes below), or that site selection requirements encompass drop boxes, they provide no evidence that any county acted contrary to those statutes. Even if some counties did act contrary to those statutes, Plaintiffs failed to show any evidence of harm resulting from such violations, such as the "confusion" or "ballot fraud or tampering" warned of by Plaintiffs. See Complaint, paragraph 195. It should also be noted that the statute itself provides that the notice requirements may be avoided in cases of "emergency" or "unavoidable events," but Plaintiffs did not argue that such exceptions did not apply and failed to even address such exceptions in the Complaint. See 25 P.S. § 2726(a). In addition, Plaintiffs boldly claim, solely on "information and belief,"

that defendants "intend to repeat this practice in the upcoming November 3, 2020 General Election." Complaint, paragraph 196. Frankly, Defendant cannot surmise what information Plaintiff could possibly possess that would substantiate this claim, as most, if not all counties, are at the mercy of the COVID-19 pandemic and are in the midst of preparing for a number of alternative eventualities (including pending legislative and judicial determinations). It is well-established that mere "[a]llegations of *possible* future injury" are not sufficient. *Clapper* at 409.

To Plaintiffs' credit, the most concrete evidence of any potential "harm" from the election practices used in the June Primary is a reference to a June news article from the Philadelphia Inquirer by Jonathan Lai, entitled, "Philly elections officials caught 40 cases of double voting. It's not fraud, but it's a problem." See Complaint, paragraph 111. Unfortunately, the link to this article no longer exists, so the veracity of the claim is unknown. However, even assuming "double voting" in fact occurred, the news article shows that the security measures implemented by "Philly election officials" worked. Moreover, though Plaintiffs warn of widespread fraud, they make no specific claim to harm caused by "double voting" in Counts I-VI. Indeed, the measures complained of by Plaintiffs bear little relationship to the prevention of double voting, as double voting does not implicate or rely on the use of drop boxes, restriction of residency for poll watchers, or counting ballots without secrecy envelopes.

Because Plaintiffs fail to offer even the slightest evidence that the election measures implemented caused "concrete, particularized, and actual or imminent" injury, this case should be dismissed. See *Clapper,* 548 at 409 (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139 (2010)).

B. Causal Connection To Defendant Adams County Board of Elections

In addition to proving injury in fact, Plaintiffs must also prove a causal connection between the alleged injuries and the Adams County Board of Elections, as a federal court may "act only to redress injury that fairly can be traced to the challenged action of the defendant…" *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 41 (1976). It is clear that Plaintiffs have little to no idea of the election practices or policies of Defendant, beyond what the Election Code requires, nor do they identify *any* evidence that Defendant acted in contravention to the Election Code in their lengthy Complaint. Indeed, the only reference to Adams County in the 56-page Complaint is as a named party.

To avoid the legwork of establishing a causal connection required for Article III standing, Plaintiffs appear to be taking a "shotgun approach" to litigation, naming every one of the 67 counties, making broad unsubstantiated claims of illegal election practices based solely on online news articles from the Philadelphia and Allegheny regions (none of which reference Adams County), and hoping discovery will turn up some evidence of fraud to hang their hat on. The vast scope of Plaintiffs' discovery requests (in spite of this Court's July 17th limiting order), which include requests for any and all emails and communications related to county election practices, underscores how little information Plaintiffs actually possess to substantiate their overly broad and serious Complaint levied against each of the 67 counties. See Plaintiffs' Written Discovery Request, attached herein as "Exhibit A." To be sure, Plaintiffs fail to cite *any* Adams County policy or practices regarding drop boxes, poll watchers, ballot counting, or notice, or any particular measure that they believe (without evidence) results in widespread voter fraud.

Therefore, Plaintiffs have failed to prove that Defendant's actions, and not the actions of some third party, are fairly traceable to the unsubstantiated claims of voter fraud, as demonstrated by the paucity of references to *any* particular action or inaction of Defendant.

For the above reasons, it is respectfully requested that this Court dismiss the above-captioned matter against Defendant for failure of Plaintiffs to establish the first two elements necessary for Article III standing.

II. The Court should abstain from exercising subject matter jurisdiction in deference to adequate state laws and remedies under the **Pullman** *doctrine.*

In light of the parallel state litigation, *Pennsylvania Democratic Party, et al. vs. Kathy Boockvar, et al.,* docket no. 407 MD 2020, pending in the Commonwealth Court of Pennsylvania, Defendant respectfully asks this Court to defer to Pennsylvania law and its courts under the doctrine of abstention. Though use of abstention is limited, at least four federal abstention doctrines have emerged to permit the states to resolve matters of state law without undue interference from the federal courts, thereby preserving the principles of federalism and comity. One such doctrine stems from *Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496 (1941), commonly known as the *Pullman* doctrine, and is applicable in this case.

The Third Circuit Court of Appeals has held that abstention under the *Pullman* doctrine applies "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Planned Parenthood of*

Central New Jersey v. Farmer, 220 F.3d 127, 149 (3d Cir. 2000) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814 (1976)). Abstention under *Pullman* is "appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" *Planned Parenthood,* 220 F.3d at 149.

As explained by our Court of Appeals, the purpose of abstaining under these circumstances is twofold: (1) to avoid a premature constitutional adjudication which could ultimately be displaced by a state court adjudication of state law; and (2) to avoid "needless friction with state policies." *Id.* While cautioning that abstention under *Pullman* is an exceptional measure, the Court outlined the three circumstances which must be present before a federal court may abstain:

> First, there must be "uncertain issues of state law underlying the federal constitutional claims." *Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman,* 99 F.3d 101, 106 (3d Cir. 1996), *cert. denied,* 520 U.S. 1155 (1997). Second, the state law issues must be amenable to a state court interpretation which could "obviate the need to adjudicate or substantially narrow the scope of the federal constitutional claim." *Id.* Third, it must be that "an erroneous construction of state law by the federal court would disrupt important state policies." *Id.*

Planned Parenthood, at 149-50. All three of those circumstances are present in the instant case.

First, it is clear that any alleged inconsistency in the application of Act 77 are based on statutory ambiguity, not constitutional infirmity of the statutes themselves, thus presenting "uncertain issues of state law" that may be readily resolved by the parallel litigation filed in the state courts. For example, Plaintiffs allege that "Defendants administration of Pennsylvania's 2020 primary election resulted in violations of the Election Code…" See Complaint, Section VI. Underpinning this claim is an interpretation of the Election Code that it does not permit so-called

"drop boxes" in which to return mail-in ballots. Though the Plaintiffs characterize the statute as "clear and unambiguous," the fact that Plaintiffs also allege great disparity in the interpretation of the statute by the state and the counties belies that characterization. As Plaintiff's recognize, the Election Code requires that sealed envelopes be either mailed or delivered in person to "said county board of election." See Complaint, paragraph 109 (citing 25 P.S. §§ 3146.6(a) and 3150.16). Unfortunately, "said county board of election" is not defined anywhere in the Election Code (though "county board" is unhelpfully defined as the "county board of elections"). See, e.g., 25 P.S. § 2602. The County will argue that "county board of election" means any location designated by, and under the control of, the board, including drop box locations.

There is also a dispute concerning whether the specific 20-day notice provision that applies to polling places contained in the Election Code apply to locations designated by the "county board of elections" for purposes of returning a mail-in ballot. See 25 P.S. § 2726(a). Moreover, even if it did apply, there remain questions as to whether the alleged pandemic constituted an "emergency" or "unavoidable event" for purposes of excusing that same 20-day notice requirement. See id. These questions surrounding the use of drop boxes and their adherence to Election Code mandates are not matters of constitutional inquiry, they are matters of state statutory construction.

As another example of the need for statutory construction, Plaintiffs allege that counties violated the Election Code by counting ballots that were not contained in a secrecy envelope marked "Official Election Ballot." See Complaint, Count 1, paragraph 152. Plaintiffs believe that because the Election Code requires that absentee and mail-in ballots "shall" be enclosed in the secrecy envelope, any ballots which are not so received must be automatically discounted. Id., citing 25 P.S. §§ 3146.6(a), 3150.16.(a), and 3146.8(g)(4)(i)-(iv)). The problem with Plaintiffs' interpretation is that it wholly ignores a section in the Election Code that specifically

addresses when ballots shall be counted and discounted. According to the Code, the only received ballots which may be wholly voided by the board of elections are "[b]allots not marked, or improperly or defectively marked, so that the whole ballot is void…" 25 P.S. § 3063. Contrary to the Plaintiffs' assertion, the County does not find statutory support for its claim that the failure of a voter to envelope a ballot within another envelope should disenfranchise that voter. Admittedly, it may be the case that not all counties read the statute the way Adams County did. However, this only underscores the need for uniform state statutory construction, and that there remain "uncertain issues of state law," the first requirement under the *Pullman* doctrine.

As to the second element under *Pullman,* that state court interpretation could "obviate the need to adjudicate or substantially narrow the scope of the federal constitutional claim," it is clear that construction of these statutory ambiguities would obviate the need for any court to reach the constitutional claims. Though Plaintiffs couch their Complaint in grand constitutional terms, the actual thrust of their arguments and support for their constitutional claims can be distilled to fact-specific matters of statutory construction. It is not the case that the Election Code (and specifically, the changes enacted with Act 77) is so "unambiguous" that some counties wholly understood the new law and purposefully chose to ignore it. It is also not the case that the Department of State issued dissimilar guidance to counties based on a single set of facts. At worst, if Plaintiffs are correct that different rules were applied throughout the state, it is because Act 77 had not yet been construed by our state courts to offer the counties (and their solicitors) a uniform understanding. Because of the novelty of Act 77 and mail-in ballot procedures, the state courts have not yet been provided an opportunity to review the statute or its

constitutionality. With the parallel state litigation pending, the Pennsylvania Commonwealth Court now has that opportunity, and should be afforded that opportunity.

It is recognized that Plaintiffs' constitutional challenge to the residency requirement of poll watchers likely does not have a remedy in statutory construction. Nevertheless, it should be noted that the residency requirement had already been litigated in 2016 in the Eastern District, when the Republican Party raised the same issue as presented here. In *Republican Party of PA v. Cortes,* 218 F.Supp. 3d 396 (E.D. Pa. 2016), mention in Section 1, the plaintiffs sought injunctive relief against the poll watcher geographic restriction as violative of the Equal Protection and Due Process guarantees. Nevertheless, the District Court declined to enjoin the residency restrictions, finding that plaintiffs' theory was based entirely on speculation about voter fraud, rather than evidence, and that the restriction did not implicate the fundamental right to vote, thus requiring only a rational basis for the law. Even if, *in arguendo,* that case were not dispositive here, the state courts can "substantially narrow the scope of federal constitutional claims" by resolving the state law issues for Plaintiffs' other two claims based on statutory interpretation.

Finally, with regard to the third element of the *Pullman* doctrine, Adams County contends that an erroneous ruling by this Court will "disrupt important state policies." Act 77, signed into law in October of last year, marked "the most significant improvement to Pennsylvania's elections in more than 80 years."[2] Act 77 permitted residents to vote by mail up to 50 days before an election without an excuse, extended voter registration times, and authorized funding for counties to modernize and secure their voting process. It was a

[2] Quote by Governor Tom Wolf, https://patch.com/pennsylvania/newtown-pa/7-big-changes-voting-pa-just-signed-law

substantial achievement and compromise between two otherwise contentious branches of state government. With the unexpected rise of the COVID-19 pandemic this spring, the ability of voters to cast ballots from the safety of their homes proved crucial for the safety of residents and for the sanctity of the democratic process.

The breadth of relief sought by Plaintiffs demonstrates the disruptive force an erroneous decision by this Court could cause. Plaintiffs allege widespread fraud as a result of Act 77 without a modicum of evidence[3] (and thus no proof of "actual controversy" for purposes of Article III or Declaratory Judgment Act jurisdiction). Without evidence of fraud or harm, Plaintiffs tellingly do not challenge any particular nomination that resulted from the primaries. More troublingly, Plaintiffs do not ask this Court for statutory construction to remedy any alleged inconsistency in the application of Act 77. Instead, they boldly seek broad injunctive relief designed to impose new voting laws to restrict the means of casting ballots (see Complaint, paragraph A of Plaintiff's requested relief, pg. 54), impose new notice requirements (paragraph B), disenfranchise voters who forget to place their ballot in an envelope within another envelope (paragraphs C and F), eliminate the Commonwealth's statutory residency requirement for poll watchers (paragraph D), limit the locations at which voters can cast ballots (paragraph E), and establish a legal right for poll watchers to be present at the pre-canvass and canvass meetings (paragraph G), despite the fact that representatives from each party and each candidate are already given a statutory right to monitor those meetings (see 25 P.S. § 3146.8(1.1)). Simply put, the Plaintiffs proposed relief asks this Court to legislate from the bench and to rewrite the Election Code on behalf of the General Assembly. As such, an erroneous ruling in favor of the relief sought by the Plaintiffs would greatly disrupt state election policies approved by the General Assembly and the Governor.

[3] Except a newspaper article (link no longer working) claiming that double voting occurred in Philadelphia, but that officials caught it. See Complaint, paragraph 111. If anything, this is proof that the system of checks works.

For the above reasons, and in deference to the pending parallel litigation in the Commonwealth Court of Pennsylvania, Defendant urges this Court to stay or dismiss this case pursuant to the *Pullman* doctrine.

III. The Court should stay or dismiss this case pursuant to its "unique and substantial" discretion under the Declaratory Judgment Act, or transfer it to the state courts pursuant to Pennsylvania's enabling statute.

As the U.S. Supreme Court has acknowledged, "[s]ince its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.,* 515 U.S. 277 (1995). Indeed, on its face, the Act provides that a federal court "*may* declare the rights and other legal relations of any interested party seeking declaration." 28 U.S.C. § 2201(a) (emphasis added). Even if Plaintiffs demonstrate an actual controversy for purposes of Article III and the Declaratory Judgment Act, such controversy does not require this Court to exercise jurisdiction over a declaratory action. *Communications Test Design, Inc. v. Contec LLC,* 367 F.Supp.3d 350, 355 (U.S.E.D. 2019). The Act's "textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of law in which concepts of discretion surface." *Wilton,* 515 U.S. at 286-87. "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yield to considerations of practicality and wise judicial administration." *Id.* at 288.

Here, all of the litigants named in the above-captioned matter are also named in a parallel state case filed in the Commonwealth Court of Pennsylvania, in the same phase of litigation, and covering the exact same legal issues (from a state law perspective). As the Third Circuit Court of Appeals has held, cases are parallel if they involve the same parties and "substantially identical" claims, raising "nearly identical allegations and issues." *Trent v. Dial Med. Of Fla., Inc.* 33 F.3d 217, 223 (3d Cir. 1994). Though the state courts of Pennsylvania do not have a removal procedure to the federal courts, Pennsylvania statutorily allows for federal courts located within its jurisdiction to transfer cases to the state courts through an enabling statute. See 42 Pa.C.S. § 5103. Indeed, instead of outright dismissal, our Court of Appeals has expressed preference to transfer or remand cases involving substantial questions of state law from federal courts to the state courts. See *Weaver v. Marine Bank,* 683 F.2d 744 (3d Cir. 1982). As the *Weaver* court explains of Pennsylvania's enabling statute,

> The cooperative federalism that is so much a part of the certification process similarly inheres in the transfer statute enacted by Pennsylvania. It is designed to prevent the parties from being trapped by jurisdictional technicalities that prevent a resolution of disputes on the merits. Obviously the limited and often uncertain jurisdiction of the federal courts poses a hazard to even an alert litigant. Pennsylvania's willingness to accept jurisdiction over cases improvidently brought in the federal courts represents an enlightened effort which deserves sympathetic consideration by this court. The Supreme Court's enthusiastic reception of the analogous certification procedure without requiring congressional authorization convinces us that we can take a similar stance with respect to the transfer provision here.

Weaver, 683 F.2d at 748. Should the federal case continue without dismissal, stay, or transfer, it will inevitably result in expensive piecemeal, duplicative litigation for all parties. Therefore, this Court is respectfully urged to exercise its considerable discretion under the Act and transfer the case pursuant to Pennsylvania's enabling statute.

WHEREFORE, it is respectfully requested that this Honorable Court dismiss, stay, or transfer this case in light of the lack of Article III standing and the pendency of parallel litigation in the Commonwealth Court of Pennsylvania.

Respectfully submitted,

___/s/ *Molly R. Mudd*____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Adams County Motion To Dismiss is being served upon Plaintiffs via first-class U.S. Mail, and via email to the following counsel for plaintiffs:

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