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 RENEWED MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1) and (b)(6)

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 and failure to state a claim upon which relief may be granted, due to Plaintiff's failure to furnish facts sufficient to demonstrate 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 and Rule 8's procedural demands.

i. Article III Jurisdiction Generally

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.'").

ii. Sufficiency of Pleadings under Rule 8 Generally

Somewhat similar to Article III's constitutional standing requirement is Rule 8's procedural requirement that a complaint be supported by sufficient facts, rather than threadbare conclusory statements. Fed.R.Civ.P. 8; *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Twombly* at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly* at 556. As the Supreme Court explains:

> Two working principles underlie *Twombly.* First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Second, determining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

As both Article III and Rule 8 require sufficiency and specificity in Plaintiffs' pleaded facts, Defendant will address them together below.

A. Injury In Fact; Sufficiency of Facts To Support Amended Complaint

Plaintiffs' Amended 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, Amended 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 Amended Complaint, Count 1, paragraph 203. 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, and that 20 counties (Adams not included by Plaintiffs) followed guidance from the Secretary of State that permitted ballots to be returned to other locations than the election office. See Amended Complaint, paragraphs 126-129. However, absent additional evidence, it does not logically follow that the mere use of drop boxes by counties thereby increases any risk of fraud. Rather, the Plaintiffs' merely make a conclusion (use of drop boxes causes fraud), unsupported by any pleaded facts. 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 under any voting regime, 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 election measures Plaintiffs seek to enjoin. See Amended Complaint, paragraph 69. Because the Plaintiffs fail to provide any facts or evidence to link the use of drop boxes to voter fraud, which serves the basis of their constitutional claims, they are not entitled to an assumption of truth in

their allegations under Rule 8, nor have they established "injury in fact" for purposes of Article III.

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." Amended Complaint, paragraph 228. 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 such insufficiencies. Instead, Plaintiffs rely solely on statistical party breakdowns[2] in certain counties to suggest and speculate that parties/candidates in which they are the minority *may* have trouble finding poll watchers. See Amended Complaint, paragraphs 177 and 178. Moreover, it should be noted that similar arguments made by Plaintiffs regarding the residency requirement of poll watchers were recently rejected by the District Court for the Eastern District of Pennsylvania, due to its purely speculative nature. See *Republican Party of PA v. Cortes,* 218 F.Supp. 3d 396 (E.D. Pa. 2016). As was the case in 2016, the Plaintiffs' claims remain similarly speculative and thus not sufficient under Rule 8 or Article III.

Counts VI and VII contend that insufficient notice was given by every defendant (or at least, the 20 defendants identified in paragraph 126, based on Plaintiffs' "knowledge and belief") to voters about the location of drop boxes and that the locations violated site selection requirements for polling place. Amended Complaint, paragraph 242. 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

[2] The website link for which does not work as of the time of this writing.

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 Amended Complaint, paragraph 243. 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 Amended 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." Amended Complaint, paragraph 244. 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 bears repeating that Plaintiffs' mere "[a]llegations of *possible* future injury," even if the notice concerns are substantiated, are not alone sufficient to establish Article III standing, *Clapper* at 409, and Plaintiffs reliance on vague "information and belief," without particular facts, does not entitle them to assumption of truth to the claims by this Court for Rule 8 purposes.

Counts VIII and IX were added as new claims in the Amended Complaint, but their inclusion is confusing, as Act 12 of 2020, Act of March 27, 2020, P.L. 41, No. 12 (to which Plaintiffs do not cite) makes such concerns moot. Specifically, Plaintiffs claim that some counties did not permit voters to cast regular ballots at polling places if they had applied for mail-in ballots but had not cast them, in violation of Act 77 of 2019 and the Election Code. Amended Complaint, paragraphs 254-257. Plainiffs argue that provisional ballots were only permitted to be cast at polling places for mail-in voters. However, it appears Plaintiffs confuse

Act 77 of 2019 (which requires provisional ballots to be cast if mail-in applicants appear at the polls), with Act 12 of 2020 (which permits regular ballot voting for mail-in applicants who bring their mail-in ballots to the polls and declare their spoliation). To be clear, contrary to the assertions of Plaintiffs, Act 77 *never* permitted voting by regular ballot for mail-in voters in the primary election, even if those voters remitted their mail-in ballots. See Act 77 of 2019, Sections 1306(b)(2) ("An elector who requests an absentee ballot and who is not shown on the district register as having voted the ballots may vote by provisional ballot…") and 1306-D(b)(2) ("An elector who requests a mail-in ballot and who is not shown on the district register as having voted the ballots may vote by provisional ballot…"). Act 12 amended the Election Code on March 27th to provide for the spoliation procedure for uncast mail-in ballots that Plaintiffs cite, but that section only applies to the November election. See Act 12 of 2020, Section 17(2)("the amendment or addition of the following shall apply to elections occurring on or after November 2, 2020") (citing Sections 1306(b) and 1306-D(b)). In other words, Act 12 specifically mandates the remedy that Plaintiffs seek in the November elections, namely, that mail-in ballot applicants may cast regular ballots at the polls if they have not cast a vote via mail-in ballot, thus making such claims moot and non-remedial. It is unclear whether Plaintiffs are unaware of Act 12, but in any case, they certainly cannot argue "injury in fact" for a claim that the General Assembly has already remedied.

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

and it is unclear what the writers mean by "double voting." However, even assuming voters in Philadelphia were able to vote by mail and by regular ballot at the polls, the news article shows that the security measures implemented by "Philly election officials" worked, as such "double voting" was caught by officials. Plaintiffs did not make any claims to specific claim to harm caused by "double voting" in its initial complaint, but they now claim that "the result of the County Election Boards' refusal and/or failure to bar voters who had already voted an absentee and mail-in ballot from voting at their polling places was the existence of double votes being casted and counted." Amended Complaint, paragraph 258. Despite this broad claim, Plaintiffs fail to provide any evidence that "double votes" were ever counted by any county, thus resulting in harm. Again, the news article only alleges that any "double votes" were caught by officials.

Because Plaintiffs fail to offer even the slightest evidence that the election measures implemented caused "concrete, particularized, and actual or imminent" injury for any of their eight claims, 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 some 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 Adams County Board of Elections, 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 the "shotgun approach" to litigation, naming every one of the 67 Pennsylvania 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 or fraud), and hoping discovery will turn up some evidence of fraud to hang their hat on. However, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79 (2009). 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 or make plausible the claims 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.

Apparently recognizing the issue of standing in naming 67 counties, most of which do not reside within the Western District, Plaintiffs have now amended their complaint to add cursory language to each of paragraphs naming the plaintiffs which reads "[a]s a candidate and voter, [name of candidate] has Article III standing to bring this action." See, e.g., Amended Complaint, paragraph 11 (citing *Orloski v. Davis,* 564 F.Supp 526, 530 (M.D.Pa. 1983); *Pierce v. Allegheny,* 324 F.Supp.2d 684, 692-3 (W.D.Pa. 2003)). In an attempt to create some connection to Adams County, the Amended Complaint names John Joyce as a plaintiff, a Blair County resident, who is running for reelection in a congressional district that covers some or all of Blair, Huntingdon,

Bedford, Fulton, Franklin, Adams, Somerset, Westmoreland, Cambria, and Cumberland counties. The mere fact that Representative Joyce has some connection to Adams County does not alone establish any of the prongs of Article III standing, including causation. Nor is it reasonable to assume that Representative Joyce has any idea of Adams County election policy and procedure beyond that prescribed by law, as he is not an Adams County voter. In the two cases cited in support of Article III standing by Plaintiffs, *Orloski* and *Pierce,* the courts merely found that voters may be the appropriate plaintiffs to challenge harm caused by election code violations, but nevertheless required that they establish "injury in fact" and injury "fairly traceable to the challenged action of the defendant." See *Orlosky* at 530; *Pierce* at 692.

Defendant does not dispute the notion that a voter or candidate may be the proper plaintiff to allege harm stemming from election policies, but argues that Plaintiffs have not established injury in fact which is fairly traceable to the policies and practices of Adams County. In *Pierce,* for example, this Court found that Article III standing was met where plaintiff voters identified "three different policies that appear inconsistent with a strict interpretation of the election code and are also inconsistent with the policy in at least one other county" from the Allegheny County Board of Elections. *Pierce,* 324 F.Supp.2d at 692. Unlike in *Pierce,* however, Plaintiffs in this matter fail to identify a single policy or practice of the Adams County Board of Elections that is alleged to be inconsistent with the Election Code. As a result, 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.

For the above reasons, it is respectfully requested that this Court dismiss the above-captioned matter against Defendant Adams County Board of Elections for failure of Plaintiffs to establish

the first two elements necessary for Article III standing and failure to establish sufficiency of the pleadings in either of the complaints filed to date.

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 (and Act 12) 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 Amended 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 Amended Complaint, paragraph 133 (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 Amended Complaint, Count 1, paragraph 200. 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 and Act 12) 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 and Act 12 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 Act 12 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."[3] 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 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.

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

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[4] (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 Amended Complaint, paragraph A of Plaintiff's requested relief, pg. 70), 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.

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.

[4] 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.

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 this case against Defendant in light of the failure of Plaintiffs to establish Article III standing and failure to develop sufficient pleadings, or to dismiss, stay, or transfer this case as the result of pendent 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 Board of Elections' Renewed 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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