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

DONALD J. TRUMP FOR PRESIDENT, INC., et al., Plaintiffs, v. KATHY BOOCKVAR, et al., Defendants.	NO. 2:20-cv-00966-NR

REPLY IN FURTHER SUPPORT OF
MOTION OF THE BUCKS, CHESTER, MONTGOMERY, AND PHILADELPHIA COUNTY BOARDS OF ELECTIONS TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, TO ABSTAIN PENDING STATE-COURT RESOLUTION OF STATE-LAW QUESTIONS

Plaintiffs assert that alleged violations of Pennsylvania election laws create a federal constitutional claim for "vote dilution." (ECF 320 ("Opp.") 24-25.) But only the Pennsylvania judiciary can definitively determine whether Plaintiffs' interpretations of the Commonwealth's Election Code are correct—and the Pennsylvania Commonwealth Court is currently examining that very question. This case does not belong in federal court, and there is no reason for this Court to entertain Plaintiffs' invitation to superintend Pennsylvania's administration of elections. This Reply addresses several specific doctrines reinforcing this conclusion.

I. PLAINTIFFS' CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

As previously shown, the county Boards of Elections—who, as Plaintiffs concede, are vested by Pennsylvania law with jurisdiction to conduct statewide and federal elections on behalf of the Commonwealth (Opp. 3)—function as "arms of the state" entitled to sovereign immunity. (ECF 284, at 8-9.) Tellingly, Plaintiffs fail to cite *any* authority addressing the status of county boards of election. Instead, Plaintiffs urge the Court to disregard the directly-on-point decision in *Trinsey v. Montgomery Cnty. Bd. of Elections*, No. 87-6975, 1988 WL 82877 (E.D. Pa. Aug. 4, 1988), incorrectly characterizing *Trinsey*'s no-jurisdiction holding as "dicta," and falsely assert that it was "[t]he sole case cited by Defendants." (Opp. at 42-43.) In fact, Defendants cited multiple additional opinions, each of which found, based on sound, articulated reasoning, that county or city boards of election are immune from federal-court challenges to their election-administration activities. (*See* ECF 284, at 8-9.) Indeed, so far as Defendants' research has revealed, *every court that has considered the status of county boards of elections has reached the same conclusion.* Plaintiffs fail to identify any contrary authority.

Plaintiffs do not even attempt to refute the reasoning of this uniform case law. Instead, they respond with a non-sequitur: they assert that counties and municipalities do not enjoy sovereign immunity. That is, of course, true—and was established well before any of the cases

Defendants cite. *See, e.g.*, *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979). But it is also irrelevant. The venerable Judge Easterbrook obviously understood, when he explained why the Chicago *Board of Elections* was entitled to sovereign immunity, that the *City of Chicago itself* was not entitled to immunity. *See Citizens for John W. Moore Party v. Bd. of Election Com'rs*, 781 F.2d 581, 584 (7th Cir. 1986) (Easterbrook, J., dissenting from decision to certify question). As Judge Easterbrook observed, however, the Chicago Board "is constituted under state rather than municipal law," "enforces state statutes," and "administer[s] state law under guidance from the State Board." *Id.*; *accord, e.g.*, *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 801 (S.D. Ohio 2012) (describing Ohio county board of election). As already shown, the same is true of the defendant Boards of Elections here: they are constituted under state rather than county law, enforce the Pennsylvania Election Code, and administer state law and conduct statewide and federal elections under guidance from the Department of State. In short, they function as arms of the state.

II. THE *PULLMAN* DOCTRINE DICTATES ABSTENTION

Plaintiffs do not dispute—nor could they—that the third prerequisite of *Pullman* abstention is met: "A federal court's erroneous construction of [the Election Code] would be disruptive of important state policies." (ECF 284, at 11-12.) Indeed, if this case proceeds, Defendants confront the prospect of finalizing election-administration procedures, during a pandemic, in the face of conflicting federal- and state-court interpretations of the Election Code.

The first prerequisite is also satisfied; Plaintiffs' interpretations of the Election Code are, to say the least, eminently contestable. The Election Code does *not* state, as it easily could have, that an absentee ballot may be delivered only to "the office" of the county board; it prescribes only that the ballot be delivered to the voter's "county board of election." 25 Pa. Stat. §§ 3146.6(a), 3150.16(a); *see Sadler v. W.C.A.B.*, 210 A.3d 372, 383 (Pa. Commw. Ct. 2019)

(courts are "not permitted, under the guise of interpretation, to add words to a statute that the General Assembly omitted"). Plaintiffs' contrary argument rests entirely on a requirement, which appears *two sentences prior* to the sentence addressing in-person delivery, that ballot-return envelopes have the "address of the elector's county board of election" printed on them—without which, of course, return by mail would be impossible. (*See* Opp. 57.) But the statute nowhere restricts in-person delivery to that address. Moreover, Plaintiffs' argument assumes, without basis, that the "address" printed on the envelopes *must* be the physical "office" of the Board, as opposed to a P.O. Box or other address. There is no textual warrant, nor sound policy reason, for interpolating such a restriction into the statute. Nor is there any logical reason to allow voters to deposit their ballots in any mailbox controlled by the postal service, while prohibiting them from depositing them in dropboxes directly controlled by the Boards.

Similarly, it is far from clear (at a minimum) that the Election Code requires Boards to discard ballots submitted without interior secrecy envelopes, as opposed to—in accordance with the Secretary's guidance—inserting them in such envelopes pending tabulation. (ECF 284, at 5.) Plaintiffs argue that this question is controlled by *In re Canvass of Absentee Ballots*, 843 A.2d 1223 (Pa. 2004), which held that 25 Pa. Stat. § 3146.6(a)'s "in person" delivery requirement, intended as a "safeguard against fraud," is mandatory. 843 A.2d at 1232-33. But the Pennsylvania Supreme Court has held that another requirement of what is now § 3146.6(a)—that ballots must be marked in "blue, black or blue-black ink"—does *not* mandate rejection of non-compliant ballots. *In re Appeal of Weiskerger*, 290 A.2d 108 (Pa. 1972); *see also In re Vodvarka*, 140 A.3d 639, 641 (Pa. 2016) (citing *Weiskerger*). Like that requirement, the secrecy-envelope requirement has the purpose of protecting the confidentiality of the vote rather than preventing fraud. *See Weiskerger*, 290 A.2d at 109. It is well settled Pennsylvania law that, while Election

Code imperatives designed to prevent fraud will be construed strictly, other requirements are to be "construed liberally in favor of the right to vote." *Rinaldi v. Ferrett*, 941 A.2d 73, 80 (Pa. Commw. Ct. 2007) (citing *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)).

The second prerequisite—that a state court's state-law interpretation might obviate the need to adjudicate federal claims—is also met. Plaintiffs appear to misunderstand this prong of the test. (*See* Opp. 58-59.) Here, state-court resolution of the state-law issues will *necessarily* avoid the need to resolve Plaintiffs' derivative constitutional claims of "vote dilution." If the court agrees with Plaintiffs' interpretation, enforcement of the alleged statutory requirements will obviate the need to reach the constitutional claims. And if the state court holds that the challenged "practices" do *not* violate state law, then the predicate for any "vote dilution" claim (or, for that matter, Elections Clause claim) necessarily vanishes. Indeed, it is no accident that both of the cases on which Plaintiffs primarily rely (misguidedly) for their "vote dilution" theory held that abstention in favor of state-court adjudication was warranted. *See Roe v. Alabama*, 43 F.3d 574, 582-83 (11th Cir. 1995); *Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F. Supp. 2d 684, 703-04 (W.D. Pa. 2003). Finally, Plaintiffs do not dispute that, to the extent their equal protection claims are viable, the *state* judiciary should decide which of the competing Election Code interpretations the Boards should follow. (*See* ECF 284, at 11.)

Plaintiffs have only themselves to blame for not yet being parties to a state-court suit, as they "inexplicably chose not" to file their Election Code claims in Commonwealth Court. *Fuente v. Cortes*, 207 F. Supp. 3d 441, 449 (M.D. Pa. 2016). Plaintiffs offer no reason to conclude that the state judiciary will not promptly resolve the Election Code questions. Indeed, since these questions present pure issues of law, they may well be resolved at the preliminary-objection stage of the *Pennsylvania Democratic Party* case, or via the preliminary injunction motion

pending in the *NAACP* case (which predates this case), which seeks, *inter alia*, additional ballot-delivery "dropboxes." (*See* Exhibit 1.) And Plaintiffs' argument completely ignores *Fuente*, which held that abstention was warranted where there was *less* time before the election and no state-court suit had been filed. *See id.* at 448, 451-52. The Court should abstain under *Pullman*.[1]

III. *BRILLHART-WILTON* ABSTENTION IS WARRANTED

Plaintiffs also fail to show the inapplicability of the *Brillhart-Wilton* doctrine, which dictates that declarations of state law should generally be left to state courts *even where the state-law questions appear straightforward*. (*See* ECF 284, at 14-15.) First, Plaintiffs contend, astonishingly, that their claims are not based on the Declaratory Judgment Act. (Opp. 67.) But the Amended Complaint expressly asks the Court for a "declaration" that various alleged practices "violate[] the Pennsylvania Election Code." (ECF 234, at 71-72.) And Plaintiffs successfully moved for "a speedy declaratory judgment hearing" (ECF 6, at 1) under Rule 57, which authorizes "a speedy hearing *of a declaratory judgment action*" (emphasis added).

Second, Plaintiffs assert that the *Brillhart-Wilton* doctrine is categorically inapplicable where a case is based on federal-question rather than diversity jurisdiction. But that is not the law. Where, as here, the federal question is insubstantial (because it is derivative and superfluous given the state-law issues), *Brillhart-Wilton* abstention is warranted. *See Main Line Health, Inc. v. Reed*, No. 98-4585, 1998 WL 961382, at *2 (E.D. Pa. Dec. 15, 1998); *VXI Glob. Sols., LLC v. Onni Times Square, LP*, No. 16-8562, 2017 WL 3579877, at *4-5 (C.D. Cal. June 16, 2017).

[1] Plaintiffs' arguments against *Burford* abstention (Opp. 61-62) are likewise unavailing. As shown above, timely and adequate review of the Election Code issues is available in the state courts. Moreover, Plaintiffs cite no authority for the proposition that *Burford* abstention cannot apply to a scheme of statutory as opposed to administrative regulation. Finally, Plaintiffs' assertion that the Election Code is not a complex regulatory scheme is directly contrary to the case law. *See, e.g., Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 402 (E.D. Pa. 2016) (Election Code is a "complex" and "comprehensive scheme" of regulation).

Respectfully submitted,

Dated: August 7, 2020

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: */s/ Mark A. Aronchick*

Mark A. Aronchick
Michele D. Hangley
John B. Hill*
One Logan Square, 27th Floor
Philadelphia, PA 19103
Telephone: (215) 496-7050
Email: maronchick@hangley.com

Counsel for Bucks, Chester, Montgomery, and Philadelphia County Boards of Elections

* *Pro hac vice motion to be filed*