

**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.

Civil Action

No.: 2:20-CV-966

Judge J. Nicholas Ranjan

**REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS  
PLAINTIFFS' AMENDED COMPLAINT BY INTERVENORS NAACP  
PENNSYLVANIA STATE CONFERENCE, COMMON CAUSE PENNSYLVANIA,  
LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, PATRICIA M. DEMARCO,  
DANIELLE GRAHAM ROBINSON, AND KATHLEEN WISE**

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Pursuant to Rule 12(b)(1), Rule 12(b)(6), and Rule 9(b) of the Federal Rules of Civil Procedure, Intervenor NAACP Pennsylvania State Conference, Common Cause Pennsylvania, League of Women Voters of Pennsylvania, and Pennsylvania voters Patricia M. DeMarco, Danielle Graham Robinson, and Kathleen Wise (“Intervenors”) respectfully submit this reply memorandum in further support of their Motion to Dismiss the Plaintiffs’ Amended Complaint.

## **INTRODUCTION**

Plaintiffs failed to support their baseless allegations of widespread voter fraud with particularity and claims regarding the recently amended Pennsylvania Election Code belong in state court. Dkt. 299 at §§ II(A)–(C) (“Mot.”). Nothing in Plaintiffs’ opposition (Dkt. 320 (“Opp.”)) undermines those conclusions, and the Court should dismiss Plaintiffs’ claims.

### **I. ARGUMENT**

#### **A. Plaintiffs Fail to Plead Fraud with Sufficient Particularity**

Rule 9(b) of the Federal Rules of Civil Procedure requires that allegations of fraud be pleaded with particularity. But Plaintiffs’ Amended Complaint contains only bald allegations concerning “fraudulent votes” (Dkt. 232 ¶ 24) (“Am. Compl.”), “forged ballots” (*id.* at ¶ 25), “practices that promote fraud” (*id.* at ¶ 26), “the casting of illegal ballots” (*id.*), “the casting of illegal or unreliable ballots” (*id.* at ¶ 64) and “dilution of vote by fraud or tampering” (*id.* at Count VII). The who, when, where, and how of the alleged fraud is left to the imagination and is nowhere specified in the Amended Complaint. Mot. at 14–16; *see also* Am. Compl. ¶¶ 26, 202, 212, 225, 245, 246, 260, 265 (Defendants’ interpretation of the “Election Code allows illegal absent and mail-in voting, ballot harvesting, and *other fraud* to occur and/or go undetected, and will result in dilution of validly cast ballots.”) (emphasis added). In actuality, fraudulent mail-in and absentee voting is extraordinarily rare, which puts in context the reason that Plaintiffs’ speculation about fraud is missing the required particularity. Mot. at 14–16.

The Omnibus Opposition to Intervenor’s and Defendants’ Motions to Dismiss does not dispute that allegations of voter fraud are subject to Rule 9(b). Rather, Plaintiffs maintain that “voter fraud is not an element of Plaintiffs’ constitutional claims.”<sup>1</sup> Opp. at 47–48. Counts IV, V, VI, and VII are based on “dilution of vote *by fraud or tampering*.” Am. Compl. at 62, 64, 65, 67. The complete lack of the who, what, where, and when allegations required to plead a fraud claim support dismissal of those counts in their entirety. See *Landes v. Tartaglione*, 2004 WL 2397292, at \*2–3 (E.D. Pa. Oct. 26, 2004), *aff’d*, 153 F. App’x 131 (3d Cir. 2005) (dismissing claims based on “generalized, theoretical concern” about “fraud and other problems”). Separately, because Plaintiffs concede that they did not intend to allege fraud, *per se*, all allegations of fraud must be stripped from any remaining claims and dismissed because all of them are insufficiently pleaded under Rule 9(b). *In re Shop-Vac Mktg. & Sales Prac. Litig.*, 964 F. Supp. 2d 355, 360 (M.D. Pa. 2013); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (“[I]f particular averments of fraud are insufficiently pled under Rule 9(b), a district court should ‘disregard’ those averments, or ‘strip’ them from the claim.”)).

## **B. Colorado River Abstention is Appropriate**

*Colorado River* abstention is appropriate for an action challenging the application of a newly amended state election code.<sup>2</sup> We dispense with two spurious claims about the applicability of the doctrine. First, Plaintiffs’ maintain that the doctrine is limited to *in rem* jurisdiction over property. (Opp. at 64.) The doctrine is not so limited, and has been applied

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<sup>1</sup> Plaintiffs assert that their claims survive under the Equal Protection clause. Opp. at 47–48. Intervenor’s join with the arguments set forth in the reply by Citizens for Pennsylvania’s Future and Sierra Club addressing that claim.

<sup>2</sup> In their opening brief, Intervenor’s also asserted that the Court should abstain under *Pullman*. Mot. at 2–11. To avoid duplicative briefing, Intervenor’s join the replies by Bucks County et al. (Dkt. 344 at § II); Secretary Boockvar (Dkt. 336 at § III); and the Democratic Intervenor’s (Dkt. 340 at § II(A)).

more broadly, including to election law disputes. *See, e.g., Mayer v. Hasbro, Inc.*, 1998 WL 964251 at \*2 (E.D. Pa. Oct. 15, 1998) (products liability); *see also Kozel v. State Bd. of Elections*, 1991 WL 11528, at \*3 (7th Cir. Feb. 4, 1991) (Illinois election law).

Second, Plaintiffs contend that the doctrine is not relevant because they are not parties to the State Court Action. The Third Circuit has never required “complete identity of the parties for abstention.” *IFC Interconsult*, 483 F.3d at 306; *cf. Nat’l Collegiate Athletic Ass’n v. Corbett*, 25 F. Supp. 3d 557, 571 (M.D. Pa. 2014) (finding abstention inappropriate where defendants were not identical). Instead, a case should be treated as “parallel” where, as here, the defendants are the same (all 67 counties and Secretary Boockvar are defendants in both proceedings) and Plaintiffs in this case (Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, and the Republican National Committee) have sought intervention in the state court proceeding. *Cf. Trent v. Dial Med. of Fla., Inc.*, 33 F.3d 217, 219 (3d Cir. 1994) (finding abstention appropriate where party intervened). Plaintiffs’ motion is *sub judice* and the Commonwealth Court has specifically afforded Plaintiffs status as *amici* who may file objections. *See* Opp. Ex. 1. Likewise, that the individual plaintiffs are not part of the State Court Action does not mean that the actions are not parallel. To the contrary, such a conclusion would mean that “the *Colorado River* doctrine could be entirely avoided by the simple expedient of naming additional parties,” or the removal of others. *Lumen Const., Inc. v. Brant Const. Co.*, 780 F.2d 691, 695 (7th Cir. 1985).

The balance of the *Colorado River* abstention factors favor dismissal here. The two actions need not, as Plaintiffs maintain, “completely overlap” (Opp. at 63–64); the claims need only be “substantially identical.” *IFC Interconsult*, 438 F.3d at 306. Here, both the state and federal cases ask for the same declaratory and injunctive relief regarding the proper statutory

interpretation of three main issues: (1) the authority to establish drop-boxes, *compare* Am. Compl. at Counts I, II, VI & VII, *with* Dkt. 85-2 at Count I; (2) the handling of ballots lacking secrecy envelopes, *compare* Am. Compl. at Counts I–III, *with* Dkt. 85-2 at Count II & IV; and (3) Pennsylvania’s poll watcher residency requirement, *compare* Am. Compl. at Counts IV & V, *with* Dkt. 85-2 at Count V. Plaintiffs’ addition of the absentee ballot spoliation issue, Am. Compl. at Counts VIII & IX, does not change the outcome as exact overlap is not required, and the spoliation provision was not in effect in the June primary, a point Plaintiffs concede. Opp. at 12 n.2.

Three of the six balancing factors weigh in favor of abstention, and one is neutral. First, piecemeal litigation—the most important factor—may result if the Court correctly opts to abstain from reviewing the uncertain state law questions under *Pullman* but retains jurisdiction over the federal claims. Dkt 299. at 3–7; *see Gibson v. Berryhill*, 411 U.S. 564, 577 & n.15 (1973). With the state and federal proceedings both on track for resolution prior to the November General Election, the potential for conflicting declarations—and thus mass confusion—as to the administration of Pennsylvania election law should be avoided. *See Lumbermens Mut. Cas. Co. v. Conn. Bank & Tr. Co., N.A.*, 806 F.2d 411, 414 (2d Cir. 1986), *abrogated on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995) (“[T]he avoidance of piecemeal litigation should be given great weight in the context of declaratory judgment actions because such litigation would complicate and fragment the trial of cases and cause friction between state and federal courts.”). Second, the order in which jurisdiction is obtained “is not a strict first-past-the-post test.” *Golden Gate Nat’l Senior Care, LLC v. Minich ex rel. Estate of Shaffer*, 629 F. App’x 348, 351 (3d Cir. 2015). And no substantial proceedings have taken place in either case. Finally, Plaintiffs’ claims involve interpretation of novel state election laws—a task best left to the state



courts. *See OpenPittsburgh.org v. Wolosik*, 2016 WL 7985286, at \*5 (W.D. Pa. Aug. 9, 2016) (“Pennsylvania Election Code provisions at issue are a complex and intricate statutory scheme over which state courts likely possess special expertise and proficiency.”). Finally, because the state court is capable of protecting all parties’ interests—the sixth factor is neutral. *See Ryan v. Johnson*, 115 F.3d 193, 200 (3d Cir. 1997) (“[T]his factor is normally relevant only when the state forum is *inadequate*.”). The six-factor balancing test thus weighs in favor of abstention.

### C. The Intervenor Satisfied the Meet and Confer Requirements

Plaintiffs suggest that some Defendants and Intervenor failed to meet and confer. Intervenor’s certification of compliance with this obligation is attached at Appendix A.

### CONCLUSION

For the reasons stated above, the Intervenor respectfully request that this Court enter an order granting the Intervenor’s Motion to Dismiss Plaintiffs’ Amended Complaint.

Dated: August 7, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, the foregoing Reply Memorandum in Further Support of Motion to Dismiss Plaintiffs' Amended Complaint were filed electronically and served on all counsel of record via the ECF system of the U.S. District Court for the Western District of Pennsylvania.

Dated: August 7, 2020

/s/ Lori A. Martin

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