No. 20-3371

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Donald J. Trump for President, Inc., et al.,
Plaintiffs-Appellants,
v.
Secretary, Commonwealth of Pennsylvania et al.,
Defendants-Appellees;

DNC Services Corporation/Democratic National Committee,
Intervenor-Defendant-Appellee; and

NAACP-Pennsylvania State Conference, et al.,
Intervenors-Defendants-Appellees.

On Appeal from the U.S. District Court for the Middle District of Pennsylvania

BRIEF OF INTERVENOR-DEFENDANTS-APPELLEES NAACP-PENNSYLVANIA STATE CONFERENCE, BLACK POLITICAL EMPOWERMENT PROJECT, COMMON CAUSE PENNSYLVANIA, LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, JOSEPH AYENI, LUCIA GAJDA, STEPHANIE HIGGINS, MERIL LARA, RICARDO MORALES, NATALIE PRICE, TIM STEVENS, AND TAYLOR STOVER

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CORPORATE DISCLOSURE STATEMENT

NAACP-Pennsylvania State Conference is an affiliate entity of the National Association for the Advancement of Colored People, which has no parent entity. Each of Black Political Empowerment Project, Common Cause Pennsylvania, and League of Women Voters of Pennsylvania has no parent entity. No publicly traded company owns stock in any of these entities. Joseph Ayeni, Lucia Gajda, Stephanie Higgins, Meril Lara, Ricardo Morales, Natalie Price, Tim Stevens, and Taylor Stover are individual voters to whom the corporate disclosure rules do not apply.

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INTRODUCTION

More than 6.8 million Pennsylvanians cast votes in this year's presidential election, exercising their sacred right to choose those who would govern them. As of 11:00 AM today, the Secretary of State has certified the results of the November 3 election and as required by federal law, Governor Tom Wolf signed the Certificate of Ascertainment for the slate of electors for Joseph R. Biden as president and Kamala D. Harris as vice president of the United States. https://www.media.pa.gov/Pages/State-details.aspx?newsid=435. But Appellants, claiming technical defects in how Pennsylvania's "urban counties" administered the election, Dkt. 89, at 4, ask the federal courts through this lawsuit to enjoin—presumably now to reverse—certification of Pennsylvania's election results, and either "declare Trump the winner" or direct the Pennsylvania General Assembly to appoint Pennsylvania's electors. ECF No. 43-1, at 12. In short, Appellants want to disenfranchise every voter in Pennsylvania.

As the District Court observed, "[o]ne might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption." App. 62. One might equally expect that a plaintiff seeking to overturn a presidential election, in the span of less than a month, would proceed with exceptional diligence and care. Appellants have done the opposite. Appellants ask this Court to order the District Court to grant them

a third opportunity to plead some basis for disenfranchising Pennsylvania. It was obviously not an abuse of discretion for the District Court to deny Appellants' last-minute motion for leave to amend.

In making a cursory argument that "there was no prejudice to Defendants," Appellants' Br., ECF 42-1, at 28, Appellants do not even mention the people who are most prejudiced by their effort to preclude the Commonwealth from certifying its election results: the voters. Those voters threatened with disenfranchisement include the eight Defendants-Appellees admitted as intervenors by the District Court, and the approximately 50,000 other voters represented by the four Intervenor organizations. Appellants' appeal is just the latest step in a litigation strategy that appears designed not to secure a ruling on the merits of their ever-evolving claims and requests for relief, but rather to *delay* a final ruling until the December 8 safe harbor deadline, thereby enabling the "Pennsylvania General Assembly to choose Pennsylvania's electors." App. 482, ¶ 327 (SAC). It is time for this attack on the franchise to end.

This case was too late the day it was filed. Had Appellants acted diligently, and if there were any merit to their complaints about election administration, they could and should have been readily addressed *before* the election. For example, Appellants object that only some counties made efforts to notify voters of their right to cure defective ballots. But as the District Court observed, even if such county-

by-county variation in election administration were deemed unconstitutional, the normal remedy would be to "level up" and require all counties to make similar efforts. Dkt. 202, at 31. That remedy could have been obtained well before Election Day, without calling into question a single vote. Similarly, Appellants complain that observers in the canvassing rooms were not closer to election workers. Here too, if Appellants had timely sued and their objections had merit, they could have obtained relief. In fact, Appellants *did* object to restrictions on observers in Philadelphia, and quickly reached agreement with the county on closer access, an agreement that held through the duration of the canvass. *See In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *9 (Pa. Nov. 17, 2020) (Saylor, C.J. dissenting). Rather than try to solve these alleged problems when they arose, Appellants awaited the result of the election, raising claims only after their candidate lost.

Then, after finally filing this action, Appellants repeatedly sought to revise their claims and allegations, in an effort to forestall a ruling on the merits before the District Court. For example, just fifteen minutes before their response to a motion to dismiss was due, Appellants *withdrew* their claims that challenged limits on observer access and insisted that motions to dismiss those claims were moot—only to belatedly shift course and attempt to revive those claims. Through two different complaints and two separate motions for a preliminary injunction, Appellants offered a series of ever-changing legal theories and allegations, and then cited the

evolution in their legal theories as an excuse to delay adjudication of defendants' motions to dismiss. When that failed, and they were facing a complete dismissal of their case, Appellants asked to amend their complaint once again—seeking to start this case from scratch 15 days after Election Day, five days before the counties' deadline for certifying election results under Pennsylvania law, and with less than three weeks left before the federal safe-harbor deadline.

Throughout these procedural machinations, the one constant has been Appellants' insistence that as long as they have pursued litigation over some allegation of voting irregularities or electoral fraud—no matter how baseless and unsubstantiated, or how recently it was concocted—the courts must enjoin Pennsylvania from appointing Presidential electors based on the tabulated vote count. It appears that protracted litigation is itself the goal—disenfranchising the entire Commonwealth of Pennsylvania not because Appellants have proved *or even alleged* any voter fraud, but merely on the grounds that they are continuing to litigate the results. Appellants refer to normal principles of liberal leave to amend as if this were a normal case being litigated on a normal timetable. This is not a normal case. Appellants are asking for an injunction to *enjoin certification of Pennsylvania's election results*. Appellants' Br. 23, 31. The proposed Second Amended Complaint cannot remotely support that relief, especially since it contains the same fundamental

defects as the prior two complaints. The District Court properly exercised its discretion to end Appellants' attempt to set aside the will of Pennsylvania's voters.

JURISDICTIONAL STATEMENT

Appellants asserted claims under the U.S. Constitution, and thus raised federal questions under 28 U.S.C. § 1331. However, for the reasons found by the District Court and explained by other Appellees, Appellants lack standing and the District Court therefore lacked subject-matter jurisdiction. The Voter Intervenors agree that this Court has appellate jurisdiction from the District Court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Whether the District Court abused its discretion in declining to allow Appellants to amend their complaint a second time, when Appellants seek to disenfranchise millions of Pennsylvania voters, inexcusably delayed commencing this lawsuit until nearly a week after the election, made a tactical decision to abandon they claims they now wish to revive, have not alleged that a single fraudulent vote was cast or counted, and seek to start this litigation from scratch just two weeks before the federal safe-harbor deadline of December 8.

STATEMENT OF THE CASE

A. The Voter Intervenors

This case is an effort to either prevent certification of Pennsylvania's election results or delegitimize the results. These efforts are not just dangerous to the integrity of Pennsylvania's elections—they threaten to disenfranchise millions of Pennsylvania voters, including the Voter Intervenors and their members. The Voter Intervenors are eight Pennsylvanians who voted by mail-in, absentee, or provisional ballot in the 2020 General Election[1] and four nonpartisan organizations that are dedicated to eliminating barriers to voting and increasing civic engagement among their members and in traditionally disenfranchised communities.[2] The individual Voter Intervenors, many of the organizational Voter Intervenors' nearly 50,000 members, and millions of other Pennsylvania voters, voted in record numbers in the 2020 General Election. Appellants overtly request relief that would disenfranchise these voters.

Lucia Gajda, Stephanie Higgins, and Tim Stevens cast their votes by mail-in or absentee ballot. Their votes were received and recorded without issue. Ms.

[1] Joseph Ayeni, Lucia Gajda, Stephanie Higgins, Meril Lara, Ricardo Morales, Natalie Price, Tim Stevens, and Taylor Stover (collectively, the "individual Voter Intervenors").

[2] The NAACP-Pennsylvania State Conference, Black Political Empowerment Project ("B-PEP"), Common Cause Pennsylvania, and League of Women Voters of Pennsylvania (the "League") (collectively, the "organizational Voter Intervenors").

Gajda, a Northampton County resident with an autoimmune disorder, decided to vote by absentee ballot due to her heightened susceptibility to COVID-19. Appellees' Supp. App. 27, ¶¶ 3–6. Ms. Higgins is in her third trimester of a high-risk pregnancy, so she, too, chose to return her absentee ballot in Philadelphia County via an official dropbox to avoid the risk of COVID-19 exposure. *Id.* at 25, ¶¶ 6–7. Mr. Stevens, a lifelong Allegheny County resident and long-time civil rights leader in Pittsburgh, voted by mail because of his age and concerns about the disproportionate impact of COVID-19 on Black people. *Id.* at 11, ¶ 2. Ms. Gaida, Ms. Higgins, and Mr. Stevens complied with every requirement and cast valid votes.

Joseph Ayeni, Meril Lara, Ricardo Morales, Natalie Price, and Taylor Stover submitted mail-in ballots before Election Day that were rejected due to minor technical errors, actual or perceived, made by individuals new to mail-in voting. Mr. Ayeni is a 77-year-old Philadelphian and registered voter. *Id.* at 33, ¶¶ 3–5. No secrecy envelope was included with the mail-in ballot he received, so he returned his ballot in mid-October without the required envelope. *Id.* ¶¶ 6–9. The day before Election Day, election officials called Mr. Ayeni and informed him that his ballot was rejected. *Id.* ¶ 8. Mr. Ayeni went to the elections office, where officials told him to vote in person on Election Day. *Id.* ¶¶ 9–10. He did so, casting a provisional ballot, as is permitted under Pennsylvania's Election Code. *Id.* ¶ 10.

Ms. Price is a 73-year-old resident of Elkins Park in Montgomery County. *Id.* at 30, ¶¶ 3–4. She votes in every election. *Id.* ¶ 3. She voted by mail-in ballot this year to avoid unnecessary exposure to crowds on Election Day. *Id.* ¶ 6. A day or two before the election, Ms. Price was notified that her ballot had been rejected. *Id.* ¶ 8. After traveling to Norristown and visiting two different sites in the pouring rain, Ms. Price learned that her ballot was rejected because she did not write her name and address on the ballot declaration, which seemed unnecessary to her because it was pre-printed on the envelope. *Id.* ¶¶ 8–11, 15. Ms. Price added this duplicative information to her ballot. *Id.* ¶¶ 13–15.

Ricardo Morales, Meril Lara, and Taylor Stover have similar stories. *Id.* at 29, ¶¶ 8–9; *id.* at 35, ¶¶ 8–9; *id.* at 38, ¶¶ 8–9. All were committed to voting, were told they had made mistakes that invalidated their ballots, and diligently obtained replacement ballots or voted provisionally to have their votes counted and their voices heard. *Id.*

The NAACP Pennsylvania State Conference, B-PEP, Common Cause Pennsylvania, and the League represent nearly 50,000 members in Pennsylvania, many of whom voted by mail and did everything that was asked of them to cast a valid ballot. The organizational Intervenors expend substantial resources on voter education and turnout efforts, and did so again in the run-up to the November general

election. Dkt. 31, at 4-7. It is their overarching mission to ensure that every eligible Pennsylvanian has an opportunity to cast a ballot and have it count.

B. Factual Background

1. Notice and Cure

Pennsylvania election officials correctly anticipated that the 2020 general election would see a surge in mail-in voting, the result not only of the COVID-19 pandemic, but also Pennsylvania's Act 77, a bill enacted in 2019 with bipartisan support, that for the first time authorized no-excuse mail-in voting. *See generally* Act of Oct. 31, 2019, P.L. 552, No. 77. (Pennsylvania previously allowed only "absentee" voting, which required the voter to justify his or her inability to cast a vote in-person on election day.) Based on experience from the June 2, 2020, primary, and with so many voters planning to vote by mail for the first time in the general election, Pennsylvania election officials were concerned that some voters would make honest mistakes in casting their ballots, such as omitting the secrecy envelope the Supreme Court of Pennsylvania had just recently decided was required.

Before Election Day, it was prominently reported that Secretary Boockvar's deputy had notified every county that they should promptly mark defective ballots as cancelled so that voters would receive automatic emails notifying them that they should cure their ballots. Dkt. 95-1, at 50–53. As early as mid-October, there was public reporting that some counties were notifying voters of defects so that they

would have an opportunity to cure, whereas other counties were not taking similar steps. *Id.* at 56–60. Philadelphia publicly advised voters on its website that if their ballot was marked as cancelled, they could request a replacement or vote provisionally.[3] Appellants have also acknowledged Secretary Boockvar's guidance that counties "'should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected' so that those voters 'may be issued a provisional ballot.'" App. 156, ¶ 135. Appellants never challenged these so-called "notice and cure process[es]," App. 374, ¶ 8, in any Pennsylvania county before Election Day.

2. Observers

Pennsylvania law has long provided that, for at least some absentee ballots, "*[o]ne authorized representative* of each candidate in an election and one representative from each political party *shall be permitted to remain* in the room in which the absentee ballots are canvassed." 25 P.S. § 3146.8(g)(2) (2006) (emphasis added) (military and overseas ballots); *see* 2006 Pa. Legis. Serv. Act 2006-45 (S.B. 999) (Purdon's). Act 77 extended this "[o]ne authorized representative" provision to "the room in which absentee and mail-in ballots are pre-canvassed" and "canvassed." 25 P.S. § 3146.8(g)(1.1), (2). Pre-canvassing is

[3] Office of Philadelphia City Comm'rs, Cancelled Ballot Notification Information, *available at* https://www.philadelphiavotes.com/en/home/item/1873-cancelled_ballot_notification_info.

"the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots," and canvassing is "the gathering of ballots after the final pre-canvass meeting and counting, computing and tallying of the votes reflected on the ballots." 25 P.S. § 2602(a.1), (q.1). The "one authorized representative" permitted "in the room" during the pre-canvassing and canvassing process is not allowed to make any challenges to mail-in ballots and ballot envelopes during that process; the only basis for challenging a mail-in ballot is that the voter is not a qualified elector, and that challenge must have been made the Friday before Election Day. *See* 25 P.S. § 3150.12b(a)(2), (3).

Almost a full week before Election Day, the Secretary issued revised guidance making clear that "one authorized representative" would be permitted to remain in the room where absentee and mail-in ballots were pre-canvassed and canvassed, and that these authorized representatives would be required to "maintain social distancing practices and ensure they are at least 6 feet from others at all times." Pa. Dep't of State, *Guidance Concerning Poll Watchers and Authorized Representatives*.

On Election Day, the Trump Campaign sought closer observer access in Philadelphia. *In re Canvassing Observation Appeal of: Donald J. Trump for President, Inc.,* No. 201107003, 2020 WL 6556823 (Pa. Com. Pl. Nov. 3, 2020),

rev'd, No. 1094 C.D. 2020, 2020 WL 6551316 (Pa. Commw. Ct. Nov. 5, 2020), *rev'd sub nom. In re Canvassing Observation Appeal of City of Philadelphia Bd. of Elections*, No. 30 EAP 2020, 2020 WL 6737895 (Pa. Nov. 17, 2020). The Delaware County Republican Party did the same thing, obtaining an Order by consent on November 4. Dkt. 95-1, at 47–48 (observers may enter room "[a]t two-hour intervals" with "the time not to exceed five minutes each visit"). Appellants' Philadelphia and Delaware cases never suggested a concern with lack of uniform treatment of observers across Pennsylvania. Nor did Appellants file similar challenges regarding observer access in Allegheny, Centre, Chester, Montgomery, and Northampton Counties.

The Supreme Court of Pennsylvania ultimately held that the closer access Appellants had demanded in Philadelphia was not required by Pennsylvania law. *In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *9 (Pa. Nov. 17, 2020). But by the time of that ruling, the canvassing of ballots was essentially complete. For most of the counting, Philadelphia operated under a ruling of the Commonwealth Court and an agreement resolving federal litigation, by which observers in Philadelphia received closer access, and could "observe whether ballots were being counted lawfully to the best of their ability, consistent with health and safety restrictions." *Id.* at *9 (Saylor, C.J., dissenting). Chief Justice Saylor, who agreed with the Trump Campaign that it had not been given

close enough access initially, "fail[ed] to see that there is any real issue" in "legitimizing the will of the Philadelphians who cast their votes," before or after the improved access was granted. *Id.* It would be "misguided," Chief Justice Saylor explained, to suggest "that presumptively valid ballots cast by the Pennsylvania electorate would be disregarded based on isolated procedural irregularities that have been redressed." *Id.*

C. Procedural History

Nearly a week after the November 3, 2020 General Election, and two days after every major media outlet had projected the result in Pennsylvania, Appellants filed a Complaint seeking emergency relief in the United States District Court for the Middle District of Pennsylvania. App. 110, ¶ 15. Over the next twelve days, Appellants filed a series of papers containing changing factual assertions and legal arguments in an attempt to articulate some basis for the ultimate relief they sought, and still seek in this appeal: an order preventing the certification of Pennsylvania's election results. The "tortured procedural history" of the case, App. 67, is thoroughly described in the District Court's November 21 opinion and addressed by other parties to this appeal, but Voter Intervenors recount the main events here briefly.

The Original Complaint, filed on November 9, alleged six constitutional violations: three related to claims that county officials permitted insufficient observation to vote canvassing sites, and three related to claims that county officials

improperly permitted voters to cure mail-in and absentee ballots that were rejected because of alleged deficiencies. App. 164–185. Appellants asked the District Court to enjoin certification of the election results entirely, or alternatively, to prohibit counting every mail-in or absentee ballot in six counties and to prohibit counting "cured" ballots. App. 186. Defendants and Intervenors (hereinafter "Appellees") all filed motions to dismiss the original Complaint.

The First Amended Complaint was filed on November 15, just minutes before Appellants filed their opposition to Appellees' motions to dismiss. In the Amended Complaint, Appellants removed the three claims related to the alleged insufficient observation of vote canvassing sites, and one of the claims related to allegedly improperly cured mail-in and absentee ballots. *See* App. 192–342. Of the remaining two claims, Appellants acknowledged that they lacked standing to bring one, the Elections and Electors Clause claim, under this Court's binding precedent in *Bognet*. Dkt. 124 at 1. The First Amended Complaint therefore presented a single, exceedingly narrow Equal Protection claim: Counties adopted different approaches to notifying voters of problems with their mail-in ballots, which made it easier for voters in some counties to cure the problem and cast a valid ballot. App. 329–333, ¶¶ 150–60. Appellees all filed motions to dismiss the First Amended Complaint, and those motions were fully briefed. In the midst of this second round of motion to dismiss briefing, Judge Brann held an oral argument, during which Appellants'

counsel largely discussed claims that the First Amended Complaint had abandoned. *See* Dkt. 199. Despite repeated mentions of "fraud" during the hearing, Appellants' counsel eventually acknowledged that no fraud had been pled. Oral Arg. Tr. (Dkt. 199), 117:20–118:21.

The Motion for Leave to File a Second Amended Complaint was filed on November 18, the day Judge Brann had set for Appellants to file their motion for a preliminary injunction. App. 360–598. Appellants asked the court to delay the briefing schedule on the motion for preliminary injunction and instead filed a motion for leave to a file a Second Amended Complaint that, in large part, simply revived claims and allegations that Appellants claimed had been "mistakenly" removed from the original Complaint.

Judge Brann's Decision. On November 21, Judge Brann issued an order and memorandum opinion dismissing Appellants' action with prejudice and denying Appellants leave to amend. App. 61–99. Judge Brann concluded that Appellants had "presented [the District Court] with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence," which could not "justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state." App. 62. Judge Brann also denied leave to amend "given that: (1) Plaintiffs have already amended as of right; (2) Plaintiffs seek to amend simply in order to effectively reinstate their initial

complaint and claims; and (3) the deadline for counties in Pennsylvania to certify their election results to Secretary Boockvar is November 23, 2020," so "amendment would unduly delay resolution of the issues." App. 98.

STANDARD OF REVIEW

"A decision on whether to permit amendment of the pleadings generally falls within the District Court's discretion." *Mullin v. Balicki*, 875 F.3d 140, 150 (3d Cir. 2017). Denial of leave to amend a complaint under Federal Rule of Civil Procedure 15(a) is therefore "review[ed] for abuse of that discretion, except where amendment is denied for legal reasons drawing *de novo* review (such as when the proposed amendment would fail to state a claim)." *Id*. Even if the Court of Appeals disagrees with the District Court's reasoning, it may "nevertheless affirm 'if . . . the District Court's remaining findings would support denial of leave to amend.'" *Id.* (quoting *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (alteration adopted)).

SUMMARY OF ARGUMENT

1. The District Court did not abuse its discretion in declining to afford Appellants a *second* opportunity to amend their complaint. In the span of 35 days between Election Day and the safe-harbor certification deadline, Appellants are seeking to overturn the results of an election. The District Court gave them every opportunity to present their claims, yet Appellants inexplicably delayed. The central

claims Appellants now wish to present, concerning alleged restrictions on observer access to canvassing, were included in Appellants' original complaint and then *abandoned* in their Amended Complaint. Appellants dropped those claims in a technical effort to moot out pending motions to dismiss. They cannot now revive those claims. Appellants' only explanation for their delay is that they changed lawyers, but that cannot excuse their own delay.

Remarkably, amid litigation Appellants themselves have described as "emergency" proceedings, Appellants insist that allowing them to amend would cause no prejudice. But they do not even mention the people who suffer the most prejudice: the voters. Appellants are asking a federal court to override state certification deadlines and to order a protracted second-guessing of the vote count that would jeopardize Pennsylvania's ability to certify results by the December 8 safe-harbor deadline. The result of this would be mass disenfranchisement of 6.8 million Pennsylvania voters, depriving them of a voice in choosing the next President. It is hard to imagine what could be more prejudicial than that.

2. Amendment would also be futile, which is an independent reason why the District Court's denial of leave to amend should be affirmed. The District Court correctly found that Appellants lacked standing and that their claims were foreclosed on the merits as a matter of law. Here, the Voter Intervenors focus on two additional reasons why the proposed Second Amended Complaint could not succeed.

First, Appellants delayed far too long in mounting these challenges to Pennsylvania election procedures, so their claims are barred by laches. It is a fundamental rule of election law that wherever possible, challenges to election procedures must be brought *before* the election. That way, any issues can be addressed in advance without the prospect of judicial intervention disturbing votes after the fact. Here, Appellants knew in advance from Pennsylvania law itself and the Secretary's guidance that there would be limitations on observer access to canvassing procedures. Appellants certainly knew what that access would look like by early in the morning on Election Day, and in the limited circumstances in which Appellants raised challenges early in the vote counting, they were able to obtain relief. It would be strikingly prejudicial to allow Appellants to wait until after all the votes were counted, and then use alleged procedural infirmities in that process to try to disenfranchise millions. Similarly, Appellants knew well before Election Day that certain counties were implementing notice-and-cure practices and that other counties were not. They could have raised their challenges then and sought to address them with tailored relief, but instead waited until after the Election to use this objection as a further basis for disenfranchisement.

Second, the unprecedented relief claimed in the proposed Second Amended Complaint—enjoining certification of election results, and even directing a state legislature to substitute its own electors for those chosen by the people—cannot

possibly be supported by Appellants' factual allegations. Appellants do not allege that the vote of a single unqualified voter has been counted. They do not come close to pleading fraud in the administration of the election. Far from stating a constitutional claim that would justify disenfranchising millions, the relief requested by Appellants would *itself* deprive voters of their constitutional right to vote.

ARGUMENT

I. The District Court Properly Denied Appellants' Motion for Leave To Amend On The Basis Of Undue Delay—Delay That Severely Prejudices The Rights Of Voters.

To prevail in this appeal, Appellants would have to demonstrate that the District Court abused its discretion by denying them leave to amend their complaint for a second time, weeks after Election Day, on the eve of the deadline imposed by Pennsylvania law for counties to certify their election results to the Commonwealth Secretary, and with a looming deadline of December 8 for Pennsylvania to satisfy the Elector College safe-harbor provision, *see* 3 U.S.C. § 5. In these circumstances, Appellants cannot show that the District Court's denial of leave to amend was *incorrect*, let alone an *abuse of discretion*.

This is not a case that permits delay. There were only 20 days between Election Day and the county certification deadline, and 35 days between Election Day and the Electoral College safe-harbor deadline. The county certification

deadline has passed, and Pennsylvania has appointed electors consistent with the counties' certifications. The risk posed by delay in resolving this litigation was, and is, the literal disenfranchisement of the 6.8 million Pennsylvanians who cast a ballot for President.

A. Appellants Unduly Delayed.

As Appellants acknowledge, a district court may properly deny leave to amend under Federal Rule of Civil Procedure 15(a)(2) based on "undue delay; bad faith or dilatory motive on the part of the movant; . . . prejudice to the opposing party; and futility." *Mullin*, 875 F.3d at 149; *see* Appellants' Br. 25. In addition to these factors, a district court may also "ground its decision, within reason, on consideration of additional equities, such as judicial economy/burden on the court and the prejudice denying leave to amend would cause to the plaintiff." *Mullin*, 875 F.3d at 149–50 (footnote omitted).

The District Court found that, in the circumstances presented by this case, allowing Appellants another attempt at amending their complaint would cause undue delay. App. 96. As the District Court explained, Appellants "ha[d] already amended once as of right" and "s[ought] to amend simply in order to effectively reinstate their initial complaint and claims." *Id.* To determine whether the new complaint should be dismissed for lack of standing or failure to state a claim, the court "would need to implement a new briefing schedule [and] conduct a second oral argument." *Id.*

And all this would have to happen within just a few days, because "the deadline for counties in Pennsylvania to certify their election results to Secretary Boockvar [was] November 23, 2020," a date that has since passed. *Id.* These findings amply support the District Court's decision to deny leave to amend on the ground of undue delay.

In particular, the amendment would have "place[d] an unwarranted burden on the court." *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001); *see also Estate of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 803 (3d Cir. 2010) ("Delay is 'undue' when it places an unwarranted burden on the court or when the plaintiff has had previous opportunities to amend."). Appellants sought leave to amend late in the day on November 18. App. 360, ¶ 1. That left only four full days—and only two full business days—before the November 23 deadline for county certification of election results for the District Court to order briefing on both Appellees' motions to dismiss and Appellants' motion for a preliminary injunction, hear oral argument, digest those briefs and oral argument, and render a decision. *See* 25 P.S. § 2642(k). Adjudicating any case on such a compressed schedule would have severely burdened the District Court.

On appeal, Appellants charge the District Court with "mistakenly believ[ing] that relief must be granted by Monday, November 23, the date by which the

Secretary certifies the result of the Presidential election" [*sic*][4] and "disregard[ing] that the real deadline is December 8, 2020, the safe harbor by which electors need to be appointed." Appellants' Br. 5. But the District Court's focus on the November 23 deadline for the counties to certify their election results to the Secretary was no error. Even in their proposed Second Amended Complaint, Appellants asked the District Court first and foremost to enjoin "Defendants"—that is, both Secretary Boockvar and the named county boards of elections—from certifying the election results. App. 340. Appellants were themselves demanding relief before November 23; it could not have been error to seek to adjudicate Appellants' case according to their own timetable. Nor could it have been error to deny Appellants leave to reinstate claims that they had already quite purposefully abandoned just days earlier.

Appellants assert that they did not delay at all, on the basis that, after a series of counsel changes, their current counsel informed the Court that they intended to amend the complaint two days after appearing in this case. Appellants' Br. 26–27. The unstated premise of that argument is that delay in seeking leave to amend is measured from when new counsel happens to appear in a case. But Appellants' own

[4] Following the counties' certification, the Secretary had a statutory duty to "certify" the results "forthwith." 25 P.S. § 3159. The Secretary complied with that obligation on November 24, 2020, and the Governor of Pennsylvania signed the Certificate of Ascertainment.

authority makes clear that whether delay is undue depends on the "*movant*'s reasons for not amending sooner." *Mullin*, 875 F.3d at 151 (3d Cir. 2017) (quotation marks omitted and emphasis added). The official campaign of the sitting President of the United States cannot be heard to cite counsel changes as a basis for delaying litigation that it itself initiated. *See Ramsay-Nobles v. Keyser*, No. 16-CV-5778 (CM), 2018 WL 6985228, at *6 (S.D.N.Y. Dec. 18, 2018) ("[C]hange in counsel, or the dissatisfaction with the manner in which previous counsel pleaded claims . . . cannot excuse undue delay to amend."). The District Court was not obliged to let Appellants' discretionary change of counsel interfere with an already rushed timetable.

B. Appellants' Delay Severely Prejudiced Voters.

Appellants take the untenable position that their delay caused no prejudice whatsoever. Appellants' Br. 34–35, ECF No. 42-1. Prejudice abounds, from interference with state and county officials' ability to timely perform their statutory functions, to the burdens placed on the District Court itself by Appellants' emergency requests. But the most fundamental prejudice is the prejudice to Pennsylvania's voters.

Pennsylvania's voters are entitled to have their votes Had the District Court permitted Appellants to protract this case, it would have jeopardized the counties' and Commonwealth's ability to certify the results of the election, acts which have

since occurred. Pennsylvania faces a December 8 safe harbor to appoint its electors, and failure to meet that deadline raises the specter that everyone who cast a ballot in the General Election will be disenfranchised. Just four years ago, then-President-elect Trump objected when losing third-party candidate Jill Stein tried to do something strikingly similar. Ms. Stein, according to the then-President-elect, was proposing a "process [that] would last weeks, perhaps even months," which "would virtually guarantee that Pennsylvania would not be able to certify its Presidential Electors by . . . the federal safe-harbor deadline for doing so," which "in turn risks disenfranchising *all* of the Pennsylvania voters whose constitutional rights Stein purports to vindicate." Br. for Intervenors President-Elect Donald Trump et al., at *4–5, *Stein v. Cortés*, No. 16-CV-6287, 2016 WL 8828229 (E.D. Pa. filed Dec. 8, 2016). Here, Appellants have just recently seized on an equally laborious process (mischaracterized as "targeted expedited discovery")—*i.e.*, some sort of inspection of the declaration envelopes for 1.5 million ballots. Appellants' Br. 28–29. Now it is the Trump Campaign asking the Judiciary to countenance litigation that risks disenfranchisement of all Pennsylvanians.

The Court does not need to decide whether Appellants were intentionally seeking to delay certification past the safe-harbor deadline or not. But Appellants' convoluted and erratic litigation is exactly what would result if one *were* trying to obstruct Pennsylvania from certifying the results on time.

Pennsylvania voters are entitled to have their votes given effect according to an orderly and lawful process. Every day that this litigation continues creates greater risk of mass disenfranchisement. The District Court properly refused to countenance delay through repeated amendment of Appellants' meritless complaint.

II. Amendment Would Be Futile.

Even if this Court were to conclude that the District Court abused its discretion in denying leave to amend based on Appellants' prejudicial, undue delay, it should still affirm because amendment would be futile. *See Mullin*, 875 F.3d at 150 ("If we find an error in the District Court's reasoning, we exercise our own discretion in determining whether we will nevertheless affirm if the District Court's remaining findings would support denial of leave to amend." (quotation marks omitted and alteration adopted)); *see also Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001) (district court did not abuse its discretion by denying leave to amend as futile, but could also have denied leave to amend on grounds of undue delay); *Wiedbrauk v. Lavigne*, 174 F. App'x 993, 995 (6th Cir. 2006) (affirming on futility grounds where district court denied leave to amend due to prejudice and undue delay). *See generally Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701, 705 (3d Cir. 2019) (Court of Appeals "can affirm for any reason in the record.").

The District Court dismissed this action on the grounds that Appellants lacked standing to assert their claims and, in any event, failed to state a claim upon which

relief could be granted. The proposed Second Amended Complaint fails for substantially the same reasons, as explained by other Appellees in their briefs, which Voter Intervenors will not repeat and incorporate here by reference. *See* Fed. R. App. P. 28(i). Here, Voter Intervenors focus on independent grounds for denying leave to amend as futile: Appellants' claims are untimely, and Appellants cannot obtain the remedies they seek.

A. Appellants' Claims Are Barred by Laches.

Appellants have not alleged that a single ballot was counted that did not reflect the actual voting preference of an actual registered and otherwise qualified Pennsylvania voter. Rather, Appellants seek to discard votes because they are dissatisfied with the results. The law prohibits such gambits by requiring challenges to election procedures to be raised before the election is conducted. This rule protects voters and reflects common sense: pre-election challenges allow problems to be addressed *before* the election is held, without disrupting votes *after* they have been cast.

1. A Candidate Cannot Wait For Election Results Before Challenging Alleged Errors That Could Have Been Raised Earlier.

Laches is "an equitable doctrine that prevents recovery when a defendant can show inexcusable delay in instituting suit and prejudice to the defendant resulting from such delay." *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800,

804 (3d Cir. 1998). "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).[5]

Laches applies with particular rigor in the elections context, requiring "any claim against a state electoral procedure [to] be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990). Before an election, laches requires such claims to be promptly raised lest last-minute court orders confuse voters, disincentivizing voting and undermining public confidence in the fairness of elections. *See, e.g.*, *Purcell v. Gonzales*, 549 U.S. 1, 4–5 (2006) (per curiam); *Bognet v. Sec'y Commw. of Pa.*, No. 20-3214, 2020 WL 6686120, at *17–18 (3d Cir. Nov. 13, 2020). And after an election, laches will generally bar parties from challenging the election on grounds they could have raised beforehand. *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988).

Rigorous application of laches in the election context is well established and protects vital interests. Overturning the results of an election is an extraordinary intervention by the Judiciary into democratic processes. *See Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 478 (7th Cir. 1986); *McMichael v. Napa County*,

[5] Laches is properly considered in determining whether amendment would be futile. *See Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 259 (3d Cir. 2014) (affirmative defenses properly considered on motion to dismiss "if apparent on the face of the complaint").

709 F.2d 1268, 1273–74 (9th Cir. 1983) (Kennedy, J., concurring). Laches minimizes such interventions by insisting that plaintiffs raise their challenges to election procedures *when there is still time to correct those procedures* without disenfranchising voters. It avoids the highly inequitable alternative, under which parties could "'lay by and gamble upon receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action." *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)); *see Soules*, 849 F.2d at 1180 ("[C]ourts have been wary lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs."). And it avoids the "judicial fire drill[s]" and "mad scramble[s]" required to adjudicate belated challenges to election procedures before deadlines mandated by state law for certification of results. *Stein v. Cortés*, 223 F. Supp. 3d 423, 436 (E.D. Pa. 2016) (internal quotation marks omitted).

2. Appellants Could Have Raised Their Claims in Time to Address Them.

Appellants' belated complaints about election administration are exactly what the doctrine of laches forecloses. Appellants appear to have two theories of this case: one relating to Trump Campaign workers' ability to observe the pre-canvassing and canvassing of absentee and mail-in ballots, and the other relating to whether individuals who submitted absentee or mail-in ballots with certain defects could

learn about or cure those defects. Regardless of the theory on which they rely, however, Appellants could have raised all of their claims prior to the election without disturbing votes after they are cast and counted. Instead, they waited for the results of the election to become apparent, and then nearly a week after Election Day tried to reverse the outcome.[6]

Observers. Appellants failed to act with diligence in raising their complaints about the level of access granted to campaign observers during pre-canvassing and canvassing of absentee and mail-in ballots. Pennsylvania law has long made clear that "[o]ne authorized representative of each candidate . . . shall be permitted to remain in the room" where canvassing happens. Appellants now demand far more access than "one" representative being "in the room." *See, e.g.*, App. 434, ¶ 154 (SAC) (alleging that "presen[ce]" in the room requires an opportunity "to meaningfully view and even read" ballots). But the Election Code should have made it abundantly clear to Appellants that campaign observers would not have the ability to scrutinize the writing on the envelope of every mail-in or absentee ballot,

[6] Although Appellants' various pleadings vaguely intimate that Defendants have countenanced voter or electoral fraud of some sort, they allege no facts to that effect, and have disclaimed that this is not a fraud case. To the extent Appellants suggest that allowing both in-person and absentee/mail-in balloting somehow violates the Constitution (*e.g.*, App. 379, ¶ 17 (SAC))—a suggestion that would invalidate the voting laws of every State—Appellants were necessarily aware of this two-track voting system long before the election.

especially in populous counties where many elections workers would be processing ballots simultaneously.[7]

Moreover, almost a full week before Election Day, the Secretary issued revised guidance making clear that "one authorized representative" would be permitted to remain in the room where absentee and mail-in ballots were pre-canvassed and canvassed, and that these authorized representatives would be required to "maintain social distancing practices and ensure they are at least 6 feet from others at all times." Guidance § 4. And Appellants would have witnessed exactly how much access observers were given shortly after 7:00 a.m. on Election Day, when pre-canvassing began.

At any of these points, if Appellants were dissatisfied with their access, they could have gone to court. Indeed, less than an hour into pre-canvassing on Election Day, the Trump Campaign did exactly that in Philadelphia, seeking closer access and obtaining a favorable ruling from the Commonwealth Court granting them closer access (though that ruling was later vacated by the Pennsylvania Supreme Court). *In re Canvassing Observation Appeal of: Donald J. Trump for President, Inc.,* No. 201107003, 2020 WL 6556823 (Pa. Com. Pl. Nov. 3, 2020), *rev'd*, No.

[7] Pa. Dep't of State, Guidance Concerning Poll Watchers and Authorized Representatives (Oct. 28, 2020), *available at* https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Poll%20Watcher%20Guidance%20Final%2010-6-2020.pdf.

1094 C.D. 2020, 2020 WL 6551316 (Pa. Commw. Ct. Nov. 5, 2020), *vacated*, No. 30 EAP 2020, 2020 WL 6737895 (Pa. Nov. 17, 2020). And the Delaware County Republican Party did the same thing, obtaining an Order by consent on November 4. Yet Appellants did not file similar challenges regarding observer access in Allegheny, Centre, Chester, Montgomery, and Northampton Counties, when they plainly could have done so.

Appellants complain that despite entry of the Delaware County order, they had insufficient access. *E.g.*, App. 432, ¶ 150 (SAC). But what they describe is exactly what the consent order requires, and Appellants never sought any access beyond that. *Compare id.* (objecting that observers were allowed in a room "for only five minutes every two hours") *with* Consent Order, *Del. Cty. Republican Exec. Comm. v. Del. Cty. Bd. of Elections*, No. CV-2020-007523 (Del. Cty. C.C.P. Nov. 4, 2020) (observers may enter room "[a]t two-hour intervals" with "the time not to exceed five minutes each visit"). And if Appellants were dissatisfied with Philadelphia's compliance with the Commonwealth Court's order granting the Campaign greater access to the pre-canvass and canvass, *see* App. 432, ¶ 149 (SAC), they could have promptly sought enforcement in state court, rather than wait for several more days of counting to be completed. *But cf. In re Canvassing Observation*, 2020 WL 6737895, at *9 (Saylor, C.J., dissenting) (noting that "canvassing has now proceeded to near conclusion under an ensuing agreement

among the parties associated with federal litigation," and opining that the matter was "moot—or at least moot enough").

On top of all this, Appellants' Philadelphia and Delaware cases never suggested a concern with lack of uniform treatment of observers across Pennsylvania, an Equal Protection complaint that emerged for the first time in this lawsuit.

Notice and Cure. Nor can Appellants deny knowing, before the election, that some counties would allow voters to cure allegedly defective absentee or mail-in ballots, whether by correcting their ballots, requesting new absentee or mail-in ballots, or casting provisional ballots. The proposed Second Amended Complaint acknowledges Secretary Boockvar's November 2 guidance that counties "'should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected' so that those voters 'may be issued a provisional ballot.'" App. 430, ¶ 142. Even before that, it was prominently reported that Secretary Boockvar's deputy had notified every county that they should promptly mark defective ballots as cancelled so that voters would receive automatic emails notifying them that they should cure. Voters' Supp. App. 87.

Indeed, this notice-and-cure issue was common knowledge by mid-October. On October 15, a Pennsylvania CBS affiliate broadcast a story about this very issue,

and published an article with the *headline* "Some Pennsylvania counties offer second chances at mail-ballots, others do not." Voters' Supp. App. 93. The report began: "Will you get a second chance if you made a mistake on a mail-in ballot? Well, it may depend on where you live." *Id.* In fact, the report stated that in Lancaster County, home to Appellant Henry, SAC ¶ 22, "a naked ballot is dead in the water and no one will be reaching out if you forget a signature." Voters' Supp. App. 93.

Similarly, several days before the election, the *Philadelphia Inquirer* reported that "Pennsylvania struggles with how—or if—to help voters fix their mail ballots." Voters' Supp. App. 87. The report pointed to a "patchwork" of policies across the State. *Id.* "Some counties are marking [defective] ballots as received" and thus "giv[ing] voters no indication there's a problem"; other counties "are marking them as canceled . . . which sends voters warning emails"; and "[s]till others try to reach voters directly." *Id.* As Appellants acknowledge, Philadelphia County publicized that it was notifying voters whose ballots were rejected because those ballots were not enclosed in a secrecy envelope and signed declaration envelope, and Philadelphia officials disseminated that information well before Election Day.[8] That the very "patchwork" of notice-and-cure policies that Appellants allege was widely

[8] *See* App. 239, ¶ 127 (Am. Compl.) (citing Phila. City Comm'rs, *Cancelled Ballot Notification Information*, https://www.philadelphiavotes.com/en/home/item/1873-cancelled_ballot_notification_info); Al Schmidt, Twitter.com (Oct. 29, 2020), https://twitter.com/Commish_Schmidt/status/1321952555342172161 (Philadelphia City Commissioner linking to the Cancelled Ballot Notification Information).

reported several weeks ago shows that Appellants could have raised their claim long before Election Day. Indeed, the Trump Campaign filed pre-election suits in several jurisdictions, including Pennsylvania, challenging various election procedures. *See Donald J. Trump for President, Inc. v. Boockvar,* No. 2:20-cv-966, 2020 WL 5997680, at *28–29 (W.D. Pa. Oct. 10, 2020) (concluding that the Trump Campaign's pre-election challenges to mail-in ballot procedures were ripe).

Appellants have not identified any good reason why they decided to wait nearly a week *after* Election Day to file this action, nearly another week to amend it, and four more days before proposing to file the proposed Second Amended Complaint. The only plausible inference is that this was a strategic decision to do exactly what is forbidden: "gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Hendon*, 710 F.2d at 182 (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (internal quotation marks omitted))

3. *Appellants' Delay Was Prejudicial.*

Appellants' delay prejudiced not just Appellees but voters throughout Pennsylvania who reasonably relied on the guidance given to them by election officials. Had Appellants brought these claims earlier, they could have sought tailored remedies to address Pennsylvania's alleged errors in administering the election. Instead, Appellants waited, and now seek to leverage their own calculated

delay to ask this Court to enjoin certification of the election results and to hand responsibility for choosing Pennsylvania's presidential electors from the people of the Commonwealth to the General Assembly—thereby disenfranchising millions of voters.

Observers. If Appellants were right that Pennsylvania law required more observer access, and if Appellants had timely raised such claims, they could have secured that access through state-court actions (like the one they brought against Philadelphia)—and done so at the beginning of the counting. As Chief Justice Saylor noted, Appellants' complaints about access in Philadelphia were quickly "redressed," *In re Canvassing Observation*, 2020 WL 6737895, at *9 (Saylor, C.J., dissenting), there is no reason they could not have sought similar accommodations elsewhere. Had they done so, there would have been no question that mail-in and absentee ballots would be counted. Instead, by waiting until after the end of counting, Appellants now try to cast a cloud over ballots cast in good faith by more than one million Pennsylvania voters in the Appellee counties. That includes voters like Voter Intervenors Ms. Gadja, Ms. Higgins, and Mr. Stevens, who took all necessary steps to ensure that their voices count in this election. It is difficult to conceive of greater prejudice from delay.

Notice and Cure. Likewise, Appellants' delay in asserting their notice-and-cure claims prejudices Pennsylvania voters. Had Appellants objected in advance of

the election to the alleged county-to-county variation in notice-and-cure procedures, a court could have "leveled up" by directing the counties that were *not* giving notice and an opportunity to cure to do so. Indeed, the District Court recognized that this would be the normal remedy for the Equal Protection violation Appellants allege. App. 91. Such a remedy would have given Appellants Henry and Roberts an opportunity to cure their defective ballots, without threatening the disenfranchisement of anyone. Even if a court had leveled-down by forbidding other counties from giving notice of defects on absentee or mail-in ballot envelopes, at least some voters would have known that their ballots were at risk of rejection, that they would not be notified of that rejection, and that they should take special care to ensure that their votes were counted. Either way, no one would necessarily be disenfranchised. If Appellants have their way, however, individual Voter Intervenors such as Mr. Ayeni, Ms. Lara, Mr. Morales, Ms. Price, Ms. Stover, as well as many of the organizational Voter Intervenors' members, would be disenfranchised, despite having done everything asked of them, in some cases taking additional steps to make sure that their ballots were accepted and tallied. Again, the prejudice from Appellants' delay is obvious.

B. Appellants' Requested Relief Is Unavailable as a Matter of Law.

Amendment would also be futile because Appellants cannot obtain the relief they seek: some sort of order invalidating the Pennsylvania election results and

handing the Commonwealth's electors to President Trump. No court in history of this nation has ever ordered "such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated." App. 62. Nor should the Judiciary take such a momentous step. Such a remedy would violate the fundamental right to vote of millions of qualified voters. It is hard to imagine such a remedy could ever be appropriate, but certainly it is not in this case, in which Appellants have failed to even allege, much less prove, that a single fraudulent vote was counted or that the governmental Appellees somehow conspired to influence the election results. The District Court rightly found that such "speculative accusations, unpled in the operative complaint and unsupported by evidence. . . . cannot justify the disenfranchisement of a single voter, let alone all the voters of [this country's] sixth most populated state." *Id.* Because Appellants have not adequately pleaded entitlement to the relief they request, the Second Amended Complaint is futile.

1. Appellants Seek Mass Disenfranchisement.

Appellants seek the disenfranchisement of hundreds of thousands, if not millions, of qualified Pennsylvanians. App. 62.

On appeal, Appellants deny that they are seeking to disenfranchise *all* 6.8 million Pennsylvanians, just "a substantial portion of the approximately 1.5 million [voters who cast] absentee and mail votes in the Defendant Counties." Appellants'

Br. 12–13, 18, 35. That assertion conflicts with their own proposed pleading. Appellants continue to seek a permanent injunction "prohibit[ing] Defendants from certifying the results of the 2020 presidential election in Pennsylvania on a statewide basis." App. 482, ¶ 325 (SAC); *cf.* App. 483, ¶ 328 (seeking "a temporary restraining order and preliminary injunction granting the above relief during the pendency of this action"). It is difficult to see how such an injunction would not result in disenfranchising every Pennsylvania voter. Indeed, Appellants overtly seek an order for someone *other* than the people of Pennsylvania to choose Pennsylvania's electors: The proposed Second Amended Complaint requests, "an order, declaration, and/or injunction that the results of the 2020 presidential general election are defective and providing for the Pennsylvania General Assembly to choose Pennsylvania's electors." App. 482, ¶ 327 (SAC). Unless, of course, Appellants propose amending their complaint yet *again*, it is impossible to read their prayer for relief as anything other than an attempt to disenfranchise all Pennsylvanians, and they have made clear that they want the courts to "declare Trump the winner" in conflict with the will of Pennsylvania as expressed by the count of the ballots cast in the election.

Even Appellants' supposedly modest alternative request for relief is anything but that. Appellants ask either to have access to all 1.5 million mail ballots in the Appellee Counties, or to a "statistically significant random sample" of those ballots

that their purported expert could use to estimate what percentage of ballots cast in those counties were supposedly defective. Appellants' Br. 12–13, 28–29. Appellants suggest that the District Court should discount Joe Biden's vote total based on this estimated percentage of defective ballots. Appellants are cagey about how many ballots they would seek to disqualify on this basis, but they hypothesize that it would be a "substantial portion" of the 1.5 million mail ballots cast in the Appellee counties. *Id.* at 18. It does not take a precise number to know that Appellants seek mass disenfranchisement. Indeed, given the more than 80,000-vote margin in Pennsylvania's presidential vote, nothing other than mass disenfranchisement could accomplish what Appellants set out to do.

2. Mass Disenfranchisement Is Not a Remedy for Alleged Technical Errors by Non-Party Counties.

The problem with Appellants' requested remedies is not just their scale, but their mismatch with the supposed errors of election administration that Appellants allege. Appellants do not allege that a single unqualified voter cast a ballot in this election. Nor do they offer more than wildly speculative and conclusory allegations of misconduct by election officials. Appellants allege that (1) instead the county Appellees should have permitted campaign observers greater ability to scrutinize the pre-canvass and canvass of absentee and mail-in ballots; and (2) there was variation in county practice in notifying voters about deficiencies in their mail ballots. *At most*, Appellants allege good-faith error or variance in standards for applying the

Election Code. But even if Commonwealth or county officials committed some error, that cannot justify depriving millions of Pennsylvania voters of their right to a say in who will be President. This is a classic case in which "the cure [is] worse than the alleged disease, at least insofar as the professed concern is with the right of voters to cast effective ballots in a fair election." *Baber v. Dunlap*, 349 F. Supp. 3d 68, 76 (D. Me. 2018).

Appellants' notion that any alleged error in election administration can be a basis for discarding the results is deeply impractical and at odds with centuries of law. Courts have refused to "believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error." *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970). Pennsylvania law is in accord: "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*, 2020 WL 6737895, at *9 (Saylor, C.J., dissenting). Disenfranchisement is particularly inappropriate when any fault rests with election administrators, not voters themselves: "For mere irregularities in conducting an election it is not to be held void," "because the rights of voters are not to be prejudiced by the errors or wrongful acts of the officers of the election." *Appeal of*

Simon, 46 A.2d 243, 246 (Pa. 1946). Appellants' pleadings, which do not allege any instances of fraud in this election, systemic or otherwise, cannot support the extreme relief requested.

Only the most egregious elections misconduct could even conceivably justify the sort of mass disenfranchisement Appellants seek. *See McMichaely*, 709 F.2d at 1293–94 (Kennedy, J., concurring) (invalidation of election results "has been reserved for instances of willful or severe violations of established constitutional norms"). Appellants identify nothing of the sort. Although the proposed Second Amended Complaint occasionally speculates about some sort of conspiracy among Pennsylvania election officials to throw the race to Vice President Biden, it alleges zero facts supporting the existence of such a conspiracy. *At most*, the SAC alleges good-faith disagreements over interpretation of the Election Code. As a matter of law, such allegations cannot support the relief they seek.

Appellants' heavy reliance on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), is thus inapt: Even assuming that the district court's remedy on remand in that case was appropriate, that case approved the invalidation of a local election based on specific findings by the district court of "massive absentee ballot fraud, deception, intimidation, harassment and forgery." *Id.* at 887. Appellants' attempt to invalidate an entire State's presidential election based on nothing more than alleged garden-variety errors by election administrators presents radically different equities.

Observers. Appellants do not have any constitutional right to have observers present at all, much less to have them so close that they can read every envelope. *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *67 (W.D. Pa. Oct. 10, 2020) ("At the outset, 'there is no individual constitutional right to serve as a poll watcher[.]'") (quoting *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020)). Nor could closer access have had any practical impact on the canvassing process, as the Supreme Court of Pennsylvania held well before the election that under Pennsylvania's Election Code there is no right to challenge ballots during canvassing. *In re Nov. 3, 2020 Gen. Election*, No. 149 MM 2020, 2020 WL 6252803, at *14 (Pa. Oct. 23, 2020).

The Supreme Court of Pennsylvania has long held that "[n]either an individual voter nor a group of voters can be justly disfranchised 'except for compelling reasons.'" *Appeal of Simon*, 46 A.2d at 246. In *Appeal of Simon*, "[i]rregularities were disclosed" in the counting process, and these irregularities might even "have facilitated the commission of fraud if fraud had been planned." *Id*. But "no [actual] fraud was alleged," so there was no compelling basis to invalidate the 3,011 ballots at issue. *Id*.

Here there is a request to invalidate *at least* a "substantial" portion of 1.5 million ballots. Any alleged "irregularities" concerning observer access are far less substantial, and there is no question that "no fraud is alleged." There is not even any

basis to doubt election officials' good faith. *See In Re: Canvassing Observation Appeal*, 2020 WL 6551316, at *3–4 (despite ordering closer access, concluding that Philadelphia's interpretation of the Election Code was "reasonable" and "in strict compliance with the text of the Election Code"); *see also In re Canvassing Observation*, 2020 WL 6737895, at *9 (Saylor, C.J., dissenting) ("[T]o the degree that there is a concern with protecting or legitimizing the will of the Philadelphians who cast their votes while candidate representatives were unnecessarily restrained at the Convention Center, I fail to see that there is any real issue."). Even if county officials erred, "the rights of voters are not to be prejudiced by [officials'] errors." *Simon*, 46 A.2d at 246. The disenfranchisement of millions of Pennsylvania is plainly not an available remedy.

Notice and Cure. Nor can the allegations support an injunction against counting "cured" ballots. *See* App. 186 (Compl.). Pennsylvania law is clear that a voter "who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot." 25 P.S. § 3150.16(b)(2). Appellants' grievance is exclusively that some counties or third parties notified voters that those voters' absentee or mail-in ballots were deficient, whereas others did not. But there is no reason to think that Appellees' notice procedures caused Appellants to suffer any injury—that is, that, as a result of Appellees' notice procedures, enough voters

cast "cured" ballots to materially alter the outcome of the election—and the Complaint fails to allege facts supporting such inference.

Moreover, even if county boards somehow erred in giving notice, and could have been enjoined from doing so had a suit been timely filed, nowhere does the Complaint allege that *voters* did anything wrong in taking action to correct their innocent mistakes and cast a valid votes. *See In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 309 (Pa. 1974) (even where an official erred, courts reject "invalidation of a ballot where the voter has complied with all instructions communicated to him"). To the contrary, "cured" ballots are by definition entirely compliant with every requirement in Pennsylvania's Election Code.

"When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Stein*, 223 F. Supp. 3d at 437 (citation omitted). This "right to vote necessarily includes the right to have the vote fairly counted." *Id.* at 437–38 (collecting cases). Permanently enjoining the results of the election from being certified, or ignoring the voters' will after the fact in favor of electors chosen by someone else, would disenfranchise every Pennsylvanian who voted in the election, and therefore would violate rights safeguarded by the Fourteenth Amendment's Due Process Clause.

Id. at 442. Appellants' request for relief cannot possibly be granted, and for this reason as well, the proposed Second Amended Complaint is futile.

CONCLUSION

This Court should affirm the judgment of the District Court.

November 24, 2020

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

On behalf of all Intervenor-Defendant-Appellees, and in accordance with 3d Cir. L.A.R. 28.3(d), I certify that at least one of the attorneys whose names appear on the brief is a member of the bar of this court, or has filed an application for admission pursuant to 3d Cir. L.A.R. 46.1.

/s/ David M. Zionts
David M. Zionts

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH TYPE-VOLUME AND VIRUS-DETECTION REQUIREMENTS

In accordance with Fed. R. App. P. 32(g) and 3d Cir. L.A.R. 31.1(c), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 10,335 (*i.e.*, no more than 13,000) words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it is printed in 14-point Times New Roman font. I further certify, in accordance with 3d Cir. L.A.R. 31.1(c), that the text of this brief is identical to the text of the paper copies that will be submitted to this Court, and that this brief was scanned with virus detection software (Symantec Endpoint Protection, version 14.2.770.0 (updated Nov. 24, 2020)), has been run on the file and no virus was detected

/s/ David M. Zionts
David M. Zionts

CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, November 24, 2020, I filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ David M. Zionts
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