No. 20-3371

In the United States Court of Appeals for the Third Circuit

DONALD J. TRUMP FOR PRESIDENT, INC., ET AL.
Appellants,

v.

KATHY BOOCKVAR, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, NO. 4:20-CV-02078 (BRANN, J.)

BRIEF FOR INTERVENOR DEMOCRATIC NATIONAL COMMITTEE

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November 24, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit LAR 26.1, Defendant-Intervenor DNC Services Corporation/Democratic National Committee states (1) that it does not have a parent corporation, (2) no publicly held corporation owns 10% or more of its stock, (3) it is not affiliated with any publicly owned corporation that is not named in this appeal, and (4) it is not aware of any publicly owned corporation not a party to the appeal that has a financial interest in the outcome of the litigation.

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INTRODUCTION

This appeal (and Plaintiffs' underlying lawsuit) is now moot. The actions Plaintiffs ask this Court to enjoin have already occurred: all 67 counties in the Commonwealth have now certified their results, Pennsylvania's Secretary of State has tabulated those results, and, just within the last few hours, Governor Wolf has signed the Certificate of Ascertainment for the slate of electors for President-elect Biden and Vice President-elect Harris and submitted the certificate to the Archivist of the United States. The certification of the November 3, 2020 general election in Pennsylvania is complete, and there is nothing to enjoin. The Court should dismiss this appeal.

In any event, the district court correctly denied Plaintiffs leave to amend and certainly did not abuse its discretion. As the record of erratic filings reveals, the proceedings below were chaos. Not only did Plaintiffs bombard the district court with "strained legal arguments without merit and speculative accusations," while seeking to disenfranchise "all the voters of [the] sixth most populated state" based on unfounded accusations of a nationwide conspiracy, but they also continuously moved the goalposts during their own emergency proceedings. *Donald J. Trump for President, Inc. v. Boockvar*, --- F. Supp. 3d ---, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020).

Plaintiffs were also entirely responsible for the delays that rendered their

claims moot. Even though the Commonwealth's certification process spans just a few weeks, Plaintiffs waited until a week after Election Day to file this suit, and after another week, Plaintiffs switched counsel and, rather than respond in full to the merits of Defendants' and Intervenors' motions to dismiss, Plaintiffs amended their complaint by abandoning most of their claims. The parties then engaged in a second round of briefing on motions to dismiss the Amended Complaint. But just before the district court's hearing on those motions, and without explanation, Plaintiffs switched counsel *again* and asked to delay the hearing, which the court denied. And after a nearly six-hour hearing on the renewed motions to dismiss, Plaintiffs asked to file yet another amended complaint to re-assert the claims they had previously eliminated.

The district court correctly recognized that Plaintiffs had created the situation in which they found themselves: had Plaintiffs not eliminated the claims they sought to re-assert, the court and parties could have timely addressed them. But given certification deadlines, Plaintiffs' bait-and-switch meant there was not enough time to restart this suit without significantly prejudicing all others involved. And, critically, amending the complaint once more would have been futile because the proposed Second Amended Complaint ("SAC") suffered from the same defects as the First Amended Complaint ("FAC"). There was no abuse of discretion; the district court's ruling should be upheld.

STATEMENT OF JURISDICTION

Both the district court and this Court lack subject matter jurisdiction because Plaintiffs' claims are moot, and Plaintiffs lack standing to bring their claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

ISSUE PRESENTED

1. Whether Plaintiffs' appeal is moot now that all 67 counties in Pennsylvania have certified their results, the Secretary of the Commonwealth has tabulated those results, and the Governor has signed the Certificate of Ascertainment.

2. Whether the district court abused its discretion by denying Plaintiffs' motion for leave to file a second amended complaint.

RELATED CASES AND PROCEEDINGS

Intervenor-Defendant-Appellee Democratic National Committee ("DNC") is not aware of any related cases or proceedings, and this case has not previously been before this Court.

STATEMENT OF THE CASE

I. Statement of Facts

This lawsuit is one of several legal actions initiated by the Trump Campaign (the "Campaign"), challenging Pennsylvania's election procedures both before and after election day. This summer the Campaign attempted (unsuccessfully) to require Pennsylvania and its counties to (1) prohibit voters from returning mail ballots to

drop-boxes or other polling locations, (2) not count any mail ballot that was not personally dated by the voter (even if it arrived by election day), (3) not count any mail ballot that could be challenged based on signature comparison, and (4) create entirely new rights for poll-watching that do not exist in Pennsylvania law. *See Donald J. Trump for President, Inc. v. Boockvar*, __ F. Supp. 3d. __, No. 2:20-CV-966, 2020 WL 5997680, at *1 (W.D. Pa. Oct. 10, 2020); Complaint, *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, ECF No. 4 (W.D. Pa. June 29, 2020). The campaign also participated in pre-election litigation before the Pennsylvania Supreme Court concerning, in addition to the issues described above, whether to extend the deadline for receipt of mail-in and absentee ballots, *see Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. Sept. 17, 2020), and whether county boards of elections were required to reject mail-in and absentee ballots based on signature comparisons, *In re November 3, 2020 General Election*, No. 149 MM 2020, --- A.3d ----, 2020 WL 6252803 (Pa. Oct. 16, 2020).

After Election Day, the Campaign engaged in significant litigation seeking to invalidate mail ballots, and to ensure closer access to inspect the canvassing process, almost all of was were ultimately rejected by Pennsylvania courts. *See, e.g.*, *Donald J. Trump for President Inc. v. Philadelphia Cnty. Board of Elections*, No. 2:20-cv-05533, ECF No. 5 (E.D. Pa. Nov. 2020) (dismissing Campaign's complaint to prohibit Philadelphia County from counting ballots with prejudice); DNCAPP282

(rejecting Campaign's effort to disqualify hundreds of mail-in ballots in Montgomery County); DNCAPP234 (Pennsylvania Supreme Court rejected Campaign's attempt to disqualify thousands of mail-in ballots from Philadelphia and Allegheny Counties where voter did not handwrite their name, address, or date on the outer envelope, but no fraud was alleged).

II. Proceedings and Briefing Below

A. The Original Complaint

Six days after the 2020 General Election, the Campaign and two Pennsylvania voters filed this lawsuit. APP103. The Original Complaint, spanning 86 pages, raised wide-ranging objections about election procedures which had largely been in place for weeks or even months before the election, including (1) the procedures for requesting and sending mail ballots, (2) the signature requirements for in-person and mail ballots, (3) the pre-canvass and canvass procedures of the county election boards, (4) the notification and cure procedures for defective mail ballots, and (5) the alleged inability of the Campaign to "meaningful[ly]" engage in poll watching. APP131-161.

The Complaint alleged that Lancaster and Fayette Counties rejected the mail ballots of Voter Plaintiffs Henry and Roberts, and that neither County affirmatively notified Voter Plaintiffs of any opportunity to cast a new ballot. APP178. But Plaintiffs did not sue Lancaster or Fayette Counties. Instead, Plaintiffs sued

Secretary Boockvar and the boards of elections of seven other "Democratic-heavy counties"—including the Allegheny, Centre, Chester, Delaware, Philadelphia, Montgomery, and Northampton County Boards of Elections, raising seven causes of action, including: (1) violations of due process (2) equal protection, and (3) the Elections and Electors Clauses, all based on Plaintiffs' alleged inability to meaningfully observe canvassing and tabulation, APP164-175, as well as separate (4) equal protection, (5) Elections and Electors Clause, and (6) due process claims, and (7) another Elections and Electors Clause Claim, all based on the allegation that some counties had permitted voters to cure their ballot when their first mail ballot was deemed invalid or deficient. APP175-185.

In the Complaint's Prayer for Relief, Plaintiffs sought an injunction prohibiting Defendants from certifying the results of the General Election "on a Commonwealth-wide basis" (corresponding to nearly seven million votes); or, in the alternative, an injunction prohibiting Defendants from certifying the results of the General Election which included mail ballots that the Campaign alleged it could not meaningfully observe (corresponding to an alleged 600,000+ votes); or, as a third alternative, an injunction prohibiting Defendants from certifying the results of the General Election which include the tabulation of absentee and mail-in ballots which Defendants improperly permitted to be cured. APP185.

The next day, recognizing the need for an expedient resolution of this case, the district court held a scheduling conference in which it ordered the Defendants and Intervenors to file any motions to dismiss within two days—that is, by November 12, 2020. APP040. Plaintiffs were also required to file their Motion for a Preliminary Injunction by that same date. *Id.* The court required all opposition briefing and reply briefing to be completed by November 16, in time for a hearing on the Motions to Dismiss on November 17. *Id.* On November 12, as required by court order, all Defendants and Intervenors filed their motions to dismiss, collectively raising issues of standing, abstention, laches, and failure to state a claim, among other grounds for dismissal. APP046-048.

That same day, Plaintiffs' Counsel from Porter & Wright moved to withdraw from the case and assured the Court that any new counsel would "be prepared to proceed according to the [Court's pre-existing] schedule." DNCAPP003. The Court granted the Motion to Withdraw. APP050. But Linda Kerns, who was among Plaintiffs' original counsel, remained in the case. New counsel, John Scott and Douglas Hughes, entered appearances for Plaintiffs. APP050.

B. The First Amended Complaint

On November 15, the day that Plaintiffs were due to file their Oppositions to the various Motions to Dismiss, *see* APP040, Plaintiffs first filed their FAC, signed by both Linda Kerns and John Scott, and verified by the Trump Campaign's

Pennsylvania Director, *see* APP192. The FAC abandoned several causes of action under the Due Process Clause, the Equal Protection Clause, and the Electors and Elections Clauses (Counts I, II, and III in the Original Complaint, respectively), all of which were premised on the belief that a campaign's representatives must have the right to stand close enough to inspect and review mail ballots during the canvassing process. APP318-329. What remained included (1) an Equal Protection Clause claim based on certain counties' efforts to notify voters whose mail ballots contained non-substantive defects, so they could vote by provisional ballot in person or cast a replacement mail ballot, APP247-250, and (2) an Electors and Elections Clause Claim, which Plaintiffs acknowledged had been foreclosed by *Bognet v. Secretary of the Commonwealth of Pennsylvania*, ---F.3d ---, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), but nonetheless asserted to preserve for appellate review, APP250-252.[1] The FAC did not meaningfully narrow the Prayer for Relief; and Plaintiffs still sought to enjoin certification of the election on a "Commonwealth-wide basis." APP253.

The same day, Plaintiffs filed their "Opposition" to the several Motions to Dismiss. APP348. The Opposition argued that "Defendants' motions should be dismissed as moot because they target a complaint that is no longer operative," but

[1] Separately, Plaintiffs acknowledged that this new Third Circuit authority meant they did not have standing to pursue their Elections and Electors Clause claims. APP349 n.1.

also addressed the threshold standing, abstention, and laches issues raised in Defendants and Intervenors motions to dismiss. *Id*. Over the next 36 hours, Defendants and Intervenors worked assiduously to file new Motions to Dismiss the FAC before the Court's scheduled hearing. APP051-053.

On November 16, the afternoon before the hearing on the Motion to Dismiss, all of Plaintiffs' attorneys—Linda Kerns, John Scott, and Douglas Hughes—moved to withdraw. DNCAPP007. In their motion, Plaintiffs' counsel assured the Court that Plaintiffs' new counsel, Marc Scaringi, was "aware of the schedule set by the Court in this matter and will be prepared to proceed according to that schedule." DNCAPP008.

A few hours later, at 7:40 PM, despite those assurances from Plaintiffs' counsel, Plaintiffs moved to continue the hearing that was set to take place the next day. DNCAPP012-014. Plaintiffs' counsel explained that he needed additional time to prepare for oral argument. DNCAPP013. While Plaintiffs announced their general intent to file a motion for leave to file a SAC in the motion to continue, DNCAPP014, Plaintiffs did not file a motion for leave to file a SAC that night or the day of the hearing. The Court denied the motion to continue the hearing. APP053.

C. The November 17, 2020 Hearing

On November 17, Judge Brann of the Middle District of Pennsylvania held a nearly six-hour hearing on the Motions to Dismiss the FAC. At the start of the

hearing, Plaintiffs' counsel confirmed that the only two remaining claims were the Equal Protection and Elections Clause claims regarding notice and cure of defective mail ballots and confirmed that the Due Process claims had been "removed" from that Complaint, albeit "mistakenly." DNCAPP027-28, Tr. at 12:9-13:8. Despite agreeing that the FAC was the operative complaint, which did not allege any sort of fraud, Plaintiffs' counsel proceeded to argue that Pennsylvania's election was part of a campaign of "widespread, nationwide voter fraud" which spanned "at least ten other jurisdictions," DNCAPP030, Tr. at 15:7-10. Plaintiffs' counsel also argued that the election was stolen from President Trump, DNCAPP038, Tr. at 23:15-16, that 1.5 million ballots cast in Pennsylvania were "illegal," DNCAPP041, Tr. at 26:9:17, that the Defendant Counties were controlled by a "little mafia," DNCAPP041, Tr. at 26:25, and that Plaintiffs would put forward "hundreds of affidavits" in support of their eventual motion for injunctive relief. DNCAPP043, Tr. at 28:11-12.

On rebuttal, Plaintiffs' counsel confirmed that Plaintiffs were seeking to invalidate at least 680,000 votes that were allegedly counted without adequate inspection from poll watchers. DNCAPP122, Tr. at 107:15-17. When the Court inquired whether Plaintiffs were in fact pleading fraud, and pressed Plaintiffs about the heightened pleading requirements of Rule 9(b), Plaintiffs' counsel then confirmed that the Amended Complaint *did not* actually plead fraud. DNCAPP133, Tr. at 118:15:21; *see also* DNCAPP152 at 137:18 (Plaintiffs' counsel later

reminding court, "[T]his is not a fraud case.").

At the end of the hearing, the Court asked the Plaintiffs if they had filed a motion for leave to file a SAC, to which the Plaintiffs responded, "No, we didn't, Your Honor." DNCAPP170, Tr. at 155:19-24. But, Plaintiffs' counsel noted, "the [SAC] does not differ very, very much from what we've already addressed, with one exception, and that's the due process count." DNCAPP173, Tr. at 158:13-16.

D. The Motion to File a Second Amended Complaint

Finally, on November 18, more than two weeks after Election Day, Plaintiffs filed their Motion for Leave to File a SAC. APP587. The proposed SAC, which spanned 115 pages, revived Plaintiffs' Due Process, Equal Protection, and Elections Clause claims regarding poll watchers, APP438-454, and again sought an injunction prohibiting Defendants "from certifying the results of the 2020 presidential general election in Pennsylvania on a statewide basis," APP482. The proposed SAC also sought, for the first time, an injunction "providing for the Pennsylvania General Assembly to choose Pennsylvania's electors." APP482.

The next day, after receiving an additional 24-hour extension from the Court, Plaintiffs filed their second motion for a preliminary injunction. APP055; APP599. Plaintiffs asked the Court to enjoin Defendants from certifying the results of the presidential election so that the Campaign could engage in a "simple" audit of 1.5 million mail ballots, gather evidence to support their accusations, and petition this

Court to then "set aside those votes and declare Trump the winner." Dist. Dkt. No. 183 at 2.

III. The District Court's Opinion and Order

On November 21, the district court granted the motions to dismiss the FAC with prejudice. APP098. First, the Court held that the Voter Plaintiffs lacked standing because their claims were not traceable to or redressable by the Defendants. *See Trump for President, 2020 WL 6821992*, at *6-7 (M.D. Pa. Nov. 21, 2020). As the district court explained, "[p]rohibiting certification of the election results would not reinstate the Individual Plaintiffs' right to vote. It would simply deny more than 6.8 million people *their* right to vote." *Id.* at *7. Second, the Court held that the Campaign did not have standing because the Campaign had not shown injury-in-fact, causation, or redressability. *Id.* at *7-9, *9 n.75.

The court then considered Plaintiffs' arguments on the merits, including the unpled but alleged discrimination against the Campaign's "use of poll-watchers," even though, as the Court explained, the operative complaint did not allege such a claim. *Id.* at *11; *see also id*. at *5 n.39 ("Plaintiffs attempt to revive their previously-dismissed poll-watcher claims. Count I [of the FAC] does not seek relief for those allegations, *but the Court considers them*.") (emphasis added). The court held that Plaintiffs failed to state an equal protection claim—even as to their unpled poll-watching claims—and that even if they had stated such a claim, the court simply

could not grant the relief Plaintiffs sought. *Id.* at *12-13 ("[Plaintiffs] ask the Court to violate the rights of over 6.8 million Americans. It is not in the power of this Court to violate the Constitution."). As the court summarized, the court was "presented with strained legal arguments without merit and speculative accusations." *Id.* at *1.

Finally, the court denied Plaintiffs leave to amend, noting that "(1) Plaintiffs have already amended once 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 …." *Id.* at *14. The district court then denied the remaining motions on the docket as moot. *Id.*

SUMMARY OF ARGUMENT

Plaintiffs requested that the district court enjoin certification of Pennsylvania's November 3, 2020 general election, but their delay in bringing and prosecuting this lawsuit has rendered their request—and this appeal—moot. The certification process is complete, and there is nothing left to enjoin. Thus, the Court should dismiss this appeal.

In any event, Plaintiffs' appeal lacks merit. The district court correctly exercised its discretion to deny Plaintiffs leave to amend their FAC for three independent reasons.

First, the record shows that further amendment would have caused undue delay and that Plaintiffs' litigation tactics were prejudicial. *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Plaintiffs waited until a week after Election Day to bring this lawsuit. Over the next ten days, Plaintiffs changed their counsel twice, filed multiple complaints, and asked to delay hearings. After the court held a nearly six-hour hearing on Defendants' and Intervenors' motions to dismiss, Plaintiffs asked to restart the entire process by reinstating claims they voluntarily withdrew from their original complaint. The district court properly found that Plaintiffs' attempt to amend was unjustified, particularly within the short timeframe that the relevant certification deadlines provided for the court to resolve this suit. Plaintiffs had ample opportunity to present their claims. The fact that they ultimately regret their strategic choices in their FAC did not require the district court to give them another opportunity to drag these proceedings along even further.

Second, further amendment would have caused significant and widespread prejudice to the other parties and the public. Allowing Plaintiffs to restart this lawsuit by reinstating claims they could have brought (and did bring) weeks earlier would have created an unjustifiable risk of preventing the Commonwealth from timely certifying the results of its presidential election, denying Pennsylvania officials their role in the process of choosing the Commonwealth's slate of presidential electors. It

also would have caused severe prejudice to DNC and President-elect Biden if Pennsylvania's 20 electoral votes were not awarded to President-elect Biden, despite leading the presidential race in the Commonwealth by over 80,000 votes. Most importantly, it would have disenfranchised approximately 7 million voters who participated in Pennsylvania's presidential election expecting that their votes would count towards the selection of the Commonwealth's presidential electors.

Third, further amendment would have been futile. As an initial matter, Plaintiffs lack standing under any theory of injury asserted in their proposed SAC. This Court's binding precedent makes clear that they lack standing on their Electors and Elections Clause claims, and the same precedent forecloses their equal-protection and due-process claims, which continue to be grounded in a non-cognizable theory that they were injured because their votes were "diluted" by the counting of unlawful votes. Nor can the individual Plaintiffs establish injury-in-fact through the denial of their votes, because any such injury is not fairly traceable to Defendants, nor would any judgment against Defendants redress that harm. And the Campaign cannot establish standing through its bare, speculative allegations that a decision in its favor would affect a sufficient number of votes to change the outcome of the election.

Next, Plaintiffs' amendment would be futile because the SAC does not plead a plausible due-process violation. Plaintiffs first assert that their constitutional right

to vote (which is protected in part by the Due Process Clause) was infringed by supposed violations of Pennsylvania's poll-observer requirements. But there is no constitutional right to poll-watch, and Plaintiffs have not shown that counties' treatment of poll observers infringed on any other constitutionally protected right. Plaintiffs also allege that their due-process rights were violated by some counties' notice-and-cure procedures. But county variations in implementing the Election Code do not create the significant disenfranchisement required for a due-process violation. To the extent that disparate notice-and-cure procedures affected Plaintiffs' right to vote, they should have sued the counties that did not allow them to cure. As it stands, Plaintiffs have not stated a viable due-process claim in their proposed SAC.

Moreover, the additional Equal Protection Clause allegations that Plaintiffs seek to include would not save these claims from dismissal. The SAC restores claims based on Defendants' alleged placement of observers too far from mail ballot canvassers, but the district court already considered and rejected those allegations. Defendants' placement of observers would, moreover, easily survive constitutional scrutiny, and is consistent with state law. And Plaintiffs' recharacterization of the election procedures they challenge as part of a "scheme" to help President-elect Biden is conclusory and fails to establish any equal-protection violation.

Finally, Plaintiffs' proposed remedy is unconstitutional because they seek to deprive anywhere from tens of thousands to millions of Pennsylvanians' of their

fundamental right to vote. And Plaintiffs fail to allege the type of fundamental and widespread unfairness that would in some instances warrant enjoining the certification of election results. Thus, any further amendment of Plaintiffs' Complaint would have been futile, and the district court correctly denied Plaintiffs leave to amend.

STANDARD OF REVIEW

This Court reviews the denial of leave to amend for abuse of discretion. *DLJ Mortg. Capital, Inc. v. Sheridan*, 975 F.3d 358, 370 (3d Cir. 2020). In addition, "[a]mendment would be futile if the complaint, as amended, would nonetheless be subject to dismissal for failure to state a claim." *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 494 (3d Cir. 2017).[2]

ARGUMENT

I. This case is moot.

This Court lacks jurisdiction over this appeal because the case has become moot. All 67 counties have certified their results, the Secretary of the Commonwealth has performed her statutory duties of tabulation, and just this morning Governor Wolf signed a Certificate of Ascertainment, which has been

[2] Although the district court did not address futility, it is a legal question, *Fallon*, 877 F.3d at 494, and is therefore reviewed de novo. This Court can and should reach the issue of futility.

submitted to the Archivist of the United States.[3] There is nothing left to enjoin. APP253, 481-83. And even if there were, the Defendants in this litigation—the Secretary and several county defendants—lack the authority to provide any relief, as the certification of the 2020 general election results is out of their hands. Plaintiffs assert that a court could "de-certify" these results, Brief at 6 n.4, but they cite no authority for that proposition, nor do they explain how any of the Defendants in this litigation could achieve that result. Neither this Court nor the district court can issue an order in this case that would grant Plaintiffs the relief they seek either in their operative Complaint or the proposed SAC. As a result, the case is moot, and this appeal should be dismissed. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698-99 (3d Cir. 1996) ("If developments occur during the course of adjudication that . . . prevent a court from being able to grant the requested relief, the case must be dismissed as moot."); *accord Cinicola v. Scharffenberger*, 248 F.3d 110, 119 (3d Cir. 2001); *see also Torres-Jurado v. Administrator of Bergen Cty. Jail*, 767 F. App'x 227, 230 (3d Cir. 2019) (dismissing appeal as moot because the "sole remaining defen[dant]" was the county sheriff, "and the only relief being sought that

[3] *See* Pa. Dep't of State, *Press Release: Dep't of State Certifies Presidential Election Results* (Nov. 24, 2020), https://www.media.pa.gov/pages/state-details.aspx?newsid=435 (stating that earlier today, "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," which was "submitted to the Archivist of the United States").

[was] even potentially still available to Torres-Jurado [did] not involve the Sheriff at all").

For the same reason, neither this Court nor the district court can grant the alternative relief sought in the proposed SAC, which asks the court to "provid[e] for the Pennsylvania General Assembly to choose Pennsylvania's electors." APP482. None of the Defendants in this suit can produce that outcome—they have no power to de-certify the Governor's certification and send the question to the General Assembly. And because the General Assembly is not a defendant in this case, the district court cannot order that body to "choose Pennsylvania's electors." *Id.*; *see, e.g.*, *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) (explaining that when a plaintiff fails to sue the wrong defendant, "an order enjoining the correct official who has not been joined as a defendant cannot suddenly make the plaintiff's injury redressable").

Because this case is moot, this Court lacks jurisdiction over this appeal. As a result, this appeal must be dismissed.

II. The district court did not abuse its discretion in denying leave to amend because amendment would have caused unjustified delay and prejudice.

The district court properly concluded that the procedural chaos Plaintiffs caused in the proceedings below warranted denying them another opportunity to amend their complaint. A party may only amend its pleadings once as of right; "[i]n all other cases, a party may amend its pleading only with the opposing party's written

consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Although a court should grant leave to amend "when justice so requires," *id.*, the Rule does not require the court to abdicate its responsibility "to secure the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1; *see also CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 630 (3d Cir. 2013) ("While we are cognizant of the liberal amendment policy of the Rules, it is also true that they give district courts discretion to deny a motion in order to forestall strategies that are 'contrary to both the general spirit of the federal rules and the liberal amendment policy of Rule 15(a).'"). As a result, the decision to accept or deny leave to amend a complaint under Rule 15 "is committed to the 'sound discretion of the district court,'" and this Court reviews the denial of a "motion for leave to amend a complaint for abuse of discretion." *In re Allergan ERISA Litig.*, 975 F.3d 348, 356 n.13 (3d Cir. 2020) (quoting *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 248 (3d Cir. 2016); *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001)).

Leave to amend is inappropriate "if it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party." *Lake*, 232 F.3d at 373 (citing *Foman*, 371 U.S. at 182). Here, the district court denied Plaintiffs leave to further amend their complaint for two reasons. First, given the

timing of the case—in particular, looming certification deadlines—allowing Plaintiffs to re-assert claims they voluntary withdrew would have caused an unjustifiable delay in resolving the issues presented in an extremely time-sensitive suit. *Trump for President*, 2020 WL 6821992, at *14. Second, and relatedly, granting Plaintiffs leave to file another amended complaint, which would restart the litigation, would have caused widespread, undue prejudice. *Id.* Because both of these grounds were independently sufficient to warrant denying leave to amend, the district court did not abuse its discretion in doing so.

A. Plaintiffs caused undue delay by voluntarily eliminating claims from their original complaint and then later attempting to re-assert them.

Post-election litigation, particularly lawsuits that jeopardize the Commonwealth's ability to certify election results, require expeditious review and prompt resolution, otherwise the consequences to the Commonwealth and its voters could be severe. Certification deadlines exist for good reason: they ensure that the Secretary of the Commonwealth has time to process and compute election returns as required under Pennsylvania law, and that the Governor will have sufficient time to ascertain the number of votes given and issue certificates of election by December 8 based on the choice of Pennsylvania's voters. *See* 25 P.S. § 3166; 3 U.S.C. § 5 (establishing the federal "safe harbor" deadline of December 8, 2020). These state-mandated deadlines are in place precisely so that Pennsylvania can ensure that its

chosen slate of electors is accepted by Congress without question. *See Stein v. Cortés*, 223 F. Supp. 3d 423, 437 (E.D. Pa. 2016) (explaining failure to meet federal safe harbor would be "prejudicial" to Pennsylvania). What's more, elected members of the State House of Representatives must be seated by December 1, 2020. *See* Pa. Const. art. II, § 2.

In all cases, but especially so here, unjustified delay is a sufficient ground for denying leave to amend even in the absence of prejudice to other parties or the court. *CMR D.N. Corp.*, 703 F.3d at 629 ("[A] significant, unjustified, *or* 'undue' delay in seeking the amendment may itself constitute prejudice sufficient to justify denial of a motion for leave to amend." (emphasis added)); *Estate of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 803 (3d Cir. 2010) (if a "delay in seeking leave to amend was undue," leave to amend may be denied "[i]rrespective of whether Appellees would [] suffer[] prejudice"). This Court has long recognized that "if a plaintiff's delay in seeking amendment is undue," the district court is within its discretion to deny the motion. *Cureton*, 252 F.3d at 273. As a result, this Court "ha[s] refused to overturn denials of motions for leave to amend where the moving party offered no cogent reason for the delay in seeking the amendment." *CMR D.N.*, 703 F.3d at 629.

The chaos and inexcusable delay that Plaintiffs imposed on the court and the parties to this action speaks for itself. At 7:45 a.m. on Election Day, the Campaign filed suit in state court, claiming it was being denied adequate proximity to election

workers during the canvassing process. *See In re Canvassing Observation*, --- A.3d ---, 2020 WL 6737895, at *2 (Pa. Nov. 17, 2020). The Campaign abruptly withdrew that suit, but then refiled it at 9:45 p.m. without explaining its prior withdrawal and without asserting that anything had changed in the intervening 14 hours. *Id.* Plaintiffs waited another week to bring this lawsuit, which, just as the Campaign's earlier suit did, asserted that their representatives had been denied adequate proximity to election officials during the canvassing process. APP164-175. Six days later—after Defendants and Intervenors filed their motions to dismiss the complaint, and on the due date for Plaintiffs' responses—Plaintiffs substituted most (but not all) of their counsel and amended their complaint, withdrawing claims that their poll observers' allegedly inadequate proximity to the county boards' canvassing process violated the Due Process Clause, the Equal Protection Clause, and the Elections and Electors Clauses, and subsequently argued that the motions to dismiss were moot. In response to Plaintiffs' Amended Complaint, Defendants and Intervenor-Defendants rushed to file new motions to dismiss within 24 hours, following which the district court held a nearly six-hour hearing. Two days later, and after again substituting their counsel, Plaintiffs asked the Court for leave to re-assert the same claims they eliminated from their original complaint.

Given these erratic filings, one would expect Plaintiffs to explain why, in the context of their own emergency proceedings, they eliminated claims from their

original complaint only to ask permission to add them back in. But in their motion for leave to file the SAC, Plaintiffs offered no adequate explanation. They simply asserted that these claims were inadvertently deleted from their amended complaint due to a "lack of clear communication" in the midst of substituting counsel. APP364-365.[4] They do the same on appeal. Brief at 26 (asserting that counsel "incorrectly omitted numerous allegations and counts"). But that explanation is implausible, not only because of the sheer breadth of the claims that were eliminated, but also because Plaintiffs relied on this maneuver to avoid responding in full to pending motions to dismiss and affirmatively argued that those motions were moot. This was a deliberate choice. That Plaintiffs now regret that decision does not entitle them to amend, particularly given the exigencies of this case. By failing to provide any "cogent" explanation for their actions, Plaintiffs provided no reason to grant them leave to file another amended complaint. *CMR D.N.*, 703 F.3d at 629.

[4] Two days after they moved for leave to file the SAC, Plaintiffs filed a two-page "memorandum of law" seeking to "direct the Court's attention" to the fact that, on November 17, the Pennsylvania Supreme Court rejected the Campaign's state court suit referenced above. DNCAPP188; *see Canvassing Observation*, 2020 WL 6737895, at *9 (holding Philadelphia election officials "allowed candidate representatives to observe the [Canvassing] Board conducting its activities as prescribed under the Election Code"). While the Pennsylvania Supreme Court's decision indeed vitiates the Elections and Electors Clauses claim in the proposed SAC, APP452-454, it has no impact on Plaintiffs' equal protection and due process claims, which were asserted in Plaintiffs' original complaint. APP164-173. As a result, the Pennsylvania Supreme Court's decision in *Canvassing Observation* provides Plaintiffs no justification for attempting to revive those claims after voluntarily withdrawing them.

To be sure, this unnecessary procedural morass occurred in the span of a week, and in normal litigation such a delay may not foreclose leave to amend. But in the context of an extremely compressed post-election window to certify election results, time is of the essence, and Plaintiffs' unjustified delay was critical and prejudicial. This Court has explained that "[w]hen a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied." *Jang v. Boston Sci. Scimed, Inc.*, 729 F.3d 357, 368 (3d Cir. 2013) (quoting *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006)). The reverse is also true: when a party takes its single opportunity to amend its complaint as of right under Rule 15(a)(1) to *eliminate* causes of action it previously asserted, it must justify its decision to later seek leave to re-assert those claims. Plaintiffs' utter failure to do so makes their delay unjustified, which was a sufficient ground for denying leave to amend. *CMR D.N.*, 703 F.3d at 629.

The only plausible reason for this self-induced procedural chaos is delay. The district court noted that "dilatory motive" is "[a]mong the grounds that could justify a denial of leave to amend" when it denied Appellants leave to amend. *Trump for President*, 2020 WL 6821992, at *14 (quoting *Lorenz*, 1 F.3d at 1413-14). And although the court did not explicitly find Appellants acted with dilatory motive, this Court can affirm on that basis because the "rationale is readily apparent from the record on appeal." *Lake*, 232 F.3d at 373-74 ("Not providing a justification for a

denial of leave to amend … does not automatically constitute an abuse of discretion as long as the court's rationale is readily apparent from the record on appeal."); *see also Rhymer v. Philip Morris, Inc.*, 164 F. App'x 268, 270 (3d Cir. 2006) ("Although the district court's reasons for its denial may not have been stated as artfully as possible, its rationale is readily apparent from the record.").

In sum, the unjustified delay that allowing Plaintiffs to file another amended complaint would have caused in the proceedings below was a proper basis for the district court to deny the motion. The district court reasonably concluded that granting Plaintiffs their request would place the court and the other parties in an untenable position, and properly exercised its discretion in denying leave to amend.

B. Allowing another amendment would have been highly prejudicial.

The district court's order should also be affirmed for the independent reason that allowing amendment would have been highly prejudicial to the other parties, including DNC, its members, and President-elect Biden. *Lake*, 232 F.3d at 373. Amendment would have required the court to issue "a new briefing schedule, conduct a second oral argument, and then decide the issues." *Trump for President*, 2020 WL 6821992, at *14. It would have been virtually impossible for these actions to occur before November 23, "the deadline for counties to certify their election results to Secretary Boockvar." *Id.* Plaintiffs do not argue otherwise on appeal. *Cf.*

Brief at 12 ("[T]here is plenty of time to allow briefing on the Motion to Amend and conduct a hearing on the Renewed Injunction Motion before December 8.").

If the district court had granted Plaintiffs leave to file another amended complaint, the new round of briefing, along with an oral argument and the sort of evidentiary hearing Plaintiffs previously requested, could well have prevented timely certification of the Commonwealth's election results by the federal safe-harbor deadline, *see* 3 U.S.C. § 5, or even the December 14 meeting of the Electoral College, *id.* § 7; *see also Stein*, 223 F. Supp. 3d at 437 (explaining unnecessary litigation could prejudice Pennsylvania if the Commonwealth cannot meet the safe harbor). As noted, the Election Code provides just two weeks for the Secretary to process the counties' certified results and present them to the Governor, who then certifies the Commonwealth-wide results. 25 P.S. § 3166. Even without an evidentiary hearing, it took 12 days for the district court to reach the decision below after Plaintiffs filed their suit. There was simply not enough time for another round of litigation on claims Plaintiffs could have presented to the Court weeks ago.

Causing Pennsylvania to miss its certification deadline would cause enormous prejudice to Defendants, DNC, President-elect Biden, and all Pennsylvania voters. It would prevent Defendants from adhering to their roles in the electoral scheme set forth under Pennsylvania law. It would also deny DNC and President-elect Biden the election procedures they relied upon in crafting campaign strategy. And it would

revoke the fundamental right to vote from millions of Pennsylvanians despite their expectation that their choice in the presidential election would be expeditiously certified and transmitted to Congress for the counting of electoral votes. *Reynolds*, 377 U.S. at 555 n.29 ("The right to vote includes the right to have the ballot counted."). All of this damage would occur simply to allow Plaintiffs to re-assert claims based on "strained legal arguments without merit and speculative accusations." *Trump for President*, 2020 WL 6821992, at *1. Put simply, that outcome is not warranted. The district court was well within its discretion to deny Plaintiffs leave to file another amended complaint.

III. Providing Plaintiffs leave to amend would have been futile.

In any event, the district court acted properly in denying Plaintiffs leave to amend because amendment would have been futile; Plaintiffs' proposed SAC fails to state a claim on which relief can be granted. *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 494 (3d Cir. 2017).[5]

A. Even under the Proposed Second Amended Complaint, Plaintiffs would lack standing to assert their claims.

The amendment Plaintiffs propose would be futile because Plaintiffs lack Article III standing to bring any of the claims in the proposed SAC—no less than

[5] Although the district court did not address futility, it is a legal question, *Fallon*, 877 F.3d at 494, and is therefore reviewed de novo. This Court can and should reach the issue of futility.

any of the claims in the FAC, and for largely the same reasons. Specifically, the proposed SAC fails to allege any "concrete and particularized" injury-in-fact that is fairly traceable to any of the Defendants. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). This Court's recent decision in *Bognet v. Secretary of the Commonwealth of Pennsylvania*, ---F.3d ---, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), makes that clear.[6]

Bognet held that plaintiff voters had failed to establish standing on an equal-protection claim that "state actors count[ed] ballots in violation of state election law," thereby "diluting" the strength of the plaintiffs' votes. *Id.* at *9-14. As this Court explained, "when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that … doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause." *Id.* at *18. To permit standing based on non-compliance with state law "'would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim.'" *Id.* at *11 (quoting *Trump for President*, 2020 WL 5997680, at *35). Put simply, the Court concluded, any injury suffered by plaintiff

[6] As Plaintiffs conceded below, *Bognet* forecloses their standing to bring any claim under the Electors or Elections Clauses. APP349 n.1.

voters was insufficiently "concrete" and "particularized" to confer standing. *Id.*; *accord DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (standing absent where plaintiff "suffers in some indefinite way in common with people generally"); *Stein*, 223 F. Supp. 3d at 432-33 (candidate's speculation that election's integrity was compromised was too generalized to support standing).

Bognet disposed of Plaintiffs' claims under the FAC, yet Plaintiffs propose to allege the same injury in the SAC. They still assert, for instance, that their votes were "illegally diluted by invalid ballots." APP372, SAC ¶ 3; *see also* APP422, SAC ¶ 117 (challenging Defendants' alleged "unlawful dilut[ion]" of Plaintiffs' votes); Brief at 20 ("Of course, the voter Plaintiffs have standing because their votes are improperly diluted by a scheme to count defective ballots."). To be sure, the SAC would add new claims under the Due Process Clause that are premised on the same vote-dilution theory. APP441-472, SAC ¶¶ 172, 174, 176, 186, 282. But the alleged injury that forms the basis of those claims remains the same, and whether asserted under the Due Process Clause or the Equal Protection Clause, Plaintiffs' asserted generalized entitlement to have the state follow certain procedures in canvassing other voters' ballots remains insufficient because it is "'about group political interests, not individual legal rights,'" *Jacobson v. Fla. Secretary of State*, 974 F.3d 1236, 1248 (11th Cir. 2020) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018)).

Indeed, such a claim presents "a 'paradigmatic generalized grievance that cannot support standing.'" *Bognet*, 2020 WL 6686120, at *12.

Nor can Plaintiffs escape *Bognet*'s reach by adding conclusory allegations that the vote dilution they allege was the result of a "scheme" to enable President-elect Biden to win in Pennsylvania. APP438-465, SAC ¶¶ 167, 193, 222, 252. As an initial matter, such allegations are not new to the SAC; Plaintiffs have made them throughout this litigation. *See, e.g.*, Dkt. 170 at 1 ("Defendants purposefully violated the Constitution by unequally and improperly processing hundreds of thousands of mail ballots under the cover of darkness in an illegal scheme to favor Joseph Biden over President Donald J. Trump."); *id.* at 7 (alleging an "illegal purposeful scheme to favor Biden and other [D]emocrat[ic] candidates over Trump and Republican candidates, knowing that mail votes would favor the Democrats"). But as Plaintiffs' counsel conceded at oral argument below (and as the Campaign has repeatedly acknowledged in other Pennsylvania post-election litigation), Plaintiffs do not, and cannot plausibly, allege fraud.[7] Plaintiffs—who allege no facts concerning the

[7] In Philadelphia County, the Campaign said it was "not proceeding based on allegations of fraud or misconduct." DNCAPP246-247. In Montgomery County, the campaign confirmed that it had no "knowledge" of "any fraud" or "undue or improper influence" with respect to the "592 disputed ballots" being challenged. DNCAPP210. And in Bucks County, the campaign stipulated that it was not alleging fraud. DNCAPP214 ("It must be noted that the parties specifically stipulated in their comprehensive stipulation of facts that there exists no evidence of any fraud, misconduct, or any impropriety with respect to the challenged ballots.").

supposed scheme or any Defendant's intent to engage in it—cannot rely on speculative allegations to establish standing. *See infra*.

Moreover, as the district court explained regarding the FAC—and the same is true of the SAC—the individual Plaintiffs' assertions that they were *denied* the right to vote, as well as the Trump's campaign's claim of "competitor standing," are inadequate to establish standing. *See* APP 76-83. Plaintiffs point to nothing in the SAC that avoids the fatal problems the district court's thorough analysis laid out. *See Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (upholding denial of leave to amend where "even if they were pled, [new] additional facts would not breathe life into [the plaintiff's] claim," because "[m]ost of them … are repetitions of events already described in the amended complaint").

In particular, the two voter Plaintiffs still have not pointed to any injury that is fairly traceable to *Defendants*, rather than to the counties in which Plaintiffs reside, i.e., the counties that cancelled their ballots without notifying them. Plaintiffs still do not allege, that is, that *these Defendants* took any action with respect to their canceled ballots. Moreover, any claim based on "vote denial" also fails the redressability requirement because a judgment disenfranchising hundreds of thousands of voters who cast lawful ballots in *other* counties would do nothing to redress any injury Plaintiffs felt at the hands of their own county boards of elections

(neither of which is even named as a defendant). *See Lujan*, 504 U.S. at 560-61 (1992).

Nor is there any new allegation in the SAC that would resuscitate Plaintiffs' "competitive standing" theory as to the Campaign. Under *Bognet*, the Campaign must show that "counting more timely cast votes would lead to a *less* competitive race," "that a greater proportion of [defective] mailed ballots" would be cast for President-elect Biden, and that "such votes" were cast in "sufficient … number[s] to change the outcome of the election to [Trump's] detriment." 2020 WL 6686120, at *8. The SAC adds no allegation that supports a reasonable inference that any of these things is true. Plaintiffs offer, at most, a conclusory assertion that they "*believe*[] that statistical analysis will evidence that over 70,000 mail and other mail ballots which favor Biden were improperly counted." APP380, SAC ¶ 18 (emphasis added); *see also* Brief at 18. But Plaintiffs plead no facts that turn their "belief" into a plausible allegation. Plaintiffs thus cannot establish that the ballots they sought to exclude were cast in "sufficient ... number[s] to change the outcome of the election to [Trump's] detriment," 2020 WL 6686120, at *8. For this reason as well, the SAC fails to plausibly allege injury-in-fact and therefore amendment would be futile.

Finally, Plaintiffs' claim concerning the placement of canvassing observers also fails as an equal-protection claim for the same reason as the flawed claim that the Campaign previously asserted against counties' use of unstaffed ballot drop

boxes. *See Trump for President*, 2020 WL 5997680, at *42. Plaintiffs attempt to string together an equal-protection theory by speculating that unlawful ballots were counted as a result of observer placement, which, they claim, caused their votes to be diluted. But the Pennsylvania Supreme Court has now held that Defendants *should* have counted the primary category of mail ballots that Plaintiffs challenge—ballots whose outer envelope was missing a handwritten name, address, or date. DNCAPP235. And beyond that category of ballots, Plaintiffs offer no factual support for the speculation that *any* ballots were allowed to be counted because their observers were not hovering near the canvassers. The SAC would have to be dismissed for that reason alone.

B. Plaintiffs' Second Amended Complaint did not state a due-process violation.

Plaintiffs seek to amend their complaint to add due-process claims based on two sets of allegations: (1) Defendants violated Pennsylvania's poll-observer requirements; and (2) some counties (Defendants here) gave voters the opportunity to cure deficient mail-in ballots, while other counties (where Plaintiffs voted) did not. None of the due-process claims in the SAC (Counts I, VI, and VII) would state a viable claim for relief. Amendment to add those claims would therefore be futile.

1. There is no constitutional right to poll observers.

Plaintiffs allege in Counts I and VII that Defendants violated the Pennsylvania Election Code by establishing minimum requirements for poll observers and by

requiring them to maintain distance from canvassers. But "[t]o prevail on a substantive due process claim challenging a state actor's conduct, 'a plaintiff must establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment's due process protection applies.'" *Hill v. Borough of Kutztown*, 455 F.3d 225, 234 n.12 (3d Cir. 2006). And Plaintiffs point to no liberty or property interest that is protected by the Due Process Clause. Courts have repeatedly held, for example, that "there is no individual constitutional right to serve as a poll watcher." *Trump for President*, 2020 WL 5997680, at *67 (quoting *Pa. Democratic Party*, 238 A.3d at 385); *see also Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984) ("While it would be desirable for each candidate to have persons looking out for his interests at the poll, we are not persuaded that this interest is a vital one for constitutional access to the voting process."); *Dailey v. Hands*, No. 14-00423-KD-M, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983).[8]

[8] Plaintiffs appear to assert substantive (rather than procedural) due-process claims, and so they cannot rely on any state-law-created interest. As this Court has explained, "substantive due process claims do not arise out of state-created liberty interests." *Steele v. Cicchi*, 855 F.3d 494, 501 (3d Cir. 2017). Even if Plaintiffs did raise procedural claims, however, those claims would fail. The Pennsylvania Supreme Court has held that local election boards have broad discretion to "protect the security and privacy of voters' ballots, as well as safeguard [their] employees and others who would be present during a pandemic for the pre-canvassing and canvassing process," as long as one authorized representative of each campaign is permitted to "remain in the room" where the canvassing occurs. *In re Canvassing Operation*, 2020 WL 6747895, at *8.

Plaintiffs similarly have failed to connect the challenged conduct to a constitutionally protected interest in any other way. The appointment of poll watchers is generally a "prophylactic measure[] designed to prevent election fraud"—and "a matter for consideration by state legislatures." *Harris v. Conradi*, 675 F.2d 1212, 1216 n.10 (11th Cir. 1982). "[T]he Constitution does not require the states to take steps to remedy a constitutional infirmity which does not exist," *id.*, so the only way for Plaintiffs to allege a plausible due-process violation regarding poll observers would be to allege an underlying violation of a constitutional right.

Plaintiffs have not done so. They propose to allege that Defendants excluded observers "to conceal their decision not to enforce requirements that declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes," with the alleged ultimate objective being "to count absentee and mail ballots that should have been disqualified." APP 465, SAC ¶ 252. But many of the possible deficiencies that they propose to allege were not deficiencies even under Pennsylvania law, much less under the U.S. Constitution. As noted above, for example, the Pennsylvania Supreme Court has held that "the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity

has been alleged." *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 31 EAP 2020, slip op. at 2 (Pa. 2020).

More generally, the SAC still does not approach even the bare minimum necessary to plead fraud or irregularities in counting the ballots. Although Plaintiffs would allege that lack of observers *could* have allowed ballots to be counted that were cast without secrecy envelopes, with incomplete declarations, or after being delivered improperly, the SAC contains no factual allegations that would allow a court to reasonably infer that any such ballots were in fact counted. Instead, Plaintiffs rely on highly generalized assertions about widespread fraud—which are not enough to satisfy the basic pleading requirement of Rule 8, much less the requirement of pleading fraud with particularity under Rule 9(b). *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also Hartmann v. Moore*, 547 U.S. 250 (2006) (stressing the "presumption of regularity" that attends official action).

Other courts—presented with similarly evidence-free fraud claims—have rejected such claims. The Pennsylvania Supreme Court, for example, recently concluded that allegations of "heightened election fraud involving mail-in voting … are unsubstantiated" and "specifically belied" by data from elections officials. *Pa. Democratic Party*, 238 A.3d at 385. Another federal court in Pennsylvania similarly rejected such fraud claims recently as "speculative," because "[a]t most, they have pieced together a sequence of uncertain assumptions." *Trump for President*, 2020

WL 5997680, at *2. And a third court has explained (in a case brought by the Campaign) that although "[c]entral to some of the Plaintiffs' claims is the contention that the upcoming election, both nationally and in Montana, will fall prey to widespread voter fraud," the "evidence suggests … that this allegation, specifically in Montana, is a fiction." *Donald J. Trump for President, Inc. v. Bullock*, --- F. Supp. 3d ---, 2020 WL 5810556, *1 (D. Mont. Sept. 30, 2020).[9] This Court should recognize, as well, that Plaintiffs' claims are without substance and therefore that amendment would be futile.

2. Notice-and-cure procedures do not create a significant disenfranchisement.

Plaintiffs' proposed allegations regarding some counties' notice-and-cure procedures (Count VI) also fail to state a viable due-process claim. Putting aside Plaintiffs' irresponsible use of rhetoric about "scheme[s]" and "intentional and purposeful discrimination"—which, like their fraud allegations discussed above, are completely lacking in any factual support—Plaintiffs claim, at most, that some counties in the Commonwealth were more solicitous than others in ensuring that

[9] *See also Donald J. Trump for President, Inc. v. Way*, 2020 WL 5912561, at *13 (D.N.J. Oct. 6, 2020) (finding no evidence that New Jersey's mail ballot law would lead to election fraud, including no evidence whatever of "voter fraud resulting from ballots cast after Election Day"); *Harding v. Edwards*, No. CV 20-495-SDD-RLB, 2020 WL 5543769, at *10 (M.D. La. Sept. 16, 2020) (defendants' evidence of voter fraud is "woefully inadequate … they offer not a scintilla of evidence of fraud associated with voting by mail in Louisiana"); *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1112 (D. Kan. 2018) (seeing "scant evidence of noncitizen voter fraud").

mail-in voters would not have their ballots discarded because of technical defects. But Plaintiffs fail to explain how the Defendant Counties' steps to ensure that other (non-party) voters were *not* denied the right to vote could have deprived *Plaintiffs* of due process. As explained, the Voter Plaintiffs were not denied *anything* by Defendants; if their ballots were set aside, that was entirely due to conduct taken by other counties. And the Campaign fails to explain how *ensuring* that someone can vote could deprive it of due process. The Constitution does not include a right to deny someone else the right to vote.

More generally, the Constitution "d[oes] not authorize federal courts to be state election monitors," *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980); *see also Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020). Even if this minor kind of local deviation contravened state law—and here it does not—"garden variety election irregularities do not violate the Due Process Clause." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). It is only where "a pervasive error … undermines the integrity of the vote" that the Constitution is implicated. *Id.* At a minimum, a plaintiff claiming a violation of due process must allege "*significant disenfranchisement* that results from a change in the election procedures." *Id.* at 1227 (emphasis added).

Applying these principles, courts have rejected due-process claims based on malfunctioning voting machines, *Hennings v. Grafton*, 523 F.2d 861, 864-65 (7th

Cir. 1975); miscounting votes and delayed arrival of ballots, *Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996); mistakenly allowing non-party members to vote in a congressional primary, *Powell v. Power*, 436 F.2d 84, 85 (2d Cir. 1970); an allegedly inadequate state response to illegal cross-over voting, *see Curry v. Baker*, 802 F.2d 1302, 1316 (11th Cir. 1986); mechanical and human errors when tallying votes, *see Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986); technical inadequacies in printing ballots, *see Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983); and unintentionally misclassifying all votes at several precincts, resulting in the wrong candidate being declared the winner, *see Gamza*, 619 F.2d at 451. Indeed, the Fifth Circuit rejected a due-process claim based on a bevy of absentee-ballot irregularities, including "complaints about missing signatures, ballots that should have been mailed rather than hand-delivered, and six fraudulent votes"—even though the contested ballots were enough to decide the election. *Welch v. McKenzie*, 765 F. 2d 1311, 1317 (5th Cir. 1985); *see also id.* (deeming these "garden variety" issues).

Far more serious impropriety is needed to rise to the level of a due-process violation—as in, for example, *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). There, one candidate induced hundreds of voters to fill out absentee ballots fraudulently, with the deliberate assistance of state election officials. *Id.* at 877-78. Such conduct amounted to a substantive-due-process violation, this Court held, because there was

"ample record support[] that the wrongdoing was substantial, that it *could* have affected the outcome of the election, and that it rendered the certified vote count an unreliable indicator of the will of the electorate." *Id.* at 886-87.

The allegations here are entirely dissimilar. As explained below, Plaintiffs are wrong that any of the procedures they challenge violated any state law. But even if they were right, their allegations would amount to (at worst) no more than "garden variety irregularities." Plaintiffs have certainly not alleged "significant disenfranchisement," *Bennett*, 140 F.3d at 1227—whether based on a vote-dilution theory or otherwise; indeed, they have not alleged any disenfranchisement at all, because no one was denied the right to vote by any of Defendants' alleged actions. Nor have Plaintiffs alleged intentional, official action to tip the scales for one candidate, as in *Marks*, *see* 19 F.3d 873. Rather, they allege only that the Secretary encouraged counties to protect the franchise by enacting notice-and-cure procedures. That some non-party counties chose not to heed this advice does not render Defendants' conduct unconstitutional. This Court should refuse to constitutionalize Plaintiffs' (unsupported) state-law-based grievances.[10]

[10] The Pennsylvania Supreme Court recently held that "the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." DNCAPP236. Thus, it is unclear what supposedly unlawful ballots Plaintiffs' observers needed to see in the Defendant Counties, or that the closer placement of observers could have led to the counting of fewer such ballots.

C. Plaintiffs' Second Amended Complaint did not state an equal protection violation.

The SAC's equal-protection claims would likewise fail to state a plausible claim, making any amendment futile. The SAC makes only two overarching changes to the FAC's equal-protection allegations. *First*, it revives allegations that Defendants violated the Equal Protection Clause by requiring observers to stand farther from canvassers than some other counties did—a theory the district court already rejected. APP94. (The SAC also adds summary allegations regarding Defendants' notification procedures (¶¶ 237-38) that are indistinguishable from allegations the district court rejected.) *Second*, the SAC relabels the observer-placement practice and notification and ballot-canvassing procedures Plaintiffs already challenged, characterizing them as part of a "scheme" to favor President-elect Biden by preventing Republican canvassing observers from detecting the tabulation of "unlawful" ballots. Neither change creates a viable equal-protection claim.

1. Plaintiffs allege in the SAC that Defendants sought "to … exclud[e] Republican and Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce requirements that the declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes as required by" Pennsylvania statute. SAC ¶ 222. But the district court

already addressed that claim, and explained that it has no substance as an equal-protection theory. APP94.

Moreover, it is not clear what is left of this claim after the Pennsylvania Supreme Court's recent decisions. Last week, the court upheld Defendant Philadelphia County's placement of poll observers that Plaintiffs challenge as unlawful. *In re Canvassing Observation*, No. 30 EAP 2020, 2020 WL 6737895, at *7-9 (Pa. Nov. 17, 2020). And more recently, the court held that "failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope … do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters." *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. J-118A-2020-J-118F-2020, at *34. Thus, it is not clear what unlawful ballots Plaintiffs claim observers needed to be able to spot, or that the closer placement of observers could have led to the counting of fewer such ballots. In other words, because "Plaintiffs' … theory is that by the Secretary [and Defendant Counties] violating state law, unlawful votes are counted and thus lawfully cast votes are diluted[,] … a necessary predicate for th[is] constitutional claim[]" is the unlawfulness of counting certain ballots. *Trump for President*, 2020 WL 5997680, at *52-53. Defendants' challenged procedures could only have led to the unobserved counting of *lawful* votes, and therefore, they cannot have violated equal protection.

Plaintiffs' equal-protection allegations also fail to state a claim under the *Anderson-Burdick* balancing test that this Court applies to equal-protection claims challenging state election rules, *see Rogers v. Corbett*, 468 F.3d 188, 193 (3d Cir. 2006). *Anderson-Burdick* creates a "flexible standard," which recognizes that "[e]lection laws will invariably impose some burden upon individual voters," and that not all such burdens are unconstitutional. *Burdick v. Takushi*, 504 U.S. 428, 433-434 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under that standard, when—as here—voting rights are subjected only to "reasonable, nondiscriminatory restrictions, … the State's important regulatory interests are generally sufficient to justify" the restriction. *Burdick*, 504 U.S. at 434. As explained above, Plaintiffs allege nothing to suggest that Defendants applied their limitations on canvassing observers in a discriminatory, unequal, or otherwise unreasonable fashion.

Defendants' observer-placement regulations were also reasonably calibrated to serve strong state interests—as the Pennsylvania Supreme Court recently stressed in upholding Philadelphia County's canvassing regulations "based on [each board of elections'] careful consideration of how it could best protect the security and privacy of voters' ballots, as well as safeguard its employees and others who would be present during a pandemic for the pre-canvassing and canvassing process, while, at the same time, ensuring that the ballots would be counted in the most expeditious

manner possible." *In re Canvassing Observation*, 2020 WL 6737895, at *8. Indeed, public-health considerations readily justify some counties' decisions to require distancing between canvassing observers and local election officials. After all, "COVID-19 has spread to every corner of the globe, including Pennsylvania, and jeopardized the safety and health of many people." *Trump for President*, 2020 WL 5997680, at *10 (citations omitted). As the U.S. Centers for Disease Control and Prevention ("CDC") has explained, the two greatest risk factors in transmission of COVID-19 are the distance from and duration of exposure to an infected person.[11] The CDC accordingly encouraged election officials to "[m]odif[y] layouts and procedures," "ensur[ing] sufficient space for social distancing and other measures," and "identify[ing] larger facilities for use as future polling places."[12] Defendants should not be penalized for following that expert guidance to protect the health of election workers—as well as the health of the canvass observers themselves. Defendants' "interests in protecting . . . health and safety . . . in light of the COVID-19 pandemic far outweigh any burden on Plaintiffs' right to vote, particularly when that burden is premised on a speculative claim of voter fraud resulting in dilution of votes." *Paher v. Cegavske*, 457 F. Supp. 3d 919, 922 (D. Nev. 2020); *see also Nemes*

[11] CDC, *Polling Locations and Voters* (Oct. 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.
[12] *Id.*

v. Bensinger, No. 3:20-CV-407-CRS, 2020 WL 3402345, at *13 (W.D. Ky. June 18, 2020) (Kentucky's interest in "provid[ing] for a free and fair election while attempting to minimize the spread of COVID-19" was a "sufficiently weighty" interest to justify "modest burden" of closing some polling locations).

Defendants also have an independent interest, as this Court has recognized, in ensuring the "orderly and efficient administration of elections." *Libertarian Party of Pa. v. Governor of Pa.*, 813 F. App'x 834, 835 (3d Cir. 2020). The decisions of large counties to have vote canvassers stand in rows and to prohibit observers from freely circulating in the canvassing area serves those jurisdictions' "interests in efficiently allocating [their] election resources and administering elections in an orderly manner," which outweighs any minimal burden on Plaintiffs' rights. *Mays v. LaRose*, 951 F.3d 775, 783 (6th Cir. 2020); *see also Harlan v. Scholz*, 866 F.3d 754, 755-56 (7th Cir. 2017) (upholding law that gave "more options for same-day registration and voting for residents of counties with populations of 100,000 or more than it does for those who live in smaller counties"). Finally, Defendants have a strong interest in protecting voter privacy and ballot security—both of which would be ill-served by allowing observers to be in close proximity to canvassers, where they could introduce additional ballots and distort the count, tamper with election machinery, interfere with or intimidate election workers, or view outer declaration envelopes that contain voters' personal information. *See, e.g.*, *Fusaro v. Howard*,

2020 WL 3971767, at *20 (D. Md. July 14, 2020) (recognizing voter privacy as a state interest sufficient to justify burdening access to election information).

2. Plaintiffs also cannot salvage their challenge to Defendants' observer-placement practices—or to any other mail-ballot-canvassing practice—by characterizing those practices as a "scheme" to help Vice President Biden by counting unlawful ballots. Plaintiffs made the substance of these same arguments in their briefing below. Plaintiffs now simply add (for instance) the phrase "in order to favor Biden over Trump" at the end of a series of allegations concerning Plaintiffs' allegedly unlawful conduct. *See* SAC ¶¶ 117, 139; *see also id.* ¶ 156, 162, 163 (adding allegations that challenged procedures were "designed to favor Biden over Trump"). That sort of conclusory accusation, without any supporting factual assertions, falls far short under Rule 12(b)(6), because "[w]here a complaint pleads facts that are 'merely *consistent* with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft*, 556 U.S. at 678 (emphasis added). And those threadbare allegations are certainly insufficient to satisfy Rule 9(b), which would apply to any theory grounded in fraud.

D. Plaintiffs' Second Amended Complaint sought unconstitutional remedies that would have resulted in widespread disenfranchisement.

The district court properly concluded Plaintiffs sought an unconstitutional remedy, and its order should be affirmed because Plaintiffs' SAC seeks the exact

same relief and any amendment would be futile. Contrary to their assertions otherwise, Appellants continue to seek the exact same unconstitutional, disproportionate, and disconnected relief they sought in the now-dismissed FAC that Judge Brann found "the Court has no authority" to issue. *Trump for President*, 2020 WL 6821992, at *12; *see Goldfish Shipping, S.A. v. HSH Nordbank AG*, 623 F. Supp. 2d 635, 636 (E.D. Pa. 2009), *aff'd*, 377 F. App'x 150 (3d Cir. 2010) (denying leave to file SAC that "essentially seeks the same relief as was sought in the [FAC]."); *Carson v. Willow Valley Communities*, No. 5:17-CV-2840, 2018 WL 827400, at *5 (E.D. Pa. Feb. 12, 2018), *aff'd*, 789 F. App'x 310 (3d Cir. 2019) (finding amendment of claim futile where the amended complaint "presents the same claim and seeks the same relief").

Plaintiffs again request that a federal court disenfranchise and ignore the choices of millions of voters in Pennsylvania who cast their ballots during the November general election. Plaintiffs' SAC asks the court to "prohibit[] Defendants from certifying the results of the 2020 presidential general election in Pennsylvania on a statewide basis," APP482, SAC ¶325, and instead certify the presidential election results after discarding the votes of some unknown number of qualified Pennsylvania voters, *id*. ¶326. *Compare* APP482, SAC ¶¶325-326 *with* APP253, FAC, Prayer for Relief, (i)-(ii) (seeking same relief). Indeed, instead of remedying the court-identified deficiencies in their relief sought, and contrary to their claim that

they are "not seeking to disenfranchise 6.8 million Pennsylvanians," Brief at 29, Plaintiffs' SAC *added* an alternative request to disenfranchise all Pennsylvanians by discarding their votes and instead "providing for the Pennsylvania General Assembly to choose Pennsylvania's [presidential] electors." APP482, SAC ¶327. The requested relief, regardless of Plaintiffs' efforts to minimize it, remains both unconstitutional and unhinged from their alleged injuries in the SAC.

Plaintiffs speculate that "[t]he Court [] misconstrued the remedy sought, which may have affected its view of amendment," Brief at 29, but it is Plaintiffs who misunderstand the infirmities with their requested relief. While the number of Pennsylvanians Plaintiffs seek to disenfranchise is breathtaking whether it is all 6.8 million voters or just "tens of thousands," of voters, Brief at 4, Plaintiffs' singular focus on the number of disenfranchised voters misses the point. The incurable defect with Plaintiffs' requested relief is that the "[c]ourt has no authority to take away the right to vote of even a single person." *Trump for President*, 2020 WL 6821992, at *13. In other words, whether Plaintiffs seek to disenfranchise all Pennsylvania voters or just "tens of thousands" of voters in the Commonwealth, their requested relief is unconstitutional, and amending the complaint would be futile.

Plaintiffs fundamentally misunderstand the relationship between the rights they seek to assert and the remedy they claim should be awarded. *Id.* at *12. "A

plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). As the district court aptly explained:

> a court may not prescribe a remedy unhinged from the underlying right being asserted. By seeking injunctive relief preventing certification of the Pennsylvania election results, Plaintiffs ask this Court to do exactly that. Even assuming that they can establish that their right to vote has been denied, which they cannot, Plaintiffs seek to remedy the denial of their votes by invalidating the votes of millions of others. Rather than requesting that their votes be counted, they seek to discredit scores of other votes . . . .

Id. In the SAC, Voter Plaintiffs again claim that they were denied the right to vote by their respective counties, who are not Defendants in this case. *See, e.g.*, APP461, SAC ¶ 237 (alleging Voter Plaintiff Henry's vote was rejected by Lancaster County). Ignoring that the "simple answer is that their votes would be counted," Plaintiffs again ask the court to disenfranchise other Pennsylvanians. *Id.* at *13; *see* APP482, SAC ¶¶325-327; *see also Gill*, 138 S. Ct. at 1934. But "[t]his is simply not how the Constitution works." *Trump for President*, 2020 WL 6821992 at *12. Such a remedy is "impermissible" because a court may not "remedy discrimination by striking down a benefit,"—here, the right to vote—"that is constitutionally guaranteed." *Id.* As the Supreme Court has repeatedly reaffirmed, the right to vote is "fundamental" under the Constitution "because [it is] preservative of all rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("all qualified voters have a constitutionally protected right to vote and to have their votes counted") (citations omitted). Infringing Pennsylvanians' fundamental right to vote

"would necessarily violate the Constitution," and "[i]t is not in the power of [a] [c]ourt to violate the Constitution." *Id.* at *13. Instead of remedying these deficiencies in their SAC, Plaintiffs double down, seeking the exact same unconstitutional relief (and more) once again; allowing Plaintiffs to file their SAC would thus be futile, and the district court's order should be affirmed.[13]

Federal courts have taken the drastic measure of enjoining the certification of election results *only* where the election was fundamentally unfair. *Stein*, 223 F. Supp. 3d at 438 (collecting cases); *cf. Bognet*, 2020 WL 6686120, at *11 ("It was not intended by the Fourteenth Amendment … that all matters formerly within the exclusive cognizance of the states should become matters of national concern." (citation omitted)). There must be "a pervasive error" and "significant disenfranchisement" that "undermines the integrity of the vote," *Bennett v. Yoshina*, 140 F.3d 1219, 1226-27 (9th Cir. 1998). But Plaintiffs' SAC, like their FAC, fails to allege such circumstances. 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, such that

[13] Plaintiffs also again seek only to enjoin certification of the presidential election results, *e.g.*, APP482, SAC ¶325, despite alleging that entire ballots were purportedly "invalid." Here too, the same infirmity exists: "even if it were logically possible to hold Pennsylvania's electoral system both constitutional and unconstitutional at the same time, the [district court] would not do so." *Trump for President*, 2020 WL 6821992 at *12, n.118. Plaintiffs SAC also fails to remedy this defect.

this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens." *Trump for President*, 2020 WL 6821992, at *1. But "[t]hat has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations." *Id.* The SAC does not, and cannot, remedy these deficiencies.

Even if the allegations in Plaintiffs' SAC were true (they are not), and there were incidents in which the election laws were violated—not by voters but by election workers—this occurrence could not possibly justify widescale disenfranchisement of Pennsylvanians. Just this month, when litigants in Michigan asked a court to do precisely what Plaintiffs ask here—to stop certification of election results under state law—the court refused to do so, concluding "[i]t would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. The Court cannot defy a legislatively crafted process." DNCAPP279. Similarly, the Northern District of Georgia flatly refused to enjoin Georgia election officials from certifying results, concluding that "[t]o interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways. Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise of over one million Georgia voters." *Wood*

v. Raffensperger, No. 1:20-cv-04651-SDG, Dkt. 54 (N.D. Ga. Nov. 20, 2020). Plaintiffs' SAC does not overcome these fundamental issues.

Separately, Plaintiffs again request the same right to conduct an audit of the 1.5 million mail ballots cast in Defendant Counties, Brief at 6-7, 23, *after* the certification deadline, despite only vague and confounding allegations of coordinated fraud. Their unprecedented request is simply an end run around the Commonwealth's election contest procedures—a remedy that is available to them under Pennsylvania law, *see* 25 P.S. § 3456, but requires petitioners to bring forth affidavits and point to specific evidence demonstrating why the election was illegal, *id.* § 3457—a burden Plaintiffs clearly cannot carry.[14] Plaintiffs' speculative allegations as to errors or fraud does not suffice. In *Pfuhl v. Coppersmith*, for example, the petitioner sought to amend his election contest petition and "speculate[d] that a pervasive recount of all such previously unrecounted boxes would yield proportionate errors, and result in [contestant's] election." 253 A.2d 271, 275 (Pa. 1969). The Pennsylvania Supreme Court rejected the petitioner's request, explaining, "[t]he court will not grope in the dark, or follow a contestant on

[14] Federal courts have also generally intervened only where there was not an adequate state law remedy to challenge election irregularities. *See González-Cancel v. Partido Nuevo Progresista*, 696 F.3d 115, 120 (1st Cir. 2012); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). Here, Pennsylvania has well developed recount and election contest procedures.

a fishing expedition, in the hope of being able to find enough to enable him by the investigation to make out his case." *Id.* (citation omitted). This is exactly what Plaintiffs again seek through their SAC, and this fishing expedition must end as any further amendment would be futile.

CONCLUSION

The district court's order denying leave to amend should be affirmed.

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Respectfully submitted,

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Dated: November 24, 2020

CERTIFICATE OF SERVICE

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

s/ Uzoma N. Nkwonta

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