No. 20-3371

In the United States Court of Appeals for the Third Circuit

DONALD J. TRUMP FOR PRESIDENT, INC.; LAWRENCE ROBERTS; and DAVID JOHN HENRY,

Plaintiffs-Appellants,

v.

KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania; ALLEGHENY COUNTY BOARD OF ELECTIONS; CENTRE COUNTY BOARD OF ELECTIONS; CHESTER COUNTY BOARD OF ELECTIONS; DELAWARE COUNTY BOARD OF ELECTIONS; MONTGOMERY COUNTY BOARD OF ELECTIONS; NORTHAMPTON COUNTY BOARD OF ELECTIONS; and PHILADELPHIA COUNTY BOARD OF ELECTIONS,

Defendants-Appellees,

DEMOCRATIC NATIONAL COMMITTEE; NAACP PENNSYLVANIA STATE CONFERENCE; COMMON CAUSE PENNSYLVANIA; LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; BLACK POLITICAL EMPOWERMENT PROJECT; LUCIA GAJDA; STEPHANIE HIGGINS; MERIL LARA; RICHARDO MORALES; NATALIE PRICE; TAYLOR STOVER; JOSEPH AYENI; TIM STEVENS,

Intervenor Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania in Case No. 4:20-cv-2078-MWB, Judge Matthew W. Brann

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ANSWERING BRIEF OF APPELLEES ALLEGHENY COUNTY BOARD OF ELECTIONS, CHESTER COUNTY BOARD OF ELECTIONS, MONTGOMERY COUNTY BOARD OF ELECTIONS, AND PHILADELPHIA COUNTY BOARD OF ELECTIONS

November 24, 2020

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INTRODUCTION

Plaintiffs-Appellants Donald J. Trump for President, Inc. and two individual voters (collectively, the "Trump Campaign" or "Plaintiffs") have no argument to show Article III standing and have not offered even a modicum of factual or legal support for their gambit to stop certification of Pennsylvania's election. Instead, the Trump Campaign seeks to needlessly draw out this futile litigation by asserting the right to reinstate meritless claims they excised and abandoned in the District Court in a well-publicized effort to undermine this election and, ultimately, democracy itself. The Trump Campaign's *third* complaint in a matter of ten days will not cure the lack of jurisdiction, scarcity of evidence, or want of a viable constitutional claim. And now that the Pennsylvania vote is certified, any claim to enjoin certification is moot.

From the start, the Trump Campaign's lawsuit was devoid of well-pled facts and unhinged from cognizable legal claims that could justify the extraordinary remedy of enjoining county and state-wide certification of Pennsylvania's election—a result that would disenfranchise all Pennsylvania voters who legally cast ballots. Throughout, Plaintiffs proceeded by speculative and unsubstantiated accusations, constitutional theories previously considered and rejected by this Court, and Pennsylvania Election Code issues definitively resolved against them by the Pennsylvania Supreme Court. All the while, the Trump Campaign alternately sought

expedition or delay to gain procedural advantage and to avoid court review of the merits of their deficient pleadings, culminating in their final request to file a Second Amended Complaint that would have put the matter back to square one only days before the Commonwealth's certification deadline. It was against *that* backdrop that the District Court cut the antics short, dismissed the Amended Complaint with prejudice, and found it would constitute undue delay to allow futile amendments at such a late stage of the election process.

The Trump Campaign now invokes Federal Rule of Civil Procedure 15 to claim it should have been permitted to amend and reinstate its original flawed claims. Meanwhile, it leaves unrebutted (and thus conceded) the District Court's finding that its lawsuit is deficient. Such circular procedural tactics only seek to avoid court review of their baseless claims and to prolong inevitable dismissal. That is not how the Rule 15 is supposed to operate—particularly in the context of "emergency" litigation that implicates the constitutional rights of millions of voters.

Resort to Rule 15 does not obscure the fundamental flaws that led the District Court to properly dismiss the Amended Complaint with prejudice—a further amendment would have gotten the Trump Campaign nowhere. For one, amendment would not cure Plaintiffs' lack of Article III standing to enjoin the now-certified election results—a conclusion that is unavoidable in light of this Court's precedential decision in *Bognet v. Sec'y of Commonwealth of Pa.*, — F.3d —, No.

20-3214, 2020 WL 6686120, at *7 (3d Cir. Nov. 13, 2020); App72-83. Stunningly, Plaintiffs fail to even *cite* that opinion, issued only *ten days* before this appeal. The proposed Second Amended Complaint does not contain even a flicker of a constitutional claim.

As a result, both futility and undue delay bar Plaintiffs from resorting to Federal Rule of Civil Procedure 15 to reprise the same losing arguments the District Court rejected and that are otherwise plainly foreclosed. The District Court rejected Plaintiffs' feeble effort to replead and dismissed their lawsuit with prejudice, in part, because of the pressing need to move on with counting and certifying Pennsylvania's votes. This Court should summarily affirm and reject Plaintiffs' baseless effort to undermine this election.

STATEMENT OF THE ISSUES

1. Whether this appeal seeking to enjoin the Secretary of the Commonwealth and the County Boards from certifying the presidential election is moot now that the County Boards and the Secretary have certified the election.

2. Whether this Court should affirm the District Court's order dismissing the Amended Complaint for lack of jurisdiction because the Trump Campaign and Individual Voters lack Article III standing to seek the extraordinary remedy of enjoining certification of Pennsylvania's election.

3. Whether the District Court acted within its discretion by dismissing the

Trump Campaign's Amended Complaint with prejudice and denying the Trump Campaign's motion for leave to amend, where further amendment would have been futile and prejudicial, and the motion was unduly delayed and filed with a dilatory motive.

STATEMENT OF JURISDICTION

The Trump Campaign's claims arise under federal law within the meaning of 28 U.S.C. § 1331, and the District Court's order is final and appealable within the meaning 28 U.S.C. § 1291. But the District Court correctly concluded that it lacked jurisdiction because Plaintiffs do not have Article III standing to pursue their claims. App72-83.

STATEMENT OF THE CASE

A. Factual Background

As noted by the District Court, "Pennsylvania regulates the times, places, and manner" of its elections through the Pennsylvania Election Code. App63 (internal quotations omitted). Pennsylvania's Constitution mandates that "[e]lections shall be free and equal." *Id*. In October 2019, the Pennsylvania General Assembly enacted Act 77, which extended the opportunity for all registered voters to vote by mail. App64 (citing *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020)); *Bognet*, 2020 WL 6686120, at *2 (discussing Act 77).

Since its enactment in 1937, the General Assembly has authorized a "county-

based scheme to manage elections within the state, and consistent with that scheme the legislature endeavored to allow county election officials to oversee a manageable portion of the state in all aspects of the process." *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 409 (E.D. Pa. 2016); *accord Donald J. Trump for President, Inc. v. Boockvar*, — F. Supp. 3d —, No. 20-cv-966, 2020 WL 5997680, at *9 (W.D. Pa. 2020) (citing 25 P.S. § 2641(a)). As part of this delegated authority, "[t]he Election Code vests county boards of elections *with discretion to conduct elections and implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania's elections*." *Boockvar*, 2020 WL 5997680, at *9 (citing 25 P.S. §§ 2641(a), 2642(g)) (emphasis added). It is wholly permissible—and expected—that counties will "employ entirely different elections procedures and voting systems within a single state." *Id.* at *44; *see In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 29 WAP 2020, 2020 WL 6866415 (Pa. Nov. 23, 2020).

B. The Presidential Election

Due to the coronavirus pandemic and Act 77, the rate of mail-in voting was significantly higher in 2020 than in previous years. App66. And, on November 3, 2020, millions more Pennsylvania voters cast ballots through the mail than at their local polling places. *Id.* When the votes were counted, President-elect, Joseph R. Biden Jr., and his running-mate, Kamala D. Harris, won the presidential election in

Pennsylvania by a margin of more than 80,000 votes. *Id.* Philadelphia and other counties certified their election results on November 23, 2020. The Commonwealth certified the election results on November 24, 2020.[1]

C. Plaintiffs' Allegations

The Trump Campaign has asserted violations of the due process, equal protection, and Elections and Electors clauses based on two claims.

First, the Trump Campaign alleged that the lack of meaningful access to canvassing activities by Republican-affiliated poll watchers led to the counting of "illegal" mail-in and absentee ballots that did not comply with the requirements in the Election Code. The poll-watcher claims were set forth in Counts I-III of the Complaint, App164-75 ¶¶ 159-202, abandoned in the Amended Complaint, and identically realleged in the proposed Second Amended Complaint. *See* App438-54 ¶¶ 166-220. The proposed Second Amended Complaint also sought to collaterally attack the Pennsylvania Supreme Court's decision in *In re Canvassing Observation Appeal of City of Phila. Bd. of Elections*, — A.3d —, No. 30 EAP 2020, 2020 WL 6737895, at *8-9 (Pa. Nov. 17, 2020), which held that authorized representatives

[1] Commonwealth of Pennsylvania, Pennsylvania Pressroom, *Department of State Certifies Presidential Election Results*, Nov. 24, 2020, *available at* https://www.media.pa.gov/pages/State-details.aspx?newsid=435 ("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. The certificate was submitted to the Archivist of the United States.").

only may be present in the canvassing room *without* setting a minimum distance between the representative and canvassing activities. *See* App469-83 ¶¶ 264-323 (Counts VII-IX).

Second, the Trump Campaign alleged that because some Counties notified mail-in and absentee voters that deficiencies in their ballots would not permit them to be counted under the Election Code, and they claimed a "patchwork of different rules from county to county and as between similarly situated absentee and mail-in voters arose." *See* App177-78 ¶ 209; App249 ¶ 156; App460 ¶ 235. Plaintiffs claimed that this alleged "disparate" treatment disenfranchised those citizens who did not live in a county providing such "notice and cure." *See* App178 ¶¶ 211-12; App249 ¶¶ 158-59; App435-36 ¶¶ 237-38. From the original Complaint to the proposed Second Amended Complaint, Plaintiffs did not set forth any new factual allegations plausibly pleading their standing to bring this action or a constitutional violation.

D. Procedural History

The District Court's description of the procedural history of this case as "tortured" is an understatement, with Plaintiffs making "multiple attempts at amending the pleadings" over the course of ten days and having a slew of "attorneys both appear and withdraw in a matter of seventy-two hours." App67; *see* App67-70 (overview of procedural history).

Despite insisting that there was a "need for emergency judicial intervention" (App162), the Trump Campaign waited until November 9, 2020, six days after the election, to commence this action[2] and spent the ensuing weeks steadfastly avoiding the merits of their "emergency" claims. The Trump Campaign named Secretary Boockvar and seven Pennsylvania County Boards of Elections—the Boards of Elections of Allegheny, Centre, Chester, Delaware, Montgomery, Northampton, and Philadelphia Counties.[3] Through their initial Complaint, the Trump Campaign sought an "emergency order prohibiting" the County Boards and the Commonwealth "from certifying the results of the General Election." App110 ¶ 15. Although the Trump Campaign sought that relief in its pleading, it did *not* seek a TRO or preliminary injunction at the time.

The next day, the District Court held a telephonic status conference with the parties to schedule future proceedings and issued an expedited briefing schedule commensurate with the Trump Campaign's claims of emergency. App67-68. The Court also set aside a date shortly after the culmination of briefing for oral argument on Defendants' motions to dismiss, as well as a separate date several days later for

[2] Rather than promptly filing suit, the Trump Campaign's counsel in this action held a widely viewed press conference—at the Four Seasons (Total Landscaping) in Philadelphia—forecasting the Campaign's litigation strategy and explaining that this lawsuit would be filed in the future.

[3] Even though "Individual Plaintiffs' ballots were rejected by Lancaster and Fayette Counties," neither County Board of Elections is a party to this case. App76.

an evidentiary hearing (if necessary). *Id.* In compliance with that schedule, Secretary Boockvar, the County Boards, and the intervenor defendants promptly moved to dismiss the Complaint in its entirety. App46-49 (ECF Nos. 81, 85, 86, 90, 92-98, 105). It was not until November 12—three days after filing this action and nine days after the election—that the Trump Campaign moved to preliminarily enjoin certification of the election, while attempting to downplay this extraordinary request as merely "a brief pause to allow Plaintiffs time to confirm their well-founded theory that Pennsylvania election officials counted tens of thousands of invalid votes." ECF No. 89-1, at 5.

The Trump Campaign's response to the Defendants' motions to dismiss was due on November 15, but that day the Trump Campaign mooted those motions by filing an Amended Complaint. "This new complaint excised five of the seven counts from the original complaint, leaving just two claims: one equal-protection claim, and one Electors and Elections Clauses claim." App68. The Trump Campaign concurrently filed a brief in opposition to the Amended Complaint. ECF No. 126. Without addressing any of the merits arguments in Defendants' motions to dismiss or this Court's decision in *Bognet*, the Trump Campaign argued that the motions "can be resolved in short order: they are now moot because Plaintiffs have amended their complaint." *Id.* at 1.

On November 16—the day before oral argument—substitute counsel (Marc Scaringi, Esq) entered his appearance and *all* of the Trump Campaign's existing counsel sought to withdraw from the case. ECF No. 151; App69-70. Substitute counsel sought a continuance of the oral argument on the motions to dismiss—on the ground he needed "additional time to adequately prepare" (ECF No. 152, at 2)—which was promptly denied "given the emergency nature of this proceeding, and the looming deadline for Pennsylvania counties to certify their election results." App70; *see* ECF No. 153 (order). At the hearing, the Trump Campaign explained for the first time that it did not mean to abandon the due process claims in its Amended Complaint and that it would seek leave to amend after the hearing. SA13.

At the conclusion of argument, the District Court cancelled the scheduled evidentiary hearing and ordered Defendants to refile their motions to dismiss directed toward the Amended Complaint and for the Trump Campaign to renew its recently mooted motion for a preliminary injunction. ECF No. 162. Defendants promptly filed those motions the following day. App54-55. But the Trump Campaign sought (and obtained) an extension of time to file its preliminary injunction motion (ECF No. 164), which was filed on November 19 and fully briefed by November 21.

On November 18, the Trump Campaign also moved to amend its Amended Complaint, which would have been its second amendment in the span of a mere ten

days. App360-68. The cursory motion did not even try to justify the Trump Campaign's puzzling litigation conduct and its utter lack of diligence in pursuing its "emergency" lawsuit. Instead, the Trump Campaign vaguely alluded to the "interests of justice," blamed former counsel for somehow having "inadvertently deleted" five distinct claims from the Amended Complaint (which was redlined and filed on the docket), and sought to add "newly learned facts"—*i.e.*, facts about a Pennsylvania Supreme Court decision rejecting the Trump Campaign's poll-observer claims, which the Trump Campaign seeks to collaterally attack on appeal. App360. Elsewhere in the motion, however, the Trump Campaign admitted that the claims were omitted from the Amended Complaint "[b]ecause of the lack of clear communication" among the Trump Campaign's legal team. App365-66. And the Trump Campaign conceded that nothing in the proposed Second Amended Complaint was genuinely new, arguing that there was no prejudice or surprise because "Defendants will have seen most, if not all of the allegations before, and recently"—namely, in the original Complaint. App366; *see id.* (arguing that through the Second Amended Complaint "Plaintiffs seek to restore all relevant claims and allegations"). Finally, although the Trump Campaign admitted that it needed discovery to determine whether it even had a viable claim, it revealed that this action is not about ensuring a fair election, but rather about snatching victory from the jaws of defeat—as it explained that its ultimate plan is to "seek the remedy of Trump

being declared the winner." App366-67. As the District Court recognized, federal courts do not declare the winners of elections: voters do.

E. The District Court's Memorandum Opinion and Order

On November 21, 2020, the District Court issued a memorandum opinion and order dismissing the Trump Campaign's claims in the Amended Complaint with prejudice, denying the Trump Campaign's motion for leave to amend, and denying the Trump Campaign's preliminary injunction motion as moot.[4] App61-97 (opinion); *see* App98-99 (order). The District Court's well-reasoned opinion provided several bases for dismissal of the Amended Complaint and also demonstrated that leave to amend yet again was unwarranted.

First, the District Court concluded that "Plaintiffs lack standing to raise either of their claims." App72. As to their claim for violations of the Elections and Electors Clauses, the court found standing was lacking under this Court's decision in *Bognet*, which holds that only the Pennsylvania legislature has standing to pursue such claims. App70. In fact, after the *Bognet* decision was issued on November 13, *Plaintiffs conceded that they lack standing to pursue these claims*. *See* App69 ("Plaintiffs acknowledge that under the Third Circuit's decision in *Bognet*, this Court

[4] On November 23, 2020, the District Court issued an amended memorandum opinion that made minor, non-substantive corrections to the initial opinion. The amended memorandum opinion, docketed at ECF No. 202, is cited throughout this brief.

cannot find that Plaintiffs have standing for their Elections and Electors Clauses claim[.]").

As to their equal protection claim, the court found that neither the Trump Campaign nor the individual voters had standing. The individual voters failed to establish, as they must, "that it was Defendants who caused these injuries" or that "their purported injury of vote-denial is adequately redressed by invalidating the votes of others." App74-76. For one, "Defendant Counties . . . had nothing to do with the denial of Individual Plaintiffs' ability to vote," since the individual voters' "ballots were rejected by Lancaster and Fayette Counties, neither of which is a party to this case." App76. And their alleged injury would not be redressed by the relief Plaintiffs were seeking, because "[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." App77-78. The Trump Campaign likewise failed to plead a cognizable basis for its standing to sue the County Boards and the Secretary of the Commonwealth for purported equal protection violations. App77-83. As the court explained, no facts in the Amended Complaint sufficed to confer standing on the Trump Campaign under a theory of associational or competitive standing. *Id.* (citing cases).

Second, the court concluded that "[e]ven if Plaintiffs had standing, they fail[ed] to state an equal protection claim." App86. As the court explained, "[t]he

general gist of their claims is that Secretary Boockvar, by failing to prohibit counties from implementing a notice-and-cure policy, and Defendant Counties, by adopting such a policy, have created a 'standardless' system and thus unconstitutionally discriminated against Individual Plaintiffs. Though Plaintiffs do not articulate why, they also assert that this has unconstitutionally discriminated against the Trump Campaign." App87. The court swiftly dismissed this claim as lacking any factual or cognizable legal basis, since it is neither irrational nor arbitrary "for a state to allow counties to expand the right to vote if they so choose." *Id.*; *see* SA137 ("Court: Well, let me ask you, are you arguing then that strict scrutiny should apply here? Mr. Giuliani: *No*, the normal scrutiny should apply. If we had alleged fraud, yes, *but this is not a fraud case*." (emphases added)). And even if the claim were cognizable (and it is not), the court explained that dismissal would still be warranted because of the severe disconnect between the right they claim was violated and the extraordinary remedy they sought to vindicate that right. App90-95. The Trump Campaign's claims were similarly meritless, as they were based on the untenable premise that the U.S. Constitution requires "every single county administer elections in exactly the same way," which is not the law. App92-95.

Finally, the District Court denied leave to amend. At the outset, the Trump Campaign is flatly wrong that the denial was solely based on undue delay. (*See* Opening Br. at 1, 24.) Indeed, the court explained that "[a]mong the grounds that

could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." App96 (quoting *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413-14 (3d Cir. 1993)). Given Plaintiffs' haphazard and puzzling approach to this "emergency" litigation, the circumstances surrounding Plaintiffs' repeated attempts to amend their pleading, and the futility of the Second Amended Complaint in light of the District Court's merits analysis, the court's opinion demonstrated that there were various grounds on which leave to amend was properly denied. *Id.*

This appeal followed.

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When conducting this analysis, the Court must: (i) take note of the elements of the cause of action; (ii) identify and ignore all legal conclusions, and (iii) ask whether the remaining well-pled factual allegations "plausibly give rise to an entitlement to relief." *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016). Applying this familiar standard, this Court reviews the District Court's order and judgment *de novo*. *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 166 (3d Cir. 2014).

The district court's decision to deny a motion to amend the complaint is reviewed for abuse of discretion. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*,

614 F.3d 57, 73 (3d Cir. 2010).

SUMMARY OF THE ARGUMENT

The District Court properly dismissed the Amended Complaint and denied Plaintiffs leave to file a futile and belated Second Amended Complaint. Contrary to their claims in this appeal, Plaintiffs' Second Amended Complaint does not conjure viable constitutional claims out of the remains of their speculative and baseless Amended Complaint.

1. Now that Pennsylvania has certified the election results, this appeal is moot. The only form of injunctive relief sought in the operative complaint was to enjoin certification. The Trump Campaign can no longer obtain the relief it seeks.

2. The Trump Campaign strictly limits its appeal to complain only about the District Court's refusal to allow it to "amend" to file a third pleading over the course of a mere ten days, claiming it should have been allowed to revert back to the flawed allegations it abandoned at the outset of this litigation. But the Trump Campaign's appeal makes *no* challenge to the District Court's finding that, after multiple attempts, none of the Plaintiffs established Article III standing or to the District Court's conclusion that Plaintiffs had presented the only "strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence." App62. By failing to challenge the District Court's dispositive findings in their appeal, the Trump Campaign waives any

argument to the contrary. Amendment is not a stand-alone cure to these fundamental flaws.

3. This Court should affirm because Plaintiffs lack standing. Nothing in operative complaint or the "Second Amended Complaint" would establish that the Trump Campaign (a mere funding entity) has standing to represent the interests of Pennsylvania voters or even the candidate himself under its ill-fitting "associational" or "competitive" standing theories. The two individual voters likewise have no Article III standing, as they have no constitutional injury traceable to the Appellees or redressable by the extraordinary remedy of an injunction to stop certification of the Pennsylvania election.

4. The Trump Campaign has asserted no viable legal claims. First, it cannot make out an constitutional claim based on "uneven" treatment of the Campaign's canvassing observers —a claim which was based on a now-repudiated theory of Pennsylvania law that affords partisan observers no right to "observe" the canvass process from a specific distance, *see In re Canvassing Observation Appeal of City of Phila. Bd. of Elections*, 2020 WL 6737895, at *9, and which, in any event, asserted no plausible claim of disparate treatment.

The Trump Campaign also failed to state a constitutional claim staked on allegations that a non-dispositive number of voters were given "notice" of deficiencies in their mail-in ballot declaration and permitted to "cure" the deficiency

on or before Election Day or to cast provisional ballots—practices that comply with state law, are entirely consistent with the traditional discretion exercised by Counties in administering elections, and in any event would make no difference to the outcome of the presidential election. None of this, moreover, constitutes a Due Process violation or a claim under the Electors and Elections Clauses of the U.S. Constitution.

While styled a "Second Amended Complaint," in actuality, the Trump Campaign tried to reinstate their effort to toss out mail-in ballots based on technical deficiencies—claims that *Plaintiffs* excised from the original Complaint after it was apparent such claims were deficient in law and fact, and which are confirmed to be meritless by the Pennsylvania Supreme Court's decision on this very question. *See In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 2020 WL 6866415, at *13; *see also In re Canvassing Observation Appeal of City of Phila. Bd. of Elections*, 2020 WL 6737895, at *8. Contrary to Plaintiffs' claims here, their Second Amended Complaint offers no viable claim based on "illegal" mail-in ballots. Like the other claims, moreover, this claim challenges only a small number of ballots that have no chance of changing the outcome of Pennsylvania's election.

5. In the face of a fundamentally deficient complaint and the impending deadline to certify Pennsylvania's election, the District Court was well within its discretion to bring this matter to a definitive close. The Trump Campaign had no

right to amend to reinstate baseless allegations that some amorphous and widespread fraud occurred or to recycle unfounded claims of deficient ballots in a mistaken attempt to put this litigation back to the starting line on the eve of the certification deadline. Nor were Plaintiffs entitled to restyle their failed constitutional claims under the banner of "due process." The District Court rightly cited futility and undue delay as proper bases for dismissing the lawsuit with prejudice and denying leave to amend.

ARGUMENT

I. This Appeal Is Moot

The Trump Campaign commenced this action to enjoin the certification of Pennsylvania's general election for President. The *only* form of injunctive relief sought in its operative Amended Complaint was an "injunction that prohibits the Defendant County Boards of Elections and Defendant Secretary Boockvar from certifying the results of the 2020 General Election in Pennsylvania on a Commonwealth-wide basis" or, alternatively, an injunction that prohibits them "from certification the results of the General Election which include tabulation of absentee and mail-in ballots which Defendants improperly permitted to be cured." App253 ¶¶ i, ii (prayer for relief).[5] On November 24, 2020, however, Secretary

[5] Although inoperative, the request for injunctive relief in the proposed Second Amended Complaint seeks similar injunctive relief against certification and a new,

Boockvar certified Pennsylvania's presidential election results in favor of Joseph R. Biden. As a result, the appeal is now moot. "The central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007) (quoting *In re Surrick*, 338 F.3d 224, 230 (3d Cir. 2003)); *Constand v. Cosby*, 833 F.3d 405, 409 (3d Cir. 2016). That is precisely the case here. The Commonwealth's recent certification of the election prevents this Court from granting the Trump Campaign the relief it seeks. Accordingly, the case should be dismissed as moot. *See In re Linear Elec. Co., Inc.*, 852 F.3d 313, 318 (3d Cir. 2017) ("[W]e generally cannot resolve a dispute once the dispute has become moot, even if mootness was not raised below[.]").

II. Plaintiffs Have Waived Any Challenge to the Merits of the District Court's Dismissal, Which Properly Dismissed for Lack of Standing and Because Plaintiffs State No Constitutional Claim

Plaintiffs' Opening Brief does not raise the issues of standing or the District Court's decision to dismiss on the merits. Plaintiffs' omission is dispositive and waives any argument to the contrary. "It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on

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yet equally frivolous, request to allow the Pennsylvania legislature choose the electors, rather than the 6.8 million Pennsylvania voters who have already lawfully cast their ballots. App482-83 ¶¶ 325-27. The case would still be moot, then, even if the District Court had granted leave to amend.

appeal." *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005); *see also Odd v. Malone*, 538 F.3d 202, 207 n.2 (3d Cir. 2008) (explaining that arguments contained in footnotes in an opening brief are waived); *United States v. Quillen*, 335 F.3d 219, 224 (3d Cir. 2003) (explaining that "arguments not raised in an appellant's opening brief are deemed waived"); *Judge v. Shikellamy Sch. Dist.*, 905 F.3d 122, 127 (3d Cir. 2018) (holding that an appellant had "abandoned her equal protection and substantive due process arguments on appeal by allotting them only one sentence apiece in her opening brief"). Moreover, the final judgment rule codified by 28 U.S.C. § 1291 requires "that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

Although the Trump Campaign improperly tried to cabin its appeal to the District Court's denial of leave to amend its First Amended Complaint, the court's decision to dismiss the Complaint with prejudice was bound up with its correct conclusions that Plaintiffs neither pled, argued, nor presented any evidence aside from "speculative accusations" to support their challenge to Pennsylvania's election, Plaintiffs flatly lacked Article III standing, and offered no coherent constitutional theory that could "justify the disenfranchisement of *a single voter*, let alone all the voters of its sixth most populated state." *Id.* (emphasis added).

Yet, on appeal, Plaintiffs do not even attempt to challenge the merits of the District Court's dismissal, choosing instead to claim in conclusory fashion, that "better pleading" and restored allegations of "defective" mail-in ballot counting "cures any possible deficiencies." Opening Br. at 18-19. These new pleadings do not cure the lack of standing, the non-existent evidence, or the absence of any constitutional claim, which stand as unchallenged barriers to the present appeal.

III. Plaintiffs Lack Standing to Enjoin Certification of Pennsylvania's Vote

Plaintiffs put forth two theories of standing: (1) one based on two individual voters, and (2) another based on the Trump Campaign. The District Court correctly found "[b]oth theories unavailing." App74. Plaintiffs' lack of standing forecloses this appeal, whether or not Plaintiffs add or subtract (inadequate) allegations of "defective" mail-in ballots, recast these allegations as "Due Process" violations, or attempt to collaterally attack the Pennsylvania Supreme Court's interpretation of Pennsylvania's Election Code.

Standing "is an irreducible constitutional minimum," without which a federal court lacks jurisdiction to rule on the merits of an action. App73. A plaintiff bears the burden of establishing standing by showing: (1) an injury in fact; (2) that is fairly traceable to the challenged conduct of the Counties; and (3) that is likely to be redressed by a favorable judicial decision. *See Cotrell v. Alcon Laboratories*, 874 F.3d 154, 161-62 (3d Cir. 2017). As this Court recently held in *Bognet*, "parties

seeking to invoke federal judicial power must first establish their standing to do so." *Bognet*, 2020 WL 6686120, at *5. Plaintiffs have not. The District Court's decision should be affirmed.

A. The District Court Properly Held that Under *Bognet* Plaintiffs Do Not Have Standing to Raise an Elections and Electors Clause Claim

On Friday, November 13, this Court issued its decision in *Bognet*, which undercut Plaintiffs' assertions of standing and foreclosed the theories of relief underlying the claims in the original Complaint. In response, the Trump Campaign conceded that "*Bognet* forecloses their allegations that they have standing to pursue their Elections and Electors Clauses claims." ECF No. 124, at 1. The District Court agreed, holding that "the Third Circuit's decision in *Bognet* is clear," App69; App349, "[b]ecause Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses." *Bognet*, 2020 WL 6686120, at *7. That reasoning forecloses Plaintiffs' standing to pursue any Elections or Electors Clause claims.

B. The Trump Campaign Lacks Standing

The District Court rightly held that the Trump Campaign failed to establish standing. App78-83.

First, the Trump Campaign cannot assert associational standing. This is because the Campaign is a mere funding entity that "represents only Donald J. Trump and his electoral and political goals"—not a political association or party with members that represents the interests of voters. *Donald J. Trump for President, Inc. v. Cegavske*, — F. Supp. 3d —, No. 20-1445, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020). The District Court correctly found the interests of the Trump Campaign and that of voters are wholly distinct. App80.

Second, the District Court quickly dispatched the Trump Campaign's claim to "competitive standing" as "at best[] misguided." App81. As Judge Brann noted, the cases the Trump Campaign relied upon to assert "competitive standing" all concern ballot access and eligibility restrictions—claims not remotely implicated here. App82.

Finally, the Trump Campaign fails each of the prongs of the traditional standing analysis: it claims no injury-in-fact, no causation, and no redressability. It cannot allege an injury-in-fact. The Trump Campaign fails to plead facts that would plausibly show that ***any*** of its purported challenges—whether that be its "observer" claims, the purported notice-and-cure challenge, or any other alleged technical

deficiencies—call into question nearly enough votes to change the result of this election.

The Trump Campaign also fails to establish the causation element of standing. Neither the claims of "ballot security" nor the opportunity to "cure" or cast provisional ballots are traceable to Appellees' actions. Even if there were illegally casts votes (for which there is no evidence), that would be the work of third parties, not the County Boards. No standing exists to sue the County Boards (or Secretary Boockvar) on that basis. "[S]peculation about the decisions of independent actors" cannot provide the basis for standing. *Boockvar*, 2020 WL 5997680, at *35.

Lastly, the Trump Campaign's alleged injury—the loss of the election—cannot be redressed. As discussed above, the Trump Campaign has failed to plausibly allege that Trump would close his 80,000-vote deficit but for the issues he raises. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (holding that redressability is lacking where "it is entirely conjectural whether the nonagency activity that [allegedly] affects respondents will be altered . . . by the agency activity they seek to achieve"). The Trump Campaign cannot allege that the overall Pennsylvania election results would be different if the issues it alleges were remedied, and thus cannot redress their claim. *See, e.g.*, *Bognet*, 2020 WL 6686120, at *8 ("What's more, for Bognet to have standing to enjoin the counting of ballots

arriving after Election Day, such votes would have to be sufficient in number to change the outcome of the election to Bognet's detriment.").

For these reasons, the Trump Campaign does not have standing.

C. The District Court Correctly Held that Individual Voters Do Not Have Standing

The District Court correctly held that neither Mr. Henry nor Mr. Roberts had standing because they failed to establish causation and redressability.

With respect to causation, the District Court held that Plaintiffs failed to establish that "Defendant Counties or Secretary Boockvar actually caused their injuries." App76. The seven Counties Boards named in this action "had ***nothing*** to do with the denial of Individual Plaintiffs' ability to vote." App76 (emphasis added). "None of Defendant Counties received, reviewed, or discarded Individual Plaintiffs' ballots." *Id.* Indeed, Lancaster and Fayette Counties—where Mr. Henry and Mr. Roberts, respectively, reside—are not parties to this litigation. App76. The District Court rightfully held that "Plaintiffs have entirely failed to establish any causal relationship between Secretary Boockvar and the cancellation of their votes." App76. Indeed, Secretary Boockvar encouraged a notice-and-cure policy to ensure that voters' mistakes would *not* result in their votes being invalid. App76. It is Lancaster and Fayette Counties' alleged failure to set up a system to permit curing of improper mail-in ballots that caused the individual voters' harm, not the County Boards and not Secretary Boockvar.

Plaintiffs also fail to establish redressability. As the District Court aptly held, "[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." App78. A "plaintiffs' remedy must be tailored to redress the plaintiff's particular injury," not to punish others who properly voted. *See Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

This Court could also find that Mr. Henry and Mr. Roberts lacked standing on other grounds. Mr. Henry and Mr. Roberts' ballots were rejected because they did not comply with mail-in ballot instructions. This is a generalized injury experienced by anyone who failed to follow the mail-in ballot instructions, and cannot support standing.[6] *See Pa. Voters Alliance v. Centre Cnty.*, No. 20-cv-1761, 2020 WL 6158309, at *3-7 (M.D. Pa. Oct. 21, 2020); *see also Bognet*, 2020 WL 6686120, at *14. And, neither Mr. Henry nor Mr. Roberts states a concrete injury because they fail to allege that they would have cured their defective ballots had they had the opportunity to do so. *Bognet*, 2020 WL 6686120, at *6 (holding that to bring suit you "must be injured in a way that concretely impacts your own protected legal interest"). We are left to speculate as to what actions Mr. Henry and Mr. Roberts—or any other voter—would have taken had they been given the opportunity to cure.

[6] The District Court determined that Mr. Henry and Mr. Roberts had established an injury-in-fact because their votes were allegedly denied. App75.

When it is the voter's *choice* to become part of the "preferred class," as it is here, *Bognet* confirms that no standing exists for an equal protection claim. 2020 WL 6686120, at *15. These speculations and hypotheticals concerning whether a voter would have cured his mail-in ballot cannot establish the requisite injury in fact required to maintain standing. *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009).

Mr. Henry and Mr. Roberts do not have standing.

IV. The District Court Correctly Concluded that Plaintiffs Failed to State a Plausible Claim for Relief

The sole equal protection claim Plaintiffs pled in their Amended Complaint fails as a matter of law, and the remedy Plaintiffs sought is facially unconstitutional. The District Court correctly dismissed those claims, which is perhaps why Plaintiffs do not even address the court's analysis. The same flaws, however, pervade the proposed Second Amendment Complaint, and demonstrate that it was futile and meritless.

A. Plaintiffs' Equal Protection Claim Lacks Merit

The equal protection claim in the Trump Campaign's Amended Complaint (Count I) fails as a matter of law. App247 ¶¶ 150-60. As the District Court explained, the claim is much like "Frankenstein's monster," with the Campaign "trying to mix-and-match claims to bypass contrary precedent." App71-72. The claim was properly dismissed.

First, the District Court correctly found the "notice-and-cure" allegations stated no constitutional claims. As the court observed, "Defendant Counties, by implementing a notice-and-cure procedure, have in fact *lifted* a burden on the right to vote, even if only for those who live in those counties" and, moreover, "[e]xpanding the right to vote for some residents of a state does not burden the rights of others." App88-89 (emphasis in original). It is "perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots." *Id.*

Similar equal protection claims were asserted by the Trump Campaign and rejected less than two months ago. *Donald J. Trump for President, Inc*, 2020 WL 5997680, at *38. Both here and in that related action, individual Plaintiffs complained that *other* counties—which are not parties to this case—denied them the right to vote, but that is not a viable theory of equal protection either. As Judge Ranjan (and Judge Brann here) explained, the Trump Campaign and individual voters cannot state an equal protection claim by complaining, as they do here, that "the state is *not* imposing a restriction on *someone else's* right to vote." *Id.* at *44; App89. The District Court properly rejected the Trump Campaign's novel and meritless "inverted theory of vote dilution." *Donald J. Trump for President, Inc.*, 2020 WL 5997680, at *44.

The Trump Campaign also tried to assert vestiges of its failed ballot-observation claim—a theory that now has been definitively resolved against the Trump Campaign by the Supreme Court of Pennsylvania—and which, in any event, asserts only speculative injury that depends on an illogical leap that rational and legal county differences in partisan ballot observation somehow resulted in illegal votes. *See In re Canvassing Observation Appeal of City of Phila. Bd. of Elections*, 2020 WL 6737895, at *8-9. This challenge (previously characterized as a claim of "ballot security" and now recast in the Campaign's opening brief as a due process right to "meaningful safeguards") has no basis in Pennsylvania law—where partisan observers are not tasked with verifying the validity of votes—and concededly lacks any facts to plausibly claim fraud or otherwise demonstrate "illegal" votes sufficient to change the outcome of the election. *See* Opening Br. 21-22. The District Court properly found these allegations "fall[] flat" absent any facts to suggest "that the Trump Campaign's watchers were treated *differently* than the Biden campaign's watchers." App92.

The Trump Campaign's generalized reliance on "defective" mail ballots similarly rests on claims that have now been rejected by the Pennsylvania Supreme Court, which held that technical deficiencies in mail-in ballot declarations (like absence of address, date, or signature), do not automatically invalidate a vote absent affirmative evidence of fraud—something Plaintiffs fail to allege (except in

sweeping, conclusory terms). *See In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 2020 WL 6866415. The Pennsylvania Supreme Court further found no evidence of fraud in these challenged ballots, which again, numbered well below that required to change the outcome of this election. *Id.* And Plaintiffs' vague assertion that certain counties enforced the Election Code in a manner that differs from the approach used by other counties is a theory rejected by this Court in *Bognet*, which confirmed no equal protection violation is established simply by virtue of county differences or even by virtue of state-law election code violations. *See* 2020 WL 6686120, at *15-*16.

Finally, as Judge Ranjan explained, "'[c]ommon sense, as well as constitutional law, compels the conclusion' that states must be free to engage in 'substantial regulation of elections'" to ensure "'order, rather than chaos,'" in the administration of an election. *Id*. (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Indeed, "'[i]t is well-settled that states may employ in-person voting, absentee voting, and mail-in voting and each method need not be implemented in exactly the same way." *Id.* at *61. Thus, "while the Constitution demands equal protection, that does not mean all forms of differential treatment are forbidden." *Id.* (dismissing identical claim and explaining that "[i]f the courts were 'to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest,' it 'would tie the hands of States

seeking to assure that elections are operated equitably and efficiently'" (quoting *Burdick*, 504 U.S. at 433)). These bedrock constitutional principles foreclose Plaintiffs' equal protection claim.

For these reasons, the Trump Campaign falls far short of pleading a cognizable claim for equal protection violations. There is no constitutional basis for the Trump Campaign's demand that *each* county administer its election in an identical way. That is not what the law requires.

1. Plaintiffs' Electors and Elections Clauses Claim Lacks Merit

Plaintiffs "acknowledge[d] that—because the General Assembly is not a party here—*Bognet* forecloses their allegations that they have standing to pursue their Elections and Electors Clause claims." Pls.' Resp. to Notice of Supp. Auth. at 1, ECF No. 124. Yet they did not excise those claims from their Amended Complaint—and they have sought to add several additional claims for such violations in their Second Amended Complaint. Plaintiffs' concession that they lack standing forecloses these claims—and their decision to double-down on them is puzzling.

2. The Remedies Plaintiffs Seek Are Facially Unconstitutional

The District Court properly refused the Trump Campaign's invitation to impose a "draconian" and otherwise unconstitutional remedy for alleged violations of equal protection. *See* App91-92; SA108 (Mr. Giuliani: "[T]he remedy is really required and is draconian because their conduct was egregious."). As explained by

the District Court, "the Trump Campaign and the Individual Plaintiffs [sought] to discard millions of votes legally cast by Pennsylvanians from all corners – from Greene County to Pike County, and everywhere in between," without reference to a single authority suggesting that such widescale disenfranchisement was necessary, much less required. *See* App61-62. The District Court further reasoned that it lacked the power to grant the Trump Campaign's requested remedy because doing so would "violate the Constitution." App91. This decision should be affirmed.

The Trump Campaign disagrees and now argues that the District Court erred in finding it lacked "the power . . . to violate the Constitution" and "invalidat[e] the ballots of every person who voted in Pennsylvania," App91-92, because the Court "misconstrued the remedy sought," Opening Br. at 29-30. The Trump Campaign now claims it does not seek the "draconian" remedy of disenfranchising 6.8 million Pennsylvania; rather, it seeks to shred only the ballots of a mere 1.5 million Pennsylvania voters—just enough to manufacture a victory for its candidate. *Id.* at 29. This caveat, however, changes nothing.[7]

As the District Court explained, "[w]hen remedying an equal protection violation, a court may either 'level up' or 'level down.'" App91. That is, "a court

[7] To be clear, the Trump Campaign is wrong; it is plainly seeking to disenfranchise all Pennsylvania voters. Indeed, in its Opening Brief and Second Amended Complaint, the Trump Campaign specifically requests that the *General Assembly* be permitted to displace *all* 6.8 million Pennsylvania voters. Opening Br. at 23-24.

may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing that person on part with others who already enjoy the right, or a court may level down by withholding the benefit from those who currently possess it." *Id.* What a court cannot do is "level down" in such a way that would necessarily violate the Constitution or disenfranchise voters. *See* App91-92; *see also Shannon v. Jacobowitz*, 394 F.3d 90, 97 (2d Cir. 2005) (reversing district court's grant of relief to plaintiff in case where plaintiff alleged voting machine malfunctioned and the relief had the effect of disenfranchising voters).[8] Yet that is exactly what the Trump Campaign asked the District Court to do here.

The Trump Campaign's present demand to set aside millions (or "potentially tens of thousands") of lawfully cast ballots—without a single plausible factual allegation to back up this extraordinary request—should be swiftly rejected. As a "citizen's link to his laws and government," *Evans v. Cornman*, 398 U.S. 419, 422 (1970), the right to vote is "at the heart of our democracy," *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (Blackmun, J., plurality opinion). This fundamental right

[8] Plaintiffs principally rely on one case to support their mistaken belief that widescale voter disenfranchisement is an appropriate remedy: *Marks v. Stinson*, 19 F. 3d 873, 887 (3d Cir. 1994). But this case is not *Marks*. As Plaintiffs point out, the plaintiff in *Marks* presented evidence, not just threadbare allegations, of "massive absentee ballot fraud." *See* Opening Br. at 20. Plaintiffs' allegations of voter fraud at oral argument do not—and cannot—bring this case within the same hemisphere as *Marks*, which involved an election with a margin of several hundred votes—not the 80,000 votes at issue here.

should not be abrogated based on conspiracy, inuendo, or unidentified "statistical analysis" conducted by the losing candidate. Opening Br. at 14.

B. The District Court Acted Well Within Its Discretion in Denying Leave to Amend This Baseless Lawsuit

The District Court's decision to deny Plaintiffs' leave to amend should be affirmed. As the District Court explained, Plaintiffs exercised their opportunity to amend as of right (rather than filing a response to the then-pending motions to dismiss), filed an Amended Complaint that struck claims, *and then* sought to reinstate claims they had freely elected to strike. Plaintiffs could have pursued the claims contained in the proposed Second Amended Complaint earlier. The District Court properly exercised its discretion to deny Plaintiffs' request to amend. *See Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413-14 (3d Cir. 1993). Further, because Plaintiffs' proposed amendment is clearly futile in light of *Bognet* and the District Court's well-reasoned decision, this Court may affirm on the alternate basis of futility. *See In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 343-44 (3d Cir. 2004) ("Of course, we may affirm the district court on grounds different from those relied on by the district court.").

1. Plaintiffs' Request to Amend—to Add Claims They Had Struck Just Days Before Because They Had No Basis in Fact or Law—Was Dilatory and Would Have Unduly Delayed Pennsylvania's Certification of the Election Results.

The District Court properly exercised its discretion to deny Plaintiffs leave to amend because amendment would cause undue delay. *See* App96. "Undue delay is protracted and unjustified—it can place a burden on the court or counterparty or show a lack of diligence sufficient to justify a discretionary denial of leave." *Spartan Concrete Prod., LLC v. Argos USVI, Corp.*, 929 F.3d 107, 115 (3d Cir. 2019) (internal quotation marks omitted). This Court has upheld district courts' findings of prejudice and undue delay when, though amendment, the assertion of "a new claim would fundamentally alter the proceeding and could have been asserted earlier." *Id.* at 116 (internal quotation marks and alterations omitted). That is the case here.

The District Court's exercise of discretion must be viewed in the context of Plaintiffs' litigation antics. Plaintiffs have treated this action as an emergency in name only. Plaintiffs filed their original Complaint on November 9, 2020, nearly a week after the general election. They claimed to seek "emergency" relief (ECF No. 1, at 8), yet they waited three more days to file a motion for a preliminary injunction. Plaintiffs further delayed the District Court proceedings with at least three substitutions of counsel and two extension requests.

The Trump Campaign amended the Complaint to abandon claims and moot pending motions to dismiss, in a deliberate litigation strategy that the Trump Campaign quickly came to regret and sought to unwind through improper procedural gamesmanship. The record demonstrates the Trump Campaign lacked any good-

faith basis to claim the amendment was the result of a "mistake" or inadvertence." ECF No. 172; *see* Opening Br. at 2-3 (suggesting that *five separate counts* and numerous factual allegations were "incorrectly omitted" from the Amended Complaint).[9] It is apparent, moreover, from the face of the proposed Second Amended Complaint that Plaintiffs had no new information to add—quite the contrary, Plaintiffs' sought "to amend simply in order to effectively *reinstate* their initial complaint and claims." App96. That is, Plaintiffs had already raised and abandoned the claims they sought to add through the Second Amended Complaint and fully acknowledged that they merely sought to recycle claims from earlier iterations of their Complaint: "Defendants will have seen most, if not all of the allegations before, and recently." App366; *see id.* (arguing that through the Second Amended Complaint "Plaintiffs seek to restore all relevant claims and allegations").

Against that backdrop, and where the entire country is looking to Pennsylvania and questioning what is going on with its elections (based on scurrilous allegations), the District Court acted well within its discretion in finding that amendment would cause undue delay. *See Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 404-05 (E.D. Pa. 2016) (denying preliminary injunction based on,

[9] That is particularly true, since the Trump Campaign filed on the docket a redline comparing the original to Amended Complaint, which belies any suggestion that the changes to the Amended Complaint were inadvertent or that the deletion of five counts of the Complaint could have gone unnoticed by counsel. App256-342.

inter alia, prejudicial delay and proximity to election, where political party and voters waited until 18 days before election before moving for preliminary injunction prohibiting enforcement of county-residence restriction on poll watchers, and the "requested relief . . . would alter Pennsylvania's laws just five days before the election"); *see also* Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1488 (3d ed.) ("A party who delays in seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time.").

In the context of urgent election-related litigation, the District Court acts within its discretion by relying upon the operative pleadings and counsel's framing of the issues. Plaintiffs cannot simply re-set the litigation by replacing their lawyers—Plaintiffs have no entitlement to relief because of laches, the equitable doctrine on delay that is routinely applied in the election context. *See Public Interest Legal Found. v. Boockvar*, No. 20-cv-2905, 2020 WL 6144618, at *12, 14 (M.D. Pa. Oct. 20, 2020) ("[W]e decline to order such drastic action simply because Plaintiff elected to file its suit on the eve of the national election . . . . In an election where the margins may be razor-thin, we will not deprive the electorate of its voice without notice or proper investigation on the basis of an ill-framed and speculative venture launched at this late date."); *Stein v. Boockvar*, No. 16-cv-6287, 2020 WL 2063470, at *19-20 (E.D. Pa. Apr. 29, 2020) (laches barred relief where relief sought, namely, order requiring decertification, prior to November 2020 election, of

voting machines used in Philadelphia and other counties, would "effectively disenfranchise" voters); *Maddox v. Wrightson*, 421 F. Supp. 1249, 1252 (D. Del. 1976) (lawsuit filed "a mere five weeks before the election" was barred by laches where plaintiffs "were aware of ballot access difficulties at least seven weeks before th[e] suit was filed").

Accordingly, the District Court's denial of Plaintiffs' request for leave to file the Second Amended Complaint should be affirmed.

2. Amendment Would Have Been Futile.

"Futility alone can justify the denial of a motion for leave to amend." *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004). Allowing amendment of the complaint would be futile where "the complaint, as amended, would fail to state a claim upon which relief could be granted." *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010) (internal quotation marks omitted). "The standard for assessing futility is the same standard of legal sufficiency as applies under Federal Rule of Civil Procedure 12(b)(6)." *Id.* (internal quotation marks and brackets omitted). Although Rule 15(a) sets forth a liberal pleading policy, the decision to grant amendment "rest[s] within the sound discretion of the trial court." *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983). This Court reviews a denial of leave to amend for an abuse of discretion. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) (citing

Foman v. Davis, 371 U.S. 178, 182 (1962)). "Denial of leave to amend a complaint is especially appropriate where a party has already been given the opportunity to amend the complaint." *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 564 F. App'x 672, 673 (3d Cir. 2014).

Leave to amend was properly denied and would have been futile because Plaintiffs lack standing to assert the claims in the Second Amended Complaint and Plaintiffs' recycled claims fail as a matter law. Plaintiffs do not even bother to engage with the merits of the District Court's decision. Instead, they make the sweeping and unsubstantiated assertion that their Second Amended Complaint would "cure any possible deficiencies"—*i.e.*, the same deficiencies they ignore in their opening brief. Opening Br. at 18-21. Any amendment would have been futile and was properly denied on that basis.

(a) Amendment Would Be Futile for Plaintiffs' Lack Standing to Pursue Claims Raised in the Second Amended Complaint

For the same reasons discussed above in Section II, Plaintiffs *still* fail to adequately plead standing in their Second Amended Complaint.

Additionally, and incredibly, Plaintiffs' Second Amended Complaint deletes Mr. Henry's and Mr. Roberts' injury allegations—which the District Court held were sufficient to establish injury in fact—in favor of a generic, insufficient statement of injury. For example, instead of alleging that Mr. Henry was notified

that his ballot was canceled three days after Election Day, Plaintiffs now seek to allege that "Mr. Henry has been injured in a way that concretely impacted his rights[.]" App382-83 ¶ 22. More is required. Under the District Court's ruling, which is not challenged here, and well-settled binding precedent, this general pleading of injury does not suffice to establish standing. *See* App75; *see also Bognet*, 2020 WL 6686120, at *6.

Similarly, the Second Amended Complaint fails to add any allegations supporting standing for the Trump Campaign—because it cannot. President Trump lost this election, whether the ballots at issue are counted or not. The Trump Campaign's displeasure with losing the election is not an injury caused by any Defendant, and is a natural consequence of its failure to achieve a majority of the legitimate 6.8 million votes cast—and now certified—by Pennsylvanians in this election. Plaintiffs cannot disenfranchise one voter, much less all voters, without more. *See* App62; *Huertas v. City of Camden*, 245 F. App'x 168, 172 (3d Cir. 2007).

(b) Plaintiffs' Have Not Stated an Equal Protection or Due Process Claim through Amendment.

In the Second Amended Complaint, Plaintiffs claim to have cured three deficiencies that infected their earlier pleadings. Each is unavailing:

First, Plaintiffs suggest that they can now sustain an equal protection claim against the Counties because the Second Amended Complaint contains allegations that "Defendants excluded *all* observers from the canvassing of the mail ballots to

conceal [that] defective ballots were being opened, mixed, and counted to benefit Biden." Opening Br. at 21 (emphasis added). That representation is outrageous. The Trump Campaign has repeatedly stated, in federal court, that its observers *were present* during the canvassing of votes. *See Donald J. Trump for President, Inc. v. Phila. Bd. of Elections*, No. 20-5533, ECF No. 7, at 11:1-5 (E.D. Pa. Nov. 5, 2020) (Diamond, J.) (Court: "I'm asking you as a member of the bar of this Court, are people representing the Donald J. Trump For President . . . in that [observation] room? [Campaign Lawyer]: Yes."). In any event, the Trump Campaign cannot state constitutional claims "based on speculation that . . . alleged instances of voter fraud would be prevented by . . . poll watchers were they not precluded from serving at [specific] locations." *Cortés*, 218 F. Supp. 3d at 407.

Second, Plaintiffs claim that they can sustain an equal protection and due process claim against the Counties because they have alleged an "intentional scheme" to "count defective ballots to favor one candidate over the other."[10] Putting aside that instances of voter fraud is not, in and of itself, a constitutional claim, the proposed Second Amended Complaint is devoid of any allegations of fraud. And, of

[10] Notably, Plaintiffs' counsel informed the District Court that these allegations existed in the Amended Complaint but did *not* amount to an allegation of fraud. *See* SA118 (Court: "[D]oes the amended complaint plead fraud with particularity? Mr. Giuliani: No, Your Honor. And it doesn't plead fraud. It pleads the—it pleads the plan or scheme . . . without characterizing it.").

course, to sustain a claim sounding in fraud, Plaintiffs must plead the facts of fraud with particularity. *See* Fed. R. Civ. P. 9(b); *cf. Digenova v. Baker*, No. 02-cv-98, 2002 WL 32356401, at *2 (E.D. Pa. Apr. 11, 2002) (applying heightened pleading requirement to allegation of fraud in a union election). Conspiracy theories repackaged from the darkest corners of the internet or cable news alone cannot support a federal claim. Instead, Plaintiffs were required to allege what fraud occurred, how that fraud occurred, where and when it occurred, and who was involved. *See Inst. Inv'rs Grp. v. Avaya, Inc.*, 564 F.3d 242, 254 (3d Cir. 2009).[11] Plaintiffs' attempt to repackage their unsubstantiated allegations of fraud as a broadside attack on Pennsylvania's mail-in voting procedures based on the mistaken premise that mail-in votes are inherently suspect—a theory supported by only irrelevant historical anecdotes, inapplicable international election "standards," and speculative theories of potential voter fraud—must not suffice to state a claim. *See, e.g.*, App215-17 ¶¶ 56-62 (proposed Second Am. Compl. providing historical commentary on voter fraud); App211-15 ¶¶ 50-55 (referencing international standards).

[11] Plaintiff Donald J. Trump for President, Inc. recognized this standard just four years ago in litigation concerning a third-party candidate's attempt to seek a recount in light of flimsy allegations of voter fraud. *See* Memo. of Donald J. Trump for America, Inc in Opposition to Pls' Mtn. for Preliminary Injunction, No. 16-cv-6287, Dkt. 38, at 22-23 (E.D. Pa. Dec. 8, 2016).

Third, Plaintiffs appear to argue that the remedy requested in the Second Amended Complaint would not itself violate the Constitution because "[n]o legal votes are being excluded," by their request. Again, this is false. Plaintiffs unabashedly request that the ballots cast by over 6.8 million Pennsylvania voters be discarded by judicial decree. *See* App481-82. This is no different than the remedy requested in the First Amended Complaint, and properly rejected as unconstitutional by the District Court. *See* App92.

(c) Plaintiffs' Cannot State a Constitutional Claim by Collaterally Attacking the Pennsylvania Supreme Court's Interpretations of State Law

In a last-ditch effort to salvage their case, Plaintiffs also contend that their Second Amended Complaint is now viable because the Pennsylvania Supreme Court has issued several opinions rejecting the Trump Campaign's assault on mail-in voting, complaints about inadequate observational access, and erroneous interpretations of the Election Code. Opening Br. at 21-22. These decisions are a definitive interpretation of Pennsylvania law and establish that law provides neither a right to "inspect" mail-in ballots, nor a presumption that such ballots are somehow invalid unless the Trump Campaign's partisan observers conducted some sort of independent verification from a certain distance. *In re Canvassing Observation Appeal of City of Phila. Bd. of Elections*, 2020 WL 6737895, at *8-9. Yet the Trump Campaign argues that it should have been granted leave to amend because the

Second Amended Complaint "now asserts a Due Process claim based on the[se] Pennsylvania Supreme Court's decisions" interpreting the Election Code—namely, the Pennsylvania Supreme Court's recent decision *rejecting* the Trump Campaign's arguments that the County Boards' procedures for observation violated the Election Code. The Trump Campaign provides no legal support for its futile arguments that its collateral attacks on the Pennsylvania Supreme Court's rulings give rise to a federal constitutional claim.

At the outset, these arguments fundamentally misunderstand the role of federal courts. Each of the challenged Pennsylvania Supreme Court decisions involve a straightforward issue of state law regarding the proper interpretation of the Election Code. And a bedrock feature of our system of federalism is that state supreme courts are the ultimate expositors of state law. *See*, *e.g.*, *Wardius v. Oregon*, 412 U.S. 470, 477 (1973) ("It is, of course, true that the Oregon courts are the final arbiters of the State's own law."). Indeed, it is a fundamental principle "that state courts be left free and unfettered . . . when interpreting their" state laws. *Florida v. Powell*, 559 U.S. 50, 56 (2010). That is particularly true in the context of election disputes, where "[p]rinciples of federalism limit the power of federal courts to intervene in state elections[.]" *See Shannon*, 394 F.3d at 94 (quoting *Burton v. Georgia*, 953 F.2d 1266, 1268 (11th Cir. 1992))); *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) (The constitution "leaves the conduct of state elections to the

states"). This Court should accordingly decline the Trump Campaign's invitation to disregard the Pennsylvania Supreme Court's interpretation of state law.

These collateral challenges to the Pennsylvania Supreme Court decision, advanced in the Second Amended Complaint, are in any event, barred by the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine is specifically designed to prevent a party that has lost in state court to run to federal court and collaterally attack the state court's judgment. *See, e.g.*, *Stein v. Cortes*, 223 F. Supp. 3d 423, 434 (E.D. Pa. 2016) (citing *Marran v. Marran*, 376 F.3d 143, 149 (3d Cir. 2004); *see also D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923))). That is precisely what the Trump Campaign has done here. Because the issue has been "actually litigated" in state court by the Trump Campaign and its federal claims are "inextricably intertwined" with the Pennsylvania Supreme Court's ruling, the *Rooker-Feldman* doctrine would bar federal jurisdiction over the due process claim in the Second Amended Complaint. *ITT Corp. v. Intelnet Int'l*, 366 F.3d 205, 201 (3d Cir. 2004).

Finally, although the Plaintiffs make passing reference to *Bush v. Gore*, they do not explain how the Pennsylvania Supreme Court's interpretation of the Election Code implicates that decision. It does not. Nothing in *Bush v. Gore* suggests that Plaintiffs have stated a federal constitutional claim, much less a claim that could

warrant the extraordinary federal intervention in the Commonwealth's administration of its election that Plaintiffs seek.

Nothing in the record or the Second Amended Complaint remotely supports the conclusion that due process or equal protection was violated here. Only profound, systemic wrongdoing, such as "willful conduct" by state actors that "undermine[s] the organic process by which candidates [are] elected," can state a federal constitutional claim. *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 646 (E.D. Pa. 2018); *see also Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994); *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980). Although the Trump Campaign cites these same cases for the proposition that "election systems without meaningful safeguards violate due process,"[12] it points to no allegations (or evidence) plausibly demonstrating that such safeguards were lacking—perhaps that is why they have been utterly unable to support their wild conspiracy theories of widespread voter fraud *with actual evidence*. Opening Br. at 21-22.[13]

[12] The cases the Trump Campaign cites are entirely distinguishable from the facts alleged here. For example, in *Marks v. Stinson* election officials participated "massive absentee ballot fraud" along with a candidate to induce hundreds of voters to submit fraudulent absentee ballot applications. 19 F.3d at 888. And in both *Griffin* and *Hoblock*, election officials systemically refused to tally valid absentee ballots. *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2005); *Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978).

[13] Proposed Plaintiff-Appellant Intervenors' brief waives the only argument they can make under well-established Circuit precedent and, in any event, is meritless.

* * * * *

In sum, nothing in the Trump Campaign's briefs suggests that Plaintiffs have stated a cognizable claim in their Second Amended Complaint. The Trump Campaign alleges no facts (and points to no evidence) to suggest the procedures implemented in Pennsylvania led to voter fraud or otherwise corrupted the integrity of the present election. Quite to the contrary, Pennsylvania's mail-in ballot procedures were a success, allowing over 2.6 million Pennsylvania voters the opportunity to safely vote amid a deadly global pandemic. The Trump Campaign's lackluster, three-page defense of their Second Amended Complaint demonstrates the futility of further proceedings. The Trump Campaign's not-so-veiled attempt to

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The District Court properly denied the proposed intervenors' motion leave to intervene because this case was complete. App99. Proposed intervenors' arguments should be rejected out of hand for two reasons. First, they did not file an appeals brief by this Court's deadline, which means that they have not presented any arguments on appeal. *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167, n.4 (11th Cir. 2004); *Northland Ins. Co. v. Stewart Title Guaranty Co.*, 327 F.3d 448, 452 (6th Cir. 2003); *Cray Commc'ns Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 396, n.6 (4th Cir. 1994). Second, since they were never granted leave to intervene, the proposed intervenors only have the ability to appeal the denial of intervention. This Court has explained that "one properly denied the status of intervenor cannot appeal on the merits of the case." *Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir. 1976); *see also IPSCO Steel (Ala.), Inc. v. Blaine Constr. Corp.*, 371 F.3d 150, 153 (3d Cir. 2004) ("Ordinarily, only parties of record before the district court have standing to appeal."). The proposed intervenors do not claim on appeal to be aggrieved by the District Court's order. Nor could they because they could merely assert a generalized dissatisfaction with the District Court's order. *Pa. Voters Alliance*, 2020 WL 6158309, at *3-7; *see also Bognet*, 2020 WL 6686120, at *14.

maintain political power at the expense of Pennsylvania voters should be rejected out of hand. The vote has been certified, it should stand.

CONCLUSION

For the foregoing reasons, Appellees respectfully requests that the Court affirm the District Court.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP (LAR 46.1)

Pursuant to Third Circuit Local Appellate Rule 46.1, I, Mark A. Aronchick, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Mark A. Aronchick
Mark A. Aronchick

Dated: November 24, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 11,499 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

3. In addition, pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies. I further certify that the electronic version of the brief has been scanned for viruses by Trend Micro OfficeScan 10.6.5372 (updated continuously) and is, according to that program, free of viruses.

/s/ Mark A. Aronchick
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November 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2020, I electronically filed the foregoing Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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