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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OPPOSITION OF APPELLEES ALLEGHENY COUNTY BOARD OF ELECTIONS, CHESTER COUNTY BOARD OF ELECTIONS, MONTGOMERY COUNTY BOARD OF ELECTIONS, AND PHILADELPHIA COUNTY BOARD OF ELECTIONS TO APPELLANTS' EMERGENCY MOTION UNDER FRAP 8

November 24, 2020

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I. INTRODUCTION

Plaintiffs ask this Court to issue an injunction preventing the certification of an election in which 6.8 million Pennsylvanians cast their ballots exercising their fundamental right to vote in multiple elections—including the Presidential election. This is an extraordinary ask: An ask that should be made only with formidable bases in fact and law. But that is not the case presented to this Court. Plaintiffs' outlandish request is premised largely on claims that are not even a part of this case.

In any event, Plaintiffs' request is moot. On November 24, 2020, Pennsylvania's Secretary of State certified the results of the November 3 election, the Pennsylvania Governor signed the Certificate of Ascertainment, and the Commonwealth submitted it to the Archivist of the United States.[1] As such there is no longer an ongoing certification process that can be enjoined. Seemingly recognizing this foregone conclusion, for the first time, Plaintiffs now dare to ask this Court, in the first instance, to decertify the expressed intent of 6.8 million Pennsylvania voters. Not only has this audacious request been waived, it is unheard of where there is not *any* basis in law or fact.

In a case with an already "tortured procedural history," and millions of legally cast votes potentially on the line, Plaintiffs ask this Court to pretend the actions they

[1] Pennsylvania Department of State, *Department of State Certifies Presidential Election Results*, Nov. 24, 2020, available here: https://www.media.pa.gov/Pages/State-details.aspx?newsid=435.

took in the district court do not bind them now; but they must be held to the record and any request for relief must be based solely on that record. And the record in no way supports the issuance of injunctive relief. Plaintiffs have no likelihood of success on the merits of their claims, it is the Pennsylvania voters not Plaintiffs who will suffer irreparable harm, and the public interest could not be more strongly aligned *against* granting such an injunction. This Court may easily dispense with Plaintiffs inexplicable request.

Moreover, applying this court's recent decision in *Bognet v. Secretary Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), the District Court held that Plaintiffs have no standing to bring their underlying claims. As a result, this Court does not have jurisdiction to grant the requested relief.

II. PROCEDURAL REVIEW

On November 9, 2020, Plaintiffs filed suit against Secretary Boockvar, as well as seven County Boards of Elections raising seven counts: two equal-protection claims, two due-process claims, and three claims under the Electors and Elections Clauses. App068-70.

On November 12, 2020, Plaintiffs filed a motion for a preliminary injunction. The next day, November 13, 2020, the United States Court of Appeals for the Third

Circuit issued its decision in *Bognet*, addressing issues of standing and equal protection relevant to Plaintiffs' claims. App069.

On November 15, 2020—the day Plaintiffs' response to Defendants' motions to dismiss was due—Plaintiffs filed a First Amended Complaint (the "FAC") excising five of the seven counts from the Complaint, including any claim of fraud, leaving an equal-protection claim and an Electors and Elections Clauses claim premised wholly on Plaintiffs' challenge to the propriety of notice being provided to mail-in ballot voters of technical deficiencies in their ballots and the fact that a limited number of voters were able to either remedy the defect or submit a provisional ballot. *See* App247, App249-50, App252.

Acknowledging that under *Bognet* they do not have standing to pursue their Elections and Electors Clauses claim, Plaintiffs included this claim in the FAC to preserve the argument for appellate review. App349. On November 16, 2020, in response to the FAC, Appellees filed new motions to dismiss. The FAC remains the operative pleading in the case and its dismissal is the basis for this appeal. App061-97, App100.

III. ARGUMENT

A. Plaintiffs' Motion fails to satisfy threshold requirements.

1. Plaintiffs' Motion fails to comply with Fed. R. App. P. 8.

A party must move first in the district court for an order granting an injunction while an appeal is pending. Fed. R. App. 8(a)(1)(C); Fed. R. Civ. P. 62. Plaintiffs erroneously assert that their preliminary injunction motion renders this requirement moot. Mot. for TRO at 13; *see also Baker v. Adams County Ohio Valley School Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (stating that first applying for an injunction at the district court level is "the cardinal principle of stay applications") (internal citations omitted); *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001). They are wrong.

A motion for issuance of a stay or injunction pending appeal must be filed with the district court ***after*** the order being appealed is entered and a notice of appeal is filed. Plaintiffs' failure to comply with Rule 8(a)(1)(c) is cause enough to deny the requested relief. *Id.* at 774 (denying a motion for stay for failure to move first in the district court); *see Agudath Israel of Am. v. Cuomo*, Nos. 20-3572, 20-3590, 2020 WL 6750495, at *2 (2d. Cr. Nov. 9, 2020) (finding it a straightforward requirement of Rule 8(a) that a party must first move for an injunction pending appeal in the district court and denying the motion due to procedural flaws). Plaintiffs have provided *no* reason why making this request to the District Court would be impractical. *See* Fed. R. App. P. 8(a)(2)(i).

2. Plaintiffs' Amended Complaint was dismissed by the District Court for lack of standing, and this Court does not have jurisdiction to issue the requested relief.

As set forth in the Counties' Answering Brief, incorporated by reference, both of Plaintiffs' theories of standing are "unavailing." App074. Plaintiffs bear the burden of establishing standing (*id*. at 162) and they have failed to do so.

(a) The Trump Campaign lacks standing.

The Trump Campaign—an entity that did not, cannot, and will never vote—asserts that it has standing: (1) for the entity itself; and (2) for the candidate, Donald J. Trump. Judge Brann rightly held that the Trump Campaign failed to establish standing under any theory. App078-83.

The Trump Campaign, as an entity, does not have standing because it "represents only Donald J. Trump and his electoral and political goals"—not the interests of voters. *Donald J. Trump for President, Inc. v. Cegavske*, No. 20-cv-1445, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020). The Trump Campaign neither has associational standing—it is not an association with *members* that are harmed—nor does it have "competitive standing" because it is not the actual candidate, Donald J. Trump. The Trump Campaign has further asserted no injury-in-fact, no causation, and no redressability, as demonstrated by the Answering Brief (Dkt. No. 55, at 24-25).

(b) The individual voter plaintiffs lack standing.

Judge Brann held that neither Mr. Henry nor Mr. Roberts had standing because, among other reasons (*see* Dkt. No. 26-28), they failed to establish causation and redressability. Plaintiffs failed to establish that "Defendant Counties or Secretary Boockvar actually caused their injuries." App076. Defendant Counties "had **nothing** to do with the denial of Individual Plaintiffs' ability to vote." App076 (emphasis added). "None of Defendant Counties received, reviewed, or discarded Individual Plaintiffs' ballots." App076. Lancaster and Fayette Counties—where Mr. Henry and Mr. Roberts, respectively, reside—are not parties to this litigation. App076. As to redressability, Judge Brann 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." App078. That is equally true for Plaintiffs' new request to *de*certify the election. A "plaintiffs' remedy must be tailored to redress the plaintiff's particular injury," not to punish others who properly voted. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

3. This appeal is moot.

The Trump Campaign commenced this action to enjoin the certification of Pennsylvania's general election for President—which has now occurred. The *only* form of injunctive relief sought in its operative FAC 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 certifying the results of the General Elections which include tabulation of absentee and mail-in ballots which Defendants improperly permitted to be cured." App253 ¶¶ i, ii (prayer for relief).[2] Similarly, the only request in the Motion is one to "stay the vote certification pending this appeal." Pls. Emergency Mot. at 26.

On November 24, 2020, Secretary Boockvar certified Pennsylvania's presidential election results: the Governor signed the Certificate of Ascertainment, and the certificate was duly submitted to the Archivist of the United States.[3] As a result, this Motion, and the appeal, are now moot. Indeed, "[t]he 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

[2] Although inoperative, the proposed SAC seeks similar injunctive relief against certification. App482-83 ¶¶ 325-28. The case would still be moot, then, even if the District Court had granted leave to amend.

[3] 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.").

(3d Cir. 2016). That is precisely the case here. The Court cannot grant the Trump Campaign an injunction—it cannot enjoin action that has already occurred. *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 (as it was not here)."). Accordingly, the present Motion should be denied as moot.

B. Plaintiffs fail to state sufficient grounds for an injunction from the Court pending appeal.

Plaintiffs' amorphous request has been simultaneously styled as a "temporary restraining order," "stay," and "injunctive relief" and is unclear at best. For clarity, "[a] stay simply suspend[s] judicial alteration of the status quo while injunctive relief grants judicial intervention that has been withheld by lower courts." *Nken v. Holder*, 556 U.S. 418, 429 (2009) (alternation in original). Plaintiffs disguise their request for extraordinary relief, as a "stay" while pursing appellate review. In reality, they are pursuing *the very injunctive relief the District Court denied*: enjoining the certification of 6.8 million votes. Plaintiffs do not seek a stay of the status quo.

Plaintiffs seek the very judicial intervention withheld by the District Court. An appellate court may issue an injunction only when it is "[n]ecessary or appropriate in aid of [its] jurisdiction" and "the legal rights are ***indisputably clear***." *Wisc. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (internal quotation marks omitted) (emphasis added); *see also Respect Maine PAC v. McKee*, 562 U.S.

996, 996 (2010) ("[A]pplicants here are asking for an injunction against enforcement of a presumptively constitutional state legislative act. Such a request demands a significantly higher justification than a request for a stay, because unlike a stay, an injunction . . . grants judicial intervention that has been withheld by lower courts."). This is not the case here.

An injunction is "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (vacating an injunction pending appeal because the public interests outweighed the injury at issue). To obtain an injunction from a district court, movants generally bear the burden of showing that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v*, 555 U.S. at 20. However, "[t]o obtain a stay of a district court's order pending appeal, more is required, including a 'strong showing that [the movant] is likely to succeed on the merits.'" *Agudath Israel*, 2020 WL 6750495, at *2 (quoting *New York v. U.S. Dep't of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020)).

Because Plaintiffs cannot demonstrate an entitlement to the extraordinary relief of a preliminary junction or the extreme remedy of enjoining the expressed intent of 6.8 million voters, this motion should be denied.

1. Plaintiffs cannot demonstrate a likelihood of success on the merits of the appeal.

The Third Circuit has made clear that establishing potential success on the merits requires a plaintiff to "demonstrate that [it] can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not)." *Holland v. Rosen*, 895 F.3d 272, 286 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 440 (2018). "A plaintiff's failure to establish a likelihood of success on the merits 'necessarily result[s] in the denial of a preliminary injunction.'" *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 115 (3d Cir. 2018). To demonstrate likelihood of success on the merits, Plaintiffs must either demonstrate that this Court will find that the District Court abused its discretion in denying leave to file an amended complaint and/or that the dismissal of the FAC will be reversed. Neither is likely.

(a) The district court was well within its authority to deny further amendment and did so properly.

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); Fed. R. Civ. P. 15. This Court reviews a denial of leave to amend for 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).

The District Court was well within the proper exercise of its discretion when denying Plaintiffs leave to file a second amendment to their complaint. The District Court granted Plaintiffs an opportunity to amend and with it they abandoned the majority of their claims. *See* App192 (ECF No. 125 at Ex. 1). In the operative FAC, Plaintiffs abandoned the fraud-based counts related to the observation of canvassing activities. App349. Notably, the abandonment of their claims followed this Court's precedential decision on standing in *Bognet*, *see also* App072-83, which decidedly foreclosed Plaintiffs' claimed constitutional violations on jurisdictional grounds.

Thus, when Plaintiffs sought leave to amend again and file a second amended complaint ("SAC"), which contained no new factual claims and the only new counts were the previously abandoned and foreclosed claims from the Complaint, the District Court properly recognized that Plaintiffs "reversed course." App071-72 n. 36-39. Plaintiffs were attempting to revive implausibly pled and legally deficient claims. *Id*.

The District Court properly exercised its discretion to deny Plaintiffs leave to amend because amendment was futile and would cause undue delay. See App096.

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

(b) Further amendment of the Amended Complaint would be futile.

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). "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).

Plaintiffs lack standing to assert the claims in the SAC, those claims fail as a matter law. Plaintiffs' cursory argument that their SAC would "cure any possible deficiencies"—*i.e.*, the same deficiencies they proceed to ignore in their brief—demonstrates the futility of amending complaint yet again.. Op. Br. at 18-21.

(c) The District Court properly dismissed the First Amended Complaint.

The District Court addressed the showing made by Plaintiffs on the merits of their claims by noting that it "ha[d] been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by the evidence. . . . At bottom, Plaintiffs have failed to meet their burden to state a claim upon which relief may be granted." App062.

The Trump Campaign ostensibly seeks to raise two constitutional issues: (i) an equal protection claim, and (ii) a claim for violations of the Elections and Electors Clauses of the U.S. Constitution. Neither has merit.

1. The Trump Campaign cannot prevail on its equal protection claims.

The Trump Campaign's equal protection claims are based on the Counties allegedly violating state law by reviewing ballot submissions before Election Day and notifying voters of potential deficiencies. *See* Pls. Emergency Mot. at 15-17.

First, at worst, the Trump Campaign's claims are based on alleged violations of state law that do not—and cannot—state a constitutional injury. *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-966, 2020 WL 5997680, at *46 (W.D. Pa. Oct. 22, 2020) ("[I]t is well-established that even violations of state election laws by state officials . . . do not give rise to federal constitutional claims."). The Trump Campaign's claims that the Counties counted ballots that did not comply with the

Election Code's requirements, *see id*. at *18, and that voters were notified that their ballots contained some technical deficiency and given the opportunity to vote by a provisional ballot does not state an equal protection violation. Pls. Emergency Mot. at 17; *see also* App799, App808-09. Notably, the substance of these claims has been largely rejected by the Pennsylvania Supreme Court, which held that Counties have discretion to determine whether mail-in ballots are sufficient notwithstanding technical errors on the declaration envelope. *See In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 2020 WL 6866415 (Pa. Nov. 23, 2020).

Second, the Trump Campaign premises its claim on the Counties' exercise of their delegated authority to implement the Election Code. *See* 25 P.S. §§ 2641(a), 2642(g)). Plaintiffs have not identified any state law, regulation, or policy that burdened the right of any Pennsylvania citizen's vote. Pennsylvania's General Assembly authorized the Counties to use their discretion in assessing the needs of their residents, available resources, and other factors when implementing the specific procedures needed to administer an election. Any differences in each county boards' process of notifying voters of deficient ballots, as an example, is a recognition of these differences and manifestation of that delegated discretion. The Trump Campaign's claims based on the cancellation notifications given to Mr. Henry, Mr. Roberts, and the four additional declarants referenced in the Motion for Extraordinary Injunction are simply different notes in the same refrain. These claims

do not evidence the devaluation or discriminatory treatment of a cognizable group sufficient to establish an equal protection violation, specifically, as Plaintiffs attempt to claim discrimination *in favor of Biden instead of Trump*. Pls. Mot. for Prelim. Inj. at 15. Importantly, "while the Constitution demands equal protection, that does not mean all forms of differential treatment are forbidden." *Donald J. Trump*, 2020 WL 5997680, at *38. The Trump Campaign's attempt to cast the Counties' lawful discretionary decision-making into an equal protection violation fails. Courts have repeatedly rejected even "garden variety election irregularities" as not alleging constitutional injury. *See, e.g., Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 643 (E.D. Pa. 2018).

Finally, the Trump Campaign's claim that counting ballots with certain purported declaration deficiencies (such as a missing date or incomplete address) fail for several reasons: (1) there are no such allegations pled in the FAC; and (2) 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. 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 election administration. *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). "If 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.'" *Id.* (quoting *Burdick*, 504 U.S. at 433)). Consequently, the Trump Campaign has no chance, let alone a likely one, of success on the merits of the claim.

2. Plaintiffs admit that they cannot prevail on their elections and electors clause claims.

The Elections and Electors Clause claims, while not removed from the FAC, have no merit by the Trump Campaign's own admission. Plaintiffs agreed that the *Bognet* opinion forecloses their allegations and they "cannot assert standing in this Circuit to raise their Elections and Electors Clause claims." SA12-13. Accordingly, there is no likelihood of success on the merits of this claim.

2. Plaintiffs cannot demonstrate irreparable harm and the claim of emergent need to prevent irreparable harm does not exist by their own admission.

Despite a lack of harm shown in the court below, the Trump Campaign now reprises its request to enjoin the certification of 6.8 million votes without actually having been injured. Plaintiffs' request to amend a complaint itself would do nothing

to support the claim of irreparable harm or support an injunction in any way, but rather continues a record of contradictions and dilatory tactics.

Irreparable harm cannot ensue where, as here, a plaintiff has merely claimed, but failed to show, it suffered a constitutional injury. This alone is enough to determine that no irreparable injury will result from a denial of an injunction against the certification of Pennsylvania's votes. *See Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-966, 2020 WL 5407748, at *5 (W.D. Pa. Sept. 8, 2020) (denying preliminary injunction alleging equal protection violations regarding absentee and mail-in ballots, because "Plaintiffs [had] not shown that the harm they fear[ed] is 'likely,' or than an injunction is the 'only' way to prevent it[.]").

True irreparable harm would ensue if this Court grants the Trump Campaign's requested relief. Issuance of an injunction would amount to millions of the Commonwealth's citizens being denied their constitutionally guaranteed right to vote. The General Assembly "vest[ed] the right to vote for president in its people, [and] the right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000). The Trump Campaign cannot be permitted to use the electorate as a sword for its own political gain.

3. The public interest is served by denying the requested injunction and allowing Pennsylvania voters' voices to be heard.

Contrary to Plaintiffs' assertions, it is the 6.8 million citizens of the Commonwealth of Pennsylvania whose rights would be injured if this Court issues an injunction. As Judge Brann aptly recognized, Plaintiffs "ask[ed that] Court to disenfranchise almost seven million voters." It now asks ***this*** Court to do the same. The Trump Campaign has no legal or factual basis for its contentions here, and like below "cannot justify the disenfranchisement of a single voter, let alone all of the voters of [the United States of America's] sixth most populates state" based on "strained legal arguments without merit and speculative accusations." App062; *see also Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) ("[C]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy" and "the State's interest[] in . . . quickly certifying election results . . . further serve[s] the public's interest[.]" (internal quotation marks and citations omitted)).

The Trump Campaign continues to rely heavily, and misguidedly, on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), for the availability of the remedies it seeks. The *Marks* decision was explicitly premised on specific, proven findings of a conspiracy between election officials and a specific candidate that resulted in

"massive absentee ballot fraud [and] voter deception." *Id*. at 887.[4] The record on appeal here and the exhibits attached to the present motion provide nothing close to the record evidence in *Marks*. First, by the Trump Campaign's own admission, there are no present allegations of fraud nor do they plausibly allege that any Counties' election practices amount to the harms shown in *Marks*. SA118 at 118:16-21. By the Trump Campaign's own admission, their claims rest on the alleged procedural differences in how Counties' dealt with mail-in votes and whether voters were notified of deficiencies observable upon receipt of the ballot submission. The routine election issues decried here fall woefully short or warranting the extreme remedy granted in *Marks*. *See*, *e.g.*, *Perkins v. Matthews*, 400 U.S. 379 (1971) (Black, J. dissenting) ("This Court has always heretofore been rightly hesitant in interfering with elections even for the grossest abuses."); *Perles v. Cty. Return Bd. of Northumberland Cty.*, 415 Pa. 154, 159 (1964) ("The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."); *Appeal of Simon*, 46 A.2d 243, 246 (Pa.

[4] *Marks* involved an organized and executed plan to defraud citizens into applying for absentee ballots when they did not meet the criteria, with outright lies that this represented a "new form of voting," so that their ballots could ultimately be cast fraudulently.

1946) ("For mere irregularities in conducting an election it is not to be held void," "because the rights of voters are not to be prejudiced by the errors or wrongful acts of the officers of the election."). Absent a proven, wide-spread fraudulent scheme, the disenfranchisement of millions of voters does not serve the public interest.

4. The balance of the equities favors denial of Plaintiffs' requested injunction.

Even if Plaintiffs could establish likelihood of success, irreparable harm, and public interest, the Court would still need to "balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. In this situation, with a government entity closely aligned with its citizens, the factors relating to public interest and equities overlap. *Nken*, 556 U.S. at 435.

On balance, Plaintiffs have not shown the "reasonable diligence" necessary to support injunctive relief. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam); *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010) (denying motion for emergency injunction pending appeal when Plaintiffs' claimed "emergency is largely one of their own making"). Specifically, there is no harm absent relief because, as to the individual Plaintiffs, they claim their ballots were properly rejected and, as to the Trump Campaign, the attempt to delay the certification of a nationwide election is too little too late. App197-98. The alleged margin of votes at issue does not upset the election results; Pennsylvania has

certified its results; and almost half of the states in the country have certified their election results.

Further nothing in the record before this Court favors massive disenfranchisement or undermining public faith in an election. It is the Commonwealth of Pennsylvania and its voting electorate—not the Trump Campaign—that will be irreparably harmed if this motion is granted. App092. Any delay increases the risk that the election is baselessly undermined, thus undermining citizens' faith in democracy. "Our people, laws, and institutions demand more." *Id.* at *1.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny the requested injunctive relief.

Respectfully submitted,

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Dated: November 24, 2020

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 4,959 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*
MARK A. ARONCHICK

November 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2020, I electronically filed the foregoing 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.

/s/ *Mark A. Aronchick*
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