No. 20-3371

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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

v.

KATHY BOOCKVAR, ET AL.,
Appellees,

Appeal from the United States District Court for the Middle District of Pennsylvania, No. 4:20-cv-02078 (Brann, J.)

Intervenor-Defendant DNC's Opposition To Plaintiffs-Appellants' Motion For Temporary Restraining Order And Preliminary Injunction

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' motion for injunctive relief is extraordinary for several reasons. First, the sheer scope of what they seek is unprecedented. Pennsylvania's election results have now been certified by both the Secretary of State and the Governor. Plaintiffs have offered no authority for a federal court to direct decertification of results that have already been properly certified under state law; indeed, in the district court they stated that "[w]hile, arguably, the Court could decertify … after electors are appointed, this is Constitutionally uncharged ground," and they cited only non-presidential election cases when discussing decertification. D. Ct. PI Br. 24 n.21. But even if there were such authority, the injunction Plaintiffs request could throw Pennsylvania's established and carefully choreographed post-election procedures into chaos, risking both disenfranchising millions of Pennsylvanians and improperly changing the outcome of the Commonwealth's presidential election.

In contrast, Plaintiffs would suffer no real harm absent an injunction, as they fail to identify *any* ballots that were illegally counted—let alone a sufficient number of ballots to overcome President Trump's more than 80,000 vote deficit in Pennsylvania. Indeed, the Pennsylvania Supreme Court has now held that the claimed deficiencies that poll watchers were purportedly unable to observe do not invalidate those ballots as a matter of state law. *See In re Canvass of Absentee and*

Mail-In Ballots Of Nov. 3, 2020 Gen. Election, No. J0118A-2020 *et al.*, slip op. 3 (Pa. Nov. 23, 2020).

Plaintiffs' request is separately extraordinary because it seeks injunctive relief far beyond what they are seeking in the underlying appeal. Plaintiffs are not appealing the district court's dismissal of their amended complaint. Nor are they appealing from the denial of a preliminary injunction. Plaintiffs are appealing only the district court's decision, based on concerns about undue delay, not to allow them to file a second amended complaint. Hence, even if they were completely successful in this appeal, all that Plaintiffs would receive is an order for the district court to consider whether there are grounds other than undue delay to deny Plaintiffs leave to file a second amended complaint. Yet Plaintiffs ask this Court to go vastly beyond that, and—now that the election results have been certified—to order decertification pending appeal. There is no basis in precedent or principle for an injunction pending appeal that is so divorced from the merits of the appeal itself. The injunction can and should be denied for that reason alone.

Even if Plaintiffs could somehow secure injunctive relief well beyond the relief that even a successful appeal would yield them, they could do so only if they could show that they would likely succeed both in obtaining leave to file their proposed second amended complaint in litigating the claims in that complaint. Absent both showings, there is no basis to issue the requested injunctive relief,

because there would be no ground for concluding that plaintiffs would eventually be entitled to such injunctive relief, such that it would be equitable to maintain the status quo while proceedings play out.

Plaintiffs cannot remotely make the required showing. In particular, *Bognet v. Secretary of the Commonwealth*, __ F.3d __, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), forecloses Plaintiffs from establishing standing on any of their claims. This Court explained that, *first*, only the Pennsylvania legislature has standing to sue under the Elections and Electors Clauses, *id.* at *6-9, and *second*, equal-protection injury based on "state actors [allegedly] counting ballots in violation of state election law" is insufficient for Article III standing because it is neither "concrete" nor "particularized," *id.* at *9-14. Plaintiffs conceded the first point below, Dkt. 126 at 2 n.1, and the second holding applies to Plaintiffs' equal-protection claims as well, *see* Dkt. 202 ("Op.") at 11-23. The same is true of the due-process claims that Plaintiffs propose to resurrect in their Second Amended Complaint ("SAC").

Independently or together, the weighty equitable concerns at stake and the weakness of Plaintiffs' legal position warrant denial of Plaintiffs' requested injunction. As the district court held—in accord with numerous other courts around the country—the Trump campaign's unsupported claims that the election was rigged are meritless. This Court should bring an end to Plaintiffs' attempts to

delay the inevitable, and should allow the millions of votes that Pennsylvanians solemnly cast on election day to be counted.

FACTUAL BACKGROUND

A. This Lawsuit Is One Of Many Attempts By The Trump Campaign To Delay Certification And Disenfranchise Voters

Since the November 3 election, the Trump campaign has filed a bevy of lawsuits around the Commonwealth, first to try to prevent votes from being counted, and more recently to prevent the certification of election results. Of particular relevance here, the campaign filed suit in several county Courts of Common Pleas, alleging that mail-in or absentee ballots ("mail ballots") that were unlawful for various reasons, including missing information on mail ballot declarations, were nonetheless counted. The vast majority of those courts rejected the Trump campaign's claims, finding that the challenged ballots were validly cast. *See, e.g.*, *In re: Canvass of Absentee and Mail Ballots of Nov. 3, 2020 General Election*, Nos. 201100874-78 (Pa. Ct. Com. Pl. Nov. 13, 2020); *Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elections*, No. 2020-18680 (Pa. Ct. Com. Pl. Nov. 13, 2020). And the Pennsylvania Supreme Court upheld these decisions rejecting the Trump campaign's position. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 31 EAP 2020, slip op. at 2 (Pa. Nov. 23, 2020). These rulings, moreover, represent a fraction of the dozens of state and federal court decisions around the country that have rejected

the Trump campaign's efforts to stop the counting of votes or the certification of election results, including this Court's recent ruling in *Bognet*.

This lawsuit is yet another attempt by the Trump campaign to invalidate election results, this one centered (under the SAC that Plaintiffs wish to file) on the alleged practices of (1) notifying voters who submitted procedurally defective mail ballots about the deficiencies and permitting them to "cure" their ballots; and (2) maintaining distance between poll watchers and canvassers. These two practices, Plaintiffs propose to argue, prevented poll watchers from observing purported deficiencies in the ballot declarations. After the Pennsylvania Supreme Court ruled that counties are not *required* to adopt notice-and-cure procedures, *see Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), Secretary Boockvar sent an email encouraging counties to nonetheless do so*, see* Op.5. Last week, the Pennsylvania Supreme Court upheld Defendant Philadelphia County's placement of poll observers that Plaintiffs challenge as unlawful. *In re Canvassing Observation*, 2020 WL 6737895, at *7-9 (Pa. Nov. 17, 2020).

B. District Court Proceedings

Plaintiffs—the Trump campaign and two individual plaintiffs whose mail-in ballots were canceled (and who were not given an opportunity to cure their ballots by their own county election boards)—filed this lawsuit one week after the election. Their original complaint advanced seven claims for relief but their First

Amended Complaint ("FAC"), which is the one the district court dismissed, advanced only two, one under the Equal Protection Clause and one under the Elections and Electors Clause.

After motions to dismiss the original complaint were arguably mooted by the FAC, and while motions to dismiss the FAC were pending, Plaintiffs sought leave to file the SAC. After an in-person hearing that lasted over five hours, the district court dismissed the FAC and denied the motion for leave to file the SAC. The case, the court observed, seeks to "disenfranchise almost seven million voters" based on what it called "strained legal arguments … and speculative accusations." Op.2. Yet, the court noted, one of the two claims, under the Elections and Electors Clause, was foreclosed by *Bognet*. And as to the other claim (alleging an equal-protection violation), the court explained that Plaintiffs' "attempt to avoid controlling precedent" by "haphazardly stitch[ing] together" two distinct equal-protection theories fails, *id.* at 11, both because neither theory suffices to establish standing and neither states a plausible claim for relief on the merits.

1. Addressing Plaintiffs' theory of standing based on the alleged denial of the individual Plaintiffs' right to vote, the court held that Plaintiffs had failed to show either that Defendants had caused them any injury or that the requested relief would redress their alleged injury. The defendant counties "had nothing to do with the denial of Individual Plaintiffs' ability to vote," the court explained, because

their ballots were rejected by Lancaster and Fayette Counties, "neither of which is a party to this case." Op.16. And Secretary Boockvar, meanwhile, had "*encouraged* counties to allow exactly these types of votes" through the cure process. *Id.* at 17 (emphasis added). Further, the court explained, enjoining the certification of the election results would not redress the individual plaintiffs' alleged injury. "It would simply deny more than 6.8 million people *their* right to vote." *Id.* at 18.

Next, the court explained that the Trump campaign had not even made clear "what its alleged injury is." *Id.* at 18. Indeed, the court stressed, even after an "extensive project of examining almost every case cited to by Plaintiffs," *id.* at 19, it could identify no concrete or particularized injury sufficient for Article III standing, *see id.* at 19-23 (explaining that associational standing is inapplicable here and that the campaign's reliance on competitive standing "is, at best, misguided"). The court further held that the campaign could not "satisfy the causation and redressability requirements" of standing because, "[t]o the extent the Trump campaign alleges any injury at all, its injury is attenuated from the actions challenged." *Id.* at 23 n.75.

2. The district court also concluded that "[e]ven if [Plaintiffs] had standing," they had failed to plead a plausible equal-protection claim. Op.26. With respect to the individual Plaintiffs' claim, the court explained that rational-

basis review applies because Defendants' conduct imposed no burden on the individual Plaintiffs' right to vote. *Id.* at 29. To the contrary, the Defendant Counties "*lifted* a burden on the right to vote" by implementing notice-and-cure procedures. *Id.* Moreover, the court recognized, because "Plaintiffs seek to remedy the denial of their votes by invalidating the votes of millions of others," *id.* at 31, granting the requested relief would "violate the Constitution," *id.* at 32.

Finally, the court rejected the Trump campaign's equal-protection claim, i.e., that (1) "Defendants excluded Republican/Trump observers from the canvass" (a theory Plaintiffs "attempt[ed] to revive" in briefing after failing to seek relief on this basis, Op.12 n.39); and (2) Defendants' "use of notice/cure procedures … was deliberately done in counties where defendants knew that mail ballots would favor Biden/Democrats." *Id.* at 32-33. As to the first (poll-observer) theory, the court explained that it "finds no support in the operative pleading," because the amended complaint "makes no mention of disparity in treatment of observers based on which campaign they represented." *Id.* at 33.

Nor, the court recognized, could Plaintiffs "salvage their notice-and-cure theory"—and thus their equal-protection claim—"by invoking *Bush v. Gore*." Op.34. That decision "does not stand for the proposition that every rule or system must ensure uniform treatment." *Id.* at 35. It concerned a particular situation in which "the lack of guidance from a court constituted an equal-protection

violation." *Id.* But as the court explained, Plaintiffs "are not challenging any court action," nor do they "allege that Secretary Boockvar's guidance differed from county to county." *Id.* And as "[m]any courts [] have recognized," simply employing "different election procedures and voting systems within a single state" does not violate the Equal Protection Clause. *Id.* at 35-36.

Finally, the court noted that Plaintiffs sought leave to file a SAC that would revive many of the claims from the original complaint that were omitted in the FAC. As noted, the SAC's claims challenged the alleged practices of (1) notifying voters who submitted procedurally defective mail ballots about the deficiencies and permitting them to "cure" their ballots; and (2) maintaining distance between poll watchers and canvassers. These two practices, Plaintiffs propose to argue, prevented poll watchers from observing purported deficiencies in the ballot declarations, and created an arbitrary system in which some voters can cure and have their votes counted while others cannot. The district court denied Plaintiffs leave to file the SAC on grounds of undue delay, i.e., in light of the severe time pressures of the election-certification process. The court therefore granted Defendants' motions to dismiss with prejudice.

C. Subsequent Developments

Plaintiffs appealed—but not to challenge the dismissal of the FAC. Plaintiffs are instead appealing only the district court's conclusion that undue delay

warranted denial of leave to amend. Yet Plaintiffs seek an injunction pending appeal that goes far beyond the limited relief they would receive from succeeding with that challenge and instead grants them the relief they could receive if they (1) succeeded on this appeal, (2) succeeded in securing leave to file the SAC, *and* (3) succeeded in litigating the SAC's claims.

While the appeal has been pending, Pennsylvania officials have continued carrying out their statutory duties regarding post-election processes: Yesterday was the deadline for counties to certify their election results, which they did. And earlier today, both the Secretary of State and the Governor certified the statewide election results—which show President-elect Biden prevailing in the Commonwealth over President Trump by some 80,000 votes. *See* Pa. Dep't of State, Unofficial Returns, https://www.electionreturns.pa.gov/ (updated Nov. 24, 2020). The Secretary does not have authority to undo the certification of the Governor, who is not a party to this lawsuit.

ARGUMENT

Preliminary injunctive relief is "an extraordinary remedy, which should be granted only in limited circumstances." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002). The movant must first "demonstrate that it can win on the merits" and "that it is more likely than not to suffer irreparable harm in the absence of preliminary

relief." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). If those "gateway factors are met, a district court then considers" the balance of the equities and the public interest, "and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*; *see also Adorers of the Blood of Christ v. FERC*, 2017 U.S. App. LEXIS 25215 at * 1 (3d Cir. 2017).

Here, all four factors weigh strongly in favor of denying Plaintiffs' request for the extraordinary relief of an injunction pending appeal.

I. PLAINTIFFS' REQUESTED INJUNCTION IMPROPERLY GOES FAR BEYOND THE RELIEF THEY SEEK IN THIS APPEAL

As a threshold matter, the injunction Plaintiffs request should be denied because it goes well beyond the relief they seek in this appeal. As noted, Plaintiffs' underlying appeal seeks only an order that undue delay was not a valid basis for the district court to deny Plaintiffs leave to file the SAC. If they prevail on the appeal, therefore, Plaintiffs would receive only an order for the district court to consider whether, setting aside undue delay, they should be allowed to *file* the SAC. Yet as explained, Plaintiffs seek an injunction pending appeal that would give them the relief they could receive if they not only succeeded in this appeal, but also succeeded on remand both in securing leave to file the SAC and in litigating the merits of the claims in the SAC. Plaintiffs offer no rationale for a court to issue *any* injunction pending appeal—let alone the extremely far-reaching

one they request—that goes so far beyond the merits of the actual underlying appeal.[1]

II. PLAINTIFFS HAVE NOT DEMONSTRATED THE REQUISITE LIKELIHOOD OF SUCCESS

Plaintiffs have neither shown a likelihood of success on the merits nor, as discussed below, satisfied the other required factors. Because Plaintiffs seek an injunction pending appeal that would give them the relief they could receive if they actually prevailed on remand on the merits of their claims in the SAC (i.e., assuming they first won on appeal and were allowed to file the SAC). Hence, the likelihood of success they must show to obtain that injunction is likelihood of prevailing (1) on appeal, (2) on their motion for leave to file the SAC on remand, and (3) on the merits of the claims in the SAC. They cannot do so.

A. Plaintiffs Will Not Likely Prevail In This Appeal Because The District Court Did Not Abuse Its Discretion In Denying Leave To Amend Based On Undue Delay

The district court's denial of leave to amend on grounds of undue delay was well within its broad discretion, for two reasons.

First, the record shows that in litigating this case, Plaintiffs had "dilatory motives," *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000). Plaintiffs waited a

[1] Plaintiffs' requested injunction could also be denied for failure to comply with Federal Rule of Appellate Procedure 8(a). *See Baker v. Adams Cty./Ohio Valley School Bd.*, 310 F.3d 927, 930-31 (6th Cir. 2002); *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001).

week after the election to bring this lawsuit. And over the ensuing ten days, they changed counsel twice, filed multiple complaints, and asked to delay hearings. After the district court held a nearly six-hour hearing on motions to dismiss, moreover, Plaintiffs asked to start over by reinstating claims they had withdrawn from their original complaint. The district court was well within its discretion to conclude under these circumstances that Plaintiffs' attempt to amend a second time was unjustified, particularly within the short timeframe that the court had to resolve the case.

Second, further amendment would have caused widespread prejudice to the other parties and the public (and such prejudice is of course one reason that delay can be "undue"). Allowing Plaintiffs to effectively restart this lawsuit by reviving claims they could have brought (and in fact did bring) weeks earlier would have created an unjustifiable risk of preventing the Commonwealth from timely certifying the results of its presidential election, denying Pennsylvania officials their statutory role in the process of appointing the Commonwealth's slate of presidential electors. It would also have caused severe prejudice to the DNC and President-elect Biden if Pennsylvania's 20 electoral votes were not awarded to him, despite leading the presidential race in the Commonwealth by over 80,000 votes. And it would have disenfranchised approximately 7 million voters who participated in Pennsylvania's presidential election expecting that their votes

would count towards the selection of the Commonwealth's presidential electors. Given that Plaintiffs' strategic choices had placed the district court and the parties in this position, allowing such prejudice to continue was plainly unwarranted.

B. Plaintiffs Will Not Likely Prevail In This Appeal Because The Case Is Moot

Plaintiffs seek (including in the SAC) to enjoin certification of Pennsylvania's election results. *See* SAC ¶¶ 325-326. But as of this morning, those results have now been certified, by all 67 counties in the Commonwealth, by the Secretary of State, and by the Governor (who has signed the Certificate of Ascertainment for the slate of electors for President-elect Biden and Vice President-elect Harris and submitted the certificate to the Archivist of the United States).[2] And as noted, although Plaintiffs' preliminary-injunction motion below cited (at 24 n.21) cases that purportedly "sustain decertification as a remedy," none of those cases arose in the context of a presidential election—where, following certification by the governor, the only remaining step is for the electors to "perform the duties enjoined upon them by the Constitution and laws of the United States," 25 Pa Stat § 3192. Indeed, as also noted, Plaintiffs conceded below that,

[2] *See* Press Release, Pa. Dep't of State, *Department of State Certifies Presidential Election Results* (Nov. 24, 2020), https://www.media.pa.gov/Pages/State-details.aspx?newsid=435.

in this context, decertification is "unchar[t]ed ground" and at best "arguably" constitutional. D. Ct. PI Br. 24 n.21.

Moreover, even if decertification is ever permissible in the context of a presidential election, it is not a viable remedy here. Plaintiffs sued only the Defendant Counties and the Secretary of State—not the electors or the Governor. As explained, then, Plaintiffs have not sued any party capable of affording them relief at this juncture. *See* 25 P.S. § 3192 (following certification by the Governor "[t]he electors chosen … shall assemble at the seat of government of this Commonwealth [as] directed by the Congress of the United States, and shall then and there perform the duties enjoined upon them by the Constitution and laws of the United States"). Because it is therefore "impossible for the court to grant any effectual relief," the case is moot. *Cinicola v. Scharffenberger*, 248 F.3d 110, 119 (3d Cir. 2001); *see also Torres-Jurado v. Adm'r of Bergen Cty. Jail*, 767 F. App'x 227, 230 (3d Cir. 2019) (dismissing appeal as moot because the "sole remaining defen[dant]" was the county sheriff, "and the only relief being sought that [was] even potentially still available to Torres-Jurado [did] not involve the Sheriff at all").

C. Plaintiffs Have No Likelihood Of Success On The Merits Of The Claims In The SAC, And Hence No Likelihood Of Even Being Given Leave To File The SAC

Even if Plaintiffs demonstrated a likelihood of success on the limited issue being appealed, the injunction they request would still have to be denied. Plaintiffs cannot show that they both would be allowed to file the SAC and would then prevail on the merits of the claims in the SAC. In fact, they could not prevail on any of the claims in the SAC, and hence they would likely be denied leave even to file the SAC, as a matter of futility.

1. Plaintiffs Lack Standing To Assert Their Claims

Plaintiffs lack Article III standing to advance any of the claims in the SAC because Plaintiffs fail to establish, as to any of those claims, any "concrete and particularized" injury-in-fact or that any injury was traceable to Defendants. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Indeed, this Court's decision in *Bognet* is dispositive of the SAC's due-process and equal-protection claims stemming from "vote dilution." There, this Court rejected a claim that "state actors count[ed] ballots in violation of state election law," thereby "dilut[ing]" the strength of the Plaintiffs' votes, as neither "concrete" nor "particularized" enough to support Article III standing. 2020 WL 6686120, at *9-14. To permit standing based on non-compliance with state law "'would transform every violation of state election law (and, actually, every violation of every law) into a potential federal

equal-protection claim.'" *Id.* at *11. Plaintiffs' equal-protection and due-process claims, which are premised on a challenge to Defendants' alleged "unlawful dilut[ion]" of Plaintiffs' votes, SAC ¶ 117; *see also id.* ¶¶ 172, 174, 176, 186, 282, thus present "a 'paradigmatic generalized grievance that cannot support standing.'" *Bognet*, 2020 WL 6686120, at *12.

To the extent Plaintiffs assert that their votes were *denied*, that injury is "fairly trace[able]" not to any Defendant here but to other counties that chose not to assist voters in exercising their rights, *Lujan*, 504 U.S. at 560-61. Any claim based on vote denial would also fail the redressability prong of standing; Plaintiffs' injury can only be addressed by Plaintiffs' own county boards of elections, neither of which is named as a Defendant in the SAC. *See id.*

Bognet—which rejected a federal election candidate's effort to force Pennsylvania officials to comply with state election law—likewise forecloses the Trump campaign's effort to establish "competitive standing." If a candidate's complaint that officials were accepting ballots in contravention of state law were by itself sufficient to show injury, *Bognet* would have come out differently. *Bognet* thus makes clear that this standing theory was far too speculative—and the same is true of the Trump campaign's competitor-standing theory. The SAC, for example, does not explain "how counting more timely cast votes would lead to a less competitive race, nor does [it] offer any evidence tending to show that a

greater proportion of [defective] mailed ballots" would be cast for President-elect Biden—much less that "such votes would have [been] sufficient in number to change the outcome of the election to [Trump's] detriment." *Bognet*, 2020 WL 6686120, at *8. Plaintiffs likewise offer no "empirical evidence … that would establish a statistical likelihood or even the plausibility" that procedures they challenge resulted in a single unlawful vote being cast for President-elect Biden, *id*. at *17, especially since the Pennsylvania Supreme Court has now upheld those procedures as lawful, *see supra* pp. 1-2.

2. Plaintiffs Would Not Likely Succeed On The Merits Of The Equal-Protection Claims In The SAC

The proposed SAC fails to state a plausible claim for relief under the Equal Protection Clause, and hence Plaintiffs cannot show either (1) that they would likely succeed in filing such a claim or (2) that they would likely succeed on the merits.

The SAC makes two overarching changes to the FAC's equal-protection allegations.

First, the SAC revives allegations from the original complaint that Defendants violated the Equal Protection Clause by requiring observers to stand farther from canvassers than some other counties did. But the district court already rejected that theory, because "[n]one of these allegations … claim that the Trump campaign's watchers were treated *differently* than the Biden campaign's watchers,"

and "[s]imply alleging that poll watchers did not have access or were denied access to some areas does not plausibly plead unequal treatment." Op.34. The SAC does nothing to remedy that deficiency; in particular, Plaintiffs do not allege that Defendants (or anyone else) failed to apply observer-placement policies equally to Democrats and Republicans *within* each county.

Plaintiffs' equal-protection allegations also fail to state a claim under the *Anderson-Burdick* balancing test that this Court applies to equal-protection claims challenging state election rules. *See Rogers v. Corbett*, 468 F.3d 188, 193 (3d Cir. 2006). Under that standard, when—as here—voting rights are subjected only to "reasonable, non-discriminatory restrictions, … the State's important regulatory interests are generally sufficient to justify" the restriction. *Burdick*, 504 U.S. 428, 433-434 (1992); *accord Anderson v. Celebrezze*, 460 U.S. 780 (1983). Again, Plaintiffs allege nothing to suggest that Defendants applied their limitations on canvassing observers in a discriminatory, unequal, or otherwise unreasonable fashion.

Defendants' observer-placement regulations were likewise reasonably calibrated to serve strong state interests—as the Pennsylvania Supreme Court recently stressed in upholding Philadelphia County's canvassing regulations:

> based on [each board of elections'] careful consideration of how it could best protect the security and privacy of voters' ballots, as well as safeguard its employees and others who would be present during a pandemic for the pre-canvassing and canvassing process, while, at the

> same time, ensuring that the ballots would be counted in the most expeditious manner possible.

In re Canvassing Observation, 2020 WL 6737895, at *8.

Plaintiffs cannot salvage their challenge to Defendants' observer-placement practices by characterizing them as a "scheme" to help President-elect Biden by counting unlawful ballots. Plaintiffs made substantively the same challenge in their briefing below; they now simply propose to add (for instance) the phrase "in order to favor Biden over Trump" at the end of a series of allegations concerning Plaintiffs' allegedly unlawful conduct, *see* SAC ¶¶ 117, 139; *see also id.* ¶¶ 156, 162, 163 (adding allegations that challenged procedures were "designed to favor Biden over Trump"). That sort of conclusory accusation falls far short under Rule 12(b)(6), *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("a complaint [may not] pleads facts that are 'merely *consistent* with' a defendant's liability" (emphasis added)), and is certainly insufficient to satisfy Rule 9(b) heightened standard for fraud.

3. Plaintiffs Would Not Likely Succeed On The Merits Of The Due-Process Claims In The SAC

The proposed SAC similarly fails to state a plausible claim for relief under the Due Process Clause.

Plaintiffs first assert that their constitutional right to vote (which is protected in part by the Due Process Clause) was infringed by supposed violations of

Pennsylvania's poll-observer requirements. But "there is no constitutional right to serve as a poll watcher." *Donald J. Trump for President, Inc. v. Boockvar*, __ F. Supp. 3d __, 2020 WL 5997680, at *71 (W.D. Pa. Oct. 10, 2020); *see also Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984) ("While it would be desirable for each candidate to have persons looking out for his interests at the poll, we are not persuaded that this interest is a vital one[.]"). And Plaintiffs have not shown that counties' treatment of poll observers infringed on any other constitutionally protected right. The SAC alleges that Defendants excluded observers "to conceal their decision not to enforce requirements that declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes," with the alleged ultimate objective being "to count absentee and mail ballots that should have been disqualified." SAC ¶ 252. But the SAC contains no factual allegations that irregular ballots were in fact counted.

The SAC also alleges that Plaintiffs' due-process rights were violated by some counties' notice-and-cure procedures. But county variations in implementing the Election Code do not create the "significant disenfranchisement" required for a due-process violation. *See Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998). To the extent that disparate notice-and-cure procedures affected Plaintiffs' right to vote, they should have sued the counties that did not allow them to cure.

4. Plaintiffs' Claims Regarding The Notice-And-Cure Procedures Are Barred By Laches

Plaintiffs also cannot succeed either in their effort to amend the complaint or in prevailing on the merits of the claims in the SAC because the SAC's due-process and equal-protection claims concerning Defendants' notice-and-cure procedures are barred by laches. Plaintiffs conceded below that their claim is premised on procedures that Plaintiffs have known about since before election day. Dkt. 170 at 7, 10. Plaintiffs also conceded that "[c]ounties took different positions on curing *before* election day." *Id.* at 10 (emphasis added). Indeed, the Trump campaign sued unsuccessfully based on a similar theory prior to election day. *See Donald J. Trump for President, Inc.*, 2020 WL 5997680 at *60-68. Yet Plaintiffs waited to file their claims until *after* it became apparent that their preferred candidate would lose, and did not file their proposed SAC until over a week later.

Such "hedging" is barred by laches. *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss. 1985); *see also Kansas v. Colorado*, 514 U.S. 673, 687 (1995). Plaintiffs "la[id] by and gamble[d] upon receiving a favorable decision of the electorate and then, upon losing, s[ought] to undo the ballot results in a court action." *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) (en banc) (quotation marks omitted). The prejudice that granting Plaintiffs' request would cause would be extreme, as Plaintiffs seek nothing less than to undo the popular vote of all Pennsylvanians, as reflected in the now-certified statewide results.

III. THE EQUITIES UNEQUIVOCALLY WEIGH AGAINST GRANTING THE REQUESTED EQUITABLE RELIEF

Even if Plaintiffs' case on the merits were not as weak as it is, forceful equitable concerns warrant denying the requested injunction. To begin with, Plaintiffs will not suffer any irreparable harm absent an injunction. To show likely irreparable harm, Plaintiffs would have to demonstrate that an injunction would enable them to overturn the presidential election in the Commonwealth. They cannot do so, as they have not identified *any* ballots in Pennsylvania that were counted despite being invalid under state law—let alone a sufficient number of ballots to overcome the more than *80,000-vote* margin that separates President Trump and President-elect Biden in the Commonwealth.

While the Court need not reach the final two injunctive factors, they also favor denying relief. The requested injunction could make it impossible for Defendants to perform their legal duties in a timely fashion—and, in the process "abrogate the right of millions of Pennsylvanians to select their President and Vice President," *Stein v. Cortes*, 223 F. Supp. 3d 423, 442 (E.D. Pa. 2016), by interfering with the Commonwealth's ability to enjoy the protection offered by the federal "safe-harbor" deadline, *see* 3 U.S.C. § 5. And granting the injunction would be contrary to the public interest. Disenfranchising even "a single voter is a matter for grave concern." *SEIU v. Husted*, 906 F. Supp. 2d 745, 750 (S.D. Ohio

2012). An injunction pending appeal here, however, risks invalidating *millions* of Pennsylvanians' votes. That is in no way in the public interest.

A. Plaintiffs Will Not Suffer Irreparable Harm Absent An Injunction

The "extraordinary remedy" of injunctive relief is "unavailable absent a showing of irreparable injury and no adequate remedy at law." *Flynn v. U.S. by & through Eggers*, 786 F.2d 586, 590 (3d Cir. 1986); *see also Bey v. DeRose*, 2014 WL 5035417, at *2 (M.D. Pa. Oct. 8, 2014). The only irreparable harm that Plaintiffs assert is that—absent an injunction—"unlawful ballots" will be certified. *See* Br. 24. But irreparable harm here means showing that enough unlawful ballots would be counted and certified to change the outcome of the presidential election in Pennsylvania. Plaintiffs have not met that burden—indeed, they have not identified *any* invalid ballots that were counted (and, as of today, certified).

Instead, Plaintiffs seek to set aside millions of ballots that *may* have been "cured" or *may* have had deficiencies, including missing "a signature, a date, and a complete address,"—or other "'minor errors'"—on the grounds that they such ballots do not "comply with Pennsylvania law." *See, e.g.*, TRO Br. 2-4. Yesterday afternoon, the Pennsylvania Supreme Court squarely rejected the argument that such minor imperfections invalidate a mail-in ballot, holding "the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballots outer

envelope, but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." *See Canvass of Absentee and Mail-In Ballots Of Nov. 3, 2020 Gen. Election*, No. J0118A-2020 *et seq*., slip op. 3 (Pa. Nov. 23, 2020). Indeed, Plaintiffs now acknowledge that "the Pennsylvania Supreme Court *may* have ruled today to allow the[] deficiencies" that Plaintiffs have previously claimed rendered mail ballots "defective." TRO Br. 3 & n.3 (emphasis added). This statement does not go far enough—the Court *did* in fact reject the basic state law premise that undergirds Plaintiffs' case.

The Pennsylvania Supreme Court's ruling demolishes Plaintiffs' claim for irreparable harm. Even if Plaintiffs could establish a constitutional principle that requires all ballots that are invalid under Pennsylvania law to be discarded (and to be clear, they cannot), their suit *does not identify any unlawful ballots* that were cast. Accordingly, Plaintiffs cannot meet their burden to show that they will suffer "a likelihood of irreparable injury—not just a possibility" in the absence of an injunction. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008).

B. The Balance Of Equities And The Public Interest Weigh Against An Injunction

As noted, this Court need not address the final two injunctive factors in light of Plaintiffs' failure to show likelihood of success on the merits or irreparable harm. Regardless, both favor denying the requested injunction.

The net effect of Plaintiffs' requested injunction could be to delay the finalizing of Pennsylvania slate of presidential electors after the federal safe-harbor deadline. Specifically, the results of the election for President within a state must be determined by December 8, 2020, to benefit from the safe-harbor provision of the federal election code and in any event by December 14, 2020, to ensure that Pennsylvania's electoral votes will be counted. Any delays in the elector-selection process would imperil Defendants' ability to help the Commonwealth meet that deadline—now just two weeks away (including the Thanksgiving holiday weekend)—because the timetable for completion is so short. An injunction could prevent Defendants from completing their statutory duties to ensure that the slate of electors chosen by the majority of Pennsylvanians were appointed by the safe-harbor deadline. That is a significant harm.

In addition, the requested injunction could cause enormous harm to the DNC and, more importantly, to the millions of Pennsylvanians who cast votes in the presidential election and who expect that their choices will expeditiously be certified and transmitted to Congress for the counting of the electoral votes. Indeed, it is this requested relief—not any alleged Election Code violation—that threatens to deprive countless Pennsylvanians, including the DNC's members, of their constitutional right to vote and to have their votes counted. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) ("There is more to the right to

vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted." (quotation marks omitted)).

A court order obstructing the will of those voters, when President-elect Biden currently leads by more than 80,000 votes in the Commonwealth, would deeply diminish voters' faith in the electoral process—a sentiment that would persist long after this election. *See Hardin v. Montgomery*, 495 S.W.3d 686, 711 (Ky. 2016) (noting "the destabilization of election results that would occur if we cast aside election results for trivial reasons or unsubstantiated accusations" would be "corrosive to the public's trust in fair elections").

In contrast, Plaintiffs will as explained suffer no cognizable harm. *See supra* pp. 24-25. The equitable balance tips even further against Plaintiffs because they failed to take advantage of existing state-law remedies that provide a clear mechanism for receiving the kind of relief they seek in this suit. For example, although the time has now passed, Plaintiffs had the option of filing an election contest in state court that if successful would have required the election to be overturned. 25 P.S. § 3456. Although state law sets a high bar for relief in such instances, *see In re Contest of Election for Office of City Treasurer*, 400 Pa. 507, 512 (1960), invoking the election-contest procedure in a timely fashion would have

avoided the prospect of unduly delaying Pennsylvania's post-election procedures, which are built to accommodate this kind of challenge.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). It is not in the public interest to have Pennsylvania's post-election processes disrupted, rushed, and possibly hampered by late-breaking intervention from a federal court. By delaying the elector selection process, the requested injunction would harm the millions of Pennsylvanians who cast votes in the presidential election and who expect that their choices will expeditiously be certified and transmitted to Congress for the counting of the electoral votes.

CONCLUSION

Plaintiffs' motion should be denied.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I, Seth P. Waxman, hereby certify as follows:

(1) I am counsel of record and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

(2) The electronic file of this brief was scanned with CYLANCE Protect anti-virus software.

(3) This motion contains 6,435 words within the meaning of Fed. R. App. P. 27(d) and 32(f). In making this certification, I have relied on the word count of the word-processing system used to prepare this brief.

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November 24, 2020

CERTIFICATE OF FILING AND 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.

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