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. 20-cv-2078, Judge Matthew W. Brann

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SECRETARY OF THE COMMONWEALTH KATHY BOOCKVAR'S CORRECTED OPPOSITION TO APPELLANTS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

No federal court has ever issued an order enjoining a state's certification, or directing decertification, of presidential electors—and Appellants offer no reason why this Court should be the first. The motion that they have filed flagrantly violates Federal Rule of Appellate Procedure 8, since they did not first seek relief pending appeal in the district court. And Appellants fail to satisfy *any* of the criteria for an injunction pending appeal. They are not likely to succeed on the merits of their claims, which are alleged in an inoperative pleading that the district court properly rejected, which suffer from clear Article III defects, and which collapse upon even cursory inspection. Nor have Appellants demonstrated that the relief they seek would avert irreparable harm: the injuries they alleged are entirely conjectural and the remedy they seek lacks any basis in law. Finally, consideration of the public interest and the balance of the equities only confirms that there is no merit whatsoever to Appellants' motion.

BACKGROUND

"Although this case was initiated less than two weeks ago, it has already developed its own tortured procedural history." District Court's Memorandum Opinion Dismissing the First Amended Complaint at 7, Dist. Ct. Dkt. 202 ("Mem. Op."). On November 9, 2020, Appellants filed suit against Secretary Boockvar as well as the County Boards of Elections for Allegheny, Centre, Chester, Delaware,

Montgomery, Northampton, and Philadelphia counties. Dist. Ct. Dkt. 1. Appellants' original complaint raised seven counts stemming from two overarching objections. First, Appellants alleged that Appellees denied the Trump Campaign "meaningful access to observe and monitor" the canvassing process for mail-in ballots from their preferred distance in contravention of the Fourteenth Amendment's Due Process (Count I) and Equal Protection (Count II) Clauses, as well as the Elections and Presidential Electors Clauses (Count III). *Id*. at ¶¶ 178, 188, 201. Second, Appellants alleged that Appellees violated the Equal Protection Clause (Count IV), Due Process Clause (Count VI), and Elections and Presidential Electors Clauses (Counts V and VII), by allowing voters who cast mail-in ballots to cure prior to the close of the polls. *Id*. at ¶¶ 212, 222, 232, 242.

On November 12, Appellants filed a motion for a preliminary injunction, Dist. Ct. Dkt. 89, and Appellees (including several intervenors) filed motions to dismiss, Dist. Ct. Dkts. 81, 85-86, 90, 92-99, 105. That same day, Appellants had their first of several changes in counsel. Attorneys from Porter Wright Morris & Arthur, who had signed Appellants' complaint, filed a motion seeking to withdraw from the case. Dist. Ct. Dkt. 106. The district court granted the motion, and Appellants retained John Scott and Douglas Brian Hughes to serve as co-counsel alongside their remaining original attorney, Linda A. Kerns. Dist. Ct. Dkts. 116-117, 123.

The next day, this Court decided *Bognet v. Secretary of the Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), which held that plaintiffs—a congressional candidate and voters—lacked Article III standing to enjoin Secretary Boockvar and county election officials from counting ballots based on alleged violations of the Elections, Presidential Electors, and Equal Protection Clauses. *Id.* at *7, 18. Specifically, this Court explained that an "undifferentiated," "generalized grievance" to enforce "compliance with the Elections Clause and Electors Clause" does not constitute Article III injury. Nor did the voter-plaintiffs "conceptualization of vote dilution—state actors counting ballots in violation of state election law—[constitute] a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at *11.

On November 15, the day Appellants owed their response to the pending motions to dismiss, Appellants' new group of attorneys filed the First Amended Complaint ("FAC"). Dist. Ct. Dkt. 125. The FAC abandoned five of the seven claims in the original complaint—including both of the due process claims—and excised numerous factual allegations relating to canvass observers. *See id.*; Dist. Ct. Dkt. 125-1 (redline indicating changes from the original complaint). The remaining counts in the FAC consisted of an equal protection claim (based on the discretion afforded to counties to adopt a notice and cure policy for mail-in ballots) and a claim

pursuant to the Elections and Presidential Electors Clauses (which Appellants subsequently acknowledged was expressly precluded by *Bognet*). *Id.* at ¶¶ 150-170.[1]

Appellees filed motions to dismiss the FAC on November 16. *See* Dist. Ct. Dkts. 135-136, 139-145. Later that day, Appellants instituted their second series of substitutions of counsel. Mr. Scott, Mr. Hughes, and Ms. Kerns requested permission to withdraw. Dist. Ct. Dkt. 151. The district court granted Mr. Scott and Mr. Hughes' withdrawal motions but denied Ms. Kerns' motion. Dist. Ct. Dkt. 154; Mem. Op. 10. Marc A. Scaringi subsequently entered an appearance on behalf of Appellants. Despite his representation that this substitution would not delay the court's proceedings, Mr. Scaringi asked the district court to postpone the November 17 oral argument and the evidentiary hearing scheduled for November 19. Dist. Ct. Dkts. 149, 151-152. The district court promptly denied that request. Dist. Ct. Dkt. 153.

Shortly before oral argument on November 17, Rudolph W. Giuliani entered an appearance on behalf of Appellants.[2] Dist. Ct. Dkts. 156, 158. On November 18, Appellants opposed the pending motions to dismiss the FAC. *See* Dist. Ct. Dkt. 170. The next day, Appellees submitted replies in support of their motions to dismiss. *See* Dist. Ct. Dkts. 175-179. Appellants also filed an amended motion for a temporary

[1] *See* Appellants' Response to Defendant Kathy Boockvar's Notice of Supplemental Authority in Support of Motion to Dismiss at 1, Dist. Ct. Dkt. 124.

[2] Following the appearances of Mr. Scaringi and Mr. Giuliani, Ms. Kerns was permitted to withdraw her representation on November 19.

restraining order or preliminary injunction, Dist. Ct. Dkts. 182-183, and a motion for leave to file a Second Amended Complaint (SAC). Dist. Ct. Dkt. 172, 185. The proposed SAC sought to reinstitute several claims from the original complaint that Appellants had dropped just four days earlier when they filed the FAC, including those based on the purported lack of access by observers to monitor the canvass.

On November 21, 2020, the district court granted Appellees' motions to dismiss the FAC with prejudice and denied as moot all other pending motions. Dist. Ct. Dkts. 202-203. Noting that Appellants' equal protection claim was "like Frankenstein's monster"—since it had been "haphazardly stitched together . . . in an attempt to avoid controlling precedent," Mem. Op. 11—the district court rejected Appellants' attempt to "disenfranchise almost seven million voters" based on "strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence," *id.* at 2. The district court also rejected Appellants' motion for leave to file the SAC, stating as follows:

> Given that: (1) Plaintiffs have already amended once as of right; (2) Plaintiffs seek to amend simply in order to effectively reinstate their initial complaint and claims; and (3) the deadline for counties in Pennsylvania to certify their election results to Secretary Boockvar is November 23, 2020, amendment would unduly delay resolution of the issues. This is especially true because the Court would need to implement a new briefing schedule, conduct a second oral argument, and then decide the issues.

Id. at 36.

On November 22, Appellants filed a notice of appeal in the district court. Dist. Ct. Dkt. 205. Later that day, they filed a motion for expedited review with this Court, ECF No. 5, and subsequently amended that motion in the early morning hours of November 23, ECF No. 6. The Court granted that motion, directing Appellants to file their merits brief by 4:00 p.m. on November 23 and Appellees to file their opposition by 4:00 p.m. on November 24. ECF No. 9. Notwithstanding the expedited briefing schedule on the merits, Appellants then filed the motion here at issue, in which they request an injunction pending appeal. *See* ECF No. 43. On the morning of November 24, Pennsylvania certified the results of the presidential election.

STANDARD OF REVIEW

An injunction is "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). To qualify for an injunction pending appeal, Appellants must establish "(1) a likelihood of success on the merits; (2) that [they] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). This standard is only rarely satisfied pending appeal and "demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the *status quo* but grants judicial intervention that has been withheld by [the district

court].” *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation marks omitted).

ARGUMENT

Appellants’ motion for an injunction pending appeal should be denied for two fundamental reasons: it does not comply with Federal Rule of Appellate Procedure 8(a)(1) and it does not satisfy any of the requirements for such extraordinary relief.

I. Appellants’ Motion is Procedurally Improper

Federal Rule of Appellate Procedure 8(a)(1) provides that “[a] party must ordinarily move first in the district court for . . . an order . . . granting an injunction while an appeal is pending.” This requirement is excused only if a party “show[s] that moving first in the district court would be impracticable.” *Id.* Here, Appellants identify no reason why it would have been “impracticable” to comply with Rule 8. And while Appellants did request preliminary injunctive relief *before* the district court dismissed their case, they did not move the district court for an order “granting an injunction *while [their] appeal is pending*,” Rule 8(a)(1) (emphasis added). They thus violated Rule 8’s “cardinal principle” that “the relief ordinarily must first be sought in the lower court.” Wright & Miller, 16A Fed. Prac. & Proc. Juris. § 3954 (5th ed. 2020). For this reason alone, Appellants’ motion is plainly improper. *See, e.g.*, *Agudath Israel of Am. v. Cuomo*, No. 20-3572, --- F.3d ---, 2020 WL 6559473, at *1 (2d Cir. Nov. 9, 2020) (denying motion under Rule 8 where appellant had

earlier filed a preliminary injunction motion but did not move the district court for an injunction pending appeal); *S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001); *Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 38 (2d Cir. 1993).

Adherence to Rule 8's requirements is especially important where, as here, the nature of the injunctive relief requested is itself a moving target: although Appellants originally requested an injunction that would stop certification of the election results, they now seek a very different injunction that would "stay the effect," Mot. 1, of a certification, while also implying that they may subsequently file still another motion to "decertify the electors," Mot. at 15 n.10. It is in precisely these circumstances that Rule 8 requires parties to first seek relief from the district court, rather than through ever-evolving "emergency" motions in the Court of Appeals. *See Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930–31 (6th Cir. 2002).

II. Appellants Do Not Satisfy Any of the Requirements for an Injunction Pending Appeal

A. Appellants Are Not Likely to Succeed on the Merits

Appellants seek to demonstrate a likelihood of success on the basis of claims alleged in a document—the proposed SAC—that is not the operative complaint and that the district court rejected under Federal Rule of Civil Procedure 15. On its face, this is a strange and doubtful justification for an injunction pending appeal. And Appellants' position does not improve upon further scrutiny: in fact, there are three

independent reasons why Appellants are unlikely to succeed on the merits. First, as explained in the Secretary's merits brief, Appellants have failed to demonstrate a likelihood of success in reversing the decision below denying their motion to file the SAC. *See* Merits Br. 20-42. Second, and again as explained in the Secretary's merits brief, Appellants lack Article III standing to pursue the equal protection and due process claims alleged in the proposed SAC. *See id.* at 27-32. Finally, as explained in the Secretary's merits brief and addressed again below, Appellants come nowhere close to demonstrating that they are likely to succeed on the merits of the equal protection or due process claims alleged in the SAC. *See id.* at 32-40.[3]

1. Appellants' equal protection claims are meritless

Appellants present a hodgepodge of equal protection claims. These arguments, however, can be distilled into three theories: (1) that similarly situated voters were treated disparately; (2) that poll-watchers were denied a meaningful opportunity to observe canvassing; and (3) that counties adopted varying standards for processing and counting ballots. Mot. 19-21. Each of those theories is meritless.

First, Appellants contend that Appellees burdened the rights of voters by providing notice-and-cure opportunities in some counties but not others. *See* Mot. 20. Yet nowhere do Appellants explain how this resulted in any burden on the right

[3] The proposed SAC also includes claims under the Elections Clause and Presidential Electors Clause. *See* Counts III & V. But Appellants do not rely upon those claims in arguing that they are likely to succeed on the merits. So we do not address them.

to vote. To the contrary, they allege only that certain counties made it *easier* to vote. And as the district court held, "[e]xpanding the right to vote for some residents of a state does not burden the rights of others." Mem. Op. 29 (citing *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018)); *Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 145 (5th Cir. 2020) ("How [the] expansion of voting opportunities burdens anyone's right to vote is a mystery."). Because Appellees' alleged conduct did not burden anybody's right to vote, the law requires only a rational basis. *Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004). Appellees easily satisfy that standard: enabling voters to cast provisional ballots or cure defects is rationally related to the Commonwealth's "longstanding and overriding policy" of "protect[ing] the elective franchise." *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004).[4]

Second, Appellants fare no better in alleging that Appellees unconstitutionally denied poll-watchers in "Defendant counties" a meaningful opportunity to observe canvassing. Mot. 21. Denying partisan poll watchers a "meaningful" opportunity to observe vote canvassing violates neither the federal constitution nor Pennsylvania law. *See Republican Party of Pennsylvania v. Cortés*, 218 F. Supp. 3d 396, 414 (E.D.

[4] Equally unavailing is Appellants' related assertion that certain counties violated the Equal Protection Clause by counting allegedly defective ballots. Mot. 19-20. The defect here is obvious: Appellants fail to allege that any defective ballot was actually counted. Moreover, the garden-variety irregularities that Appellants allege simply do not give rise to an equal protection violation absent "intentional or purposeful discrimination." *See Snowden v. Hughes*, 321 U.S. 1, 8 (1944). And Appellants do not offer any particularized allegations that could possibly surmount that hurdle.

Pa. 2016) ("State law, not the Federal Constitution, grants individuals the ability to serve as poll watchers . . . ."); *In re Canvassing Observation*, 2020 WL 6737895, at *8 (Pa. Nov. 17, 2020) (rejecting similar claims under state law). In any event, Appellants do not actually allege that Republican poll watchers and Democratic poll watchers were treated differently. *See* Mem. Op. 34. At most, Appellants cite minor, constitutionally insignificant differences across counties in the location of observers, which were justified by differences among counties with respect to size, staffing, and security. *See PG Pub. Co. v. Aichele*, 705 F.3d 91, 115 (3d Cir. 2013).

Finally, Appellants broadly allege that counties adopted "varying standards" for canvassing ballots in violation of *Bush v. Gore*, 531 U.S. 98, 107 (2000). But the Equal Protection Clause does not demand the imposition of "mechanical compartments of law all exactly alike." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). That is why "many courts . . . have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state." *Donald J. Trump for President, Inc. v. Boockvar*, 20 Civ. 966, 2020 WL 5997680, at *44 (W.D. Pa. Oct. 10, 2020) (collecting cases). Indeed, such lawful county-by-county variation is a feature (not a bug) of the Commonwealth's electoral system. *See, e.g.*, 25 Pa. Stat. §§ 2641(a), 2642(g). For this reason, there is no merit whatsoever to the scattershot, conclusory, and facially deficient equal protection allegations set forth in the proposed SAC.

2. Appellants' due process claims are meritless

Appellants are unlikely to succeed in their sweeping, amorphous claim that Pennsylvania's "ballot scheme, without the right to meaningfully observe or challenge deficient mail ballots . . . , is so porous" that it violates the Due Process Clause. Mot. at 4. While Appellants may not like the system the Pennsylvania General Assembly adopted, or the recent decisions by the Pennsylvania Supreme Court interpreting that statutory scheme, they cannot show that those decisions resulted in any disenfranchisement—let alone the type of "significant disenfranchisement"—that would violate the Constitution. *Montgomery Cty. v. Microvote Corp.*, No. 97 Civ. 6331, 2000 WL 134708, at *4, n.3 (E.D. Pa. Feb. 3, 2000).

Contrary to Appellants' assertions, Pennsylvania's Election Code has several provisions designed to ensure the integrity of the ballot. For instance, the Election Code requires voters to affirmatively apply for mail-in ballots and demonstrate their qualifications to vote in their application, 25 Pa. Stat. § 3150.12; provides for a challenge process for any mail-in ballot application until the Friday prior to the election, *id.* § 3150.12b(a)(3); calls for review of provisional ballots by county boards of elections following each election and in the presence of candidate and party representatives who are entitled to make certain challenges, *id.* § 3050; requires

county boards to have minority representation, *id.* § 2641; and mandates that all elections workers take an oath prior to their service, *id.* §§ 2676-2680.

Nevertheless, the proposed SAC alleges that the statutory scheme is "too porous" to ensure fundamental fairness. It aims this charge at three decisions by the Pennsylvania Supreme Court, which clarified three points: (1) that the Election Code does not authorize signature challenges or time-of-canvassing ballot challenges for mail-in ballots, relying instead on the voter's ballot declaration and proof of identification, *see In re Nov. 3, 2020 General Election*, 2020 WL 6252803, at *11-12, 14 (Pa. Oct. 23, 2020); (2) that the Election Code requires only that an authorized poll watcher be permitted "to remain in the room" for observation and that the absence of statutory parameters reflects a "deliberate choice" by the General Assembly to leave such matters to the "informed discretion of the county boards of elections," *In re Canvassing Observation*, 2020 WL 6737895, at *8; and (3) that ballots whose outer envelopes are missing certain features, "while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters," *In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election Appeal of Donald J. Trump for President, Inc.*, 2020 WL 6866415 (Pa. Nov. 23, 2020).

Nothing about these decisions renders the Election Code constitutionally defective. To show a due process violation, Appellants would—at minimum—have

to demonstrate (not merely attempt to allege) that the Pennsylvania Supreme Court's decisions effectuated a "significant disenfranchisement" of voters. *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998). This Appellants cannot do. In fact, at times they seem to allege the very opposite: namely, that too many votes were counted (since, in their view, mail-in ballots should not have been counted if they were mixed with other ballots before they could be "meaningfully observed," Mot. at 10). But a claim that more votes were counted does not disenfranchise anyone. And Appellants' generalized vote dilution claim falls miles short of alleging a due process violation. *See Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 828 (1st Cir. 1980) (upholding Supreme Court of Puerto Rico's decision to count mismarked ballots, and rejecting the notion that vote "dilution" can be a constitutional violation); *see also Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 17 (1st Cir. 2004) (finding no due process violation where the disputed local action at issue "actually enfranchised voters"). While Appellants may disagree with the Pennsylvania Supreme Court's interpretation of the Pennsylvania Election Code, that disagreement is of no constitutional moment.

B. Appellants Have Failed to Demonstrate Irreparable Injury

"[I]rreparable harm must not be speculative." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 488 (3d Cir. 2000). But Appellants seek an injunction pending appeal based on alleged injuries that pile conjecture upon conspiracy. Moreover, now that

the Commonwealth has certified the results of the presidential election, the novel relief that Appellants seek—an injunction "to stay the effect of . . . [the] certification of the 2020 Presidential election," Mot. 1—lacks any recognized basis in law and thus could not possibly remedy the injuries that Appellants assert.

1. Appellants' supposed injuries are speculative

As the Secretary has previously explained, Appellants lack standing because they have not suffered any injury-in-fact based on the allegations in their proposed SAC. The same flaw infects their request for injunctive relief: Appellants have failed to prove "injury that is neither remote nor speculative, but actual and imminent." *In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015). The voter-plaintiffs' alleged injury is not legally cognizable, much less irreparably harmful. *See Bognet v. Sec'y Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120, at *11 (3d Cir. Nov. 13, 2020). And any alleged harm to the Trump Campaign is, at most, conjectural. *See id.* at *8. To the extent Appellants rely on the rough outline of a potential statistical analysis—and theories about an elaborate conspiracy—precedent requires much more than hypotheticals to justify injunctive relief. *See Adams*, 204 F.3d at 488 & n.13 (collecting cases where the absence of "hard evidence" of irreparable harm precluded injunctive relief).

2. Appellants' requested remedy lacks any legal basis

Originally, Appellants asked this Court to enjoin the certification of the results of the presidential election in Pennsylvania. But now that the Commonwealth has certified the results of the presidential election, that request is unquestionably moot. *See Scattergood v. Perelman*, 945 F.2d 618, 621 (3d Cir. 1991). This leaves only Appellants' request for a mandatory injunction that would somehow "stay the effect of . . . [the] certification of the 2020 Presidential election." Mot. 1. It may also leave Appellants' suggestion of "decertification as a remedy." Mot. n.17. Yet either form of relief would be unprecedented, unjustified, and probably unconstitutional—and therefore would not be available to remedy any of Appellants' claimed injuries.

First, Appellants' proposed remedies would raise substantial separation of powers issues and may well raise a non-justiciable political question. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). The Twelfth Amendment of the U.S. Constitution entrusts Congress with the responsibility for receiving and counting certificates identifying slates of presidential electors. Congress has enacted a statute, the Electoral Count Act (ECA), which establishes procedures for raising and resolving objections to particular certificates. *See, e.g.*, 3 U.S.C. § 15. And that same statute delegates to the "executive of each State" the duty to certify to the Archivist of the United States "the final ascertainment" of electors under state law. 3 U.S.C. § 6. Where a governor has already discharged his duty under 3 U.S.C. § 6 and

transmitted a certificate to the federal government, it is (at best) doubtful that an Article III court—consistent with the separation of powers—can "stay the effect" of the certification or issue an order purporting to de-certify a slate of presidential electors.

Second, Appellants' proposed remedies raise grave federalism concerns. As the Seventh Circuit has observed, "[a] federal court reaching into the state political process to invalidate an election necessarily implicates important concerns of federalism and state sovereignty. It should not resort to this intrusive remedy until it has carefully weighed all equitable considerations." *Bowes v. Indiana Sec'y of State*, 837 F.3d 813, 817 (7th Cir. 2016). That caution is fully applicable here. Under 3 U.S.C. § 6, the "executive of each State" is directed to make a certification "under and in pursuance of the laws of [the] State." A judicial intervention into that state determination would be extraordinarily intrusive. Indeed, in these circumstances it might result in delay and confusion that interferes with the certification process and "abrogate[s] 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).

Finally, there is no precedent for an injunction that purports to "stay the effect" of a Governor's certification of a slate of presidential electors. While Appellants seek to rely on *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), Mot. 19 & 21, there is a world of difference between decertifying the results of a state senate

election (which can result in a special election) and decertifying a certification of presidential electors (which raises separation of powers and federalism concerns, lacks historical support, and cannot result in any electoral do-over). The novelty and implications of Appellants' proposed injunction is reason enough to deny it—and to conclude that the requested relief therefore could not avert any asserted injury here. *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

C. The Equities and Public Interest Weigh Powerfully Against Injunctive Relief

Issuing an injunction pending appeal after Pennsylvania has already certified its election results would grievously undermine the public's trust in the electoral system, contravene democratic principles, and reward Appellants for their procedural gamesmanship. Accordingly, equity and the public interest disfavor an injunction.

To start, granting Appellants' motion would sow chaos and confusion across the nation while inflaming baseless conspiracies about widespread fraud. It would also invite additional last-minute efforts to smear electoral processes that are the heart of our democratic republic. Appellants belittle that concern in their filing, even as they strive here and elsewhere to call the basic integrity of democratic processes into question. See Q. Forgey & A. Isenstadt, *Giuliani and fellow Trump lawyers crank out conspiracies as legal challenges implode*, POLITICO (Nov. 19, 2020). But

there can be no doubt that the public interest would be ill-served by unprecedented federal judicial intervention into a Governor's completed certification of presidential electors—especially on such flimsy grounds and especially when that risks the mass disenfranchisement of voters.

Moreover, issuing an injunction would contravene bedrock principles of equity by rewarding Appellants for their bad-faith litigation tactics. *In re U.S. Lines, Inc.*, 318 F.3d 432, 437 (2d Cir. 2003) ("[I]t is well-established that a litigant who seeks equity must do equity."). Appellants' conduct offers a case study in procedural chicanery: they filed a complaint replete with frivolous allegations, amended it to remove many of their claims, and then tried to resuscitate those very same claims at the last minute as a basis for overturning the certification of election results in Pennsylvania. The Court should not reward such dilatory and overtly strategic behavior with an injunction; if anything, this conduct should foreclose their motion.

CONCLUSION

For the reasons set forth above, the Court should deny Appellants' motion for an injunction pending appeal.

November 24, 2020

Respectfully submitted,

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