IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*, Plaintiffs, v. KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, *et al.*, Defendants.	Civil Action No. 2:20-cv-00966-NR Judge J. Nicholas Ranjan

DEFENDANT-INTERVENORS CITIZENS FOR PENNSYLVANIA'S FUTURE AND SIERRA CLUB'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY STAY ORDER AND FOR PRELIMINARY INJUNCTIVE RELIEF (ECF # 414)

PRELIMINARY STATEMENT

Plaintiffs' motion for preliminary injunction is a transparent end-run around this Court's stay order. This Court's August 23, 2020 order, ECF 410, expressly set forth the bases, and timing, on which a party could seek to lift the stay. The Court's order did not invite a precipitous motion for injunctive relief, let alone one based on Plaintiffs' meritless federal "uniformity" claims, *see* ECF 414 ¶ 41. For that reason alone, the Court should summarily deny Plaintiffs' motion to modify the stay order and deny Plaintiffs' motion for injunctive relief. Nor should Plaintiffs' flagrant forum shopping be rewarded. As the Court correctly recognized, comity and judicial efficiency would not be served by adjudicating Plaintiffs' "uniformity" theories until after the state law issues that permeate those theories are decided—now, it appears, by the Pennsylvania Supreme Court. *See* ECF 418-3. Having initially chosen *not to* seek preliminary injunctive relief in this Court, Plaintiffs cannot now avoid the jurisdiction of the state court—where it can readily seek its requested relief—through a stay modification motion. Such gamesmanship should be rejected.

Plaintiffs fare no better on the substance of their application. Having failed to produce a shred of evidence of the widespread fraud, ballot manipulation, and chaos they warned of, *see* ECF 232 ¶ 1, Plaintiffs have altogether abandoned *any* claim based on fraud or vote dilution. Plaintiffs instead rest their application entirely on the fiction that any differences, no matter how benign, in county election procedures—procedures that have subsequently been updated—violate equal protection. ECF 414 ¶ 41. This is a meritless claim that has already been rejected by every federal circuit appeals court to address the issue. There is no showing—none—Plaintiffs have made (or could make) that supports any likelihood of success on its discredited theory. Plaintiffs, among other things, altogether fail to show that the statewide guidance they challenge—including *new* guidance that directly addresses the purported "nonuniform" procedures Plaintiffs focus on—creates, rather than ameliorates, any county-specific disparities in voting procedures. And

Plaintiffs, tellingly, fail to explain how the preliminary injunction they seek would remedy any such purported inconsistencies.

At core, Plaintiffs' application to modify the Court's stay order is procedurally spurious and the purported equal protection claims underlying Plaintiffs' application for injunctive relief are meritless and devoid of any legal or factual support.

I. PLAINTIFFS' IMPROPER REQUEST FOR RECONSIDERATION OF THIS COURT'S PRIOR ORDER SHOULD BE DENIED

Although styled as a motion for "preliminary injunction," Plaintiffs' application is nothing but a thinly-veiled motion for reconsideration of this Court's stay order. Plaintiffs fail to meet the high standard for reconsideration and Plaintiffs notably offer no reason why they could not address their preliminary injunction request to the state court and no justification for modifying the stay imposed by this Court. Nothing requires this Court to even consider a preliminary injunction motion filed in such flagrant violation of its stay order.

This Court already expressly rejected Plaintiffs' argument that "the Court, even if it abstains, must still decide any motions seeking preliminary relief," holding that it "misses the mark." ECF 409 ("Opinion") at 33. Plaintiffs do not even attempt to overcome the heavy burden of obtaining reconsideration of this determination. *See Lazardis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010) (reconsideration requires manifest errors of law or newly discovered evidence). Instead, Plaintiffs simply *disagree* with this Court's analysis—but that alone is not sufficient to warrant lifting the stay or preliminary relief. *See In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2011 WL 4945713, at *1 (E.D. Pa. Oct. 14, 2011) (reconsideration not permitted to reargue matters the court already resolved or relitigate points of disagreement between the court and the moving party); *Kennedy Indus., Inc. v. Aparo*, 2006 WL 1892685, at *1 (E.D. Pa. Jul. 6, 2006) (a party that "fails in its first attempt to persuade a court to adopt its position may not use a motion

for reconsideration either to attempt a new approach or correct mistakes it made in its previous one"); *Odgen v. Keystone Residence*, 226 F. Supp. 2d 588, 606 (M.D. Pa. 2002) ("A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant.").

As this Court already correctly observed, it has no obligation to consider Plaintiffs' preliminary injunction motion because Plaintiffs opted for expedited discovery and trial instead of filing a preliminary injunction. "Plaintiffs' deliberate choice on how to proceed obviates the Court's need to take any immediate action." Opinion at 33-34 (citing *Fuente v. Cortes*, 207 F. Supp. 3d 441, 453 (M.D. Pa. 2016) ("[T]hough courts in the past have entertained parties' requests for emergency relief *contemporaneously* with a decision to abstain on the merits of the case, this scenario is distinguishable from such instances, as indeed no motion has even been filed for such relief.")) (emphasis added). Plaintiffs cannot now renege on their "deliberate choice," petition for a "do over," and move for a preliminary injunction after their initial gambit failed.

Indeed, Plaintiffs' request squarely conflicts with the Court's reasoning in issuing a stay. As the Court stated, the state court's resolution of state law "would eliminate the need for this Court to decide whether the alleged statutory violations infringe any constitutional right" and "a state court could grant Plaintiffs the exact relief they seek here by enjoining any conduct that violates the election code, without further consideration of whether that conduct also violates the Constitution." Opinion at 26. That is just as true now as it was ten days ago and Plaintiffs can readily seek the injunctive relief they purport to desire in state court. There is no reason why, given the express terms of its stay order, this Court need even consider Plaintiffs' application.

II. PLAINTIFFS CANNOT SHOW THE REQUIRED LIKELIHOOD OF SUCCESS ON THE MERITS

Even if the instant motion did not flagrantly violate this Court's stay order and were not

altogether procedurally improper, Plaintiffs have no probability of success on the merits. Plaintiffs seek to have this Court order election officials throughout the Commonwealth to segregate non-fraudulent ballots that Plaintiffs want to invalidate, to delay vote canvassing, and to provide specific surveillance of ballot boxes. Plaintiffs fail to make any showing supporting their request that this Court order such extraordinary relief.

As Plaintiffs concede, the well-established four-factor test for issuance of a preliminary injunction applies here, including the requirement of a likelihood of success on the merits. *See* ECF 414 ¶ 25 (citing preliminary injunction factors). Plaintiffs have, however, repeatedly abandoned any attempt to plead or establish a connection between any of the preliminary or permanent relief they seek and the "fraud" they purported to allege. Plaintiffs have also declined to make any argument in favor of their untenable "vote dilution" theory. And they have fallen far short of showing that the Fourteenth Amendment requires every county in Pennsylvania to adopt identical election procedures or else face suit and the possibility of a federal injunction.

A. Plaintiffs Continue To Offer No Argument In Favor Of Their Fraud Allegations Which The Discovery To Date Has Exposed As Baseless

As Intervenors established in their briefs in support of their Motion to Dismiss, Plaintiffs' operative complaint does not allege any facts giving rise to even a plausible inference (much less a reasonable likelihood of establishing) that the election practices they criticize will increase, or the remedies they seek will decrease, the rate of voter fraud. *See* ECF 297 at 2-8, ECF 346 at 1-2. Plaintiffs did not argue otherwise in opposing Intervenors' Motion to Dismiss and they do not argue otherwise now. *See* ECF 320 at 24 (relying on argument that "vote dilution will occur regardless of such fraud"); ECF 414 ¶¶ 39-41 (no reference to establishing fraud). Because Plaintiffs' fraud-based claims are plainly insufficient as a matter of law, *see* ECF 297 at 2-8, ECF

346 at 1-2, Plaintiffs clearly cannot establish a reasonable likelihood of success on the merits on those claims.

Plaintiffs' repeated decision not to advance any of their intimations of fraud in this motion reflects the fact that the record in this stayed litigation, though still incomplete, has already established that Plaintiffs never had any evidence supporting the Amended Complaint's overheated rhetoric of purported voter fraud. Plaintiffs' designated witness pursuant to Rule 30(b)(6) confirmed, among other things, that Plaintiffs are not aware of *any* circumstance "where somebody pressured somebody else to vote in a certain way in the [June] primary," or asked another person "to give them their – that ballot or took the ballot from them and then submitted it," and in fact clarified "We don't make that claim." Ex. A (Fitzpatrick Dep. Tr. Part I) 370:10-371:8. The same witness, who holds a position in the Trump campaign, *id.* 24:17-21, confirmed that he is not aware of any instance of a voting drop-box or its contents being destroyed, or of anyone threatening to do the same, anywhere in Pennsylvania. *Id.* at 405:2-16, 411:2-20. Plaintiffs' representative, indeed, was not aware of a single report of improperly cast ballots from Plaintiffs' own volunteers who observed ballot drop boxes and ballot collection sites. *Id.* at 163:15-165:25.[1] And while Plaintiffs refer to photographs "obtained … from newspapers and social media posts" that they claim "confirm several instances of non-disabled voters placing [two ballots] into the drop-boxes," ECF 414 ¶ 21, the relevant disability status is of the elector whose vote is delivered, not the voter who does the delivering. *See* 25 P.S. § 3146.1(k). On this point, Plaintiffs moreover

[1] Out of an abundance of caution Intervenors have redacted nonconfidential content of a deposition on the basis that certain other statements in the deposition were designated as confidential and the 30-day period for the deponent's review has not expired under the operative protective order, *see* ECF 349-1 paragraph (e). Intervenors will seek leave to file their unredacted papers and exhibits under seal, and will meet and confer with Plaintiffs.

admitted that they have no more supporting evidence than a small handful of photos and a video in which a voter dropped just *two* ballots into a ballot box and they "have not talked to any of the people in those pictures who are dropping the ballot" and do not "know anything that's not in the picture about any of the circumstances to do with why the person is voting the second ballot or where this person – the second person is" including if they are in the proximity. Ex. A 362:2-364:3. Nothing in the record casts any doubt on Secretary Boockvar's uncontradicted testimony that she has "seen no evidence that voter fraud is a problem" and that, to the contrary, out of nearly 2.9 million votes cast in the 2020 primaries, only *three* were identified as having been cast by someone other than the voter, "[a]nd in each case, the county election officials were confident that there was no intent. It was a mistake. And they voided the ballots." Ex. B (Boockvar Dep. Tr.) 252:10-253:18; *see also id.* at 253:19-254:1 ("Q: Are you aware of any ballots being cast in the 2020 primary, where there was willful or attempted fraud? A: No. Q: Does that include with respect to mail-in or absentee ballot? A: Yes. With respect to all kind of voting, I'm not aware of any intentional fraud.").

Both as a matter of pleadings and now as a matter of record evidence, there is no connection between Plaintiffs' lawsuit and voter fraud. The extraordinary relief Plaintiffs request in the instant motion thus relates, at most, to Plaintiffs' goal of invalidating *non-fraudulent* ballots, cast by registered Pennsylvania voters, that identifiably and reliably indicate those citizens' valid electoral preferences. Because Plaintiffs cannot establish any likelihood that their requested relief somehow combats voter fraud, the Court should decline Plaintiffs' invitation to modify its stay order and attempt to have this Court substantively alter Pennsylvania's administration of the election.

B. Plaintiffs Abandon Their Vote Dilution Theory

Just as they abandoned their fraud allegations in seeking to survive Defendants' and Intervenors' Motions to Dismiss, Plaintiffs also abandon wholesale their "vote dilution" theory in

seeking to establish a likelihood of success on the merits here. *See* ECF 414 ¶ 39-41 (no reference to "dilution" theory). Once again, Plaintiffs' concession reflects the fact that their constitutional theory has been repeatedly considered and rejected: "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss." *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980); *see also Abbot v. Perez*, 137 S. Ct. 2305, 2314 (2018) (defining "vote dilution" as "'invidiously minimizing or canceling out the voting potential of racial or ethnic minorities'") (quoting *Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980) (plurality opinion)); *Acosta v. Dem. City Comm.*, 288 F. Supp. 3d 597, 643 (E.D. Pa. 2018) ("'[G]arden variety election irregularities' are not actionable under § 1983.").

Fundamentally, Plaintiffs' "dilution" theory seeks to repurpose cases that ensure that citizens' right to vote is not improperly burdened in service of Plaintiffs' mutated claim that the state has not *burdened citizens' right to vote enough*. Like the vote-by-mail procedures that varied by county in California and that the Ninth Circuit upheld against similar challenges, each of the policies Plaintiffs challenge "does not burden anyone's right to vote. Instead, it makes it easier for some voters to cast their ballots," which does not implicate the Equal Protection concerns that animate the voting rights cases brought by voters whose franchise is burdened. *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018). A violation of state election law, even if established, does not inherently cause vote dilution. *Paher v. Cegavske*, --- F. Supp. 3d ---, 2020 WL 2089813, *5 n.7 (D. Nev. Apr. 30, 2020) ("Even if the Court had concluded . . . there was a violation of Nevada law in the implementation of the all-mail provisions . . . , the Court finds that Plaintiffs have not

established a nexus between such alleged violations and the alleged injury of vote dilution."); *see also, e.g., Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

Plaintiffs' concession that they cannot establish any likelihood of success on the "vote dilution" theory they pled and pursued through the Motions to Dismiss is unsurprising. They identify nothing in the record that would allow them to avoid the theory's facial deficiencies. *See Short*, 893 F.3d at 679 ("Importantly, the appellants do not argue that the VCA's distinction along county lines is a proxy for some other form of discrimination—that it is a racial or political gerrymander disguised as a geographic distinction."). As with their deficient fraud allegations, the vote dilution theory that Plaintiffs omit from their motion fails to state a claim as a matter of law, and thus cannot carry Plaintiffs' burden of showing a likelihood of success on the merits.

C. Plaintiffs' Equal Protection "Uniformity" Claim Fails On The Merits

Plaintiffs also fail to establish any reasonable likelihood of success on the one theory they posit in their motion—that the Fourteenth Amendment requires every county in Pennsylvania to adopt some formalistic and unrealistic identicalness. *See* ECF 414 ¶ 39-41. Voters must have equal access to the fundamental right to vote and counties must honor that right. But communities are diverse – they face different barriers and have different needs. Plaintiffs altogether ignore that the law not only accepts, but encourages, meeting those needs through specific practices and procedures. That is why, for example, Section 203 of the Voting Rights Act requires the provision of registration forms, other materials, and voter assistance in languages other than English in jurisdictions—including counties—where more than five percent of voting age citizens are members of a single language minority group with limited English proficiency. *See* 52 U.S.C. § 10503. It is also why Pennsylvania counties can have different numbers of election districts—

with each borough, township, and ward of every city serving as a district, along with possible additional districts comprised of 100 to 1,200 registered electors—and, in turn, different numbers of polling places. *See* 25 P.S. §§ 2701, 2702, 2726. And it is why voters with disabilities can bring their own assistive devices to help them vote. Votes PA, *Voters With Disabilities*, Penn. Dep't of State (Apr. 2020), *available at* https://www.votespa.com/Resources/Poll-Worker-Training/Pages/Voters-With-Disabilities.aspx.

Decisions from across the country, indeed, thoroughly refute Plaintiffs' false assertion that uniformity requires strict identicalness of all procedures. *See, e.g.*, *Short*, 893 F.3d at 679 (rejecting Equal Protection challenge to state vote-by-mail law that adopted different policies for different counties); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635 (6th Cir. 2016) (rejecting Equal Protection challenge even where "plaintiffs presented uncontested evidence that, in determining whether to reject a given ballot, the practices of boards of elections can vary, and sometimes considerably"); *Wexler v. Anderson*, 452 F.3d 1226, 1231 (11th Cir. 2006) (rejecting Equal Protection challenge to "manual recount procedures, which vary by county according to voting system"); *Paher v. Cegavske*, 2020 WL 2748301, *9 (D. Nev. May 27, 2020) (rejecting Equal Protection challenge at preliminary injunction stage where a county's "Plan may make it easier or more convenient to vote in [that] County, but does not have any adverse effects on the ability of other voters in other counties to vote"); *Tex. Democratic Party v. Williams*, 2007 WL 9710211, *4 & n.4 (W.D. Tex. Aug. 16, 2007) (rejecting Equal Protection challenge because one county's choice to use particular "eSlate machines do[es] not treat voters arbitrarily or disparately compared to Texas voters using other voting technologies"). Plaintiffs unprecedented interpretation of uniformity would create a race to the bottom, where counties can only provide the bare minimum to voters, and cannot meet the particular needs of their communities. But that

is not what Equal Protection requires. Ensuring an equal right to vote often requires counties and localities to adopt *differing* practices.

While Plaintiffs continue to rely exclusively on *Pierce v. Allegheny Cnty. Bd. of Elections*, 324 F. Supp. 2d 684, 706 (W.D. Pa. 2003), Plaintiffs ignore that the *Pierce* court erroneously made ***no*** determination of likelihood of success on the merits. Instead, the *Pierce* court held only that there was "a reasonable probability that plaintiffs' claims could succeed on the merits *depending upon how the state court interprets the provision of the election code at issue*." *Pierce*, 324 F. Supp. 2d at 705 (emphasis added). The Court then specifically opined that "[t]his court finds it inappropriate, based upon the doctrines of comity and federalism, to speculate as to how the Pennsylvania courts would interpret this provision." *Id.* The *Pierce* court thus made no determination that the plaintiffs there had established a likelihood of success on the merits, and the preliminary injunction should not have issued. *See, e.g.*, *Philadelphia City Council v. Schweiker*, 2002 WL 827158, at *2 (E.D. Pa. May 1, 2002) (holding preliminary injunction standard not met because "resolution of Plaintiffs' claims is based in great part upon the determination of state laws whose meanings are substantially uncertain" and, as a result, "Plaintiffs are unable to show any likelihood of success on the merits"). It is thus no surprise that the *Pierce* decision was appealed and that the plaintiffs there elected to settle and dismiss the case prior to the Third Circuit's consideration of the erroneous preliminary injunction ruling. *See Pierce v. Allegheny Cnty. Bd. of Elections*, No. 2:03-cv-01677-JFC, (W.D. Pa.), ECF 12 (Dec. 4, 2003), ECF 13 (Feb. 2, 2004), ECF 14 (Feb. 27, 2004).[2]

[2] Regardless, *Pierce* is inapposite because in that case, there was no pending state-court proceeding, *see* 324 F. Supp. 2d at 703; there is a pending state-court proceeding here, in which Plaintiffs can seek the same preliminary injunction they seek in this Court.

Plaintiffs also err in relying on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). The *per curiam* decision for the majority in *Bush v. Gore* expressly held that it was not addressing "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. Instead, it limited its Equal Protection analysis to circumstances like the one before it: "where a state court with the power to assure uniformity has ordered a statewide recount," and where, because that recount only considered the interpretation of inanimate, already-cast ballots, "[t]he formulation of uniform rules to determine intent based on … recurring circumstances is practicable." *Id.* at 106, 109. In such a situation, the Court held, there must be "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* at 109. Florida's 2000 recount failed to provide those assurances because, *inter alia*, counties changed their evaluative standards in the middle of the counting process, failed to ensure consistent practices within each county, and alternatively included partial and full recounts, and because the Florida Supreme Court failed even to specify who would perform the recount in each county, much less provide uniform guidance for the interpretive questions that were bound to recur. *See id.* at 106-09. No similar lack of even "rudimentary" equal treatment is alleged or established here or, indeed, in the large majority of cases in which plaintiffs present similar arguments to federal courts, which largely follow the *Bush v. Gore* Court's express admonition that its "consideration [was] limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.* at 109.

Even assuming that *Bush v. Gore* imposed the kind of state uniformity standard that Plaintiffs assert (it does not), Plaintiffs would still have no reasonable probability of success, for reasons set forth in their own motion. As Plaintiffs acknowledge, Secretary Boockvar has

published "the Pennsylvania Department of State's official guidance on how a county election board can use drop-boxes for the return and collection of absentee and mail-in ballots, and what a county election board should do if it receives an absentee or mail-in ballot that lacks an inner secrecy envelope." ECF 414 ¶ 15. As those materials state on their face, they "provide guidance on how each county should establish a ballot return and collection plan," Penn. Dep't of St., *Pennsylvania Absentee an Mail-in Ballot Return Guidance*, Aug. 19, 2020, at 2, *available at* https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf, and call for county processes "for counting naked ballots" "[i]n order to promote consistency across the 67 counties," Penn. Dep't of St., *Pennsylvania Guidance for Missing Official Election Ballot Envelopes ("Naked Ballots")*, Aug. 19, 2020, at 2, *available at* https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_NakedBallot_Guidance_1.0.pdf. Plaintiffs provide no argument, and certainly no evidence, that any of the defendant County Board of Elections will refuse to follow Secretary Boockvar's guidance, much less refuse to follow any decision from Pennsylvania state courts on the same topics.[3]

[3] Plaintiffs allege, without citation, that "several County Election Boards have stipulated to follow Plaintiffs' interpretations if they are accepted by the courts, whereas others believe Secretary Boockvar's interpretations are correct," ECF 414 at 17, but of course these are not mutually exclusive positions; a County Election Board can agree with all of Secretary Boockvar's interpretations, including her August 19 guidance, while still committing to follow any contrary determination handed down by Pennsylvania's judiciary. *See, e.g.*, Ex. C (Philadelphia County Board of Elections' Response to Plaintiffs' Interrogatory No. 3) ("[T]he Board of Elections states that it followed the Pennsylvania Election Code, 25 Pa. Stat. Ann. §§ 2600 *et seq.* (the 'Election Code'), and guidance issued by the Secretary and the Department concerning the return or delivery of absentee and mail-in ballots for the June 2, 2020 Primary Election … The Board of Elections plans to follow the Election Code and such guidance concerning the return or delivery of absentee and mail-in ballots for the November 3, 2020 General Election"). Indeed, Plaintiffs offer no evidence that any County Board of Elections takes any position *other than* agreeing with Secretary Boockvar while adhering to court orders, a circumstance that would tend to vindicate the validity of the Secretary's interpretations, cure any purported concerns about inter-county uniformity, and

Courts have long held that the type of statewide guidance on the interpretation and application of state election-law that Plaintiffs concede is now in place contribute to curing Equal Protection concerns like the ones Plaintiffs raise, even assuming they are cognizable. For example, in *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), the Ninth Circuit held that "[e]ven were *Bush* applicable to more than the one election to which the Court appears to have limited it," a Secretary of State's guidance to county election boards "would be sufficiently uniform and specific to ensure equal treatment of voters." Id. at 1106. Similarly, in *In re Contest of Gen. Election Held on Nov. 4, 2008 for Purpose of Electing a U.S. Senator From the State of Minn.*, 767 N.W.2d 453 (Minn. 2009), the Minnesota Supreme Court rejected an Equal Protection challenge to counties' admittedly divergent procedures for counting ballots because "there were clear statutory standards for acceptance or rejection of absentee ballots, about which all election officials received common training" from the Secretary of State. *Id.* at 466.

Furthermore, even assuming *arguendo* Plaintiffs had a valid Equal Protection claim, the injunctive remedy they seek in their motion is totally disconnected from that claim. As discussed above, Plaintiffs do not press their claims based on fraud or vote dilution. And, unlike in *Pierce*, there is no suggestion that the votes are being cast in contravention of governing election guidance. Thus, even if the state court ultimately adopts Plaintiffs' view of election law, there is no basis to invalidate non-fraudulent, legitimate votes cast under then-governing election law as the remedy for a supposed Equal Protection violation. In fact, doing so would unconstitutionally deprive citizens who voted according to the procedures that were in place at the time of their right to vote. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). And while Plaintiffs claim that they only seek to

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provide a further basis to abstain from altering Pennsylvania's election procedures until its courts can address open questions of state law.

segregate votes now, not to invalidate them, such segregation is pointless unless there is some legal basis by which they could be invalidated—and there is none.

At bottom, Plaintiffs' invocation of Secretary Boockvar's uniform, state-wide guidance as a basis for this Court to modify its stay and enjoin Pennsylvania election officials to take certain actions reveals the true basis of Plaintiffs' claims: not a purported concern with fraud (which they do not argue and which the evidence refutes), not a purported concern with "dilution" (which they abandon as any basis for likely success), and not even a purported concern with nonuniformity (which the Secretary's guidance would tend to ameliorate, not exacerbate). Plaintiffs simply disapprove of Pennsylvania's election laws, both on their face and in their application. Whatever the merits of Plaintiffs' state-law theories (and they have none), Plaintiffs provide no basis for this Court to exercise jurisdiction over Pennsylvania's election process, particularly not where this Court has already thoroughly explained the reasons to abstain and stay the case.

Dated: September 2, 2020

Respectfully submitted,

/s/ Eliza Sweren-Becker

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CERTIFICATE OF SERVICE

I, Eliza Sweren-Becker, certify that I served the foregoing BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY STAY ORDER AND FOR PRELIMINARY INJUNCTIVE RELIEF was sent automatically by CM/ECF to the following counsel who are registered as CM/ECF filing users who have consented to accepting electronic service through CM/ECF:

All counsel of record

Dated: September 2, 2020

Respectfully submitted,

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