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 RESPONSE TO PLAINTIFFS' NOTICE OF REMAINING VIABLE CLAIMS AND PROPOSED DISPOSITION PLAN (ECF 448)

The Pennsylvania Supreme Court definitively resolved the questions in this case related to drop boxes, ballots lacking inner secrecy envelopes, and the poll watcher residency requirement. Astonishingly, Plaintiffs construe this ruling by the Pennsylvania Supreme Court as an opportunity to *broaden* the issues before this Court and seek to introduce entirely new claims related to signature matching. ECF 451-2 ¶¶ 172–87. With just 42 days before Election Day, Plaintiffs should not be permitted to spin out ever more tenuous variations of their claims in the deluded hope that they will stumble upon one that is meritorious. As Defendants have detailed, Plaintiffs' claims are fatally deficient as a matter of law and supported by nothing more than rank speculation. After being pressed to produce actual evidence of the voter fraud they warned of in their original complaint, Plaintiffs quickly pivoted to argue that their claims do not rely on proving fraud. *See, e.g.*, ECF 373 at 4 (arguing that "Intervenors' discovery requests aimed at supposed allegations of fraud . . . are not relevant to the claims or defenses"). Now, more than a month later, Plaintiffs return to their fraud-based arguments, claiming—without a shred of evidence—that the use of drop boxes is impermissible because of the purported risk of "fraud or other illegal casting or tampering of absentee or mail-in ballots." ECF 448 at 2, 3, 4. Indeed, Plaintiffs now speculate, again without support, that it is an "open question" whether County Election Boards will follow the Secretary of State's guidance on the use of drop boxes and the Pennsylvania Supreme Court's unequivocal ruling as to the invalidity of ballots lacking inner secrecy envelopes. ECF 448 at 12. Given the Pennsylvania Supreme Court's September 17, 2020 decision, none of these, or the other claims set forth in either Plaintiffs' Amended Complaint or their newly-minted Second Amended Complaint (proposed today), are viable or appropriate for resolution in this Court.

For the reasons already extensively briefed to the Court, the federal claims Plaintiffs advance suffer from fatal deficiencies, and as this Court has already twice recognized, this Court

should abstain from hearing the remaining state law slivers Plaintiffs have cobbled together. *See* ECF 409, 410, 444, 445. While Plaintiffs populate their Notice of Remaining Viable Claims (the "Notice") with long string cites to their Amended Complaint, Plaintiffs' pleadings boil down to two equally deficient types of claims.

First, Plaintiffs continue to advance their misguided "vote dilution" federal equal protection challenge to the use of drop box and third-party in person delivery. *See* Notice Categories A & B. The Court may dispense with these claims as a matter of law. Defendant-Intervenors and the other Defendants have already exposed the legal deficiency of these claims in extensive briefing. *See* ECF 441 at 7–9. Nor, in support of these claims can Plaintiffs assert that they have pled, or established, any actual voter fraud in the primary. *See* ECF 373 at 4; *see also* ECF 441-1, Fitzpatrick Dep. Tr. Part I 370:10–371:8 (cataloging Plaintiffs' concession that they have no evidence that anybody "pressured somebody else to vote in a certain way in the [June] primary," paid another person for their vote, or asked another person "to give them their . . . ballot or took the ballot from them and then submitted it").

Second, Plaintiffs challenge state law issues that have either already been decided by the Supreme Court of Pennsylvania or should be decided by the state court. These include challenges to ballots with missing or improper inner or outer envelopes, verifying voter registration records, challenges to the poll watcher residency requirement, and challenges to the method of casting in-person votes after applying for a mail-in ballot. *See* Notice Categories C–F. Plaintiffs' proposed Second Amended Complaint also seeks to add a new, untimely, challenge to the method of comparing and challenging signatures (hereinafter Category "G"). Each of these claims should fail because they (a) are based either on entirely speculative *future* violations of the Pennsylvania Supreme Court's September 17, 2020 decision and the Secretary's guidance, (b) fail to allege any

cognizable injury whatsoever, or (c) raise state law issues that, as this Court has correctly recognized, should be decided by the Pennsylvania state courts in the first instance. While Plaintiffs try to dress these state law claims up in the thin federal gloss of their meritless "vote dilution" equal protection theory, any such federal claim is utterly meritless and not justiciable in this Court for numerous reasons.

While Defendant-Intervenors believe it unnecessary, to the extent the Court feels that further discovery or an evidentiary hearing would be of assistance, Defendant-Intervenors agree with and join in the proposed schedule offered by the NAACP Intervenors. *See* ECF 455. Plaintiffs' proposed schedule—under which all discovery, briefing, reports, and conferences would be compressed into the next two weeks in order to hold a hearing on the day this Court originally ruled might be the *start* of reopening these federal proceedings—is unworkable and inappropriate.

A. Plaintiffs' Federal Claims Should Be Dismissed As A Matter Of Law

Plaintiffs' federal claims—Notice Categories A and B—should be dismissed in their entirety for the reasons set forth in Defendant-Intervenors' and other parties' Motions to Dismiss. *See, e.g.*, ECF 297 (Opening Brief); ECF 346 (Reply Brief); *cf.* ECF 428 (Opposition to Motion to Modify Stay). Such dismissal will, inevitably, also render the remaining federal claim gloss Plaintiffs seek to apply to Notice Categories C, D, E, F, and G equally meritless and non-viable, even though these claims are not justiciable in this Court.

By way of summary, despite months of litigation Plaintiffs still fail to allege any connection between the election procedures they challenge and voting fraud, nor does the Constitution or Section 1983 give every individual a personal cause of action to challenge state election procedures for insufficiently deterring voting fraud, a vanishingly rare occurrence. *See* ECF 297 at 2–7, 10–12; ECF 346 at 1–2; ECF 428 at 4–6. In fact, Plaintiffs previously conceded that they could not

support their invocations of voting fraud, and instead asked the Court to credit their "alleg[ation] that vote dilution will occur regardless of such fraud." ECF 320 at 24. Plaintiffs' concession, deficient pleadings, and absence of any supportive authority all require dismissal of all claims premised on any allegations regarding voting fraud.

Plaintiffs have also failed, in any of their operative or proposed pleadings, to state a claim based on "vote dilution," a term they perniciously tear from its precedential context, where it refers to "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities," in an effort to craft from whole cloth a new, extraordinary, constitutional right based on individual voters' interpretation of the Pennsylvania Election Code. *Abbot v. Perez*, 137 S. Ct. 2305, 2314 (2018) (quoting *Mobile v. Bolden*, 446 U.S. 55, 66–67 (1980) (plurality opinion)); *see* ECF 297 at 10–12; ECF 346 at 2–4; ECF 428 at 6–8. Both the substance of all relevant precedent and basic principles of standing require dismissal of all claims premised on any allegations regarding this purported "dilution." *See* ECF 441 at 7–9.

Plaintiffs have similarly failed to allege any equal protection violation by simply noting the fact that different, inherently heterogeneous, counties may implement different election procedures, an utterly universal truth in the United States. *See* ECF 297 at 10–12; ECF 346 at 2–5; ECF 428 at 8–14. The Constitution does not require that every locality across a state or commonwealth adopt precisely identical election procedures, and no authority has ever suggested that it does. Doing so here would, unavoidably, entail adopting a rule that requires every county in Texas to use the same voting machines, every county in Georgia to have the same number of polling places,[1] and every county in Missouri to train poll workers with identical materials. No

[1] Or perhaps the number of polling places should vary by county population? Or by population density? Or by the number of voters in the last election? Plaintiffs never once define

federal court has ever micromanaged state election processes in the manner that Plaintiffs claim the Constitution requires, because Plaintiffs' theory is fundamentally wrong, which requires dismissal of all claims premised on allegations of deprivation of equal protection. *See* ECF 441 at 9–15.

Finally, although seemingly abandoned at this point, Plaintiffs' claims that either Secretary Boockvar or the County Boards of Elections have violated the Constitution's Election Clause is similarly fatally defective. All of these Defendants have played their proper role, and exercised their proper authority, under both Pennsylvania and United States law. *See* ECF 297 at 13–17; ECF 346 at 5. All claims premised on attacks on the Secretary or Boards' involvement in the upcoming election should likewise be dismissed.

B. Plaintiffs' State Law Claims Are Not Justiciable

The state-law driven claims Plaintiffs advance are either based on unfounded speculation that counties will not follow the decision of the Pennsylvania Supreme Court or seek, at core, to advance state law issues that this Court has correctly recognized should be decided by the state court in the first instance.

First, Plaintiffs' facial claims regarding drop boxes, third-party delivery, ballot envelopes, and the poll-watcher residency requirement (Categories A, B, C, and E, above) have all been resolved in their entirety by Pennsylvania's highest court. Plaintiffs neither identify any basis to believe that any County Board of Election will fail to follow the Supreme Court's pronouncements nor provide any basis on which this Court could, today, decide issues that the Supreme Court held were not ripe. The Court should accordingly decline to consider any of these claims or issues.

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what would constitute "equal" use of, for example, the drop boxes that they concede Pennsylvania law allows Boards of Elections to use, because no such test is workable, required, or appropriate.

Second, Plaintiffs' claims regarding verifying voter registration records and casting in-person ballots after applying for a mail-in ballot, as well as their proposed new claim regarding signatures (Categories C, D, F, and new Category G) are state law claims that should not be heard in this Court. Each of these claims asks this Court to adopt Plaintiffs' interpretations of the Pennsylvania Election Code. For all of the reasons this Court set forth in its August 23, 2020 Opinion & Order abstaining from deciding such issues and staying this litigation, *see* ECF 409, 410, the federal courts are not the proper venue for resolving any disputes about the contents, interpretation, and application of Pennsylvania election law. The Court should accordingly decline to consider any of these claims or issues.

As the Court expressly noted in its Opinion staying this litigation, there are numerous unresolved bases to dismiss Plaintiffs' claims, "including a variety of other threshold justiciability grounds" beyond *Pullman* abstention and challenges to "the legal merits of some"—indeed, all—"of Plaintiffs' claims." ECF 409 at 12 n.3. If the Court were to proceed on *any* of Plaintiffs' claims, *all* of these grounds for dismissal would become ripe for decision, and any number of them (including, but not limited to, the grounds discussed above and raised in Defendant-Intervenors' prior briefing) should result is dismissal of Plaintiffs' claims *en toto*. These challenges are equally applicable to Plaintiffs' proposed Second Amended Complaint, which does nothing to resolve the fundamental flaws in Plaintiffs' theory and is thus futile, as Defendant-Intervenors will establish in greater depth on the Court's briefing schedule for Plaintiffs' motion to amend.

Nor can Plaintiffs convert these quintessential state law claims into federal claims by mere incantation of their meritless "vote dilution" theory. For the reasons set forth above, absent a finding of future violation of Pennsylvania state law of the sort Plaintiffs imagine, there is simply no colorable federal claim for this Court to even consider.

* * *

Because this case can and should be resolved by dismissing Plaintiffs' claims on the pleadings, no further discovery or evidentiary hearing is necessary. However, if the Court determines that it will order further discovery, reports, and briefing, and/or hold an evidentiary hearing, Defendant-Intervenors join in the proposed schedule offered by the NAACP Intervenors, *see* ECF 455, and oppose Plaintiffs' unworkable and unnecessarily abbreviated alternative proposal.

Dated: September 22, 2020

Respectfully submitted,

/s/ Eliza Sweren-Becker

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CERTIFICATE OF SERVICE

I, Eliza Sweren-Becker, certify that I served the foregoing DEFENDANT-INTERVENORS CITIZENS FOR PENNSYLVANIA'S FUTURE AND SIERRA CLUB'S RESPONSE TO PLAINTIFFS' NOTICE OF REMAINING VIABLE CLAIMS AND PROPOSED DISPOSITION PLAN (ECF 448) 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 22, 2020

Respectfully submitted,

/s/ Eliza Sweren-Becker

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