No. 20-3371

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

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

— v. —

KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; ET. AL,
Intervenor-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA - CIVIL ACTION NO. 20-CV-02078-MWB

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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November 23, 2020

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INTRODUCTION

On an emergency basis, Plaintiffs/Appellants Donald J. Trump for President, Inc. ("**Trump Campaign**" or "**Campaign**") and two voters ask this Court to reverse the decision below (Opinion, ECF 202) denying their Motion to File a Second Amended Complaint (ECF 172) based solely on alleged undue delay, after the District Court dismissed the First Amended Complaint ("**FAC**" [ECF 125]) with prejudice. The Trump Campaign asks that the matter be remanded to the District Court to decide the Motion to Amend on the merits, and, if the Second Amended Complaint ("**SAC**" [ECF 172-2]) is permitted, to expeditiously hold a hearing of their Renewed Injunctive Relief Motion (ECF 182, 183) in order to prevent awarding Pennsylvania's electors in the Presidential election based on defective mail ballots. Only the winner of the legal ballots – be it President Donald J. Trump or Joseph Biden – should receive Pennsylvania's electors. If the appeal is granted, this Court should retain jurisdiction should any emergency issues arise during remand given the importance and urgency of future review.

The Initial Proceedings

On Monday, November 9, 2020, immediately following the Election, the Trump Campaign and two voters filed a Complaint (ECF 1) in the United States District Court for the Middle District of Pennsylvania asserting claims, *inter alia*, under the Civil Rights Act for violation of the Equal Protection, Due Process, and

the Electors and Election Clause of the United States Constitution, involving Defendants' scheme to favor Joseph Biden over President Trump by counting defective mail ballots sufficient to turn the result of the election.

The District Court held an immediate scheduling conference and on November 10 (ECF 135) directed Defendants to file motions to dismiss on Friday, November 13, with responses due on Sunday, November 15, and oral argument on Tuesday, November 17. The Court also directed Plaintiffs to file their motion for a temporary restraining order and preliminary injunction to prevent Defendant Secretary of the Commonwealth Boockvar and seven Defendant County Boards of Election from certifying the 2020 General Election and scheduled a hearing for Thursday, November 19 – four days before Secretary Boockvar was to certify the Presidential election under Pennsylvania law (ECF 135).

The Unexpected Withdrawal of Plaintiffs' Counsel

Following the filing of the Complaint, the Trump Campaign's longtime, main counsel, Porter Wright Morris & Arthur LLP ("**Porter Wright**"), received threats of violence and economic retaliation and withdrew on November 13 (ECF 117). The Campaign's remaining attorney, Linda Kerns, a sole practitioner, received a threatening telephone call from opposing counsel, Kirkland & Ellis (Motion for Sanctions, ECF 131). Rather than oppose the motions to dismiss, she filed the FAC

(ECF 125), which incorrectly omitted numerous allegations and counts.[1]

Plaintiffs Immediately Engage New Counsel and Request Leave to Amend

The Campaign engaged Scaringi & Scaringi PC ("**Scaringi**") in Pennsylvania, and former New York Mayor Rudolph Giuliani ("**Giuliani**"), as new counsel. On Monday, November 16, new counsel informed the Court that the Campaign intended to move for leave to file a SAC, which was intended to correct the omission of certain allegations and counts in the FAC, as well as to include allegations based on continuing investigation, and requested the Court briefly adjourn the argument scheduled for the next day, November 17. (Motion, ECF 152). The Court denied the request to adjourn (ECF 153).

The November 17 Argument

At the November 17 argument, the Campaign again informed the Court that it wanted to move to amend the Complaint. (Transcript, ECF 199, at 13, 22, 153, 196) The Court directed the Campaign to respond to motions to dismiss the FAC and move to amend on Wednesday, November 18, and file a renewed motion for injunctive relief on Thursday, November 19. (Transcript, ECF 199, at 152-154) The Campaign filed the Motion to Amend (ECF 172), attaching the proposed SAC (ECF

[1] Ms. Kerns later withdrew on November 19, 2020 (ECF 174). Apparently terminated for its misconduct directed at Ms. Kerns, Kirkland & Ellis withdrew on November 20 (ECF 192).

172-2), as well as a Supplement to its Motion to Amend (ECF 185), and a Reply brief regarding its Renewed Motion for Temporary Restraining Order or Preliminary Injunction (ECF 198).

The Decision Denying Leave to Amend

On Saturday evening November 21, the District Court dismissed the Amended Complaint with prejudice. (Opinion, ECF 202). The Court denied leave to amend the Complaint – before Defendants even filed responses – ***solely*** on the basis that "amendment would unduly delay resolution of the[] issues" concerning certification of the Election. *Id.* The Court noted that amendment would require it to set "a new briefing schedule, conduct a second oral argument, and then decide these issues." *Id.* It did not find bad faith, dilatory motive, prejudice or futility. The Court denied the Renewed Injunction Motion as moot. (Order, ECF 203)

Summary

The District Court abused its discretion in denying the Motion to Amend for numerous reasons. This prevents the Campaign from litigating its serious and well-founded claims that Defendants – Secretary Boockvar, and seven County Boards of Elections controlled by Democrats – engaged in a partisan scheme to favor Biden over Trump by counting potentially tens of thousands of defective mail ballots. Contrary to historical practice in Pennsylvania, observation of the canvassing of mail ballots was prevented in order to conceal that defective ballots – *i.e.*, ballots that did

not comply with Pennsylvania's signature, dating, and other requirements, *see* 25 P.S. §§ 3146.8, 3150.16 – were being opened, mixed, and counted because Defendants knew that these ballots would overwhelmingly favor Biden over Trump.[2] In other words, Defendants deliberately counted defective mail ballots because they knew the results would benefit their favored candidate, Biden, in violation of Equal Protection and Due Process under the Civil Rights Act. *See* SAC (ECF 172-2, at 56, 60, 91).[3]

First, the Court abused its discretion in finding undue delay. There was no delay at all – the Court was notified one day after the Amended Complaint that Plaintiffs, represented by new counsel, wished to amend again. It apparently mistakenly believed that relief must be granted by Monday, November 23, the date by which the Secretary certifies the result of the Presidential election under Pennsylvania law. However, the Court disregarded that the real deadline is December 8, 2020, the safe harbor by which electors need be appointed under 3

[2] *See* Motion to Amend (ECF 172, at 8); proposed SAC (ECF 172-2, at 58, 65-67, 76-77); Renewed Injunction Motion (ECF 183, at 5,6), Renewed Injunction Motion Reply (ECF 198, at 6-9).

[3] This Court affirmed similar claims for violation of the Equal Protection and Due Process clauses under the Civil Rights Act arising from a scheme to count illegal absentee ballots in affirming the removal of candidate William Stinson and the certification of candidate Bruce S. Marks in *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), *on remand*, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. April 26, 1994).

U.S.C. §5. *See* Renewed Injunction Motion (ECF 183, at 7, 25).[4] On Monday, November 16, the Campaign informed the Court of its intent to amend and filed the motion on Wednesday, November 18. There was no reason that the Court could not have adjourned oral argument, allowed filing the Motion to Amend and scheduled a new oral argument date at that time. In any case, there is plenty of time to allow briefing on the Motion to Amend and conduct a hearing on the Renewed Injunction Motion before December 8 in regard to one of the most important disputes imaginable – the true winner of Pennsylvania's electors for President.

Second, even if the Court found delay, it never found that Defendants suffered harm as a result, a requisite for denial. Nor could it – given Defendants had not responded and still have not responded to the Motion to Amend.

Third, the Court also misconstrued the remedy sought. The Campaign is not seeking to disenfranchise 6.8 million Pennsylvanians. (Opinion, ECF 202 at 18, 32) Rather, as explained in numerous filings, including the Renewed Injunction Motion (ECF 183, at 2) and Renewed Injunction Motion Reply (ECF 198, at 24-25), the Campaign only seeks to aside the ***defective*** mail ballots among 1.5 million cast in

[4] Moreover, the Court also has the power to order the Secretary to decertify the results, a remedy approved in *Marks v. Stinson* where this Court affirmed removal of Stinson. 19 F.3d at 873. The Renewed Injunction Motion (ECF 183, at 24-25), and Renewed Injunction Motion Reply (ECF 198, at 21, 26) cited numerous other cases where courts have undone election results.

the defendant Counties.[5] The Campaign's sought remedy is to examine a sample of the mail ballots to determine the defective percentage and engage an expert to calculate the overall defective number among the 1.5 million. The defective ballots should be deducted from Biden's votes, which may change the result of the election. This is the exact process and remedy approved by *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. Apr. 26, 1994), *aff'd*, 19 F.3d 873 (3d Cir. 1994).

Finally, the Court erred in dismissing the Renewed Injunction Motion as moot because it erred in denying the Motion to Amend.

This Court should reverse denial of the motion to amend and direct the District Court below to immediately decide the Motion to Amend on the merits and conduct a hearing on the Renewed Injunction Motion if the SAC states claims.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over Plaintiffs' claims under

[5] Contrary to historical practice, Defendants did not allow the Trump Campaign to meaningfully observe the mail ballot canvassing in order to identify defective ballots – making them stay 20 or 30 feet away where one could not even observe the writing on mail ballots with binoculars. At the same time, in the middle of the Election, the Pennsylvania Supreme Court held that Pennsylvania law does not allow observers to meaningfully observe the canvass of mail ballots, *In re Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020), or to object to their opening, mixing, and counting, *see In re November 3, 2020 Gen. Election*, 2020 Pa. LEXIS 5560 (Pa. Oct. 23, 2020), despite a provision of Pennsylvania law to the contrary, 25 P.S. §3146.8(f), rendering Pennsylvania's mail ballot system so porous that it is unconstitutional under the Due Process Clause.

28 U.S.C. §1331. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). This appeal is from the denial of Plaintiffs' motion for preliminary injunction and a final judgment. The District Court entered its order on November 21, 2020, Plaintiffs filed the notice of appeal on November 22, 2020, and this appeal is therefore timely.

STATEMENT OF ISSUES

1. Did the Court abuse its discretion in denying the Motion to Amend, given that there was no undue delay, no prejudice, and it misconstrued the timing and nature of the relief sought?
2. Did the Court err in denying the Renewed Injunction Motion as moot because it erred in denying the Motion to Amend?

STATEMENT OF RELATED CASES

This case has not been before this Court previously.

STATEMENT OF THE CASE AND FACTS

A. Procedural Background

On November 9, 2020, Plaintiffs filed suit against Secretary Boockvar, as well as the County Boards of Elections for the following counties: Allegheny, Centre, Chester, Delaware, Montgomery, Northampton, and Philadelphia (ECF 1). The next day, at a scheduling conference, the Court "learned that several organizations, including the Democratic National Committee, sought to file intervention motions

with the Court." Opinion (ECF 202), at 8. The Court set a briefing schedule, set aside November 17 for oral argument on any motions to dismiss and "told the parties to reserve November 19, 2020 … in the event that the Court determined that an evidentiary hearing was necessary." *Id*.

Defendants filed their motions to dismiss on November 12 (ECF 81, 85, 92, 96). The proposed intervenors filed their motions on November 10 (ECF 30) and November 11 (ECF 39). Plaintiffs filed a motion for a temporary restraining order and preliminary injunction on November 12 (ECF 89).

On November 12, Plaintiffs' counsel Porter Wright withdrew; Ms. Kerns remained and was joined by two out-of-state counsel, Messrs. Scott and Hughes, from Texas, appearing *pro hac vice.*

On November 15, Plaintiffs filed the FAC (ECF 125).

On November 16, Defendants field new motions to dismiss and supporting briefs (ECF 127, 135, 138, 140).

Also on November 16, Plaintiffs' counsel, Kerns, Scott and Hughes, requested permission to withdraw (ECF 151). The District Court granted the withdrawal motions of the Texas attorneys (ECF 154), but initially did not grant Ms. Kerns' request. That same evening, Scaringi entered its appearance on behalf of Plaintiffs (ECF 149).

On the evening of November 16, Plaintiffs moved to postpone the oral

argument scheduled for November 17 and the evidentiary hearing scheduled for November 19 (ECF 152). The Court denied Plaintiffs' motion for a continuance. The Court explained: "[G]iven the emergency nature of th[e] proceeding [before it], and the looming deadline [of November 23] for Pennsylvania counties to certify their election results, postponing those proceedings seemed imprudent." Opinion (ECF 202, at 10).

On November 17, former Mayor Giuliani entered his appearance *pro hac vice* on behalf of Plaintiffs (ECF 156). The District Court heard oral argument on the afternoon of November 17 (Transcript, ECF 199). At the argument, counsel again informed the Court that Plaintiffs intended to move to amend. (*Id*., at 13, 22, 153, 196). At the conclusion of the argument, the Court determined that the November 19 hearing was "no longer needed and cancelled that proceeding." Opinion (ECF 202, at 10). The Court "imposed a new briefing schedule in light of the FAC's filing, which arguably [had] mooted the initial motions to dismiss." *Id*., at 10-11.

On November 18, Plaintiffs submitted their brief in opposition to the motion to dismiss the FAC (ECF 170) and their second Motion to Expedite Discovery (171). Plaintiffs also filed their Motion to Amend to file a SAC (ECF 172).[6]

6 During the oral argument on November 17, Defendants stated that they would not consent to the filing of a third pleading and did not concur in Plaintiffs' motion for leave to file the SAC. Opinion (ECF 202), f.n. 36, at 11.

On November 19, Defendants submitted Reply briefs (ECF 175, 176, 177, 178, 179). Plaintiffs also submitted a Renewed Injunction Motion (ECF 182, 183).

On November 20, Defendants and Intervenors submitted briefs in opposition to the Renewed Injunction Motion (ECF 189, 190, 191, 193, 195, 196).

On November 21, Plaintiffs submitted their Renewed Injunction Motion Reply (198). The District Court dismissed the Amended Complaint with prejudice. (Opinion, ECF 202). The Court denied leave to amend the Complaint and also denied Plaintiffs' Renewed Injunction Motion as moot. (Order, ECF 203)

B. The Proposed SAC

1. The Scheme To Favor Biden over Trump in Violation of Equal Protection

The proposed SAC (ECF 172-2) alleged Defendants participated in an intentional scheme to count defective mail ballots in favor Biden over Trump in violation of the Equal Protection and Due Process clauses under the Civil Rights Act.

First, "Democrats who controlled the Defendant County Election Boards" engaged in a scheme to "count absentee and mail ballots which should have been disqualified." SAC ¶252 at 95. They "carried out this scheme knowing that the absentee and mail ballots that should have been disqualified would overwhelmingly favor Biden because of the registrations of persons who voted by mail, as well as

their knowledge and participation in the Democrat/Biden election strategy, which favored mail-in voting, compared to the Republican/Trump strategy, which favored voting in person at the polls." *Id*. ¶253 at 95. "As a result, Defendant County Election Boards deliberately favored Biden with votes which should not have been counted, effectively stuffing the ballot box in his favor with illegal votes" in violation of *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. Apr. 26, 1994), *aff'd*, 19 F.3d 873 (3d Cir. 1994), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Bush v. Gore*, 531 U.S. 98 (2000), and *Snowden v. Hughes*, 321 U.S. 1 (1943). SAC ¶253 at 95; *see also* ¶168 at 69, ¶177 at 72, ¶179 at 73, ¶194 at 77, ¶223 at 86. The SAC alleges that "a substantial portion of the approximately 1.5 million absentee and mail votes in the Defendant Counties should not have been counted, and the vast majority favored Biden, thus resulting in returns indicating Biden won Pennsylvania." SAC ¶253 at 95-96.

Second, the "Democratic-majority controlled Defendant county boards of elections provided political parties and candidates, including the Trump Campaign, no meaningful access or actual opportunity to review and assess mail-in ballots during the pre-canvassing meetings in order to favor Joseph Biden over President Donald J. Trump." SAC ¶4 at 2-3.

Third, the SAC alleged that the "Democratic controlled County Elections Boards' failure and refusal to set aside and challenge … [defective ballots] resulted

in the arbitrary, disparate, and unequal treatment between those who vote in-person at the polling place versus those who vote by absentee or mail-in ballot – all designed to favor Biden over Trump." SAC ¶110 at 49; *see also* SAC ¶112 at 49-50; SAC ¶117 at 52.

Fourth, the SAC alleged that Secretary Boockvar's Naked Ballot Guidance[7] was issued in order to "encourage the counting of mail ballots which she knew would favor Biden." SAC ¶98 at 44-45. Following the Pennsylvania Supreme Court's decision in *Pennsylvania Democratic Party*, 2020 Pa. LEXIS 4872 (Pa. Sep. 17, 2020), which ruled that the secrecy provision language in Election Code §3150.16(a) is "mandatory," Secretary Boockvar removed the Naked Ballot Guidance from the Pennsylvania Department of State's website. However, she did not issue "any guidance advising all 67 County Election Boards that they must not count non-compliant absentee or mail-in ballots, including, without limitation, those that lack an inner secrecy envelope, contain on that envelope any text, mark, or symbol which reveals the elector's identity, political affiliation, or candidate preference, do not

[7] On August 19, 2020, Secretary Boockvar issued her "**Naked Ballot Guidance**" espousing the "position that naked ballots should be counted pursuant to the Pennsylvania Election Code, furthering the Right to Vote under the Pennsylvania and United States Constitutions[,]" that "[t]he failure to include the inner envelope ('Secrecy Envelope') does not undermine the integrity of the voting process[,]" and that "no voter should be disenfranchised for failing to place their ballot in the official election ballot envelope before returning it to the county board of election." SAC ¶98 at 44-45.

include on the outside envelope a completed declaration that is dated and signed by the elector, and/or are delivered in-person by third-parties for non-disabled voters." SAC ¶¶99-100 at 45.

Fifth, the SAC alleged that "[c]ertain of the Democratic controlled County Election Boards proceeded to pre-canvass mail-in ballot envelopes prior to Election Day in order to favor Biden over Trump." SAC ¶139 at 58. Further, the SAC alleges that "Secretary Boockvar encouraged this unlawful behavior to favor Biden over Trump." SAC ¶142 at 60.

Sixth, the SAC alleged the Trump Campaign believes that "statistical analysis will evidence that over 70,000 mail and other mail ballots which favor Biden were improperly counted – sufficient to turn the election – a remedy expressly applied in *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273, at *78 (E.D. Pa. Apr. 26, 1994) which was later affirmed without opinion by the Third Circuit Court of Appeals." SAC ¶18 at 10-11.

Finally, the SAC alleged that, in order to favor Biden over Trump, "Defendants have violated the Equal Protection Clause because as a result of their conduct to obscure access to the vote-counting process, watchers in Allegheny, Philadelphia and other Defendant Counties did not have the same right as watchers in Republican controlled Pennsylvania Counties, such as York, to be present when envelopes containing official absentee and mail-in ballots were reviewed, opened,

counted, and recorded" in order to count defective mail ballots. SAC ¶56 at 64.

2. The Scheme To Favor Biden Over Trump In Violation of Due Process

The SAC alleged that "Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination to favor presidential candidate Biden over Trump by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order 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 as required by 15 PA.S 3146.6(a) and 3150.16 (a) in order to count absentee and mail ballots which should have been disqualified." SAC ¶252 at 95.

3. Pennsylvania's Mail Ballot Scheme As Interpreted By The Pennsylvania Supreme Court Violates Equal Protection and Due Process

Plaintiffs will rely on recent Pennsylvania Supreme Court cases to show that the Pennsylvania's system is porous and lacking in checks and balances and that these eve-of-election changes to Pennsylvania law governing a presidential election are also improper under *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*).

On September 17, 2020, the Pennsylvania Supreme Court rejected the Secretary's position that naked ballots should be counted and ruled that "the secrecy provision language in Election Code Section 3150.16(a) is mandatory and the mail-

in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid." SAC ¶¶98-99 at 44-45 (*citing Pennsylvania Democratic Party*, 2020 Pa. LEXIS 4872, *72 (Pa. Sep. 17, 2020)).

As a result, some "Democratic controlled County Election Boards proceeded to pre-canvass mail-in ballot envelopes prior to Election Day in order to favor Biden over Trump." SAC ¶139 at 58. "For those ballots that lacked an inner secrecy envelope, the voters were notified prior to Election Day in order to 'cure' the invalidity by voting provisionally on Election Day at their polling location." *Id*. Thus, although the Pennsylvania Supreme Court was clear that the Election Code "does not provide for the 'notice and opportunity to cure' procedure," Defendants favoring Biden nonetheless engaged in notice/cure practice. *Id*. ¶141 at 59, ¶248 at 93-94 (*citing Pa. Democratic*, *supra*). "This kind of tampering squarely undermines the legislature's 'mandate' that mail-in voting cannot compromise 'fraud prevention' or 'ballot secrecy.'" *Id*. ¶141 at 59 (*citing Pa. Democratic*, *supra*).

On October 23, 2020, the Pennsylvania Supreme Court *sua sponte* declared that the provision of the Pennsylvania election code providing for challenging mail ballots by observers on Election Day, 25 P.S. §3146.8(f), was invalid based on the conclusion it was inadvertently contained in the statute. *In re November 3, 2020 Gen. Election*, 2020 Pa. LEXIS 5560 (Pa. Oct. 23, 2020).

On November 17, the Pennsylvania Supreme Court ruled, in a five to two

Opinion, that the Commonwealth's current definition of 'observer' under the state election code is hereby re-defined as 'present in the same building.'" SAC ¶7 at 4; *In Re: Canvassing Operation Appeal of: City of Phila. Bd. of Elections*, No. 30 EAP 2020 (Pa. Nov. 17, 2020). "The majority concluded that the Commonwealth 'did not act contrary to law in fashioning its regulations governing the positioning of candidate representatives during the precanvassing and canvassing process, as the Election Code does not specify minimum distance parameters for the location of such representatives." *Id*. (*quoting Canvassing*, *supra*, at 19).

As a result of the last-minute decisions on the eve of the Presidential election, Pennsylvania no longer allows meaningful observation or challenges to mail ballots that do not comply with Pennsylvania law, *see* 25 P.S. §§ 3146.8, 3150.16, before they are mixed with other ballots and opened – *i.e.*, ballots in secrecy envelopes are separated from the outside envelope, mixed, opened, and counted without any observation or challenge.

The SAC alleged that the "Pennsylvania Supreme Court [has] depart[ed] from Pennsylvania's long-standing practice and concept of observers in the [vote counting] process in the middle of a Presidential election." SAC ¶7 at 4. The SAC alleged that "[w]ith the recent Opinion, the Pennsylvania Supreme Court join[ed] the[] other elected and appointed officials in re-interpreting the plain language of a statute …" and they have "now usurped the Pennsylvania legislature's Constitutional

role as promulgator of the rules for Presidential Electors." SAC ¶16 at 8-9.

The SAC alleged that, based on the Pennsylvania Supreme Court's Opinion in *Canvassing*, *supra*, "Plaintiffs are additionally harmed by further deprivation of their Due Process rights under the Constitution" because "Plaintiffs' franchise was denied by direct, improper, and unconstitutional acts." SAC ¶280 at 101-102. Further, the Pennsylvania Supreme Court holding "permits votes to be counted by counties who followed the meaningful observation argument and by counties refusing watchers," which resulted in "disparate treatment between Pennsylvania counties" and "created a textbook example of Equal protection violation, prohibited by the United States Supreme Court (*Bush v. Gore*)." SAC ¶281 at 102; *see also* SAC ¶301 at 106; SAC ¶321 at 111.

The SAC also alleged that, based on the Pennsylvania Supreme Court's Opinion in *Canvassing*, *supra*, "that declared observers merely be present, but not be provided meaningful review, Plaintiffs are additionally harmed by further deprivation of their Due Process rights under the Constitution." SAC ¶300 at 106; *see also* SAC ¶320 at 110.

4. The SAC Cures Any Possible Deficiencies

The SAC restored many of the allegations and counts of the original Complaint which were incorrectly omitted from the Amended Complaint. In particular, it detailed Defendants' deliberate scheme to count defective mail ballets,

knowing this would improperly favor Biden over Trump. Plaintiffs believe that these allegations and better pleading cures any deficiencies which the Court found in the Amended Complaint. Plaintiffs are not asking this Court to rule on the merits of the Motion to Amend – to the extent Defendants assert futility, either on its own or based on the decision dismissing the FAC (over which Plaintiffs believe there may be no "case or controversy" because they do not intend to prosecute it), it is the District Court's role to resolve these issues in the first instance. But, to assist the Court, Plaintiffs note the following issues:

First, the District Court found the Trump Campaign lacked standing under the Equal Protection clause because the FAC alleged only that some voters were offered "notice and cure" and others were not. It also found it lacked "competitive standing" based on these allegations. (Opinion, ECF 202 at 18-23). But, the Second Amended Complaint states completely different allegations, asserting Defendants engaged in a deliberate scheme to count defective mail ballots in violation of Pennsylvania law requiring signatures and dates, *see* 25 Pa.Stat. §§3146.8, 3150.16,which they knew would favor Biden over Trump, no different than the scheme in *Marks v. Stinson*. *See* SAC (ECF 172-2 at ¶110, at 49; ¶112, at 49-50; ¶117, at 52; ¶168 at 69, ¶177 at 72, ¶179 at 73; ¶194 at 77; ¶223 at 86; ¶252 at 95; ¶253 at 95).

Numerous cases recognized candidates have standing to assert claims when

their opponent receives illegal votes. *See, e.g., Marks v. Stinson*, 19 F.3d at 887-88 (permitting candidate to seek redress for due-process violation resulting from "massive absentee ballot fraud, deception, intimidation, harassment and forgery, [and] many of the absentee votes were tainted"); *Carson v. Simon*, 978 F.3d 1051, 2020 U.S. App. LEXIS 34184, *13 (8th Cir. 2020) (holding candidates have "cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast" and "[a]n inaccurate vote tally is a concrete and particularized injury to candidates," who thus "meet the injury-in-fact requirement" and "have Article III standing as candidates"); *Hunter v. Hamilton County Bd. of Elections*, 850 F.Supp.2d 795, 803 (S.D. Ohio Feb. 8, 2020) ("As a candidate in the … election, [plaintiff] has standing to challenge the Board's treatment of provisional ballots.").

In addition, the SAC asserts violation of Due Process, which was incorrectly omitted from the Amended Complaint. Of course, the voter Plaintiffs have standing because their votes are improperly diluted by a scheme to count defective ballots. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote."); *Marks*, 19 F.3d at 888 ("[R]ejection of a ballot where the voter has been effectively deprived of the ability to cast a legal vote implicates federal due process concerns.").

Second, the Court found the Trump Campaign did not state plausible Equal Protection claims because it was treated the same as the Biden campaign regarding

the refusal to permit meaningful observations at the canvass of mail ballots, and allowing "notice in cure" in some counties, but not others. *See* Opinion (ECF 202, at 32-36). The SAC has addressed this issue, alleging that Defendants excluded all observers from the canvassing of the mail ballots to conceal defective ballots were being opened, mixed, and counted to benefit Biden. *See* SAC (ECF 172-2, at ¶56, at 64; ¶56, at 64; ¶60, at 65; ¶110 at 49; ¶112 at 49-50; ¶117 at 52; ¶252, at 95; ¶253, at 95).

Plaintiffs also allege that the Defendants implemented "notice in cure" in violation of Pennsylvania law in order to favor Biden in order to increase his votes – an intentional scheme different than that alleged in the Amended Complaint. Thus, Defendants' conduct – while superficially neutral – was, in fact, designed to count defective ballots to favor one candidate over the other. In addition, the SAC also asserts Due Process claims arising from this conduct. This more than satisfies the plausibility requirement under *Twombly*. *Marks v. Stinson* recognized illegally favoring one candidate over the other violated Equal Protection and Due Process. As to the voters, there can be no doubt that they state claims if their votes are diluted. In holding that the normal remedy is to "level up" rather than "level down," under the SAC, the only votes which are being disallowed are those of defective ballots. No legal votes are being excluded.

Third, the SAC now asserts a Due Process claim based on the Pennsylvania

Supreme Court's decisions holding there is no right to challenge mail ballots during the canvassing, *see In re November 3, 2020 Gen. Election, supra,* despite historical practice and a statutory provision to the contrary, see 25 Pa.Stat. §§3146.8(f), and no right for campaigns and parties to meaningful observation during the canvass, *see Canvassing, supra.*, contrary to historical practice. Numerous cases hold that election systems without meaningful safeguards violate due process.[8] The Due Process claim was not included in the FAC; in fact, *Canvassing* was only decided after the FAC was filed. Further, this change in the law and practice in the middle of a Presidential election violates *Bush v. Gore.*

C. Motions for Expedited Discovery

Appellants filed a Motion for Discovery (ECF 118) and a Motion for Expedited Discovery (ECF 171) requesting limited, expedited discovery necessary to substantiate their claims. The Order (ECF 203) denied both motions as moot. However, district courts have the power to order targeted expedited discovery and when movants have shown good cause, as Appellants have done. Appellants'

8 *See, e.g., Griffin*, 570 F.2d at 1077 ("If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under §1983 [is] therefore in order…. [T]here is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action."); *New Georgia Project v. Raffesnsperger*, 2020 U.S. Dist. LEXIS 159901, *76 (N.D. Ga. Aug. 31, 2020) (holding receipt deadline for absentee ballots "deprive[d] voters of their liberty interest without adequate procedural safeguards (that is to say, violates due process)").

requested discovery is within the control of Defendants and critically important to proving their allegations at a hearing. In particular, Appellants requested, *inter alia*, access to the 1.5 million mail ballots, or a statistically significant random sample of them, in order for their expert to assess the percentage of defective mail ballots cast in the Defendant Counties – without an opportunity to meaningfully observe or object during canvassing – in accord with the procedure approved by *Marks v. Stinson*, 19 F.3d at 889, f.n.14 ("Courts, with the aid of expert testimony, have been able to demonstrate that a particular result is worthy of the public's confidence even though not established solely by applying mathematics to the record evidence. … What is required is evidence and an analysis that demonstrate that the district court's remedy is worthy of the confidence of the electorate.").

D. Relief Sought in the SAC and Renewed Injunction Motion

In the proposed SAC, Plaintiffs seek to prohibit Defendants from certifying results of the 2020 Presidential general election in Pennsylvania on a statewide basis, including certifying results that include tabulation of unauthorized votes, including mail ballots which did not meet the statutory requirements, mail ballots which were cured without authorization, and any other vote cast in violation of law, and, instead, compel Defendants to certify the election based solely on legal votes. Alternatively, Plaintiffs seek an order that the results of the 2020 Presidential general election are defective, which would allow the Pennsylvania General Assembly to choose

Pennsylvania's electors. Plaintiffs seek a temporary restraining order and preliminary injunction granting appropriate relief during the pendency of this action.

SUMMARY OF ARGUMENT

First, the Court abused its discretion in denying leave to amend on the sole basis of "undue delay" because there was no delay in filing the Motion to Amend (let alone "undue delay"), Defendants were not prejudiced by permitting Plaintiffs to file the SAC, and the Court misconstrued the relevant timeframe and relief sought in this case.

Second, if this Court reverses denial of the Motion to Amend, the denial of the Renewed Injunction Motion as "moot" is wrong as a matter of law.

ARGUMENT[9]

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING LEAVE TO AMEND[10]

The Court abused its discretion in denying leave to amend on the sole basis of "undue delay" because (1) there was no delay in filing the Motion to Amend, let alone "undue delay," (2) Defendants were not prejudiced by permitting Plaintiffs to file the SAC, and (3) the Court misconstrued the relevant timeframe and relief sought

[9] All emphases are added, and citations, quotation marks, footnotes, and brackets are omitted, unless otherwise stated.

[10] This Court reviews a district court's denial of a motion to amend for abuse of discretion. *Geness v. Cox*, 902 F.3d 344 (3d Cir. 2018) (*citing Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000)).

in this case.

Fed.R.C.P. 15(a)(2) states that leave to amend a complaint "shall be freely given when justice so requires." "The liberal amendment regime helps effectuate the general policy embodied in the Federal Rules favoring resolution of cases on their merits." *Mullin v. Balicki*, 875 F.3d 140, 149 (3d Cir. 2017) (citations and internal quotation marks omitted). "Leave to amend must generally be granted unless equitable considerations render it otherwise unjust." *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006).

"Denial of leave to amend can be based on undue delay, bad faith or dilatory motive on the part of the movant; repeated failure to cure deficiencies by amendments previously allowed; prejudice to the opposing party; and futility." *Mullin*, 875 F.3d at 149-50 (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)). *See also Arthur*, 434 F.3d at 204 (same) (*citing Foman, supra*). "All factors are not created equal, however, as prejudice to the non-moving party is the touchstone for the denial of an amendment." *Id.* at 150 (citations and internal quotation marks omitted). "While abuse of discretion is ordinarily a deferential standard of review, it has bite in this context; the District Court's discretion, circumscribed by … Rule 15's directive in favor of amendment, must be exercised within the context of liberal pleading rules." *Id.* at 151 (citations and internal quotation marks omitted). Here, the Court's only reason for denying leave was alleged undue delay.

A. There Was No Delay, Let Alone Undue Delay

The Court abused its discretion in denying leave to amend because there was no undue delay. "The 'undue delay' factor recognizes that a gap between when amendment becomes possible and when it is actually sought can, in certain circumstances, be grounds to deny leave to amend." *Mullin*, 875 F.3d at 151. "While simple delay cannot justify denying leave to amend by itself, delay that is 'undue'—a delay that is protracted and unjustified—can place a burden on the court or counterparty, or can indicate a lack of diligence sufficient to justify a discretionary denial of leave." *Id.* (*citing Bjorgung v. Whitetail Resort, L.P.*, 550 F.3d 263, 266 (3d Cir. 2008); *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267 (3d Cir. 2001)). "As there is no presumptive period in which … delay becomes 'undue,' the question of undue delay requires that we focus on the movant's reasons for not amending sooner while bearing in mind the liberal pleading philosophy of the federal rules." *Mullin*, 875 F.3d at 151 (*citing Cureton*, 252 F.3d at 273).

First, Plaintiffs filed their Complaint on November 9, 2020 – six days after the Presidential election (ECF 1). After receiving threats from opposing counsel, the Campaign's main counsel, Porter Wright, withdrew on November 13th (Order, ECF 117). The Campaign's remaining attorney (Kerns) filed the FAC (ECF 125) on November 15th, which incorrectly omitted numerous allegations and counts. On Monday, November 16, new counsel informed the Court (ECF 152) that the

Campaign intended to move for leave to file a SAC(ECF 172-2), which was intended to correct the omission of allegations and counts in the FAC and to include additional allegations based on continuing investigation. Plaintiffs filed a Motion to Amend on November 18 (ECF 172), which attached a copy of the proposed SAC (ECF 172-2). On November 21, 2020, the Court dismissed the FAC with prejudice and denied the Motion to Amend (ECF 203).

The Court did not make any finding that Plaintiffs' counsel was dilatory in filing the Motion to Amend (ECF 202), let alone that any delay was "protracted and unjustified," and, thus, "undue." *Mullin*, 875 F.3d at 151; *Cureton*, 252 F.3d at 273. To the contrary, after original counsel withdrew on Friday, November 13, and the Amended Complaint was filed on Sunday, November 15, Plaintiffs immediately engaged new counsel and informed the Court on the next day, Monday, November 16 that they intended to amend and filed the Motion to Amend on Wednesday, November 18, just two days after new counsel was engaged. This is hardly delay.

Second, the Court's stated justification for undue delay was the need to set a new briefing schedule, have a second oral argument, and decide any issues. But ruling on any motion to amend involves defendants' filing opposition and the Court resolving the matter. The Court also apparently thought there was undue delay because there was insufficient time to hold a hearing before the November 23 certification date. *See* Opinion at 36 ("[T]he deadline for counties in Pennsylvania

to certify their election results to Secretary Boockvar is November 23, 2020, [and therefore] amendment would unduly delay resolution of the issues."). But, this missed the point. The real date – as explained in the Renewed Injunction Motion (ECF 183, at 7, 25) and Renewed Injunction Reply (ECF 198, at 3, 26) is December 8, the safe-harbor provided for certifying electors under 3 U.S.C. §5. If the Court could have held a hearing on Thursday, November 19 in order to determine whether to enjoin certification before Monday, November 23 – a four day gap – it could have easily decided the Motion to Amend and held a hearing before December 4, four days before the December 8 safe harbor, to determine whether any certification should be revoked.[11] It can still do so.

B. There Was No Prejudice to Defendants

"[D]elay alone is an insufficient ground to deny leave to amend[.]" *Geness*, 902 F.3d at 364. Only delays that are either "undue" – which is not the case here – or "prejudicial" warrant denial of leave to amend. *Id.* at 364-65 (*citing Cureton*, 252 F.3d 267, 273 (3d Cir. 2001)).

Critically, the Court did not find that Defendants would be prejudiced by the filing of the SAC (ECF 202). In fact, Defendants never filed responses to the Motion to Amend, so there is no record of any alleged prejudice by the amendment. *See*

[11] As explained in the Renewed Injunction Motion and Renewed Injunction Reply, numerous courts have decertified election results, including *Marks v. Stinson*.

Johnson v. Knorr, 130 Fed.Appx. 552, 555 (3d Cir. 2005) ("[W]e believe the District Court erred by equating delay on [plaintiff's] part with prejudice to [defendant]" because "[d]elay alone … is an insufficient ground to deny an amendment, unless the delay unduly prejudices the non-moving party" and "[i]n his brief to this Court, [defendant] did not specify how allowing the amendment would be prejudicial to him") (*citing Cornell & Co., Inc. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978)).

C. The Court Misconstrued the Remedy Sought

The Court also misconstrued the remedy sought, which may have affected its view of amendment. The Campaign is not seeking to disenfranchise 6.8 million Pennsylvanian voters. Opinion at 18, 32. Instead, it only seeks to set aside the defective ballots among the 1.5 million cast in the defendant Counties. The Campaign seeks to examine a sample of the mail ballots to determine the defective percentage of ballots among the 1.5 million, which should then be deducted from Biden's vote total. This process and remedy was approved in *Marks v. Stinson*, where the court excluded the illegal absentee ballots, decertified Stinson, and certified Marks as the winner. *Marks*, 19 F.3d at 887-88.

In sum, the Court erred in denying the Motion to Amend, particularly given the importance of the constitutional rights at issue in this case. *See District Council 47, AFSCME v. Bradley*, 795 F.2d 310, (3d Cir. 1986) ("the district court at the least

should have granted the plaintiffs leave to amend their complaint to provide sufficient specific factual allegations to demonstrate a causal nexus between the defendants' actions and the alleged violations of constitutional rights.") (*citing Darr v. Wolfe*, 767 F.2d 79, 81 (3d Cir. 1985) ("This Court has consistently held that when an individual has filed a complaint under 1983 which is dismissible for lack of factual specificity, he should be given a reasonable opportunity to cure the defect, if he can, by amendment of the complaint and that denial of an application for leave to amend under these circumstances is an abuse of discretion.").

II. THE DISTRICT COURT ERRED IN DISMISSING THE INJUNCTION MOTION AS A MATTER OF LAW IF IT ERRED IN DENYING THE MOTION TO AMEND

The Court denied the Renewed Injunction Motion solely on the basis that it was rendered "moot" due to it dismissing the FAC (ECF 125) and denying the Motion to Amend (ECF 203). If this Court reverses denial of the Motion to Amend, the denial of the Renewed Injunction Motion as "moot" is wrong as a matter of law. *See AT&T v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1423 (3d Cir. 1994) ("Because we find that the district court committed errors of law in denying [plaintiff's] motion for preliminary injunction against [defendants], we will vacate the Order and of the district court and we will remand the matter for further proceedings."). This Court should therefore vacate the Order denying the Renewed Injunction Motion and remand for a hearing.

III. THIS COURT SHOULD RETAIN JURISDICTION IN THE EVENT OF EMERGENCY APPEALS

If this appeal is granted, given the urgency and great importance of this matter to the nation, and potential need for expedited review of the District Court's future decisions, this Court should retain jurisdiction after remand.[12]

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's denial of the Motion to Amend and its Renewed Injunction Motion. This Court should direct the Court below to immediately decide the Motion to Amend on the merits and conduct a hearing on the Renewed Injunction Motion if the Second Amended Complaint states claims, while retaining jurisdiction.

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[12] *See, e,g., Gov't Guarantee Fund of the Republic of Fin. v. Hyatt Corp*., 95 F.3d 291, 297 (3d Cir. 1996) (after granting emergency motion to judgment pending appeal, this Court "accelerated the parties' briefing schedule," and "remanded the case to the district court to fix the amount of the supersedeas bond pursuant to Fed. R. App. P. 8(a), ***while retaining jurisdiction over the appeal***."); *Shahmoon Indus., Inc. v. Imperato*, 338 F.2d 449, 450 (3d Cir. 1964) (granting parties "leave to petition the district court … to amend the pleadings and to take such evidence as might be necessary to resolve … diversity issue" with "***this court retaining jurisdiction of the appeal while this course was being pursued in the court below***."); *Oliver v. Sambor*, 1985 U.S. Dist. LEXIS 18866, *2 (E.D. Pa. June 17, 1985) (noting that the "Court of Appeals, ***while retaining jurisdiction***, remanded the case to th[e] [District] court, [and ordered that where] … the district court [had] granted a motion to dismiss … [but had not] resolve[d] … one remaining claim …. [the Circuit] ***will retain jurisdiction meanwhile***.")).

Respectfully submitted:

Dated: November 23, 2020

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No. 20-3371
IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DONALD J. TRUMP FOR PRESIDENT, INC. et. al,

Plaintiffs-Appellants,

v.

KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania; et. al,

Defendants-Appellees

CERTIFICATE OF SERVICE

I, Deborah A. Black, Paralegal for Scaringi Law, do hereby certify that I served a true and correct copy of ***Plaintiffs'-Appellants' Opening Brief, ,*** in the above-captioned action, upon all parties via CM/ECF.

Date: November 23, 2020

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