

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

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

Plaintiffs,

v.

KATHY BOOCKVAR; *et al.*,

Defendants.

Civil Action

No.: 2:20-CV-966

Judge J. Nicholas Ranjan

**MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR SUMMARY  
JUDGMENT BY INTERVENORS NAACP PENNSYLVANIA STATE CONFERENCE,  
COMMON CAUSE PENNSYLVANIA, LEAGUE OF WOMEN VOTERS OF  
PENNSYLVANIA, PATRICIA M. DEMARCO, DANIELLE GRAHAM ROBINSON,  
AND KATHLEEN WISE AND IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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Voter-Intervenors NAACP Pennsylvania State Conference, League of Women Voters of Pennsylvania, Common Cause of Pennsylvania, Patricia DeMarco, Kathleen Wise, and Danielle Graham Robinson respectfully request that the Court deny Plaintiffs' Motion for Summary Judgment in its entirety, and instead enter summary judgment in favor of Defendants on all of Plaintiffs' claims.

### INTRODUCTION

In October 2019, the Republican-led Pennsylvania General Assembly passed Act 77, which authorizes vote by mail without excuse. This modernization of the Pennsylvania election laws was timely. Americans now face an unprecedented global pandemic, and in-person voting poses serious health risks for many Pennsylvania voters. Pennsylvania's new election law promises to facilitate broad participation by Pennsylvania voters in the general election, especially for voters at elevated risk for COVID-19 or who do not want to risk their health and the health of their families by voting in person in the midst of a pandemic that has already killed over 200,000 people in the United States. In the June Primary, nearly 1.5 million Pennsylvania voters cast their vote by mail-in or absentee ballot; this is 17 times the number that voted absentee in the 2016 primary. Ex. 1 (Penn. Dep't of State, Pennsylvania 2020 Primary Election Act 35 of 2020 Report (Aug. 1, 2020)) at 4. A good number of those voters returned those ballots to their County Boards of Election by placing them in secure, designated drop boxes rather than risk mailing them and having their votes arrive too late to be counted. And less than one month ago, the Supreme Court of Pennsylvania held that the use of ballot drop boxes, which began in that primary, is both statutorily permitted and constitutional.<sup>1</sup>

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<sup>1</sup> As noted in their cross-motion, the Voter-Intervenors join in the cross-motions of the other intervenors as well as Secretary Boockvar. In the interest of judicial efficiency, the Voter-Intervenors focus here on Plaintiffs' claims as they relate to drop boxes.

Plaintiffs’ argument that expanding the use of drop boxes is a “burden” on the fundamental right to vote under *Anderson/Burdick* because it allegedly increases the possibility of voter fraud. No Court has found that creating a new procedure that makes voting *more* accessible—in other words, does the *opposite* of creating a burden on the right to vote—violates *Anderson/Burdick*.

Additionally, the national experience with mail-in ballots—whether delivered either to a United States Postal Service mailbox or to a designated ballot drop box—confirms that robust voter participation in democracy can be achieved without undermining election integrity. Multiple branches of the federal government and every methodologically reliable study of so-called “voter fraud” have each reached the same conclusion: such “fraud” is exceedingly rare. Moreover, there is no evidence that drop boxes have been used to carry out “voter fraud” of any sort on any meaningful scale, in Pennsylvania or anywhere else. This is unsurprising, as drop boxes are as secure, if not more so, than USPS mailboxes, with which Plaintiffs do not take issue.

Faced with undisputed facts that alleged voter fraud is basically non-existent in the United States, Plaintiffs argue that there is no evidence of problems with drop boxes in Pennsylvania because drop boxes have not been widely used in the Commonwealth. Given that Plaintiffs bear the burden of proof, this lack of evidence undermines, rather than bolsters, Plaintiffs’ claim. Moreover, Plaintiffs’ identify no admissible evidence to support a claim that Pennsylvania’s experience with ballot drop boxes will be different than that of the numerous other states that have used—and even required—drop boxes without sacrificing election integrity. Plaintiffs’ complaints about drop boxes in Pennsylvania are, simply put, rank speculation. As the designated witness for the Trump Campaign and Republican National Committee testified, they “are supposing” problems will arise in the General Election. Similarly, both the organizational and individual Plaintiffs testified that they have no specific knowledge of any problems with drop

boxes (or other misconduct by voters) in the June 2020 primary. “Supposing” a problem might occur—especially when that problem has never occurred before—does not, as a matter of law, support Plaintiffs’ constitutional claims.

Plaintiffs also contend that the “uneven” use of drop boxes from one county to another favors some voters over others and therefore constitutes an Equal Protection violation under *Bush v. Gore*. This claim too lacks merit. *Bush v. Gore* requires a demonstration that allowing counties to employ multiple drop box locations is arbitrary, has a disparate impact, and values one vote over another, all of which Plaintiffs have failed to do. Plaintiffs fail to identify even a single voter whose rights are somehow burdened or whose vote is somehow diluted by the use of drop boxes. They have no admissible evidence that ballots submitted via drop boxes are treated more favorably than other ballots, and no evidence that the use of drop boxes differs from countless other decisions counties make for themselves during elections. At best, Plaintiffs have shown typical variations in election procedures. But garden-variety differences are constitutionally permissible and cannot, as a matter of law, support Plaintiffs’ claims.

Ballot drop boxes are safe and secure. The undisputed evidence is that drop boxes promote participation in the democratic process, and, importantly, public health during an unprecedented pandemic. The Court should reject Plaintiffs’ unsupported and highly speculative claims, and instead grant summary judgment against Plaintiffs and in favor of Defendants.

## **FACTUAL BACKGROUND**

### **A. The Voter-Intervenors**

The Voter-Intervenors are Pennsylvania voters and organizations that represent the interests of Pennsylvania voters. The organizations are non-partisan and work to promote democracy and foster participation in elections.

The NAACP Pennsylvania State Conference is a non-profit advocacy group for civil rights, including the voting rights, for Black Americans, both nationally and in Pennsylvania, including by educating voters on different methods of voting during the COVID-19 pandemic.

Common Cause Pennsylvania encourages civic engagement and public participation in the democratic process to ensure the accountability of public officials and institutions.

The League of Women Voters of Pennsylvania provides robust voter education around the state, registers voters, and helps the people of Pennsylvania safely exercise their right to vote.

Patricia M. DeMarco, Danielle Graham-Robinson, and Kathleen Wise are Pennsylvania voters whose right to vote in the June 2020 primary was jeopardized by COVID-19, and who face similar concerns for the November 2020 general election. Each is at heightened risk for death or significant injury if she contracts COVID-19. Ex. 2 (Affidavit of Danielle Graham Robinson, dated September 8, 2020 (“Graham Robinson Affidavit”)) ¶ 5; Ex. 3 (Affidavit of Kathleen Wise, dated September 8, 2020 (“Wise Affidavit”)) ¶ 5; Ex. 4 (Affidavit of Patricia M. DeMarco, dated September 8, 2020 (“DeMarco Affidavit”)) ¶ 5. Each requested a mail-in ballot early. Ms. Graham Robinson and Wise received their ballots late; timely receipt by election officials of their ballots could not be guaranteed through the U.S. mail. Ex. 2 (Graham Robinson Affidavit) ¶¶ 7–10; Ex. 3 (Wise Affidavit) ¶¶ 6–7.

Ms. DeMarco, age 74, mailed her ballot. When she could not confirm that election officials received it, she cast a provisional in-person ballot. Ex. 4 (DeMarco Affidavit) ¶¶ 1, 7–10. Ms. Wise, age 62, was disenfranchised when she received her mail-in ballot too close to the Primary Election to permit timely return of the ballot to election officials. Ex. 3 (Wise Affidavit) ¶¶ 1, 11–12. Ms. Graham Robinson, age 44, delivered her ballot in-person at her County Board of Elections central office. She was recently unemployed, incurred parking charges to deliver her ballot to

county election officials and was exposed to significant health risks by voting. Ex. 2 (Graham Robinson Affidavit) ¶¶ 11–12.

### **B. Ballot Drop Boxes**

United States citizens have voted by mail in federal elections since 1864. Ex. 5<sup>2</sup> (Report of Robert M. Stein, Ph.D., dated September 30, 2020 (“Stein Rpt.”))<sup>3</sup> at 4. Mail-in voting procedures vary from state-to-state, and within individual states, to account for local considerations and circumstances. Ex. 5 (Stein Rpt.) at 5; Ex. 6 (Report of Amber McReynolds, dated September 30, 2020 (“McReynolds Rpt.”))<sup>4</sup> at 10. States and localities have facilitated the return of mail-in ballots, including through (1) the United States Postal Service (“USPS”); (2) in-person ballot return—at local election offices; and (3) return at a secure drop box specially designated for the receipt of election ballots. Ex. 5 (Stein Rpt.) at 7.

The use of a drop box for voting is now accepted in the majority of the states. At least 34 states expect to use drop boxes in the November General Election. Ex. 7 (Report of Paul Gronke, Ph.D., dated September 30, 2020 (“Gronke Rpt.”))<sup>5</sup> at 16 (citing Ex. 8 (Hufford, A., “The Rise of

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<sup>2</sup> Materials designated “Ex. \_\_\_” are exhibits to the appendix filed herewith pursuant to the Court’s Amended Scheduling Order (Dkt. 462).

<sup>3</sup> Dr. Stein is a fellow in urban politics at the Baker Institute and the Lena Grohlman Fox Professor of Political Science at Rice University, where is the faculty director of Rice’s Center for Civic Leadership. His current research focuses on alternative modes of elections and voting procedures in the U.S. His work has been supported by the National Science Foundation, the City of Houston’s Office of Public Safety and Homeland Security, and the Pew Charitable Trusts, among others.

<sup>4</sup> Amber McReynolds is Chief Executive Officer for the National Vote at Home Institute, a member of the National Task Force for Elections Crises, the Advisory Committee for the Massachusetts Institute of Technology (MIT) Election and Data Science Lab, Secure the Vote Advisory Board, Circle of Advisors for the Democracy Fund’s Election Validation Project, Michigan Election Modernization Advisory Committee, and various statewide and national committees and working groups devoted to securing election procedures. She is also the former Elections Deputy Director and Director for the City and County of Denver Colorado.

<sup>5</sup> Dr. Gronke is a Professor of Political Science at Reed College and Director of the Early Voting Information Center, which is a nonpartisan center for the study of non-precinct place

Ballot Drop Boxes Due to the Coronavirus.”)). Five states employ “universal vote-by-mail” (i.e. the state votes *entirely* via mail-in voting). In those states, nearly two-thirds of voters will return their ballots in secure, specially designated election drop boxes. Ex. 5 (Stein Rpt.) at 7 (citing Ex. 9 (Menger and Stein 2020)).

Specially designated election drop boxes are safe and reliable. A Department of Homeland Security (“DHS”) working group on election infrastructure concluded that ballot drop boxes provide “a secure and convenient means for voters to return their mail ballot.” Ex. 10 (Cybersecurity and Infrastructure Security Agency (CISA) Elections Infrastructure Government Coordinating Council and Sector Coordinating Council’s Joint COVID Working Group, United States Dep’t of Homeland Security, Ballot Drop Box (2020) (“DHS Ballot Drop Box Paper”)) at 1. They are constructed of materials designed to withstand vandalism and inclement weather, and to prevent unauthorized removal. Ex. 6 (McReynolds Rpt.) at 10. They can be installed at locations that ensure greater voter access, including 24-hour permanent installations, temporary indoor installations, and drive-by installations. Ex. 6 (McReynolds Rpt.) at 10. *See also* Ex. 10 (DHS Ballot Drop Box Paper) at 1. Permanently installed drop boxes share some common features with traditional blue USPS mailboxes and include enhanced security options. Ex. 6 (McReynolds Rpt.) at 12. Depending on placement, they can be accessible to pedestrians or motor vehicles. Some are installed on government property; others are installed in partnership with private property owners, such as a shopping mall. Ex. 6 (McReynolds Rpt.) at 10.

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voting in the United States, and has received funding from federal agencies, state governments, public charities, and non-profits. He has published a number of peer-reviewed statistical analyses of national, regional, and state trends in voting by mail, early voting, and the demographic and attitudinal characteristics of individual early in-person and no-excuse absentee voters.



State protocols for drop box design, features, location and numbers vary based on local needs. Ex. 5 (Stein Rpt.) at 8–9 (citing Ex. 11 (National Conference of State Legislatures Ballot Drop Box Definitions, Design Features, Location and Number)); Ex. 5 (Stein Rpt.) at 16; Ex. 6 (McReynolds Rpt.) at 10, 12. Among the relevant considerations for use of drop boxes are size of county, ease of access, transportation considerations, and budgetary restrictions. Ex. 5 (Stein Rpt.) at 16; Ex. 6 (McReynolds Rpt.) at 12. By their nature, these factors vary substantially by county; for example, although urban voters generally prefer dropping ballots off to returning ballots by mail, voters in rural counties often have the opposite preference given the greater distances between residents and town centers. Ex. 6 (McReynolds Rpt.) at 13. The number of drop boxes per resident often varies vary between rural, suburban, and urban counties. Similarly, specific security measures also vary by county “based on the county’s available resources, population, needs, and assessment of risk.” Ex. 6 (McReynolds Rpt.) at 17. Depending on the circumstances, such security measures may include video surveillance or placing the drop box near a government building, among other features. Ex. 6 (McReynolds Rpt.) at 17.

Local county election officials are well situated to consider the particularized needs of voters in their counties. Ex. 5 (Stein Rpt.) at 9 (drop box locations set by local officials in California, Colorado, Hawaii, New Mexico, and Oregon). The diversity of Pennsylvania’s 67 counties is illustrative of variations in local needs:

<b>County</b>	<b>Size in Square Miles<sup>6</sup></b>	<b>Population</b>	<b>Population Density Per Square Mile</b>	<b>Number of Polling Locations</b>
Philadelphia County <sup>7</sup>	134.1	1,584,064	11,379.5	700-800

<sup>6</sup> Ex. 13 [*Demographics – County Profiles*, CTR. FOR RURAL PA.].

<sup>7</sup> Ex. 14 (Bluestein Dep.) at 29:1-18 (“Somewhere between 700 and 800” in-person polling locations).

County	Size in Square Miles <sup>6</sup>	Population	Population Density Per Square Mile	Number of Polling Locations
Sullivan County <sup>8</sup>	449.9	6,066	14.3	15
Elk County <sup>9</sup>	827.4	29,910	38.6	30
Luzerne County <sup>10</sup>	890.3	317,417	360.4	144
Allegheny County <sup>11</sup>	730.1	1,216,045	1,675.6	161
Montgomery County <sup>12</sup>	483.0	830,915	1,655.9	424

### C. Drop Boxes Facilitate Voter Participation

The central attribute of drop boxes is that they facilitate voter participation in elections. Ballots deposited in a drop box are received by election officials when they are deposited by the voter. They are not subject to postal service delays. Ex. 10 (DHS Ballot Drop Box Paper) at 1; Ex. 12 (Letter from Thomas J. Marshall, General Counsel and Executive Vice President, United States Postal Service, to Hon. Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania (July 29, 2020)) at 1–2 (warning of election pressures on USPS); Ex. 7 (Gronke Rpt.) at 17. They are not associated with voter distrust of the postal process based on concerns “that their ballot could be tampered with” or exposure of their signature.” Ex. 10 (DHS Ballot Drop Box Paper) at 1; *see also* Ex. 5 (Stein Rpt.) at 12. Distrust of the postal process is particularly prevalent in the

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<sup>8</sup> Ex. 15 (Sullivan County Election Bureau - <https://www.sullivancounty-pa.us/offices/election-bureau>).

<sup>9</sup> Ex. 16 (Elk County Polling Locations - <https://www.co.elk.pa.us/index.php/elk-county-polling-locations>).

<sup>10</sup> Ex. 17 (Luzerne County Polling Locations - <https://www.luzernecounty.org/1283/2020-Primary-Election#locations>).

<sup>11</sup> Ex. 18 [Burke Rpt.] ¶ 26 n.40.

<sup>12</sup> Ex. 18 [Burke Rpt.] ¶ 26 n.40.

Black and Latino communities.<sup>13</sup> For these and other reasons, many voters strongly prefer drop boxes,<sup>14</sup> and they contribute to greater voter turnout.<sup>15</sup>

#### **D. Drop Boxes Mitigate the Effects of the COVID-19 Pandemic**

The novel coronavirus will have a dramatic impact on in-person voting in the General Election. The novel coronavirus will have a dramatic impact on in-person voting in the General Election. Since it was declared a global pandemic in March 2020, it has killed over 200,000 Americans, and it disproportionately infects and kills Black and Hispanic Americans.<sup>16</sup> In

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<sup>13</sup> Ex. 19 (Report of Matt Barreto, dated September 30, 2020 (“Barreto Rpt.”)) at 7. Dr. Barreto is a Professor of Political Science and Chicana/o Studies at the University of California, Los Angeles, and the co-founder and faculty director of the Latino Politics and Policy Initiative (LPPI) in the Luskin School of Public Affairs, a national research center that studies policy issues that impact the Latino and immigrant communities. Dr. Barreto has published multiple peer-reviewed academic research papers on voter turnout, political participation in the U.S., barriers to voting, and minority political engagement (among other topics).

<sup>14</sup> Ex. 7 (Gronke Rpt.) at 19 (“[t]he empirical evidence from voter behavior is that voters do, in fact, love drop boxes.”); *see also* Ex. 7 (Gronke Rpt.) at 18 (citing Ex. 20 (Lissandra Villa, *Ballot Drop Boxes Are Emerging as a Vote-By-Mail Alternative—But They Have Critics, Too*, TIME, August 20, 2020)); Ex. 6 (McReynolds Rpt.) at 13.

<sup>15</sup> Ex. 7 (Gronke Rpt.) at 13; *see also* Ex. 5 (Stein Rpt.) at 10 (“voter turnout increases with the number of drop boxes available in a voting jurisdiction”) (citing Ex. 21 Collingwood, et al. (2017) and Ex. 22 (McGuire, et al. (2020))).

<sup>16</sup> Ex. 18 (Expert Report of Dr. Donald Burke (“Burke Rpt.”)) at 31. Col. Donald S. Burke, MD, US Army (Ret.) is a current member of the Board of Health for Allegheny County, Pennsylvania, a former Clinical Ward Officer for the U.S. Army Medical Research Institute of Infectious Diseases, a former Clinical Desk Officer and Chief for the Department of Virus Diseases, a former Chief in the Virology Department of the Armed Forces Research Institute of Medical Sciences, a former Director in the Division of Retrovirology at the Walter Reed Army Institute of Research, the founder and former director of the U.S. founded the U.S. Military HIV/AIDS Laboratory Complex, a former Professor of International Health and Professor of Epidemiology at the Johns Hopkins Bloomberg School of Public Health and of Medicine at the Johns Hopkins School of Medicine, the former Director of the Johns Hopkins Bloomberg School of Public Health’s Center for Immunization Research, a Member of the National Academy of Medicine, an Elected Fellow of the American Association for the Advancement of Science, American Academy of Microbiology, and the American Epidemiological Society, and a Fellow Royal Society of Tropical Medicine and Hygiene (U.K.), American College of Physicians, and a fellow of the Infectious Disease Society of America.

Pennsylvania, as of September 29, 2020, roughly 800-1,000 new cases are diagnosed every day.<sup>17</sup> The rate of the transmission of the novel coronavirus is expected to increase in the Fall and Winter as part of the second wave of anticipated infections. Ex. 18 (Burke Rpt.) at 17 (“During the coming winter, the effective reproductive number of the SARS-CoV-2 virus transmission in the United States (including Pennsylvania) is likely to increase by about 1/3 over its mean annual value.”) (citing Ex. 23 (Stephen M. Kissler, et al., Projecting the transmission dynamics of SARS-CoV-2 through the postpandemic period, 368 SCIENCE 860 (2020))). There currently is no approved vaccine to prevent infection, there is no known cure or FDA-approved antiviral treatment for COVID-19, and it is highly unlikely that a vaccine will be approved and widely distributed before November’s election. Ex. 18 (Burke Rpt.) at 18. CDC guidelines recognize that the only ways to limit the spread of the novel coronavirus are self-quarantine, social distancing, mask wearing, frequent handwashing, and disinfecting surfaces. Ex. 18 (Burke Rpt.) at 19–20.

Pennsylvania voters are reasonably concerned that in-person voting may heighten their risk of contracting COVID-19. Exs. 2-4 (DeMarco, Graham Robinson, and Wise Affidavits). “[I]n Pennsylvania, 40% of adults (over the age of 18) are at elevated risk for severe illness due to COVID-19—that is approximately four million people. And older adults (age 65 years and over) make up 58% of that elevated risk population in Pennsylvania,” or more than 2.1 million individuals. Ex. 18 (Burke Rpt.) at 11. Voting in person enhances and potentially catalyzes the spread of COVID-19. Polling places are indoors, which “may promote highly efficient spread of diseases through droplets.” Ex. 18 (Burke Rpt.) at 28 (citing Ex. 24 (Pa. Dep’t of Health, For Building Administrators and Proprietors: Use of Facilities as Polling Places During COVID-19))

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<sup>17</sup> Pennsylvania Department of Public Health COVID-19 Dashboard, <https://experience.arcgis.com/experience/cfb3803eb93d42f7ab1c2cfceca78bf7> (last accessed Oct. 3, 2020)

(polling places include churches, private banquet halls, community centers, schools, fitness centers, libraries, township buildings, “private clubs with large common area,” membership organization facilities (e.g., American Legion)).

In addition, the COVID-19 pandemic is likely to depress the number of available poll workers, leading to longer lines, and therefore increased health risk. Poll workers are more likely to be older and have higher rates of high-risk conditions, rendering them more vulnerable to COVID-19. Ex. 18 (Burke Rpt.) at 28. As one 2016 survey showed, “24 percent of poll workers were 71 or older and another 32 percent were between the ages of 61 and 70.” Ex. 18 (Burk Rpt.) at 28 (citing Ex. 25 (Michael Barthel & Galen Stocking, Older People Account for Large Shares of Poll Workers and Voters in U.S. General Elections, PEW RES. CTR. (April 6, 2020))). Poll workers must interact with hundreds, if not thousands, of voters in a given day, including checking identifications for first-time voters, distributing ballots, answering questions, and helping voters navigate the polling place. Ex. 18 (Burke Rpt.) at 27–28. As part of their duties, poll workers must sanitize every surface between voters, forcing them to interact with potentially infectious surfaces. Ex. 18 (Burke Rpt.) at 29. Poll workers may touch voting machines to troubleshoot issues, including surfaces that have not been sanitized. Ex. 18 (Burke Rpt.) at 29. In light of these issues, those who would otherwise perform a tremendous public service may be reluctant to staff polling places, and with fewer polling places, voters are more likely to be funneled through smaller areas, using only a handful of voting machines. Ex. 18 (Burke Rpt.) at 28-29. Additionally, the safety processes designed to reduce health risk, such as sanitizing voting machines between voters, increases lines into the polling locations, longer waits, and the potential for enhanced risk of infection. Ex. 18 (Burke Rpt.) at 30–31. Due to severe shortages of poll workers, Pennsylvania experienced voting delays in the Primary Election. Ex. 7 (Gronke Rpt.) at 24.

Given these problems, it is no surprise that the State of Wisconsin experienced spikes in infections following its primary election in April. Ex. 18 (Burke Rpt.) at 23 (citing Ex. 26 (Nicholas Reimann, *Coronavirus Infections Spiked in Wisconsin After In-Person Election, Study Says*, FORBES (May 19, 2020)). Social distancing measures, the distribution of masks and gloves, and deploying disinfectant proved to be ineffective in the transmission of COVID-19 at polling locations. Ex. 18 (Burke Rpt.) at 35.

In contrast, drop boxes are not associated with COVID-19 infections. This is because voter drop boxes allow an individual to return their mail ballot without interacting with any other people. Voters also do not wait in lines at drop boxes, do not interact with other voters waiting to vote, and therefore have a lower risk of COVID-19 transmission. Ex. 18 (Burke Rpt.) at 37; Ex. 5 (Stein Rpt.) at 10.

**E. There Is No Evidence of Widespread “Voter Fraud”**

There is little evidence of voter fraud in U.S. Elections. Ex. 27 (Report of Dr. Lorraine Minnite, dated September 30, 2020 (“Minnite Rpt.”)) at 10;<sup>18</sup> *see also* Ex. 5 (Stein Rpt.) at 14 (citing Ex. 28 (Levitt 2007), Ex. 29 (McDonald and Levitt 2008)). This is the overwhelming conclusion of academic studies and the federal government. In 2014, the Government Accountability Office investigated claims of “voter fraud,” focusing on five scientifically sound studies (out of a pool of over 300 studies). Ex. 27 (Minnite Rpt.) at 11 (citing Ex. 30 (U.S. Government Accountability Office, GAO-14-634, “Elections: Issues Related to State Voter Identification Laws,” (September 19, 2014; Released October 8, 2014; Reissued February 27,

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<sup>18</sup> Dr. Minnite is a political scientist and Associate Professor and Chair of the Department of Public Policy and Administration at Rutgers University-Camden. Dr. Minnite has studied voter fraud in U.S. elections for nearly twenty years, and is the author of *The Myth of Voter Fraud*, a full-length scholarly treatment of the subject and the politics surrounding the uses of voter fraud allegations to shape electoral policy.

2015))). The GAO identified “*almost no evidence of voter fraud in contemporary U.S. elections.*” Ex. 27 (Minnite Rpt.) at 12 (emphasis added). The scant examples of voter fraud are rare indeed and occur “at most” at a rate of one in 4,000 votes, or 0.025%; however, there was *strong* reason to believe that “measurement error in turnout records [could] possibly explain ... a significant portion, if not all, of this [error].” Ex. 27 (Minnite Rpt.) at 14; *see also* Ex. 5 (Stein Rpt.) at 17 (“[C]areful examination of claims of voter fraud unearths errors of administration that can and have been effectively detected and corrected through standard election procedures.”). The Director of the Federal Bureau of Investigation similarly concluded, in testimony before the United States Senate on September 24, 2020 (i.e., within the last two weeks), that the FBI “ha[s] not seen historically any kind of coordinated national voter fraud effort in a major election, whether it’s by mail or otherwise.” Ex. 27 (Minnite Rpt.) at 17.

Academic researchers have also investigated President Trump’s claims that massive voter fraud tainted his election in 2016. Their results were “inconsistent with fraud allegations made by Trump”; instead, they were “consistent with various state-level investigations conducted in the initial months of 2017, all of which *have failed to find any evidence of widespread voter fraud in the 2016 General Election.*” Ex. 27 (Minnite Rpt.) at 14 (emphasis added).

Plaintiffs’ suggestion that “voter fraud” is a frequent practice is unfounded. Ex. 27 (Minnite Rpt.) at 21. Plaintiffs rely on a database of instances of alleged “voter fraud” which “lumps relatively few instances of *voters* committing fraud with all other forms of election or public corruption and malfeasance, such as cases of ‘altering the vote count,’ ‘ballot petition fraud,’ and ‘buying votes,’ crimes that voters in their capacity as *voters* cannot commit.” Ex. 27 (Minnite Rpt.) at 21.<sup>19</sup> Their conflation results in an artificial inflation of alleged voter fraud. Ex.

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<sup>19</sup> All emphases added unless otherwise indicated.

27 (Minnite Rpt.) at 21. Even assuming each case in the database supported a conclusion that there were 10 fraudulently cast votes, the alleged fraud represented no more than 0.00012875% of over 1.6 billion total votes cast.<sup>20</sup>

#### **F. Drop Boxes Are Safe and Secure**

Drop boxes are secure and have not created opportunities for voter fraud. Ex. 6 (McReynolds Rpt.) at 16; *see also* Ex. 5 (Stein Rpt.) at 13. In fact, “[a] drop box provided by a county board of elections . . . has additional safeguards that are not available through a United States Postal Service mailbox.” Ex. 6 (McReynolds Rpt.) at 15. Drop boxes are designed “to reduce the number of ballots that can be inserted at once,” and “they are fire proof, and fluids cannot easily be dropped into the box.” Ex. 6 (McReynolds Rpt.) at 16.

In Pennsylvania, the Absentee and Mail-in Ballot Return Guidance issued on August 19, 2020 from Secretary of State Boockvar follows the best practices and advice that NVAHI—a leading nonprofit, nonpartisan organization that works with jurisdictions of all levels across the country to improve and safeguard elections via vote-by-mail—advocates. Ex. 6 (McReynolds Rpt) at 3, 14; *see also* Ex. 31 (August 19, 2020 Secretary’s Guidance). At the local level, counties such as Philadelphia County are undertaking robust measures for drop box security, including regarding the deployment of election officials to operate the drop box sites, ballot collection, and the use of secured collection bags. Ex. 6 (McReynolds Rpt.) at 9. These measures “are reasonably designed to provide voter access and ballot security.” Ex. 6 (McReynolds Rpt.) at 9.

Moreover, all vote by mail processes in Pennsylvania involve extensive protections to ensure the integrity of the process, including county election validation of the eligibility and

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<sup>20</sup> Hypothetical calculation based on information at Ex. 27 (Minnite Rpt.) at 23—i.e., 10 ballots each in 206 instances of allegedly improper absentee balloting is 2,060 ballots, which is 0.00012875% of 1.6 billion total votes.



identity of the voter upon receipt by the board of elections (Ex. 6 (McReynolds Rpt. at 17));<sup>21</sup> and rigorous procedures to prevent the casting of multiple ballots. Ex. 6 (McReynolds Rpt.) at 18; *see also* 25 P.S. § 3146.8(4). And to help ensure that double voting, a risk present to the same extent for all voting by mail and not specific to drop boxes, election workers at the polls receive rolls of voters who received a mail-in ballot. Voters who received mail-in ballots must vote with a provisional ballot upon arrival to a polling location (unless the voter turns in the mail-in ballot at the polling location). Ex. 6 (McReynolds Rpt.) at 18; *see also* 25 P.S. §§ 3146.6(b)(1)–(2), 3150.16(b)(1)–(2). Provisional ballots are not counted until *all* mail-in ballots are counted; election officials then cross-reference the mail-in ballots and provisional ballots to assure that no one votes twice (whether accidentally or purposefully). Ex. 6 (McReynolds Rpt.) at 18; *see also* 25 P.S. § 3050(a.4).

Indeed, “there is very little evidence of absentee ballot fraud in Pennsylvania over at least the past two decades.” Ex. 27 (Minnite Rpt.) at 29. Of course, there may also be a deterrent effect from the Pennsylvania Crimes Code, which includes provisions and penalties regarding election-related misconduct. Ex. 27 (Minnite Rpt.) at 27.

Plaintiffs’ moving papers present no compelling evidence of “voter fraud,” let alone undisputed facts establishing such improprieties. Plaintiffs’ Br. at 22. In lieu of statistical evidence of widespread voting fraud, or affidavits attesting to misconduct in ballot delivery, Plaintiffs offer unauthenticated photographs and still video images, from which they fabricate a fanciful tale of

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<sup>21</sup> Upon receipt of a mail-in vote by the county board of elections, “the eligibility and identity of the voter to cast a ballot is examined by an election judge who reviews and confirms all the personal identity information provided on the outside envelope. Once voter eligibility is confirmed, the ballot is extracted and separated from the outside envelope to ensure the ballot remains secret. During this step, election judges confirm that there is only one ballot in the envelope and checks for potential defects, such as tears in the ballot.” Ex. 6 (McReynolds Rpt.) at 17; *see also* 25 P.S. § 3146.8(4).

illegality. Plaintiffs' Br. at 23. Without evidence that the photographs document delivery of ballots that cannot be delivered on behalf of others (third-party delivery is permissible for disabled voters), or even the number of ballots they believe should be challenged, Plaintiffs leap to the unsupported conclusion that there was "ballot harvesting" in the June 2020 primary. Plaintiffs' Br. at 23.

Plaintiffs' rank speculation does not create a material issue of disputed fact of voter fraud. To the contrary, as Plaintiffs' Rule 30(b)(6) designee admitted, there is *no evidence* of "ballot harvesting" or any other impropriety. Plaintiffs have no factual information about the photographs on which they rely, and cannot foreclose whether any of those photographs documented the return of a ballot on behalf of a disabled voter or perhaps a spouse, standing immediately behind the person delivering the ballots. Ex. 32 (Deposition of James Fitzpatrick, dated August 20, 2020 ("Fitzpatrick Dep.)) at 146:6-149:18, 156:14-161:12, 163:19-165:12, 166:6-172:3, 182:17-185:1. Rather, Plaintiffs surmise that these photographs document the delivery of numerous ballots on behalf of voters who should have delivered the ballot on their own behalf. Ex. 32 (Fitzpatrick Dep.) at 133:2-8. There is simply no admissible evidence to support Plaintiffs' allegations of widespread improper "ballot harvesting."<sup>22</sup> And under oath, Plaintiffs could not identify a single case of illegal ballot delivery, tampering with drop boxes, destruction of drop boxes, double-voting, voting both by mail and in person, voting by impersonation, counterfeit ballots, payment for votes, pressure to vote, or anything else in their parade of hypotheticals. Ex. 32 (Fitzpatrick Dep.) at 124:8-21, 125:14-126:4, 193:4-196:11, 370:10-371:8, 374:9-375:15; 405:1-407:23; Ex.

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<sup>22</sup> Even if the evidence Plaintiffs produced showed illegal ballot *delivery*, that would not indicate that any "fraud" had occurred, because additional safeguard prevent invalid ballots from being counted and because an illegally *delivered* ballot may nevertheless reflect the intent of the voter. *See supra* § I.B.1.

33 (Deposition of Rep. Glenn Thompson, dated September 28, 2020 (“Thompson Dep.”)) at 23:17-25:25, 90:4-14; Ex. 34 (Deposition of Rep. John Joyce, dated September 28, 2020 (“Joyce Dep.”)) at 14:5-18:2, 43:23-47:21, 58:9-25; Ex. 35 (Deposition of Rep. Guy Reschenthaler, dated September 28, 2020 (“Reschenthaler Dep.”)) at 33:13-35:18, 40:8-12, 90:1-12; Ex. 36 (Deposition of Rep. Michael Kelly, dated September 28, 2020 (“Kelly Dep.”)) at 70:17-72:7.

None of the individual Plaintiffs confirmed the fanciful assertions of voter fraud that underlie Plaintiffs’ motion for summary judgment. Plaintiff Glenn Thompson testified that in 18 years of involvement in elections he had not encountered a single instance of “voter fraud” either in-person or involving a mail-in ballot. Ex. 33 (Thompson Dep.) at 33:8-20. To the contrary, “the safeguards built within the absentee ballot system”—which in terms of ballot return operates the same as the no-excuse system—are “very accountable.” Ex. 33 (Thompson Dep.) at 33:8-20. They also offered no support for Plaintiffs’ attacks on the use of drop boxes. Each acknowledged—as he must—that Pennsylvania law permits the return of ballots through the USPS. Ex. 34 (Joyce Dep.) at 51:10-13; Ex. 36 (Kelly Dep.) at 49:21-25; Ex. 35 (Reschenthaler Dep.) at 44:8-45:5; Ex. 33 (Thompson Dep.) at 86:12-15. Neither drop boxes nor USPS mailboxes are monitored by poll watchers or surveilled by video, and multiple ballots can be deposited in a USPS mailbox as easily as in a drop box. Ex. 32 (Fitzpatrick Dep.) at 102:1-102:6, 103:5-103:17, 131:18-132:6, 172:16-173:8; Ex. 35 (Reschenthaler Dep.) at 86:8-18. There is no meaningful evidence that USPS mailboxes are less susceptible to tampering than election drop boxes. Ex. 32 (Fitzpatrick Dep.) at 124:2-124:7, 125:14-125:18.

## ARGUMENT

### I. THE USE OF “UNMANNED” BALLOT DROP BOXES DOES NOT DILUTE VOTES OR VIOLATE EQUAL PROTECTION

Plaintiffs contend that the use of unmanned ballot drop boxes results in fraudulent ballots, and that even a hypothetical, non-specific potential for fraud results in a violation of equal protection and due process under the Pennsylvania and U.S. Constitutions. *See, e.g.*, Plaintiffs’ Br. at 53-57. Plaintiffs’ motion for summary judgment should be denied. *First*, the Pennsylvania Supreme Court has dispositively concluded that Pennsylvania law permits the use of drop boxes—without regard to whether they are manned or unmanned. *Second*, the record confirms that election drop boxes are secure and no more susceptible to fraud than ballot delivery through the USPS. *Third*, the careful tailoring of drop boxes based on county needs does not violate equal protection because there is no action by the state to favor one group over another.

#### A. The Pennsylvania Supreme Court Affirmed that Unmanned Drop Boxes Comport with the Pennsylvania Election Code and the Pennsylvania Constitution

The Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 2020 WL 5554644, at \*7–8 (Pa. Sept. 17, 2020), held that drop boxes are permissible under Pennsylvania law. In that decision, heard under the Court’s Extraordinary Jurisdiction, Republican Caucus members opposed any use of “unmanned drop boxes.” *Pa. Democratic Party*, 2020 WL 5554644, at \*7–8 (Pa. Sept. 17, 2020). The Pennsylvania Supreme Court rejected this argument, reasoning that the state Election Code and the free and fair election provisions of the Pennsylvania Constitution permit drop boxes because they favor the fundamental right of the electorate to vote:

With all of that said, we need not belabor our ultimate conclusion that the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop boxes. This conclusion is largely the result of the clear legislative intent

underlying Act 77, which animates much of this case, to provide electors with options to vote outside of traditional polling places. Section 3150.16(a) of the Election Code undeniably exemplifies this intent by granting the Pennsylvania electorate the right to vote by way of a mail-in ballot beyond the circumstances that ordinarily allow this alternative, such as voter absenteeism.

Accordingly, although both Respondent and the Caucus offer a reasonable interpretation of Section 3150.16(a) as it operates within the Election Code, their interpretation restricts voters' rights, as opposed to the reasonable interpretation tendered by Petitioner and the Secretary. The law, therefore, militates in favor of this Court construing the Election Code in a manner consistent with the view of Petitioner and the Secretary, as this construction of the Code favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.

*Id.* at \*9–10.

On this motion, Plaintiffs rehash the same, previously rejected argument that unmanned drop boxes are contrary to the Pennsylvania Election Code. Plaintiffs' Br. at 53-57. The Pennsylvania Supreme Court decision affirmatively resolved this question, and that decision is binding in this action. *Pa. Democratic Party*, 2020 WL 5554644, at \*7–10; *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 400 (3d Cir. 2004) (“District court rulings on Pennsylvania law are not authoritative and must yield to rulings of the state Supreme Court.”).

**B. There Is No Record of Fraud that Would Support a Finding of Voter Dilution**

Plaintiffs' motion is founded on mere speculation that unmanned drop boxes will lead to voter dilution. Plaintiffs present legally insufficient evidence to support this finding and ignore the inconvenient fact that USPS mailboxes—which they do not challenge—are also unmanned.

**1. Election Drop Boxes Are Secure and There Is Little Fraud Associated with Their Use**

The Pennsylvania Department of State (“DOS”) issued drop box security guidance.<sup>23</sup> The August 19, 2020 Guidance discusses considerations of where drop boxes should be located (*id.* §

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<sup>23</sup> Ex. 31 (*Pennsylvania Absentee and Mail-in Ballot Return Guidance*, PENN. DEP'T STATE (Aug. 19, 2020)),

1.2), design of drop boxes to ensure security and ease of use (*id.* §§ 2.2, 2.4, 2.5), drop box signage (*id.* § 2.3), and the collection and transport of ballots (*id.* §§ 3.1, 3.2). It requires counties to submit an election plan to DOS at least 45 days before the election. Counties must publish the plan 7-10 days after submission. *Id.* §§ 1.1, 1.3. For the General Election, there are at least 23 Pennsylvania counties using drop boxes. *See, e.g.*, Dkt. 504-1 (indicating 23 counties will use drop boxes in the General Election). Many of those counties will use more than one drop box location.

Contrary to Plaintiffs' assertion that the August Guidance "punts on the issue of ballot security," Plaintiffs' Br. at 24, there are numerous provisions directed to ballot security. The Guidance instructs that drop boxes should be: designed to prevent access by anyone other than authorized personnel; secured to prevent unauthorized removal, moving, or tampering; and, where feasible, monitored by video surveillance. Ex. 31 (August Guidance) at 5-6. "To ensure that only ballot material can be deposited and not be removed by anyone but designated county board of elections officials, the opening slot should be too small to allow tampering or removal of ballots" and "[t]he opening slot should also minimize the ability for liquid to be poured into the drop box or rainwater to seep in." *Id.* at 5; *see also id.* at 6.

These procedures follow best practices for drop box security. Ex. 6 (McReynolds Rpt.) ¶¶ 33, 35; Ex. 7 (Gronke Rpt.) ¶¶ 26-30. Moreover, there is little evidence of fraud in the use of mail-in procedures, such as those adopted in Pennsylvania. Ex. 27 (Minnite Rpt.) at 24-27; *see also id.* at 27-35. An exhaustive nationwide investigation by News21, a national investigative reporting project, found that *fewer than 0.00001%* of the billions of votes cast by mail between

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[https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_BallotReturn\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf) ("August Guidance").

2000 and 2012 were fraudulent.<sup>24</sup> Nationwide, there have been no significant incidents of tampering with drop boxes. Ex. 7 (Gronke Rpt.) ¶¶ 8, 37; Ex. 6 (McReynolds Rpt.) ¶ 45. As is the case nationwide, there is very little voter fraud in Pennsylvania, which has robust procedures for ensuring the voters eligibility and the validity of the ballot, Ex. 6 (McReynolds Rpt.) ¶ 46, and reasonable deterrence of fraud through criminal penalties. *See, e.g.*, 25 P.S. § 3535 (“repeat” voting punishable up to seven years and/or \$15,000); 52 U.S.C. §§ 10307, 20511.

The evidence propounded by Plaintiffs is not sufficient to support a finding that the use of unmanned drop boxes would lead to voter dilution. Mr. Riddlemoser’s report does not even discuss drop boxes. His analysis of inaccurate voter registration rolls, for example, concerns conduct that is not at issue in this action. *See* Ex. 37 (Riddlemoser Rpt.) at 4-5. Only a handful of examples in Mr. Riddlemoser’s report relate to mail-in voting, *id.* at 3, and none relate to election drop boxes. Indeed, his complaint that there is the potential for delivery of multiple ballots is no more than speculation. The delivery of more than one ballot is permissible in Pennsylvania where the absent voter is disabled—a fact that Mr. Riddlemoser cannot foreclose. *See id.* at 4. His speculative conclusions are not surprising—his election experience did not include the use of drop boxes. *See* Ex. 37 (Riddlemoser Rpt.), Ex. A (Mr. Riddlemoser served as an Elections Director in Virginia until 2019); Ex. 38 (Rebecca Tran, *Hundreds of Ballot Drop Boxes Are Coming to the*

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<sup>24</sup> Corbin Carson, *Election Fraud in America*, NEWS21 (Aug. 12. 2012), <https://votingrights.news21.com/interactive/election-fraud-database>.

The Heritage Foundation has created an online database called “A Sampling of Recent Election Fraud Cases from Across the United States.” There is no description of the methodology for inclusion of cases. The site claims to provide “proven instances of voter fraud,” but lumps relatively few instances of voters committing fraud with all other forms of election or public corruption and malfeasance, such as cases of “altering the vote count,” “ballot petition fraud,” and “buying votes,” crimes voters in their capacity as voters cannot commit. The database identifies just 206 cases (of 1.6 billion votes cast) of “Fraudulent Use of Absentee Ballot” since 1988. Absentee ballot fraud in the U.S. is exceedingly rare. *See* Ex. 27 (Minnite Rpt.) at 3.

*D.C. Region. Here's What to Expect*, WASH. POST (Sept. 11, 2020), [https://www.washingtonpost.com/local/md-politics/ballot-droboxes-maryland-dc-virginia/2020/09/10/4554087c-f1fe-11ea-b796-2dd09962649c\\_story.html](https://www.washingtonpost.com/local/md-politics/ballot-droboxes-maryland-dc-virginia/2020/09/10/4554087c-f1fe-11ea-b796-2dd09962649c_story.html)) (“Virginia’s General Assembly voted Aug. 28 [2020] to allow drop boxes.”).

## 2. The Pennsylvania Election Code Has Processes to Identify Fraudulent Votes

The Pennsylvania Election Code has adequate procedures to identify potential voter fraud. Ex. 6 (McReynolds Rpt.) ¶ 47; Ex. 27 (Minnite Rpt.) at 27-29. Pennsylvania’s fraud detection processes for mail-in ballots begin at the time a voter applies for a ballot. The Pennsylvania mail-in ballot application requires qualified electors to state their (1) date of birth; (2) length of residency in their voting district; (3) voting district, if known; (4) party choice for primaries; and (5) name. 25 P.S. §§ 3146.2(b.1), 3150.12(a). The applicant must also specify their address. *Id.* Unless unable to, the applicant must also sign the application. *Id.* §§ 3146.2(d), 3150.12(c)–(d). The county board of elections, once in receipt of an application, determines the qualifications of the applicant by verifying the proof of identification<sup>25</sup> of the applicant and “compar[es] the information provided on the application with the information contained on the applicant’s permanent registration card.” *Id.* §§ 3146.2b(c), 3150.12b(a). These procedures are in place to ensure that the voter applying for the mail-in ballot is who they say they are. Where the identification of the applicant cannot be ascertained based on the information provided in the

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<sup>25</sup> The Election Code defines “proof of identification” with respect to qualified mail-in and absentee voters as “(i) in the case of an elector who has been issued a current and valid driver’s license, the elector’s driver’s license number; (ii) in the case of an elector who has not been issued a current and valid driver’s license, the last four digits of the elector’s Social Security number; (iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or (iv) in the case of an elector who has not been issued a current and valid driver’s license or Social Security number, a copy of a document that satisfies paragraph (2).” 25 P.S. § 2602(z.5)(3).



application, the county board of elections must provide the applicant with notice and an opportunity to further prove their identity. *Id.* §§ 3146.2b(d), 3150.12b(c).

When preparing the ballots, the county board of elections place on the voter's record the "identification number of [the] specific ballot envelope into which the voter's ballot is inserted," which permits the county board to track which individuals are receiving mail-in ballots. *Id.* §§ 3146.3(a), 3150.13(a). This is another fraud deterrence measure, ensuring that electors vote only once.

Upon collection, the county board of elections canvasses the ballots. The Election Code allows poll watchers during the opening of mail-in ballots and during the pre-canvass. *Id.* § 3146.8(b), (g)(1.1). Then, the county board of elections discards any absentee or mail-in ballots for persons who died prior to opening of the poll, ensuring that malicious electors are not impersonating the deceased. *Id.* § 3146.8(d). The board also adopts additional review of mail-in ballots, including review of absentee voters' lists and lists of military veterans. *Id.* § 3146.8(g)(3). During this process, those present may challenge the qualifications of a voter to cast the mail-in ballot. *Id.* § 3146.8(g)(5). Ballots that are not challenged are counted. *Id.* § 3146.8(g)(4).

The Election Code requires that county elections officials follow reasonable processes to determine the identity and qualifications of voters. *See* 25 P.S. §§ 3146.2(b.1)–(d), 3150.12(a)–(d). The Legislature has determined that this process for verifying the identity and qualifications of mail-in voters is sufficient to secure the integrity of elections, including those conducted through the mail. *See also* Ex. 6 (McReynolds Rpt.) ¶¶ 46, 48, 57; Ex. 27 (Minnite Rpt.) at 27-29. This is

because “[s]afeguarding against fraud primarily occurs in the election office when the ballots are pre-canvassed and canvassed.” Ex. 6 (McReynolds Rpt.) ¶ 57.<sup>26</sup>

### 3. Plaintiffs’ Proposed Standard for Voter Fraud Is Contrary to Law

Plaintiffs define voter fraud as the “casting of ballots contrary to the Election Code’s mandates.” See Pls.’ Mot. for Leave to Reply, Dkt. 434 at 3; *see, e.g.*, Ex. 32 (Fitzpatrick Dep.) at 527:19-23; Ex. 37 (Riddlemoser Rpt.) at 2 (“When I use the term voter fraud, I mean the casting and/or counting of ballots in violation of a state’s election code.”).

This sweeping web of “fraud” encompasses conduct that no court has previously adopted. By its terms, it would treat as fraudulent the receipt of the following ballots:

- A ballot marked with red or green ink rather than “black lead pencil, indelible pencil or blue, black or blue-black ink.” 25 P.S. §§ 3146.6(a); 3150.16(a); *see also* Ex. 32 (Fitzpatrick Dep.) at 471:23-35, 472:1, 3-9.
- A ballot on behalf of a person with a disability who did not sign an agent designation form and had their ballot delivered by a third-party.<sup>27</sup>

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<sup>26</sup> While the Voter Intervenors are not addressing Plaintiffs challenge the Secretary’s September 11, 2020 Guidance as to the signature matching (Dkt. 505, at 15, 45-50), current policies for verifying identity of mail-in voters is sufficient without signature match. Other states follow similar validation process without signature match. Ex. 6 (McReynolds Rpt.) ¶ 64. The wisdom of this approach comports with common sense: signatures change over time, making them less reliable indicators of identity, and analyzing signatures is a subjective process which requires training to do properly. Ex. 6 (McReynolds Rpt.) ¶ 64. Moreover, no step in the process set forth in the Election Code requires signature matching, let alone the invalidation of a vote based on signature analysis alone.

<sup>27</sup> Ex. 40, *Guidance Concerning Civilian Absentee and Mail-in Ballots Procedures*, PA. DEP’T OF STATE § 4.1 (Sept. 28, 2020), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf>; *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004) (interpreting 25 P.S. § 3146.6).

Neither case involves a false representation, or deception. The absence of bad intent from Plaintiffs' proposed standard of fraud makes it an outlier in election law, where the traditional understanding of fraud is "the *intentional corruption* of the *voting process* by voters." Ex. 27 (Minnite Rpt.) at 8 (emphasis in original). The Election Code follows the traditional approach. *See, e.g.*, 25 P.S. § 3525 (Election officers may be guilty of "wilful [sic] fraud," such as by making "false entries in the district register."); 25 P.S. § 3533 (enacting a misdemeanor "to vote at any primary or election, *knowing* that he does not possess all of the qualifications of an elector."); 25 P.S. § 3527 (labeling as "Fraudulent voting" the *unqualified* voting by Soldiers using absentee ballots). In drafting these provisions, the Legislature did not "contemplate that every passive act or omission" be criminalized as voter fraud. *In re Laub*, 21 A.2d 575, 583 (Pa. Super. 1941) (interpreting other provisions of the Election Code).

The Supreme Court's rulings addressing voter fraud supports rejection of Plaintiffs' outlier definition of fraud. In *Crawford v. Marion County Election Board*, an Indiana voter ID law was enacted to prevent the impersonation of "persons who are either deceased or no longer live in Indiana," but still appeared on the voter rolls. 553 U.S. 181, at 191 (2008). The Indiana legislature also had concerns with absentee ballots; in particular, conduct by campaign staffers at poll locations to deceive voters who were "poor, infirm, or spoke little English" into requesting absentee ballots and then "assisting" those voter's in filling out the ballot, undermining the voter's intent. *Id.* at 195, n.13.

Other Supreme Court cases confirm that fraudulent ballots are those that misrepresent a voter's intent to cast a ballot for a particular candidate. The criminal conduct in *Anderson v. United States* was "a conspiracy to stuff the ballot box" by having "false votes cast." 417 U.S. 211, 226 (1974). Thirty-three years earlier, the Supreme Court used the same definition, recognizing it was

voter fraud to “willfully alter[.]” ballots. *United States v. Classic*, 313 U.S. 299, 307 (1941). Plaintiffs’ voter dilution theory requires accepting that qualified voters who make administrative errors in casting their ballots undermine the integrity of an election. Plaintiffs’ Br. at 53-57; Ex. 27 (Minnite Rpt.) at 8 (“Fraudulent registration and ballots are illegal; but not all invalid registration and ballots are fraudulent.”). This Court should reject Plaintiffs’ proposed theory of illegality.

As against any reasonable and recognized standard of fraud, Plaintiffs produced no competent evidence of widespread voter fraud executed through unmanned drop boxes or unmanned USPS boxes. Ex. 32 (Fitzpatrick Dep.) at 275:21-276:1 (“[W]e think poll watchers should be present at any place where ... mail-in ballots ... are being returned ... [but] not a mailbox.”).

Plaintiffs base their entire case on unauthenticated, foundationless pictures on social media and newspaper photos, with no testimonial evidence of wrongdoing. *See* Ex. 37 (Riddlemoser Rpt.), Ex. D. The unsworn photos provide insufficient evidence the person deposited more than one ballot, or that the person was not authorized to deliver ballots on behalf of another. *See* Ex. 32 (Fitzpatrick Dep.) at 360:23-361:5, 362:2-12, 363:22-364:4. Plaintiffs’ video evidence is similarly inconclusive. Ex. 41 (Frey Dep.) at 44:8-25, 46:4-47:4. Indeed, every Plaintiff testified that he had no more than hypothetical evidence of voter fraud. When asked whether he was aware of third parties manipulating or destroying ballots, Representative Reschenthaler testified: “Not in Pennsylvania,” and that his anecdote was “just a hypothetical.” Ex. 35 (Reschenthaler Dep.) at 42:10-24. When James Fitzpatrick was asked whether he was aware of any voters being pressured or paid to cast their ballots in certain ways, he responded that he did not “know anything about anyone paying anyone for a vote.” Ex. 32 (Fitzpatrick Dep.) at 374:9-15.

Plaintiffs' expert acknowledges that there is no evidence that election drop boxes are less secure than delivery through U.S. postal service boxes. Ex. 37 (Riddlemoser Rpt.) at 17. Without any factual basis, Mr. Riddlemoser speculates that fewer ballots could be destroyed in a USPS box than an election drop box. *Id.* Plaintiffs' expert provided no concrete evidence of voting improprieties associated with drop boxes, a voting receptacle with which he has little to no experience. In contrast, one of the nation's foremost experts regarding the use of drop boxes is "unaware of any incident of tampering with ballot boxes" and that "[d]rop-boxes do not create an increased opportunity for fraud." Ex. 6 (McReynolds Rpt.) ¶¶ 44, 45.

Thus, Plaintiffs' challenge to the constitutionality of the Pennsylvania Election Code rests not on actual evidence of fraud, but on the surmise that "there is a first time for everything." Plaintiffs' Br. at 25, n.9. Such speculation does not support a constitutional violation. *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 228 (3d Cir. 2009) ("Speculation and conjecture may not defeat a motion for summary judgment.").

In this context, Plaintiffs' complaint that the DOS does not require the staffing of ballot drop boxes is of no moment. Plaintiffs' Br. at 24. Pennsylvania has exacting standards for voter verification for absentee and mail-in ballots, and they apply with full force to ballots delivered through an unmanned drop box as they do to ballots delivered through the unmanned USPS postal box.

**C. Even If Plaintiffs Prove Voter Fraud Can Occur at Unmanned Drop Boxes, There Is No Violation of Equal Protection or Due Process**

There is no genuine issue of material fact regarding the security of election drop boxes. There similarly is no genuine issue of material fact regarding election fraud in Pennsylvania. It is rare. Plaintiffs cannot establish that those facts amount to a constitutional violation. Plaintiffs' argument fails for two reasons. *First*, the Secretary's Guidance allowing for drop boxes (either

unmanned or otherwise) does not create any burdens on voting rights and is in accord with a free and fair election. *Second*, Plaintiffs fail to identify a group whose voting power is diluted by supposed state discriminatory action.

**1. The Secretary's Guidance on Drop Boxes Does Not Burden Voting Rights**

Under the Supreme Court's *Anderson/Burdick* test, a court "evaluating a constitutional challenge to an election regulation weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Crawford v. Marion County Election Board*, 553 U.S. 181, 189 (2007) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

The essential flaw in Plaintiffs' claim is that it does not fit within the *Anderson/Burdick* framework because the addition of drop boxes *increases* access to the vote instead of burdening the right to vote. Moreover, the state has a strong justification in making voting more accessible to voters. In this election cycle alone, courts have rejected several *Anderson/Burdick* challenges to the use of mail-in ballots. *See e.g., Paher v. Cegavske*, 2020 WL 2089813 (D. Nev. Apr. 30, 2020) (rejecting *Anderson/Burdick* challenge to all mail balloting for Nevada primary). *Donald J. Trump for President, Inc. v. Bullock*, No. 20-cv-66 (D. Mont. Sept. 30, 2020) (rejecting right to vote challenge to the use of all mail ballots in Montana in November 2020 election); *Martel v. Condos*, No. 5:20-CV-131, 2020 WL 5755289, at \*1 (D. Vt. Sept. 16, 2020) (rejecting constitutional challenge based on alleged vote dilution/voter fraud to Vermont's use of all mail elections on grounds that the plaintiffs suffered no injury). This Court should reject Plaintiffs' *Anderson/Burdick* claim also.

No case, however, stands for the proposition that voting improprieties by individuals (who have evaded the states' antifraud provisions and in defiance of criminal penalties for the conduct)

burden a voters' right to vote. Such regrettable conduct does not act as a "limitation" on the ability of a person to have their vote cast. *Id.* at 191 (internal citation omitted).

To the extent that candidates, rogue voters, or elections officials illegally put their thumb on the scale by committing voting improprieties, the state has not imposed this burden on Plaintiffs. This important fact distinguishes the decisions on which Plaintiffs rely. Plaintiffs' Br. at 36–37 (first quoting *United States v. Classic*, 313 U.S. 299, 315 (1941); then quoting *Anderson v. United States*, 417 U.S. 211, 226–27 (1974)). *United States v. Classic* and *Anderson v. United States* are criminal cases charging individuals with election misconduct—not equal protection challenges against the state. Here, the Pennsylvania Legislature determined that the state's fraud detection processes were sufficient to ensure the integrity of the election and expanded mail-in voting, as discussed above. Pursuant to these procedures, fraud detection is identified at the county boards of election—not at the ballot drop-off receptacle. Ex. 6 (McReynolds Rpt.) ¶¶ 42, 46-48.

The absence of state action applies with full force to Plaintiffs' claims regarding potential third-party delivery of ballots where the voter is not disabled. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State."). Here, the Commonwealth prohibits third-party delivery of non-disabled voters' ballots. "There is no allegation that the Secretary or any other county plans to defy the Supreme Court now that it has conclusively interpreted Pennsylvania law." Dkt. 459 at 6; *see* Ex. 42 (Aug. 21, 2020 Deposition of Kathy Boockvar ("Boockvar Dep.)) at 88:20-89:15 (testifying that it "is long-time, well-established law in Pennsylvania" that "third party delivery is not permitted under Pennsylvania law except for with emergency absentee ballots, or when a voter specifically designates an agent, and the agent – the voter with disabilities – or disabilities designates an agent, and the agent accepts that appointment

by the voter”); *see also* Ex. 43 (Aug. 19, 2020 Deposition of Jonathan Marks (“Marks Dep.”)) at 62:10-24 (“[W]e told all counties that third party delivery of absentee and mail-in ballots for non-disabled voters is not authorized.”),<sup>28</sup> 269:23-270:7 (“I believe the case law is clear that third party delivery is only allowed under that very narrow circumstance with voters with disabilities. And we will be reminding counties that that is the requirement.”).

Plaintiffs’ hypothetical fraud, based upon third-party ballot collection and fraudulently cast ballots, does not establish an equal protection violation because there are no state actors promoting the challenged conduct. Instead, Plaintiffs believe that—in defiance of clearly established state law—*private actors* will commit “illegal third-party ballot harvesting” or engage in “theft, destruction, and manipulation” of ballots. Plaintiffs’ Br. at 55. But hypothetical illegal activity by private actors does not create an Equal Protection claim. *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 189 (3d Cir. 2000) (finding plaintiffs’ “allegations of state action are insufficient” to state an Equal Protection or Due Process violation because “[s]tate regulation ... of casino activities do not transform the casinos into state actors”). The Commonwealth and county boards of elections cannot be held liable under the Equal Protection clause for hypothetical conduct by private actors (Plaintiffs’ Br. at 24) any more than they could be liable for failing to prevent a vandalism or arson at a polling place or United States Postal Service mailbox, or any more than they could be liable for failing to prevent every theft, fraud, arson, vandalism, or other activity that is already prohibited and/or criminalized in the Commonwealth.

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<sup>28</sup> Plaintiffs’ citation to Mr. Riddlemoser’s report as authority for the proposition that “Secretary Boockvar and her experts know that unstaffed drop boxes leads to illegal third-party ballot harvesting,” does not create a genuine issue of material fact. *See* Plaintiffs’ Br. at 55-56. Mr. Riddlemoser has no competent information regarding Secretary Boockvar’s knowledge and he identifies no evidence that any Defendant conspired to encourage third-party delivery of non-disabled voters’ ballots to drop boxes.



## 2. There Is No Identifiable Group of Voters Burdened by Election Drop Boxes

Plaintiffs recognize that the use of election drop boxes has no adverse impact on any group of voters. They, therefore, resort to the untenable claim that drop boxes impact all Pennsylvania voters. *See, e.g.*, Plaintiffs’ Br. at 43, 55. How drop boxes “dilute[] the weight of *all* qualified Pennsylvanian electors,” *id.* at 55, is left to the imagination. Plaintiffs do not identify what group is given “greater voting strength than another” or specify how any group’s vote is diluted. *See Moore v. Ogilvie*, 394 U.S. 814, 819 (1969).

*Pierce v. Allegheny County Board of Elections* and *Bush v. Gore*, cited throughout Plaintiffs’ brief, identified actual groups of voters impaired by state action. In *Pierce*, voters in Allegheny County, where third-party ballot deliveries were accepted, were provided greater voter access than voters in Philadelphia County, where they were not. 324 F. Supp. 2d 684, 698 (W.D. Pa. 2003). And in *Bush v. Gore*, in which the Supreme Court took care to note that its “consideration [was] limited to the present circumstances,” counties in Florida applied disparate definitions for what constituted a legal vote. 531 U.S. 98, 106, 109 (2000). The Secretary’s Guidance on drop boxes does not violate these well understood principles. DOS guidance applies across all counties in Pennsylvania and is a “nondiscriminatory regulation of voting procedure” that does not single out any type of voter who can or cannot use a drop box, and does not change the standard by which a legal vote is defined. *Crawford*, 553 U.S. at 203; *Bush*, 531 U.S. at 106.

## II. THE ALLEGED “UNEVEN” USE OF BALLOT DROP BOXES DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS

Plaintiffs’ contention that equal protection and due process concerns mandate that all counties implement identical procedures and mechanisms for drop box voting lacks merit. *First*, Plaintiffs have no evidence that differences in drop box implementation substantively weight votes differently, or substantially burden the right to vote for any voter. As described above, Plaintiffs

have no evidence that differences in drop box implementation causes voter fraud, vote dilution, or any other cognizable harm—Plaintiffs only resort to speculation and supposition unsupported by the facts or the law. Plaintiffs’ “uneven” implementation of drop boxes claim thus fails to state a constitutional claim as a matter of law. *Second*, any differences in the implementation of drop boxes are justified under the U.S. Constitution, state law, and legitimate and compelling state interests in accounting for the geographic and demographic differences across counties. *Third*, even if Plaintiffs have sufficiently shown an equal protection violation, their remedy fails because it does not “level up” to remediate any allegedly unequal access to drop boxes. *Fourth*, Plaintiffs’ unpled and untimely due process claim is procedurally deficient, and substantively deficient because Plaintiffs have not shown that the election will be subject to pervasive error.

**A. Courts Have Consistently Rejected Equal Protection Claims Arising Out of Local Implementation of Election Procedures**

Pennsylvania’s county-by-county decision-making regarding whether and how to use drop boxes is a quintessential example of “local entities, in the exercise of their expertise, [] develop[ing] different systems for implementing elections,” which the Supreme Court specifically distinguished from the types of election problems that pose Equal Protection problems. *Bush v. Gore*, 531 U.S. 98, 109 (2000); *see also id.* at 134 (Souter, J. dissenting) (“It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness ...; local variety can be justified by concerns about cost, the potential value of innovation, and so on.”). Under a *Bush v. Gore* Equal Protection theory, Plaintiffs must demonstrate that Defendants have, by “arbitrary and disparate treatment, value[d] one person's vote over that of another.” 531 U.S. at 104-05. Plaintiffs have failed to show that how the decision to give discretion to counties to decide to what degree they will employ drop boxes is arbitrary, disparate, and values one vote over another.

Lower courts have also consistently refrained from second-guessing local election officials in how to administer elections when their choices do not implicate unequal weighting of votes or burdens on the right to vote. That is so even where a challenger raises the specter of potential voter fraud, because “[i]nserting the term ‘vote dilution’ in an election contest case is not a talisman.” *Curry v. Baker*, 802 F.2d 1302, 1312 n.6 (11th Cir. 1986). The Third Circuit stated that it would “hesitate to intervene” in a complaint alleging vote dilution based on “negligent[] maladminist[rati]on[] [of] the election by not properly enforcing the Pennsylvania [voting] requirements,” because “such disputes do not state a constitutional violation and therefore do not rise to the level appropriate to support federal court interference in a local election.” *Welker v. Clarke*, 239 F.3d 596, 597 & n.3 (3d Cir. 2001) (explaining the court only intervened based on the allegation that “election officials conspired ... to violate election laws [to] dilute the votes”).

Similarly, the Ninth Circuit has held that “[n]othing in the Constitution forbids th[e] choice” counties make between different systems of balloting, such as “[t]raditional paper ballots” or electronic “touch-screen systems,” despite allegations that certain systems of voting are more susceptible to “electoral fraud.” *Weber v. Shelley*, 347 F.3d 1101, 1106-1107 (9th Cir. 2003). Likewise, the Eighth Circuit rejected a voter dilution complaint based on “alleged irregularities in the transmission and handling of absentee voter ballots.” *Pettengill v. Putnam Cty. R–I Sch. Dist.*, 472 F.2d 121, 122 (8th Cir. 1973). The court of appeals explained: “[T]he appellants’ [vote dilution] complaint asks the federal court to oversee the administrative details of a local election. We find no constitutional basis for doing so[.]” *Id.*; see also *Curry*, 802 F.2d at 1314 (“Although

federal courts closely scrutinize state laws whose very design infringes on the rights of voters, federal courts will not intervene to ... supervise the administrative details of a local election”).<sup>29</sup>

Most recently, the U.S. District Court for the District of Montana rejected analogous challenges brought by some of the same plaintiffs here (*i.e.*, Donald J. Trump for President, Inc. and the Republican National Committee). The plaintiffs challenged a directive permitting the use of mail-in balloting by some counties as “facilitating fraud and other illegitimate voting practices,” and argued that the Fourteenth Amendment was violated because counties that used mail-in balloting would provide “greater voting power to [their voters] ... than voters in the 11 counties that do not.” *Donald J. Trump for President, Inc. v. Bullock*, No. 20-cv-66, slip op. at 6-7 (D. Mont. Sept. 30, 2020). The district court correctly rejected those challenges, reasoning “that few (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause.” *Id.* at 38.

For similar reasons, this Court should enter summary judgment that county boards of elections developing “different systems” for using drop boxes does not constitute an Equal Protection violation. There is simply no evidence in this case to reach a different conclusion.

Plaintiffs recite a laundry list of cases (Plaintiffs’ Br. at 40-43), without any context, and without explanation of how they apply to implementation differences in the use, placement, and

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<sup>29</sup> See also *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (explaining that “general administrative decisions” do not cause “constitutional concern,” but such concerns are implicated when local boards of elections “mak[e] specific determinations about whether particular individuals will be permitted to cast a ballot that counts.” (citation omitted)); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917-918 (9th Cir. 2003) (en banc) (affirming denial of a preliminary injunction based on allegation that the use of punch-card voting systems in some counties, but not others, violates Equal Protection); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) (“A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state.”); *N.Y. State Democratic Party v. Lomenzo*, 460 F.2d 250, 251 (2d Cir. 1972) (recognizing “the wide latitude which the state has in deciding the manner of conducting elections”).

design of drop boxes. Plaintiffs’ cases are inapposite because they involved state conduct that “classifie[d] voters in disparate ways,” which substantively elevated some voters over others. *Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (citing *Bush*, 531 U.S. at 104-105); see also *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (“[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’” (citation omitted)).<sup>30</sup> Even Plaintiffs’ cited cases expressly distinguished the actions of “local entities, in the exercise of their expertise, [to] develop different systems for implementing elections,” which do not present the same Equal Protection concerns. *Bush*, 531 U.S. at 109.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), for example, the Supreme Court held that the “malapportionment” of state legislative districts violates Equal Protection when the “weight [of a citizen’s vote] is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.” *Id.* at 556, 565. When the state favors one group over another, “the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” *Id.* at 568, 571. In *Gray v. Sanders*, 372 U.S. 368 (1963), the Court struck down a Georgia law that counted votes “which in end result *weights the rural vote more heavily* than the urban vote and weights some small rural counties heavier than other larger rural counties.” *Id.* at 379. In *Bush v. Gore*, the Supreme Court waded into a dispute over

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<sup>30</sup> A cognizable Equal Protection challenge may lie when a state “places restrictions on the right to vote” because a “voting system that burdens the exercise of the right to vote violates equal protection.” *Obama for Am.*, 697 F.3d at 428 (citation omitted). But Plaintiffs have not alleged—much less shown—that the differences in *administration* of drop boxes are arbitrary, have a disparate impact on voters, and value one person’s vote over another’s. To the extent Plaintiffs conclusorily allege a “severe burden” based on the use of “unstaffed” drop boxes (Plaintiffs’ Br. at 56), those claims depend on no more than speculation of hypothetical, “illegal third-party ballot harvesting.”

“different standards in *defining a legal vote*.” 531 U.S. at 106; *see also id.* at 107 (“each of the counties used varying standards to *determine what was a legal vote*.”); *id.* at 110 (“[E]qual protection and due process ... would require not only the adoption [] of adequate statewide standards for *determining what is a legal vote*, and practicable procedures to implement them....”).<sup>31</sup> Thus, in context, *Bush*’s discussion of “uniform treatment” was confined to seeking consistency in the manner of substantively counting votes by interpreting the “intent of the voter,” *id.* at 105-106, and expressly did not question “whether local entities, in the exercise of their expertise, may develop different systems for implementing elections,” *id.* at 109. *See also Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 696 (W.D. Pa. 2003) (describing need for “uniform statewide standards” in the context of *Bush v. Gore*’s “different standards to discern legal votes during manual recounts of votes”).

Here, even assuming the number, placement, and design of drop boxes differ across counties, there is no unequal manner in “discern[ing] legal votes” or the “weight[ing]” of a vote cast in a drop box.

#### **B. Plaintiffs’ Requested Relief Would Thrust The Court Into Election Administration**

Plaintiffs’ proposed injunction blithely suggests that drop boxes across counties be “staffed, secured, and employed consistently.” Plaintiffs’ Br. at 70; *see also* Dkt. 503-1 [Proposed

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<sup>31</sup> Plaintiffs’ other cases are even further afield. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) involved denial of the right to vote based on the lack of “wealth or affluence or payment of a fee.” *Id.* at 667. *Charfauros v. Board of Elections*, 249 F.3d 941 (9th Cir. 2001), involved a voter challenge procedure that determined whether or not votes were counted, and that treated Democratic Party challenges differently than Republican Party challenges. *Id.* at 952. *Dunn v. Blumstein*, 405 U.S. 330 (1972) involved “[d]urational residence requirements [that] completely bar from voting all residents not meeting the fixed durational standards” and thus “deprive them of ‘a fundamental political right[.]’” *Id.* at 336. *Anderson v. United States*, 417 U.S. 211 (1974), did not even involve a constitutional challenge to election procedures, but found that a conspiracy to forge ballots was a crime under 18 U.S.C. § 241.

Order] (requiring all “county boards of elections [to] agree upon ... consistent and specific site selection guidelines”). But while Plaintiffs make no attempt to account for the unique needs, characteristics, and resources of each of Pennsylvania’s 67 counties, this Court must take into account these factors. Yet how should the Court determine whether the number of drop boxes “employed” is “consistent,” for example, as between Philadelphia County and Sullivan County, when those counties have, *e.g.*: (1) different populations (1.5 million versus 6,000); (2) different land area (134 versus 450 square miles); (3) different population density (11,379 versus 14 persons per square mile); (4) a different-sized Black community that is disproportionately vulnerable to COVID-19 (42% versus 3.1%); (5) a different-sized older community that is disproportionately vulnerable to COVID-19 (13.2% versus 27% of people that are 65 years or older); and (6) different resources? See Ex. 13 [*Demographics – County Profiles*, CTR. FOR RURAL PA.]; Ex. 18 [Burke Rpt.] ¶¶ 38-39, 44-52. These complex policy decisions—like those surrounding the placement, security, and design of drop boxes—require local expertise, and are appropriately committed to the “representatives of the people to decide, after balancing the pros and cons of different systems against their expense,” and not to the federal courts. *Green Party of N.Y. v. Weiner*, 216 F. Supp. 2d 176, 190–91 (S.D.N.Y. 2002). The Court should not invade the Pennsylvania legislature’s prerogative in establishing a “county-based scheme to manage elections within the state.” *Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, at \*28 (Pa. Sept. 17, 2020).

Moreover, granting Plaintiffs’ injunction would open the floodgates to challenges to county-level election processes based on perceived Equal Protection violations. County boards of elections already use different types of sites as polling locations, different numbers of polling locations, different types of polling equipment, and poll workers for different roles. Moreover, mailboxes for returning absentee and mail-in ballots may be different in number, or placement,

across counties. Federal courts are no better positioned to referee “consistency” in drop boxes as they would be for consistency in polling locations, polling machines, and mailboxes. As the Second Circuit warned, “[w]ere we to embrace plaintiffs’ theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.” *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970).

**C. Variations in Local Election Procedures Are Permissible Under the U.S. Constitution and Pennsylvania Constitution**

Even if Plaintiffs’ “uneven” implementation of drop boxes claim were legally sufficient to make out a constitutional violation (and it is not), the variation in drop box implementation is justified by the Constitution, state law, and legitimate and compelling state interests.

Plaintiffs’ underlying premise that the implementation of election procedures must be entirely uniform from county to county has no basis in law or fact. Under the Constitution, states have “broad powers to determine the conditions under which the right of suffrage may be exercised.” *Shelby Cty. v. Holder*, 570 U.S. 529, 543 (2013). In Pennsylvania, “the General Assembly [has] enacted a county-based scheme to manage elections within the state, and consistent with that scheme the legislature endeavored to allow county election officials to oversee a manageable portion of the state in all aspects of the process.” *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 409 (E.D. Pa. 2016).<sup>32</sup> The Pennsylvania legislature’s delegation of authority to popularly elected county boards of elections includes granting “jurisdiction over the conduct of

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<sup>32</sup> *Bush v. Gore*, 531 U.S. 98 (2000) is not to the contrary. As the Supreme Court observed, “[t]he question before the Court is *not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” *Bush v. Gore*, 531 U.S. at 109 (emphasis added). That is, however, precisely the question presented here.



primaries and elections in such county, in accordance with the provisions of this act,”<sup>33</sup> including the manner of “select[ing] and equip[ping] . . . polling place[s].”<sup>34</sup>

As a result, there are myriad differences in election administration from county to county within the Commonwealth, and counties enjoy significant discretion in determining how best to conduct elections. For example, although the Commonwealth specifies guidelines for the number of voters per new precinct for the purpose of imposing a maximum number of voters per precinct,<sup>35</sup> the number of polling places differs from county to county. *See supra* pp. 8-9. Dr. Burke further observed that, although there are over 300,000 more registered voters in Allegheny County than there are in Montgomery County, Montgomery County has nearly three times as many polling places: one polling place for every 1,400 voters in the county, relative to one polling place for every 5,600 registered voters in Allegheny County. Ex. 18 [Burke Rpt.] ¶ 70 & n.40. That is born out of disparate geographic and demographic characteristics from county to county, *see* Ex. 18 [Burke Rpt.] ¶ 52 & n.21, which require different approaches to administration. Other county-by-county differences include the location of polling places<sup>36</sup> and the utilization of different voting systems. As of 2016, there were “ten different systems . . . in place across the Commonwealth.” *Cortés*, 218 F. Supp. 3d at 403.<sup>37</sup>

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<sup>33</sup> 25 P.S. § 2641.

<sup>34</sup> 25 P.S. § 2726.

<sup>35</sup> 25 P.S. § 2702.

<sup>36</sup> Ex. 18 [Burke Report] ¶ 74 n. 52; Ex. 24 [For Building Administrators and Proprietors: Use of Facilities as Polling Places During COVID-19, PA. DEPT. OF HEALTH]

<sup>37</sup> For example, all voters in Philadelphia County vote using the Verified Voter – Express Vote XL ES&S voting machine. *See Philadelphia County Voting System*, VotesPA.com, <https://www.votespa.com/readytovote/Pages/Philadelphia-County-Voting-System.aspx> (last accessed Sept. 29, 2020). Some voters in Alleghany County will use the ES&S ExpressVote 2.1 to mark their ballot, and others vote using a paper ballot. *See Alleghany County Voting System*, VotesPA.com, <https://www.votespa.com/readytovote/> (last accessed Sept. 29, 2020). *See* 25 P.S.

County-by-county variations in the implementation of drop box use, including location and design, are no different than the present variations in polling locations and voting systems—variations that Plaintiffs do not challenge here. The Commonwealth has established minimum standards for the establishment of drop boxes. Those standards are set forth in Secretary Boockvar’s August 19, 2020 Guidance, including recommendations about the location of ballot return sites (Section 1.2.1), types of ballot return sites (Section 2.1), secure receptacles (Section 2.2), signage (Section 2.3), and security (Section 2.5).<sup>38</sup> These are consistent with best practices, Ex. 6 [McReynolds Report] ¶¶ 27, 35, and ensure that drop boxes throughout the Commonwealth meet a minimum standard of security and accessibility. However, decisions about the specific implementation of drop boxes are properly left to each individual county. This is because, as with other aspects of election administration, various differences in the geographic and demographic makeup of each county, as well as the resources of different counties, require flexibility in the implementation of drop boxes from county to county. *See supra* p. 8-9.<sup>39</sup>

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§ 3031.4(a) (permitting voters in individual counties to elect to use electronic voting machines within that county by popular vote).

<sup>38</sup> *See Pennsylvania Absentee and Mail-in Ballot Return Guidance*, PA DEP’T STATE, (Aug. 19, 2020), [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_BallotReturn\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf) (Ex. 31); *see also Pennsylvania Applications and Balloting Guidance: Mail-in and Absentee Ballots and Voter Registration Changes*, PA DEP’T STATE at 4–5 (Jan. 10, 2020), [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_Act%2077\\_Absentee%20and%20Mail-in%20Guidance.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_Act%2077_Absentee%20and%20Mail-in%20Guidance.pdf) (providing additional guidance about, *inter alia*, selecting drop box locations) (Ex. 44).

<sup>39</sup> The ongoing COVID-19 pandemic underscores the advantages of Pennsylvania’s county-based approach. Risk levels vary from county to county based on population density, demographics, and other factors. For example, although all people are susceptible to COVID-19 infection, older people and those with underlying medical conditions—including roughly four million adults in Pennsylvania—are at increased risk of severe illness. Ex. 18 [Burke Rpt.] ¶¶ 33, 36-38. COVID-19 has also had a disproportionate effect on communities of color, both in terms of overall infection rates and in likelihood of severe illness or death. *Id.* ¶ 44. Accordingly, a county with a relatively large number of elderly voters, for example, may need to install a greater number of drop boxes to ensure that those voters are able to safely exercise their

Plaintiffs failed to identify even a single voter whose rights are burdened by the use of drop boxes. There is no admissible evidence that ballots submitted by drop boxes are treated more favorably than other ballots, and no evidence that differences in implementing drop boxes differ from countless other decisions counties must make for themselves during elections. Thus, even if the differences in drop boxes constituted a “slight” burden on voters, requiring the government’s interest to outweigh the challenger’s interest, *Burdick v. Takushi*, 504 U.S. 428, 439 (1992), the county boards of elections have ample justifications for garden-variety differences in their systems for administering elections.

**D. Even If The Alleged Injury Is Proven, Plaintiffs’ Proposed Remedy Fails To Redress It**

Even if Plaintiffs could prove they are entitled to a remedy for an Equal Protection violation based on “uneven” deployment of drop boxes (and they cannot), Plaintiffs’ sought-after relief is inadequate redress. Plaintiffs’ Proposed Order states: “Until the Defendant county boards of elections agree upon, or the General Assembly provides, consistent and specific site selection guidelines and all Defendant county boards of elections agree to use staffed and secured drop boxes in compliance with those guidelines, the use of drop boxes and/or mobile collection sites by the Defendant county boards of elections is hereby enjoined.” Dkt. 530-1 at 3. Given the difficulty of 67 county boards of elections, or the General Assembly, agreeing upon guidelines less than a month before the election, Plaintiffs’ proposal is a backdoor measure to prevent the use of any drop boxes, even though they are authorized by state law, even though ballots have *already* been returned via drop boxes in numerous Pennsylvania counties, and even though state and local

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right to vote. Ex. 18 [Burke Rpt.] ¶¶ 51-52. Such determinations are best left in the hands of local election officials, who have an understanding of the county’s demographics, history of COVID-19 infection, and constituents’ concerns about the safety of in-person voting.

governments and other organizations have spent extensive resources on public education regarding drop boxes. Moreover, Plaintiffs' Proposed Order does not address the alleged inequality in the number of drop boxes. *See* Plaintiffs' Br. at 27-29 ("Pennsylvania's counties have announced that they will have different numbers of drop boxes" with some counties planning to have no drop boxes, some counties planning to have only one drop box, and some counties to have as many as 50.).

Thus, for example, if Plaintiffs' theory is that some counties' voters are "burdened" because they have less access to drop boxes, the appropriate remedy is not to effectively enjoin drop boxes but to "level up" by increasing the access of voters in counties with few, or no drop boxes. In *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 225 (1964), Virginia had been required to end segregation in Prince Edward County schools. *Id.* at 222-223. In response, Prince Edward County simply closed its public schools for all children. *Id.* The Supreme Court held that eliminating a program to prevent including a discriminated-against group is just as discriminatory as excluding that group in the first place. *Id.* at 225; *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (invalidating the state's elimination of a scholarship program that had discriminated based on religion).

Under *Griffin*, eliminating or reducing access to drop boxes would not remedy the alleged unequal access to drop boxes Plaintiffs contend will be suffered by some counties' residents. Instead, if Plaintiffs are correct that the alleged variation in drop box usage constitutes an Equal Protection violation, then an appropriate injunction should *increase* access for the disadvantaged voters to make them whole. In other words, any injunction, if ordered, would have to require that all counties use similar drop boxes, and that the per capita access to drop boxes be equal in every county *and* match the lowest drop box-per-capita currently planned by any county.

**E. Plaintiffs' Unpled Due Process Claim Should Be Denied**

At the eleventh hour, after the completion of fact discovery, depositions and expert discovery, Plaintiffs argue for the first time that the election drop boxes are not uniformly adopted by counties, which “dilutes the votes and creates an unconstitutional burden on due process.” Plaintiffs’ Br. at 43-45, 57-58. That argument is procedurally and substantively defective.

Under Third Circuit law, the eleventh-hour assertion of a new claim in summary judgment papers—after the parties have completed written fact discovery, fact depositions, and expert discovery—is procedurally improper. *See Aldinger v. Spectrum Control, Inc.*, 207 F. App’x 177, 180 n. 1, 181 (3d Cir. 2006) (affirming the district court’s dismissal of a claim on the grounds that the party had not raised the issue in its pleadings, but instead first raised the issue during summary judgment); *E.E.O.C. v. Grane Healthcare Co.*, 2 F. Supp. 3d 667, 687 (W.D. Pa. 2014) (“A plaintiff cannot assert an unpled claim in a brief supporting or opposing a motion for summary judgment.”). Here, Plaintiffs had three opportunities to adequately plead their claims. Notwithstanding liberal forbearance by this Court, they contend for the first time at summary judgment that the use of drop boxes constitutes a due process violation. The term “due process” appears nowhere in Plaintiffs’ Second Amended Complaint. *See* Dkt. 461 [Second Amended Complaint]. Nor do Plaintiffs identify due process in their Notice of Remaining Claims. Dkt. 448 at 4 (describing, instead, “equal protection” claims). Plaintiffs’ motion for summary judgment based on due process should be denied for this basis alone.

Even if this Court were to entertain the due claims at this late date, they are substantively deficient as well. The weight of the evidence confirms that there is very little voter fraud—and none at all associated with the use of an election drop box as the vehicle of delivery of a ballot. *See supra* p. 13-14 [Minnitte]. At best, Plaintiffs have put forth a case of surmised, potential mistakes by voters using drop boxes—but no more than a garden-variety election irregularity.

Plaintiffs' Crediting Plaintiffs' unsubstantiated surmise would not, however, support a due process violation. Garden variety election irregularities "do not violate the Due Process Clause." *Id.* (quoting *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998)). This is true, even if the irregularity controls the outcome of an election. *Id.* There is a complete absence of evidence that would support a finding of a "pervasive error that undermines the integrity of the vote." *Bennett*, 140 F.3d at 1226.

### **III. PLAINTIFFS' STATE LAW CLAIMS SHOULD BE REJECTED**

Plaintiffs' claims should also be rejected to the extent they are based on Pennsylvania state law because the Court lacks jurisdiction over such claims. Federal courts lack jurisdiction to hear claims for declaratory or injunctive relief arising from allegations that "state officials violated state law in carrying out their official responsibilities." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 90, 121 (1984); *see also Balsam v. Sec'y of State of N.J.*, 607 F. App'x 177, 183-84 (3d Cir. 2015) (federal court lacks jurisdiction where "it is state law that provides the cause of action"). Indeed, the Court has recognized that where state law "affords Plaintiffs a total, unambiguous remedy (i.e., enforcement through state-court proceedings)," their claims must be dismissed. Dkt. 459 at 6. *See also Balsam*, 607 F. App'x at 183-84 (rejecting "attempt to tie [] state law claims into [] federal claims"). Accordingly, Plaintiffs' claims should be dismissed to the extent they assert violations of the Election Code or claims under the Pennsylvania constitution.

### **CONCLUSION**

For the reasons stated above, the Intervenors respectfully request that this Court enter an order granting the Intervenors' Motion for Summary Judgment on all counts of the Second Amended Complaint and denying Plaintiffs' Motion for Summary Judgment.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, the foregoing Memorandum of Law was filed electronically and served on all counsel of record via the ECF system of the U.S. District Court for the Western District of Pennsylvania.

Dated: October 3, 2020

/s/ Lori A. Martin

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