UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Pennsylvania State Democratic Party,

Plaintiff,

v.

Republican Party of Pennsylvania, Donald J. Trump for President, Inc., Roger J. Stone, Jr., and Stop the Steal, Inc.,

Defendants.

Case No. 16-5664

JOINT RESPONSE OF DEFENDANTS REPUBLICAN PARTY OF PENNSYLVANIA AND DONALD J. TRUMP FOR PRESIDENT, INC. TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

The Pennsylvania Democratic Party's suit is one of multiple cookie-cutter lawsuits filed across the country in a sneak attack against Donald J. Trump for President, Inc. (the "Campaign") on the basis of scattered and generalized remarks in political speeches. These lawsuits enlist some of the darkest periods in our nation's history and some of our most important civil rights laws in service of a political stunt that is transparently designed to enflame the public against Plaintiff's political opponents, while distracting those opponents from the important work of spreading their political messages to the voting public by instead burying them in time-consuming litigation. The fact that Plaintiff's suit is entirely about scoring political points rather than preventing actual misconduct is confirmed by simply reviewing their filings—which cobble together a collection of miscellaneous public statements, vague innuendo, rank speculation, and over-the-top rhetoric into an extended press release masquerading as a lawsuit. The federal courts are not political soapboxes and the civil rights statutes should not be debased into cheap political placards. This Court should deny Plaintiff's Motion for A Temporary Restraining Order and Preliminary Injunction—a request that is as misguided as it is sweeping.

Plaintiff's request is misguided because it seeks an injunction requiring Defendants to follow Pennsylvania and federal election rules on Election Day—

this despite the fact that federal courts will not typically issue "obey-the-law" injunctions absent compelling evidence that the law will not otherwise be followed. *See Belitskus v. Pizzingrilli*, 343 F.3d 632, 650 (3d Cir. 2003). And it is sweeping because any order adopting the motion's numerous requests for relief threatens to dissuade Pennsylvanians from exercising their bedrock rights to political speech and political organizing.

As a legal matter, the Complaint fails even the most basic requirements for seeking emergency injunctive relief. *First*, the Complaint cites no actual acts of "voter intimidation" attributable to the Republican Party of Pennsylvania ("RPP") or Donald J. Trump for President, Inc. (the "Campaign"). The Complaint does try to amp up two, decade-old rumors as examples of "voter intimidation." Complt. ¶¶ 44-45. But those examples fall far short. Plaintiff's first example is a news report from 2003, which predicted some "Republican volunteers 'are going to try to block some people who show up at the polls from casting votes.'" *Id.* at ¶ 44. A decade-old prediction by a newspaper of what *might* happen, is not an allegation that it *did* happen. But more importantly, "Republican volunteers" in 2003 could not possibly have been associated with the Campaign—it did not exist—and there is no allegation these supposed "volunteers" were controlled by the RPP, or that the RPP even knew about them.

The Complaint's only other "example" of "voter intimidation" comes from

2004, when according to the Complaint "attorneys for the Republican Party" were "acting as poll watchers" and "challenging the credentials of pretty much every young voter who showed up." *Id.* ¶ 45. The Complaint goes on to say "a poll watcher for the Bush-Cheney campaign tried to stop [a] verification process." *Id.* Even if this claim were true—and even if it amounted to voter intimidation, which it does not—the Complaint does not allege any involvement by the Trump Campaign or the RPP. On that ground alone, the Complaint fails to demonstrate a high probability of actual or likely harm justifying injunctive relief.

Perhaps recognizing this deficiency, Plaintiff relies heavily on the supposed activities of another person and another entity—Roger Stone and his group "Stop the Steal." *See* Complt. ¶¶ 1, 9, 33-39, 42, 59, 62, 71. But Mr. Stone and his group are completely independent from the RPP and the Campaign and there is no basis in fact or law for ascribing or imputing their activities to the RPP or the Campaign. Mr. Stone and his organization are not employed by or affiliated with the RPP or the Campaign in any way. The RPP and the Campaign have no knowledge of Mr. Stone and Stop the Steal's activities. Nor did they direct, control, or authorize any of the statements or actions Mr. Stone and Stop the Steal are alleged to have undertaken. Plaintiff conclusorily calls Mr. Stone a "longtime associate of Trump's," Complt. ¶ 9, but that vague allegation—even if true—is plainly not enough to establish the sort of nefarious conspiracy Plaintiff imagines.

Coming up short on actual facts to substantiate its offensive and inflammatory claims, Plaintiff swings for the fences in a desperate attempt to tar the Campaign and the RPP—outrageously and irresponsibly claiming they have set up shop with the literal KKK. Plaintiff asserts that Mr. Trump has "energized" "white nationalist[s]." Mot. 11. It then quotes at length a news story that reports a "neo-nazi leader" is planning "to muster thousands of poll-watchers across all 50 states." This attack is unfair, inappropriate, and out of line. There is absolutely no connection—nor is any even *alleged*—between the Campaign or the RPP and white supremacists. One need look no further than Eric Trump's statement yesterday that David Duke, the KKK grand wizard, "deserves a bullet," C. Lima, *Eric Trump says David Duke 'Deserves a Bullet*,' Politico (Nov. 3, 2016), *available at* https://goo.gl/B1Af2D, to understand as much. Plaintiff's nominee for President recently said she is "sick and tired of . . . negative, dark, divisive, dangerous vision and behavior." A. Sakuma, *Hillary Clinton Slams Trump's 'Dark, Divisive, Dangerous Vision,'* NBC News (Nov. 2, 2016), *available at* https://goo.gl/JMO5R7. Evidently, the Pennsylvania State Democratic Party and its counsel missed the memo.

Second, Plaintiff's proposed remedy threatens to undermine the political and speech rights afforded Defendants, and all Pennsylvanians, by Pennsylvania law and the United States Constitution. Pennsylvanians enjoy the right to political

speech, as well as the right to volunteer for their preferred political party, among other election-related rights. Yet Plaintiff would have the Court issue a broad, vaguely-worded order that threatens to restrain this protected political engagement. Given the lack of actual evidence of actual illegal conduct in the Complaint, it is impossible to know how broadly Plaintiff's requested relief would extend, and thus what protected political conduct would be swept up under the order it seeks—in disregard of both state law and the First Amendment.

For these and other reasons explained below, Plaintiff cannot satisfy its burden to prove a right to extraordinary emergency relief. Accordingly, the motion should be denied.

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 217 (3d Cir. 2014) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 210 (quoting *Winter,* 555 U.S. at 20).

While this test is always difficult to satisfy, it is even more difficult to do so

where, as here, the requested injunction would interfere with the electoral process on the eve of an election. That is because, in addition to the factors set forth above, courts must also weigh "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). These include the fact that "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls"—which is a risk that only increases "[a]s an election draws closer." *Id.* In this case, Plaintiff's motion fails at every step.

I. Plaintiff Cannot Show That Anyone Will Be Irreparably Harmed by the Court's Refusal to Award a Temporary Restraining Order.

This analysis begins with the second part of this four-factor test, because the relevant facts illustrate just how frivolous this case is. There is no evidence—none—that Plaintiff's imagined harms will come to pass in Pennsylvania.

Plaintiff's request for emergency relief rests upon an alleged conspiracy among the RPP, the Campaign, and others to "threaten, intimidate, and thereby prevent" voters from voting in the 2016 election. Complt. ¶ 1. Given the serious nature of these allegations—that one of our State's two venerable political parties is actively seeking to deny Pennsylvanians their fundamental right to vote—one would expect firm evidence supporting such allegations. But that evidence is nowhere to be found in 25 pages of briefing.

First, the principal source of Plaintiff's "evidence" is a handful of stray comments cherry picked out of media reports covering hundreds of hours of

campaign speeches by the Republican Presidential and Vice-Presidential candidates. Setting aside the obvious evidentiary issues with such an offer of proof, nothing in those speeches can justify an extraordinary judicial order restricting quintessential political conduct. The speech at issue includes general references to campaign volunteers "watching" polling places, *id.* ¶¶21–23, 25, encouragement to supporters to "be involved" in the campaign, *id.* ¶29, invitations to supporters to participate in the election to ensure it is not "stolen," *id.* ¶28, and questions regarding the possibility of election fraud, *id.*, a notion that enters the political vernacular (and process on occasion) *every* election season. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J.) (explaining that states have a valid interest "in deterring and detecting voter fraud"). On its face, none of this amounts to express direction that Pennsylvanians engage in forms of "voter suppression," or "vigilantism," Complt. ¶¶ 42–43, 59—an unfortunate, inflammatory characterization that serves only to invoke angry and heated reactions by those on all sides of the political arena.

Second, Plaintiff's other "evidence" is even more specious. Plaintiff relies on an anonymous hearsay quote from an "unnamed official" regarding alleged voter suppression. Complt. ¶ 1. It cites statements urging supporters to serve as "poll watchers," *id*. ¶ 31, also known as poll observers, a long-standing practice used by both parties and sanctioned by Pennsylvania law. *See* 25 Pa. Stat. §

2687(a) ("Each candidate for nomination or election at any election shall be entitled to appoint two watchers for each election district in which such candidate is voted for. Each political party and each political body which has nominated candidates in accordance with the provisions of this act, shall be entitled to appoint three watchers at any general, municipal or special election for each election district in which the candidates of such party or political body are to be voted for."). Plaintiff suggests a nefarious motive in the RPP and Campaign seeking volunteers in urban areas like Philadelphia, *see* Complt. ¶¶ 27, 28, 48, yet fails to acknowledge the obvious—that these are the largest cities with the largest concentration of voters in states critical to the outcome of the Presidential election. And Plaintiff strains to impute nebulous unlawful connotations to the prospect that many voters and observers may wear red-colored clothing to the polling place. *Id.* ¶ 35. (Plaintiff conveniently omits the fact that supporters of its nominee for President are likewise planning to wear particular clothing on election day, *see, e.g.*, Natalie Andrews, *Hillary Clinton Supporters Plan to Sport Pantsuits at the Polls*, The Wall Street Journal (Nov. 3, 2016)—garb as unlikely to "intimidate" voters as red Phillies jerseys.)

Third, perhaps best illustrating the weakness in Plaintiff's case is its reliance on stray remarks from Twitter and other places. *See* Complt. ¶¶ 57, 61. This patchwork of comments came from non-parties who are not controlled by, and

have no discernible connection to, the RPP or the Campaign. Needless to say, they have no relevance to the question whether *these defendants* will irreparably harm anyone. (Nor is there precedent for Plaintiff's requested remedy in this context. After all, if every social-media comment could serve as the basis for injunctive relief against affiliates of the speaker, our courts would be drowning in cases.)

Compare this thin record to that assembled in *Daschle v. Thune*, the lone case Plaintiff cites to justify granting a TRO. *See* Mot. 15-17 (citing Temporary Restraining Order, *Daschle v. Thune*, No. 04-cv-4177, Dkt. No. 6 (D.S.D. Nov 2. 2004)). There, the TRO was issued only after the plaintiff presented express evidence—including "[o]ral testimony" and "photographs," *id.* at 1—revealing that individuals were "follow[ing] Native Americans from the polling places," "copy[ing] [their] license plates," and recording "the license plates of Native Americans driving away for the polling places." *Id.* at 2. Nothing similar—or even in the same ballpark—has been shown here.

In sum, Plaintiff's claims rest on rhetoric, not evidence. This deficiency is surprising given that Plaintiff filed its motion knowing the burden it faces in this setting, as well as the extraordinary nature of the relief it seeks. On this record, there is no basis for awarding the extraordinary remedy Plaintiff seeks and injecting this Court into Pennsylvania's electoral process.[1]

[1] The Complaint also includes allegations against other defendants. Those parties are not associated

II. Entering a TRO Would Substantially Harm Third Parties, Thereby Undermining The Public Interest.

Plaintiff's request for emergency relief should also be denied because the issuance of a temporary restraining order would cause substantial harm to non-parties, and would be contrary to the public interest. *See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002).

A. The Motion Seeks Impermissible, Content-Based Restrictions on Political Speech.

Because democracy depends upon the free exchange of ideas, the First Amendment forbids laws "abridging the freedom of speech." U.S. Const., Am. 1. Political speech "is at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007). The Supreme Court has thus long interpreted that Amendment as "afford[ing] the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam)).

The Complaint relies on numerous statements that are unambiguously

(continued…)

with the RPP or Donald J. Trump for President, Inc. Nonetheless, Plaintiff's claims against those defendants fail for many of the reasons articulated here—including a lack of factual support.

protected political speech. *See, e.g.*, Complt. ¶ 22 ("The only way we can lose, in my opinion—and I really mean this, Pennsylvania—is if cheating goes on."); *id*. ¶ 23 ("You've got to get everybody to go out and watch, and go out and vote."). As Plaintiff is well aware, candidates are perfectly within their rights to encourage their supporters to serve as poll watchers. *See, e.g.*, Join Victory Counsel, HILLARY FOR AMERICA, *available at* https://perma.cc/MV9U-35QP ("Volunteer to protect the vote as a poll observer this election cycle."). And supporters of opposing candidates are perfectly within their rights to debate whether an election is at risk of being "rigged" because of voter fraud. However upsetting or deplorable the Plaintiff may find these views, it cannot restrict them. "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 461 (2011). It is hard to imagine a court order more inimical to the public interest than one aimed at chilling a candidate's or citizen's political speech.

Nonetheless, based on statements like those noted above, Plaintiff asks the Court to issue vague injunctions forbidding "harassment or intimidation of voters," defined to include, among other things, "suggestions of legal or criminal action" and "'citizen journalist' initiatives." Complt. Prayer for Relief (a), (b). The trouble with these proposed injunctions—apart from their dubious legal foundation—is their potential breadth. Intimidating voters is illegal, and neither the RPP nor the

Campaign remotely condones such conduct. But Plaintiff has tried to claim that all sorts of innocuous, entirely legal conduct constitutes "intimidation"—conduct such as protesting against a candidate on a sidewalk several hundred feet from a polling place; "suggest[ing]" those believed to be voting illegally may be subject to "legal or criminal action;" or even simply asking fellow citizens for whom they voted. Complt. Prayer for Relief (a).

Plaintiff's sweeping request for relief tramples the First Amendment. As an initial matter, the TRO that Plaintiff proposes is entirely lacking in specificity; it seeks, in essence, an order directing Defendants and others to "obey the law." But "[i]njunctions that broadly order the enjoined party simply to obey the law and not violate the statute," are disfavored. *N.L.R.B.*, 486 F.3d at 691; *see also Public Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 83 (3d Cir. 1990) ("Overbroad language in an injunction that essentially orders a party to obey the law in the future may be struck from the order"). That is so because such injunctions "often lack the specificity required by Rule 65(d)." *S.E.C. v. Goble*, 682 F.3d 934, 950 (11th Cir. 2012); *see* Fed. R. Civ. P. 65(d) (requiring that every temporary restraining order and injunction "state its terms specifically"). Rule 65 "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*,

414 U.S. 473, 476 (1974). Temporary restraining orders should thus "be phrased in terms of objective actions, not legal conclusions." *Goble*, 682 F.3d at 950 (internal quotation marks omitted).

This is particularly critical in the speech context. Injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994). Courts thus interpret the First Amendment to permit speech-restricting injunctive relief "only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law." *Id*. at 765 n.3. As explained above, the supposed legal violations are based on pure speculation. Further, even content-neutral injunctions must "burden no more speech than necessary to serve a significant government interest." *Id*. at 765. Yet Plaintiff has made no effort to show that the exceptionally broad relief it seeks "burdens no more speech than necessary" to serve a significant government interest. In addition, the proposed injunctions here *are* content-based, since Plaintiff is seeking to "dra[w] distinctions based on the message a speaker conveys," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); Plaintiff asks the Court to declare citizens free to speak "around polling places," but only if they do not convey certain messages. Because the injunction is content-based, it is subject to strict scrutiny—a standard Plaintiff plainly cannot satisfy given that it cannot even satisfy the lesser standard that

applies to content-neutral injunctions.

The "First Amendment embodies our choice as a Nation that, when it comes to [political] speech, the guiding principle is freedom—the unfettered interchange of ideas." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011) (internal quotation marks omitted). Despite this command, Plaintiff has regrettably made it necessary to say that which should go without saying: court orders that punish and restrict political speech are contrary to the public interest, impose substantial costs on the electorate, and are appropriate (if ever) only in the most dramatic circumstances.

Just a peek at some of the relief Plaintiff requests demonstrates just how offensive their preferred order would be. *First*, Plaintiff asks the Court for an injunction against Defendants "and those persons who are in active concert or participation with them" from "supporting" individuals "to be present at or around polling places or voter lines to challenge" any potential voters. Proposed Order 2. Such an order might be interpreted to include all those who support Donald Trump. Thus, those who support Donald Trump—but not those who support Hillary Clinton, Gary Johnson, or someone else—will violate the order if they "*support*" anyone asking anyone else outside the polling place who reasonably appears too young to vote whether he is in fact 18-years-old. So if a Donald Trump supporter attempting to encourage voter turnout on a sidewalk, hundreds of feet from the

polling place, asks those with whom he speaks whether they are eligible to vote—so as to not waste his time on non-voters—he will have violated the terms of the injunction. Unconstitutional. *See E. Connecticut Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1051 (2d Cir. 1983) ("The right to communicate freely with one's fellow citizens and with the government on issues of public importance is a cornerstone of our American polity.")

Second, Plaintiff requests that the Campaign and its supporters be barred from "distributing literature (and/or stating to) individuals that voter fraud is a crime." Proposed Order 2. A more obvious First Amendment violation is difficult to imagine. "[O]ne-on-one communication is the most effective, fundamental, and perhaps economical avenue of political discourse," and "handing out leaflets in the advocacy of a politically controversial viewpoint ... is the essence of First Amendment expression." *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014) (internal quotation marks omitted). Thus, citizens—whether working on a campaign or not—are free to speak with others and distribute literature. And they are free to express legal views in the course of these communications. *See Velo v. Martinez*, 820 F.3d 1113, 1118 (10th Cir. 2016) (affirming decision preliminarily enjoining enforcement state-court order that forbade leafleting near a courthouse, in a case involving plaintiffs who wished to distribute literature on jury nullification). To issue a content- and viewpoint-based injunction against one

political group, and to do so in vague terms is exactly what the First Amendment exists to prevent; "the First Amendment is plainly offended" when the government's "suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86, (1978).

Third, Plaintiff says the Defendants should be prohibited from "[f]ollowing, taking photos of, or otherwise recording voters or prospective voters, or their vehicles." Proposed Order at 3. The Campaign and RPP condemn "voter intimidation." But the terms of the proposed injunction are nonetheless troubling, because they are much too vague, and much too broad. For example, those terms would bar a voter who believes she is being harassed by precinct officials in a polling-place parking lot, from using her phone to record the misconduct. Unconstitutional. *See Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) ("[T]he Constitution protects the right of individuals to videotape police officers performing their duties in public.")

Even the phrase "voter intimidation" is too vague. Suppose the Campaign's supporters, hundreds of feet from the polling place, chant "make America great again!" in the presence of voters. Is that "intimidation"? Hard as it is to believe, some people think so. *See, e.g.*, Jim Galloway, *Chalk one up for Donald Trump at Emory University*, ATLANTA JOURNAL CONSTITUTION (Mar. 22, 2016),

https://perma.cc/6VQ5-NB59 (reporting that, after individuals wrote pro-Trump slogans such as "Trump 2016" in chalk on Emory University's campus, the President of Emory University circulated a letter explaining that some students believed "these messages were meant to intimidate."). Can Campaign employees or supporters engage in this obviously protected speech without having to fear a contempt hearing? It is unclear, because the terms of the proposed injunction are much too ambiguous. And that is a problem, because "[i]t is settled that" restraints on speech "so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face." *Winters v. N.Y.*, 333 U.S. 507, 509 (1948). First Amendment rights, therefore, cannot "be imperiled by threatening" punishment "for so vague an offense as follow[ing] and harass[ing]." *McCullen*, 134 S. Ct. at 2543 (Scalia, J., concurring in the judgment) (internal quotation marks omitted). Yet Plaintiff believes the government really should punish so vague an offense. Unconstitutional.

All this confirms there is no way to enter the proposed injunction without trammeling the rights of Pennsylvanians. And that tilts the balance of equities strongly in the Campaign and RPP's favor. That is particularly so here, where there is *no* evidence that the Campaign or the RPP has done or will do anything improper; Plaintiff is effectively asking this Court to limit the rights of many for

the purpose of solving a problem that does not exist.

Finally, it is worth noting that Plaintiff has left unclear what it is that gives this Court the authority to issue an injunction applicable to countless individuals—the Campaign's supporters, for example—who are not parties to this case. The general rule is that "an injunction cannot issue against an entity that is not a party to the suit." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). The Court cannot and should not do so here.

B. Polling Place Observation Is a Protected Right Under Pennsylvania Law.

The vague injunction Plaintiff seeks is also infirm because it is likely to dissuade citizens from exercising their rights, and threatens to interfere with the State's orderly management of the election.

To the extent Plaintiff's requested injunction extends beyond merely ordering Defendants to comply with Pennsylvania law, the injunction contemplates relief that would infringe rights the parties and indeed all Pennsylvanians enjoy. Voting procedures are highly regulated; Pennsylvania has codified an extensive framework of rules governing voting. Yet Plaintiff flaunts or ignores nearly all of them.

To start, many of Plaintiff's allegations focus on statements encouraging supporters to serve as "poll watchers." Complt. ¶ 23. But Pennsylvania law expressly permits "[e]ach candidate for nomination or election at any election . . .

to appoint two watchers for each election district in which such candidate is voted for." 25 Pa. Stat. § 2687. And "[e]ach political party and each political body which has nominated candidates . . . [is] entitled to appoint three watchers at any general . . . election for each election district." *Id.* Those official poll watchers who are inside the polling location must be a resident of the county, *id.*, but no provision of Pennsylvania law prevents out-of-county residents from observing outside of polling locations. In any event, there is simply nothing impermissible about the Campaign or the RPP encouraging or facilitating Pennsylvania supporters' service in statutorily permitted political activity.

Balancing the need for honest and open elections with the desire for a safe, orderly process, Pennsylvania's Election Code "contains numerous provisions designed to maintain and uphold the integrity of the vote." *Republican Party of Pennsylvania v. Cortes*, No. 16-05524, slip op. 3 (E.D.Pa. Nov. 3, 2016). For example, the State requires poll watchers to obtain a "certificate from the county board of elections, stating his name and the name of the candidate, party or political body he represents." 25 Pa. Stat. § 2687(b). Once certified, an observer is entitled to remain in the polling place for the duration of voting hours and may remain after voting has concluded to monitor compliance with procedures for closing the polls. *Id.* Recognizing the critical interest in keeping our political process fair and transparent, the statute requires all observers to "show their

certificates when requested to do so," and permits "only one watcher for each candidate at primaries, or for each party or political body at general, municipal or special elections, shall be present in the polling place at any one time." *Id.*

Measured against this statutory backdrop, Plaintiff's claim that Defendants have "directed [their] supporters to engage in activity forbidden by Pennsylvania state election law" by calling for supporters to serve as poll watchers (Complt. ¶ 64) is an invitation to punish lawful, political conduct. The State has enshrined poll observing as a means for ensuring trust in our election outcomes. *See Cortes*, No. 16-05524, slip op. 3. Plaintiff provides no evidence that Defendants have done anything more than seeking to exercise this statutory right (or engage in other protected activity outside polling places). *See id.* ¶ 50 (quoting Governor Pence as stating, "I would encourage everyone within the sound of my voice, get involved, participate, be a poll worker on election day . . . be a part of that process, and uphold the integrity of one person one vote in America.").

Equally troubling is Plaintiff's suggestion that Defendants seek to depress voter participation by invoking concerns about potential voter fraud. *See* Complt. ¶ 69. Plaintiff's claim that voter fraud is a "myth" is especially rich here given that Pennsylvania state police recently raided a Delaware County office of the organization of FieldWorks LLC, seeking evidence of possible voter-registration fraud. L. McCrystal, *State Raids Delco Offices, Seeking Evidence of Voter*

Registration Fraud, Philly.com (Nov. 1, 2016), *available at* https://goo.gl/qKMi5p. Other examples extend from 1993 to the present. [2]

But regardless of whether Plaintiff believes voter fraud is real or imaginary, Pennsylvania itself has enacted rules that voters must follow to ensure a fair election process. For example, before obtaining a ballot, a voter must sign a "Voter's Certificate" certifying that "I am qualified to vote at this election."§ 3043. In addition, all first-time voters in a district must show photo identification. *See* Pa. Dep't of State, "Voter Identification Requirements (May 2015), *available at* https://goo.gl/oAbrFb. Plaintiff repeatedly decries purported efforts to ensure that only citizens cast votes, *see* Complt. ¶¶ 31, 34, 54; but it is, of course, *illegal* for a non-citizen to vote. *See* 18 U.S.C. § 611. Recognizing as much, Pennsylvania law permits poll watchers inside polling places "from the time that the election officers meet prior to the opening of the polls . . . until the time that the counting of votes is complete and the district register and voting check list is locked and sealed." 25 Pa. Stat. § 2687(b). After voting is complete, poll watchers may remain in the polling place but outside the enclosed space where ballots are counted and voting

[2] For example, the Third Circuit held that a Democrat candidate for State Senate engaged in voter fraud: "In light of the massive scheme of Candidate Stinson and the Stinson Campaign, and in light of the failure of the Board to fairly conduct its duties, it would be grossly inequitable to allow Stinson to remain in office and for the Board to continue to conduct business as it did during the 1993 Election." *Marks v. Stinson*, 19 F.3d 873, 878 (3d Cir. 1994). And last year, the Philadelphia District Attorney issued arrest warrants for four election officials for committing election fraud during the 2014 election. *See* Press Release, Office of the District Attorney (May 18, 2015), *available at* https://phillyda.wordpress.com/2015/05/18/.

machines are canvassed. *Id.* As this Court explained yesterday, poll watchers "are permitted to participate in these activities partly in order to help 'guard the integrity of the vote.'" *Cortes*, No. 16-05524, slip op. 3.

Pennsylvania law also protects the right of any person to access and view a list of all registered voters in the precinct. 25 Pa. Stat. § 1404(a). The list must be provided "[u]pon request." *Id.* These lists are critical to political parties' and candidates' get-out-the-vote efforts. Yet the vague, far-reaching relief Plaintiff seeks threatens to infringe this right. *See* Complt. ¶ 80.

Finally, Plaintiff seeks to infringe on Pennsylvanians' First Amendment right to conduct exit polling. *See id.* Prayer for Relief (b) (requesting injunction prohibiting "collaborators from questioning . . . voters at Pennsylvania polling locations under the guise of purported 'exit polling' or 'citizen journalist' operations"). First and foremost, the Campaign and the RPP have no intention of conducting any exit polls—this issue is thus *irrelevant* as to them. But even if they did want to conduct exit polls, respectfully asking voters how they voted is a well-worn tradition in American politics that has become a staple of every election and that is, more importantly, protected by the First Amendment.

Hence, the Ninth Circuit invalidated on First Amendment grounds a statute that prohibited exit polling within 300 feet of a polling place as an impermissible content-based regulation of speech. *See Daily Herald Co. v. Munro*, 838 F.2d 380

(9th Cir. 1988). And a federal district court previously enjoined any effort to prohibit exit polling even within the 100 foot "buffer" zone at polling places. *See ABC v. Blackwell*, 479 F. Supp. 2d 719, 741, 744 (S.D. Ohio 2006). The court found that Ohio's loitering statutes "cannot be interpreted to prohibit exit polls within the 100 foot designated area around polling places without violating the First Amendment to the U.S. Constitution." *Id.* at 744. Exit polling "is a form of political speech," and "does not implicate the State's interests in preventing voter intimidation and fraud." *Id.* at 738. After all, "[b]y definition, exit polling affects only those who have already voted." *Id.*

Plaintiff cites no countervailing authority that would support a general ban on exit polling or other journalistic activities, particularly where such restrictions are placed on only one political party or campaign.

C. The Court Should Not Intervene in an Election Absent Specific Allegations of Concrete Misconduct.

One final reason why injunctive relief is contrary to the public interest bears mentioning—such action would undermine trust in the judiciary. This case is one of multiple coordinated attacks across the country that are clearly long-planned efforts to sow chaos in the Defendant's political efforts, while garnering maximum publicity for Plaintiff's unsubstantiated, extraordinarily inflammatory claims on the eve of the Presidential Election. The Court should not permit Plaintiff to enlist it in that political crusade where, as here, Plaintiff has offered no allegations and

presented no evidence of any actual misconduct by the Campaign or the RPP.

That is particularly true where, as here, Plaintiff is asking the Court to take sides on a hotly debated policy issue. Specifically, the Complaint is critical of those concerned with voter fraud and those who believe our political system is "rigged" to favor certain interests over others. In one form or another, these policy debates are long-running and legitimate ones. Defendants respectfully submit that whether expressing those policy views is a good idea or a bad idea is not for the judiciary to decide. Indeed, a pervasive element of this lawsuit is the Plaintiff's attempt to use this Court as a forum for contesting the merits of public policy views relating to voter fraud and irregularities, and to wield an injunction against these Defendants as a means of advancing their political position. Courts should be highly reluctant to silence the debate without concrete and compelling evidence that doing so is necessary.

Moreover, as the Eastern District of Pennsylvania just said yesterday, "[t]here is good reason to avoid last-minute intervention in a state's election process." *Cortes*, slip op. 6. "Any intervention at this point risks practical concerns including disruption, confusion or unforeseen deleterious effects." *Id.* It would be highly disruptive and unfair for a federal court to issue an injunction at this late hour based on the gossamer Plaintiff has alleged. On Plaintiff's own theory, the supposed conspiracy in this case has been underway (and quite public)

since August. But it waited to file until days before the election, seemingly for no other reason than to waste the opposition's time and resources, maximize the newsworthiness of the filing, and sow chaos among the Campaign's core supporters in the final pitch of political battle.

"When an election is 'imminen[t]' and when there is 'inadequate time to resolve [ ] factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures." *Crookston v. Johnson*, — F.3d —, No. 16-2490, 2016 WL 6311623, at *2 (6th Cir. Oct. 28, 2016) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam)). So too should they decline to grant an injunction that creates confusion regarding whether and to what degree one campaign may comply with those "established election procedures." *Id*. After all, "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 4–5, and that is true whether the party seeking relief is challenging an election law, or challenging someone's adherence to that law.

The presumption against last-minute orders of the sort proposed is especially strong "when a plaintiff has unreasonably delayed bringing his claim, as [Plaintiff] most assuredly has." *Id*. One of equity's foundational maxims is: "Equity aids the vigilant, not those who slumber on their rights." Pomeroy, 1 A TREATISE ON EQUITY JURISPRUDENCE § 418, at 572 (2d ed. 1892). Plaintiff could have

brought its fact- and evidence-free claims long ago. That it slept on those rights is yet another reason to deny relief.

III. Plaintiff Has Not Demonstrated a Strong Likelihood of Success.

Plaintiff similarly has not shown that it has any chance to prevail on the merits, much less a "strong" chance.

A. The Activities of Roger Stone and Stop the Steal, Inc. Cannot Be Imputed to the Pennsylvania Republican Party or the Campaign.

As an initial matter and as noted above, Plaintiff relies heavily on alleged actions and statements by a certain Roger Stone and Stop the Steal, Inc. *See* Complt. ¶¶ 1, 9, 33-38, 40, 59, 62, 71. There simply is no basis, however, for ascribing or imputing Mr. Stone or Stop the Steal's activities to the RPP or the Campaign. Mr. Stone and his organization are not employed by or affiliated with the other Defendants in any way. The RPP and the Campaign have no knowledge of Mr. Stone and Stop the Steal's activities, and did not direct, control, or authorize any of the statements or actions Mr. Stone and Stop the Steal are alleged to have undertaken.

Indeed, Plaintiff has provided no evidence whatsoever that Mr. Stone or Stop the Steal are agents of the RPP or the Campaign. The Complaint vaguely identifies Mr. Stone as a "political operative" and a "longtime associate" of Donald Trump, *id.* ¶ 9, but never adduces any factual basis for concluding that Mr. Stone

and Stop the Steal's alleged conduct was carried out at the direction or behest—or even with the passive knowledge of—the RPP or the Campaign. Plaintiff cannot invoke the alleged actions and statements of unrelated third parties as a basis for abrogating the rights or the RPP or the Campaign.

B. There Is No Evidence that the Campaign or Pennsylvania Republican Party Participated in a Conspiracy to Intimidate or Suppress Voters

While the Plaintiff spills much ink detailing alleged statements and conduct by third parties, there is no factual support for the notion that the RPP or the Campaign have forged an agreement to intimidate or suppress Pennsylvania voters. "The gist or essence of [conspiracy] is a combination or mutual agreement by two or more persons to disobey, or disregard, the law." *United States v. Felder*, 572 F. Supp. 17, 21 (E.D. Pa.), *aff'd*, 722 F.2d 735 (3d Cir. 1983); *see also* 15 Am. Jur. 2d Civil Rights § 153 ("The pleadings must specifically present facts tending to show agreement and concerted action"). When, as here, a plaintiff merely delineates a constellation of independent acts by different persons acting at different times and in different places, courts will not infer the subjective unity of purpose necessary to a viable claim of civil conspiracy. *See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 256 (3d Cir. 2010) ("the Plaintiffs' allegations do not offer even a gossamer inference of any degree of coordination among the [Defendants]."). Rattling off a litany of alleged statements and actions by sundry

third parties at various times in different locales simply does not establish a conspiracy by the RPP or the Campaign to engage in voter suppression. *See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 219 (3d Cir. 2008) ("To show concerted action, a plaintiff must produce evidence that would allow a jury to infer that "the alleged conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds.").

C. Plaintiff Has Failed to State a Valid Claim Under the Voting Rights Act.

Plaintiff utterly fails to establish any likelihood of success on its claim under Section 11(b) of the Voting Rights Act. To prevail under this provision, a plaintiff must prove "(1) that there was an intimidation, threat or coercion, or an attempt to intimidate, threaten or coerce and (2) that the intimidation or attempt was for the purpose of interfering with the right to vote." *Am. Fed'n of State, Cty. & Mun. Employees, Council 25 v. Land*, 583 F. Supp. 2d 840, 846 (E.D. Mich. 2008); *see also Olagues v. Russoniello*, 770 F.2d 791, 804 (9th Cir. 1985); *Parson v. Alcorn*, 157 F. Supp. 3d 479, 498 (E.D. Va. 2016). Claims under this provision are exceedingly difficult to establish. As one court noted in 2009, research had turned up "no case in which plaintiffs have prevailed under this section." *United States v. Brown*, 494 F. Supp. 2d 440, 477 n.56 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009); *see also, e.g.*, *Parson v. Alcorn*, 157 F. Supp. 3d 479, 498–99 (E.D. Va. 2016) (finding no likelihood of success on the merits).

Unsurprisingly, Plaintiff failed to clear even the first hurdle. Its various allegations of "intimidation" are nothing more than legitimate exercises of free speech. Wearing shirts that happen to be red—a ubiquitous color carrying no particular political or other connotation—is no more the kind of activity that inspired the statute than wearing pant suits. Cmplt. ¶ 9. Moreover, Defendants have *no intention whatsoever of conducing exit polls*. And besides, exit polling, is a regular, harmless feature of the election-day process, and an entirely proper exercise of First Amendment rights. Further, poll watching is a legal, statutorily sanctioned activity in Pennsyivlania. 25 Pa. Stat. § 2687(a). These benign activities bear no resemblance to the conduct demonstrated in *Thune*—a case involving a concerted effort to follow a discrete class of voters (Native Americans) to record their license-plate numbers. *See Thune*, Dkt. No. 6.

Plaintiff's claim also fails because Plaintiff offers no evidence that any of the defendants "intend[ed] to intimidate" individuals from voting. *Olagues*, 770 F.2d at 804. All Plaintiff could point to were vague comments warning that the election could be "stolen" if supporters did not monitor for fraud. That expression of concern is plainly not enough.

D. Plaintiff Has Not Pled a Valid Claim Under 42 U.S.C. § 1985(3).

Plaintiff's second claim fares no better. To prevail on a claim under Section 1985(3), a plaintiff must prove that "two or more persons [have] conspir[ed] to

prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election." 42 U.S.C. § 1985(3). As with claims under Section 11(b), this claim is difficult to prove. Indeed, Plaintiff has not cited a *single case in which a party has prevailed under this provision even though it has been on the books for 145 years*—since 1871. Particularly given the flimsy record and the eleventh-hour nature of the filings, nothing warrants making this case the first.

This lawsuit encapsulates precisely the type of dispute federal courts have long eschewed as political warfare in the guise of legal litigation. Expressing skepticism of the notion that Section 1985(3) could encompass non-racial conspiracies, the Supreme Court cautioned that such a proposition "would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. If [this] submission were accepted, the proscription of § 1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings." *Scott*, 463 U.S. at 836. Mindful that "§ 1985(3) is not to be construed as a general federal tort law," *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992), courts have consistently cast a jaundiced eye on political disputes between private parties cloaked in the lexicon

of civil rights. *See Grimes*, 776 F.2d at 1366 (holding that alleged private conspiracy to mislead voters by running a "sham" candidate was not actionable under Section 1985(3), reasoning that "this case presents a far greater danger that, in the words of *Scott*, § 1985(3) would provide 'a remedy for every concerted effort by one political group to nullify the influence of or do injury to a competing group by use of otherwise unlawful means'").

CONCLUSION

As noted at the outset, it is regrettable that the Democratic Party has sought to entangle this Court in its political tactics. The Pennsylvania Democratic Party has made this proceeding a vehicle for tarring anyone who votes for Donald Trump a bigot (why else bring a frivolous claim under a statute Plaintiff gratuitously and repeatedly describes as the "Klan Act"?), a conspiracy theorist, and, indeed, an actual co-conspirator whom Plaintiff asks this Court to enjoin—an aspersion Plaintiff is casting on literally millions of honest, hard-working Americans who are simply concerned about their country and looking for political change.

It is a shame this case was ever filed. Not because it is frivolous (though it is), but be-cause it will no doubt signal to many that a prominent political party is willing to make any number of wild accusations if it helps to discredit and silence the opposition. This Court should deny the request for a temporary restraining order and injunctive relief.

Dated: November 4, 2016

Respectfully submitted,

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