

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

PENNSYLVANIA STATE CONFERENCE)	
OF THE NAACP, <i>et al.</i> ,)	
)	Civil Action No.: 1:22-cv-00339
Plaintiffs,)	
)	
v.)	Judge Susan P. Baxter
)	
AL SCHMIDT, <i>et al.</i> ,)	
)	
Defendants.)	

**INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF THEIR
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs' various attempts to save their back-up constitutional challenges to the General Assembly's date requirement all fail. The Court should grant summary judgment and end this case.

I. PLAINTIFFS LACK STANDING.

This Court has already held that the Secretary is the only remaining defendant for Plaintiffs' constitutional claims. *See* ECF No. 347 at 33-34. Plaintiffs thus lack standing, as no order against the Secretary can redress Plaintiffs' alleged injuries. ECF Nos. 398 at 2-5, 434 at 3-7. Tellingly, even the Secretary does not dispute this point. *See* ECF No. 440 (silent on issue).

Plaintiffs cannot distinguish *RNC v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. 2023) (ECF No. 434-1), which authoritatively held that the "Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon County Boards." ECF No. 434-1 at 20. Here, Plaintiffs have not pointed to any statutory authority the Secretary could use to bind the county boards as to the date requirement. They allege only that the Secretary has "instructed counties" to comply with the date requirement. ECF No. 444 at 7. But the Secretary has only restated the terms of the Pennsylvania Supreme Court's order, and *only* an order directed against the county boards can change their legal obligations. *See* Statement of Position Regarding Applications for Summary Relief at 6, *Black Pol. Empowerment Project v. Schmidt*, 283 MD 2024 (Pa. Commw. Ct. June 24, 2024) (Ex. A) (Philadelphia and Allegheny County admitting this).

Next, Plaintiffs cite *Ball v. Chapman*, *see* ECF No. 444 at 6 (citing 289 A.3d 1 (Pa. 2023)), but *Ball* belies Plaintiffs' argument. *First*, standing existed in *Ball* because the Secretary's guidance deepened a state-law dispute on whether the date requirement is mandatory, creating a "lack of clarity." *Ball*, 289 A.3d at 13, 19-20. Here, the Secretary's guidance merely restates well-settled state law, and Plaintiffs "facial[] challenge[] [to] an existing interpretation of settled law"

cannot establish standing to sue the Secretary. *Id.* at 19. *Second*, all 67 counties were parties in *Ball*, which enabled the court to order a uniform statewide remedy, *see id.* at 1, while any remedy here would bind only some counties and violate the Equal Protection Clause and the Pennsylvania Constitution, *see* ECF No. 439 at 4-5. *Third*, the remedy in *Ball* issued only against the county boards, not the Secretary. *See* 284 A.3d 1189, 1192 (2022). In all events, regardless of how Pennsylvania standing law works, federal courts cannot find standing against a defendant unless a remedy lies against that defendant. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). Because an order against the Secretary would provide no remedy to Plaintiffs, their claims against the Secretary are not redressable.

This is not the only standing defect in Plaintiffs' case. The organizational Plaintiffs also lack a cognizable injury because resource-diversion injuries do not suffice to confer standing. *See* ECF No. 439 at 5-8. Plaintiffs rely on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), *see* ECF No. 444 at 3-4, and thus ignore the Supreme Court's clarification that *Havens* turned not on any resource-diversion injury, but on "actions [that] directly affected and interfered with [the plaintiff's] core business activities." *All. for Hippocratic Med.*, 602 U.S. at 395.

Plaintiffs' attempt to show interference with their core business activities is irreconcilable with *Alliance for Hippocratic Medicine*. They point only to their voluntary decision to "combat[]" the date requirement in litigation. *See* ECF No. 444 at 5. But *the entire point of Alliance for Hippocratic Medicine* is that such voluntary advocacy against a rule Plaintiffs disfavor is insufficient to manufacture standing. *See* 602 U.S. at 394-95; *see also* ECF No. 439 at 5-8. Plaintiffs are as free to provide their "voter-engagement and voter-education services," ECF No. 444 at 5, as they would be in the absence of the date requirement. They therefore lack standing. *See* ECF No. 439 at 5-8.

II. PLAINTIFFS' EQUAL PROTECTION CLAIMS ARE MERITLESS.

Plaintiffs' Equal Protection claims remain meritless. ECF No. 398 at 6-17. Plaintiffs continue to insist that UMOVA's mistake provision overrides the date requirement, ECF No. 444 at 10-12, but that provision applies only to documents identified in chapter 35 of the Election Code, which says *nothing* about how ballots are to be filled out, *see* 25 Pa. C.S. §§ 3501-3519; ECF No. 439 at 8-9. Plaintiffs' various strained citations to chapter 35 do not prove otherwise: They cite provisions governing the deadline for overseas voters to return ballots, *see* 25 Pa. C.S. §§ 3509-12, and provisions governing the *form* of ballots to be approved by the Secretary, *see id.* § 3503(c); *see* ECF No. 444 at 11-12. Indeed, the directive obliging *the Secretary* to include "an indication of the date of execution" as "a prominent part of all balloting materials" provided to overseas voters, 25 Pa. C.S. § 3503(c)(4)(iii) (cited at ECF No. 444 at 12), does not change *voters'* obligations. If anything, that directive confirms that the date requirement extends to, rather than exempts, overseas voters. *See* ECF No. 398 at 9-11.

In any event, by its terms, UMOVA's mistake provision applies only to documents used in "determining whether a covered [UMOVA] voter is eligible to vote." 25 Pa. C.S. § 3515(a). As with the federal Materiality Provision, "it makes no sense to read [this provision] to prohibit enforcement of vote-casting rules that are divorced from the process of ascertaining whether an individual is qualified to vote." *Pa. State Conf. of NAACP v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 134 (3d Cir. 2024). And even if the issue were close, constitutional avoidance requires rejecting Plaintiffs' strained interpretation. *See* ECF No. 398 at 7.

Further, any differential treatment of UMOVA voters complies with the Equal Protection Clause because they are not similarly situated to domestic voters. ECF No. 398 at 11-13. Even the case Plaintiffs cite confirms that overseas and domestic voters are not similarly situated for

purposes of mail voting. *See Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (cited at ECF No. 444 at 14); ECF No. 439 at 10-11. And Plaintiffs’ various protestations merely rehash their policy objections to the date requirement, *see* ECF No. 444 at 14-15, and do not defeat the rational basis for the alleged differential application of that requirement, *see* ECF No. 398 at 13-17.

Finally, Plaintiffs recognize that, when remedying an Equal Protection violation, “a court may either level up . . . or level down,” and “legislative intent” is the dispositive factor in choosing between those options. ECF No. 444 at 17. Thus, as explained, any remedy here should extend the General Assembly’s date requirement to overseas and domestic voters alike. *See* ECF No. 398 at 17-18.

III. PLAINTIFFS’ RIGHT-TO-VOTE CLAIMS FAIL.

Plaintiffs’ arguments fail to correct the three fatal defects in their right-to-vote claims. *See* ECF No. 434 at 7-10. *First*, Plaintiffs cite a case *agreeing* that the right to vote does not encompass a right to vote by mail. *See Tully v. Okeson*, 977 F.3d 608, 615-16 (7th Cir. 2020) (“right to vote” is only “the right to cast a ballot in person.”)) (cited at ECF No. 444 at 20). Accordingly, as explained, rules that limit only *one* method of voting but not other available methods do not violate the right to vote. *See* ECF No. 434 at 7-10. Plaintiffs thus get the law exactly backwards: Just as in *Crawford* “elderly voters who might have had trouble obtaining a photo ID to vote [in person] at the polls could decide *ex ante* to vote absentee instead,” ECF No. 444 at 19, here *all* Pennsylvania voters who want to avoid the “trouble” of the date requirement can “decide *ex ante* to vote” in person. *See* ECF No. 434 at 7-10. Plaintiffs’ protest that voters who fail to comply with the date requirement may not receive *post hoc* notice and opportunity to cure misses the point: The absence of such procedures *is known ex ante* and, thus, informs rather than changes the *ex ante* options available to all Pennsylvania voters. *See id.*

Second, Plaintiffs *concede* that “minimal” burdens receive no judicial scrutiny. *See* ECF No. 444 at 18. That concession is dispositive: The Supreme Court has made clear that the “usual burden[s] of voting” and their equivalents are such non-cognizable “minimal” burdens, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.), and the Third Circuit’s “right to vote” holding in this case says likewise, 97 F.4th at 133-35; *see also* ECF No. 434 at 10-14.

Indeed, *none* of the cases Plaintiffs cite justifies subjecting to interest-balancing the broad swaths of state election codes that impose the usual burdens of voting. *Democracy North Carolina upheld* a witness requirement over objections that voters could not comply with it during the COVID-19 pandemic. *Democracy N.C. v. N.C. State Bd. of Elections.*, 476 F. Supp. 3d 158, 193-208 (M.D.N.C. 2020). *Mazo v. New Jersey Secretary of State* dealt with ballot-access rules, which are governed by distinct rules influenced by the First Amendment. 54 F.4th 124, 136-38 (3d Cir. 2022). *Arizona Democratic Party v. Hobbs* upheld a rule requiring mail voters to sign an affidavit because it imposed only a “minimal burden,” as in this case. 18 F.4th 1179, 1181 (9th Cir. 2021). *Short v. Brown* questioned whether “having to register to receive a mailed ballot could be viewed as a burden” *at all*, but found that it was “an extremely small one” and “certainly not one that demands serious constitutional scrutiny.” 893 F.3d 671, 677 (9th Cir. 2018). *Donald J. Trump for President v. Boockvar* addressed an Equal Protection challenge to divergent county practices, making it entirely irrelevant. 493 F. Supp. 3d 331, 385 (W.D. Pa. 2020). And *Northeast Ohio Coalition for the Homeless v. Husted* addressed an Equal Protection claim where no fraud-based rationale was presented at trial. 837 F.3d 612, 630-35 (6th Cir. 2016).

Third, Plaintiffs offer no persuasive argument that the date requirement fails rational-basis review, even if the *Anderson-Burdick* framework applies. *See* ECF No. 434 at 15-20. Plaintiffs

claim that the date requirement imposes a “substantial” burden because it results in ballots not being counted, ECF No. 444 at 23, but if that were the case, *all* mandatory voting rules would impose “substantial” burdens. Plaintiffs thus improperly conflate the *consequence* of a rule with its *burden*. *See* ECF No. 434 at 16-17; ECF No. 439 at 15-16. As for the date requirement’s actual burden, Plaintiffs cannot contest the ease of writing a date. The Secretary does not even attempt a burden argument, *see* ECF No. 440; nor could he, in light of his own July 1 Directive, *see* ECF No. 439 at 14-15.

As for state interests, Plaintiffs do not dispute that counties *could* fail to timestamp a ballot or that the SURE system could fail, ECF No. 444 at 24, so they do not undercut the date requirement’s backstop function. ECF No. 434 at 18-19. They do not contest that sign-and-date requirements are legion in Pennsylvania and promote solemnity. *Id.* at 19. And they do not dispute that, in *Mihaliak*, the handwritten date helped secure the fraudster’s conviction. *Id.* at 19-20.

CONCLUSION

The Court should grant Intervenor-Defendants’ motion for summary judgment.

Dated: July 25, 2024

Respectfully submitted,

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Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT
PROJECT, POWER INTERFAITH,
MAKE THE ROAD PENNSYLVANIA,
ONEPA ACTIVISTS UNITED, NEW
PA PROJECT EDUCATION FUND,
CASA SAN JOSÉ, PITTSBURGH
UNITED, LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA, AND
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as
secretary of the commonwealth,
PHILADELPHIA COUNTY BOARD OF
ELECTIONS, and ALLEGHENY
COUNTY BOARD OF ELECTIONS,

Respondents.

Civil Action No. 283 MD 2024
Original Jurisdiction

**RESPONDENTS ALLEGHENY AND PHILADELPHIA COUNTY BOARDS
OF ELECTIONS' STATEMENT OF POSITION REGARDING SUMMARY
RELIEF**

The right to vote is the cornerstone of our democracy, the right from which all other rights ultimately flow. The Allegheny and Philadelphia County Boards of Elections (“Responding Counties”) protect this fundamental right through the fair and orderly administration of elections in their respective counties. Responding Counties are committed to safeguarding the elective franchise by ensuring that all

qualified voters can cast their ballots and that all legitimate, timely cast ballots are counted.

Responding Counties take no position on the constitutional claims raised by Petitioners in this action, and they do not dispute Petitioners' factual allegations in the underlying Petition for Review. Nor do they seek summary relief. But Responding Counties respond here to highlight the lack of any meaningful purpose served by the dating requirement, the disparate impact enforcement of that requirement has had on elderly and disadvantaged voters, the administrative burdens associated with enforcing it, and their commitment to ensuring the integrity and fairness of elections in Allegheny County and Philadelphia County.

First, Responding Counties are currently required by law to enforce the pointless instruction in the Pennsylvania Election Code that voters handwrite a date on the outer return envelope of an absentee or mail-in ballot. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *see also* 25 P.S. §§ 3146.6(a), 3150.16(a). But this dating requirement serves no purpose in the administration of elections by Responding Counties. The handwritten date is not used to determine a voter's qualification or the timeliness of the ballot, nor is it relied upon to prevent or detect fraud. When Responding Counties receive an absentee or mail ballot, the ballot envelope is stamped with the date and time of receipt to confirm its timeliness. PFR ¶ 52. Only

ballots stamped before 8:00 p.m. on Election Day may be counted.¹ PFR ¶ 53. Therefore, if an absentee or mail ballot is timely received by a county board of elections, it could *only* have been marked and dated between the time it was sent to a qualified voter and 8:00 p.m. on Election Day.² PFR ¶ 53. In sum, Responding Counties do not use the handwritten date on a ballot's outer return envelope for any purpose when administering elections other than to reject the timely ballots of otherwise qualified voters. This requirement to handwrite a date is merely a paperwork-related technicality that imposes a burden on voters' fundamental right to vote without offering any benefit to Responding Counties in the administration of elections in Pennsylvania.

Second, Responding Counties' experience establishes that the dating requirement—which led to the rejection of more than 10,000 Pennsylvania ballots (PFR ¶ 59)—disproportionately affects elderly Pennsylvania voters. For example, when Philadelphia County analyzed its own data for the 2022 General Election, it found: (i) 60.9% of undated ballots and 64.1% of misdated ballots were submitted

¹ This does not include military overseas ballots, which may be counted as timely if submitted for delivery no later than 11:59 p.m. the day before the election and received by a County Board of Elections by 5:00 p.m. on the seventh day following an election. *See* 25 P.S. §§ 3509(2), 3511(a).

² Moreover, a voter's qualifications are determined at the application stage, not by reference to a handwritten date. *See* 25 P.S. §§ 3146.2, 3146.6(a), (c), 3146.8(g)(3)-(4), 3150.12, 3150.16(c).

by voters who were 60- years old or older, (ii) 37.5% of undated ballots and 40.9% of misdated ballots were submitted by voters who were 70 years old or older; (iii) 14.1% of undated ballots and 13.9% of misdated ballots were submitted by voters who were 80 years old or older; and (iv) 57 undated ballots and 15 misdated ballots were submitted by voters who were 90 years old or older.³ “The percentages all are significantly higher than the percentage of Philadelphia’s registered voters that these age groups represent.”⁴

Third, even though the handwritten dates serve no meaningful purpose, Responding Counties must expend considerable time, labor, and resources to enforce the dating requirement. To process the large volume of absentee and mail-in ballots received each election,⁵ Responding Counties rely on automated sorting machines to recognize when ballot envelopes are returned without handwritten signatures or without the internal secrecy envelope that is required by the Pennsylvania Election

³ Transcript from November 18, 2022, Meeting of the Philadelphia County Board of Elections at 4-6, available at https://vote.phila.gov/media/111822_Meeting_Transcript.pdf (Nov. 18, 2022).

⁴ *Id.*

⁵ In the 2022 General Election, for example, Philadelphia County received over 129,000 absentee and mail-in ballots before the Election Day deadline, and Allegheny County received over 160,000 absentee and mail-in ballots. See Pennsylvania Department of State, Pennsylvania 2022 General Election Ballot Counting Status, available at https://www.vote.pa.gov/About-Elections/Documents/2022-11-11-PADOS_BEST_ENRSupplementalBoard_2022General.pdf (Nov. 11, 2022).

Code. These machines, however, cannot be configured to determine whether the date on the ballot's outer return envelope is "correct." As a result, Responding Counties must devote additional time and labor to manually inspect, identify, and set aside noncompliant ballots. This labor-intensive and time-consuming review offers no benefit to Responding Counties, and its only purpose is to invalidate otherwise valid and legitimate ballots.

Fourth, Responding Counties are committed to ensuring the integrity and fairness of elections in Allegheny County and Philadelphia County. They have made and will continue to make good-faith efforts to verify that the outer return envelopes of mail ballots are dated and to set aside those that are improperly dated. Responding Counties have previously maintained that Pennsylvania law does not mandate invalidating a qualified voter's ballot based solely on the voter's failure to handwrite a correct date on the ballot's outer return envelope. *See Ball*, 289 A.3d at 13 n.52.⁶ And Responding Counties believe that the Pennsylvania Supreme Court erred when

⁶ In state and federal court, Responding Counties have also taken the position that the Materiality Provision of the Federal Civil Rights Act prohibited county election boards from invalidating ballots solely because the voter failed to handwrite a correct date on the ballot's outer return envelope. *See* Brief of Respondents Allegheny, Bucks, Chester, Delaware, Montgomery, and Philadelphia County Boards of Elections, *Ball v. Chapman*, No. 102 MM 2022 (Pa. Oct. 25, 2022); Brief of Defendants Allegheny, Bucks, Chester, Montgomery, and Philadelphia County Boards of Elections, *Pennsylvania State Conference of the NAACP, et al. v. Schmidt, et al.*, No. 1:22-CV-339 (W.D. Pa. May 5, 2023).

it read the Pennsylvania Election Code to require Responding Counties to invalidate ballots based on noncompliance with this insignificant dating instruction. *See id.* at 20-23. Nonetheless, in compliance with the Pennsylvania Supreme Court's order in *Ball*, Responding Counties have set aside and not counted absentee and mail-in ballots that arrive in undated or misdated outer return envelopes. Responding Counties will continue to do so, absent an order from this Court or the Pennsylvania Supreme Court directing Responding Counties to handle such ballots in a different manner.

* * * * *

In sum, the handwritten date requirement serves no meaningful purpose, consumes scarce resources, and operates to disenfranchise thousands of Pennsylvanians, particularly older voters.

Dated: June 24, 2024

Respectfully submitted,

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