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

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

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Third Circuit has rejected Plaintiffs' principal claim in this case: that Pennsylvania's date requirement for absentee and mail-in ballots violates the federal Materiality Provision. *See Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024). Plaintiffs' sole remaining claim—an Equal Protection claim by individual Plaintiffs pending against the Secretary of the Commonwealth only, *see* Dkt. No. 347 at 32-34—deserves the same fate. At the threshold, individual Plaintiffs lack standing to pursue this claim: their alleged injury is not caused by the Secretary, nor is it redressable through an order against the Secretary because the Secretary has no authority to require the counting of undated or incorrectly dated absentee or mail-in ballots. Instead, that authority resides with county boards of elections, who are not parties to the Equal Protection claim and cannot be compelled to do anything by a judicial order against the Secretary. Moreover, in all events, as the Secretary has agreed, *see* Dkt. No. 298 at 22-24, individual Plaintiffs' Equal Protection claim fails on the merits as a matter of law. The Court should grant summary judgment, uphold the General Assembly's duly enacted, longstanding, and constitutional date requirement, and bring this case to an end.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A plaintiff opposing summary judgment "may not rest upon mere allegation or denials of his pleading" or a "scintilla of evidence" in support of an essential element of his claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 256 (1986). Rather, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* Indeed, Rule 56 "mandates" entry of summary judgment against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden

of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, summary judgment is warranted against any plaintiff who pursues a legally deficient theory of liability. *See, e.g.*, *id.*; Fed. R. Civ. P. 56(a).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO PURSUE AN EQUAL PROTECTION CLAIM AGAINST THE SECRETARY

Individual Plaintiffs' Equal Protection claim fails at the threshold because they lack standing to pursue that claim against the Secretary, the sole remaining defendant on that claim. *See* Dkt. No. 347 at 33-34. To establish standing, individual Plaintiffs must show (1) they have suffered an "injury in fact" (2) that is "fairly traceable" to the defendant's conduct and (3) that is likely to be redressed by favorable judicial intervention. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs' Equal Protection claim posits that the Court should enter an order requiring the counting of all absentee and mail-in ballots that fail to comply with the date requirement because 3 county boards of elections counted undated mail ballots from overseas voters in a past election. *See* Dkt. No. 275 at 23-25. Plaintiffs assert that such an order will achieve "[]equal treatment of identically-situated voters" across the Commonwealth. *Id.* at 23.

This claim fails because individual Plaintiffs' alleged injury—the decision not to count undated or incorrectly-dated absentee or mail-in ballots—is neither caused by the Secretary, nor is it redressable through an order against the Secretary. *Lujan*, 504 U.S. at 561; *Spokeo*, 578 U.S. at 338. That is because under Pennsylvania law, county boards of elections, rather than the Secretary, wield sole authority and responsibility for administering elections and enforcing the Commonwealth's election laws. *See* 25 P.S. § 2642 (outlining county boards' extensive powers and duties over the administration of elections). That includes the authority to determine the

validity of ballots and to count ballots. *See id.* The Secretary, by contrast, "does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards." *Republican Nat'l Comm. v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) (slip op. at 19-20). Indeed, the Secretary repeatedly has admitted that he lacks such authority and control. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *10 (Pa. Commw. Ct. Aug. 19, 2022) (acknowledgment by Secretary that he "does not have the authority to direct the Boards to comply with [a court order]"); *see also Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 183 (2022) ("Within wide constitutional bounds, States are free to structure themselves as they wish."). That is why the Pennsylvania Supreme Court in *Ball* directed its order not to count ballots that fail to comply with the date requirement *to the county boards*—not the Secretary. *See Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022) (per curiam) ("The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting . . ."). It is also why the Pennsylvania Commonwealth Court held that the Secretary was not an indispensable party in a lawsuit challenging the legality of a particular election practice; as the court recognized, it could grant relief to the plaintiffs only with an order that bound county boards of elections. *Republican Nat'l Comm.*, slip op. at 19-20.

Individual Plaintiffs seek an order requiring the counting of absentee and mail-in ballots that do not comply with the date requirement. *See, e.g.*, Dkt. No. 275 at 23-25. But any order against the Secretary *cannot* grant them that relief. *See, e.g.*, 25 P.S. § 2642; *Republican Nat'l Comm.*, slip op. at 20; *Chapman*, 2022 WL 4100998, at *10. Individual Plaintiffs therefore lack standing to pursue their Equal Protection claim, and the claim fails "as a matter of law," warranting dismissal on summary judgment. Fed. R. Civ. P. 56.

Even an order enjoining the Secretary from "refusing to include [Plaintiffs'] ballots when reporting the 2022 election totals" (or any other election totals), ECF No. 347 at 32, would not redress individual Plaintiffs' alleged injury. After all, it is not the Secretary's *refusal to include* ballots in a report, but the county board's decision *not to count* such ballots, that causes individual Plaintiffs' alleged injury. Moreover, such an order would not compel any county board of elections (or even the Secretary, for that matter) to *include* noncompliant ballots in the vote totals they transmit to the Secretary. The Secretary, in turn, lacks authority to compel any county board of elections to comply with such an order. *See Chapman*, 2022 WL 4100998, at *10. Thus, even if such an order were issued, an individual with standing would still have to pursue a judicial order requiring the relevant county board of elections to count the noncompliant ballot. *See, e.g.*, *id.* This Court, however, has held that no individual Plaintiff has standing to pursue an Equal Protection claim against a county board, *see* Dkt. No. 347 at 23-24, so summary judgment against Plaintiffs is required here, *see Lujan*, 504 U.S. at 561; *Spokeo*, 578 U.S. at 338.

Furthermore, the Secretary's prior non-binding guidance that county boards of elections "refrain from counting any absentee and mail-in ballots received for the November 8, 2022, general election that are contained in undated or incorrectly dated outer envelopes," Dkt. No. 347 at 31, does not affect, much less alter, this result for at least four reasons. *First*, the record contains no evidence of the Secretary reiterating that guidance for any elections after November 2022—so individual Plaintiffs have failed to adduce evidence "as to a[] material fact" undergirding their request for a prospective injunction against the Secretary. Fed. R. Civ. P. 56.

Second, if such guidance remained in place for elections after November 2022 and was uniformly followed by the county boards of elections, it would *cure* any Equal Protection problem. The guidance contemplates that *all* noncompliant ballots would not be counted, *see* Dkt. No. 347

at 31, thus achieving the "[]equal treatment of . . . voters" individual Plaintiffs claim to seek through their Equal Protection claim, *see* Dkt. No. 275 at 23.

Third, a judicial order directing the Secretary to rescind that guidance would have no effect on county boards of elections, which are not bound by the guidance and cannot be compelled to obey an order against the Secretary. *See, e.g.*, *Republican Nat'l Comm.*, slip op. at 19-20; *Chapman*, 2022 WL 4100998, at *10. Thus, once again, an individual with standing would still need to seek a judicial order directing the relevant county board of elections to count the noncompliant ballots—yet, once again, the Court has held that no individual Plaintiff has standing to seek such anorder. *See* Dkt. No. 347 at 23-24.

Finally, any judicial order would need to achieve a consistent inter-county rule across the Commonwealth, *see Bush v. Gore*, 531 U.S. 98, 106-07 (2000) ("varying standards to determine what [is] a legal vote" from "county to county" violate Equal Protection), and uphold the Pennsylvania Supreme Court's holding that the date requirement is valid and mandatory, *see Ball*, 284 A.3d at 1192. Any county board of elections that has counted undated or incorrectly dated absentee or mail-in ballots has violated state law. *See id.* at 1192. Thus, the only judicial order that could even theoretically issue is one that requires such county boards to comply with state law and not to count *any* undated or incorrectly dated ballots. *See id.*; *see also Bush*, 531 U.S. at 106-07. Plaintiffs' proposed remedy of requiring county boards to *further* violate state law by counting *all* undated or incorrectly dated ballots gets this precisely backwards. *See Ball*, 284 A.3d at 1192; *Bush*, 531 U.S. at 106-07. The Court should grant summary judgment.

II. MANDATORY APPLICATION OF THE DATE REQUIREMENT DOES NOT VIOLATE EQUAL PROTECTION

Even if individual Plaintiffs could establish standing, the Court still should grant summary judgment against their Equal Protection claim. As the Secretary has agreed, *see* Dkt. No. 298 at 22-24, the Equal Protection claim fails on the merits as a matter of law.

At its core, the Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Individual Plaintiffs argue that the date requirement violates Equal Protection because (i) "military and overseas voters who vote by mail" are exempt from the date requirement under Pennsylvania law; (ii) that alleged exemption "creates differential treatment of the right to vote;" and (iii) that differential treatment is both subject to and fails strict scrutiny. Am. Compl., **Ex. 1**, ¶¶ 83-88 (citing 25 Pa. C.S. § 3515(a)). Each premise fails, so Plaintiffs' Equal Protection claim fails alongside them "as a matter of law." Fed. R. Civ. P. 56.

A. Pennsylvania Law Does Not Exempt Military And Overseas Voters From The Date Requirement

Plaintiffs' first premise—that Pennsylvania law applies the date requirement to domestic voters but not to military and overseas voters, *see* Am. Compl., **Ex. 1**, ¶ 86; Dkt. No. 275 at 23-25, is false. Plaintiffs' lone contention is that Pennsylvania's version of the Uniform Military and Overseas Voting Act (UMOVA) exempts military and overseas voters from the date requirement. *See* Am. Compl., **Ex. 1**, ¶ 86. That contention is incorrect.

By its plain terms, the Election Code's date requirement applies to *all* voters who vote by "absentee" or "mail-in" ballot and carves out no exception for overseas voters. 25 P.S. §§ 3146.6(a), 3150.16(a). UMOVA likewise creates no express exemption from the date requirement. *See* 25 Pa. C.S. §§ 3501-3519. Plaintiffs instead latch on to UMOVA's "mistake provision," 25 Pa. C.S. § 3515(a)(1), *see* Am. Compl., **Ex. 1**, ¶ 86—which has never been cited in

any court decision—but that provision does not create such an exemption *sub silentio*. Indeed, even Plaintiffs' own putative expert agreed that the date requirement applies to overseas voters. *See* Dkt. No. 272, SOF ¶ 155.

The Court should decline at the threshold to adopt Plaintiffs' novel and countertextual reading of UMOVA. "Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not," this Court must "adopt the latter construction." *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017). Plaintiffs' unproven and unreasonable (and erroneous) construction of § 3515(a)(1) is an essential premise of their Equal Protection claim, *see* Am. Compl., **Ex. 1**, ¶¶ 83-88. Even on Plaintiffs' theory, the Equal Protection claim fails if their reading of UMOVA fails. Their proposed construction thus *requires* a "constitutional difficult[y]" in UMOVA and, therefore, flies in the face of this canon. *Herman*, 161 A.3d at 212. It should be rejected for that reason alone.

Moreover, even a cursory textual review proves that Plaintiffs' reading of § 3515(a)(1) is incorrect—and, in fact, that reading § 3515(a)(1) not to create a *sub silentio* exemption from the date requirement is not only "reasonable," but correct. *Herman*, 161 A.3d at 212. Section 3515(a)(1) states in its entirety:

> (a) Mistake, omission or failure to satisfy. – None of the following shall invalidate a document submitted under this chapter:
>
> (1) A voter's mistake or omission in the completion of a document *under this chapter* as long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote.

25 Pa. C.S. § 3515(a)(1) (emphasis added). For at least three reasons, this provision does not exempt military and overseas voters from the Election Code's date requirement by its plain terms.

First, Plaintiffs omit the mistake provision's "under this chapter" limitation from their selective quotation, Am. Compl., **Ex. 1**, ¶ 86, but that limitation is dispositive here. The mistake provision applies only to "completion of a document under this chapter"—*i.e.*, UMOVA itself, Chapter 35 of Title 25 of the Pennsylvania Consolidated Statutes. But *none* of the "document[s]" completed under the UMOVA chapter are Pennsylvania absentee or mail-in ballots. *See id.* §§ 3501-3519; *compare also* 25 P.S. 3146.6(a), 3150.16(a). Instead, the "document[s]" completed under UMOVA are special registration and application documents that facilitate military and overseas voters registering to vote and requesting ballots. *See* 25 Pa. C.S. §§ 3505-3509. It is only *those* documents that UMOVA's mistake provision covers. *See id.* § 3515(a)(1).

By contrast, the Election Code—Chapter 14 of Title 25—creates Pennsylvania's absentee and mail-in ballots and the date requirement. 25 P.S. §§ 3146.6(a), 3150.16(a). UMOVA's mistake provision does not excuse mistakes or omissions in the completion of a document under that *separate* chapter. Indeed, UMOVA "is intended to be read in concert with the Election Code," 25 Pa. C.S. § 3519, so its mistake provision does not even apply to, let alone excuse, military and overseas voters' "mistakes or omissions in the completion of" absentee or mail-in ballots, including failure to comply with the date requirement.

Second, the mistake provision applies only to documents used to "determin[e] whether a voter "covered" by UMOVA is "eligible to vote." *Id.* § 3515(a)(1). It therefore has no application to documents that constitute the *act* of voting and have no bearing on determining whether a voter is "*eligible* to vote." *Id.* (emphasis added); *see also Commonwealth v. Howard*, 257 A.3d 1217, 1222 (Pa. 2021) ("The best expression of [the General Assembly's] intent is found in the statute's plain language."); *Fisher v. Commonwealth*, 501 A.2d 617, 619 (Pa. 1985) ("The supreme principle of statutory interpretation must be that each word used by the Legislature has meaning

and was used for a reason, not as mere surplusage."). It also, therefore, has no application to the date requirement, which—as the Third Circuit explained—is a ballot-casting rule governing the *act* of voting, not a rule used to determine whether any individual is eligible to vote. *See Pa. State Conf. of NAACP*, 97 F.4th at 135.

Third, consistent with the General Assembly's direction that UMOVA must "be read in concert with the Election Code," 25 Pa. C.S. § 3519, the plain text of both the Election Code and UMOVA confirm that when the General Assembly intended to exempt military and overseas voters from the Election Code's global requirements, it did so expressly. For example—in the *very sections that create the date requirement*—the Election Code exempts UMOVA voters from its default deadlines for receipt of mail ballots in favor of the different deadlines in a UMOVA section, found at 25 Pa C.S. § 3511.25 P.S. §§ 3146.6(c), 3150.16(c). Yet those Election Code sections *create no UMOVA exemption from the date requirement*. *See id.* §§ 3146.6, 3150.16.

Moreover, UMOVA itself crafts special rules for military and overseas voters regarding a variety of voting-related actions, including voter registration, ballot applications, the deadline for returning ballots to election officials, and misspellings on write-in votes. *See, e.g.*, 25 Pa. C.S. §§ 3505-3515. But UMOVA, too, is completely silent regarding—and creates no exemption from—the date requirement.

The General Assembly thus clearly knew how to create an exception for UMOVA voters, and it elected not to adopt one as to the date requirement. *See Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017) ("[W]hen interpreting a statute, we must listen attentively to what the statute says, but also to what it does not say." (internal quotation marks omitted)); *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002) ("[T]he inclusion of a specific matter in a statute implies the exclusion of other matters."). Furthermore, the General

Assembly does not create statutory exemptions *sub silentio*, *see In re Appointment of Rodriguez*, 900 A.2d 341, 344 (Pa. 2003), and it did not create a *sub silentio* exemption from the date requirement amongst the numerous express exemptions in the Election Code and UMOVA, *see Yount v. Pa. Laws. Fund for Client Sec.*, 291 A.3d 349, 354 (Pa. 2023) ("[T]he fact that the [court rule] spells out one particular purpose . . . necessarily implies that the other purpose is excluded."); *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) ("[I]f the General Assembly intended to permit trial courts to impose suspended sentences for civil contempt of a child support order, it would have expressly provided for this alternative. It did not.").

Given UMOVA's plain statutory text, it is unsurprising that the absentee and mail-in ballots that county election officials provided to military and overseas voters in 2022 included instructions to date the envelope and contained signature and date fields for the voter to complete. *See* Dkt. No. 272, SOF ¶¶ 121-122. There would have been *no reason* to include those instructions and fields if, as Plaintiffs contend, UMOVA exempts military and overseas voters from the date requirement. Even the Federal Write-in Absentee Ballot referenced in UMOVA, *see* 25 Pa. C.S. § 3510, contains a date field, *see* Dkt. No. 272, SOF ¶ 123, and voters who use that ballot must comply with the date requirement, *see id.* ¶¶ 124-25.

Plaintiffs' proposed contrary construction of UMOVA is countertextual and nonsensical. Plaintiffs focus on the mistake provision's use of the word "document"—but they omit the dispositive "under this chapter" limitation from their selective quotation and ignore that related exemptions are express, not implied. Am. Compl., **Ex. 1**, ¶ 86. And Plaintiffs' proposed reading makes no sense: if UMOVA exempted military and overseas voters from the date requirement *sub silentio*, it would also exempt them from the host of *other* requirements for completing an absentee or mail-in ballot that UMOVA does not even mention, including the signature requirement and the

overvote prohibition. *See*, *e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a). Such a construction would be *inconsistent*, rather than "*in concert*," with the Election Code. 25 Pa. C.S. § 3519 (emphasis added).

The fact that 3 county boards of elections declined to set aside military ballots that failed to comply with the date requirement in the 2022 general election, *see* Dkt. No. 272, SOF ¶¶ 64, 105, 112, does not affect, much less bolster, Plaintiffs' reading of UMOVA's mistake provision. After all, the actions of county boards of elections do not change their obligations under state law—and those boards that counted noncompliant ballots did so in violation of state law. *Cf. Ball v. Chapman*, 289 A.3d 1, 20-23 (Pa. 2023) (state courts, not county boards of elections, decide the proper meaning of the Election Code). By contrast, the county boards of elections that declined to count military and overseas ballots that failed to comply with the date requirement, *see* Dkt. No. 272, SOF ¶¶ 70, 96, complied with state law. Any difference in approach across counties is remedied by the *noncompliant* boards coming into *compliance* with state law, not by ordering the *compliant* boards into *noncompliance* with state law, as Plaintiffs ask this Court to do. *See* Am. Compl., **Ex. 1**, Prayer for Relief ¶¶ 1-2; *see supra* Part I; *infra* Part III.

In sum, Pennsylvania law does not permit differential treatment of military and overseas voters, on the one hand, and domestic voters, on the other, with respect to the date requirement. Plaintiffs' Equal Protection claim therefore fails.

B. Military And Overseas Voters Are Not Similarly Situated to Domestic Voters

Even if UMOVA's mistake provision created a *sub silentio* exemption from the date requirement, Plaintiffs' Equal Protection claim still would fail because Plaintiffs cannot "demonstrate that [any voter] received different treatment from that received by other individuals *similarly situated*." *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005); *Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 348 (3d Cir. 2017)

("To prevail on its equal protection claim, [Plaintiff] must show that the Government has treated it differently from a *similarly* situated party *and* that the Government's explanation for the differing treatment does *not* satisfy the relevant level of scrutiny.").

"The Equal Protection Clause does not forbid classifications," but rather "keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Accordingly, there is no Equal Protection violation if the differential treatment occurs between groups of persons who are not "alike in all relevant aspects." *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (internal quotation marks and citation omitted).

That is the case here. Military and overseas voters are simply unlike domestic voters when it comes to voting. Multiple courts have recognized that "[i]n many respects, absent military and overseas voters are not similarly situated to [domestic] voters." *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012); *United States v. Alabama*, 778 F.3d 926, 928 (11th Cir. 2015) ("[A]ctive military personnel and their families have faced severe difficulties exercising their fundamental right to vote."). Indeed, military and overseas voters' "absence from the country is the factor that makes them distinct" from domestic voters—in requesting and casting absentee ballots, military and overseas voters face unique "difficulties that arise from being physically located outside the United States." *Husted*, 697 F.3d at 434-35.

As *Husted* concluded, while military voters in the State may in many respects be similarly situated to domestic voters with respect to in-person voting, there is a "relevant distinction" between overseas voters and domestic voters with respect to mail voting—the form of voting at issue in Plaintiffs' Equal Protection challenge. *Id.* at 434-36. "[U]nlike domestic absentee voters who may request an absentee ballot because it is inconvenient or difficult for them to vote at a

polling station, military personnel deployed overseas lack the ability to vote in person. Voting by absentee ballot provides these men and women with their only meaningful opportunity to vote in state and federal elections while they are deployed abroad." *Doe v. Walker*, 746 F. Supp. 2d 667, 679 (D. Md. 2010). Thus, "when military and overseas voters are *absent* from their voting jurisdictions," they "are not similarly situated to all other voters in this respect, and states are justified in accommodating their particular needs." *Husted*, 697 F.3d at 435.

The military and overseas voters who Plaintiffs contend Pennsylvania law exempts from the date requirement and the domestic voters subject to the requirement therefore are not "in all relevant respects alike." *Nordlinger*, 505 U.S. at 10; *see also Husted*, 697 F.3d at 435. For this additional reason, Plaintiffs' Equal Protection claim fails, and the Court should grant summary judgment dismissing it.

C. The Alleged Differential Application of the Date Requirement Does Not Violate Equal Protection

Plaintiffs' Equal Protection claim fails for another reason as well: any differential application of the date requirement between overseas voters and domestic voters triggers, at most, rational basis scrutiny and easily satisfies that lenient standard.

1. Any Differential Application of the Date Requirement Triggers Rational Basis Review.

The Supreme Court has reserved heightened scrutiny for laws that draw classifications between groups of similarly situated persons—such as the strict scrutiny Plaintiffs seek here, *see* Am. Compl., **Ex. 1**, ¶ 85—for two scenarios: the alleged classification "categorizes on the basis of an inherently suspect characteristic" or "jeopardizes exercise of a fundamental right." *Nordlinger*, 505 U.S. at 10. Neither scenario is present on Plaintiffs' allegations, so rational basis scrutiny applies.

First, non-military and non-overseas voters are not a "suspect class." *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004). Suspect classes involve such factors as "race, alienage, or national origin," "gender," or "illegitimacy"—factors that "generally provide[] no sensible ground for differential treatment" or "reflect prejudice and antipathy." *City of Cleburne*, 473 U.S. at 440-41. Domestic absentee and mail-in voters simply do not fit the bill: domestic voters constitute the vast majority of Pennsylvania voters, and even on Plaintiffs' Equal Protection theory are not treated differently based on any of those suspect factors. Put in hornbook terms, domestic voters are not a "'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process,'" *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153, n.4 (1938)), so heightened scrutiny cannot be justified on that basis.

Second, regulations on absentee and mail-in voting, such as the date requirement, do not implicate "fundamental rights." *Biener*, 361 F.3d at 214-15. Of course, the right to vote is fundamental. But "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). Thus, "absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny . . . the exercise of the franchise." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969). The date requirement applies only to absentee and mail-in voting—and on Plaintiffs' theory, only to domestic voters who may *also* vote in person—and therefore does not implicate a fundamental constitutional right. *See id.*; *Mays*, 951 F.3d at 792. Thus, at most, rational basis scrutiny applies to the alleged differential application of the date requirement to overseas voters and domestic voters.

2. Any Differential Application of the Date Requirement Has a Rational Basis

Excusing military and overseas voters from some requirements for absentee and mail-in voting—like the date requirement— "rationally furthers a legitimate state interest." *Nordlinger*, 505 U.S. at 11. Specifically, such an exemption would offer one of "numerous exceptions and special accommodations for members of the military," including "within the voting context," that are designed to alleviate the burdens that come along with military service and residence overseas. *Husted*, 697 F.3d at 434; *see also Alabama*, 778 F.3d at 928 (noting that accommodations are appropriate because military voters' "decision to serve their country" has often been "the very act that frequently deprived them of a voice in selecting its government"). Exempting military and overseas voters from the date requirement therefore passes rational basis review. *See Real Alternatives*, 867 F.3d at 348.

Indeed, "[f]ederal and state law makes numerous exceptions and special accommodations for members of the military, within the voting context and without, and no one"—apparently, aside from Plaintiffs— "argues that these exceptions are somehow constitutionally suspect." *Husted*, 697 F.3d at 434. For example, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to "end[] the widespread disenfranchisement of military voters stationed overseas." *Alabama*, 778 F.3d at 928. UOCAVA (the federal law that Pennsylvania's UMOVA implements) "requires that states extend additional protections to the UOCAVA absentee voting process that they might not extend to other absentee voters as a matter of state law"—for instance, a requirement that a state transmit an absentee ballot to a military or overseas voter forty-five days before an election if the voter requests it. *Id.* at 929-30.

UMOVA, of which the mistake provision in § 3515(a)(1) is part, therefore "extends to state and local elections the accommodations and protections for military and overseas voters found in

federal law." Pa. Dep't of State, *Overview of the Uniform Military and Overseas Voters Act (UMOVA)* (Sept. 26, 2022), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-UMOVA-Overview.pdf; *see also* 2012 Pa. Laws 189. It thus serves Pennsylvania's legitimate interest in complying with UOCAVA, a federal law. *Cf. Cooper v. Harris*, 581 U.S. 285, 292 (2017) (noting that the Supreme Court has "long assumed" that complying with the Voting Rights Act is a "compelling interest" for purposes of strict scrutiny).

UMOVA also fits within the tradition embodied in UOCAVA of accommodating military and overseas voters' unique circumstances. The mistake provision, like UOCAVA, is "based on highly relevant distinctions between service members and the civilian population," and "confer[s] benefits accordingly." *Husted*, 697 F.3d at 434; *see supra* Part II.B. Indeed, any exemption of military and overseas voters from the date requirement relates directly to military and absentee voters' "absen[ce] from their voting jurisdictions," *Husted*, 697 F.3d at 435, and confers no unwarranted advantages on military and overseas voters as compared to domestic voters, who retain the option to vote in person, *see id.*

"[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which … judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). There is nothing "grossly awry" about easing the requirements to have one's ballot counted for overseas military personnel, *id.,* given the well-documented difficulties that living overseas poses for the exercise of the right to vote—difficulties Congress acted to address in concert with the States. Rather, an exemption from the date

requirement for military and overseas voters would be a reasonable accommodation of those difficulties.

Because Plaintiffs cannot "negate every conceivable justification for the classification," as they must, they cannot "prove that the classification is wholly irrational." *Brian B. ex rel. Lois B. v. Pa. Dep't of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000). Thus, even if the mistake provision exempted military and overseas voters from the date requirement, *but see supra Part* II.A, and even if such exemption treats similarly situated voters differently, *but see supra* Part II.B, differential application of the date requirement would survive rational basis scrutiny. Plaintiffs' Equal Protection claim fails.

III. THE PROPER REMEDY FOR A VIOLATION IS TO ENFORCE THE DATE REQUIREMENT FOR ALL VOTERS.

Finally, in all events, even if Plaintiffs had standing and were correct in their erroneous view of the mistake provision and the Constitution, their requested remedy is improper. Plaintiffs ask this Court to mandate that *all* county boards of elections *disregard* the date requirement as to *all* voters, based on only three counties' failure to enforce the requirement for military and overseas ballots. Am. Compl., **Ex. 1**, Prayer for Relief ¶¶ 1-2. But if this Court finds a violation, the only appropriate remedy would be a mandate that county boards of elections *enforce* the date requirement as to all voters, based on every county's treatment of domestic voters.

"[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (internal quotation marks omitted). "The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand." *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017). In assessing which remedy to adopt, "a court should measure the intensity of

commitment to the residual policy—the main rule, not the exception—and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 75 (internal quotation marks omitted).

There is no basis for questioning the Pennsylvania General Assembly's commitment to the date requirement. In fact, the General Assembly declared the section containing the date requirement "nonseverable" from the remainder of Act 77 and provided that "[i]f any provision of [that] act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Act 77, P.L. 552, sec. 11 (Oct. 31, 2019); *see Rappa v. New Castle County*, 18 F.3d 1043, 1072 (3d Cir. 1994) ("When a federal court is called upon to invalidate a state statute, the severability of the constitutional portions of the statute are governed by state law."). And invalidating undated or misdated UMOVA ballots would be significantly less disruptive than invalidating the date requirement, given that there are far more domestic ballots than military and overseas ballots in Pennsylvania. *See* Dkt. No. 272, SOF ¶¶ 58-120. Likewise, it would ensure that the Court's remedy does not "render the special treatment" conferred on military and overseas voters "the general rule" rather than "an exception." *Morales-Santana*, 582 U.S. at 77.

"Put to the choice," it is implausible that the General Assembly would have abrogated its date requirement entirely so that a handful of undated and misdated UMOVA ballots could be counted. *Morales-Santana*, 582 U.S. at 76. Because the General Assembly would have "preferr[ed] preservation of the general rule," *id.*, the proper remedy from the Court would be to *enforce* the date requirement across the board, not invalidate it.

CONCLUSION

The Court should grant summary judgment dismissing Plaintiffs' Equal Protection claim.

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Respectfully submitted,

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