

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

PENNSYLVANIA STATE	:	
CONFERENCE OF THE NAACP, <i>et al.</i> ,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 1:22-cv-00339-SPB
v.	:	
	:	
AL SCHMIDT, <i>et al.</i> ,	:	
	:	
Defendants.	:	ELECTRONICALLY FILED
	:	

**BERKS COUNTY BOARD OF ELECTIONS’ SUPPLEMENTAL MOTION AND
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Berks County Board of Elections (“Berks County”) reasserts its previous motion for summary judgment (doc. 269) and submits this supplemental brief in support of its motion for summary judgment on Plaintiffs’ remaining claims.¹ For the reasons stated previously and the additional reasons below, the Court should grant summary judgment in favor of Berks County and against Plaintiffs on all of Plaintiffs’ remaining claims and dismiss with prejudice all of Plaintiffs’ remaining claims against Berks County.

I. FACTUAL AND PROCEDURAL HISTORY.

On November 21, 2023, this Court entered an Order granting in part and denying in part Berks County’s motion for summary judgment after concluding that none of the individual

¹ Berks County previously joined in and incorporated by reference the prior summary judgment motion and supporting brief and concise statement of material facts filed by Defendant Lancaster County Board of Elections (“Lancaster County”) (doc. 267 and 268). Berks County and Lancaster County previously filed responses and briefs in opposition to Plaintiffs’ motion for summary judgment (doc. 294, 295, 308, 309). All of the arguments in these prior filings relating to Plaintiffs’ remaining claims against Berks County are reasserted and incorporated by reference herein to the extent they are still applicable.

plaintiffs, and all but a few organizational plaintiffs have standing to assert their claims against Berks County. (Doc. 348 (Order) at 5.) There is a discrepancy between the Court's Order and its Opinion regarding plaintiff Make the Road Pennsylvania's standing to sue Berks County. The Court's Order dismissed for lack of standing the claims against Berks County asserted by all the plaintiffs except for the Pennsylvania State Conference of the NAACP ("NAACP") and The League of Women Voters of Pennsylvania ("League") (doc. 348 (Order) at 5); the Court's Opinion says that in addition to the NAACP and the League, Make the Road Pennsylvania (MTRP) also has standing to pursue its claims against Berks County (doc 347 (Opinion) at 15-26 & n.12 (discussion), 33-34 (chart)). Berks County assumes the Court ruled that the NAACP, the League, and MTRP all have standing to assert their claims against Berks County. (Berks County will refer below to the NAACP, the League, and MTRP, collectively, as "Plaintiffs").

The Court granted declaratory judgment in favor of Plaintiffs on their claim that enforcing the challenged Date Requirement violates the Materiality Provision of the federal civil rights act, 52 U.S.C. §10101(a)(2)(B) (Amended Complaint Count I), but it did not reach the question of summary judgment on their Equal Protection claim (Amended Complaint Count II). (Order, doc. 348 at 4-5; Opinion, doc. 347 at 74-76. The Third Circuit reversed the Court's entry of summary judgment on Plaintiffs' Materiality Provision claim and remanded the case for further proceedings on Plaintiffs' remaining Equal Protection claim. (Doc. 384.) This Court ordered the parties to file supplemental summary judgment papers on Plaintiffs' remaining Equal Protection claim. (Doc. 385.)

II. There is no evidence Berks County treats military and overseas absentee ballots differently from domestic absentee or mail-in ballots.

In Count II of the Amended Complaint, Plaintiffs claim Berks County violated their rights under the Fourteenth Amendment’s Equal Protection Clause because, by faithfully applying the provisions of the Pennsylvania Election Code requiring voter declarations on the outer envelope of absentee and mail-in ballots be correctly dated, 25 P.S. §§ 3146.6(a), 3150.16(a) (collectively, the “Date Requirement”), Berks County allegedly “invalidate[s] the mail ballots of otherwise qualified domestic voters based on trivial paperwork errors while counting the mail ballots of military and overseas voters who make the same immaterial mistake.” Amended Complaint (doc. 121) ¶ 87.

With respect to the challenged Date Requirement, Plaintiffs have no evidence to support their claim that Berks County treats military and overseas absentee ballots differently than it treats domestic civilian absentee or mail-in ballots. In response to Plaintiffs’ interrogatories, Berks County stated that it received 146 military/overseas absentee ballots in the 2022 General Election, *see Exhibit A* (Deposition Transcript of Cody L. Kauffman taken Feb. 17, 2023 (“C. Kauffman Dep.”) Ex. 2, at 1 (Response ¶ 1)), and that Berks County did not set aside any of those 146 military/overseas absentee ballots for violation of the Date Requirement, *Exhibit A* (C. Kauffman Dep.) Ex. 2, at 6-8 (Response ¶¶ 15-22)).² Clarifying Berks County’s written

² Plaintiffs’ Concise Statement of Material Facts (doc. 276 & 283) and appendices Vol. I, III, and VI in support of their prior summary judgment motion (doc. 277, 279, 281) include many references to Berks County Rule 30(b)(6) representative Cody Kauffman, Esquire’s deposition transcript, *see* doc. 276 & 283 ¶¶ 12, 14, 15, 37, 39, 47-50, 53-56, 59, 63-65, 88, 91-92, 97, 102-104, 113 (doc. 279, Appx. Vol. III, APP_00800-849) and doc. 281, Appx. Vol. V, APP_01169-1172), and Berks County’s interrogatory responses, doc. 276 & 283 ¶¶ 34(e), 35, 36(d), 42-43, 59, 91, 104, 111 (doc. 277, Appx. Vol. I, APP_00077-00086). Berks County relies on Attorney Kauffman’s deposition testimony and its interrogatory responses (C. Kauffman Dep. Ex. 2) to support its summary judgment motion. For the Court’s convenience, these materials are attached hereto as **Exhibit A**.

interrogatory responses, Berks County First Assistant Solicitor Cody L. Kauffman, Esquire testified that the reason Berks County did not set aside any military/overseas absentee ballots for violation of the Date Requirement in the 2022 General Election is because none of those 146 absentee ballots had a missing or incorrect date on the voter declaration on the outer envelope. **Exhibit A** (C. Kauffman Dep.) at 103-105 and Dep. Ex. 2.³

Because there is no evidence that Berks County treated or treats military and overseas absentee ballots differently from domestic civilian absentee or mail-in ballots, Plaintiffs' remaining Equal Protection claim against Berks County must be dismissed.

Even if there were evidence that Berks County treated or treats military and overseas absentee ballots differently than domestic absentee and mail-in ballots when it comes to applying the challenged Date Requirement, Plaintiffs base their Equal Protection claim against Berks County on the alleged difference in how Pennsylvania law—not Berks County custom, practice or policy—treats military and overseas ballots. Amended Complaint ¶ 86 (“Yet state law applies a different rule to military and overseas voters who vote by mail, stating that a ‘voter’s mistake or omission in the completion of a document’ shall not invalidate their ballot ‘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).”).

Plaintiffs have not demonstrated, as required, that the alleged violation of the Equal Protection Clause is based on Berks County’s customs, practices or policies. *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1027 (3d Cir. 1991) (“In a § 1983 claim against a local government unit, liability attaches when it is the government unit’s policy or custom itself that

³ Military/overseas absentee ballots are the same as “UOCAVA ballots” referenced by Plaintiffs’ counsel in Attorney Kauffman’s deposition.

violates the Constitution.”) Because Plaintiffs’ Equal Protection claim alleges they are being treated differently than military and overseas absentee voters based on Pennsylvania law—and not based on any custom, practice or policy of Berks County, which is bound to follow Pennsylvania law and binding interpretation caselaw⁴—Plaintiffs’ Equal Protection claim against Berks County also fails for that independent reason.

Finally, Plaintiffs’ Equal Protection claim fails because military and overseas absentee voters are not similarly situated to domestic absentee or mail-in voters. Military and overseas absentee voters have different eligibility and timing requirements for submission of their absentee ballots. Military and overseas absentee ballots must be completed and mailed by 11:59 PM the day before election day, and the county election office must receive those completed ballots no later than 5:00 PM seven days following election day. A separate uniform act applies, in conjunction with the Election Code, to military and overseas absentee voters. *See* 25 Pa. C.S.A. §§ 3501-3519 (Uniform Military and Overseas Voter Act). And by virtue of being overseas or on military deployment, if their absentee ballot is rejected for any reason,

⁴ *See Ball v. Chapman* (102 MM 2022), 289 Pa. 1, 28 (Pa. 2023) (“The Election Code commands absentee and mail-in electors to date the declaration that appears upon ballot return envelopes, and failure to comply with that command renders a ballot invalid as a matter of Pennsylvania law.”) Because of the timing, the Pennsylvania Supreme Court in *Ball v. Chapman* issued an Order dated November 1, 2022 and a supplemental Order dated November 5, 2022. The Supreme Court’s November 1, 2022 Order said, “The Pennsylvania county boards of elections are hereby ORDERED to 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.” The Court’s November 5, 2022 supplemental Order defined, for purposes of the November 8, 2022 general election, “incorrectly dated outer envelopes” as “(1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022. Pursuant to these Orders and the Court’s Majority Opinion issued February 8, 2023, the county boards of elections are required by law to set aside and not count domestic absentee and mail-in ballots “contained in undated or incorrectly dated outer envelopes.”

military and overseas absentee voters are unable to come into the county election office to cure any mistakes or arrange to vote in person in their precinct on election day. Therefore, even if Pennsylvania law requires military and overseas absentee ballots to be treated differently when it comes to the Date Requirement, there is a lawful basis for that different treatment.

III. Berks County's compliance with the Pennsylvania Election Code's Date Requirement does not unlawfully burden Plaintiffs' right to vote in violation of the First and Fourteenth Amendment.

As explained in Berks County's brief in opposition to Plaintiffs' motion for leave to amend (doc. 393), it would be inequitable to grant Plaintiffs leave, at this late stage of the case, to file a Second Amended Complaint asserting their proposed new *Anderson-Burdick* claim (proposed Count III). If the Court disagrees, Berks County incorporates by reference its futility argument set forth in its brief in opposition to Plaintiffs' motion for leave to amend (doc. 393).

For those reasons, Berks County's enforcement of the Date Requirement in the Pennsylvania Election Code and binding interpreting caselaw⁵ does not unlawfully burden Plaintiffs' right to vote in violation of the First and Fourteenth Amendment. Therefore, Plaintiffs' proposed *Anderson-Burdick* claim is legally insufficient and not factually supported by the evidence. Accordingly, the Court should grant summary judgment for Berks County and against Plaintiffs on Plaintiffs' proposed *Anderson-Burdick* claim.⁶

⁵ *Ball v. Chapman*, 289 Pa. 1, 28 (Pa. 2023); *see also* Pa. Supreme Court's Nov. 1, 2022 Order and Nov. 5, 2022 supplemental Order in *Ball v. Chapman* (102 MM 2022), *supra* at page 5, n.3.

⁶ Berks County expects to file a supplemental brief regarding the lack of merit of Plaintiffs' proposed *Anderson-Burdick* claim more fully in the related case of *Eakin v. Adams County Board of Elections*, No. 1:22-cv-00340-SPB, where that claim was timely asserted. If Plaintiffs in this case are permitted to assert their proposed *Anderson-Burdick* claim, Berks County incorporates those arguments as though set forth at length here.

IV. CONCLUSION.

For all of the above reasons, the Court should grant summary judgment for Berks County and against Plaintiffs the NAACP, the League of Women Voters of Pennsylvania, and Make the Road Pennsylvania on Count II of Plaintiffs' Amended Complaint and on Plaintiffs' proposed *Anderson-Burdick* claim.

Respectfully submitted,

Dated: May 29, 2024

SMITH BUKOWSKI, LLC

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Attorneys for Berks County Board of Elections

Exhibit A

Pennsylvania State Conference of the NAACP, et al. v. Al Schmidt, et al.
United States District Court for the Western District of Pennsylvania
Excerpt of Deposition Transcript of Cody Kauffman dated Feb. 17, 2023 (including Dep. Ex. 2)

CODY L. KAUFFMAN 30(b)(6)
Penn St Conference of the NAACP v Chapman

February 17, 2023

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C. Kauffman

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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PENNSYLVANIA STATE CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

Case No.

1:22-cv-00339-SPB

vs.

LEIGH M. CHAPMAN, In Her Official Capacity as Acting
Secretary of the Commonwealth, et al.,

Defendants.

- and -

EAKIN, et al.,

Plaintiffs,

Case No.

1:22-cv-00340

vs.

ADAMS COUNTY BOARD OF ELECTIONS, et al.,

Defendants.
-----x

REMOTE VIDEOTAPED DEPOSITION OF

CODY L. KAUFFMAN

30(b)(6): Berks County Board of Elections
Jefferson Hills, Pennsylvania

February 17, 2023

Reported by:

THOMAS A. FERNICOLA, RPR

JOB NO. 222619

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C. Kauffman

Wednesday, February 15, 2023

9:35 a.m.

REMOTE VIDEOTAPED DEPOSITION of CODY L.
KAUFFMAN, held before Thomas A. Fernicola, a Registered
Professional Reporter and Notary Public of the State of
New York.

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C. Kauffman

A P P E A R A N C E S:

(All Attendees Appearing Via Videoconference and/or
Telephonically)

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1:22-cv-00340

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C. Kauffman

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C. Kauffman

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C. Kauffman

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ALSO PRESENT:

MARK VON LANKEN, Videographer.

DANIEL OSHER, ESQ.

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C. Kauffman

THE VIDEOGRAPHER:

Good morning. My name is Mark Von Lancken. I'm a legal videographer in association with TSG Reporting.

Because this is a remote deposition, I will not be in the same room as the witness. I will be recording this videotaped deposition remotely.

The reporter, Tom Fernicola, also will not be in the same room and will swear the witness remotely.

Do all parties stipulate to the validity of this video recording and remote swearing, and that it will be admissible in the courtroom following Rule 30 of the Federal Rules of Civil Procedure and the State's rules where this case is pending?

As we agreed before going on the record, if any party objects to this remote deposition, please state your objection now.

Thank you.

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C. Kauffman

This is the start of Media
labeled No. 1 of the video-recorded
deposition of Cody L. Kauffman 30(b)(6)
in the matter Pennsylvania state
conference of the NAACP, et al. versus
Leigh M. Chapman, et al., in the United
States District Court for the Western
District of Pennsylvania.

This deposition is being held
remotely on Friday, February 17, 2023,
at approximately 9:36 a.m. Eastern Time
zone.

All counsel will be noted on the
stenographic record.

Will the court reporter please
swear in the witness.

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C. Kauffman

CODY L. KAUFFMAN,
called as a witness, having been duly
sworn by a Notary Public, was examined
and testified as follows:

BY THE REPORTER:

Q Please state your name and
address for the record.

A Cody L. Kauffman,
K-a-u-f-f-m-a-n, and the appropriate
address will be 366 Court Street,
14th Floor, Reading, Pennsylvania 19601.

BY MS. KEENAN:

Q Good morning. Thanks for being
here today.

My name is Megan Keenan. I'm an
attorney with the ACLU, and I'm part of
team of attorneys that represents the
plaintiffs in the NAACP case that's
Docket 122CV339.

Mr. Kauffman, have you ever been
deposed before today?

A I have.

Q How many times?

A I believe I've been deposed only

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C. Kauffman

Thursday, but the following Thursday.

Q And any decision that's made on that will happen in a public meeting; is that right?

A Regarding the counting of undated or incorrectly dated ballots?

Q Yes.

A Yes, that will be discussed and decided in a public meeting.

Q Okay, thank you for clarifying that.

I now want to talk about how this envelope dating requirement was administered with respect to UOCAVA ballots in Berks County.

So sometimes absentee ballots or military overseas ballots -- you're familiar with the differences in those categories of ballots; is that right?

A Generally, yes.

Q In the responses to plaintiff's written discovery, Berks County indicated that it received 146 mail ballots from UOCAVA voters.

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C. Kauffman

Does that number sound right to
you?

A It does, yes.

Q In deciding whether to count
those ballots, did Berks County review the
outer return envelope that contained the
ballot?

A For military and overseas
ballots?

Q Yes.

A I believe that staff would have,
yes.

Q When election officials were
reviewing the outer return envelope for the
military overseas ballots, were they
reviewing the voter's handwritten date in
writing whether to count those ballots?

A I can't say for certain. I
didn't observe the process personally.

I assume they would have, but we
did not have any, to our knowledge,
misdated or undated military or civilian
overseas ballots for the 2022 General
Election.

1 C. Kauffman

2 Q I wanted to make sure
3 Berks County submitted a response related
4 to Interrogatory 16, which I can pull up on
5 the screen that is Exhibit Berks 2.

6 I just wanted to make sure I was
7 understanding that response.

8 When Berks Board said it believed
9 it did not receive any overseas military
10 ballots that were not counted based on a
11 missing and/or incorrect date on the
12 elector's declaration on the return
13 envelope.

14 First, did I read that correctly?

15 A You did, yes.

16 Q Second, do you mean that, as far
17 as you know, Berks County didn't receive
18 any military overseas ballots that had a
19 missing or incorrect date on the return
20 envelope?

21 A Correct. I think that's fair,
22 yes.

23 Q Just to confirm, another way to
24 read that response is that Berks County
25 believes that if it received any ballots

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C. Kauffman

that were military or overseas and had a date missing, that ballot was counted.

Am I right that that's not the meaning you intended?

Let me know if that's confusing at all. I think there's just two readings of this answer.

MR. BUKOWSKI: It is. I think it was asked and answered, but I'll let him clarify.

A Yes. So my understanding is that Berks County did not receive and/or set aside any military or civilian overseas ballots had a missing date or an incorrect date.

And I believe it's fair to say that those ballots had a compliant date.

Q So when you're saying you believe you didn't set aside any such ballots, is it also true that you believe that the County didn't receive any ballots with missing or incorrect dates from the military overseas voters?

A Yes, that's fair.

1 C. Kauffman

2 Q So put another way, Berks County
3 believes it didn't have to make a call
4 regarding whether to count any military
5 overseas ballots that had missing or
6 incorrect dates on the envelope; is that
7 right?

8 A Yes, I think that's fair, yes.

9 Q I'm now going to share on my
10 share Exhibit Berks 5, which is that
11 initial production containing a bunch of
12 meeting minutes.

13 I'm going to go all the way down
14 toward the end of that production to the
15 page that's Bates-stamped Berks 0042.

16 I note it's oriented the wrong
17 way, so I'm going to scroll a little bit
18 when I ask you to review it.

19 This is the Berks production of
20 the blank UOCAVA voter declaration that
21 appears on the back of the return envelope;
22 is that right?

23 A Yes.

24 Q You can see that at the bottom of
25 the page here, there's an arrow with the

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C. Kauffman

instruction to sign and date here, right?

A Yes.

Q And you can see -- sorry, it just went away on my screen.

Can you still see it or has it gone blank? Okay, there it is, I see it.

You would agree that that same line also includes a spot to sign your name here?

A Yes.

Q And to print your name here?

A Yes.

Q And then to include a date; is that right?

A Correct, yes.

Q You also provided us with a copy of the instructions that you provided to the UOCAVA voters; is that right?

A That is correct.

Q That's on page that's Bates-stamped Berks 00038. You can see those instructions on your screen now?

A Yes.

Q So those instructions to UOCAVA

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C. Kauffman

voters, and I'm focusing on 6A right now,
it says:

"Fill out the absentee elector's
declaration on the back of this envelope
with your name and address."

Did I read that correctly?

A Yes.

Q It says:

"Be sure to sign where indicated.
Your ballot will not be counted without a
signature."

Right?

A Correct.

Q It does give a date by which the
ballot has to be mailed no later than and
received no later than, right?

A Yes.

Q But nowhere on the instructions
to the UOCAVA voters does it say that the
ballot wouldn't be counted without a date,
does it?

A On those instructions, no.

MS. KEENAN: I think we can go
off the record.

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C. Kauffman

Again, I believe that I'm done with my questioning for now, but I want to check in with my team quickly before I pass the deposition over to the Eakin plaintiff.

THE VIDEOGRAPHER: We are off the record. The time is 11:23 a.m.

(Recess taken from 11:23 a.m. to 11:27 a.m.)

THE VIDEOGRAPHER: We are on the record. The time is 11:27 a.m.

MS. KEENAN: Thanks so much, Mr. Kauffman. That's all from the 339 Plaintiffs for now.

And we're happy to pass the deposition over to the 340 Plaintiffs from the Eakin case.

THE WITNESS: Thank you.

BY MR. COHEN:

Q Good morning, I'm Dan Cohen. I'm representing the plaintiffs in the Eakin case. I only have a few questions for you.

MR. COHEN: But before I get into it, I just want to state for the record



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

PENNSYLVANIA STATE	:	
CONFERENCE OF THE NAACP, <i>et al.</i> ,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 1:22-cv-00339-SPB
v.	:	
	:	
LEIGH M. CHAPMAN, in her official	:	
capacity as Acting Secretary of the	:	
Commonwealth, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**RESPONSES OF DEFENDANT BERKS COUNTY BOARD OF ELECTIONS TO
PLAINTIFFS' FIRST SET OF INTERROGATORIES**

Pursuant to Fed. R. Civ. P. 33(b), defendant Berks County Board of Elections (“Berks Board”), by and through its attorneys, Smith Bukowski, LLC, responds to Plaintiffs’ First Set of Interrogatories as follows:

1. State how many mail ballots and how many military-overseas ballots voters returned to You for the 2022 General Election.

ANSWER: Berks Board received a total of 28,829 mail ballots. Included in that number were 146 military-overseas ballots. Mail ballots net of military-overseas would be 28,683. These numbers do not include any mail ballots set aside because of missing and/or incorrect dates on their outer return envelopes.

2. State how many mail ballots You received in connection with the 2022 General Election that were signed and timely received but set aside and/or segregated because they lacked a handwritten date on the outer return envelope or showed a date on the outer return envelope that You deemed to be incorrect. If you allowed voters to correct or cure the envelope-date issue, specify whether your response includes ballots that were ultimately corrected or cured.

ANSWER: Berks Board objects to the phrase “deemed to be incorrect.” Berks Board did not “deem” any dates to be incorrect. Rather, dated ballots were processed in accordance with the Pennsylvania Supreme Court’s November 5, 2022 supplemental Order in *Ball v. Chapman*. Berks Board’s records show that there was a total of 782 ballots set aside because of missing and/or incorrect dates on their outer return envelopes. This number does not include any ballots for which the voter appeared in person and timely corrected the date. Berks Board does not have information on the number of timely corrected ballots.

3. Identify and describe how you determined if a date on a mail ballot outer return envelope was “incorrect.”

ANSWER: Berks Board followed the Pennsylvania Supreme Court’s November 5, 2022 supplemental Order in *Ball v. Chapman*.

4. State the date on which you began sending the mail ballot packages to voters?

ANSWER: Berks Board began sending mail ballot packages to voters October 7, 2022.

5. State whether you opened and/or counted mail ballots where the handwritten date on the return envelope was after September 19, 2022, but before the date on which you began sending the mail ballot package to voters.

ANSWER: Yes, in accordance with the Pennsylvania Supreme Court’s November 5, 2022 supplemental Order in *Ball v. Chapman*.

6. State whether you opened and/or counted absentee ballots where the handwritten date on the return envelope was after August 30, 2022, but before the date on which you began sending the mail ballot package to voters.

ANSWER: Yes. Berks Board incorporates its response to Interrogatory 5 above as though set forth at length here.

7. Identify, by name, birthdate, address, party affiliation and any other demographic information available to you, the voters whose timely received mail ballots You set aside and/or segregated because they were received in signed outer return envelopes that lacked a handwritten date or showed a date on the voter declaration that You deemed to be incorrect. In responding to this Interrogatory, state the specific reason why each ballot was set aside and, if You allowed voters to correct or cure the date issue, specify whether each voter was able to correct or cure the issue.

ANSWER: Berks Board objects to Interrogatory 7 on the ground that the requested voters' personal identifying information is not relevant to the claims or defenses at issue in this action or, if relevant, is not proportional to the needs of the case considering the factors set forth in Fed. R. Civ. P. 26(b)(1). The requested voters' personal identifying information does not make Plaintiffs' claims more or less likely to succeed. The requested voters' personal identifying information does not impact Plaintiffs' claims; the only fact that is relevant is the number of mail-in/absentee/military-overseas ballots, if any, that county boards of elections disqualified and/or excluded from their vote totals in the 2022 General Election solely on the basis that those ballots' outer return envelopes were undated or incorrectly dated in accordance with the Pennsylvania Supreme Court's orders in *Ball v. Chapman*. Berks Board also objects to Interrogatory 7 to the extent that providing the requested voters' personal identifying information risks violating the law. *See, e.g.*, 25 P.S. § 2648 (governing public inspection of election records); 25 Pa. C.S. § 1404 (publicly released information "may not contain" signatures or certain other information regarding registered elector); 4 Pa. Code § 183.14(c)(1) (signatures and certain other information of voter registrants or applicants "may not be made available for public inspection or photocopying"); 25 P.S. § 3146.9 ("no proof of identification shall be made public"); 25 P.S. § 3150.17 (same).

On Thursday, January 19, 2023, the Office of the Attorney General, which represents Acting Secretary of the Commonwealth Chapman in this action, sent an email to counsel for the county boards of elections and Plaintiffs stating that it is the Department of State's position that, regardless of the entry of a protective order, county boards of elections must redact from any ballot return envelopes produced in response to Plaintiffs' document requests all voters' personal identifying information (including voters' names and addresses that may be printed on the envelopes or accessible through barcodes printed on the envelopes), citing *Pennsylvania State Educ. Ass'n v. Commonwealth Dep't of Cmty. & Econ. Dev.*, 148 A.3d 142, 157-158 (Pa. 2016), and *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 733 (Pa. 2020). Extrapolating the Department's position regarding redaction of voters' personal identifying information on ballot return envelopes to Plaintiffs' request in Interrogatory 7 for voters' personal identifying information, Berks Board believes that providing the requested voters' personal identifying information could violate not only 25 P.S. § 2648 but also the Department's (and Attorney General's) position and the legal authority that forms the basis of that position.

Accordingly, Berks Board will not provide the requested voters' personal identifying information unless and until Berks Board can be certain that providing the requested information will not put Berks Board and its agents (including its counsel) in jeopardy of violating the law or facing charges that it and its agents violated the law.

8. Did any mail ballots described in Interrogatory 2 have any other defects, besides a missing or incorrect handwritten date on the outer return envelope, that would cause You not to count them? If so, state how many such mail ballots had an additional defect, describe those defects, and identify the voters whose timely received mail ballots had such additional defect(s).

ANSWER: If a returned ballot was not in compliance with the requirements set forth in *Ball v. Chapman*, it was set aside, segregated, and preserved, as required by the Pennsylvania Supreme Court's Orders. It is possible some of those ballots could have had additional defects, such as being a naked ballot (missing the secrecy envelope) that would have precluded it from being counted, but Berks Board does know due to the segregation/preservation requirements within the Supreme Court's Orders.

9. Did You determine that any voters who sent timely mail ballots described in Interrogatory 2 were not qualified, eligible voters? If so, describe how you determined such voters to be ineligible and identify, for each such voter, the basis for ineligibility.

ANSWER: The term "qualified, eligible voters" is broad and vague; without further clarification, it is difficult to answer this Interrogatory with a simple "yes" or "no" response. If a returned ballot was not in compliance with the requirements set forth in *Ball v. Chapman*, it was set aside, segregated, and preserved, as required by the Pennsylvania Supreme Court's Orders. Berks Board did not undertake a subsequent review to determine voter eligibility/qualifications.

10. State whether You or any of Your agents identified or raised any credible fraud concerns specifically as to any individual mail ballot described in Interrogatory 2. If so, describe the nature of such fraud concerns.

ANSWER: The term "credible fraud concerns" is broad and vague; without further clarification, it is difficult to answer this Interrogatory with a simple "yes" or "no" response. If a returned ballot was not in compliance with the requirements set forth in *Ball v. Chapman*, it was set aside, segregated, and preserved, as required by the Pennsylvania Supreme Court's Orders. Berks Board did not undertake a subsequent review to determine if there were "credible fraud concerns," as Berks Board understands that term. Berks Board is not presently aware of any issues of potential fraud related to any of these ballots.

11. Did You provide notice to voters whose timely received mail ballots were set aside and/or segregated because the signed outer return envelope was missing a date or showed a date that You determined to be incorrect? If so, identify and describe how and when you notified voters of missing or incorrect dates on the signed outer return envelope.

ANSWER: Berks Board does not have a “notice and cure” procedure; however, the Berks Board discussed this issue at a public meeting and issued a press release stating that voters would be permitted to come in and cure their ballots because the Orders in *Ball v. Chapman* were issued days before the 2022 General Election. Prior to that, Berks Board had planned to count undated and incorrectly dated ballots pursuant to the Commonwealth Court’s August 2022 Order in *Chapman v. Berks County*. As such, some voters (who may have previously returned undated/misdated ballots) received notice that their ballots were received (and would be counted), only to have that notice be reversed by the Supreme Court’s Orders in *Ball v. Chapman*. The Board felt this was a unique situation, was unfair to those voters, and therefore allowed voters the opportunity to correct the issue in this limited circumstance despite not otherwise having a formal “notice and cure” procedure.

12. Did You provide mail ballot voters described in Interrogatory 11 with an opportunity to correct or cure the identified issues with dating the outer return envelope? If so, identify and describe the cure methods offered and how you instructed notified voters to cure any missing or incorrect date issues.

ANSWER: Yes, voters were able to come into the Office of Election Services and review and cure their mail-in/absentee ballots.

13. If you provided notice and an opportunity to cure as described in Interrogatories 11 and 12, how many mail ballot voters cured their envelope date issue?

ANSWER: Berks Board did not track that information, as cured ballots were then placed in the “general population” of ballots received that did not have deficiencies, and new ballots with a date deficiencies continued to be received. The undated and incorrectly dated ballot numbers fluctuated on a daily basis and were not otherwise tracked.

14. Do You contend that the handwritten date is material in determining whether a mail ballot voter is qualified to vote in the election in which they have cast a ballot? If so, what is the basis for that contention?

ANSWER: Under the Pennsylvania Supreme Court’s November 1, 2022 Order in *Ball v. Chapman* (102 MM 2022), Berks Board and the other county boards of elections were required to refrain from counting and including in the vote totals absentee or mail-in ballots with undated or incorrectly dated return envelopes. The Court’s November 5, 2022 supplemental Order further defined an “incorrectly dated ballot” as (1) mail-in ballot outer envelopes with dates that fall outside the range of September 19, 2022 through November 8, 2022, and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022 through November 8, 2022. Accordingly, in those instances, Berks Board did not use the date to determine or confirm a voter’s “eligibility” to the extent that term means qualification to vote or cast a ballot in that election; however, voters who returned ballots without any date on the outer return envelope, or dates that fell outside of the range defined by the Pennsylvania Supreme Court’s supplemental Order were not disqualified or prohibited from voting or “disenfranchised” as alleged in Plaintiffs’ Amended Complaint. Rather, their ballots were disqualified or not “eligible” to be counted, and thus were not counted, because the voter failed to cast their ballot in accordance with the mandatory voting requirements as interpreted by the Pennsylvania Supreme Court.

Accordingly, it is Berks Board’s contention that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), is not implicated by the dating requirement because the dating of the outer return envelope is not used to determine voters’ qualifications or eligibility to vote in any election and thereby exclude or preclude a voter from voting in any election. To the contrary, voters who return ballots with an undated or incorrectly dated outer return envelope have exercised their right to vote; however, their ballots are disqualified for not complying with the requirements of the Pennsylvania Election Code as interpreted by the Pennsylvania Supreme Court in *Ball v. Chapman*.

15. Did You count timely-received military-overseas ballots in the 2022 General Election if the voter failed to date their voter declaration or included a date that You deemed to be incorrect? If so, state how many such military-overseas ballots You counted. If not, state how many such military-overseas ballots You set aside and/or segregated due to missing or purportedly-incorrect dates on the outer return envelopes.

ANSWER: Berks Board believes it did not receive any military-overseas ballots that were not counted based on a missing and/or incorrect date on the elector’s declaration on the return envelope.

16. Identify, by name, birthdate, address, party affiliation and any other demographic information available to you, the voters who timely submitted military-overseas ballots but failed to date their voter declaration or included a date that You deemed to be incorrect.

ANSWER: Berks Board incorporates by reference its objections to Interrogatory 7 as though set forth at length here. Subject to and without waiving those objections, Berks Board does not have any responsive information requested in Interrogatory 16. See Berks Board's response to Interrogatory 15, which is incorporated by reference as though set forth at length here.

17. Did the military-overseas ballots described in Interrogatory 15 have any other defects, besides a missing or incorrect date, that would cause You not to count them? If so, state how many such military-overseas ballots had an additional defect, describe those defects, and identify the voters whose timely received military-overseas ballots had such additional defect(s).

ANSWER: Not applicable. See Berks Board's response to Interrogatory 15, which is incorporated by reference as though set forth at length here.

18. Did You determine that any voters who sent timely military-overseas ballots described in Interrogatory 15 were not qualified, eligible voters? If so, describe how you determined such voters to be ineligible and identify, for each such voter, the basis for ineligibility.

ANSWER: Not applicable. See Berks Board's response to Interrogatory 15, which is incorporated by reference as though set forth at length here.

19. State whether You or any of Your agents identified or raised any credible fraud concerns specifically as to any of the military-overseas ballots described in Interrogatory 15. If so, describe the nature of such fraud concerns.

ANSWER: Not applicable. See Berks Board's response to Interrogatory 15, which is incorporated by reference as though set forth at length here.

20. If You did not count the timely received military-overseas ballots described in Interrogatory 15, did you provide notice to the voters whose military-overseas ballots were set aside and/or segregated because the voter failed to date their voter declaration or included a date that You determined to be incorrect? If so, identify and describe how and when you notified those voters.

ANSWER: Not applicable. See Berks Board's response to Interrogatory 15, which is incorporated by reference as though set forth at length here.

21. If You did not count the timely received military-overseas ballots described in Interrogatory 15, did You provide the voters who submitted such military-overseas ballots with any opportunity to correct or cure the identified issues with the date? If so, identify and describe the cure methods offered and how you instructed notified voters to cure any date issues.

ANSWER: Not applicable. See Berks Board's response to Interrogatory 15, which is incorporated by reference as though set forth at length here.

22. If you provided notice and an opportunity to cure as described in Interrogatories 20 and 21, how many military-overseas voters cured their date issue?

ANSWER: Not applicable. See Berks Board's response to Interrogatory 15, which is incorporated by reference as though set forth at length here.

Dated: January 20, 2023

SMITH BUKOWSKI, LLC

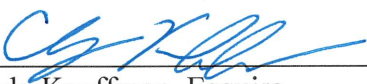
By: /s/ Jeffrey D. Bukowski
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Attorneys for Berks County Board of Elections

VERIFICATION

I, Cody Kauffman, Esquire, verify that the factual responses set forth in the foregoing Answers to Plaintiff's Interrogatories are true and correct to the best of my knowledge, information, and belief, or based on a review of publicly available documents or records readily available to me. I also understand that false statements herein are made subject to the penalties of 18 P.S. § 4904 relating to unsworn falsification to authorities.

Dated: January 20, 2023



Cody Kauffman, Esquire

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

PENNSYLVANIA STATE	:	
CONFERENCE OF THE NAACP, <i>et al.</i> ,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 1:22-cv-00339-SPB
v.	:	
	:	
LEIGH M. CHAPMAN, in her official	:	
capacity as Acting Secretary of the	:	
Commonwealth, <i>et al.</i> ,	:	
	:	
Defendants.	:	

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and LCvR 5.6, the undersigned hereby certifies that the foregoing document was served by electronic mail on all counsel of record on the below date.

Dated: January 20, 2023

SMITH BUKOWSKI, LLC

By: /s/ Jeffrey D. Bukowski
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Attorneys for Berks County Board of Elections

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

PENNSYLVANIA STATE	:	
CONFERENCE OF THE NAACP, <i>et al.</i> ,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 1:22-cv-00339-SPB
v.	:	
	:	
AL SCHMIDT, <i>et al.</i> ,	:	
	:	
Defendants.	:	ELECTRONICALLY FILED
	:	

[PROPOSED] ORDER

AND NOW, this ____ day of _____, 2024, upon consideration of the motion for summary judgment and supporting brief filed by Defendant Berks County Board of Elections, any responses thereto, and other matters of record, it is hereby ORDERED that Berks County’s motion for summary judgment is GRANTED, and all claims against the Berks County Board of Elections are DISMISSED WITH PREJUDICE.

BY THE COURT:

HONORABLE SUSAN PARADISE BAXTER, J.

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

PENNSYLVANIA STATE	:	
CONFERENCE OF THE NAACP, <i>et al.</i> ,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 1:22-cv-00339-SPB
v.	:	
	:	
AL SCHMIDT, <i>et al.</i> ,	:	
	:	
Defendants.	:	ELECTRONICALLY FILED
	:	

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and LCvR 5.6, the undersigned hereby certifies that the foregoing document was electronically filed on the below date with the Court’s CM/ECF system, which transmitted a Notice of Electronic Filing of the filed document on counsel of record and/or each party in the case who is registered as a Filing User.

Dated: May 29, 2024

SMITH BUKOWSKI, LLC

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