

**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, in his official capacity as	:	
Secretary of the Commonwealth, <i>et al.</i> ,	:	
	:	
Defendants.	:	ELECTRONICALLY FILED
	:	

**ANSWER OF DEFENDANT BERKS COUNTY BOARD OF ELECTIONS’ TO
SECOND AMENDED COMPLAINT**

Defendant Berks County Board of Elections (“Berks Board”), by its undersigned attorneys, answers Plaintiffs’ Second Amended Complaint dated June 14, 2024 (doc. 413), as follows:

1. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of Plaintiffs’ Second Amended Complaint; thus, those allegations are deemed denied.

2. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of Plaintiffs’ Second Amended Complaint regarding the counting of ballots cast in the 2022 election by the Acting Secretary of the Commonwealth or other county boards of elections; thus, those allegations are deemed denied. As to the actions of Berks Board in counting absentee and/or mail-in ballots cast in the 2022 election, Berks Board denies that it refused to count thousands of absentee and/or mail-in ballots based on a missing or incorrect date on the elector’s declaration on the outer return envelope. To the contrary, there were only a few hundred such ballots. Berks Board denies the remaining

allegations in Paragraph 2 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board's actions regarding the counting of absentee and/or mail-in ballots with missing or incorrect dates on the elector's declaration were based on the orders of the Pennsylvania Supreme Court interpreting the Pennsylvania Election Code on the counting of such ballots.

3. Berks Board denies the allegations in Paragraph 3 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board's actions regarding the counting of absentee and/or mail-in ballots with missing or incorrect dates on the elector's declaration do not violate the Equal Protection Clause of the United States Constitution by imposing arbitrary distinctions between different mail ballot voters that are unsupported by legitimate government interests. Berks Board's actions regarding the counting of absentee and/or mail-in ballots with missing or incorrect dates on the elector's declaration do not violate the First and Fourteenth Amendments to the U.S. Constitution by imposing an undue or justified burden on the right to vote. Moreover, Berks Board's actions were based on the orders of the Pennsylvania Supreme Court interpreting the Pennsylvania Election Code on the counting of such ballots.

4. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

5. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

6. Denied. Berks Board denies the allegation in Paragraph 6 of Plaintiffs' Second Amended Complaint as a conclusion of law.

RESPONSE TO ALLEGATIONS OF JURISDICTION AND VENUE

7. Denied. Berks Board denies the allegations in Paragraph 7 of Plaintiffs' Second Amended Complaint as conclusions of law.

8. Denied. Berks Board denies the allegations in Paragraph 8 of Plaintiffs' Second Amended Complaint as conclusions of law.

9. Denied. Berks Board denies the allegation in Paragraph 9 of Plaintiffs' Second Amended Complaint as a conclusion of law.

10. Denied. Berks Board denies the allegations in Paragraph 10 of Plaintiffs' Second Amended Complaint as conclusions of law.

RESPONSE TO ALLEGATIONS ABOUT THE PARTIES

11. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

12. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

13. Denied. Berks Board denies the allegation in Paragraph 13 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope will disenfranchise potentially thousands of voters. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to record the correct date on the elector's declaration on the outer return envelope constitutes a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the

Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 13 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

14. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

15. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

16. Denied. Berks Board denies the allegation in Paragraph 16 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope will disenfranchise potentially thousands of voters. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to record the correct date on the elector's declaration on the outer return envelope constitutes a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations

in Paragraph 16 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

17. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

18. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 18 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

19. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 19 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

20. Denied. Berks Board denies the allegation in Paragraph 20 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope has the effect of disenfranchising eligible electors. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to record the correct date on the elector's declaration on the outer return envelope constitutes a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations

in Paragraph 20 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

21. Denied. Berks Board denies the allegation in Paragraph 21 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope risks disenfranchising eligible electors. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to record the correct date on the elector's declaration on the outer return envelope constitutes a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 21 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

22. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

23. Denied. Berks Board denies the allegation in Paragraph 23 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope disenfranchises eligible electors. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to record the correct date on the elector's declaration on

the outer return envelope constitutes a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 23 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

24. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

25. Denied. Berks Board denies the allegation in Paragraph 25 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope disenfranchises eligible electors. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to record the correct date on the elector's declaration on the outer return envelope constitutes a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 25 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

26. Denied. Berks Board denies the allegation in Paragraph 26 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely

on a missing or incorrect date on the elector's declaration on the outer return envelope risks disenfranchising eligible electors. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to record the correct date on the elector's declaration on the outer return envelope constitutes a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 26 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

27. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 27 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

28. Denied. Berks Board denies the allegation in Paragraph 28 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope will disenfranchise potentially thousands of voters. To the contrary, an elector who fails to record the correct date on the elector's declaration on the outer return envelope constitutes a failure by an elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the

remaining allegations in Paragraph 28 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

29. Paragraph 29 was left intentionally blank by Plaintiffs; therefore, no response is required.

30. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 30 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

31. Paragraph 31 was left intentionally blank by Plaintiffs; therefore, no response is required.

32. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

33. Paragraph 33 was left intentionally blank by Plaintiffs; therefore, no response is required.

34. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 34 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

35. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 35 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

36. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 36 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

37. Admitted in part, denied in part. In response to Paragraph 37 of Plaintiffs' Second Amended Complaint, Berks Board admits only the allegations that Secretary Schmidt's duties are defined by statute, and that Secretary Schmidt's and/or his predecessors have issued written guidance to county boards of elections for the 2022 general election regarding tabulation of timely received absentee and mail-in ballots determined to have a missing or incorrect date on the elector's declaration on the outer return envelope. Upon information and belief, Secretary Schmidt's and/or his predecessors' written guidance was issued pursuant to orders by the Pennsylvania Supreme Court. Berks Board respectfully refers the Court to Secretary Schmidt's and/or his predecessors' written guidance as the best evidence of its contents. Berks Board denies the remaining allegation in Paragraph 37 of Plaintiffs' Second Amended Complaint conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, including Secretary Schmidt and his predecessors, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

38. Admitted in part, denied in part. In response to Paragraph 38 of Plaintiffs' Second Amended Complaint, Berks Board admits only the allegation that it was created pursuant to the Pennsylvania Election Code. Berks Board denies the remaining allegations in Paragraph 38 of Plaintiffs' Second Amended Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, including Berks Board and the other county boards of elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

RESPONSE TO ALLEGATIONS OF FACTS

Response to alleged facts regarding Pennsylvania's mail ballot rules

39. Admitted in part, denied in part. In response to Paragraph 39 of Plaintiffs' Second Amended Complaint, Berks Board admits only the allegations that Pennsylvania law has for many years permitted electors who meet certain criteria to cast absentee ballots, and that new mail-in voting provisions were enacted into law in 2019. Berks Board denies the remaining allegations in Paragraph 39 of Plaintiffs' Second Amended Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

40. Denied. Berks Board denies the allegations in Paragraph 40 of Plaintiffs' Second Amended Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

41. Denied. Berks Board denies the allegations in Paragraph 41 of Plaintiffs' Second Amended Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

42. Denied. Berks Board denies the allegations in Paragraph 42 of Plaintiffs' Second Amended Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections,

and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

43. Denied. Berks Board denies the allegations in Paragraph 43 of Plaintiffs' Second Amended Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

44. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 44 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

45. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 45 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

Response to alleged facts regarding litigation over the envelope-date requirement

46. Denied. Berks Board denies the allegations in Paragraph 46 of Plaintiffs' Second Amended Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

47. Denied. Berks Board denies the allegations in Paragraph 47 of Plaintiffs' Second Amended Complaint as conclusions of law.

48. Denied. Berks Board denies the allegations in Paragraph 48 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058

(Pa. Nov. 23, 2020), as the best evidence of the factual findings and legal conclusions of the Court in that case.

49. Denied. Berks Board denies the allegations in Paragraph 49 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. Nov. 23, 2020), as the best evidence of the factual findings and legal conclusions of the Court in that case.

50. Denied. Berks Board denies the allegations in Paragraph 50 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

51. Denied. Berks Board denies the allegations in Paragraph 51 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

52. Denied. Berks Board denies the allegations in Paragraph 52 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

53. Denied. Berks Board denies the allegations in Paragraph 53 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

54. Denied. Berks Board denies the allegations in Paragraph 54 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 C.D. 2021, 272 A.3d 989 (Table), 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied*, 271 A.3d 1285 (Pa. 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

55. Denied. Berks Board denies the allegations in Paragraph 55 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

56. Denied. Berks Board denies the allegations in Paragraph 56 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to the pleadings in *Ritter v. Migliori*, No. 21A772, as the best evidence of the parties' claims in that case.

57. Denied. Berks Board denies the allegations in Paragraph 57 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to *Ritter v. Migliori*, No. 21A772, 142 S. Ct. 1824 (Mem.) (U.S. Jun. 9, 2022) (Alito, J., dissenting), as the best evidence of the factual findings and legal conclusions of the Court in that case.

58. Denied. Berks Board denies the allegations in Paragraph 58 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to the decision in *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022) and *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112 (Pa. Commw. Ct. Jun. 2, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

59. Admitted in part, denied in part. In response to the allegations in Paragraph 59 of Plaintiffs' Second Amended Complaint, Berks Board admits only the allegation that after the *Chapman v. Berks Cty. Bd. of Elections* and *McCormick v. Chapman* decisions, Acting Secretary Chapman issued written guidance and statements regarding the 2022 general election that, upon information and belief, conformed to the Commonwealth Court's rulings. Meanwhile, other cases raising the same issues were brought before the Pennsylvania Supreme Court. Berks Board denies the remaining allegations in Paragraph 59 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to Acting Secretary Chapman's written guidance and statements as the best evidence of their contents.

60. Denied. Berks Board denies the allegations in Paragraph 60 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to the petition filed with the Pennsylvania Supreme Court in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], as the best evidence of the petitioners' claims in that case.

61. Denied. Berks Board denies the allegations in Paragraph 61 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to the Pennsylvania Supreme Court's order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), as the best evidence of the Court's order in that case.

62. Admitted in part, denied in part. In response to the allegations in Paragraph 62 of Plaintiffs' Second Amended Complaint, Berks Board admits only the allegation that Department of State Deputy Secretary for Elections and Commissions Jonathan Marks sent an email to county boards of elections on November 1, 2022, at approximately 6:50 PM, after issuance of the Pennsylvania Supreme Court's order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), and that a true and correct copy of Deputy Secretary

Marks's November 1, 2022 email is attached as Exhibit I to Plaintiffs' Second Amended Complaint. Berks Board denies the remaining allegations in Paragraph 62 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to the November 1, 2022 email sent by Deputy Secretary Marks as the best evidence of its contents.

63. Admitted in part, denied in part. In response to the allegations in Paragraph 63 of Plaintiffs' Second Amended Complaint, Berks Board admits only the allegation that Acting Secretary Chapman issued new written guidance to county boards of elections on November 3, 2022, after issuance of the Pennsylvania Supreme Court's order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), and that a true and correct copy of Acting Secretary Chapman's November 3, 2022 written guidance is attached as Exhibit J to Plaintiffs' Second Amended Complaint. Berks Board denies the remaining allegations in Paragraph 63 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to Acting Secretary Chapman's November 3, 2022 written guidance as the best evidence of its contents.

64. Admitted in part, denied in part. In response to the allegations in Paragraph 64 of Plaintiffs' Second Amended Complaint, Berks Board admits only that the Pennsylvania Supreme Court issued a supplemental order on November 5, 2022 in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], and that a true and correct copy of the Court's supplemental order is attached as Exhibit K to Plaintiffs' Second Amended Complaint. Berks Board denies the remaining allegations in Paragraph 64 of Plaintiffs' Second Amended Complaint as conclusions of law. Berks Board respectfully refers the Court to the Pennsylvania Supreme Court's November 5, 2022 supplemental order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], as the best evidence of its contents.

Response to alleged facts regarding Pennsylvania's 2022 general election

65. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 65 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

66. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 66, including subparagraphs 66(a) through 66(p), of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

67. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 67 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

68. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 68 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

69. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 69 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

70. Denied. Berks Board denies the allegation in Paragraph 70 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope will disenfranchise eligible voters. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the

tabulation of votes for that election. Berks Board also denies the allegations in Paragraph 70 of Plaintiffs' Second Amended Complaint as conclusions of law.

71. Denied. Berks Board denies the allegations in Paragraph 71 of Plaintiffs' Second Amended Complaint characterizing the litigation over the past year as conclusions of law. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 71 of Plaintiffs' Second Amended Complaint regarding the individual voter Plaintiffs; thus, those allegations are deemed denied.

72. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 72 of Plaintiffs' Second Amended Complaint; thus, those allegations are deemed denied.

73. Denied. Berks Board denies the allegation in Paragraph 73 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope disenfranchises eligible voters. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board also denies the allegations in Paragraph 73 of Plaintiffs' Second Amended Complaint as conclusions of law.

74. Denied. Berks Board denies the allegation in Paragraph 74 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope

disenfranchises eligible voters. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board also denies the allegations in Paragraph 74 of Plaintiffs' Second Amended Complaint as conclusions of law.

RESPONSE TO PLAINTIFFS' CLAIMS FOR RELIEF

**Count I: Alleged Violation of the Materiality Provision of the Civil Rights Act
(52 U.S.C. § 10101(a)(2)(B), 42 U.S.C. § 1983)**

75. Paragraph 75 of Plaintiffs' Second Amended Complaint is an incorporation paragraph to which no response is necessary. To the extent a response is deemed to be required, Berks Board incorporates by reference its responses in Paragraphs 1 through 74 above as though set forth at length here.

76. Denied. Berks Board denies the allegations in Paragraph 76 of Plaintiffs' Second Amended Complaint as conclusions of law.

77. Denied. Berks Board denies the allegations in Paragraph 77 of Plaintiffs' Second Amended Complaint as conclusions of law.

78. Denied. Berks Board denies the allegations in Paragraph 78 of Plaintiffs' Second Amended Complaint as conclusions of law. The challenged conduct does not deny any elector the right to vote or disqualify any elector from being eligible to vote. To the contrary, the challenged conduct is the disqualification of ballots of electors who fail to comply with the requirements of the Pennsylvania Election Code, as interpreted by the Pennsylvania Supreme

Court, regarding completion of the elector's declaration on the outer return envelope of their absentee or mail-in ballot.

79. Denied. Berks Board denies the allegations in Paragraph 79 of Plaintiffs' Second Amended Complaint as conclusions of law.

80. Denied. Berks Board denies the allegations in Paragraph 80 of Plaintiffs' Second Amended Complaint as conclusions of law. The challenged conduct does not deny any elector the right to vote or disqualify any elector from being eligible to vote. To the contrary, the challenged conduct is the disqualification of ballots of electors who fail to comply with the requirements of the Pennsylvania Election Code, as interpreted by the Pennsylvania Supreme Court, regarding completion of the elector's declaration on the outer return envelope of their absentee or mail-in ballot.

81. Denied. Berks Board denies the allegations in Paragraph 81 of Plaintiffs' Second Amended Complaint as conclusions of law. The challenged conduct does not deny any elector the right to vote or disqualify any elector from being eligible to vote. To the contrary, the challenged conduct is the disqualification of ballots of electors who fail to comply with the requirements of the Pennsylvania Election Code, as interpreted by the Pennsylvania Supreme Court, regarding completion of the elector's declaration on the outer return envelope of their absentee or mail-in ballot.

82. Denied. Berks Board denies the allegation in Paragraph 82 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope will disenfranchise eligible voters. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return

envelope. That is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board also denies the allegations in Paragraph 82 of Plaintiffs' Second Amended Complaint as conclusions of law.

**Count II: Alleged Violation of the Materiality Provision of the Civil Rights Act
(52 U.S.C. § 10101(a)(2)(B), 42 U.S.C. § 1983)**

83. Paragraph 83 of Plaintiffs' Second Amended Complaint is an incorporation paragraph to which no response is necessary. To the extent a response is deemed to be required, Berks Board incorporates by reference its responses in Paragraphs 1 through 82 above as though set forth at length here.

84. Denied. Berks Board denies the allegation in Paragraph 84 of Plaintiffs' Second Amended Complaint as a conclusion of law.

85. Denied. Berks Board denies the allegations in Paragraph 85 of Plaintiffs' Second Amended Complaint as conclusions of law.

86. Denied. Berks Board denies the allegations in Paragraph 86 of Plaintiffs' Second Amended Complaint as conclusions of law. Defendants' interpretation of the Pennsylvania Election Code is not at issue here. To the contrary, at issue is the Pennsylvania Supreme Court's interpretation of the Pennsylvania Election Code, as reflected by its order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), which defendants, including Berks Board, are legally bound to follow.

87. Denied. Berks Board denies the allegation in Paragraph 87 of Plaintiffs' Second Amended Complaint that not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope

disenfranchises eligible voters. To the contrary, it is not disenfranchisement of an elector when an elector fails to record the correct date on the elector's declaration on the outer return envelope. That is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court has determined that such failure requires that elector's ballot to be set aside and not included in the tabulation of votes for that election. Berks Board also denies the allegations in Paragraph 87 of Plaintiffs' Second Amended Complaint as conclusions of law.

88. Denied. Berks Board denies the allegations in Paragraph 88 of Plaintiffs' Second Amended Complaint as conclusions of law. The challenged conduct does not disqualify any eligible elector from voting. To the contrary, the challenged conduct is the disqualification of ballots of electors who fail to comply with the requirements of the Pennsylvania Election Code, as interpreted by the Pennsylvania Supreme Court, regarding completion of the elector's declaration on the outer return envelope of their absentee or mail-in ballot.

**Count III: Rejection of Certain Ballots for Immaterial Paperwork Errors or Omissions in Violation of the First and Fourteenth Amendments of the United States Constitution
(42 U.S.C. § 1983)**

89. Paragraph 89 of Plaintiffs' Second Amended Complaint is an incorporation paragraph to which no response is necessary. To the extent a response is deemed to be required, Berks Board incorporates by reference its responses in Paragraphs 1 through 88 above as though set forth at length here.

90. Denied. Berks Board denies the allegation in Paragraph 90 of Plaintiffs' Second Amended Complaint as a conclusion of law.

91. Denied. Berks Board denies the allegation in Paragraph 91 of Plaintiffs' Second Amended Complaint as a conclusion of law. The requirement to hand-write the correct date on

the voter declaration form on the mail ballot envelope is not a burden on the exercise of the right to vote.

92. Denied. Berks Board denies the allegations in Paragraph 92 of Plaintiffs' Second Amended Complaint as conclusions of law. To the extent a response is deemed to be required, Berks Board denies the allegations in Paragraph 92 of Plaintiffs' Second Amended Complaint. To the contrary, Pennsylvania has relevant, legitimate, and sufficiently weighty interests that justify the minimal (if any) burden on voters to handwrite the correct date on the voter declaration form on the mail ballot envelope, including, without limitation, ensuring the solemnity of the declaration, preventing voter fraud, and other legitimate election-related purposes. Furthermore, this requirement does not function to disenfranchise voters.

FIRST AFFIRMATIVE DEFENSE

93. Plaintiffs' Second Amended Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

94. Plaintiffs' claims, including, without limitation, the claims for monetary relief, costs, and attorneys' fees, are barred or limited because Berks Board acted in good faith to comply with duly issued orders of the Pennsylvania Supreme Court interpreting the Pennsylvania Election Code, which Berks Board was legally bound to follow.

THIRD AFFIRMATIVE DEFENSE

95. Plaintiffs' claims are barred or limited because some or all of Plaintiffs lack standing to bring this action.

FOURTH AFFIRMATIVE DEFENSE

96. Some or all of Plaintiffs' claims may be barred by the applicable statute of limitations under the Pennsylvania Election Code or other Pennsylvania law.

FOURTH AFFIRMATIVE DEFENSE

97. Some or all of Plaintiffs' claims may be barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

98. Some or all of Plaintiffs' claims may be barred by Plaintiffs' failure to exhaust administrative remedies.

RESERVATION OF RIGHT TO ASSERT ADDITIONAL AFFIRMATIVE DEFENSES

99. Berks Board expressly reserves the right to assert additional affirmative defenses that may become apparent during the pendency of this action.

PRAYER FOR RELIEF

WHEREFORE, based on all the foregoing, Defendant Berks County Board of Elections hereby demands judgment as follows:

(a) As to Plaintiffs' claims that the Pennsylvania Election Code, as interpreted by the Pennsylvania Supreme Court, violates (a) the Materiality Provision of the federal Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B) (Count I), (b) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Count II), and (c) the First and Fourteenth Amendments to the United States Constitution (Count III), an Order dismissing with prejudice all of Plaintiffs' claims; and

(b) An Order granting all such other relief as may be warranted under the circumstances.

Respectfully submitted,

Dated: June 28, 2024

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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, in his official capacity as	:	
Secretary of the Commonwealth, <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: June 28, 2022

SMITH BUKOWSKI, LLC

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