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

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

INTERVENOR-DEFENDANTS' OPPOSITION TO
PLAINTIFFS' 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' two backup claims—their Equal Protection claim and their belated constitutional right-to-vote claim—deserve the same fate.

At the threshold, Plaintiffs lack standing to pursue these claims. This Court already held that Plaintiffs have standing to pursue their constitutional claims only against the Secretary, not the county board defendants. *See* ECF No. 347 at 33-34. But under Pennsylvania law, county boards determine whether to count a ballot—not the Secretary. Accordingly, any order against the Secretary would not redress Plaintiffs' alleged injury of county boards declining to count ballots that do not comply with the date requirement. Moreover, the organizational Plaintiffs lack standing for another reason: They attempt to ground standing on alleged resource-diversion injuries, but the Supreme Court recently held that such injuries are insufficient to satisfy Article III. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 390-93 (2024).

Plaintiffs' constitutional claims are also meritless in any event. Individual Plaintiffs' Equal Protection claim fails as a matter of law for multiple independent reasons, *see* ECF No. 398 at 6-18, as the Secretary has agreed, *see* ECF No. 298 at 22-24. For one thing, Pennsylvania law extends the date requirement to *both* domestic and military voters, so it does not treat those groups of voters differently. For another, even if there were differential treatment, domestic and military voters are not similarly situated, and States can permissibly treat those groups differently, when it comes to mail-voting rules. And any remedy under the Equal Protection Clause should require *all* county boards to enforce the date requirement, not create a patchwork across the Commonwealth where some counties are bound to enforce the requirement and others are bound *not* to enforce it.

Plaintiffs' constitutional right-to-vote claims are equally doomed as a matter of law. The Third Circuit already held that mandatory application of the date requirement does not deny any individual's "right to vote" because the date requirement is a ballot-casting rule that regulates *how* an individual exercises that right. *Pa. State Conf. of NAACP*, 97 F.4th at 135 (citing *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissental)). As the Third Circuit explained, "a voter who fails to abide by state rules prescribing how to make a vote effective is not 'denied the right to vote'" or disenfranchised "when his ballot is not counted." *Id.* at 133. That decision, *a fortiori*, forecloses Plaintiffs' right-to-vote claim and their overheated allegation that the date requirement has "disenfranchise[d]" voters who fail to comply with it, *see* ECF No. 402 at 2—a reality Plaintiffs' brief entirely ignores.

Even if the Third Circuit's decision were not dispositive, Plaintiffs' right-to-vote claim is doomed for at least three other reasons, as Intervenor-Defendants have already explained. *See* ECF No. 434 at 7-20. *First,* because Pennsylvanians can vote in person without complying with the date requirement, applying the date requirement to mail voting cannot violate the constitutional right to vote. *See id.* at 7-10. *Second*, any burden imposed by the date requirement is not remotely severe; it is at most a "usual burden[] of voting," which cannot implicate the constitutional right to vote. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.); ECF No. 434 at 10-14. *Third*, even if subjected to interest-balancing under the *Anderson-Burdick* framework, the date requirement easily passes muster because it serves as a useful backstop in election administration, promotes solemnity in voting, and helps to detect fraud. *See id.* at 15-20.

The Court should deny Plaintiffs' motion for summary judgment, grant Intervenor-Defendants' motion for summary judgment, and bring this thinly-veiled political dispute 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 seeking 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, 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.

The Court should deny Plaintiffs' motion for summary judgment and dismiss their constitutional claims at the threshold because Plaintiffs lack standing. *First*, Plaintiffs' alleged constitutional injury is *county* election officials declining to count their ballots, so their constitutional claims—which run only against *the Secretary*—are not redressable in this Court. *Second*, the organizational Plaintiffs pursue a resource-diversion theory of standing irreconcilable with recent Supreme Court precedent.

A. Plaintiffs' Claims Are Not Redressable.

This Court previously concluded that Plaintiffs may pursue their Equal Protection claims only against the Secretary, not the county boards of elections. *See* ECF No. 347 at 33-34. The same result logically follows for Plaintiffs' right-to-vote claims. *See* ECF No. 434 at 3-4. Therefore, the Secretary is the sole defendant on Plaintiffs' remaining claims.

But as Intervenor-Defendants have already explained, Plaintiffs' constitutional claims against the Secretary are not redressable. *See* ECF No. 398 at 2-5. In Pennsylvania, county boards, not the Secretary, administer elections. *Republican Nat'l Comm. v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) (slip op. at 19-20) (Exhibit A). Thus, any order of this Court directing the Secretary not to enforce the date requirement would not change the county boards' legal obligations at all. *Id.*; ECF No. 398 at 2-5. The county boards would remain bound to enforce the date requirement under *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022); any order of this Court would not bind the county boards; and the Secretary could not bind the county boards either. *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]"); ECF No. 398 at 2-5. Indeed, the Philadelphia and Allegheny County Boards of Elections recently said as much to the Pennsylvania Commonwealth Court, where they confirmed that their obligation to enforce the date requirement stems from *Ball*, not any guidance of the Secretary. *See* Statement of Position Regarding Applications for Summary Relief at 6, *Black Political Empowerment Project v. Schmidt*, 283 MD 2024 (Pa. Commw. Ct. July 8, 2024) (explaining that county boards are obligated to enforce the date requirement because they must "compl[y] with the Pennsylvania Supreme Court's order in *Ball*") (Exhibit B). The Court therefore should dismiss Plaintiffs' case for lack of standing. *See* ECF No. 398 at 2-5.

Even if the Court were to change its mind and conclude that Plaintiffs somehow do have standing to pursue their constitutional claims against the county boards that remain as defendants in this case, it still cannot order any relief here. All agree that the vast majority of Pennsylvania counties are not proper defendants before the Court. *See, e.g.*, ECF No. 402 at 14 (Plaintiffs

acknowledging that, under this Court's prior standing ruling, only 12 county boards remain in the case); ECF No. 347 at 34. All 55 of those county boards remain bound to enforce the date requirement *regardless* of any order of this Court. *See Ball*, 289 A.3d 1, 284 A.3d 1189. So any order from this Court directing the 12 defendant county boards *not* to enforce the date requirement would result in "varying standards to determine what [is] a legal vote" from "county to county." *Bush v. Gore*, 531 U.S. 98, 106-07 (2000). Such an order, therefore, would *violate*, rather than vindicate, the Equal Protection Clause. *See id.* And it would also violate the Pennsylvania Constitution's directive that "[a]ll laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform through the State." Pa. Const. art. VII, § 6; *see also Kerns v. Kane*, 69 A.2d 388, 393 (Pa. 1949) ("To be uniform in the constitutional sense, such a law must treat all persons in the same circumstances alike."); *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914) (similar). The Court should deny Plaintiffs' motion for summary judgment and dismiss this case.

B. The Organizational Plaintiffs Lack A Cognizable Injury.

The organizational Plaintiffs lack standing for another reason: They attempt to ground standing in their alleged "diversion of resources," ECF No. 402 at 15, but the Supreme Court recently closed the door on resource-diversion standing in *Alliance for Hippocratic Medicine*, 602 U.S. 367.

Alliance for Hippocratic Medicine addressed medical associations' asserted organizational standing to challenge several FDA policy decisions. *Id.* at 375-76. The plaintiffs alleged that, in response to the FDA's actions, they "expend[ed] considerable time, energy, and resources" to "inform[ing] their members and the public about," and "engaging in public advocacy and public education" around, those actions. *Id.* at 394. The plaintiffs further alleged that these expenditures required them to divert resources "to the detriment of other spending priorities" and, thus,

"impaired their ability to provide services and achieve their organizational missions." *Id.* (internal quotation marks omitted). To support this theory of standing, the plaintiffs pointed to the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *See All. for Hippocratic Med.*, 602 U.S. at 395.

The Supreme Court unanimously rejected this theory of standing. *See id.* at 394-95. As the Supreme Court reasoned, holding that resource diversion is sufficient to confer standing would effectively allow *any* organization displeased by a law to "spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Id.* at 394. Such an "expansive theory of standing" is incompatible with Article III. *Id.* at 395. And that is true even when the organization can show that its diversion of resources came at the expense of, and impaired its ability to carry out, other aspects of its organizational mission or core business activities. *See id.*

The Supreme Court thus expressly clarified that *Havens Realty* does not countenance a resource-diversion theory standing. *See id.* at 395. It specifically cautioned federal courts that *Havens Realty* is "an unusual case" that they must be "careful" "not to extend." *Id.* at 396. It further explained that the *Havens Realty* plaintiff had standing not because it was an "issue-advocacy organization" which diverted resources in response to the defendant's actions, but instead because the defendant's actions *themselves* directly interfered with the plaintiff's operation as a housing counseling service provider. *Id.* at 395. In particular, "when [the defendant] gave [the plaintiff] false information about apartment availability, … [the defendant] perceptibly impaired [the plaintiff's] ability to provide counseling and referral services" to individuals looking for apartments. *Id.* Those "actions directly affected and interfered with [the plaintiff's] core business activities," similar "to a retailer who sues a manufacturer for selling defective goods to

the retailer." *Id.* And it was this direct injury to the plaintiff's core business activity—not the plaintiff's voluntary diversion of resources away from its other activities and toward advocating against the defendant's actions—that established standing. *See id.*

Applying this rule, the Supreme Court held that the *Alliance for Hippocratic Medicine* plaintiffs lacked standing. *See id.* The challenged FDA actions had simply resulted in the plaintiffs changing their spending priorities across their various activities—a classic diversion of resources that does not satisfy Article III. *See id.* Those actions had not "imposed any similar impediment" on any of the plaintiffs' "core business activities," which they remained free to carry out on the same terms as they had done prior to the challenged actions. *Id.* Indeed, the challenged actions had not changed *anything* about how the plaintiffs operated or inhibited their ability to carry out their core business activities. *See id.*

Since *Alliance for Hippocratic Medicine*, at least two district courts have concluded that organizations lacked standing based on their alleged diversion of resources. *See Citizens Project v. Colorado Springs*, No. 1:22-cv-01365, 2024 WL 3345229 (D. Colo. July 9, 2024); *Plant Based Food Ass'n v. Stitt*, No. 20-938, 2024 WL 3106901, at *3-4 (W.D. Okla. June 24, 2024). In *Citizens Project*, for example, voting-rights organizations alleged they diverted resources to turning out voters because of a municipality's decision to host elections in years when other major elections were not happening. 2024 WL 3345229, at *3-4. The court held that those allegations were insufficient to establish standing because *Alliance for Hippocratic Medicine* "suss[ed] out" the "diversion-of-resources injury claimed by [p]laintiffs." *Id.* at *7. And the "fact that Plaintiffs [were] dedicated to serving voters [was] not enough to confer organizational standing," even if the plaintiffs had to divert resources to continue engaging in that core business activity because of the challenged law. *Id.* at *7.

Here as well, *Alliance for Hippocratic Medicine* forecloses the organizational Plaintiffs' theory of standing. Like the plaintiffs there, the organizational Plaintiffs here allege that they diverted resources in response to a challenged law, and that the diversion resulted in an impairment of their mission and core business activities. ECF No. 402 at 15 ("The Organizational Plaintiffs reassigned staff, members, and/or volunteers . . . towards responding to [the date requirement]"). Like the *Alliance for Hippocratic Medicine* plaintiffs, the organizational Plaintiffs rely on an overly broad reading of *Havens*, which the Supreme Court rejected. *Id.* at 14 (citing *Havens* and now-abrogated cases reading *Havens* broadly). Like the *Alliance for Hippocratic Medicine* plaintiffs, the organizational Plaintiffs have not even tried to prove that the date requirement "directly affected and interfered with [their] core business activities," similar "to a retailer who sues a manufacturer for selling defective goods to the retailer." 602 U.S. at 395. Instead, the organizational Plaintiffs remain free to carry out those activities on the same terms they did before they filed suit. *See id.* at 394-95. And any claimed impairment to their mission or core business activities resulting from their own diversion of resources, *see, e.g.*, ECF No. 402 at 15, does not suffice to establish standing to challenge the date requirement. *All. for Hippocratic Med.*, 602 U.S. at 394-95. The organizational Plaintiffs lack standing, so the Court should dismiss them. *See id.*

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

Even if any Plaintiff could establish standing, the Equal Protection claim is meritless, *see* ECF No. 398 at 6-18, as even the Secretary has agreed, *see* ECF No. 298 at 22-24. Plaintiffs' latest contrary arguments get them nowhere.

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

To start, Plaintiffs are wrong that the date requirement does not apply to military and overseas voters. *See* ECF No. 398 at 6-11. 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).

Searching for ambiguity, Plaintiffs latch onto Pennsylvania's version of the Uniform Military and Overseas Voting Act (UMOVA), *see* Am. Compl. ¶ 86, and in particular point to UMOVA's "mistake provision," 25 Pa. C.S. § 3515(a)(1), *see* ECF No. 402 at 20. That provision has never been cited by any judicial decision, and it does not create a *sub silentio* exception to the date requirement. Intervenor-Defendants have already explained why, under its plain text, UMOVA's mistake provision does not displace the date requirement. *See* ECF No. 398 at 6-11. Indeed, even Plaintiffs' own putative expert agreed that the date requirement applies to overseas voters. *See* ECF No. 272, SOF ¶ 155.

Even if Plaintiffs could overcome the textual holes in their argument, they simply ignore the canon of constitutional avoidance. *See* ECF No. 398 at 7. "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). At minimum, the UMOVA mistake provision can be reasonably read not to displace the date requirement. Therefore, if the Court finds the UMOVA mistake provision ambiguous, it must accept Intervenor-Defendants' reading. *See id*.

Having failed to engage with UMOVA's text or constitutional avoidance, Plaintiffs rely on the fact that "[t]hree of the 12 counties remaining in the case (Lehigh, Philadelphia, and Bucks) admit to treating the overseas mail ballots differently." ECF No. 402 at 20. Simply put, those county boards violated state law in counting noncompliant ballots. *See* ECF No. 398 at 11. By contrast, the county boards that declined to count military and overseas ballots that failed to comply

with the date requirement, *see* ECF No. 272, SOF ¶¶ 70, 96, properly enforced 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. *Compare* ECF No. 398 at 5, 17-18, *with* ECF No. 402 at 20.

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). Intervenor-Defendants have already explained that domestic and military voters are not similarly situated when it comes to mail voting. *See* ECF No. 398 at 11-13.

Plaintiffs invoke the Sixth Circuit's decision in *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012), ECF No. 402 at 21, but that decision belies their argument. *Obama for America* concluded that there was "no relevant distinction between" military and domestic voters with respect to *in-person* voting. *Id.* at 435. But *Obama for America* explicitly recognized that overseas voters' "absence from the country is the factor that makes them distinct" from domestic voters when they request and cast mail ballots. *Id.* at 434-36. *Obama for America* thus concluded 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. *Obama for America* therefore confirms that Plaintiffs' Equal Protection claim fails. *See* ECF No. 398 at 11-13.

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

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

Intervenor-Defendants have already addressed this point at length. *See* ECF No. 398 at 13-17. By contrast, Plaintiffs' motion says nothing about the standard of review or whether the date requirement can withstand rational-basis scrutiny.

In fact, the only case Plaintiffs cite, *Obama for America*, again proves Intervenor-Defendants' point. *See* ECF No. 402 at 21. *Obama for America* acknowledged that States can and do offer "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. 697 F.3d at 434; *see also United States v. Alabama*, 778 F.3d 926, 928 (2015) (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 would therefore easily pass rational-basis review. *See Real Alts., Inc. v. HHS*, 867 F.3d 338, 348 (3d Cir. 2017); *see also* ECF No. 398 at 13-17.

D. The Proper Remedy For a Violation Is To Enforce The Date Requirement For All Parties.

Finally, as Intervenor-Defendants previously explained, Plaintiffs' requested remedy of ordering a subset of county boards *not* to enforce the date requirement when the remaining county boards are bound *to* enforce it would violate, rather than vindicate, the Equal Protection Clause. ECF No. 398 at 5, 17-18. Under well-established equal-protection precedents, the only appropriate remedy would be a mandate that all county boards of elections *enforce* the date requirement as to

all voters, based on every county board's enforcement of the requirement for domestic voters. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017). Plaintiffs make no attempt to rebut this point, which provides yet another basis to reject their Equal Protection claim. *See* ECF No. 398 at 17-18.

III. PLAINTIFFS' RIGHT-TO-VOTE CLAIM IS MERITLESS.

Plaintiffs' new constitutional right-to-vote claim—which Plaintiffs did not raise until 18 months *after* filing suit and even longer after the *Eakin* plaintiffs' complaint put them on notice of it—fails for the myriad reasons Intervenor-Defendants have explained. *See* ECF No. 434 at 7-20.

A. The Date Requirement Cannot Violate Any Right To Vote Because It Regulates Only Mail Voting.

Mandatory application of the date requirement cannot violate any right to vote because it applies only to one method of voting and does not affect in-person voting, which is universally available to, and used by the majority of, Pennsylvania voters. *See* ECF No. 434 at 7-10. Plaintiffs' brief entirely ignores this fatal flaw in their claim. *See* ECF No. 402 at 21-25.

B. The Date Requirement Cannot Violate Any Right To Vote Because It Is Merely a "Usual Burden Of Voting."

As Intervenor-Defendants have already explained, *see* ECF No. 434 at 10-15, and the Third Circuit effectively held, *see Pa State Conf. of NAACP*, 97 F.4th at 133-35, the date requirement is merely a usual burden of voting and, thus, cannot implicate any right to vote.

Plaintiffs do not engage with or rebut the authorities Intervenor-Defendants previously marshaled on this point. In particular, they do not explain how the date requirement can violate the constitutional right to vote when the Third Circuit already held it does not violate any statutory right to vote. *See id.* Those failures are telling.

Instead, Plaintiffs *agree* that some burdens are too *de minimis* to implicate the constitutional right to vote. *See* ECF No. 402 at 22. They cite *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020), which instructs that only "more-than-minimal" burdens on the right to vote are subject to scrutiny under the *Anderson-Burdick* standard. ECF No. 402 at 22 (citing *Daunt*, 956 F.3d at 406-07). And Plaintiffs cite *Price v. N.Y. Bd. of Elections*, 540 F.3d 101 (2d Cir. 2008), for the proposition that "at least some burden on voters which is not trivial is required." ECF No. 402 at 22 (citing *Price*, 540 F.3d at 109-10).

Intervenor-Defendants, *Crawford*, and *Pa. State Conference of NAACP* are in complete accord with Plaintiffs that "trivial" and "minimal" burdens cannot violate the constitutional right to vote. *Compare id.*, *with* ECF No. 434 at 10-15; *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *Pa State Conf. of NAACP*, 97 F.4th at 133-35. Plaintiffs are simply wrong, however, to assert that writing a date is a "more-than-minimal" or non-"trivial" burden. ECF No. 402 at 22. Plaintiffs complain that the "date requirement burdens voters because it requires them . . . to read" "instruction[s]" and "correctly input the month, date, and year without any typos or slips of the pen," and "refrain from omitting" the date. *Id.* at 22. Once again, Intervenor-Defendants agree that is the relevant burden, but disagree that it amounts to a constitutional violation. *See* ECF No. 434 at 15-16. After all, *all* voters must read instructions, write things accurately, and "refrain from omitting" information to cast a ballot. *See, e.g.*, *Pa State Conf. of NAACP*, 97 F.4th at 133-35. Indeed, such mundane tasks are an essential part of everyday life. Failing to read instructions for, making typos on, and failing to provide required information on important documents can have significant consequences in many aspects of life. *See* ECF No. 434 at 15-16; *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021) ("[M]en must turn square corners when they deal with the

government."). The "trivial" impositions of the date requirement cannot implicate the constitutional right to vote. *Price*, 540 F.3d at 109-10.

The only other "burden" Plaintiffs identify is the need for voters to "comply with their county's formatting preferences" for dates. ECF No. 402 at 22. But it is undisputed that all county boards accept a date written in the standard American format of MM/DD/YYYY. And no Plaintiff claims (nor plausibly could allege) that she does not know how to write a date in the standard American format. Once again, such a burden is not "more-than-minimal" and cannot implicate any right to vote. *Daunt*, 956 F.3d at 406-07.

If more were somehow needed, a development earlier this month has clarified Pennsylvania law's "formatting preferences" for dates on mail-ballot declarations, ECF No. 402 at 22, made compliance with the date requirement *easier*, and obviated many of the concerns and hypotheticals Plaintiffs conjure in their constitutional right-to-vote claim. In particular, on July 1, 2024, the Secretary issued to county boards of elections a "Directive Concerning the Form of Absentee and Mail-In Ballot Materials" ("Directive"). *See* Directive (Exhibit C). The Directive prescribes how county boards must prepare and print the mail-ballot declaration, including the date field—and its requirements for the form of ballots are binding on all county boards in the Commonwealth. *See* 25 P.S. §§ 2621, 3146.4 (giving Secretary authority to prescribe format for absentee ballots), 3150.14 (giving Secretary same authority for mail-in ballots).

The Directive imposes three requirements for the date field on the mail-ballot declaration that are relevant here:

1. The Directive requires that the full year—2024, for the November general election—be preprinted in the date field, *see* Directive 3-4 & Appendix E, and thus eliminates the instances of missing or inaccurate years Plaintiffs highlight in their brief, *see* ECF No. 402 at 23.

2. The Directive requires that the date field be divided into four preprinted boxes, that "Month" be printed under the first two boxes, and that "Day" be printed under the second two boxes, *see* Directive Appendix E, and therefore clarifies that voters should adhere to the "traditional … month-day-year format," ECF No. 402 at 22; and

3. The Directive requires that "Today's date here (REQUIRED)" be printed above the date field, *see* Directive Appendix E, thus confirming that voters should write the current date, not some other date like a date of birth, and that completing the date field is mandatory, *see* ECF No. 402 at 22-23.

The date requirement would impose no more than a usual burden of voting—and, thus, not even implicate, let alone violate, any right to vote—if voters were required to handwrite the entire date in the date field. *See* ECF No. 434 at 10-14. Indeed, even in that scenario, compliance with the date requirement would be less burdensome than "[h]aving to identify one's own polling place and then travel there to vote," which "does not exceed the usual burdens of voting." *Brnovich v. DNC*, 594 U.S. 647, 678 (2021) (internal quotation marks omitted). But the Secretary's Directive has made the date requirement even *less* burdensome than that—and less burdensome than it was even at the beginning of this case. The date requirement does not violate the Constitution, and the Court should enter judgment dismissing Plaintiffs' claim.

C. The Date Requirement Easily Withstands Scrutiny Under the *Anderson-Burdick* Test.

Even if this Court (inappropriately) applies the *Anderson-Burdick* test to assess the date requirement, the date requirement easily satisfies it.

1. The date requirement imposes miniscule burdens.

As explained, the date requirement imposes only, at most, a miniscule burden on voters. *See supra* Part III.A-B. That burden, moreover, has become even *more* minimal under the Secretary's Directive. *See supra* at 14-15.

Attempting to prove otherwise, Plaintiffs claim that "over 10,000" voters failed to comply with the date requirement in 2022. ECF No. 402 at 23. But as Intervenor-Defendants have already

explained, the consequences of failing to comply with a rule are not the same thing as the burden imposed by a rule. *See* ECF No. 434 at 16-17. In any event, even Plaintiffs' own figures demonstrate that well over 99% of individuals voting by mail in 2022 successfully complied with the rule. *See* ECF No. 402 at 23. Moreover, the noncompliance rate has dropped considerably in elections since the 2022 election Plaintiffs refer to: For example, the noncompliance rate in the 2024 primary elections was only about 0.4%. *See* Carter Walker, *Redesigned Envelope Leads to Fewer Rejected Mail Ballots, But a New Type of Error Sticks Out*, Spotlight Pa (May 31, 2024), https://perma.cc/UL5U-3LGC. And the Secretary's newly issued Directive promises to push the noncompliance rate even lower. *See id.*; *supra* at 14-15. A rule that over 99% of mail voters successfully complied with in the past—and that an even *higher* percentage are complying with now and in the future—does not implicate any right to vote. *See Brnovich*, 594 U.S. at 651 ("A procedure that appears to work for 98% or more of voters to whom it applies . . . is unlikely to render a system unequally open.").

Next, Plaintiffs suggest that the date requirement disproportionately harms older voters. ECF No. 402 at 24. Plaintiffs, however, cite zero evidence for that proposition. *See id.* And in any event, the Supreme Court has already made clear that subgroup evidence is irrelevant to constitutional right-to-vote claims. *See Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *id.* at 205-08 (Scalia, J., concurring in judgment); *Burdick v. Takushi*, 504 U.S. 428, 436-37 (1992); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 235-36 (5th Cir. 2020).

Finally, Plaintiffs attempt analogies to two out-of-circuit cases, but neither comparison holds. *See* ECF No. 402 at 23-24. In *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016), the Sixth Circuit addressed a requirement that voters write addresses and birthdates on provisional ballots. The court ruled against that requirement under the Equal

Protection Clause, not the constitutional right-to-vote. *Id.* at 630, 637. The court also expressly declined to consider an anti-fraud argument in support of the provision because Ohio had not presented any argument on the point. *Id.* at 632-33. That is not true here, where the date requirement has *already* been used in Pennsylvania to help prosecute voter fraud. *See* ECF No. 434 at 20.

Plaintiffs also offer *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (11th Cir. 2019), which addressed Florida's signature matching rules. That case was a "motion panel decision"—and the Eleventh Circuit has subsequently explained that it has no "effect outside that case" due to its "necessarily tentative and preliminary nature" and the fact that the controversy became moot before the Eleventh Circuit could conduct plenary review of the merits. *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020); *see also Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) (declining to treat opinion Plaintiffs cite here as "binding precedent"). *Lee* is also factually distinct. The court reasoned that the "inherent nature" of signature matching meant that ballots would be mistakenly rejected "through factors out of [voters'] control." *Id.* at 1320. In Pennsylvania, any voter can comply with the date requirement by writing the date on the ballot—including, now, in compliance with the date field as updated under the Secretary's Directive. The two cases are thus nothing alike. The Court should reject Plaintiffs' constitutional right-to-vote claim.

2. The date requirement is supported by legitimate state interests.

Because the date requirement imposes, at most, miniscule burdens on the right to vote, "rational basis review" applies, *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020), which is of course "quite deferential." *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 153 (3d Cir. 2022). Those

attacking a statute's rationality "have the burden to negat[e] every conceivable basis which might support it." *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993).

Plaintiffs do not acknowledge their burdens under rational-basis review, instead insisting that the burden is somehow on the Intervenor-Defendants to prove its constitutionality. ECF No. 402 at 24-25. Perhaps that helps explain why Plaintiffs believe they can convince this Court to strike down the date requirement with a single paragraph analyzing potential state interests. The General Assembly's work deserves more respect than that. *See, e.g.*, *Mazo*, 54 F.4th at 153; *Vote.Org v. Callanen*, 89 F.4th 459, 481 (5th Cir. 2023) (calling for "considerable deference" to legislatures).

Nor does Plaintiffs' single paragraph add much value. It says nothing about two of the three interests previously identified by Intervenor-Defendants as supporting the date requirement. ECF No. 402 at 25. Plaintiffs thus do not dispute that the date requirement plays a useful role as a backstop in election administration. *See* ECF No. 434 at 18-19; *Migliori v. Cohen*, 36 F.4th 153, 165 (2022) (Matey, J., concurring in judgment). Nor do they contest that sign-and-date requirements have long been understood to promote solemnity. ECF No. 434 at 19; *Vote.Org.*, 89 F.4th at 489.

Plaintiffs' couple of sentences disputing the date requirement's fraud-deterrence and fraud-detection function also miss the mark. ECF No. 402 at 25. They say nothing about the *Mihaliak* case, a recent and concrete example in which the date requirement played an important role in an election-fraud prosecution. *See* ECF No. 434 at 20. The Supreme Court has repeatedly made clear that States do not need to point to evidence of fraud within their borders to justify an anti-fraud rule. *Brnovich*, 594 U.S. at 686. Pennsylvania therefore has more than ample basis to enforce the date requirement: *Mihaliak* proved that, even in just the first few years following the enactment

of universal mail voting in Pennsylvania, the date requirement helped detect and punish election fraud. The date requirement is thus clearly lawful and constitutional. *See id.*; *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.); ECF No. 434 at 20.

CONCLUSION

The Court should deny Plaintiffs' motion for summary judgment, grant Intervenor-Defendants' motion for summary judgment, and dismiss Plaintiffs' claims.

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Respectfully submitted,

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