

**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.	:	<b>ELECTRONICALLY FILED</b>
	:	

**REPLY BRIEF OF DEFENDANT BERKS COUNTY BOARD OF ELECTIONS IN  
FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant Berks County Board of Elections (“Berks County”) briefly replies to two arguments raised in Plaintiffs’ July 18, 2024 brief in opposition to Berks County’s motion for summary judgment (doc. 444).

As previously pointed out, this Court determined the Secretary is the only remaining defendant for Plaintiffs’ Equal Protection claim. *See* Doc. 347 at 33-34 (Nov. 21, 2023 Mem. Opinion) (second column of chart showing Individual Plaintiffs have standing to assert their Equal Protection claim against only Secretary Schmidt; and by virtue of the “n/a” none of the Organizational Plaintiffs have standing to assert their Equal Protection claim against any defendant).<sup>1</sup> That same analysis applies to the Organizational Plaintiffs’ new *Anderson-Burdick* claim that the Date Requirement illegally burdens the right to vote in violation of the First and Fourteenth Amendments (Count III).

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<sup>1</sup> On the merits of the Equal Protection claim (Count II), Plaintiffs do not challenge Berks County’s explanation that it did not receive any overseas absentee ballots in outer envelopes with voter declarations that were undated or incorrectly dated; thus, Berks County did not treat overseas ballots differently from domestic absentee or mail-in ballots.

But even if the Court does not apply its prior conclusion regarding the Equal Protection claim in Count II to the *Anderson-Burdick* claim in Count III, the Organizational Plaintiffs have failed to satisfy the requirements for standing set forth in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 144 S. Ct. 1540 (2024) (“*FDA*”).

Plaintiffs’ opposition brief argues that Defendants misconstrue *FDA* in suggesting it precludes Organizational Plaintiffs from demonstrating the required injury-in-fact. *See* Doc. 444 at 10 (Opp. Brief at 3). Berks County is not arguing *FDA* precludes that result but rather that the Organizational Plaintiffs have failed to satisfy the test in *FDA* for establishing organizational standing. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), which the Supreme Court in *FDA* distinguished as unique, a housing counseling services organization challenged alleged “racial steering” in housing, which was the “core mission” of the organization. Here, however, although the Organizational Plaintiffs presented evidence they provide voter-engagement and voter-education services, those are not “core services” of any of the Organizational Plaintiffs.

Berks County Plaintiffs’ opposition brief also argues Berks County is wrong in asserting it cannot be liable under Section 1983 because the Election Code is responsible for the challenged exclusion of domestic mail ballots. Doc. 444 at 14-16 (Opp. Brief at 7-9). Berks County agrees it is responsible for managing elections conducted within its borders. Contrary to Plaintiffs’ assertion, doc. 444 at 15-16 (Opp. Brief at 8-9), Berks County never disenfranchised voters or litigated to be able to disenfranchise voters. Instead, Berks County simply applied the plain meaning of the relevant Election Code provisions as written. Berks County’s application of the Election Code was ultimately vindicated by the Pennsylvania Supreme Court’s November 2022 decision in *Ball v. Chapman*.

Whatever happened before the November 2022 General Election at issue in this action, from that point forward, Berks County has been bound by and complied with the Pennsylvania Supreme Court's Order in *Ball v. Chapman*, which mandated the county boards of elections set aside and not count votes from absentee and mail-in ballots submitted in outer envelopes on which the voter declaration was undated or incorrectly, and all other legally issued court orders, including this Court's November 21, 2023 Order granting summary judgment on Plaintiffs' Materiality Provision claim (doc. 348).<sup>2</sup>

Plaintiffs also incorrectly assert that Berks County refused to notify domestic voters of the date issue or allow them to cure in November 2022. Doc. 444 at 15-16 (Opp. Brief at 8-9). As this Court previously observed, Plaintiff NAACP itself recognized in social media posts that "Berks County officials want voters to know they can fix undated mail ballots." Doc. 347 at 16-17 (quoting doc. 280, pp. 42-43).

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<sup>2</sup> Because the November 2023 General Election results had not yet been certified, Berks County complied with this Court's November 21, 2023 summary judgment Order (doc. 348) by canvassing the votes from ballots in the previously segregated undated or incorrectly dated absentee and mail-in ballot outer envelopes, and included the tally of those votes in Berks County's final certified election results. After this Court's summary judgment Order on the Materiality Provision claim was reversed by the Third Circuit, in the 2024 Primary Election Berks County resumed setting aside, segregating, and not counting votes on absentee and mail-in ballots submitted in outer envelopes on which the voter declaration was undated or incorrectly dated, as required by *Ball v. Chapman*.

For all the reasons set forth in support of Berks County's motion for summary judgment and previous briefs, and the reasons set forth above, the Court should grant summary judgment for Berks County and against Plaintiffs and dismiss with prejudice Plaintiffs' remaining claims.

Respectfully submitted,

Dated: July 25, 2023

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**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: July 25, 2024

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