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

BETTE EAKIN, *et al.*, Plaintiffs, v. ADAMS COUNTY BOARD OF ELECTIONS, *et al.*, Defendants.	Case No. 1:22-cv-00340-SPB

PLAINTIFFS' CONSOLIDATED REPLY TO DEFENDANTS' AND INTERVENORS' OPPOSITION TO PLAINTIFFS' SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Berks County Board of Elections ("Berks County") and Intervenors have failed to identify a legitimate and sufficiently weighty state interest that is advanced by the date requirement, demonstrating exactly why this Court should grant summary judgment for Plaintiffs. The right to vote unquestionably includes the right to have one's ballot counted, regardless of the means by which that ballot is cast, and the single overtired anecdote repeatedly offered by the date requirement's proponents cannot justify burdening that right.[1]

ARGUMENT

I. The right to vote protects ballots cast by mail.

As Plaintiffs have repeatedly argued, qualified Pennsylvanians have a "right to cast a ballot and *to have it counted*." *United States v. Classic*, 313 U.S. 299, 318 (1941) (emphasis added). Intervenors have repeatedly failed to grapple with the latter part of that statement, even though it is well-established that the constitutional right to vote includes "the right to have one's vote counted." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *see Trinsey v. Commonwealth of Pennsylvania*, 941 F.2d 224, 231–32 (3d Cir. 1991). As a result, Intervenors' arguments regarding ballot casting and alternative means of voting that are hypothetically available to voters facing rejection due to noncompliance with the date requirement, ECF No. 388 at 2–5, are of no avail.

Intervenors' core contention is that *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), allows a state to implement a mail voting system without regard for the constitutional protections of the right to vote so long as the state also offers other methods of voting. Absolutely nothing in *McDonald* actually supports that proposition. As Plaintiffs have

[1] Most of the arguments raised by Berks County and Intervenors in their recent opposition briefs echo points made in their opening supplemental briefs, which Plaintiffs have already addressed in detail. *See* ECF Nos. 380, 391.

explained at length, *McDonald* involved plaintiffs seeking the opportunity to cast ballots by mail where that option was not available to them under Illinois law. *See* ECF No. 380 at 2–4; ECF No. 391 at 3–5. The Supreme Court rejected the argument that the Constitution requires states to allow mail voting to voters who may be able to cast their ballots through alternate means. *McDonald*, 394 U.S. at 809–10. But the opinion simply does not say that if a state does allow mail voting, it may then also discard mail ballots cast by eligible voters without any constitutional implications. Intervenors respond that "*McDonald* nowhere suggests that regulations of a mail-voting privilege must be carefully scrutinized under the *Anderson-Burdick* test," ECF No. 388 at 3, but this argument would have required the members of the Court to be time travelers—*McDonald* was decided fourteen years before *Anderson* and twenty-three years before *Burdick*. As such, it is hardly surprising that *McDonald* has nothing to say about a test that did not yet exist.

Crawford v. Marion County Election Board likewise does not establish that state regulation of mail voting does not implicate the right to vote so long as in-person voting is permitted, and it especially does not remotely suggest that regulation of mail voting escapes *Anderson-Burdick* review. Instead, within the context of the *Anderson-Burdick* framework, the plurality opinion acknowledges that the ability to vote without presenting photo identification is relevant to determining the burden imposed by a photo identification requirement. *See* 553 U.S. 181, 201 (2008) (Stevens., J.). That observation cannot plausibly be extended into a blanket exclusion of mail voting regimes from constitutional protection. Instead, such regimes are evaluated under the *Anderson-Burdick* framework dictated by decisions from the U.S. Supreme Court, Third Circuit, and other courts nationwide. *See, e.g.*, *Crawford*, 533 U.S. at 191; *Kim v. Hanlon*, 99 F.4th 140, 155 (3d Cir. 2024); *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 138, 140–41 & n.18 (3d Cir. 2022); *Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020). And Intervenors' assertions that "'usual

burdens of voting' cannot violate the right to vote" and are not subject to "*any* balancing test," ECF No. 388 at 5–6 (citing ECF No. 378 at 8–13), is supported by zero on-point authorities; the cases they cite instead utilize the *Anderson-Burdick* framework. *See Crawford*, 553 U.S. at 190–91 (analyzing Indiana law under *Anderson-Burdick* balancing approach); *Clingman v. Beaver*, 544 U.S. 581, 602 (2005) (O'Connor, J., concurring in part) (recognizing that *Anderson-Burdick* was "reaffirmed by the Court").

II. No state interest justifies the burdens imposed by the date requirement.

The date requirement does not actually advance any of the state interests asserted by Intervenors, and the arguments to the contrary are unavailing.

First, as Plaintiffs have already explained, "solemnity" is not a legitimate interest that could be pursued by the date requirement, ECF No. 380 at 6–8; ECF No. 391 at 10, but even if it were, Intervenors make no attempt to demonstrate how discarding a ballot lacking a compliant handwritten date weeks after it is cast actually advances such an interest. *See, e.g.*, *Lerman v. Bd. of Elections in N.Y.C.*, 232 F.3d 135, 149 (2d Cir. 2000) ("that . . . asserted interests are 'important in the abstract' does not necessarily mean that . . . [challenged] regulation will in fact advance those interests" (quotation omitted)). Of course, that is because they cannot—an alleged interest in "solemnity" is so nebulous that it is meaningless. *See* ECF No. 380 at 7–8; ECF No. 391 at 10.

Second, Intervenors briefly argue that the date requirement serves an "important role as a backstop in election administration," without providing any facts to substantiate that claim. ECF No. 388 at 11. No county Defendant has stated that the handwritten date would "prove important if county boards fail to timestamp ballots upon receiving them or if Pennsylvania's SURE system malfunctions," *id.*, and Intervenors offer nothing more than outright speculation about how the date requirement could be useful in such circumstances.

Third, Intervenors argue that noncompliance with the date requirement "could be" a reason to suspect fraud. *Id*. But why? Not one county Defendant—the parties that actually administer elections—stated as much. In fact, every county board of elections to respond to Plaintiffs' Concise Statement of Material Facts *admitted* that noncompliance with the date requirement is not a reason to suspect fraud, and that they were unaware of any credible concern regarding fraud with respect to the date requirement. *See* ECF No. 311 ¶¶ 65–68, 71 (Lancaster County); ECF No. 309 (Westmoreland County joining Lancaster County's response to Plaintiffs' Motion for Summary Judgment). Indeed, even Berks County admitted (contrary to its recent brief) that noncompliance with the date requirement is *not* a reason to suspect fraud, ECF No. 323 ¶¶ 65–68, that the date written on the outer envelope provides no help to a county board in detecting fraud, *id.* ¶¶ 69–71, and that Berks County does not use the date for any purpose other than determining compliance with the date requirement, *id.* ¶ 77.

Both Berks County and Intervenors can only point to the Mihaliak case in Lancaster County, but no one has provided any evidence that the Mihaliak investigation was predicated on the date written on the outer envelope. *See, e.g.*, ECF No. 387 at 4; ECF No. 320 ¶¶ 45–50 (Plaintiffs' Response to Intervenors' Concise Statement of Material Facts). Intervenors' hypothetical musing that without the date on the outer envelope, "law enforcement *may not* have investigated further," ECF No. 388 at 12 (emphasis added), is not enough. *See also* ECF No. 387 at 4 ("Plaintiffs argue the Mihaliak investigation would have occurred anyway. Maybe it would have; maybe not."). And Berks County's similarly baseless claim that the date requirement "*led* to the detection and successful prosecution" in Mihaliak, *id.* (emphasis added), is entirely unsupported. As the Acting Commonwealth Secretary admitted in proceedings before the Pennsylvania Supreme Court, "an investigation would have followed no matter what was written

on the return envelope." *Ball v. Chapman*, 289 A.3d 1, 16 n.77 (Pa. 2023); *see also Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *21 n.14 (Pa. Cmwlth. Aug. 19, 2022) ("ballot at issue had already been separated by the chief clerk"); Int-Defs.' Ex. 12, Aff. of Probable Cause ¶ 2, ECF No. 285-12 ("The [decedent's] ballot . . . was received on April 28, 2022. . . . Teresa J. Mihaliak was removed from the voter rolls on April 25, 2022.").

Even if Berks County and Intervenors "do not need to point to actual evidence of election fraud," ECF No. 388 at 12, they cannot simply handwave a state interest without explaining *how* the date requirement actually advances that asserted interest. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 219–22 (1986); *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018); *Lerman*, 232 F.3d at 149. Their bald speculation is not enough.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

/s/ Uzoma N. Nkwonta

Adam C. Bonin (PA 80929)
THE LAW OFFICE OF ADAM C. BONIN
121 South Broad Street, Suite 400
Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

Uzoma N. Nkwonta*
Justin Baxenberg*
Daniel J. Cohen*
Omeed Alerasool* (PA 332873)
ELIAS LAW GROUP LLP
250 Massachusetts Ave. NW, Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4490
Facsimile: (202) 968-4498
unkwonta@elias.law
jbaxenberg@elias.law
dcohen@elias.law
oalerasool@elias.law

* *Admitted Pro Hac Vice*

Counsel for Plaintiffs