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

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs,

v.

AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth, *et al.*,

Defendants.

Case No. 1:22-cv-00339-SPB

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND

INTRODUCTION

This case is before the Court on remand from the Third Circuit for consideration of the Plaintiffs' Equal Protection claim. Plaintiffs seek leave to amend to add an additional constitutional claim, namely that refusing to count voters' mail ballots for failure to write a "correct" date on the voter declaration form on the outer mail ballot envelope constitutes an undue burden on the fundamental right to vote in violation of the First and Fourteenth Amendments. State election laws may not burden a plaintiff's constitutional right to vote unless relevant and legitimate state interests of sufficient weight exist to justify the burdens imposed. *See Const. Party of Pa. v. Cortes*, 877 F.3d 480, 484 (3d Cir. 2017) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

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Leave to amend should be granted here. Plaintiffs do not seek to add any new factual allegations and do not seek to reopen discovery, nor is any additional discovery needed. Rather, Plaintiffs seek to conform the pleadings and the claims to the record, which revealed after discovery that requiring voters to correctly handwrite the date on the outer envelope of their ballot serves no state election administration interest or purpose: Pennsylvania counties do not rely on the handwritten date on the outer mail ballot envelope to determine a ballot's timeliness, or anything else about a voter's qualifications. Rather, as this Court previously noted, it is "wholly irrelevant." Nov. 21 MSJ Op., ECF No. 347 at 67; *accord Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024) ("The date

requirement, it turns out, serves little apparent purpose. It is not used to confirm timely receipt of the ballot or to determine when the voter completed it."). Moreover, the addition of this claim will cause no prejudice to any defendant in this case because an *Anderson-Burdick* claim is already pending and fully briefed in the parallel *Eakin* case involving the same facts and the same defendants, *e.g.* Intervenor-Defs.' Opp. to Summ. Judgment, *Eakin v. Adams Cnty. Bd. of Elections*, No. 22-CV-340 (W.D. Pa. May 5, 2023), ECF No. 312.

Leave to amend should be granted.

BACKGROUND

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The Court is familiar with the underlying nature of the case, which involves the requirement that voters handwrite a date on the voter declaration form on the mail ballot envelope, on pain of having their mail ballot set aside and not counted, often without any notice or opportunity to cure the issue. *See* 25 P.S. §§ 3146.6(a) and 3150.16(a).

In the 2022 general elections, counties rejected ballots from over 10,000 eligible, qualified voters solely because they omitted the date from the envelope form or made some error, like a typo, in writing the date on the form. *E.g.*, Nov. 21 MSJ Op., ECF No. 347 at 48–49 & n.30; Plaintiffs' L.R. 56(B)(1) Statement of Material

Facts (hereinafter "SMF"), ECF No. 283 at ¶¶ 28, 36–38, 42.[1] As revealed by discovery in this case, the handwritten date is not used to determine whether a ballot was timely received, SMF ¶¶ 51–52, or whether a voter meets the qualifications to vote in Pennsylvania, such as age or citizenship, SMF ¶¶ 47–50. Nor is the date used to prevent the votes of persons who die before Election Day from being counted; rather, such ballots are not counted regardless of the date written on the envelope declaration form. *See* SMF ¶¶ 43, 61–64; *see also* Nov. 21 MSJ Op., ECF No. 347 at 67–69 & n.39.

Plaintiffs filed this action following the 2022 election challenging the refusal to count voters' mail ballots based on a meaningless mistake in writing the date on the mail ballot envelope declaration form. Plaintiffs asserted a statutory claim pursuant to 52 U.S.C. § 10101(a)(2)(B), the Materiality Provision of the 1964 Civil Rights Act, as well as a constitutional claim under the Equal Protection Clause. *See* Am. Compl., ECF No. 121 at ¶¶ 75–88. Another such challenge asserting statutory and constitutional claims, *Eakin v. Adams County Board of Elections*, No. 22-CV-340 (W.D. Pa. filed Nov. 7, 2022), was also filed around the same time.

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Immediately following the close of discovery, the parties in this case cross-moved for summary judgment, and the Court granted Plaintiffs' motion based on

[1] Plaintiffs cite the previously filed SMF in connection with their initial motion for summary judgment for reference here because it contains relevant citations to the underlying discovery record. In accordance with the briefing schedule set forth by the Court on May 8, 2024, ECF No. 385, Plaintiffs will file a new motion for summary judgment, accompanied by a renewed SMF, on their pending Equal Protection claim as well as the proposed *Anderson-Burdick* claim sought to be added here.

their statutory claim. Nov. 21 MSJ Op., ECF No. 347 at 64–73. The Court accordingly declined to rule on the Equal Protection claim. *Id.* at 73–76.

Certain defendants appealed, and the Third Circuit reversed on the statutory claim, holding that, although the requirement to handwrite the date on the envelope form "serves little apparent purpose" and indeed "bears no relation—it is immaterial—to whether a voter is qualified under Pennsylvania law to vote," the statute did not apply as a matter of law to the particular paperwork at issue in this case. *Pa. State Conf. of NAACP Branches*, 97 F.4th at 125, 131. The court of appeals remanded "for further proceedings on the equal protection claim." COA Mandate, ECF No. 384 at 3.

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Plaintiffs now seek to amend their complaint to add an additional constitutional cause of action under the First and Fourteenth Amendments for consideration along with the Equal Protection claim.

ARGUMENT

Courts should "freely give leave" to amend the pleadings "when justice so requires." Fed. R. Civ. P. 15(a)(2); *Foman v. Davis,* 371 U.S. 178 (1962). "The Third Circuit has adopted a liberal policy favoring the amendment of pleadings to ensure that claims are decided on the merits rather than on technicalities." *Johnson v. Geico Cas. Co.*, 673 F. Supp. 2d 244, 248 (D. Del. 2009) (citing *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990)). Amendment should be granted unless there is a showing of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue

prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman*, 371 U.S. at 182; *e.g.*, *Abraham v. City of Philadelphia*, No. CV 05-6327, 2006 WL 8459993, at *1 (E.D. Pa. Aug. 15, 2006) (quoting *Foman*, 371 U.S. at 182).

None of those circumstances exist here and leave to amend should be granted.

First, there is no undue delay. "[D]elay alone is an insufficient ground to deny leave to amend." *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001) (citation omitted). Rather, the delay must be "undue," that is, "protracted and unjustified," such that it places "an unwarranted burden on the court" or results in prejudice to an opposing party. *Id.*; *see also Mullin v. Balicki*, 875 F.3d 140, 151 (3d Cir. 2017).

Here, Plaintiffs have moved swiftly to amend their complaint following the Third Circuit's reversal of summary judgment on Plaintiffs' statutory claim and remand for the consideration of their constitutional claim. "[A]mendment of a complaint is not unusual at the summary judgment stage of the case," including to present an alternative theory on the same facts after rejection of an initial legal theory. *See Adams v. Gould Inc.*, 739 F.2d 858, 868–69 (3d Cir. 1984) (citation omitted). Accordingly, the Third Circuit has rejected attempts to "characterize [amendment to add an alternative legal theory at the summary judgment stage] as 'undue delay.'" *Id.*; *see also Bradley v. Kemper Ins. Co.*, 121 F. App'x 468, 471 (3d Cir. 2005) (suggesting the grant of leave to amend following remand would be "prudent"); *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("At the

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summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a).”). Nor would allowing the addition of an *Anderson-Burdick* claim in this case place any unwarranted burden on the Court: Plaintiffs do not seek to reopen discovery or to delay the filing of a renewed summary judgment motion as contemplated by the Court’s May 8 Scheduling Order, because the *Anderson-Burdick* claim is fully supported by the existing record. Indeed, there is *already* a fully-briefed summary judgment motion on an *Anderson-Burdick* challenge to the envelope date rule pending before the Court in the parallel *Eakin* case. *See* Pls.’ MSJ and Br. in Supp., *Eakin v. Adams Cnty. Bd. of Elections*, No. 22-CV-340 (W.D. Pa. April 21, 2023), ECF Nos. 287, 288.

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Second, there is no possible prejudice to any of the defendants from the addition of the *Anderson-Burdick* claim. Prejudice for purposes of Rule 15 “means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change in tactics or theories on the part of the other party.” *Deakyne v. Comm’rs of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969). Proving undue prejudice requires a defendant to “show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the ... amendments been timely.” *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir.1989).

Here, Plaintiffs seek to add only a cause of action, not new factual allegations.[2] Plaintiffs are seeking the same relief for the same class of voters based on the same facts, with no additional discovery whatsoever. Plaintiffs' proposed *Anderson-Burdick* claim under the First Amendment requires the Court to assess governmental interest in the challenged voting restriction—an issue that was already explored in discovery because it is also implicated by Plaintiffs' existing Equal Protection claim. *E.g.*, *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 905–06 (S.D. Ohio) (Equal Protection analysis looks to whether there is "substantial justification from the state" necessitating disparate treatment of voters). Nor could any defendant argue that they might need to reopen the record to conduct additional discovery beyond what they already took in both this case and the *Eakin* case (where, again, they have faced an *Anderson-Burdick* claim from the start and have already opposed a motion for summary judgment). There can be no possible prejudice from the grant of leave to amend where "it is unlikely Defendants would have conducted the case any differently had these amendments been made earlier" and "the general nature of the factual allegations has remained the same." *Johnson*, 673 F. Supp. 2d at 252.

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[2] A copy of Plaintiffs' Proposed Second Amended Complaint is appended to the Motion for Leave to Amend. The new cause of action is set forth under the heading "Count III" at paragraphs 89 through 92. The language describing the causes of action asserted in paragraphs 3, 7, 74, and the Prayer for Relief is also modified slightly for consistency in order to include reference to the proposed new claim. Separately, the proposed Second Amended Complaint also conforms the pleadings to the record by removing references to three withdrawn plaintiffs and substituting the name of the current Secretary of the Commonwealth, Al Schmidt.

Finally, amendment is not futile. The *Anderson-Burdick* test weighs the burden imposed by a state voting rule against the legitimate, non-speculative state interests served by that rule. *E.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 449 (9th Cir. 2018). Even a "minimal" burden on the right to vote "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *See Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 538 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008)). Here, the existing record reveals—and the Court of Appeals agreed—that the handwritten date on the envelope declaration form serves no state interest. It serves no function related to determining a voter's qualifications, the timeliness of a ballot, or preventing the counting of fraudulent ballots. Plaintiffs' motion for leave to amend is "solidly grounded in the record" and "supported by substantial evidence" in the existing record. *E.g.*, *Hatch v. Dep't for Child., Youth & Their Fams.*, 274 F.3d 12, 19 (1st Cir. 2001) (citation omitted). The Court should grant the motion for leave to amend and consider the proposed *Anderson-Burdick* claim along with Plaintiffs' Equal Protection claim as set forth in Plaintiffs' forthcoming motion for summary judgment.

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CONCLUSION

Leave to amend should be granted.

Dated: May 17, 2024

Respectfully submitted,

/s/ Ari J. Savitzky

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CERTIFICATE OF SERVICE

I hereby certify that, on the date set forth below, I caused a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Amend to be served via the Court's electronic filing system upon all counsel of record.

Dated: May 17, 2024
/s/ Ari Savitzky

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