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 OPPOSITION TO DEFENDANTS' AND INTERVENORS' SECOND SUPPLEMENTAL MEMORANDA IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

The *Anderson-Burdick* test is the standard framework for analyzing constitutional challenges to regulations that burden the right to vote. The test requires courts to balance the character and magnitude of the burden against the legitimate state interests advanced by the challenged law. This flexible framework allows courts to analyze all sorts of burdens on the right to vote, large or small. And nothing in the *Anderson-Burdick* test limits its application to laws regulating certain methods of voting.

Rather than identify legitimate interests sufficient to justify burdens on voters, Intervenor-Defendants the Republican National Committee, National Republican Congressional Committee, and the Republican Party of Pennsylvania ("Intervenors") and Defendant Berks County Board of Elections ("Berks County") begin their summary judgment briefs arguing that *Anderson-Burdick* doesn't apply at all. *See* Mem. in Supp. of Intervenor-Defs.' Mot. for Summ. J. 3–13, ECF No. 378; Berks Cnty. Suppl. Br. in Supp. of Mot. for Summ. J. 2–7, ECF No. 379. This makes sense as a litigation tactic: the Third Circuit has stated that the handwritten date on a timely-received mail ballot envelope "serves little apparent purpose," which dooms the date requirement under the *Anderson-Burdick* framework. *See, e.g.*, *Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, 97 F.4th 120, 125 (3d Cir. 2024) ("*Pa. NAACP*"). But Defendants' attempt to sweep the notable absence of legitimate state interests under the rug and subvert the well-established *Anderson-Burdick* test misreads settled law and has no legal basis.

Evidence of the date requirement's myriad burdens—including its mass disenfranchising effects, its disproportionate impact on elderly, Black, and Hispanic voters, and its universal effects on every mail voter in requiring an additional step to have their vote counted—speaks for itself and has not been justified by any legitimate State interest. This entirely unnecessary restriction cannot evade constitutional scrutiny simply because it is limited to mail voting, or because

Defendants attempt to pass it off as a "usual" burden. Nor do the various arguments regarding standing, municipal liability, or Federal Rule of Civil Procedure 5.1's notice requirement made by Berks County or Lancaster County Board of Elections ("Lancaster County") prevent this Court from granting Plaintiffs relief.

The Court should deny Defendants' and Intervenors' motions for summary judgment.

ARGUMENT

I. Plaintiffs' constitutional challenge to the date requirement must be analyzed under the *Anderson-Burdick* framework.

Plaintiffs have established through their summary judgment briefing and unrefuted evidence that the date requirement imposes a burden on the right to vote that cannot be justified by any legitimate state interest under the *Anderson-Burdick* test. *See infra* Parts II–III; *see also* Mem. in Supp. of Pls.' Mot. for Summ. J. 18–24, ECF No. 288; Pls.' Consol. Br. in Opp'n to Mots. for Summ. J. 17–24, ECF No. 318; Pls.' Reply to Intervenor-Defs.' Opp'n to Pls. Mot. for Summ. J. 2–5, ECF No. 330; 2d Suppl. Mem. in Supp. of Pls. Mot. for Summ. J. 4–14, ECF No. 380. Intervenors now strain to avoid that test, claiming that the date requirement is immune from *any* scrutiny because other methods of voting exist and because it imposes no more than "usual burdens" on voting. ECF No. 378 at 4–13. Both arguments fail: Regulations of mail voting are subject to the same scrutiny as other means of voting, and *Anderson-Burdick* is the governing standard regardless of the precise severity of the burden imposed. *Mazo v. New Jersey Sec'y of*

State, 54 F.4th 124, 138, 140–41 & n.18 (3d Cir. 2022) (collecting circuit cases "scrutinizing under *Anderson-Burdick* laws regulating . . . absentee voting").[1]

A. Regulations of mail voting are not exempt from *Anderson-Burdick*.

Contrary to Intervenors' repeated mischaracterizations, this case does not seek to mandate access to absentee voting—Pennsylvania has already conferred upon its citizens the right to vote by mail. Instead, Plaintiffs challenge a burdensome restriction that results in the rejection of timely-received mail ballots cast by eligible voters. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("[A]ll qualified voters have a constitutionally protected right to vote and to have their votes counted" (citations omitted)).

Defendants' and Intervenors' heavy reliance on *McDonald* and its progeny is misplaced. In *McDonald v. Board of Election Commissioners of Chicago*, pre-sentence inmates claimed a right to receive and cast absentee ballots where Illinois state law did not provide such an option. 394 U.S. 802, 807–08 (1969). The Supreme Court concluded that the failure to include those inmates among the categories of voters permitted to vote absentee did not impermissibly burden the right to vote because of insufficient evidence of such a burden. *Id.* at 808–09 & n.6; *see also*

[1] The Third Circuit's passing statement that voters whose ballots are not counted due to noncompliance with the date requirement are not denied the right to vote for purposes of the Civil Rights Act's materiality provision, *Pa. NAACP*, 97 F.4th at 134–35, does not render the *Anderson-Burdick* framework inapplicable to Plaintiffs' constitutional claim. Not only was the statement dictum—the court's decision hinged on the scope of the materiality provision's application—it does not address the question before this Court: whether the date requirement unconstitutionally *burdens* the right to vote.

O'Brien v. Skinner, 414 U.S. 524, 529–31 (1974) (emphasizing that "disposition of the claims in *McDonald* rested on failure of proof").[2]

Here, in contrast, Pennsylvania has adopted universal mail voting, *see generally* 25 Pa. Stat. §§ 3150.11, 3150.16; having done so, it must administer its voting system in accordance with the U.S. Constitution. *See McDonald*, 394 U.S. at 807 ("[W]e have held that once the States grant the franchise, they must not do so in a discriminatory manner."); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1316, 1318–19 (11th Cir. 2019) (recognizing that "Florida allows eligible voters to cast their votes by mailing in their ballots" and applying *Anderson-Burdick* to vote-by-mail signature matching scheme); *Voto Latino v. Hirsch*, No. 1:23-CV-861, 2024 WL 230931, at *26 (M.D.N.C. Jan. 21, 2024) (recognizing that same-day voter registration, once provided, cannot be administered so as to violate procedural due process rights); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

Intervenors also misread *Crawford* in arguing that even regulations that "severely burden[]" voters are exempt from federal constitutional protection so long as another method of

[2] Intervenors' reliance on *Goosby v. Osser*, 409 U.S. 512 (1973), is similarly unpersuasive. ECF No. 378 at 7–8. Like *McDonald*, the underlying issue in *Goosby* was the failure to provide absentee voting for imprisoned individuals in Pennsylvania. 409 U.S. at 513–14. And Intervenors' repeated citation of motions panel stay orders in *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), and *United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023), ECF No. 80-1, is even less relevant. The merits panel in *Texas Democratic Party* expressly vacated the stay panel's *McDonald* analysis. *See* 978 F.3d 168, 194 (5th Cir. 2020) ("[T]he holdings in the motions panel opinion as to *McDonald* are not precedent."). And the *Paxton* stay panel's analysis is suspect as a statement of the Fifth Circuit's position: The panel relied on multiple premises squarely rejected in a merits decision issued by the Fifth Circuit *the same day*. *See Vote.org v. Callanen*, 89 F.4th 459 (5th Cir. 2023) (rejecting arguments that materiality provision is not enforceable through private action and that it only covers actions involving racial animus).

voting does not share that same restriction. ECF No. 378 at 5–6. In that case, the Supreme Court evaluated alternative means of voting as part of the overall burden analysis *within* the *Anderson-Burdick* framework. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 201 (2008) (controlling op.). Nothing in *Crawford* stands for the proposition that regulations of mail voting are entirely exempt from constitutional protection merely because alternative means of voting are hypothetically available.[3]

Indeed, Intervenors do not, and cannot, explain which means of voting *would be* protected by the U.S. Constitution when there is more than one avenue to cast one's ballot. As they tell it, a state could require a voter to pay a poll tax before voting in-person on election day, so long as the state offers absentee voting without such a requirement—an absurd result that would undermine the constitutional protections that the *Anderson-Burdick* test seeks to enforce. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665–66 (1966) (holding poll tax unconstitutional); *see also Crawford*, 553 U.S. at 189–90.

B. The *Anderson-Burdick* framework applies even to so-called "usual burdens."

Intervenors next attempt to escape *Anderson-Burdick* by concocting a novel threshold test: that so-called "usual burdens" on the right to vote are also exempt from constitutional scrutiny. ECF No. 378 at 8. But they fail to cite a single authority anywhere that adopted this proposed exemption and rely instead on court decisions that either *applied* the *Anderson-Burdick*

[3] Intervenors also ignore that not every mail voter *can* vote in person. *See, e.g.*, ECF No. 311 ¶¶ 81, 90; *accord* ECF No. 313 ¶¶ 81, 90. And a voter whose mail ballot is rejected for noncompliance with the date provision may not have the opportunity to vote through other means. *See, e.g.*, ECF No. 311 ¶ 11 (45 of 67 county boards provided no notice to voters that their mail ballots did not comply with the date requirement). So even accepting Intervenors' framework, the date requirement nonetheless burdens the right to vote.

framework, *see, e.g.*, *id.* at 8–13 (citing *Crawford*, 553 U.S. at 191, 198, 204–09),[4] or addressed a different question entirely, *see id*. (citing *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 669–70 (2021)).[5]

The reason that Intervenors cannot offer a case that supports their exclusionary theory is simple: Federal courts have uniformly applied "*Anderson-Burdick* scrutiny . . . even when the burden imposed may appear slight." *Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020); *see also*, *e.g.*, *Crawford*, 553 U.S. at 191 (same); *Kim v. Hanlon*, 99 F.4th 140, 155 (3d Cir. 2024) (recognizing *Anderson-Burdick* test applies even when state regulations impose reasonable, nondiscriminatory restrictions). There is no hidden cellar below the foundations of *Anderson-Burdick* where "[f]ederal courts . . . must *defer* to . . . state voting laws" regardless of the total lack of state interests. ECF No. 378 at 10.

The so-called "usual burdens" Intervenors allude to are already accounted for within the *Anderson-Burdick* framework. And because no legitimate state interest is advanced by the date requirement, it is unconstitutional regardless of the severity of the burden it inflicts upon Pennsylvania voters.

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

Under the *Anderson-Burdick* framework, a challenged election practice must advance "relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). And courts must

[4] Likewise, Intervenors cite *Timmons* for the proposition that states must regulate elections, but conveniently omit that the very sentence they quote is followed by a citation to *Burdick*—the namesake foundation of the applicable doctrine here. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

[5] *Brnovich* considered the contours of vote-denial claims under Section 2 of the Voting Rights Act, 594 U.S. at 666–67; it did not address constitutional claims evaluated under the *Anderson-Burdick* framework.

determine both "the legitimacy *and* strength" of purported state interests. *Belitskus v. Pizzingrilli*, 343 F.3d 632, 645 (3d Cir. 2003) (emphasis added) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

A state interest that is not legitimate cannot justify even a slight burden on the right to vote. *Cf. Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (recognizing that "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" (quotation omitted)). And even if a state interest is "legitimate in the abstract," defendants must put forward "concrete evidence" that "such an interest made it necessary to burden voters' rights." *Schwab*, 957 F.3d at 1132–33. In other words, a challenged practice must *actually advance* the asserted state interest. *See, e.g.*, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 219–22 (1986) (holding inapplicable "legitimate interest[s]" in preventing party raiding and avoiding voter confusion that were not advanced by challenged law); *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018) (holding even "important government interest" could not justify burden because the court "struggle[d] to understand how [challenged statutes] . . . advance[d] that goal"); *Lerman v. Bd. of Elections in N.Y.C.*, 232 F.3d 135, 149 (2d Cir. 2000) ("[T]he fact that the defendants['] asserted interests are 'important in the abstract' does not necessarily mean that its chosen means of regulation 'will in fact advance those interests.'" (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994))). Importantly, courts may only "identify and evaluate the precise interests put forward by the" defendants, without "speculat[ing] about possible justifications." *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (quoting *Anderson*, 460 U.S. at 789).

Here, Defendants and Intervenors assert that the date requirement advances the Commonwealth's interests in: (1) "orderly administration"; (2) "solemnity"; (3) fraud detection

and deterrence; and (4) voter confidence. ECF No. 378 at 15–18; ECF No. 379 at 9–14.[6] None are sufficient to withstand scrutiny under *Anderson-Burdick*.

A. The date requirement does not advance any interest in "orderly administration."

According to Intervenors, the date requirement serves an interest in "orderly administration" of elections by providing proof of when a voter fully executes their ballot, and a backstop in case election officials do not enter the date the ballot was received into the SURE system or the system malfunctions. ECF No. 378 at 15–16 (citing *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020)). Notably, not a single county Defendant—all of whom are responsible for actually administering elections in Pennsylvania—asserts such an interest.[7]

Nor is it clear what "orderly administration" means in the context of the date requirement, let alone how it could be measured. It is not used to determine when the voter completed their ballot, and counties have applied differing standards to determine which handwritten dates are acceptable and how to cure an incorrect or missing date, creating a patchwork of varying election administrative practices and causing a flurry of last-minute election litigation that is anything but "orderly." *See* Resp. of Lancaster Cnty. to Concise Statement of Material Facts ¶¶ 11–27, ECF No. 311 (undisputed facts regarding county boards' piecemeal enforcement of date requirement); *accord* Intervenor-Defs.' Resp. to Statement of Material Facts ¶¶ 11–27, ECF No. 313; *see*, *e.g.*,

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[6] Although Intervenors no longer appear to assert a state interest in voter confidence, *see* ECF No. 378 at 15–18, Berks County effectively reproduced Intervenors' prior state-interest arguments in its most recent brief and now asserts state interests in solemnity, fraud detection and deterrence, and voter confidence. *Compare* ECF No. 379 at 9–14, *with* Mem. in Supp. of Intervenor-Defs.' Mot. for Summ. J. 18–23, ECF No. 282.

[7] Even Berks County—the only county Defendant to file a brief opposing Plaintiffs' constitutional claim—does not assert that the date requirement serves a purported state interest in "orderly administration." *See generally* ECF No. 379.

Pennsylvania All. for Ret. Ams. v. Lancaster Cnty. Bd. of Elections, No. CI-24-03992 (C.P. Lancaster Cnty. filed June 7, 2024) (challenging county's decision to not count ballots missing last two digits of year); *Schellberg v. Centre Cnty. Bd. of Elections*, No. 2024-CV-1220-CI (C.P. Centre Cnty. May 24, 2024) (dismissing challenge of county's decision to count mail ballots missing month, day, or last two digits of year in handwritten date, or with incorrect date).

Exactly how the handwritten date ensures orderly election administration, Intervenors do not say. They cite the Pennsylvania Supreme Court's decision in *In re Canvass* to imply that the court endorsed their abstract interest but the lead opinion said the opposite—it concluded that the date requirement did *not* implicate "weighty interests" so as to render it mandatory and thereby justify disqualification of undated ballots. 241 A.3d at 1076–78. And Intervenors' attempt to cobble together a majority based on the separate opinions of Justices Wecht and Dougherty—the latter joined by two other justices—falls short. Justice Wecht commented only that "colorable arguments" *might* "suggest [the] importance" of the date requirement while also acknowledging that "colorable arguments may be mounted to challenge the necessity of the date requirement"; his opinion is far from an endorsement of any "weighty interests" and does not explain what that important interest might entail. *Id.* at 1087 (Wecht, J., concurring & dissenting in part).[8] And none of the explanations posited by the other three Justices writing separately garnered a majority. *Id.* at 1090–91 (Dougherty, J., concurring & dissenting in part, joined by Saylor, C.J., and Mundy, J.).

In sum, Intervenors fail to establish that "orderly administration" is a legitimate interest advanced by the date requirement. And the record proves otherwise.

[8] Justice Wecht's opinion concluded that the date requirement should be construed as mandatory—prospectively only, 241 A.3d at 1079–80—based on his interpretation of the statutory terms, thus no analysis of "weighty interests" was required, *id.* at 1085–87.

B. The purported state interest in "solemnity" is neither legitimate nor advanced by the date requirement.

As Plaintiffs have explained, legitimate state interests are those that strengthen democracy and the links between voters casting their ballots and the consequent electoral outcomes. ECF No. 380 at 6. For example, the Supreme Court has held that preventing party raiding is legitimate because it may prevent "voters in sympathy with one party . . . [from] influenc[ing] or determin[ing] the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). On the other hand, it has held that "desire to harm a politically unpopular group" is not a legitimate state interest. *Romer*, 517 U.S. at 634–35 (quotation omitted).

Both Berks County and Intervenors argue that the date requirement is justified by a state interest in "solemnity." ECF No. 379 at 11–14; ECF No. 378 at 16–17. And yet the best either party can do to explain what "solemnity" means is that it serves a "cautionary function" that helps people appreciate the seriousness of their actions. ECF No. 378 at 16; *accord* ECF No. 379 at 11. But the questions remain: How does a mere dating requirement serve a cautionary function? And how does one measure the "solemnity" created by a dating requirement as compared to other procedural hurdles? Could an interest in "solemnity" be used to justify any otherwise unnecessary step that makes it more difficult to cast a ballot?

Neither Berks County nor Intervenors meaningfully explain how a State has any legitimate role in imposing procedural requirements merely to force some indeterminate degree of additional "seriousness" upon voters. *See also* ECF No. 380 at 7; *cf. Anderson*, 460 U.S. at 798 (criticizing "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them"). And even if they could establish that an interest in solemnity exists and is legitimate, they cannot explain how such an interest is advanced by rejecting ballots after the voter has simply entered an incorrect date.

C. The date requirement does not advance any interest in fraud detection or deterrence.

Berks County and Intervenors also point to the state's interest in fraud prevention, but they cannot explain how the date requirement advances that interest. ECF No. 379 at 10–11; ECF No. 378 at 17–18. They rely on a single instance of fraud involving a mail ballot that was allegedly completed and backdated by a Lancaster County voter on behalf of her recently deceased mother (the Mihaliak case) but mischaracterize the date requirement's role in that investigation. As this Court has already recognized, the date requirement played *no role* in detecting or preventing the counting of the fraudulent ballot in the Mihaliak case. *See* Mem. Op. on Cross Mots. for Summ. J. at 67–68 n.39, *Pennsylvania State Conf. of the NAACP v. Schmidt*, No. 1:22-CV-00339 (W.D. Pa. Nov. 21, 2023), ECF No. 347 (noting record evidence that "the fraudulent ballot was first detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope"). The ballot was already "separated by the chief clerk because the scan of the return envelope revealed, through the SURE system, that the elector was deceased," all while being accompanied by a misdated outer envelope, *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *21 n.14 (Pa. Commw. Ct. Aug. 19, 2022), *overruled in part on other grounds*, *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023). As the Lancaster County Board of Elections admitted, the perpetrator's mother had already been removed from the voter rolls before the ballot was received, and her mail ballot never would have been counted, regardless of what was written on the outer envelope. *See* ECF No. 311 ¶¶ 73–75; *accord* ECF No. 313 ¶¶ 73–74.

Intervenors nonetheless insist that the handwritten date was "the only evidence of third-party fraud *on the face of the fraudulent ballot*," ECF No. 378 at 17 (emphasis added); but this studiously ignores the material reality that—as this Court previously found—the date requirement was *not* the "reason or basis" to investigate the alleged voter fraud, ECF No. 288 at 24; ECF No.

318 at 20–21; ECF No. 330 at 5; ECF No. 380 at 9–11. Instead, the investigation was triggered by several unrelated safeguards in the Commonwealth's election administration system and the Mihaliak investigation "would have followed no matter what was written on the return envelope." *Ball*, 289 A.3d at 16 n.77; *see also* ECF Nos. 311 ¶ 72, *accord* ECF No. 313 ¶ 72. If anything, the Lancaster County investigation demonstrates that handwritten date is *not* used for any purpose in determining the validity of a mail ballot. And Berks County's and Intervenors' failed attempts to connect the handwritten date to the Mihaliak investigation only underscores the fact that the date requirement does not actually advance any interest in either detecting or deterring fraud.

D. The date requirement does not advance any interest in voter confidence.

Lastly, Berks County asserts for the first time a state interest in voter confidence but makes no effort to demonstrate that the date requirement actually advances this interest. And no Defendant has offered any "concrete evidence" to support this theory.[9] *See Schwab*, 957 F.3d at 1132–33. In fact, the undisputed evidence shows just the opposite: that discarding otherwise valid mail ballots for noncompliance with a meaningless requirement *impairs* voter confidence. *See, e.g.*, ECF No. 311 ¶ 89; *accord* ECF No. 313 ¶ 89. And another court in this district has found that ensuring qualified voters are able to cast their ballots and have them counted *inspires* confidence. *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 356 (W.D. Pa. 2020) (outlining evidence showing that drop boxes "inspire voter confidence").

[9] Intervenors invoked this state interest briefly in their motion for summary judgment, *see* ECF No. 282 at 23, and again in a conclusory statement in their reply, *see* Omnibus Reply in Supp. of Intervenor-Defs.' Mot. for Summ. J. 5, ECF No. 325, but have not mentioned it since. *See generally* ECF No. 378. Berks County attempts to resurrects this theory by merely restating word-for-word the argument from Intervenor's motion for summary judgment. *Compare* ECF No. 379 at 14, *with* ECF No. 282 at 23. Because this argument is ill-developed, it should be considered forfeited. *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023) ("arguments raised in passing . . . but not squarely argued, are considered forfeited" (cleaned up)).

III. The date requirement burdens the right to vote.

A. The date requirement's mass disenfranchising effects are not a "usual burden of voting."

Defendants attempt to dismiss any potential burden caused by the date requirement by lumping it in with other "usual burdens of voting." ECF No. 378 at 14–15; *see* ECF No. 379 at 9; *see also supra* Part I.B. But nothing is "usual" about the rejection of over 10,000 otherwise-valid ballots in 2022. ECF No. 311 ¶ 10; *accord* ECF No. 313 ¶ 10. County Defendants wholly ignore this mass disenfranchising effect, *e.g.*, ECF No. 379 at 8–9, while Intervenors dismiss it as insubstantial because it "pales in comparison to the estimated '43,000' Indiana citizens who lacked a photo ID in *Crawford*[.]" ECF No. 378 at 19 (quoting *Crawford*, 553 U.S. at 198). But Intervenors' argument compares apples to oranges: the estimate in *Crawford* identified the number of voters who would need to obtain photo ID in order to vote; here, Plaintiffs have gone one step further and identified the number of Pennsylvanians whose mail ballots were not counted because of the date requirement. There is thus a "fundamental difference[] between the record in this case and in *Crawford*," where the Supreme Court found "that th[e] 43,000 number was meaningless because it told the Court . . . nothing about how many voters actually would be turned away from the polls." *Schwab*, 957 F.3d at 1130–31.

The analysis in *Crawford* was also driven by an undeveloped record, which is not the case here. There, the Court held that the photo identification requirement was not unduly burdensome because the record said "virtually nothing" about its impact on the most-affected class of voters: those who lacked and were unable to afford photo identification. *Crawford*, 553 U.S. at 200–02. Specifically, the Court noted that it knew "nothing about the number of free photo identification cards issued since" the challenged statute was enacted, "nothing about how often elderly and indigent citizens have an opportunity to obtain a photo identification at the BMV," that "nothing

in the record establishes the distribution of voters who lack photo identification," and that "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates." *Id.* at 202 n.20.

The opposite is true here: The record is exceedingly clear on the impact of the date requirement. *See* ECF No. 311 ¶ 10; *accord* ECF No. 313 ¶ 10. Plaintiffs' burden analysis here aligns with the Tenth Circuit's reasoning in *Schwab*, where a challenged law requiring documentary proof of citizenship prevented 31,089 people from registering to vote, and the court concluded it imposed a "significant" burden requiring "heightened scrutiny." 957 F.3d at 1127–28. Like *Schwab*, an "extensive record" here shows that thousands of voters have been disenfranchised and will continue to face such a risk as a direct result of the challenged law. *Id.* at 1128.

Finally, Intervenors' belief that the exclusion of more than 10,000 otherwise-valid ballots is insignificant or too small a figure to be "unconstitutionally burdensome" distorts the *Anderson-Burdick* test. ECF No. 378 at 19. The Supreme Court has repeatedly explained that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms," *Timmons*, 520 U.S. at 359, and that "[c]onstitutional challenges to . . . election laws cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974))). Rather, the Court must make a "case-specific inquiry" based on the "severity of the burden imposed on the right to vote in any given case." *Schwab*, 957 F.3d at 1124.[10] And the undisputed records shows that the burden here is significant.

[10] For this reason, Pennsylvania's signature requirement (which is not challenged here) and unrelated laws requiring signatures and dates in other, non-voting contexts are irrelevant to the *Anderson-Burdick* analysis for the date requirement. *See* ECF No. 379 at 12 & n.3.

B. The date requirement's disproportionate impact underscores its burden.

In determining the magnitude of the burden, the Court may consider the "limited number of persons" for whom a "heavier burden" may apply. *Crawford*, 553 U.S. at 199; *see League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018) ("Disparate impact matters under *Anderson-Burdick*."); *cf. Harper*, 383 US. at 668 (holding poll tax was unconstitutional because of its impact on those unable to pay it). Intervenors claim that any subgroup analysis would "circumvent the rigorous requirements for proving racial discrimination[.]" ECF No. 378 at 20. But as Intervenors acknowledge, Plaintiffs do not bring an equal protection claim, so such requirements do not apply. *Id.* Rather, the subgroup analysis provides evidence of the burden itself, which is plainly relevant under *Anderson-Burdick*.

Intervenors nonetheless invite the Court to ignore impacted subgroups and focus solely on the impact to all voters, *id.* at 13–14, but again they ignore settled precedent that says just the opposite. In *Crawford* the Supreme Court explained, "[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with [Indiana law]," and "[t]he fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute." 553 U.S. at 198. That approach tracks the Court's analysis in *Anderson* itself, where the Court focused on "[a] burden that falls unequally on new or small political parties" and warned that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." 460 U.S. at 793.

Meanwhile, the cases Intervenors cite do not help their cause. *See* ECF No. 378 at 13–14. Intervenors, for instance, point to Justice Scalia's concurrence in *Crawford*, 553 U.S. at 205 (Scalia, J., concurring), but fail to account for the six justices who agreed that the burden analysis

must consider the impact on identifiable subgroups, *id.* at 199–203 (controlling op.); *id.* at 212–23, 237 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting). They also rely on a non-binding Fifth Circuit stay panel opinion which found that the challenged law's impact on small subgroups was insufficient to demonstrate a *severe* burden on the right to vote. *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 236 (5th Cir. 2020). But that is a far cry from Intervenors' suggestion that the court "can only consider the burden that the date requirement places on 'voters as a whole.'" ECF 378 at 13 (quoting *Richardson*, 978 F.3d at 235–36). And they cite *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016), but omit the fact that the court also found the record "devoid of quantifiable evidence" of the challenged law's impact on a narrower class of "homeless and illiterate voters." *Id*. at 631.

Here, Plaintiffs presented unrebutted expert analysis showing that certain subgroups—namely, older, Black, and Hispanic voters—were disproportionately likely to have their mail ballots rejected because of the date requirement. *See* ECF No. 314-11 ¶¶ 21–23. Specifically, "counties with a higher proportion of Black and Hispanic mail voters rejected ballots [due to the date requirement] at a higher rate than counties with a lower proportion of voters from those demographic groups." *Id.* ¶ 31; *see also id.* ¶¶ 56–57. There were also statistically significant relationships between the rate of mail ballot rejections due to the date requirement and voter age, as well as education levels. *Id.* ¶¶ 45, 47–49. Simply put, it is "extremely unlikely" that any of these statistically significant patterns or disparities "have emerged by random chance alone." *Id.* ¶ 34. The only plausible explanation is that the date requirement imposes *some* burden on voters, which in turn affects subgroups of voters differently. Ignoring the most serious effects of a challenged law merely because they don't apply to everyone would lead to absurd results. For example, a challenged law that disenfranchises a definite subset of voters would evade scrutiny so

long as it doesn't excessively burden anyone else. This would defeat the purpose of *Anderson-Burdick* to assess the "character and magnitude of the asserted injury" to the right to vote. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

But even accepting Intervenors' argument that the burdens can only be measured as applied to all voters, the date requirement burdens Pennsylvania voters nonetheless because it requires successful and accurate completion of an additional date field in a precise format that is acceptable to a given county board, creating another potential pitfall that may result in disenfranchisement. *See Husted*, 837 F.3d at 632 (holding that rejecting mail ballots based on voters' failure to write their birthday and address with "technical precision" imposed unjustified burden). In the absence of any legitimate state interest advanced by the date requirement, *see supra* Part II, these burdens cannot be justified.

IV. Plaintiffs' constitutional claim is justiciable.

Finally, Berks County and Lancaster County advance various theories as to why this Court should not render a decision on the merits of Plaintiffs' constitutional claim. None are persuasive.

A. Plaintiffs have standing to sue Berks County and Lancaster County.

Berks County again argues that Plaintiffs lack standing to sue the county board of elections because it was merely following the law. ECF No. 379 at 3. Similarly, Lancaster County incorporates its previous arguments that Plaintiffs lack standing because any claims of future harm caused by the County are "entirely speculative." Lancaster Cnty.'s Suppl. Mem. in Supp. of Mot. for Summ. J., ECF No. 376; Lancaster Cnty.'s Mem. in Supp. of Mot. for Summ. J. 3–6, ECF No. 280. But as Plaintiffs explained in their first Supplemental Memorandum in Support of Plaintiffs' Motion for Summary Judgment, each county Defendant's enforcement of the date requirement risks disenfranchising members and constituents of DSCC, DCCC, and AFT Pennsylvania (collectively, "Organizational Plaintiffs") and causes organizational injury. *See* Suppl. Mem. in

Supp. of Pls. Mot. for Summ. J. 2–3, ECF No. 359; *see also, e.g.*, App. to Pls.' Suppl. Statement of Material Facts, Ex. S ¶¶ 4–6, ECF No. 361 (Second Decl. of Devan Barber); *id.* at Ex. T ¶¶ 5–8 (Second Decl. of Erik Ruselowski); Pls.' Suppl. Statement of Material Facts ¶¶ 1–4, 6–8, 10–13, 16–17, ECF No. 360; Pls.' Statement of Add'tl Material Facts ¶¶ 1–3, ECF No. 321. Specifically, each county—including Berks County and Lancaster County—has admitted that they did not count undated or incorrectly-dated mail ballots in the past and will continue to reject such ballots in future elections. *See* Concise Statement of Material Facts in Supp. of Pls.' Mot. for Summ. J. ¶¶ 8, 28, ECF No. 289; Resp. of Lancaster Cnty. to Pls' Concise Statement of Material Facts ¶¶ 8, 28, ECF No. 307; Berks Cnty. Opp'n to Pls.' Mot. for Summ. J. ¶¶ 8, 28, ECF No. 323. Thus, there is nothing speculative about the resulting harm, which is certain to occur. *See Boockvar*, 493 F. Supp. 3d at 342–43.

The same risk of disenfranchisement applies to Organizational Plaintiffs' members and constituents. DSCC and DCCC have over two million constituents across every county in Pennsylvania—again including Berks County and Lancaster County—while AFT Pennsylvania has about 25,000 members across at least 36 counties in Pennsylvania, including Lancaster County. *See* ECF No. 359 at 3–4 & n.2. Many of these members and constituents vote by mail and are thus at risk of being disenfranchised as a direct result of Berks County's and Lancaster County's enforcement of the date requirement. *See id.* at 7–10. Organizational Plaintiffs thus have associational standing in every Pennsylvania county.[11]

[11] The U.S. Supreme Court's recent decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. __, 2024 WL 2964140 (June 13, 2024) ("*FDA*"), addressing requirements for organizational standing does not have any impact here. First, *FDA* did not

B. Plaintiffs have established municipal liability.

Berks and Lancaster Counties' argument that Plaintiffs failed to establish municipal liability also fails. ECF No. 379 at 14–15; Lancaster Cnty.'s Opp'n to Pls. Mot. for Summ. J. 2, ECF No. 306. In *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), the U.S. Supreme Court held that local governments were liable under Section 1983 claims "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[.]" *Id.* at 694. Nowhere does *Monell* state that a municipality cannot be held liable for enforcing state law, as Berks and Lancaster Counties suggest. ECF No. 306 at 2; *cf.* ECF No. 379 at 14–15. As Plaintiffs explained in their summary judgment briefs, Plaintiffs' injuries—i.e., past and future disenfranchisement of Organizational Plaintiffs' members and constituents—are a direct result of the county Defendants' policy of refusing to count otherwise-valid mail ballots because they lack a correct date on the ballot envelope. *See* ECF No. 288 at 7, 9–10; Pls.' Reply to County Defs.' Opp'n to Mot. for Summ. J. 1–4, ECF No. 331; ECF No. 359 at 3–9. Berks and Lancaster Counties are thus just as liable for their actions as the other county Defendants—all of whom have admitted

concern associational standing, which in and of itself suffices. And, as explained, each of the Organizational Plaintiffs have established that they have associational standing. *See* ECF No. 359 at 7–10. But each Organizational Plaintiff also has standing in its own right under *FDA*'s analysis. In *FDA*, the Supreme Court simply emphasized that its prior decision in *New Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), did not allow organizations to establish standing merely by "divert[ing] its resources in response to a defendant's actions"; the organization's mission must be "perceptibly impaired" by the defendant's conduct. *FDA*, 2024 WL 2964140, at *13. The Court explained that this can be shown when the defendant's actions "directly affected and interfered with" plaintiff's "core . . . activities[.]" *Id.* As Organizational Plaintiffs explained, Defendants' enforcement of the date requirement directly impacts Plaintiffs' core get-out-the-vote and ballot curing activities—and in DSCC's and DCCC's case, their candidates' electoral prospects—which impairs their missions and causes direct injury. *See* ECF No. 359 at 4–7.

that they set their own policy regarding how to enforce the Date Provision in future elections. *See* ECF No. 331 at 2–4 & n.2.

C. Federal Rule of Civil Procedure 5.1 does not prevent the Court from ordering relief at any point.

Finally, Berks County argues that Plaintiffs failed to comply with Federal Rule of Civil Procedure ("Rule") 5.1, which requires a party challenging the constitutionality of a state law to file a notice of the constitutional question if the state, one of its agencies, or one of its officers or employees in an official capacity is not named as a party. ECF No. 379 at 4–6. As an initial matter, Rule 5.1 only affects *when* the Court may "enter a final judgment holding the statute unconstitutional." Fed. R. Civ. P. 5.1(c). Indeed, Rule 5.1(d) expressly states: "A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted." *Id.* In other words, Rule 5.1 does not prevent the Court from ordering injunctive relief at any point, so long as the Court does not enter final judgment until the time period for intervention has run. The Court may also reopen proceedings if the Attorney General ultimately decides to intervene. Indeed, the Western District of Virginia took this approach in *Buchanan County v. Blankenship*, certifying a copy of its opinion to the Attorney General while noting that the court would "entertain a motion for rehearing if the Attorney General thinks that intervention is necessary." 545 F. Supp. 2d 553, 555 n.3 (W.D. Va. 2008).

Just like *Blankenship*, there has been no prejudice to the government here as a result of belated certification. The Secretary of State is a named defendant in the companion *Pa. NAACP* case, which as of June 14, 2024, shares the same constitutional question that is at issue in this case. *See* 2d Am. Compl. for Decl. & Injunctive Relief ¶¶ 89–92, *Pa. State Conf. of the NAACP*, No. 1:22-CV-00339 (W.D. Pa. June 14, 2024), ECF No. 413. Moreover, certification has already occurred: Plaintiffs filed a Rule 5.1 notice on June 14, 2024, *see* ECF No. 382, and the Court also

has certified the constitutional issue to the Attorney General, Cert. of Const. Challenge to Pa. Att'y Gen., ECF No. 383, which means this Court can enter final judgment in Plaintiffs' favor by August 13 (or earlier, if the Attorney General takes a position on intervention before that deadline). *See* Fed. R. Civ. P. 5.1(c). In the interim, nothing prevents the Court from issuing timely injunctive relief while reserving the ability to reopen proceedings if necessary.

CONCLUSION

The Court should deny Defendants' and Intervenors' motions for summary judgment.

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Respectfully submitted,

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