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

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 1:22-cv-00339-SPB
v.	:	
AL SCHMIDT, *et al.*,	:	
Defendants.	:	
	:	**ELECTRONICALLY FILED**

BRIEF OF DEFENDANT BERKS COUNTY BOARD OF ELECTIONS
IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

On May 8, 2024, upon entry of the mandate from the United States Court of Appeals for the Third Circuit (doc. 384) reversing this Court's November 21, 2023 Order granting summary judgment in favor of Plaintiffs on their Materiality Provision Claim and remanding this case for further proceedings on Plaintiffs' equal protection claim, this Court promptly entered a scheduling Order (doc. 385) requiring the parties to file any dispositive motions on the remaining equal protection claim by Wednesday, May 29, 2024 and ordered the filing of oppositions thereto by June 14, 2024, and any reply briefs by June 21, 2024.[1]

Nine days later, May 17, 2024, Plaintiffs filed a motion seeking leave to file their proposed Second Amended Complaint (doc. 387) to assert a new claim (proposed Count III)

[1] On May 16, 2024, this Court lifted its stay of the related civil action captioned *Eakin v. Adams County Bd. of Elections*, 1:22-cv-00340-SPB ("Case 340") (doc. 375) and ordered the parties in that action to supplement their respective motions for summary judgment as to the remaining constitutional claim by June 5, 2024, and ordered the filing of oppositions thereto by June 21, 2024, and any reply briefs by June 28, 2024.

under a new legal theory relying on the same facts previously alleged.[2] Plaintiffs' proposed Count III asserts a claim under the so-called *Anderson-Burdick* doctrine alleging the provision of the Pennsylvania Election Code at issue—requiring electors to correctly date their declarations on the outer envelope of their absentee and mail-in ballot (the "Date Requirement")—places an undue burden on electors' right to vote guaranteed by the First and Fourteenth Amendments.

Pursuant to the Court's May 18, 2024 text-only Order (doc. 389), defendant Berks County Board of Elections ("Berks County"), by its undersigned attorneys, submits this brief in opposition to Plaintiffs' motion seeking leave to their proposed Second Amended Complaint. For the reasons below, the Court should exercise its discretion and deny Plaintiffs' motion for leave to amend at this late stage of the case.

The standard for amendment of pleadings.

Fed. R. Civ. P. 15 embodies the liberal pleading philosophy of the federal rules. Under Rule 15(a), a complaint may be amended once as a matter of right and afterward by leave of court, which is to be freely granted "when justice so requires." Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178 (1962).

A motion for leave to amend a complaint addressed to the sound discretion of the district court. *Cureton v. National Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001). The district court's discretion is limited by the liberal pleading standards under the federal rules. A district court may deny leave to amend for undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previous amendments, undue

[2] Plaintiffs also seek to amend the case caption to change the name of the Secretary of the Commonwealth and dismiss certain named Plaintiffs from the action. Berks County does not oppose those requests by Plaintiffs. Berks County opposes only Plaintiffs' request to add a new legal claim (proposed Count III), which if permitted would assert a new constitutional claim under a different legal theory that Plaintiffs had not previously included in this case.

prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. *Foman*, 371 U.S. at 182.

"The first four of these reasons devolve to instances where permitting amendment would be inequitable." *Goldfish Shipping, S.A. v. HSH Nordbank AG*, 623 F. Supp.2d 635, 639 (E.D. Pa. 2009) (quoting *Grayson v. Mayview State Hospital*, 293 F.3d 103, 108 (3d Cir. 2002)), *aff'd* 337 Fed. Appx. 150, 154-55 (3d Cir. 2010). "Thus amendment must be permitted . . . unless it would be inequitable or futile." *Id.*

Plaintiffs' requested amendment would be inequitable.

Plaintiffs argue that the equities favor their request for leave to file a Second Amended Complaint. To the contrary, it would be inequitable to permit Plaintiffs to amend their pleadings at this late stage of the case.

Delay "becomes 'undue,' and thereby creates grounds for the district court to refuse leave [to amend], when in places an unwarranted burden on the court or when the plaintiff has had previous opportunities to amend." *Goldfish*, 623 F. Supp.2d at 640 (quoting *Borjegung v. Whitetail Resort, L.P.*, 550 F.3d 263, 266 (3d Cir. 2008) (citations omitted). As such, in considering whether Plaintiffs engaged in "undue delay" the Court must consider its interests in judicial economy and finality as well as a focus on the movant's reasons for not amending sooner. Id. (citing *USX Corp. v. Barnhart*, 395 F.3d 161, 168 (3d Cir. 2004) (quotations omitted); *see also Cureton*, 252 F.3d at 273 (citing cases involving motions to amend after summary judgment is granted, in which the interest of judicial economy and finality of litigation were "particularly compelling"). Thus, the Third Circuit has stated that it is appropriate to assess undue delay by focusing on the movant's reasons for not amending sooner

Plaintiffs utterly fail to explain their reasons for waiting until now to seek to file their proposed Second Amended Complaint. It is not the case that Plaintiffs did not know this theory was available to them; the plaintiffs in Case 340 had asserted this legal theory in its Amended Complaint. Perhaps Plaintiffs' reason for seeking amendment so late is they expected to prevail on their Materiality Provision claim and did not need a second constitutional claim. But that is no reason not to assert such a claim before the Court ruled on the parties' cross-motions for summary judgment. Indeed, this reasoning goes to the heart of what is prohibited: seriatim assertions of legal theories.

Plaintiffs argue that they 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. Plaintiffs' Brief (doc. 388) at 5. Plaintiffs argue that amendment of a complaint at the summary judgment stage is not unusual. *Id.* (citing *Adams v. Gould Inc.*, 739 F.2d 858, 868–69 (3d Cir. 1984) and *Bradley v. Kemper Ins. Co.*, 121 Fed. App'x 468, 471 (3d Cir. 2005)).

In each of the cases Plaintiffs cite, the court allowed the plaintiffs to amend their complaint to assert a new legal theory after summary judgment had been entered against the plaintiffs. Unlike Plaintiffs in this case, none of the plaintiffs in any of those cases filed their own summary judgment motions on their legal claims.[3] Worse yet, Plaintiffs in this case filed

[3] Nor did Plaintiffs argue in any of their summary judgment briefs that they should be permitted to add a new legal theory to avoid summary judgment being entered against them. *See Bradley*, 121 Fed. Appx. at 471 (citing *Sola v. Lafayette College*, 804 F.2d 40, 45 (3d Cir. 1986) (reversing district court's grant of summary judgment based on plaintiff's new legal claim/theory being raised for the first time in her opposition brief and at oral argument, concluding district court should have treated opposition brief and argument as a motion to amend)).

their own summary judgment motion. They did so with full knowledge that the plaintiffs in Case 340 had already asserted the very same *Anderson-Burdick* claim Plaintiffs seek to add now.

Plaintiffs argue the fact there is already a pending *Anderson-Burdick* claim pending in Case 340 supports permitting them to amend their complaint now. Plaintiffs' Brief (doc. 388) at 6. To the contrary, the fact that there is an *Anderson-Burdick* claim in Case 340 is yet another reason that permitting Plaintiffs to amend now would be inequitable. Plaintiffs already amended their complaint once. Their motion utterly fails to explain why they did not seek leave to amend their complaint a second time sooner, such as at the end of the discovery period and before the Court considered and decided the parties' cross-motions for summary judgment.

If Plaintiffs were going to amend, they should have sought amendment, at the latest, after the close of discovery and **before** the deadline for filing summary judgment motions. Perhaps Plaintiffs could be forgiven if they sought to amend after reviewing Defendants' motions for summary judgment on their existing claims and before the Court ruled on the parties' cross-motions for summary judgment. But they did not. Instead, they chose two horses (Materiality Provision and Equal Protection Clause) and further chose to ride those horses through the Court's initial summary judgment process, knowing full well there was another possible horse (*Anderson-Burdick*) available to them. After running the race and learning their favorite horse (Materiality Provision) was disqualified by the Third Circuit, they should not be permitted to add a third horse now that the Third Circuit rejected their first and favorite horse.

Plaintiffs argue there is no prejudice to Defendants in allowing them to amend at this late stage. Plaintiffs' Brief (doc. 388) at 6-7. It is not necessary, however, for the Court to find prejudice to Defendants to deny Plaintiffs' motion for leave to amend. The Third Circuit has clearly stated: "A district court may deny leave to amend a complaint if a plaintiff's delay in

seeking amendment is undue, motivated by bad faith, **or** prejudicial to the opposing party." *Goldfish*, 623 F. Supp.2d at 641 n. 6 (quoting *Cureton*, 252 F.3d at 272–73 (emphasis added) (citing *Foman*, 371 U.S. at 182, 83 S.Ct. 227); *see also Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993) ("*In the absence of substantial or undue prejudice*, denial [may] be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment.") (emphasis added) (citing *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir.1981)); *but see Arthur v. Maersk, Inc.,* 434 F.3d 196, 204 (3d Cir. 2006) (stating "prejudice to the non-moving party is the touchstone for the denial of amendment") (citation, internal quotations omitted).

Nevertheless, for the same reasons Plaintiffs' piecemeal presentation of legal theories would impose an unwarranted burden on the Court, that same conduct would impose an unwarranted burden on Berks County and the other Defendants, who would be required to respond seriatim to Plaintiffs' claims. *Goldfish*, 623 F. Supp.2d at 641 n. 6. These are two sides of the same coin. Permitting Plaintiffs to amend now would not only be unduly burdensome on the Court, it also would be unduly prejudicial to Berks County and the other Defendants.

Significantly, from the standpoint of determining whether the Date Requirement violates the Constitution, denying Plaintiffs' motion to amend to assert an *Anderson-Burdick* claim will not prevent the Court from reaching that issue; the Court will do so when it decides the summary judgment motions in Case 340. It just will not be these Plaintiffs presenting that claim.

Like the plaintiff in *Goldfish*, Plaintiffs here should not be permitted a "do-over" to assert new legal theories or permutations of its prior claims that it could have asserted much earlier. *Goldfish*, 623 F. Supp.2d at 641. "Indeed, it seems self-evident that a litigant should not be

permitted to present legal theories to the court seriatim, raising anew [sic] legal theory only after the court rejects its prior one." *Id.* (quoting *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967) ("A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim.")

For the above reasons, it would be inequitable to grant Plaintiffs' motion to amend without even reaching the issue of whether the proposed amendment would be futile.

Plaintiffs' requested amendment would be futile.

Even if the Court reaches the issue of futility, Plaintiffs' proposed new *Anderson-Burdick* claim is legally deficient. Therefore, amendment would be futile and the Court should deny Plaintiffs' motion for this independent reason.

Futility in the context of a motion to amend "means that the complaint, as amended, would fail to state a claim upon which relief could be granted. *Goldfish*, 623 F. Supp.2d at 639 (quoting *In re Burlington Coat Factory Sec. Lit.*, 114 F.3d 1410, 1434 (3d Cir. 1997). In assessing futility, the district court applies the same standard of legal sufficiency that applies under Fed. R. Civ. P. 12(b)(6). *Id.* (citations omitted).

The provision of the Election Code at issue—the Date Requirement—requires the electors' declaration on outer envelope of their absentee or mail-in ballot to be both signed and dated. That declaration is returned to the electors' county board of elections with their mail-in or absentee ballot. The additional burden on voters of writing the correct date on their declarations after signing them is minimal or non-existent.

Mandatory application of the Date Requirement does not violate the United States Constitution.

At the threshold, regulation of absentee and mail-in voting such as the Date Requirement does not implicate "fundamental rights." *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004).

There is no federal constitutional right to vote by absentee or mail-in ballot. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 406 (5th Cir. 2020); *see also McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969) ("[A]bsentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny . . . the exercise of the franchise."). Thus, the *Anderson-Burdick* framework Plaintiffs seek to invoke is inapplicable. *See Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 137 (3d Cir. 2022).

Instead, rational basis scrutiny applies. *See McDonald*, 394 U.S. at 809. For the reasons explained below, the Date Requirement is constitutional under that test because it "bear[s] some rational relationship to a legitimate state end." *Id.*

Even applying the *Anderson-Burdick* framework, the Date Requirement is constitutional. *Anderson-Burdick*, when it applies, requires courts to weigh the character and magnitude of the burden, if any, imposed by the law on protected rights against the state's interests in and justifications for the law. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-91 (2008) (Opinion of Stevens, J.). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest," while those imposing "[l]esser burdens … trigger less exacting review, and [the] State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cty. Area New Party*, 520 U.S. 351, 358-59 (1997).

The date requirement is constitutional because it imposes no more than the usual burdens of voting and is amply justified by the State's interests in protecting the integrity of its elections.

The commonsense Date Requirement's "burdens" are too light and its justifications too reasonable to violate the Constitution. The U.S. Supreme Court's decision in *Crawford* demonstrates as much. The plaintiffs in that case claimed that an Indiana law requiring in-person

voters to present a photo ID imposed an unconstitutional burden under the *Anderson-Burdick* framework. *See* 553 U.S. at 185 (Opinion of Stevens, J.). The Supreme Court noted that because the plaintiffs brought a facial challenge "that would invalidate the statute in all its applications, they bear a heavy burden of persuasion." *Id.* at 200. The plaintiffs, however, did not introduce "evidence of a single, individual Indiana resident who [would] be unable to vote" under the challenged law. *Id.* at 187 (internal quotation marks omitted). The Supreme Court ultimately held the plaintiffs had failed to carry that burden and rejected their claim. *See id.* at 200-04.

The Supreme Court analyzed the character and magnitude of the burden imposed by the photo ID requirement. *See id.* at 198. The Supreme Court recognized that the law placed some burden on voters, particularly voters who lacked a photo ID. *See id.* The Supreme Court noted that voters who did not already have a photo ID must bear "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph." *Id.* The Supreme Court concluded, however, that such inconvenience "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.*

The Supreme Court also addressed the state's asserted interests in adopting the photo ID requirement—"deterring and detecting voter fraud," "moderniz[ing] election procedures," and "safeguarding voter confidence." *Id.* at 191. The Supreme Court concluded that those interests were "legitimate" and that the photo ID requirement "is unquestionably relevant to the state's interest in protecting the integrity and reliability of the election process." *Id.* Accordingly, the Supreme Court held that the plaintiffs' unconstitutional burden claim failed. *See id.* at 200-04.

Plaintiffs' unconstitutional burden claim likewise fails because the Date Requirement imposes no more than the "usual burdens of voting." *Id.* at 198. Plaintiffs concede that the signature requirement is constitutional. The fact that Plaintiffs (in this case and Case 340) have not contested the constitutionality of the signature requirement demonstrates the Date Requirement is similarly lawful.

Signing one's name is at least as "burdensome" as writing the date the declaration is signed. If the signature requirement is valid and not unconstitutionally burdensome, then so too is the Date Requirement. It cannot be a significant burden to require voters to write a date on the same declaration they are required to sign. Moreover, any burden in writing the date is a lesser burden 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. Democratic Nat'l Committee*, 594 U.S. 647, 676 (2021) (internal quotation marks omitted). And signing one's name and dating the voter declarations are certainly less onerous than "the inconvenience of making the trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph," which was upheld as minimal and constitutional in *Crawford*, 553 U.S. at 198 (Opinion of Stevens, J.).

The Date Requirement advances "legitimate" and "unquestionably relevant" state interests related to "protecting the integrity and reliability of the election process." *Id.* at 191. The Date Requirement serves several weighty interests and an "unquestionable purpose." *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election* ("*In re 2020 Canvass*") 241 A.3d at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see also id.* at 1087 (Opinion of Justice Wecht) ("colorable arguments . . . suggest [the Date Requirement's] importance").

First, the Date Requirement advances the Commonwealth's interests in "deterring and detecting voter fraud" and "protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 191 (Opinion of Stevens, J.); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *In re 2020 Canvass*, 241 A.3d at 1091 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). "And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 594 U.S. at 686.

The Date Requirement's advancement of the Commonwealth's interest in preventing fraud is actual, not hypothetical. Two years ago, the Date Requirement was used to detect a Lancaster County woman's forgery and fraudulent submission of her deceased mother's mail-in ballot, leading to her guilty plea and sentencing on January 20, 2023 of two years of probation and forfeiture of her voting rights for four years. *See Commonwealth v. Mihaliak*, CP-36-CR-0003315-2022 (Lancaster Cty. Jan. 20, 2022). Because current Pennsylvania Supreme Court precedent precludes county boards of elections from comparing signatures on ballot envelopes with those in the official record, the only evidence of third-party fraud on the face of the fraudulent ballot in *Mihaliak* was the handwritten date of April 26, 2022, which was twelve days after the decedent had passed away. *See id*. This example shows the Date Requirement effectively serves—at a minimum—the Commonwealth's legitimate interest in preventing election fraud.

Second, the Date Requirement serves the State's interest in solemnity—*i.e.*, in ensuring that voters "contemplate their choices" and "reach considered decisions about their government and laws." *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1887-88 (U.S. 2018); *Tashjian v. Republican Party*, 479 U.S. 208, 221-22 (1986) (state has "legitimate interests" in

"providing for educated and responsible voter decisions."). The formalities that attend voting—namely, that the "elector shall then fill out, **date and sign** the declaration printed," 25 P.S. § 3146.6(a) (emphasis added); § 3150.16(a)—encourage such deliberation, see *Ball*, 289 A.3d at 10 (the date "provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at the polling place").

"Signature requirements have long been recognized as fulfilling cautionary functions in protecting an individual's rights." *State v. Williams*, 565 N.E.2d 563, 565 (Ohio 1991). Formalities like signing and dating requirements serve the "cautionary function" by "impressing the parties with the significance of their acts and their resultant obligations." *See Davis G N Mortg. Corp.*, 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003). These formalities "guard[] against ill-considered action," *Thomas A. Armbruster, Inc. v. Barron*, 491 A.2d 882, 883-84 (Pa. Super. Ct. 1985), and the absence of formalities "prevent[s] . . . parties from exercising the caution demanded by a situation in which each ha[s] significant rights at stake," *Thatcher's Drug Store v. Consol. Supermarkets*, 636 A.2d 156, 161 (Pa. 1994). Traditional signing and dating requirements help people "to appreciate the seriousness of their actions," *id.*, and for that reason are required in a range of instruments, including "wills" and "transfer[s] of real property," *Williams*, 565 N.E.2d at 565.

Pennsylvania can require its citizens to exercise the same caution when engaging in the solemn civic exercise of voting. "Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation." *Minnesota Voters Alliance*, 138 S. Ct. at 1888. If states can require the formalities of signing and dating for wills and property transactions, they can do the same for voting. The Election Code's Date Requirement is inextricably intertwined with the signature requirement. Together they together focus voters "on

the important decisions immediately at hand." *Id.* Indeed, everyday experience confirms that signatures are frequently accompanied by dates—to name an easy example, on checks.

Pennsylvania law often pairs signature and date requirements in its statutes.[4] Similarly, forms set forth in Pennsylvania statutes that provide spaces for both a signature and a date are too numerous to list here. A few examples include 57 Pa. C.S.A. § 316 (short form certificates of notarial acts); 23 Pa. C.S.A. § 5331 (parenting plan); 73 P.S. § 201-7(j.1)(iii)(3)(ii) (emergency work authorization form); 42 Pa. C.S.A. § 8316.2(b) (childhood sexual abuse settlement form); 73 P.S. § 2186(c) (cancellation form for certain contracts). It thus makes no sense to analyze the signature requirement and the date requirement separately—they appear in the same statutory clause, govern the same document, and together perform a cautionary function.

How can a voter be held accountable for a false declaration stating, among other things, "I have not already voted in this election," unless the voter's declaration is both signed and dated? It is not onerous or unusual to legally require a declarant to sign and date a declaration or affidavit stating certain facts are true. Pennsylvania's statute on unsworn declarations, 42 Pa. C.S.A. § 6206, requires both signature **and dating**, as follows:

[4] *See, e.g.*, 75 Pa. C.S.A. § 1731(c.1) (form rejecting uninsured motorist protection "must be signed by the first named insured and dated to be valid"); *id.* § 1738(e) (form rejecting stacked limits of underinsured motorist coverage "must be signed by the first named insured and dated to be valid"); 62 P.S. § 1407-C(c)(1) ("In order to decline participation in the health information exchange, a patient must sign and date a form declining participation."); 20 Pa. C.S.A. § 5484(c), (d) (requiring "dated signature of the attending physician" on DNR bracelets and necklaces); 35 Pa. C.S.A. § 5203(b)(2) ("The patient executing and filing a voluntary nonopioid directive form with a practitioner shall sign and date the form."); 73 P.S. § 517.7(d)(4) (arbitration clause "shall not be effective unless both parties have assented as evidenced by signature and date, which shall be the date on which the contract was executed"); 35 Pa. C.S.A. § 52B02(b)(4) ("The treatment agreement form under subsection (a)(3) shall … include … [t]he signature of the individual and the date of signing.").

§ 6206. Form of unsworn declaration.

An unsworn declaration under this chapter must be in substantially the following form:

> I declare under penalty of perjury under the law of the Commonwealth of Pennsylvania that the foregoing is true and correct.
>
> Signed on the.....day of.....,.....,
> at.....,
> (date).....(month).....(year).....
> (county or other location, and state).....
> .....
> (country).....
> (printed name).....
> (signature).....

Federal law provides another example of such a requirement. 28 U.S.C. § 1746 provides that when any matter is required or permitted to be supported, evidenced, established, or proved by a sworn written declaration, verification, certificate, statement, oath or affidavit, an unsworn declaration, verification, certificate, statement, oath or affidavit may be provided instead, with like force and effect, to support, evidence, establish or prove the matter at issue, as long as the unsworn declaration is in a writing that is subscribed to be true under penalty of perjury, **and dated**, in a specified form (depending on whether it is executed within or without the United States, its territories, possessions, or commonwealths).

Regardless of where it is executed, both forms require the declarant to provide the date on which the declaration is executed:

> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

See 28 U.S.C. § 1746.

Third, the Date Requirement advances the State's interest in "safeguarding voter confidence" in Pennsylvania elections. *Crawford*, 553 U.S. at 191 (Opinion of Stevens, J.). Pennsylvania law has long imposed the Date Requirement, which encourages "citizen participation in the voting process" by ensuring voters that Pennsylvania elections are free, fair, trustworthy, and untainted by fraud, *Crawford*, 553 U.S. at 197 (Opinion of Stevens, J.).

Because the Date Requirement imposes a minimal burden on voting and effectively furthers several weighty Commonwealth interests such as protecting the integrity and reliability of the election process the Election Code's Date Requirement does is constitutional, and thus Plaintiffs' proposed amendment is futile.

Conclusion

It would be inequitable to permit Plaintiffs to amend their pleadings to assert a new legal theory at this late stage of the case. Additionally, Plaintiffs' proposed amendment would be futile because the Date Requirement at issue is constitutional. Accordingly, the Court should deny Plaintiffs' motion to amend (doc. 387).

Respectfully submitted,

Dated: May 24, 2024

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