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

BETTE EAKIN, *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No.: 1:22-cv-00340
	)	
v.	)	
	)	Judge Susan P. Baxter
ADAMS COUNTY BOARD OF ELECTIONS, *et al.*,	)	
	)	
	)	
Defendants.	)	

INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF THEIR SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

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Plaintiffs invite this Court to revolutionize federal right-to-vote jurisprudence, extending it to apply searching scrutiny to "all" election regulations—no matter how mundane. ECF No. 391 at 1. This extreme extension of federal judicial power is wrong, as already explained. ECF No. 378 at 8-13. Plaintiffs offer various contrary arguments, but all fail. Summary judgment is warranted.

I. THE CONSTITUTION'S RIGHT TO VOTE DOES NOT ENCOMPASS A RIGHT TO VOTE BY MAIL WHERE A STATE ALLOWS IN-PERSON VOTING.

To start, Plaintiffs' right-to-vote claim fails right out of the gate because they necessarily assert a constitutional right to vote by mail—a right which does not exist. *See* ECF No. 378 at 4-8.

Plaintiffs try—and fail—to distinguish the Supreme Court's decision in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). Plaintiffs continue to insist that *McDonald* held only that mail ballot restrictions "did not impermissibly burden the right to vote because of insufficient evidence of such a burden." ECF No. 391 at 3. However, the burden *McDonald* referred to was whether the plaintiffs were "absolutely prohibit[ed]" from voting by *any method*. *McDonald*, 394 U.S. at 809. Like the plaintiffs in *McDonald*, Plaintiffs cannot prove they are barred from voting in person.

Crawford instructs likewise, holding that the in-person ID requirement's burdens on elderly voters were irrelevant because they could vote absentee without complying with it. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 201 (2008) (opinion of Stevens, J.). Plaintiffs insist that this analysis was merely part of the "overall burden analysis *within* the *Anderson-Burdick* framework." ECF No. 391 at 5. But *Crawford* refused to consider those burdens *at all* because the elderly could vote absentee. *Crawford*, 553 U.S. at 201 (opinion of Stevens, J.). *Crawford* did not balance those burdens against Indiana's state interests. *Id.*

Against *McDonald, Crawford*, and two Fifth Circuit decisions, Plaintiffs offer only inapt authority. *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (11th Cir. 2019) was a motions panel decision that cited *McDonald* zero times, and which the Eleventh Circuit subsequently explained has no "effect outside that case." *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020). *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018), also did not mention *McDonald* and was a procedural due process case—not a right-to-vote case. *See id.* at 214-222. Similarly, *Voto Latino v. Hirsch* is only a preliminary *procedural due process* decision that, again, cited *McDonald* zero times. 2024 WL 230931, at *18 (M.D.N.C. Jan. 21, 2024).

Finally, Plaintiffs suggest that some people might be unable to vote without mail voting. ECF No. 391 at 5 n.3. Even assuming such atypical burdens can satisfy *McDonald*'s test, they are irrelevant here because no *Plaintiff* alleges she cannot vote in person. Plaintiffs' challenge is, after all, a facial challenge, which means they must show the date requirement is unconstitutional in all "of its applications." *United States v. Rahimi*, No. 22-915, 2024 WL 3074728, at *6 (U.S. June 21, 2024). Plaintiffs' utter failure to engage with that standard alone warrants summary judgment.

II. "USUAL BURDENS OF VOTING" LIKE THE DATE REQUIREMENT CANNOT VIOLATE THE RIGHT TO VOTE.

Even if *McDonald* did not control, both *Crawford* and *Pa. State Conference of the NAACP* have made clear that the "usual burdens of voting" cannot violate the right to vote. ECF No. 378 at 8-13.

Plaintiffs try to reinterpret *Crawford* to subject even the "usual burdens of voting" to judicial balancing. ECF No. 391 at 5-6. But *Crawford* recognized that regulations imposing *more than* the "usual burdens of voting" get minimal judicial scrutiny, so it *does* prove there is a category of voting rules imposing such *de minimis* burdens that no judicial scrutiny is warranted. 553 U.S.

at 198 (opinion of Stevens, J.). Tellingly, moreover, Plaintiffs fail to contest Intervenor-Defendants' point that "no binding authority has *ever* invalidated such a law under the *Anderson/Burdick*" test. ECF No. 378 at 9.

Tacitly acknowledging the Third Circuit's right-to-vote holding forecloses their claim, Plaintiffs dismiss it as "dictum." ECF No. 391 at 3 n.1. They are wrong. The court gave two reasons for rejecting Plaintiffs' Materiality Provision claims: the date requirement is not used during voter registration *and* ordinary ballot-casting rules like the date requirement do not "den[y] the right to vote." *Pa. State Conf. of NAACP v. Schmidt*, 97 F.4th 120, 131, 133 (3d Cir. 2024). As the Third Circuit made clear, its right-to-vote holding was "[y]et a separate reason" Plaintiffs lost. *Id.* at 133. An "alternate holding" is "not dicta" and binds this Court. *Mariana v. Fisher*, 338 F.3d 189, 201 (3d Cir. 2003).

Notably, Plaintiffs do not contest that *Pa. State Conference of the NAACP* and *Brnovich* found—without any interest balancing—that "usual burdens" cannot violate the "right to vote" in the federal civil rights statutes. *Brnovich v. DNC*, 594 U.S. 647, 669 (2021); *Pa. State Conf. of NAACP*, 97 F.4th at 133. Logically, then, Plaintiffs must believe that the Constitution's right to vote is *greater* than what is protected in the civil rights statutes. ECF No. 391 at 5-6. But they cite *zero* authority for that odd notion, previously argued the opposite to the Third Circuit, CA3 ECF No. 97 at 26-27, and ignore Intervenor-Defendants' contrary authority. *See* ECF No. 378 at 8-13.

Against that binding authority, Plaintiffs offer inapt precedents that do not address ballot-casting rules imposing the "usual burdens of voting." *Fish v. Schwab* addressed a voter-registration rule, not a ballot-casting rule. 957 F.3d 1105, 1111 (10th Cir. 2020). *Kim v. Hanlon*

dealt with a *First Amendment* challenge to ballot-access rules, not a ballot-casting rule. 99 F.4th 140, 155 (3d Cir. 2024).

At bottom, this case is about judicial power. The Constitution gives *legislatures* the power to set election rules. *See* U.S. Const. art. I, § 4, cl. 1. If this Court accepts Plaintiffs' invitation to second-guess ballot-casting rules imposing the "usual burdens of voting," courts will be routinely enmeshed in "political, not legal" fights over all corners of state election codes. *Cf. Rucho v. Common Cause*, 588 U.S. 684, 707 (2019). That approach cannot be right. This Court should grant summary judgment.

III. EVEN IF THE COURT APPLIES SCRUTINY UNDER THE *ANDERSON-BURDICK* TEST, THE DATE REQUIREMENT EASILY PASSES MUSTER.

Even if the Court inappropriately subjects the date requirement to scrutiny under the *Anderson-Burdick* test, the date requirement easily withstands it. *See* ECF No. 378 at 13-23.

A. The Date Requirement Imposes, At Most, Minor Burdens on Voting.

The date requirement imposes a *de minimis* burden on voting. *Id.* at 13-15. Employing misdirection, Plaintiffs play up the 2022 rejection rate. ECF No. 391 at 13-14. But the consequences of noncompliance with a rule is *not* the relevant burden. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). And Plaintiffs do not dispute that dating a ballot is easier than "making a trip to the [Bureau of Motor Vehicles], gathering . . . required documents, and posing for a photograph," *id.*, or "[h]aving to identify one's own polling place and then travel there to vote." *Brnovich*, 594 U.S. at 678.

Even if such evidence is relevant, the date requirement's rejection rate in the 2024 primary *dropped* to about 0.4%.[1] A requirement that well over 99% of people can comply with cannot

[1] *See* Carter Walker, *Redesigned Envelope Leads to Fewer Rejected Mail Ballots, But a New Type of Error Sticks Out*, Spotlight Pa (May 31, 2024), https://perma.cc/UL5U-3LGC.

violate any right to vote. *See Brnovich*, 594 U.S. at 650-51 (rejecting scrutiny where rejection rate is below 2%).

Further, Plaintiffs continue to rely on disparate impact evidence. ECF No. 391 at 15-16. Indeed, they *admit* they are circumventing the strict demands of equal protection jurisprudence because they are not "bring[ing] an equal protection claim." *Id.* at 15. Precedent forecloses that maneuver. ECF No. 378 at 20. And Plaintiffs do not dispute that they cannot identify the race of any voter whose ballot was rejected—meaning they cannot prove disparate impact. ECF No. 378 at 20-21.

In the end, Plaintiffs admit that the burden in this case is the "successful and accurate completion of an additional date field in a precise format." ECF No. 391 at 17. They do not (and cannot) dispute that every Pennsylvania county will accept a date in the standard American format. And they have identified precisely zero people who do not know how to write a date in that format. That burden is *de minimis* compared to any a court has *ever* found to violate the right to vote.

B. The Date Requirement is Amply Supported by Legitimate State Interests.

Plaintiffs also minimize the legitimate state interests supporting the date requirement—but well-established precedent and commonsense rebut their efforts. *See* ECF No. 378 at 15-18.

First, Plaintiffs invite the Court to overrule the Pennsylvania Supreme Court's view that the date requirement serves an "unquestionable purpose" in election administration by establishing when an elector cast his ballot, *See 2020 Gen. Election*, 241 A.3d 1058, 1090 (Pa. 2020) (opinion of Dougherty, J.); *id.* at 1087, and providing a timing backstop. *Migliori v. Cohen*, 36 F.4th 153, 165 (2022) (Matey, J., concurring in judgment). They omit that the Pennsylvania Supreme Court in *Ball v. Chapman* heard arguments that the date requirement serves no purpose and violates the constitutional right to vote. 289 A.3d at 14-15. A majority of that court refused to accept that

argument and upheld the date requirement as mandatory and lawful. *Id.* at 20-23. And of course, Plaintiffs ignore the General Assembly's judgment on this point, which this Court must defer to.

Next, Plaintiffs ask this Court to hold that date requirements do not advance the state interest in solemnity, thus entirely ignoring a recent Fifth Circuit decision squarely rejecting that position. *Vote.Org. v. Callanen*, 89 F.4th 459, 467, 489 (5th Cir. 2023). And Plaintiffs do not contest that Pennsylvania requires citizens to sign and date documents *all the time* to promote solemn decisionmaking. ECF No. 378 at 14. Surely the General Assembly can do the same here.

Finally, Plaintiffs continue to insist the date requirement serves no interest in fraud detection. They continue to employ misdirection about the *Mihaliak* case, insisting the fraudster's ballot would not have been counted, and could have been investigated, regardless of the date. ECF No. 391 at 11-12. But it is undisputed that prosecutors used the date requirement to help secure a guilty plea. ECF No. 304, SOF ¶¶ 45-50. Without that evidence, the defendant could have plausibly argued that her mother cast the ballot and simply died before the ballot was *received* by the county. The date requirement foreclosed that argument and helped secure a conviction—thus punishing and deterring future fraud. *See Commonwealth v. Mihaliak*, CP-36-CR-0003315-2022 (Lancaster Cnty. Jan. 20, 2022). For that reason alone, the date requirement survives any balancing test. *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.) (accepting argument with *zero* proven cases of fraud detection).

CONCLUSION

The Court should grant Intervenor-Defendants' motion for summary judgment.

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Respectfully submitted,

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