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

BETTY EAKIN, *et al.*,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 1:22-cv-00340-SPB
	:	
ADAMS COUNTY BOARD OF ELECTIONS, *et al.*,	:	
	:	
	:	**ELECTRONICALLY FILED**
Defendants.	:	

REPLY BRIEF OF BERKS COUNTY BOARD OF ELECTIONS IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Berks County Board of Elections ("Berks County") submits this reply brief in support of its renewed motion for summary judgment responding to certain arguments in Plaintiffs' June 21, 2024 response brief (doc. 391). For all the additional reasons stated below, the Court should grant summary judgment in favor of Berks County and against Plaintiffs and dismiss with prejudice all of Plaintiffs' claims against Berks County.

I. The Third Circuit's decision in the related case (No. 1:22-cv-00339) impacts not only Plaintiffs' Materiality Provision claims but also their constitutional claim.

Plaintiffs' response brief ignores the devastating impact to Plaintiffs' constitutional claim logically flowing from the Third Circuit's rejection of Plaintiffs' principal claim that Pennsylvania's date requirement for absentee and mail-in ballots violates the federal Materiality Provision, *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024) ("*NAACP*"). In *NAACP*, the Third Circuit held that mandatory application of the date requirement does not deny any individual's **"right to vote"** because the Date Requirement is a ballot-**casting** rule that regulates **how** an individual exercises that right. *Id.* at 135 (citing *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissent)) (emphasis added).

As the Third Circuit explained, "a voter who fails to abide by state rules prescribing how to make a vote effective is not 'denied the right to vote'" or disenfranchised "when his ballot is not counted." *Id.* at 133. "[T]he failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of the right." *Id.* at 135 (quoting *Ritter*, 142 S. Ct. at 1824 (Alito, J. dissent)). Thus, the Third Circuit's decision defeats Plaintiffs' constitutional right-to-vote claim based on Plaintiffs' spurious allegation the Date Requirement has "disenfranchised" voters who fail to comply with it. Doc. 380 at 6 (Plfs' 2d Suppl. Br. at 1).

II. The Court should reject Plaintiffs' disparate impact argument.

In Section III(B) of their opposition brief, Plaintiffs argue that the Court should consider the disparate impact of the Date Requirement on certain groups of voters. Doc. 391 at 20 (Plfs' Opp. Br. at 15). According to Plaintiffs, the Court may consider the "limited number of persons" for whom a "heavier burden" may apply. *Id.* (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 (2008) (controlling op.). *Crawford* notwithstanding, it makes no sense constitutionally to conduct the type of disparate impact analysis Plaintiffs urge when analyzing facially neutral and non-discriminatory voting requirements like the Date Requirement at issue here.[1]

But the Court need not reach that legal issue here because Plaintiffs' purported evidence of disparate impact is speculative and unscientific at best and thus should be disregarded. Plaintiffs' argument is nothing more than a bald assertion that the Court should consider the burden of the Date Requirement only on those voters who fail to comply with it. Importantly, the impact of the Date Requirement on Plaintiffs' favored classes of voters—*e.g.,* older voters,

[1] Even if, based on *Crawford*, this Court cannot reject the applicability of "disparate impact" analysis under the *Anderson-Burdick* framework, Berks County preserves this argument for when this issue reaches an appellate level at which it may be properly addressed.

minority voters—is the same impact the Date Requirement has on all voters. It is not more burdensome for older voters or minority voters to handwrite the correct date on their voter declarations. Therefore, Plaintiffs' disparate impact argument, if viable at all, fails.

III. Plaintiffs have failed to establish standing to sue Berks County.

Section IV(A) of Plaintiffs' response avoids conceding, as Plaintiffs must, that individual Plaintiff Ms. Eakin is not a Berks County voter and thus does not have standing to sue Berks County. Instead, Plaintiffs breeze through their cursory argument on why the organizational Plaintiffs have standing.

Plaintiffs cleverly tries to disguise in a footnote the impact of the U.S. Supreme Court's June 13th decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. __, 144 S. Ct. 1540 (2024) ("*FDA*"), which is monumental. *See* Doc. 391 at 23 n. 11 (Plfs' Opp. Br. at 18 n. 11). In *FDA*, the Supreme Court squarely addressed the organizational plaintiffs' argument in that case that they had standing because the challenged FDA action "'forced' the associations to 'expend considerable time, energy, and resources' drafting citizen petitions to FDA, as well as engaging in public advocacy and public education, all to the detriment of other spending priorities.'" *FDA*, 144 S. Ct. at 1563.

In response, the Supreme Court firmly stated, "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *FDA*, 144 S. Ct. at 1563-1564. In reaching this conclusion, the Supreme Court distinguished the unique facts of its decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982), and clarified that *Havens* does not stand for the "expansive theory" that standing exists when an organization diverts its resources in response to a defendant's actions. *Id.* at 1564.

"*Havens* was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context. So too here." *Id.* Otherwise, under the expansive organizational standing theory Plaintiffs press in this case, "all the organizations in America would have standing to challenge almost every [] policy that they dislike, provided they spend a single dollar opposing those policies. *Havens* does not support such an expansive theory of standing." *Id.* "An organization cannot manufacture its own standing in that way." Finally, the Court rejected the argument that if the plaintiffs in *FDA* did not have standing, no one would have standing to challenge the FDA's actions. *Id.*

Thus, Plaintiffs rely on "associational standing," which is the alleged standing of their members throughout the Commonwealth. In addition to the prior reasons raised by Berks County, Plaintiffs' associational standing argument also stands on shaky constitutional ground because, among other things, it relaxes both the injury and redressability arguments for Article III Standing, and upsets other legal doctrines. *See* FDA, 144 S. Ct. at 1566-1570 (Thomas, J., concurring).

IV. Plaintiffs' Rule 5.1 Argument Misses the Mark.

Finally, in Section IV(C) of their opposition brief, in response to Berks County raising Plaintiffs' failure to comply with Rule 5.1 and notify the Pennsylvania Attorney General of its constitutional challenge to the Election Code, Plaintiffs argue that Rule 5.1 only affects the **timing** of the Court's entry of final relief, but does not prevent the Court from entering preliminary injunctive relief or reopening the proceedings if necessary if and when the Commonwealth intervenes. Doc. 391 at 24 (Plfs' Opp. Br. at 20). But Plaintiffs do not merely seek to defeat Berks County's summary judgment motion. Plaintiffs' own motion for summary judgment request summary judgment for Plaintiffs as a form of final relief, not a preliminary injunction.

Plaintiffs argue there is no prejudice here because the Commonwealth is named as a defendant in Case 339, which includes the same constitutional claim. However, that was not the case when these Case 340 Plaintiffs filed their summary judgment motion because the Court had not yet ruled on the Case 339 Plaintiffs' motion for leave to amend.

In any event, Plaintiffs have now complied with the Rule 5.1 notice requirement, and the Court has certified the constitutional question and has authorized the Commonwealth to intervene on this issue. Because the Attorney General is duty-bound by the Commonwealth Attorney's Act to defend the constitutionality of all Pennsylvania laws, presumably the Commonwealth will weigh in on this issue and defend the constitutionality of the Election Code's Date Requirement.

V. Conclusion.

For the reasons set forth above and previously, the Court should grant summary judgment in favor of Berks County and against Plaintiffs and dismiss all of Plaintiffs' claims against Berks County.

Respectfully submitted,

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SMITH BUKOWSKI, LLC

By: /s/ Jeffrey D. Bukowski
Jeffrey D. Bukowski, Esquire
PA Attorney I.D. No. 76102
JBukowski@SmithBukowski.com
1050 Spring Street, Suite 1
Wyomissing, PA 19610
Telephone: (610) 685-1600
Facsimile: (610) 685-1300

Attorneys for Berks County Board of Elections