

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

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

**BERKS COUNTY BOARD OF ELECTIONS’ SUPPLEMENTAL MOTION AND
BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Berks County Board of Elections (“Berks County”) reasserts its previous motion for summary judgment (doc. 269) and submits this supplemental brief in support of its motion for summary judgment on Plaintiffs’ remaining claims.¹ For the reasons stated previously and the additional reasons below, the Court should grant summary judgment in favor of Berks County and against Plaintiffs on all of Plaintiffs’ remaining claims and dismiss with prejudice all of Plaintiffs’ remaining claims against Berks County.

I. FACTUAL AND PROCEDURAL HISTORY.

On November 21, 2023, this Court entered an Order granting in part and denying in part Berks County’s motion for summary judgment after concluding that none of the individual

¹ Berks County previously joined in and incorporated by reference the prior summary judgment motion and supporting brief and concise statement of material facts filed by Defendant Lancaster County Board of Elections (“Lancaster County”) (doc. 267 and 268). Berks County and Lancaster County previously filed responses and briefs in opposition to Plaintiffs’ motion for summary judgment (doc. 294, 295, 308, 309). All of the arguments in these prior filings relating to Plaintiffs’ remaining claims against Berks County are reasserted and incorporated by reference herein to the extent they are still applicable.

plaintiffs, and all but a few organizational plaintiffs have standing to assert their claims against Berks County. (Doc. 348 (Order) at 5.) There is a discrepancy between the Court's Order and its Opinion regarding plaintiff Make the Road Pennsylvania's standing to sue Berks County. The Court's Order dismissed for lack of standing the claims against Berks County asserted by all the plaintiffs except for the Pennsylvania State Conference of the NAACP ("NAACP") and The League of Women Voters of Pennsylvania ("League") (doc. 348 (Order) at 5); the Court's Opinion says that in addition to the NAACP and the League, Make the Road Pennsylvania (MTRP) also has standing to pursue its claims against Berks County (doc 347 (Opinion) at 15-26 & n.12 (discussion), 33-34 (chart)). Berks County assumes the Court ruled that the NAACP, the League, and MTRP all have standing to assert their claims against Berks County. (Berks County will refer below to the NAACP, the League, and MTRP, collectively, as "Plaintiffs").

The Court granted declaratory judgment in favor of Plaintiffs on their claim that enforcing the challenged Date Requirement violates the Materiality Provision of the federal civil rights act, 52 U.S.C. §10101(a)(2)(B) (Amended Complaint Count I), but it did not reach the question of summary judgment on their Equal Protection claim (Amended Complaint Count II). (Order, doc. 348 at 4-5; Opinion, doc. 347 at 74-76. The Third Circuit reversed the Court's entry of summary judgment on Plaintiffs' Materiality Provision claim and remanded the case for further proceedings on Plaintiffs' remaining Equal Protection claim. (Doc. 384.) This Court ordered the parties to file supplemental summary judgment papers on Plaintiffs' remaining Equal Protection claim. (Doc. 385.)

II. There is no evidence Berks County treats military and overseas absentee ballots differently from domestic absentee or mail-in ballots.

In Count II of the Amended Complaint, Plaintiffs claim Berks County violated their rights under the Fourteenth Amendment’s Equal Protection Clause because, by faithfully applying the provisions of the Pennsylvania Election Code requiring voter declarations on the outer envelope of absentee and mail-in ballots be correctly dated, 25 P.S. §§ 3146.6(a), 3150.16(a) (collectively, the “Date Requirement”), Berks County allegedly “invalidate[s] the mail ballots of otherwise qualified domestic voters based on trivial paperwork errors while counting the mail ballots of military and overseas voters who make the same immaterial mistake.” Amended Complaint (doc. 121) ¶ 87.

With respect to the challenged Date Requirement, Plaintiffs have no evidence to support their claim that Berks County treats military and overseas absentee ballots differently than it treats domestic civilian absentee or mail-in ballots. In response to Plaintiffs’ interrogatories, Berks County stated that it received 146 military/overseas absentee ballots in the 2022 General Election, *see Exhibit A* (Deposition Transcript of Cody L. Kauffman taken Feb. 17, 2023 (“C. Kauffman Dep.”) Ex. 2, at 1 (Response ¶ 1)), and that Berks County did not set aside any of those 146 military/overseas absentee ballots for violation of the Date Requirement, *Exhibit A* (C. Kauffman Dep.) Ex. 2, at 6-8 (Response ¶¶ 15-22)).² Clarifying Berks County’s written

² Plaintiffs’ Concise Statement of Material Facts (doc. 276 & 283) and appendices Vol. I, III, and VI in support of their prior summary judgment motion (doc. 277, 279, 281) include many references to Berks County Rule 30(b)(6) representative Cody Kauffman, Esquire’s deposition transcript, *see* doc. 276 & 283 ¶¶ 12, 14, 15, 37, 39, 47-50, 53-56, 59, 63-65, 88, 91-92, 97, 102-104, 113 (doc. 279, Appx. Vol. III, APP_00800-849) and doc. 281, Appx. Vol. V, APP_01169-1172), and Berks County’s interrogatory responses, doc. 276 & 283 ¶¶ 34(e), 35, 36(d), 42-43, 59, 91, 104, 111 (doc. 277, Appx. Vol. I, APP_00077-00086). Berks County relies on Attorney Kauffman’s deposition testimony and its interrogatory responses (C. Kauffman Dep. Ex. 2) to support its summary judgment motion. For the Court’s convenience, these materials are attached hereto as **Exhibit A**.

interrogatory responses, Berks County First Assistant Solicitor Cody L. Kauffman, Esquire testified that the reason Berks County did not set aside any military/overseas absentee ballots for violation of the Date Requirement in the 2022 General Election is because none of those 146 absentee ballots had a missing or incorrect date on the voter declaration on the outer envelope. **Exhibit A** (C. Kauffman Dep.) at 103-105 and Dep. Ex. 2.³

Because there is no evidence that Berks County treated or treats military and overseas absentee ballots differently from domestic civilian absentee or mail-in ballots, Plaintiffs' remaining Equal Protection claim against Berks County must be dismissed.

Even if there were evidence that Berks County treated or treats military and overseas absentee ballots differently than domestic absentee and mail-in ballots when it comes to applying the challenged Date Requirement, Plaintiffs base their Equal Protection claim against Berks County on the alleged difference in how Pennsylvania law—not Berks County custom, practice or policy—treats military and overseas ballots. Amended Complaint ¶ 86 (“Yet state law applies a different rule to military and overseas voters who vote by mail, stating that a ‘voter’s mistake or omission in the completion of a document’ shall not invalidate their ballot ‘as long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote.’ 25 Pa. C.S. § 3515(a).”).

Plaintiffs have not demonstrated, as required, that the alleged violation of the Equal Protection Clause is based on Berks County’s customs, practices or policies. *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1027 (3d Cir. 1991) (“In a § 1983 claim against a local government unit, liability attaches when it is the government unit’s policy or custom itself that

³ Military/overseas absentee ballots are the same as “UOCAVA ballots” referenced by Plaintiffs’ counsel in Attorney Kauffman’s deposition.

violates the Constitution.”) Because Plaintiffs’ Equal Protection claim alleges they are being treated differently than military and overseas absentee voters based on Pennsylvania law—and not based on any custom, practice or policy of Berks County, which is bound to follow Pennsylvania law and binding interpretation caselaw⁴—Plaintiffs’ Equal Protection claim against Berks County also fails for that independent reason.

Finally, Plaintiffs’ Equal Protection claim fails because military and overseas absentee voters are not similarly situated to domestic absentee or mail-in voters. Military and overseas absentee voters have different eligibility and timing requirements for submission of their absentee ballots. Military and overseas absentee ballots must be completed and mailed by 11:59 PM the day before election day, and the county election office must receive those completed ballots no later than 5:00 PM seven days following election day. A separate uniform act applies, in conjunction with the Election Code, to military and overseas absentee voters. *See* 25 Pa. C.S.A. §§ 3501-3519 (Uniform Military and Overseas Voter Act). And by virtue of being overseas or on military deployment, if their absentee ballot is rejected for any reason,

⁴ *See Ball v. Chapman* (102 MM 2022), 289 Pa. 1, 28 (Pa. 2023) (“The Election Code commands absentee and mail-in electors to date the declaration that appears upon ballot return envelopes, and failure to comply with that command renders a ballot invalid as a matter of Pennsylvania law.”) Because of the timing, the Pennsylvania Supreme Court in *Ball v. Chapman* issued an Order dated November 1, 2022 and a supplemental Order dated November 5, 2022. The Supreme Court’s November 1, 2022 Order said, “The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes.” The Court’s November 5, 2022 supplemental Order defined, for purposes of the November 8, 2022 general election, “incorrectly dated outer envelopes” as “(1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022. Pursuant to these Orders and the Court’s Majority Opinion issued February 8, 2023, the county boards of elections are required by law to set aside and not count domestic absentee and mail-in ballots “contained in undated or incorrectly dated outer envelopes.”

military and overseas absentee voters are unable to come into the county election office to cure any mistakes or arrange to vote in person in their precinct on election day. Therefore, even if Pennsylvania law requires military and overseas absentee ballots to be treated differently when it comes to the Date Requirement, there is a lawful basis for that different treatment.

III. Berks County's compliance with the Pennsylvania Election Code's Date Requirement does not unlawfully burden Plaintiffs' right to vote in violation of the First and Fourteenth Amendment.

As explained in Berks County's brief in opposition to Plaintiffs' motion for leave to amend (doc. 393), it would be inequitable to grant Plaintiffs leave, at this late stage of the case, to file a Second Amended Complaint asserting their proposed new *Anderson-Burdick* claim (proposed Count III). If the Court disagrees, Berks County incorporates by reference its futility argument set forth in its brief in opposition to Plaintiffs' motion for leave to amend (doc. 393).

For those reasons, Berks County's enforcement of the Date Requirement in the Pennsylvania Election Code and binding interpreting caselaw⁵ does not unlawfully burden Plaintiffs' right to vote in violation of the First and Fourteenth Amendment. Therefore, Plaintiffs' proposed *Anderson-Burdick* claim is legally insufficient and not factually supported by the evidence. Accordingly, the Court should grant summary judgment for Berks County and against Plaintiffs on Plaintiffs' proposed *Anderson-Burdick* claim.⁶

⁵ *Ball v. Chapman*, 289 Pa. 1, 28 (Pa. 2023); *see also* Pa. Supreme Court's Nov. 1, 2022 Order and Nov. 5, 2022 supplemental Order in *Ball v. Chapman* (102 MM 2022), *supra* at page 5, n.3.

⁶ Berks County expects to file a supplemental brief regarding the lack of merit of Plaintiffs' proposed *Anderson-Burdick* claim more fully in the related case of *Eakin v. Adams County Board of Elections*, No. 1:22-cv-00340-SPB, where that claim was timely asserted. If Plaintiffs in this case are permitted to assert their proposed *Anderson-Burdick* claim, Berks County incorporates those arguments as though set forth at length here.

IV. CONCLUSION.

For all of the above reasons, the Court should grant summary judgment for Berks County and against Plaintiffs the NAACP, the League of Women Voters of Pennsylvania, and Make the Road Pennsylvania on Count II of Plaintiffs' Amended Complaint and on Plaintiffs' proposed *Anderson-Burdick* claim.

Respectfully submitted,

Dated: May 29, 2024

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