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

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*, *Plaintiffs*, v. AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth, *et al.*, *Defendants*.	Case No. 1:22-cv-00339-SPB

PLAINTIFFS' OMNIBUS OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE 2

A. Plaintiffs Have Demonstrated a Sufficient Injury-in-Fact. 2

B. Plaintiffs Have Standing to Sue the Secretary. 6

C. The Remaining Counties Are Proper Defendants. 7

D. The Requested Relief Creates No Disuniformity Problem. 9

II. THE UNEQUAL TREATMENT OF DOMESTIC AND OVERSEAS VOTERS VIOLATES EQUAL PROTECTION 10

A. Pennsylvania Law Provides for Unequal Treatment. 10

B. The Unequal Treatment Is Not Justified. 13

C. The Appropriate Remedy Is Counting Voters' Votes. 17

III. EXCLUDING VOTERS' BALLOTS BASED ON A MEANINGLESS MISTAKE IS UNCONSTITUTIONAL 18

A. The *Anderson-Burdick* Framework Applies Here. 18

B. The Challenged Conduct Fails the *Anderson-Burdick* Test and Is Unconstitutional. 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Alexander v. South Carolina State Conference of NAACP,
144 S. Ct. 1221 (2024) 21

American Party of Texas v. White,
415 U.S. 767 (1974) 16

Anderson v. Celebrezze,
460 U.S. 780 (1983) 23

Arizona Democratic Party v. Hobbs,
18 F.4th 1179 (9th Cir. 2021) 20

Ball v. Chapman,
289 A.3d 1 (Pa. 2023) 6, 10, 11

Belitsksus v. Pizzingrilli,
343 F.3d 632 (3d Cir. 2003) 24

Bonner v. Chapman,
298 A.3d 153 (Pa. Commw. Ct. 2023) 18

Brnovich v. DNC,
594 U.S. 647 (2021) 20

Burdick v. Takushi,
504 U.S. 428 (1992) 23

Bush v. Gore,
531 U.S. 98 (2000) 9

Califano v. Westcott,
443 U.S. 76 (1979) 17

Chapman v. Berks County Board of Elections,
No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022) 7, 8

Conroy v. City of Philadelphia,
421 F. Supp. 2d 879 (E.D. Pa. 2006) 9

Constitution Party of Pennsylvania v. Cortes,
877 F.3d 480 (3d Cir. 2017) 18

Council of Alternative Political Parties v. Hooks,
179 F.3d 64 (3d Cir. 1999) 21

Crawford v. Marion County Election Board,
553 U.S. 181 (2008) 19, 20

Daunt v. Benson,
956 F.3d 396 (6th Cir. 2020) 18

Democracy North Carolina v. North Carolina State Board of Elections,
476 F. Supp. 3d 158 (M.D.N.C. 2020) 21

DNC v. Wisconsin State Legislature,
141 S. Ct. 28 (2020) 21

Donald J. Trump for President, Inc. v. Boockvar,
493 F. Supp. 3d 311 (W.D. Pa. 2020) 20

Donald J. Trump for President, Inc. v. Boockvar,
502 F. Supp. 3d 899 (M.D. Pa. 2020) 17

Donald J. Trump for President, Inc. v. Secretary of Pennsylvania,
830 F. App'x 377 (3d Cir. 2020) 25

Dunn v. Blumstein,
405 U.S. 330 (1972) 10

FDA v. Alliance for Hippocratic Medicine,
602 U.S. 367 (2024) 3, 4, 5

Finberg v. Sullivan,
634 F.2d 50 (3d Cir. 1980) 8

Frank v. Walker,
819 F.3d 384 (7th Cir. 2016) 23

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 4, 5

Heckler v. Mathews,
465 U.S. 728 (1984) 17

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 2

Lutz v. Portfolio Recovery Assocs., LLC,
49 F.4th 323 (3d Cir. 2022) 12

Mazo v. New Jersey Secretary of State,
54 F.4th 124 (3d Cir. 2022) 2, 18, 20

Mazo v. Way,
551 F. Supp. 3d 478 (D.N.J. 2021) 21, 23

McDonald v. Board of Election Commissioners of Chicago,
394 U.S. 802 (1969) 15, 16

Memphis A. Philip Randolph Institute v. Hargett,
2 F.4th 548 (6th Cir. 2021) 21

Monell v. Department of Social Services of the City of New York,
436 U.S. 658 (1978) 8

New Georgia Project v. Raffensperger,
484 F. Supp. 3d 1265 (N.D. Ga. 2020) 23

Northeast Ohio Coalition for the Homeless v. Husted,
696 F.3d 580 (6th Cir. 2012) 11, 24

Northeast Ohio Coalition for the Homeless v. Husted,
837 F.3d 612 (6th Cir. 2016) 20, 23

O'Brien v. Skinner,
414 U.S. 524 (1974) 16

Obama for America v. Husted,
697 F.3d 423 (6th Cir. 2012) 14

Obama for America v. Husted,
888 F. Supp. 2d 897 (S.D. Ohio 2012) 14

OpenPittsburgh.Org v. Voye,
563 F. Supp. 3d 399 (W.D. Pa. 2021) 8

Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania,
97 F.4th 120 (3d Cir. 2024) 22

People First of Alabama v. Merrill,
491 F. Supp. 3d 1076 (N.D. Ala. 2020) 15

Peters v. Lincoln Electric Co.,
285 F.3d 456 (6th Cir. 2002) 25

Price v. New York State Board of Elections,
540 F.3d 101 (2d Cir. 2008) 20

Richardson v. Texas Secretary of State,
978 F.3d 220 (5th Cir. 2020) 16

RNC v. Schmidt,
No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) 6

Rucho v. Common Cause,
588 U.S. 684 (2019) 21

Sessions v. Morales-Santana,
582 U.S. 47 (2017) 17

Short v. Brown,
893 F.3d 671 (9th Cir. 2018) 20

Soltysik v. Padilla,
910 F.3d 438 (9th Cir. 2018) 24

Texas Democratic Party v. Abbott,
961 F.3d 389 (5th Cir. 2020) 16, 19

Texas Democratic Party v. Abbott,
978 F.3d 168 (5th Cir. 2020) 16

Tully v. Okeson,
977 F.3d 608 (7th Cir. 2020) 20

United States v. Alabama,
778 F.3d 926 (11th Cir. 2015) 17

Vote.Org v. Callanen,
89 F.4th 459 (5th Cir. 2023) 25

Voto Latino v. Hirsch,
No. 1:23-CV-861, 2024 WL 230931 (M.D.N.C. Jan. 21, 2024) 23

Welsh v. United States,
398 U.S. 333 (1970) 17

Statutes

25 P.S. § 2641 8

25 P.S. § 2642 8

25 P.S. § 3146.1 14

25 P.S. § 3146.6(a) 11

25 P.S. § 3150.16(a) 11

25 Pa. C.S. § 3503(c)(2) 12

25 Pa. C.S. § 3503(c)(4)(iii) 12

25 Pa. C.S. § 3505 11

25 Pa. C.S. § 3506 11

25 Pa. C.S. § 3507 11

25 Pa. C.S. § 3509 11

25 Pa. C.S. § 3510 11

25 Pa. C.S. § 3511 ..... 11, 15

25 Pa. C.S. § 3512 11

25 Pa. C.S. § 3515 ..... 11, 12

25 Pa. C.S. § 3515(a) 11, 12

25 Pa. C.S. § 3519 18

28 U.S.C. § 1746 25

Act of Oct. 31, 2019, P.L. 552, No. 77, § 11 18

Constitutional Provisions

U.S. Const. art VI, cl. 2 10

INTRODUCTION

In every election since 2020, thousands of Pennsylvanians lawfully chose to vote by mail, timely submitted their ballots, signed the proper form on the outer envelope, and yet had their votes excluded because of the handwritten envelope date. This mass disenfranchisement of Pennsylvanians solely due to an irrelevant paperwork mistake violates the U.S. Constitution. Defendants' motions for summary judgment ignore the applicable law and the undisputed facts.

Defendants try to relitigate justiciability issues that have already been decided and offer new and equally meritless arguments as well. The bottom line is that Plaintiffs have standing as against all the remaining Defendants. Plaintiffs scrambled their plans and diverted resources from their preexisting goals to deal with the consequences of mass disenfranchisement due to the challenged, unconstitutional conduct, which is an injury-in-fact. And Plaintiffs can maintain this action against the remaining counties *and* against the Secretary of the Commonwealth, because the exclusion of thousands of ballots is traceable to all of them and will be redressed by a declaration that their actions are unlawful as well as corresponding injunctive relief.

Moving Defendants' merits arguments all fail, too.

As to the Equal Protection claim, GOP Intervenors offer a strained interpretation of Pennsylvania's overseas and military ballot statute, but they cannot evade the simple fact that state law treats overseas mail ballot voters differently than domestic voters, excusing trivial errors for the former group and ruthlessly enforcing them against the latter by summarily excluding their votes. No Defendant offers any

legitimate justification for this distinction. The right remedy is to follow the ordinary rule and "level up" relief by giving the same leeway to all. The alternative would disenfranchise military voters and fly in the face of the Legislature's policy goals.

And as to the *Anderson-Burdick* claim, Moving Defendants ask the Court to simply ignore the applicable sliding-scale framework, an approach that would be contrary to law. *See, e.g.*, *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 137, 140 n.18 (3d Cir. 2022) ("Courts have applied *Anderson-Burdick* to a wide range of election laws covering nearly every aspect of the electoral process," including absentee voting). Applying the required framework, Defendants again identify no legitimate interest that necessitates disenfranchising thousands due to a totally irrelevant paperwork mistake. Their motions should be denied.

ARGUMENT[1]

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE[2]

A. Plaintiffs Have Demonstrated a Sufficient Injury-in-Fact.

To establish Article III standing, Plaintiffs must demonstrate (1) an "injury in fact," (2) that is "fairly traceable" to the challenged conduct, and (3) likely to be redressed by favorable judicial intervention. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Plaintiffs have done so. *See* Pls.' MSJ Br., ECF No.

[1] The undisputed facts are set forth in Plaintiffs' summary judgment brief, ECF No. 402 ("Pls.' MSJ Br."), the accompanying Statement of Material Facts, ECF No. 401 ("SMF"), and the underlying Appendix, ECF Nos. 277–282 ("APP_").

[2] Plaintiffs incorporate by reference the standing arguments set forth in their prior filings. *See* Pls.' MSJ Br. 12–18; *see also* Pls.' Initial MSJ Br., ECF No. 313, at 3–6; Pls.' Initial MSJ Reply, ECF No. 323, at 2–3.

402, at 12–18. Defendants misconstrue *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) ("*AHM*") in suggesting that it precludes Organizational Plaintiffs from demonstrating a required injury in fact. GOP Suppl. Br., ECF No. 434, at 4 n.2; Berks Suppl. Br., ECF No. 438, at 5–7.

Organizational Plaintiffs' constitutional claims are premised on the same injuries as their statutory claims: Enforcement of the envelope dating requirement impairs their core services, especially assisting new voters and increasing voter turnout, by forcing them to divert resources from those services toward counteracting the threat of disenfranchisement from the envelope dating requirement. *Compare* Pls.' MSJ Br. 12–18 (setting forth grounds for standing as to Equal Protection and *Anderson-Burdick* claims); SMF ¶¶ 27–32; APP_01068, 1084–1088, 1108–09, 1112, 1114, 1126, 1133, *with* Nov. 21 MSJ Op., ECF No. 347, at 16–19, 29 (NAACP has standing against Berks and York); *id.* at 19–21, 29 (League has standing against Berks and Lancaster); *id.* at 24–25, 29 (MTRP has standing against Berks); *id.* at 29–30 (Plaintiffs have standing against remaining non-moving counties); *id.* at 30–33 (all Plaintiffs have standing against Secretary Schmidt).[3]

Nothing in *AHM* changes this Court's conclusion that Organizational Plaintiffs

[3] Lancaster County misconstrues the injury-in-fact requirement by fixating on whether the Organizational Plaintiffs diverted resources "to educate voters on allegedly differing treatment of military and absentee ballots." Lancaster MSJ Br., ECF No. 396, at 1–2. Organizational Plaintiffs need only show that they were injured by the unequal treatment—as this Court has already found—not that their injury stems from educating voters about the specific, technical basis for that unequal treatment.

have established a cognizable injury in fact.[4] In *AHM*, the Court reaffirmed that *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), governs whether organizations have standing "to sue on their own behalf for injuries they have sustained." *AHM*, 602 U.S. at 393, 395. The Court reiterated that, when a defendant's actions have "directly affected and interfered with [the plaintiff organization's] core business activities," that is a cognizable injury. *Id.* at 395.

In *Havens*, the Court held that an organization that provided housing-counseling services had standing to sue an apartment-complex owner engaged in "racial steering"—providing Black individuals with false information about the availability of rental units. 455 U.S. at 366–68, 378–79. The organization ("HOME") alleged that "its efforts to assist equal access to housing through counseling and other referral services" had been frustrated because it "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Id.* at 379. The Court concluded that, if "petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers," that was a cognizable injury in fact—a "concrete and demonstrable injury to the organization's activities … with the consequent drain on the organization's resources" and "more than simply a setback to the organization's abstract social interests." *Id.*

[4] Because two Individual Plaintiffs have standing to sue York County, the *FDA* decision—which addresses only organizational standing—has no impact on Plaintiffs' *Anderson-Burdick* claim against York County. *See* Nov. 21 MSJ Op. 27, 28–29 (explaining why Polinski and Gutierrez have standing against York).

AHM applied that same standard, but the organizational plaintiffs in *AHM* fell short. The plaintiffs in *AHM* failed to show that any defendant's action caused any impediment to their preexisting business activities; instead, they claimed only that that they chose to expend resources "engaging in public advocacy and public education" to "oppose [the defendant's] actions." *AHM*, 602 U.S. at 394–95. Consistent with *Havens*, the Court held that an organization that has not otherwise suffered a concrete injury cannot "spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Id.* As Berks County argues, an organization "cannot manufacture its own standing in that way." *Id.* at 394; Berks Suppl. Br. 6–7.

This case is different from *AHM* and squarely in line with *Havens*, as this Court previously determined. *See* Nov. 21 MSJ Op. 14. Here, on the undisputed facts, enforcement of the envelope dating requirement directly interferes with Organizational Plaintiffs' preexisting activities. As in *Havens*, Organizational Plaintiffs here are not just "issue-advocacy organization[s]," *AHM*, 602 U.S. at 395; they provide voter engagement, registration, and education services. SMF ¶¶ 27–32; *see, e.g.*, APP_01068–1074, 1084–1088, 1095, 1097, 1108–09, 1114, 1126, 1133. Just as the provision of false information to renters required a housing-counseling services provider to "devote significant resources to identify and counteract the defendant's racially discriminatory steering practices," *Havens*, 455 U.S. at 379, enforcement of the envelope dating rule requires providers of voter-engagement and voter-education services to devote significant resources towards combatting the resulting

disenfranchisement. SMF ¶¶ 27–32; *see, e.g.*, APP_01068–1074, 1084–1088, 1095, 1097, 1108–09, 1114, 1126, 1133. Plaintiffs cannot avoid this resource drain without simply abandoning their preexisting mission to provide assistance services to voters in need. The challenged conduct thus directly interferes with their core activities.

B. Plaintiffs Have Standing to Sue the Secretary.

GOP Intervenors also newly contest Plaintiffs' standing to sue the Secretary, citing only inapposite cases and ignoring the undisputed facts. GOP Suppl. Br. 3–7.

As this Court has already concluded, the injuries that Plaintiffs have established are traceable to and redressable by Secretary Schmidt. Nov. 21 MSJ Op. 30–34; *see* Pls.' MSJ Br. 13–14, 15–16. Ironically, one of the cases GOP Intervenors newly cite to oppose Plaintiffs' standing to sue the Secretary over enforcement of the envelope dating requirement is a case in which *GOP Intervenors themselves* sued the Secretary and the county boards over enforcement of the envelope dating requirement, *and the court held that they had standing*. *See Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023).

Neither of the remaining two cases GOP Intervenors cite addresses a plaintiff's standing to sue the Secretary—and in any event, both were decided on substantially different facts. *RNC v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) (slip op.) involved allegations that the Secretary had issued guidance on different election-related issues than those at issue in the case and "*may, in the future*, issue guidance or statements on th[e relevant] issue"—grounds that were too speculative to make the Secretary an indispensable party. *Id.* at 20–21 (emphasis in original). And in *Chapman v. Berks County Board of Elections*, No. 355 M.D. 2022, 2022 WL

4100998, at *10 (Pa. Commw. Ct. Aug. 19, 2022), the Secretary was a plaintiff, not a defendant, so traceability and redressability were not at issue.

None of these cases changes the undisputed facts of *this* case, which trace Plaintiffs' injuries to the Secretary's actions and demonstrate that a favorable decision from this Court would redress their injuries. *See* Nov. 21 MSJ Op.31–32 & n.14 (describing email and guidance that link the Secretary's conduct to the segregation and non-counting of ballots at issue, and describing why requested relief would redress Plaintiffs' injuries). Individual Plaintiffs' injuries are traceable to the Secretary, who has a statutory duty to implement the Election Code provisions at issue and who instructed counties to refrain from counting their votes and to enter their ballots as cancelled in the SURE system. Pls.' MSJ Br. 13. Organizational Plaintiffs' injuries are traceable to the Secretary, who facilitated the disenfranchisement that forced the injurious diversion of resources from Organizational Plaintiffs' preexisting activities. Pls.' MSJ Br. 15–16. The relief sought here would redress those injuries. A declaration that strict enforcement of the envelope-date requirement is unconstitutional and corresponding injunctive relief would require the Secretary to review and revise his implementation of the Election Code with respect to mail voting and would result in the individual voters' votes being counted and included in the totals for the 2022 election. Pls.' MSJ Br. 14. And relief preventing such mass-disenfranchisement in future elections would permit Organizational Plaintiffs to direct resources back to their mission. Pls.' MSJ Br. 16.

C. The Remaining Counties Are Proper Defendants.

Lancaster and Berks Counties claim they cannot be subject to Section 1983

liability because the Election Code, rather than the Board's "own independent policy," is responsible for the challenged exclusion of domestic mail ballots. Lancaster MSJ Br., ECF No. 396, at 2; Berks Suppl. Br. 9–10. They are wrong.

The county boards manage elections in their respective counties. *See* 25 P.S. § 2641. Their authority includes canvassing and computing votes in each county's election districts and certifying the results of each race to the Secretary. *See* 25 P.S. § 2642. County Defendants' official conduct and decisions relating to canvassing, computing, and certifying the results of the election are "'edicts or acts' on behalf of the County Defendants that 'may fairly be said to represent official policy.'" *OpenPittsburgh.Org v. Voye*, 563 F. Supp. 3d 399, 426 (W.D. Pa. 2021) (quoting *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 694 (1978)).

Lancaster County's precise argument, that its "enforcement of the [] Election Code is purely ministerial, and [it is] not the moving force behind Plaintiffs' alleged injuries," has been squarely rejected as "yield[ing] a result that flies in the face of well-established Supreme Court and Third Circuit law." *OpenPittsburgh.Org*, 563 F. Supp. 3d at 427 (citing *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980)). And even if the argument had theoretical merit, Lancaster and Berks are hardly passive, ministerial actors. When the enforceability of the envelope dating requirement was unsettled under state law, those counties refused to count voters' ballots, and repeatedly litigated to be able to disenfranchise domestic mail ballot voters, *e.g.*, *Chapman*, 2022 WL 4100998, at *1. They also refused to notify domestic voters of the envelope-date issue or allow them to cure in November 2022, despite the

Organizational Plaintiffs' entreaties, SMF ¶¶ 28(f), 40. They thus "affirmatively adopted the policy or custom" that "is the driving force behind the alleged violation." *E.g.*, *Conroy v. City of Philadelphia*, 421 F. Supp. 2d 879, 886 (E.D. Pa. 2006) (citation omitted).

D. The Requested Relief Creates No Disuniformity Problem.

GOP Intervenors' argument that Plaintiffs' requested relief is barred as against the remaining counties (GOP Suppl. Br. 6–7) misconstrues both the nature of the requested relief and the teachings of *Bush v. Gore*.

Bush v. Gore involved a broad-based order requiring recounts in certain counties without any standard governing those recounts. 531 U.S. 98, 103, 105–06 (2000). The Court held that "the absence of specific standards" in the "recount mechanisms implemented in response to the decisions of the Florida Supreme Court" failed to "satisfy the minimum requirement for nonarbitrary treatment of voters" under the Equal Protection Clause. *Id* at 105–06. Here, the relief sought would not suffer from any absence of specific standards. Plaintiffs seek a declaration that disenfranchising voters for a particular, meaningless paperwork error is unlawful. Implementing that decision just means counting otherwise valid mail ballots.

The invocation of *Bush* is especially misguided on this record, which demonstrates that thousands of voters are *currently* being subjected to arbitrary treatment with respect to the envelope dating requirement. Nov. 21 MSJ Op. 70–71 & n.42; SMF ¶¶ 26, 39, 65, 67–71, 72, 74–80, 81, 86–88, 91–94, 97; APP_ 0929a–0929b, 0929m–0929o, 1432. Such disarray does not promote the "nonarbitrary treatment of voters." *Bush*, 531 U.S. at 105–06. Plaintiffs' requested relief would.

GOP Intervenors are also wrong in arguing that a "judicial order to the county boards remaining in this case would result in a single state law being applied in a disparate manner across the Commonwealth." GOP Suppl. Br. 7. Relief precluding the remaining county defendants from enforcing the envelope dating requirement (or, for that matter, requiring voters' ballots from 2022 to be counted notwithstanding envelope dating mistakes) would not *require* that any other county afford different treatment to anyone.[5] Rather, Plaintiffs' requested relief would eliminate disuniformity. *All* counties can and should follow a federal court's declaration that the practice of disenfranchising voters based on the envelope dating requirement violates the Constitution, whether or not they were previously dismissed on standing grounds. *See* U.S. Const. art VI, cl. 2. And the dismissed counties would in no way be prohibited from doing so by *Ball*, which holds only that *state law* requires voters to be disenfranchised for immaterial errors or omissions regarding the handwritten envelope date. 289 A.3d at 28 (opinion announcing the judgment).

II. THE UNEQUAL TREATMENT OF DOMESTIC AND OVERSEAS VOTERS VIOLATES EQUAL PROTECTION

A. Pennsylvania Law Provides for Unequal Treatment.

Similarly situated voters must be subject to the same basic rules: "[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein,* 405 U.S. 330, 336 (1972).

[5] Indeed, dozens of Pennsylvania counties who were otherwise dismissed would still be bound to follow this Court's order due to the stipulation they executed "agree[ing] to not contest . . . the declaratory and injunctive relief requested by Plaintiffs in this action." Stipulation, ECF. No 157, at 1; Suppl. Stipulation, ECF No. 192, at 1.

Accordingly, certain categories of mail ballots cannot arbitrarily be given "preferential treatment" over others. *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012)

Pennsylvania law treats the handwritten envelope dates of domestic mail ballot voters differently from those of overseas voters. Domestic voters' mail-ballots with no date or a purportedly incorrect date on the return envelopes are excluded. *See Ball*, 289 A.3d at 23; 25 P.S. §§ 3146.6(a), 3150.16(a). But overseas voters may commit such errors and have their votes counted. Specifically, the Uniform Military and Overseas Voters ("UMOVA") provides that a "voter's mistake or omission in the completion of a document under this chapter" shall not "invalidate a document submitted under this chapter" "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).

GOP Intervenors contend that 25 Pa. C.S. § 3515's "mistake" provision does not reach overseas mail ballot materials, but rather "applies only to 'completion of a document under this chapter'—i.e., UMOVA itself"—a category that they say includes only "special registration and application documents." GOP Br., ECF No. 398, at 8–9. That is wrong. The "chapter" in question is Chapter 35 of the voter registration laws, which covers not only the registration documents (25 Pa. C.S. § 3505) and application documents (25 Pa. C.S. §§ 3506–3507) that military-overseas voters must complete, but also overseas ballots themselves (25 Pa. C.S. §§ 3509–3512). Chapter 35 covers the "standardized absentee-voting materials and their electronic equivalents, authentication materials and voting instructions to be used

with the military-overseas ballot of a voter" (25 Pa. C.S. § 3503(c)(2)) and it expressly provides for a declaration to accompany the mail ballot, which must include "an indication of the date of execution" as "a prominent part of all balloting materials for which the declaration is required." 25 Pa. C.S. § 3503(c)(4)(iii). The declaration and date line are plainly addressed "under this chapter" of the Code.

Intervenors reach even further in arguing that UMOVA's mistake provision "applies only to documents used to determine whether a voter covered by UMOVA is eligible to vote" and not to the "act of voting." GOP Br. 8 (internal quotation marks and citations omitted). As a matter of plain text, 25 Pa. C.S. § 3515 applies to any "document submitted under this chapter," with no such limitation. And indeed, the same code section elsewhere refers to the "[federal-write in ballot] declaration" as a "document." *See Lutz v. Portfolio Recovery Assocs., LLC*, 49 F.4th 323, 333 (3d Cir. 2022) ("[T]he consistent-usage canon holds that a term should have the same meaning each time it is used throughout a statute").

GOP Intervenors also miss the mark by invoking the canon of "constitutional avoidance," which they concede applies where "a statute is susceptible of two reasonable constructions." GOP Br. 7. Here, the statute has only one reasonable construction with respect to the relevant issue: It explicitly covers any "mistake or omission in the completion of a document" as required by UMOVA so long as the mistake "does not prevent determining whether a covered voter is eligible to vote." 25 Pa. C.S. §§ 3515(a), § 3503(c)(4)(iii). That includes completing the date on the required voter declaration. For the same reasons, GOP Intervenors are wrong in

suggesting that UMOVA's special exemption for irrelevant mistakes or omissions is "*sub silentio*." GOP Br. 9–10. UMOVA's mistake provision is part of the statute's express text, creating a different rule than the one that is applied to domestic mail ballot voters, who must scrupulously comply with the irrelevant envelope dating requirement or else be disenfranchised.[6]

Moreover, and as explained in Plaintiffs' summary judgment motion, the undisputed facts also demonstrate actual unequal treatment of in-state and overseas voters. *See* Pls.' MSJ Br. 10, 19–20. At least three county boards remaining in the case admit to treating the overseas mail ballots differently, and others (including Lancaster and Berks County) simply did not receive any with missing or incorrect dates. *Id.*; *see also* ECF No. 273-43 (Miller Depo Tr.) at 97:19-98:4.[7]

B. The Unequal Treatment Is Not Justified.

Differential treatment of in-state and military-overseas mail voters violates

[6] GOP Intervenors also incorrectly suggest that the mere fact that overseas ballots "included instructions to date the envelope and contained signature and date fields for the voter to complete" must mean that the mistake provision does not apply; "[t]here would have been no reason to include those instructions and fields," they surmise, if "UMOVA exempts military and overseas voters from the date requirement." GOP Br. 10. But Plaintiffs do not challenge the mere existence of a date line on the envelope form. Rather, they challenge its hard-edged *enforcement*, to disenfranchise any mail ballot voter who makes a mistake in completing it.

[7] While Berks County did not receive any such ballots, it did represent the date requirement differently to overseas mail voters. Its instructions to domestic mail voters for the November 2022 election stated that "YOUR BALLOT WILL NOT COUNT IF IT IS NOT SIGNED AND DATED." SMF ¶ 102; APP_1170. By contrast, its instructions to overseas voters submitting in the same election told the voters, "Your ballot will not be counted without a signature," but did not indicate that the ballot would not be counted if the declaration on the return envelope lacked only a handwritten date. SMF ¶ 103; APP_1169.

the Equal Protection Clause where "there is no relevant distinction between the two groups" of voters, and "no reason to provide [in-state] voters with fewer opportunities to vote than military voters." *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012). Voters "cannot be restricted or treated in different ways without substantial justification from the state." *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 905-06 (S.D. Ohio 2012), *aff'd*, 697 F.3d 423. The justification must be "relevant" to the distinction between the two groups; a reason for giving military voters more flexibility also needs a "corresponding justification for giving others less." *Husted*, 697 F.3d at 435.

None of the moving parties identifies a substantial or relevant justification here. GOP Intervenors claim that military voters are distinct from non-military voters in that they are "absent from their voting jurisdictions," GOP Br. 13, and Berks County argues that overseas and domestic voters are not similarly situated because overseas voters "are unable to come into the county election office to cure any mistakes or arrange to vote in person," Berks MSJ Br., ECF No. 403, at 5–6, *see also* Berks Suppl. Br. 10–11. But all of that is true of numerous other categories of eligible domestic mail ballot voters, who may be absent from their home county due to work or family obligations, or who may be unable to arrange to vote in person due to an issue relating to disability or health. *See, e.g.*, 25 P.S. § 3146.1 (noting categories of eligible absentee voters). GOP Intervenors also suggest that overseas' voters "absence from the country" causes "difficulties," GOP Br. 12, *see also* Berks Suppl. Br. 10–11, but never explain how those difficulties might justify different treatment

as compared to domestic voters, who may also be unable to learn of or timely cure the mistake in person (especially in counties like Berks and Lancaster that may not provide notice and a cure opportunity).

There is especially little justification for giving domestic mail voters a *stricter* envelope dating requirement as compared to overseas voters. If anything, the voter's handwritten date is *more* important in the context of military-overseas ballots, which may be received after Election Day. 25 Pa. C.S. § 3511. In contrast, because domestic ballots must be received by 8:00 P.M. on Election Day, the county board's time-stamp conclusively establishes their timeliness. SMF ¶¶ 11–12.

GOP Intervenors also argue that heightened scrutiny does not apply to unequal enforcement of the envelope dating requirement because absentee balloting is at issue (GOP Br. 14), but that is both wrong and, ultimately, irrelevant.

Because the unequal treatment at issue here implicates the fundamental right to vote, strict scrutiny is appropriate. *See* Pls.' MSJ Br. 19.[8] Defendants rely on *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 808 (1969) (GOP Br. 14; *see also* GOP Suppl. Br. 8), but that case is inapposite. *McDonald* involved a challenge to Illinois law which extended absentee voting to some persons based on need, but not others. 394 U.S. at 803–04. In that context, the Court held that voters for whom the State had not made mail ballot voting available at all had no

[8] *See also, e.g*, *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1178 (N.D. Ala. 2020) (Equal Protection challenge to witness requirement for absentee ballot casting "implicates [plaintiffs'] or their members' basic fundamental right to vote," making "rational basis review … inappropriate").

constitutional right to vote by mail. *Id.* at 807–08. This case, by contrast, is about whether, having *already made mail ballot voting available to all*, Pennsylvania must do so on equal terms. If anything, *McDonald* supports the Plaintiffs here, by acknowledging that "once the States grant the franchise, they must not do so in a discriminatory manner." *Id.* at 807.[9] The record demonstrates that thousands of Pennsylvanians attempted to vote and had their ballots permanently rejected solely due to the scrupulous enforcement of the envelope dating requirement, with no ability to cure—much closer to the type of actual "bar to voting" that merits strict scrutiny. *Cf. O'Brien v. Skinner*, 414 U.S. 524, 529 (1974); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974) ("[P]ermitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause").

And in any case, even if rational basis were the appropriate test, enforcement of the envelope dating requirement against some voters but not others would still be unconstitutional, for the reasons explained below: the date requirement is irrelevant

[9] In misreading *McDonald*, GOP Intervenors repeatedly rely (GOP Suppl. Br. 7–8) on Fifth Circuit motions panel stay decisions, which are "essentially written in sand with no precedential value." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 244 (5th Cir. 2020) (Higginbotham, J., concurring). They cite the stay decision in *United States v. Paxton*, to argue that "there is no constitutional right to vote by mail," but *Paxton* was not a constitutional case at all, and in any event this case does not involve any claimed constitutional right to vote by mail. *See* Order, *United States v. Paxton*, No. 23-50885, ECF No. 80-1 (5th Cir. Dec. 15, 2023); *see also supra* 15–16. They also rely on the discussion of *McDonald* in the stay opinion in *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), but the merits panel in that case disavowed the stay opinion as "not precedent" as to that specific point. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 194 (5th Cir. 2020).

and serves no election administration purpose. *See infra* 23–25.

C. The Appropriate Remedy Is Counting Voters' Votes.

GOP Intervenors suggest (GOP Br. 18) that the unequal treatment of in-state mail voters should be remedied by disenfranchising overseas voters, rather than counting all votes despite the inconsequential envelope dating error. It is true that "a mandate of equal treatment … can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews,* 465 U.S. 728, 740 (1984). In other words, a court may either "level up" (extend a benefit to a group that was previously wrongfully denied it), or "level down" (withdraw the benefit from those who receive it). *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 920–21 (M.D. Pa.), *aff'd*, 830 F. App'x 377 (3d Cir. 2020). "Ordinarily," "extension, rather than nullification, is the proper course," *Sessions v. Morales-Santana*, 582 U.S. 47, 74 (2017) (citation omitted); *see also Donald. J. Trump,* 502 F. Supp. 3d at 920–21. And leveling up is especially appropriate where, as here, a fundamental right is at stake. *See Welsh v. United States*, 398 U.S. 333, 361–64 (1970).

Courts consider legislative intent to level-up or level-down, *see Califano v. Westcott*, 443 U.S. 76, 78, 90 (1979), and here, that favors levelling up. UMOVA, like the companion federal Uniformed Overseas and Citizens Absentee Voting Act, is designed to "end[] the widespread disenfranchisement of military voters stationed overseas." *E.g.*, *United States v. Alabama*, 778 F.3d 926, 928 (11th Cir. 2015). A remedy that disenfranchises those voters would be perverse. And while GOP Intervenors argue that the supposed "general rule" from the Election Code (*i.e.*,

disenfranchisement for a minor mistake) should be applied to all, they ignore the General Assembly's specific instruction that, in any conflict with the Election Code, "the provisions of *this chapter* [*i.e.*, UMOVA] shall prevail." 25 Pa. C.S. § 3519 (emphasis added). The benefits of UMOVA should accordingly be extended to all, rather than withdrawn from overseas voters.[10]

III. EXCLUDING VOTERS' BALLOTS BASED ON A MEANINGLESS MISTAKE IS UNCONSTITUTIONAL

A. The *Anderson-Burdick* Framework Applies Here.

The *Anderson-Burdick* balancing test applies to constitutional challenges to the enforcement of state election laws. *E.g.*, *Mazo*, 54 F.4th at 137; *Const. Party of Pa. v. Cortes*, 877 F.3d 480, 484 (3d Cir. 2017). Any burden on the right to vote that is "more than minimal" is subject to this test. Pls.' MSJ Br. 22 (quoting *Daunt v. Benson*, 956 F.3d 396, 406–07 (6th Cir. 2020)). Defendants suggest that this Court can simply refrain from conducting the applicable balancing test. They are wrong.

For one, Defendants mischaracterize this case as involving some "constitutional right to vote by mail" that they claim is foreclosed by precedent. GOP Suppl. Br. 2, 7–10; *see also* Berks Suppl. Br. 13. As explained above, Plaintiffs do not seek to extend mail ballot voting to any new class of persons for whom it is unavailable under state law, as in *McDonald* or *Texas Democratic Party v. Abbott*,

[10] GOP Intervenors wrongly argue that the Court cannot "level-up" because Act 77, P.L. 552, sec. 11 (Oct. 31, 2019) included a nonseverability provision. GOP Br. 18. But Plaintiffs do not seek to strike the envelope dating requirement from the statute. Plaintiffs only ask that it not be enforced in a manner that disenfranchises voters. *Cf. Bonner v. Chapman*, 298 A.3d 153, 168 (Pa. Commw. Ct. 2023) (nonseverability not triggered where statute was not "declared invalid or stricken from the statutory scheme.").

961 F.3d 389 (5th Cir. 2020). *See supra* 16. Rather, they challenge the practice of offering all voters the ability to vote by mail and then snatching thousands of citizens' votes away after their ballots have been cast, often without any notice or opportunity to correct the issue before being completely deprived of the franchise. GOP Intervenors' argument that Pennsylvania voters can just vote in person (GOP Suppl. Br. 8–10) disingenuously ignores the fact that a voter only learns that their mail ballot has been excluded due to an irrelevant paperwork mistake (if they ever learn of it) *after* they have already attempted to vote. Impacted individuals here were never notified of their mistake—either as a practical matter (because they did not find out about the mistake in time) or, for about half the counties in 2022, as a matter of express county policy—and thus had no alternative way of voting. Pls.' MSJ Br. 22–23; SMF ¶¶ 22(f), 23(f), 24(e), 25(d)–(e), 26(f)–(g). Even setting aside disability, travel, and the other myriad reasons one may need to vote by mail, a voter cannot go back in time and choose a different method after 8 p.m. on Election Day. The scenario here is thus fundamentally distinct from *Crawford*, where elderly voters who might have had trouble obtaining a photo ID to vote at the polls could decide *ex ante* to vote absentee instead. *Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 201 (2008) (Stevens, J.) (discussed in GOP Suppl. Br. 8–10 and Berks Suppl. Br. 13–15).

Defendants are similarly wrong to suggest some "usual-burdens-of-voting" exemption from the *Anderson-Burdick* framework. GOP Suppl. Br. 10–14; Berks Suppl. Br. 13–15. *Crawford* contains no such exemption and instead confirms that all burdens on the right to vote must be "justified by relevant and legitimate state

interests." 553 U.S. at 191 (Stevens, J.).[11] And *Brnovich v. DNC*, 594 U.S. 647 (2021), on which Defendants also rely, is totally inapposite: a Voting Rights Act case involving alleged racial discrimination, based on a different set of challenged election practices. *Id.* at 654–55, 664.

More generally, GOP Intervenors' fabrication of some class of "usual burdens" voting rules that supposedly "have never been subject to judicial scrutiny under the Constitution's right-to-vote guarantee" (GOP Suppl. Br. 11) does not reflect reality. In fact, sundry election rules and practices have been scrutinized and struck down where they lacked sufficient justification for the burden imposed, including similar practices in the absentee voting context. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631–34 (6th Cir. 2016) ("*Ne. Ohio Coal. II*") (absentee ballot paperwork requirement held unconstitutional); *see also, e.g.*, *Mazo*, 54 F.4th at 137 & 140 n.18 (collecting cases where *Anderson-Burdick* was applied to absentee voting rules, including *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1181 (9th Cir. 2021) (mail ballot curing deadline); *Tully v. Okeson*, 977 F.3d 608, 615–16 (7th Cir. 2020) (absentee voting laws); *Short v. Brown*, 893 F.3d 671, 676–79 (9th Cir. 2018) (varying mail ballot receipt policies); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 107–12 (2d Cir. 2008) (absentee ballot restriction)); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 311, 385 (W.D. Pa. 2020) (applying *Anderson-Burdick*

[11] The *Crawford* plurality never stated that there are some burdens on voting that are subject to no judicial scrutiny at all, as GOP Intervenors wrongly suggest. GOP Suppl. Br. 13–14. Rather, the Court stated only that, "[f]or most voters who need them," the burden of getting a photo identification at some point before the election does not "represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

framework to mail ballot rules but ruling against Trump campaign on the merits); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 239–40 (M.D.N.C. 2020) (absentee ballot witness rule).

As these cases make clear, and contrary to GOP Intervenors' argument (GOP Suppl. Br. 11–12), federal courts' application of the *Anderson-Burdick* standard is perfectly consistent with states' general "power to enact election codes that comprehensively regulate the electoral process." *Council of Alt. Pol. Parties v. Hooks*, 179 F.3d 64, 70 (3d Cir. 1999) (citation omitted). The standard is in some cases deferential, and more importantly it is flexible—"lesser burdens receive lesser scrutiny, while greater burdens require more substantial justifications." *Mazo v. Way*, 551 F. Supp. 3d 478, 500 (D.N.J. 2021), *aff'd* 54 F.4th 124 (citation omitted). But Defendants' assertion, based on single-judge concurrences and inapposite redistricting cases, that *Anderson-Burdick* is not just deferential or flexible but totally inert, allowing disenfranchisement without any proffered justification, is simply not the law.[12]

[12] *Alexander v. S.C. State Conf. of NAACP*, 144 S. Ct. 1221 (2024) and *Rucho v. Common Cause*, 588 U.S. 684 (2019) were gerrymandering cases that did not involve *Anderson-Burdick*; the passages cited (GOP Suppl. Br. 12) involve the political sensitivity of the redistricting process, not whether mail ballot voters of all political stripes may be arbitrarily disenfranchised. Justice Kavanaugh's non-precedential, single-judge stay concurrence in *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 35 (2020) dealt mostly with the timing of the challenge at issue, and GOP Intervenors omit key language from the snippet they cite which makes clear that it refers only to election deadlines: "[A] State's election deadline does not disenfranchise voters who are capable of meeting the deadline but fail to do so." Meanwhile, the solo concurrence in *Memphis A. Philip Randolph Institute v. Hargett* confirms that *Anderson-Burdick* is the applicable legal framework in all "matters involving election mechanics." 2 F.4th 548, 561–62 (6th Cir. 2021) (Readler, J.).

Finally, nothing about the Third Circuit's decision on the Materiality Provision claim in this case forecloses an *Anderson-Burdick* claim here, as Defendants wrongly assert. GOP Suppl. Br. 1–2, 11; Berks Suppl. Br. 11–12. The Third Circuit's decision dealt exclusively with an alleged violation of the right to vote as guaranteed by the statute. *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 139 (3d Cir. 2024). It did not deal with the type of balancing test called for by *Anderson-Burdick*, and if anything, strongly suggests that enforcement of the envelope dating requirement would *fail* that test because it "serves little apparent purpose." *Id.* at 125.

Defendants now claim that the constitutional right at issue in an *Anderson-Burdick* claim must necessarily be narrower than the statutory right guaranteed by the Materiality Provision. GOP Suppl. Br. 1–2, 13–14; Berks Suppl. Br. 12. Plaintiffs have never made any such assertion, or framed the question in terms of which right is broader or narrower.[13] To the contrary, the scope of the rights protected by the Materiality Provision on the one hand, and *Anderson-Burdick* on the other, are simply different—they involve the application of separate and distinct legal standards, and one or the other or both may apply in a particular case. Consistent with that, courts can and do find state laws restricting voting unconstitutional even where a parallel claim involving some statutory right to vote fails. *See, e.g.*, *Ne. Ohio*

[13] In the Third Circuit, Plaintiffs stated only that "GOP-Intervenors' reliance ... on cases holding that there is no constitutional right to vote by mail ignores the *statutory* right at issue." Pls.' Br. at 43, *Pa. State Conf. of NAACP v. Schmidt*, No. 23-3166 (3d Cir. Jan. 10, 2024), ECF No. 151. The point being that, as noted above, *supra* 16, cases like *McDonald* are inapposite in evaluating Plaintiffs' claims in this case.

Coal. II, 837 F.3d at 625–38 (Voting Rights Act claim unsupported but Equal Protection Clause violation established); *Voto Latino v. Hirsch*, No. 1:23-CV-861, 2024 WL 230931, at *14–*15 (M.D.N.C. Jan. 21, 2024) (plaintiffs unlikely to succeed on Civil Rights Act claim but likely to succeed on constitutional claims) *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1301, 1304 (N.D. Ga. 2020) (plaintiffs unlikely to succeed on Voting Rights Act claim but likely to succeed on *Anderson-Burdick*).

B. The Challenged Conduct Fails the *Anderson-Burdick* Test and Is Unconstitutional.

In conducting the required balancing analysis, courts consider "(1) the 'character and magnitude' of the constitutional injury, (2) 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' and (3) 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Way*, 551 F. Supp. 3d at 500 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983)). If, in light of these considerations, the challenged conduct "imposes 'severe' restrictions," then a form of strict scrutiny applies. *Way,* 551 F. Supp. 3d at 500 (citations omitted). If "only 'reasonable, nondiscriminatory restrictions'" are imposed, the defendant must still show that "its 'legitimate interests sufficient[ly] ... outweigh the limited burden.'" *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 440 (1992)).

Here, as Plaintiffs explained in their summary judgment motion, the burden on voters is substantial because the consequence of noncompliance is total disenfranchisement for thousands of eligible voters, most of them without any notice or recourse. Pls.' MSJ Br. 22–24; *see also Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (harm to even a "single" voter may violate the Constitution). And

Defendants have not identified (let alone substantiated) any legitimate, non-speculative interests that might justify this burden, *see, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 448–49 (9th Cir. 2018). Their attempts to do so fail.

First, Defendants repeat the debunked assertion that the envelope dating requirement helps prevent fraud, based on a single incident in the 2022 primary. GOP Suppl. Br. 20; Berks Suppl. Br. 16. In fact, the ballot at issue in that case was first detected via the SURE system and Department of Health records, not the handwritten date, and in any event, the undisputed facts, including testimony from the county, show that the vote *would never have been counted*, regardless of the handwritten date on the envelope. Nov. 21 MSJ Op. 67–68; Pls.' MSJ Br. 8. Nor does this one incident demonstrate how some attenuated anti-fraud interest makes it necessary to disenfranchise thousands of voters for a meaningless paperwork mistake. *See Ne. Ohio Coal. for the Homeless*, 696 F.3d at 633 (speculative anti-fraud interest "does not offset the burden of technical perfection").

The remaining interests Defendants cite are even less persuasive. GOP Intervenors theorize that the handwritten envelope date "would become quite important if a county failed to timestamp a ballot upon receiving it or if Pennsylvania's SURE system malfunctioned," implicitly admitting that nothing like this has ever actually happened. GOP Suppl. Br. 18. Nor can Defendants substantiate the proffered interest in promoting "solemnity." GOP Suppl. Br. 19; Berks Suppl. Br. 17. Defendants point to no evidence of any lack of solemnity among Pennsylvania voters. *See Belitsksus v. Pizzingrilli*, 343 F.3d 632, 645 (3d Cir. 2003).

And to the extent asking voters to write the date next to their signature on the envelope promotes solemnity, *that is already happening and is not at issue here*. Again, Plaintiffs do not challenge the existence of a date line on the envelope form;[14] they challenge the disenfranchisement of voters simply for making a mistake in filling it out. Defendants say absolutely nothing about how that draconian, after-the-fact punishment for a minor mistake promotes "solemnity" in the act of voting.[15]

To similar effect, Berks County cites nothing at all to support its assertion that enforcement of the envelope dating requirement on pain of disenfranchisement somehow "safeguard[s] voter confidence." Berks Suppl. Br. 20. To the contrary, mass disenfranchisement, especially when conducted in an arbitrary manner as in 2022, if anything undermines confidence in the electoral process. *Cf. Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 390–91 (3d Cir. 2020) (non-precedential) ("Democracy depends on counting all lawful votes …. The public must have confidence that our Government honors and respects their votes.").

CONCLUSION

The motions for summary judgment should be denied.

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[14] Berks County points to various forms that call for a signature and date, Berks Suppl. Br. 17–20, but no instance in which any of those forms was invalidated for lack of a date. Indeed, as for the signature and dating requirement in 28 U.S.C. § 1746, courts have held that "the absence of a date [on such a declaration] does not render them invalid if extrinsic evidence could demonstrate the period when the document was signed." *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 475–76 (6th Cir. 2002).

[15] GOP Intervenors' reliance on *Vote.Org v. Callanen*, GOP Suppl. Br. 19–20, is misplaced because, among other reasons, Plaintiffs do *not* challenge Pennsylvania's signature requirement on mail-in ballots. 89 F.4th 459, 468 (5th Cir. 2023) (considering a wet-signature requirement under *Anderson-Burdick*).

Dated: July 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2024, Plaintiffs served this omnibus opposition to the Moving Defendants' motions for summary judgment all parties in this matter.

Dated: July 18, 2024

Respectfully submitted,

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