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

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*,	)	
	)	Civil Action No.: 1:22-cv-00339
Plaintiffs,	)	
v.	)	Judge Susan P. Baxter
AL SCHMIDT, *et al.*,	)	
Defendants.	)	

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

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Plaintiffs' various attempts to save their back-up constitutional challenges to the General Assembly's date requirement all fail. The Court should grant summary judgment and end this case.

I. PLAINTIFFS LACK STANDING.

This Court has already held that the Secretary is the only remaining defendant for Plaintiffs' constitutional claims. *See* ECF No. 347 at 33-34. Plaintiffs thus lack standing, as no order against the Secretary can redress Plaintiffs' alleged injuries. ECF Nos. 398 at 2-5, 434 at 3-7. Tellingly, even the Secretary does not dispute this point. *See* ECF No. 440 (silent on issue).

Plaintiffs cannot distinguish *RNC v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. 2023) (ECF No. 434-1), which authoritatively held that the "Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon County Boards." ECF No. 434-1 at 20. Here, Plaintiffs have not pointed to any statutory authority the Secretary could use to bind the county boards as to the date requirement. They allege only that the Secretary has "instructed counties" to comply with the date requirement. ECF No. 444 at 7. But the Secretary has only restated the terms of the Pennsylvania Supreme Court's order, and *only* an order directed against the county boards can change their legal obligations. *See* Statement of Position Regarding Applications for Summary Relief at 6, *Black Pol. Empowerment Project v. Schmidt*, 283 MD 2024 (Pa. Commw. Ct. June 24, 2024) (Ex. A) (Philadelphia and Allegheny County admitting this).

Next, Plaintiffs cite *Ball v. Chapman*, *see* ECF No. 444 at 6 (citing 289 A.3d 1 (Pa. 2023)), but *Ball* belies Plaintiffs' argument. *First*, standing existed in *Ball* because the Secretary's guidance deepened a state-law dispute on whether the date requirement is mandatory, creating a "lack of clarity." *Ball*, 289 A.3d at 13, 19-20. Here, the Secretary's guidance merely restates well-settled state law, and Plaintiffs "facial[] challenge[] [to] an existing interpretation of settled law"

cannot establish standing to sue the Secretary. *Id.* at 19. *Second*, all 67 counties were parties in *Ball*, which enabled the court to order a uniform statewide remedy, *see id.* at 1, while any remedy here would bind only some counties and violate the Equal Protection Clause and the Pennsylvania Constitution, *see* ECF No. 439 at 4-5. *Third*, the remedy in *Ball* issued only against the county boards, not the Secretary. *See* 284 A.3d 1189, 1192 (2022). In all events, regardless of how Pennsylvania standing law works, federal courts cannot find standing against a defendant unless a remedy lies against that defendant. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). Because an order against the Secretary would provide no remedy to Plaintiffs, their claims against the Secretary are not redressable.

This is not the only standing defect in Plaintiffs' case. The organizational Plaintiffs also lack a cognizable injury because resource-diversion injuries do not suffice to confer standing. *See* ECF No. 439 at 5-8. Plaintiffs rely on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), *see* ECF No. 444 at 3-4, and thus ignore the Supreme Court's clarification that *Havens* turned not on any resource-diversion injury, but on "actions [that] directly affected and interfered with [the plaintiff's] core business activities." *All. for Hippocratic Med.*, 602 U.S. at 395.

Plaintiffs' attempt to show interference with their core business activities is irreconcilable with *Alliance for Hippocratic Medicine*. They point only to their voluntary decision to "combat[]" the date requirement in litigation. *See* ECF No. 444 at 5. But *the entire point of Alliance for Hippocratic Medicine* is that such voluntary advocacy against a rule Plaintiffs disfavor is insufficient to manufacture standing. *See* 602 U.S. at 394-95; *see also* ECF No. 439 at 5-8. Plaintiffs are as free to provide their "voter-engagement and voter-education services," ECF No. 444 at 5, as they would be in the absence of the date requirement. They therefore lack standing. *See* ECF No. 439 at 5-8.

II. PLAINTIFFS' EQUAL PROTECTION CLAIMS ARE MERITLESS.

Plaintiffs' Equal Protection claims remain meritless. ECF No. 398 at 6-17. Plaintiffs continue to insist that UMOVA's mistake provision overrides the date requirement, ECF No. 444 at 10-12, but that provision applies only to documents identified in chapter 35 of the Election Code, which says *nothing* about how ballots are to be filled out, *see* 25 Pa. C.S. §§ 3501-3519; ECF No. 439 at 8-9. Plaintiffs' various strained citations to chapter 35 do not prove otherwise: They cite provisions governing the deadline for overseas voters to return ballots, *see* 25 Pa. C.S. §§ 3509-12, and provisions governing the *form* of ballots to be approved by the Secretary, *see id.* § 3503(c); *see* ECF No. 444 at 11-12. Indeed, the directive obliging *the Secretary* to include "an indication of the date of execution" as "a prominent part of all balloting materials" provided to overseas voters, 25 Pa. C.S. § 3503(c)(4)(iii) (cited at ECF No. 444 at 12), does not change *voters'* obligations. If anything, that directive confirms that the date requirement extends to, rather than exempts, overseas voters. *See* ECF No. 398 at 9-11.

In any event, by its terms, UMOVA's mistake provision applies only to documents used in "determining whether a covered [UMOVA] voter is eligible to vote." 25 Pa. C.S. § 3515(a). As with the federal Materiality Provision, "it makes no sense to read [this provision] to prohibit enforcement of vote-casting rules that are divorced from the process of ascertaining whether an individual is qualified to vote." *Pa. State Conf. of NAACP v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 134 (3d Cir. 2024). And even if the issue were close, constitutional avoidance requires rejecting Plaintiffs' strained interpretation. *See* ECF No. 398 at 7.

Further, any differential treatment of UMOVA voters complies with the Equal Protection Clause because they are not similarly situated to domestic voters. ECF No. 398 at 11-13. Even the case Plaintiffs cite confirms that overseas and domestic voters are not similarly situated for

purposes of mail voting. *See Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (cited at ECF No. 444 at 14); ECF No. 439 at 10-11. And Plaintiffs' various protestations merely rehash their policy objections to the date requirement, *see* ECF No. 444 at 14-15, and do not defeat the rational basis for the alleged differential application of that requirement, *see* ECF No. 398 at 13-17.

Finally, Plaintiffs recognize that, when remedying an Equal Protection violation, "a court may either level up . . . or level down," and "legislative intent" is the dispositive factor in choosing between those options. ECF No. 444 at 17. Thus, as explained, any remedy here should extend the General Assembly's date requirement to overseas and domestic voters alike. *See* ECF No. 398 at 17-18.

III. PLAINTIFFS' RIGHT-TO-VOTE CLAIMS FAIL.

Plaintiffs' arguments fail to correct the three fatal defects in their right-to-vote claims. *See* ECF No. 434 at 7-10. *First*, Plaintiffs cite a case *agreeing* that the right to vote does not encompass a right to vote by mail. *See Tully v. Okeson*, 977 F.3d 608, 615-16 (7th Cir. 2020) ("right to vote" is only "the right to cast a ballot in person.")) (cited at ECF No. 444 at 20). Accordingly, as explained, rules that limit only *one* method of voting but not other available methods do not violate the right to vote. *See* ECF No. 434 at 7-10. Plaintiffs thus get the law exactly backwards: Just as in *Crawford* "elderly voters who might have had trouble obtaining a photo ID to vote [in person] at the polls could decide *ex ante* to vote absentee instead," ECF No. 444 at 19, here *all* Pennsylvania voters who want to avoid the "trouble" of the date requirement can "decide *ex ante* to vote" in person. *See* ECF No. 434 at 7-10. Plaintiffs' protest that voters who fail to comply with the date requirement may not receive *post hoc* notice and opportunity to cure misses the point: The absence of such procedures *is known ex ante* and, thus, informs rather than changes the *ex ante* options available to all Pennsylvania voters. *See id.*

Second, Plaintiffs *concede* that "minimal" burdens receive no judicial scrutiny. *See* ECF No. 444 at 18. That concession is dispositive: The Supreme Court has made clear that the "usual burden[s] of voting" and their equivalents are such non-cognizable "minimal" burdens, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.), and the Third Circuit's "right to vote" holding in this case says likewise, 97 F.4th at 133-35; *see also* ECF No. 434 at 10-14.

Indeed, *none* of the cases Plaintiffs cite justifies subjecting to interest-balancing the broad swaths of state election codes that impose the usual burdens of voting. *Democracy North Carolina upheld* a witness requirement over objections that voters could not comply with it during the COVID-19 pandemic. *Democracy N.C. v. N.C. State Bd. of Elections.*, 476 F. Supp. 3d 158, 193-208 (M.D.N.C. 2020). *Mazo v. New Jersey Secretary of State* dealt with ballot-access rules, which are governed by distinct rules influenced by the First Amendment. 54 F.4th 124, 136-38 (3d Cir. 2022). *Arizona Democratic Party v. Hobbs* upheld a rule requiring mail voters to sign an affidavit because it imposed only a "minimal burden," as in this case. 18 F.4th 1179, 1181 (9th Cir. 2021). *Short v. Brown* questioned whether "having to register to receive a mailed ballot could be viewed as a burden" *at all*, but found that it was "an extremely small one" and "certainly not one that demands serious constitutional scrutiny." 893 F.3d 671, 677 (9th Cir. 2018). *Donald J. Trump for President v. Boockvar* addressed an Equal Protection challenge to divergent county practices, making it entirely irrelevant. 493 F. Supp. 3d 331, 385 (W.D. Pa. 2020). And *Northeast Ohio Coalition for the Homeless v. Husted* addressed an Equal Protection claim where no fraud-based rationale was presented at trial. 837 F.3d 612, 630-35 (6th Cir. 2016).

Third, Plaintiffs offer no persuasive argument that the date requirement fails rational-basis review, even if the *Anderson-Burdick* framework applies. *See* ECF No. 434 at 15-20. Plaintiffs

claim that the date requirement imposes a "substantial" burden because it results in ballots not being counted, ECF No. 444 at 23, but if that were the case, *all* mandatory voting rules would impose "substantial" burdens. Plaintiffs thus improperly conflate the *consequence* of a rule with its *burden*. *See* ECF No. 434 at 16-17; ECF No. 439 at 15-16. As for the date requirement's actual burden, Plaintiffs cannot contest the ease of writing a date. The Secretary does not event attempt a burden argument, *see* ECF No. 440; nor could he, in light of his own July 1 Directive, *see* ECF No. 439 at 14-15.

As for state interests, Plaintiffs do not dispute that counties *could* fail to timestamp a ballot or that the SURE system could fail, ECF No. 444 at 24, so they do not undercut the date requirement's backstop function. ECF No. 434 at 18-19. They do not contest that sign-and-date requirements are legion in Pennsylvania and promote solemnity. *Id.* at 19. And they do not dispute that, in *Mihaliak*, the handwritten date helped secure the fraudster's conviction. *Id.* at 19-20.

CONCLUSION

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

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Respectfully submitted,

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