

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

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

ANSWER TO COMPLAINT

Defendant Berks County Board of Elections (“Berks Board”), by its undersigned attorneys, answers Plaintiffs’ Complaint dated November 7, 2022 (doc. 1), as follows:

1. Denied. Berks Board denies the allegations in Paragraph 1 of Plaintiffs’ Complaint as conclusions of law. Berks Board respectfully refers the Court to the relevant provisions of the Civil Rights Act as the best evidence of its contents.

2. Denied. Berks Board denies the allegation in Paragraph 2 of Plaintiffs’ Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections. Berks Board respectfully refers the Court to the relevant provisions of the Pennsylvania Election Code and the Pennsylvania Supreme Court’s Order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), as the best evidence of their contents.

3. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of Plaintiffs’ Complaint regarding the counting of ballots cast in the 2022 election by other county boards of elections; thus, those allegations are deemed denied. As to the actions of Berks Board in counting absentee and/or

mail in ballots cast in the 2022 election, Berks Board denies that it identified or refused to count thousands of absentee and/or mail in ballots based on a missing or incorrect date on the elector's declaration on the outer return envelope. To the contrary, there were only a few hundred such ballots. Berks Board denies the remaining allegations in Paragraph 3 of Plaintiffs' Amended Complaint as conclusions of law. Berks Board's actions regarding the counting of absentee and/or mail in ballots with missing or incorrect dates on the elector's declaration were based on the orders of the Pennsylvania Supreme Court interpreting the Pennsylvania Election Code on the counting of such ballots.

4. Denied. Berks Board denies the allegation in Paragraph 4 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the relevant provisions of the Pennsylvania Election Code as the best evidence of its contents.

5. Denied. Berks Board denies the allegation in Paragraph 5 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the relevant provisions of the Pennsylvania Election Code as the best evidence of its contents.

6. Denied. Berks Board denies the allegation in Paragraph 6 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the relevant provisions of the Pennsylvania Election Code as the best evidence of its contents.

RESPONSE TO ALLEGATIONS OF JURISDICTION AND VENUE

7. Denied. Berks Board denies the allegation in Paragraph 7 of Plaintiffs' Complaint as a conclusion of law.

8. Denied. Berks Board denies the allegation in Paragraph 8 of Plaintiffs' Complaint as a conclusion of law.

9. Denied. Berks Board denies the allegation in Paragraph 9 of Plaintiffs' Complaint as a conclusion of law.

10. Denied. Berks Board denies the allegations in Paragraph 10 of Plaintiffs' Complaint as conclusions of law.

11. Denied. Berks Board denies the allegation in Paragraph 11 of Plaintiffs' Complaint as a conclusion of law.

RESPONSE TO ALLEGATIONS ABOUT THE PARTIES

12. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12 of Plaintiffs' Complaint; thus, those allegations are deemed denied.

13. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 of Plaintiffs' Complaint; thus, those allegations are deemed denied.

14. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14 of Plaintiffs' Complaint; thus, those allegations are deemed denied.

15. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15 of Plaintiffs' Complaint; thus, those allegations are deemed denied.

16. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 16 of Plaintiffs' Complaint; thus, those allegations are deemed denied.

17. Admitted in part, denied in part. In response to Paragraph 17 of Plaintiffs' Complaint, Berks Board admits only the allegation that it was created pursuant to the Pennsylvania Election Code. Berks Board denies the remaining allegations in Paragraph 17 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, including Berks Board and the other county boards of elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

RESPONSE TO ALLEGATIONS OF FACTS AND LAW

18. Denied. Berks Board denies the allegation in Paragraph 18 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the relevant provisions of the Pennsylvania Election Code as the best evidence of its contents.

19. In response to Paragraph 19 of Plaintiffs' Complaint, Berks Board admits only the allegations that Pennsylvania law for many years permitted electors who meet certain criteria to cast absentee ballots, and that new mail-in voting provisions were enacted into law in 2019. Berks Board denies the remaining allegations in Paragraph 19 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

20. Denied. Berks Board denies the allegations in Paragraph 20 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents.

21. Denied. Berks Board denies the allegations in Paragraph 21 of Plaintiffs' Complaint as conclusions of law. The Pennsylvania Election Code is a statute that sets forth in writing the authority, rights, and obligations of participants in Pennsylvania elections, and Berks Board respectfully refers the Court to the Election Code as the best evidence of its contents. Berks Board also respectfully refers the Court to *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. Nov. 23, 2020), as the best evidence of the factual findings and legal conclusions of the Court in that case.

22. Denied. Berks Board denies the allegations in Paragraph 22 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully refers the Court to *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. Nov. 23, 2020), as the best evidence of the factual findings and legal conclusions of the Court in that case.

23. Denied. Berks Board denies the allegations in Paragraph 23 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully refers the Court to *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. Nov. 23, 2020), as the best evidence of the factual findings and legal conclusions of the Court in that case.

24. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24 of Plaintiffs' Complaint; thus, those allegations are deemed denied. Berks Board respectfully refers the Court to *In re Canvass of*

Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058 (Pa. Nov. 23, 2020), as the best evidence of the factual findings and legal conclusions of the Court in that case.

25. Denied. Berks Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25 of Plaintiffs' Complaint; thus, those allegations are deemed denied. Berks Board respectfully refers the Court to *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. Nov. 23, 2020), as the best evidence of the factual findings and legal conclusions of the Court in that case.

26. Denied. Berks Board denies the allegations in Paragraph 26 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully refers the Court to *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

27. Denied. Berks Board denies the allegations in Paragraph 27 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully refers the Court to *Ritter v. Migliori*, No. 21A772, 142 S. Ct. 1824 (Mem.) (U.S. Jun. 9, 2022) (Alito, J., dissenting), as the best evidence of the factual findings and legal conclusions of the Court in that case. Berks Board also respectfully refers the Court to *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

28. Denied. Berks Board denies the allegations in Paragraph 28 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully refers the Court to the decision in *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

29. Denied. Berks Board denies the allegations in Paragraph 29 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully refers the Court to the decision in *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022) and *Migliori v. Cohen*, No. 22-1499, 36 F.4th 153 (3d Cir. May 27, 2022), as the best evidence of the factual findings and legal conclusions of the Courts in those cases. Berks Board also respectfully directs the Court to the petition filed in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], as the best evidence of petitioners' assertions in that case.

30. Denied. Berks Board denies the allegations in Paragraph 30 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully directs the Court to the Pennsylvania Supreme Court's Order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), as the best evidence of the factual findings and legal conclusions of the Court in that case.

31. Denied. Berks Board denies the allegations in Paragraph 31 of Plaintiffs' Complaint as conclusions of law. Berks Board respectfully directs the Court to the Pennsylvania Supreme Court's November 5, 2023 supplement order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], as the best evidence of its contents.

RESPONSE TO PLAINTIFFS' CLAIMS FOR RELIEF

**Count I: Alleged Violation of the Materiality Provision of the Civil Rights Act
(52 U.S.C. § 10101(a)(2)(B), 42 U.S.C. § 1983)**

32. Paragraph 32 of Plaintiffs' Complaint is an incorporation paragraph to which no response is necessary. To the extent a response is deemed to be required, Berks Board incorporates by reference its responses in Paragraphs 1 through 31 above as though set forth at length here.

33. Denied. Berks Board denies the allegations in Paragraph 33 of Plaintiffs' Complaint as conclusions of law.

34. Denied. Berks Board denies the allegations in Paragraph 34 of Plaintiffs' Complaint as conclusions of law.

35. Denied. Berks Board denies the allegations in Paragraph 35 of Plaintiffs' Complaint as conclusions of law.

36. Denied. Berks Board denies the allegations in Paragraph 36 of Plaintiffs' Complaint as conclusions of law. Berks Board also denies the allegation in Paragraph 36 of Plaintiffs' Complaint that enforcing the "Date Instruction," as defined in Plaintiffs' Complaint—the Pennsylvania Election Code provisions requiring electors to "fill out, date and sign the declaration" on the outer return envelope, 25 P.S. §§ 3146.6(a), 3150.16(a)—constitutes denial of an individual's right to vote. To the contrary, enforcing the Date Instruction by not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope does not constitute denial of any individual's right to vote. It is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court's Order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022),

requires that elector's ballot to be set aside and not included in the tabulation of votes for that election.

37. Denied. Berks Board denies the allegations in Paragraph 37 of Plaintiffs' Complaint as conclusions of law.

38. Denied. Berks Board denies the allegations in Paragraph 38 of Plaintiffs' Complaint as conclusions of law.

39. Denied. Berks Board denies the allegations in Paragraph 39 of Plaintiffs' Complaint as conclusions of law.

40. Denied. Berks Board denies the allegations in Paragraph 40 of Plaintiffs' Complaint as conclusions of law. Berks Board also denies the allegation in Paragraph 40 of Plaintiffs' Complaint that enforcing the "Date Instruction," as defined in Plaintiffs' Complaint—the Pennsylvania Election Code provisions requiring electors to "fill out, date and sign the declaration" on the outer return envelope, 25 P.S. §§ 3146.6(a), 3150.16(a)—will deprive Pennsylvanians of the right to vote. To the contrary, enforcing the Date Instruction by not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope does not constitute denial of any individual's right to vote. It is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court's Order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), requires that elector's ballot to be set aside and not included in the tabulation of votes for that election.

Count II: Alleged Violation of the U.S. Constitution and 42 U.S.C. § 1983

41. Paragraph 41 of Plaintiffs' Complaint is an incorporation paragraph to which no response is necessary. To the extent a response is deemed to be required, Berks Board incorporates by reference its responses in Paragraphs 1 through 40 above as though set forth at length here.

42. Denied. Berks Board denies the allegation in Paragraph 42 of Plaintiffs' Complaint as a conclusion of law.

43. Denied. Berks Board denies the allegations in Paragraph 43 of Plaintiffs' Complaint as conclusions of law.

44. Denied. Berks Board denies the allegations in Paragraph 44 of Plaintiffs' Complaint as conclusions of law.

45. Denied. Berks Board denies the allegations in Paragraph 43 of Plaintiffs' Complaint as conclusions of law.

46. Denied. Berks Board denies the allegations in Paragraph 46 of Plaintiffs' Complaint as conclusions of law. Berks Board also denies the allegation in Paragraph 46 of Plaintiffs' Complaint that enforcing the "Date Instruction," as defined in Plaintiffs' Complaint—the Pennsylvania Election Code provisions requiring electors to "fill out, date and sign the declaration" on the outer return envelope, 25 P.S. §§ 3146.6(a), 3150.16(a)—constitutes disenfranchisement of eligible voters. To the contrary, enforcing the Date Instruction by not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope does not constitute disenfranchisement of any individual voter. It is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court's Order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189

(Mem.) (Pa. Nov. 1, 2022), requires that elector's ballot to be set aside and not included in the tabulation of votes for that election.

47. Denied. Berks Board denies the allegations in Paragraph 47 of Plaintiffs' Complaint as conclusions of law. Berks Board also denies the allegation in Paragraph 47 of Plaintiffs' Complaint that enforcing the "Date Instruction," as defined in Plaintiffs' Complaint—the Pennsylvania Election Code provisions requiring electors to "fill out, date and sign the declaration" on the outer return envelope, 25 P.S. §§ 3146.6(a), 3150.16(a)—constitutes arbitrary rejection of ballots. To the contrary, enforcing the Date Instruction by not counting timely received absentee and mail-in ballots based solely on a missing or incorrect date on the elector's declaration on the outer return envelope does not constitute arbitrary rejection of any individual's ballot. It is a failure by the elector to complete the elector's ballot in accordance with the requirements of the Pennsylvania Election Code, and the Pennsylvania Supreme Court's Order in *Ball v. Chapman*, No. 102 MM 2022 [J-85-2022], 284 A.3d 1189 (Mem.) (Pa. Nov. 1, 2022), requires that elector's ballot to be set aside and not included in the tabulation of votes for that election.

FIRST AFFIRMATIVE DEFENSE

48. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

49. Plaintiffs' claims, including, without limitation, the claims for monetary relief, costs, and attorneys' fees, are barred or limited because Berks Board acted in good faith to comply with duly issued orders of the Pennsylvania Supreme Court interpreting the Pennsylvania Election Code, which Berks Board is legally bound to follow.

THIRD AFFIRMATIVE DEFENSE

50. Plaintiffs' claims are barred or limited because some or all of Plaintiffs lack standing to bring this action against Berks Board.

FOURTH AFFIRMATIVE DEFENSE

51. Plaintiffs' claims may be barred or limited by the doctrine of mootness.

FIFTH AFFIRMATIVE DEFENSE

52. Plaintiffs' claims may be barred or limited by the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

53. Plaintiffs' claims may be barred or limited by Plaintiffs' failure to exhaust administrative remedies.

SEVENTH AFFIRMATIVE DEFENSE

54. Plaintiffs' claims may be barred or limited by the applicable statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

55. Plaintiffs' claims may be barred or limited by the doctrine of estoppel.

NINTH AFFIRMATIVE DEFENSE

56. Plaintiffs' claims may be barred or limited by the doctrine of waiver.

TENTH AFFIRMATIVE DEFENSE

57. Plaintiffs' claims may be barred or limited by the doctrine of unclean hands.

ELEVENTH AFFIRMATIVE DEFENSE

58. Plaintiffs' claims may be barred or limited by Plaintiffs' failure to join one or more indispensable parties.

RESERVATION OF RIGHT TO ASSERT ADDITIONAL AFFIRMATIVE DEFENSES

59. Berks Board expressly reserves the right to assert additional affirmative defenses that may become apparent during the pendency of this action.

PRAYER FOR RELIEF

WHEREFORE, based on all the foregoing, Defendant Berks County Board of Elections hereby demands judgment as follows:

(a) As to Plaintiffs' claims that the Pennsylvania Election Code, as interpreted by the Pennsylvania Supreme Court, violates (a) the Materiality Provision of the federal Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B) (Count I), and (b) the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 (Count II), an Order dismissing with prejudice all of Plaintiffs' claims; and

(b) An Order granting all such other relief as may be warranted under the circumstances.

Respectfully submitted,

Dated: January 9, 2022

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

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	:	
ADAMS COUNTY BOARD OF ELECTIONS, <i>et al.</i> ,	:	
	:	ELECTRONICALLY FILED
Defendants.	:	

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and LCvR 5.6, the undersigned hereby certifies that the foregoing document was electronically filed on the below date with the Court’s CM/ECF system, which transmitted a Notice of Electronic Filing of the filed document on counsel of record and/or each party in the case who is registered as a Filing User.

Dated: January 9, 2022

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

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