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

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

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Intervenor-Defendants support and seek to uphold free and fair elections on behalf of all Pennsylvanians. Intervenor-Defendants therefore respectfully move the Court to uphold the General Assembly's duly enacted laws governing Pennsylvania's elections and to dismiss Plaintiffs' First Amended Complaint.[1]

The General Assembly has mandated that a voter who uses an absentee or mail-in ballot "shall . . . fill out, date and sign the declaration" printed on the outer envelope of the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a). Less than three months ago, the Pennsylvania Supreme Court held that the General Assembly's date requirement is mandatory and, thus, that election officials may not count any absentee or mail-in ballot that fails to comply with it. *See* Order, *Ball v. Chapman*, No. 102 MM 2022 (Pa. Nov. 1, 2022) (per curiam) ("*Ball* Order").

Plaintiffs' First Amended Complaint is the latest in a series of lawsuits asking courts to

[1] Intervenor-Defendants are the Republican Committees the Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania.

erode the General Assembly's date requirement. But Plaintiffs' two counts wholly "fail[] to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6), because the date requirement does not violate the federal materiality provision, 52 U.S.C. § 10101(a)(2)(B), or the U.S. Constitution. Indeed, as to Plaintiffs' first count, the Pennsylvania Supreme Court's order upheld the date requirement under the federal materiality provision, *see Ball* Order at 1, and three Justices of the U.S. Supreme Court have already concluded that the notion that the date requirement violates the federal materiality provision is "very likely wrong," *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Mem.) (Alito, J., dissenting from the denial of the application for stay). No other U.S. Supreme Court Justices addressed the merits in the stay posture of that case.

These decisions are correct: the plain statutory text and governing case law confirm that the date requirement does not even *implicate* the federal materiality provision, let alone violate it. The federal materiality provision prohibits "deny[ing] the right of an[] individual to vote" as part of an election official's determination whether that "individual is qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B)—but application of the date requirement to absentee and mail-in ballots does not deny anyone the right to vote or determine anyone's qualifications to vote.

Neither can the Plaintiffs show a constitutional violation in mandatory application of the longstanding, commonsense, and unburdensome date requirement based on their citation of a (purported) exception to the date requirement for military and overseas voters. Plaintiffs fail to offer sufficient facts to establish that any such exception exists—and such an exception would not violate equal protection in any event. The Court should decline Plaintiffs' invitation to split from the Pennsylvania Supreme Court and the opinion of three U.S. Supreme Court Justices, dismiss Plaintiffs' First Amended Complaint, and uphold the General Assembly's lawful and constitutional date requirement.

BACKGROUND

Plaintiffs acknowledge that this suit is merely the latest salvo in a long line of attempts to persuade the courts to undo the General Assembly's date requirement for absentee and mail-in ballots. *See* First Am. Compl. ¶¶ 46–64 (Dkt. No. 121). In 2020, a majority of the Pennsylvania Supreme Court held that the date requirement is mandatory and, thus, that election officials may not count any noncompliant ballot in any election after the 2020 general election. *See In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1079–80 (2020) (Opinion of Justice Wecht); *id.* at 1090–91 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy).

In the first two cases following that ruling, the Pennsylvania Commonwealth Court upheld mandatory application of the date requirement. The Pennsylvania Supreme Court allowed both decisions to stand. *See In re Election in Region 4 for Downington Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Commw. 2022) (unpublished), *appeal denied*, 273 A.3d 508 (Pa. 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa. Commw. 2022) (unpublished), *appeal denied*, 271 A.3d 1285 (Pa. 2022).

Four days after the Pennsylvania Supreme Court resolved *Ritter*, individual voters filed a new lawsuit in federal court claiming that the date requirement violates the federal materiality provision, 52 U.S.C. § 10101(a)(2)(B). The Third Circuit agreed, but the U.S. Supreme Court recently vacated that decision. *See Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *cert. granted and judgment vacated*, *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.). And when addressing a request for a stay at an earlier stage in that case, three Justices opined that the Third Circuit's now-vacated holding was "very likely wrong" on the merits because it rested upon a misconstruction of the materiality provision. *Ritter*, 142 S. Ct. at 1824 (Mem.)

(Alito, J., dissenting from the denial of the application for stay). No other Justices addressed the merits in that stay posture.

Meanwhile, the Commonwealth Court twice has invoked the now-vacated decision in *Migliori* to depart from the General Assembly's date requirement in unpublished, non-precedential cases arising out of the 2022 primary election. *See McCormick for U.S. Senate v. Chapman*, 2022 WL 2900112 (Pa. Commw. June 2, 2022) (unpublished); *Chapman v. Berks Cnty. Bd. of Elections*, 2022 WL 4100998 (Pa. Commw. Aug. 19, 2022) (unpublished).

Finally, late last year, the Pennsylvania Supreme Court exercised its rarely invoked original jurisdiction and held that the date requirement is mandatory and, thus, that any absentee or mail-in ballot that fails to comply with it is invalid. *See Ball* Order. The Pennsylvania Supreme Court therefore ordered county boards of elections "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." *Id.* at 1. Its order noted that "[t]he Court is evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. § 10101(a)(2)(B)." *Id.*

Thus, as Plaintiffs acknowledge—after seven cases in five courts over two years—the current state of the law is that the General Assembly's date requirement is mandatory and that any noncompliant absentee or mail-in ballot may not be counted in the 2022 general election and beyond. *See* First Am. Compl. ¶¶ 46–64; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (federal courts may not order changes to state election laws on the eve of an election). Plaintiffs now ask the Court to split from the Pennsylvania Supreme Court and to invalidate the date requirement duly enacted by the General Assembly and upheld after two years of litigation. *See* First Am. Compl. ¶¶ 75–88.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Accordingly, federal courts "disregard[] allegations in the complaint that are legal conclusions," *Lutz v. Portfolio Recovery Assocs., LLC*, 49 F.4th 323, 330 (3d Cir. 2022), and must grant motions to dismiss under Rule 12(b)(6) where the complaint fails to "raise a right to relief above the speculative level," including because it asserts a legally deficient theory of liability, *Twombly*, 550 U.S. at 555.

ARGUMENT

"States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cty. Area New Party*, 520 U.S. 351, 358 (1997). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347–48 (2021) (because voter "[f]raud is a real risk," a state may act prophylactically to prevent fraud "without waiting for it to occur and be detected within its own borders").

The General Assembly has prescribed such a regulation through its mandatory date requirement for absentee and mail-in ballots. *See* 25 P.S. §§ 3146.6(a), 3150.16(a); *Ball* Order. As Justices of the Pennsylvania Supreme Court have affirmed, the date requirement serves an "unquestionable purpose." *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and

Justice Mundy) (citing then-Judge Brobson's "observ[ations] below"). The date "provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at the polling place." *Id.* It "establishes a point in time against which to measure the elector's eligibility to cast the ballot." *Id.* And it "ensures the elector completed the ballot within the proper time frame and prevents tabulation of potentially fraudulent back-dated votes." *Id.* at 1091; *see also id.* at 1087 (Opinion of Justice Wecht) (noting that "colorable arguments also suggest [the] importance" of the date requirement).

These are no mere theoretical interests. Last year, officials in Lancaster County discovered that an individual had cast a fraudulent ballot in her deceased mother's name. At least one piece of crucial evidence was the fact that the date provided on the outer envelope was April 26, 2022, twelve days after the mother had passed away. *See* Affidavit of Probable Cause ¶ 2, Police Criminal Complaint, *Commonwealth v. Mihaliak*, No. CR-126-22 (June 3, 2002) (Ex. A).

In all events, Plaintiffs' First Amended Complaint is riddled with errors that demand dismissal. *First*, Plaintiffs' contention that the date requirement violates the federal materiality provision contravenes the provision's plain statutory text and governing law, resting instead on a misreading of federal law that would invalidate a broad swath of duly enacted state election rules. *Second*, Plaintiffs' argument that the date requirement violates the Fourteenth Amendment of the U.S. Constitution is predicated on a misapplication of hornbook Equal Protection principles to an exception that they have not adequately alleged even exists. The Court should dismiss the First Amended Complaint and uphold the General Assembly's date requirement and its authority to enact commonsense laws governing Pennsylvania's elections.

I. MANDATORY APPLICATION OF THE DATE REQUIREMENT DOES NOT VIOLATE THE FEDERAL MATERIALITY PROVISION

Plaintiffs acknowledge that three Justices of the U.S. Supreme Court dissented from denial of the stay in *Migliori*, but they do not recount the basis for that dissent. *See* First Am. Compl. ¶ 57. Those Justices concluded that the Third Circuit panel's view that mandatory application of the date requirement violates the federal materiality provision is "very likely wrong." *Ritter*, 142 S. Ct. at 1824 (Mem.) (Alito, J., dissenting from the denial of the application for stay). The plain statutory text and governing law confirm that the General Assembly's date requirement does not even implicate, let alone violate, 52 U.S.C. § 10101(a)(2)(B). The Court should dismiss Count I.[2]

A. Application Of The Date Requirement Does Not Deny Anyone The Right To Vote Or Determine Anyone's Qualifications To Vote

The materiality provision states:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B).

Application of the General Assembly's date requirement to preclude counting of undated or incorrectly dated absentee or mail-in ballots does not violate this provision for at least three reasons. *First*, the materiality provision prohibits only "deny[ing] the right of any individual to vote," not imposing mandatory rules on the act of completing and casting a ballot. *Id.* The materiality provision therefore has no application to the date requirement because "[w]hen a mail-

[2] The Court should also dismiss Count I because neither 52 U.S.C. § 10101(a)(2)(B) nor 42 U.S.C. § 1983 grants them a right to sue. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (reiterating holding that there is no private right to sue and recognizing circuit split); *Vote.Org v. Callanen*, 39 F.4th 297, 305 n.5 (5th Cir. 2022) (reserving question for upcoming merits panel).

in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.'" *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay) (quoting 52 U.S.C. § 10101(a)(2)(B)). Rather, "that individual's vote is not counted because he or she did not follow the rules for casting a ballot." *Id.*

An individual "may be unable to cast a vote for any number of reasons," such as showing up to the polls after Election Day, failing to sign or to use a secrecy envelope for an absentee or mail-in ballot, attempting to vote for too many candidates for a single office, failing to adequately indicate the intent to vote for a particular candidate, returning the ballot to the wrong location, or arriving at the wrong polling place. *See id.* Application of these rules does not deny the right to vote; nor does application of the date requirement. *See id.* at 1825 ("Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right."); *id.* ("[I]t would be absurd to judge the validity of voting rules based on whether they are material to eligibility."); *see also Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (application of neutral state-law voting requirement does not "disenfranchise" voters); *Timmons*, 520 U.S. at 358 ("States may, and inevitably must, enact reasonable regulations" for effectuating votes); *Brnovich*, 141 S. Ct. at 2338 ("Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules."); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 35 (Mem.) (Oct. 26, 2020) (Kavanaugh, J., concurring) ("In other words, reasonable election deadlines do not 'disenfranchise' anyone under any legitimate understanding of that term."). As the Fifth Circuit has reasoned in a precedential, non-vacated decision, "[i]t cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply

denies the right of that individual to vote under" the federal materiality provision. *Vote.Org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022).

Second, the materiality provision requires that the error or omission affect a "determin[ation] whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). It therefore regulates requirements and practices related to qualifications and registration to vote, not rules like the date requirement "that must be met in order to cast a ballot that will be counted." *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see also Vote.Org*, 39 F.4th at 305 n.6.

Congress enacted the materiality statute and the broader § 10101 of which it is part "to enforce th[e] [Fifteenth] Amendment[,]" *United States v. Mississippi*, 380 U.S. 128, 138 (1965), which guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, § 1. Congress's purpose in enacting the materiality statute was to "forbid[] the practice of *disqualifying voters* for their failure to provide information irrelevant to their eligibility to vote." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (emphasis added). In particular, Congress addressed "the practice of requiring unnecessary information for voter registration"—such as listing the registrant's "exact number of months and days in his age"—"with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Id.* In other words, "[s]uch trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to *justify rejecting applicants*." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008) (emphasis added); *see also* H. Rep. No. 88-914, pt. 2, at 5 (1963) ("[R]egistrars [would] overlook minor misspelling errors or mistakes

in age or length of residence of white applicants, while rejecting" an application from an African-American applicant "for the same or more trivial reasons.").

The federal materiality statute thus functions as a safeguard against discriminatory application of state voter qualification and registration rules. *See Mississippi*, 380 U.S. at 138; *Schwier*, 340 F.3d at 1294; *Browning*, 522 F.3d at 1173; *see also* H. Rep. No. 88-914, pt. 1, at 19 (recognizing that Title I of the Civil Rights Act, now codified in § 10101, was part of an effort "by which the Congress took steps to guarantee to all citizens the right to vote without discrimination as to race or color"). The two other subsections of § 10101(a)(2) further underscore this point: those subsections require election officials to apply uniform "standard[s], practice[s], [and] procedure[s] . . . in determining whether any individual is qualified to vote under state law," 52 U.S.C. § 10101(a)(2)(A), and restrict the use of literacy tests "as a qualification for voting in any election," *id.* § 10101(a)(2)(C).

Here, the date on the absentee or mail-in ballot declaration is not used to determine an individual's *qualifications* to vote, but rather the *validity* of a ballot. *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see also Vote.Org*, 39 F.4th at 305 n.6. Indeed, mandatory application of the date requirement results in invalidation of a noncompliant ballot, not a "determin[ation]" that the individual is or is not "qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). In other words, mandatory application of the date requirement results in a ballot not being counted, not in an individual being removed from, or prevented from joining, the list of registered voters. *Compare, e.g.*, *Schwier*, 340 F.3d at 1294; *Browning*, 522 F.3d at 1173; H. Rep. No. 88-914, pt. 2, at 5; *see also Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *Vote.Org*, 39 F.4th at 305 n.6. Because mandatory application of the date requirement does not result in a qualification

determination, it is outside the plain terms and narrow scope of, and does not violate, the federal materiality provision. *See Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see also Vote.Org*, 39 F.4th at 305 n.6; *Schwier*, 340 F.3d at 1294; *Browning*, 522 F.3d at 1173.

Third, the materiality provision demands that the "record or paper" be related to an "application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). To be sure, an absentee or mail-in ballot and accompanying declaration is a "record or paper." *Id.* But casting a ballot—which, under Pennsylvania law, requires completing the declaration, *see* 25 P.S. §§ 3146.6(a), 3150.16(a)—constitutes the *act* of voting, not an application, registration, or other act *requisite* to voting. *Ritter*, 142 S. Ct. at 1826 n.2 (Mem.) (Alito, J., dissenting from the denial of the application for stay). It therefore would be an "awkward" statutory construction at best to extend the materiality provision to absentee and mail-in ballots and the date requirement. *Id.* Voting is voting; it is not an act requisite to voting.

B. There Is No Tenable Basis To Conclude That Mandatory Application Of The Date Requirement Violates The Federal Materiality Provision

In their First Amended Complaint, Plaintiffs offer two main arguments in support of their claim that the date requirement violates the federal materiality provision. Both are not only unpersuasive but also, in fact, demonstrate that the Court should decline Plaintiffs' invitation to create a split of authority with the Pennsylvania Supreme Court on the date requirement's validity.

First, the entire thrust of Plaintiffs' First Amended Complaint is that "[a] voter's failure to handwrite the date next to their signature on the ballot return envelope is not material to determining their qualification to vote," First Am. Compl. ¶ 80, which in Pennsylvania requires being at least 18 years of age on the date of the election; having been a citizen of Pennsylvania for at least one month; having lived in the relevant election district for at least 30 days; and not being

imprisoned for a felony, *see* 25 P.S. § 1301; *see also* First Am. Compl. ¶ 79. Plaintiffs are entirely correct that compliance with the date requirement is not material to any individual's qualifications to vote. But that point *disproves* Plaintiffs' case. As explained above, the date requirement is not used to determine whether an individual is "qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), so it does not implicate, let alone violate, the federal materiality provision, *see Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see also Vote.Org*, 39 F.4th at 305 n.6; *Schwier*, 340 F.3d at 1294; *Browning*, 522 F.3d at 1173; *supra* Part I.A.

In fact, Plaintiffs' proposed reading of the federal materiality provision is breathtakingly broad—and, unsurprisingly, incorrect. Under Plaintiffs' reading, states could enact no mandatory rules against "errors or omissions" on any voting "record[s] or paper[s]" except those that merely implement the requirements for "determining whether [an] individual is qualified under State law to vote in [the] election." First Am. Compl. ¶¶ 76, 78, 82. In other words, under Plaintiffs' construction of the federal materiality provision, states could not adopt *any* requirements for completing ballots or ballot-return envelopes that do not confirm the individual's qualifications to vote.

Take, for example, the General Assembly's requirement that a voter sign an absentee or mail-in ballot return envelope, which appears in the very same statutory sentence as the date requirement. *See* 25 P.S. §§ 3146.6(a), 3150.16(a) (voter "shall . . . fill out, date and sign the declaration" printed on the outer envelope of the ballot); *see also Ritter*, 142 S. Ct. at 1826 n.2 (Mem.) (Alito, J., dissenting from the denial of the application for stay) (discussing signature requirement). Before the Pennsylvania Supreme Court, Acting Secretary Chapman agreed that the signature requirement is valid and mandatory and does not violate the federal materiality provision.

See Acting Sec'y Ans. 15–23, *Ball v. Chapman*, No. 102 MM 2022 (Oct. 19, 2022) ("Acting Sec'y Ans.") (Ex. B). But under Plaintiffs' proposed reading, the signature requirement would violate the federal materiality provision: a failure to provide a signature is an "omission" or "an error" involving a "record or paper," and the signature requirement is "immaterial to whether the voter is qualified under State law to vote in [the] election." First Am. Compl. ¶ 78 (internal quotation marks omitted).

Take, as another example, the secrecy-envelope requirement contained in the same statutory section as the date requirement. *See* 25 P.S. §§ 3146.6(a), 3150.16(a) (voter "shall . . . enclose and securely seal" the ballot in a secrecy envelope). The Pennsylvania Supreme Court has upheld that requirement as mandatory, *see Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 379–80 (Pa. 2020), and the Acting Secretary conceded in *Ball* that it does not violate the federal materiality provision, *see* Acting Sec'y Ans. 39 n.15. But it would on Plaintiffs' proposed reading: a failure to use a secrecy envelope is an "omission" or "an error" involving a "record or paper," and the secrecy envelope requirement is "immaterial to whether the voter is qualified under State law to vote in [the] election." First Am. Compl. ¶ 78 (internal quotation marks omitted).

If another example were somehow needed, consider also the General Assembly's commonplace prohibition on "mark[ing] [a] ballot for more persons for any office than there are candidates to be voted for such office." 25 P.S. § 3063(a). Under the Election Code, any such overvotes are invalid, and the ballot "shall not be counted for such office." *Id.* Under Plaintiffs' proposed construction of federal law, the overvote prohibition would violate the materiality provision: mismarking a ballot is an "omission" or "an error" involving a "record or paper," and the overvote prohibition is "immaterial to whether the voter is qualified under State law to vote in [the] election." First Am. Compl. ¶ 78 (internal quotation marks omitted).

Thus, Plaintiffs' reading of federal law "would subject virtually every electoral regulation" related to voting records and papers to the superintendence of the federal materiality provision, "hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). Indeed, if Plaintiffs' construction were correct, numerous state election rules—such as the General Assembly's signature and secrecy-envelope requirements and overvote prohibition—have been invalid for nearly sixty years, since Congress enacted the federal materiality provision in 1964. This novel interpretation not only defies the statute's plain text, but also the rule that "if Congress intends to alter the usual constitutional balance between the States and Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)); *see Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*) (applying federalism canon). But, of course, Plaintiffs' construction is not correct: states can and do enact a wide range of laws that regulate how voting is conducted and prohibit omissions and errors on voting records or papers without running afoul of the federal materiality provision. That is because application of those laws—like mandatory application of the General Assembly's date requirement—does not "deny the right of any individual to vote" or result in a determination whether that individual "is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B); *see also supra* Part I.A.

Second, Plaintiffs cite the Third Circuit panel's vacated opinion in *Migliori* as "persuasive" authority. First Am. Compl. ¶¶ 57, 81. But "of necessity [the Supreme Court's] decision vacating the judgment of the [Third Circuit] deprives that court's opinion of precedential effect." *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (addressing consequences of *Munsingwear* vacatur); *see also Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522, 1534 n.30 (3d Cir. 1993) (court

is not "bound" by holding in a vacated opinion) (cited at First Am. Compl. ¶ 57). *Munsingwear* vacatur "is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). Thus, the Supreme Court's *Munsingwear* vacatur of the Third Circuit's decision "eliminate[d] [the] judgment, review of which was prevented through happenstance." *Id.* at 40. The Court should not rely on the Third Circuit's untested—and accordingly erased—analysis. Moreover, for the reasons explained above, that opinion was wrongly decided. *See supra* Part I.A.

Nor should the Court follow the two Commonwealth Court decisions from last year holding that the date requirement violates the federal materiality provision. *See* First Am. Compl. ¶¶ 58 (discussing *McCormick* and *Chapman*). Those decisions relied upon the now-vacated *Migliori* decision, have been superseded by the Pennsylvania Supreme Court's recent holding in *Ball*, and, in all events, were incorrect. *See McCormick*, 2022 WL 2900112; *Chapman*, 2022 WL 4100998; *Ball* Order at 1; *supra* Part I.A.

II. MANDATORY APPLICATION OF THE DATE REQUIREMENT DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

The Court should also dismiss Count II because mandatory application of the date requirement does not violate equal protection. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Plaintiffs' equal protection theory rests on three premises: (i) that Pennsylvania law exempts "military and overseas voters who vote by mail" from the date requirement; (ii) that this alleged exemption "creates differential treatment of the right to vote," and (iii) that this classification of voters is therefore subject to and fails strict scrutiny. First Am. Compl. ¶¶ 83–88 (citing 25 Pa. C.S. § 3515(a)). Each of these premises is fatally flawed.

First, Plaintiffs have not plausibly alleged that Pennsylvania law imposes "different treatment" on domestic mail-in voters compared to military and overseas mail-in voters with respect to the date requirement. *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005); *see also Vorchheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 105 (3d Cir. 2018) ("To survive a motion to dismiss, a complaint must contain enough facts to state a claim to relief that is plausible on its face." (internal quotation marks omitted)). Plaintiffs' lone allegation on this point is a citation to 25 Pa. C.S. § 3515, which directs that a military or overseas mail-in voter's "mistake or omission in the completion of a document under this chapter" shall not "invalidate a document submitted under this chapter" so long as "the mistake or omission does not prevent determining whether a covered voter is eligible to vote." 25 Pa. C.S. § 3515(a)(1). But Plaintiffs plead no facts to support their contention that § 3515 has ever been applied to exempt a military or overseas voter from the date requirement. *See* First Am. Compl. ¶¶ 83–88. They have offered no example of such an exemption being granted in the past and have produced no authority to support their reading of the statute. In fact, § 3515 has never been cited in even a single judicial opinion. Plaintiffs have accordingly failed plausibly to allege differential treatment, and Count II founders at the first step. *See Martinez v. UPMC Susquehanna*, 986 F.3d 261, 265 (3d Cir. 2021) ("Plausible does not mean possible.").

Second, even if § 3515 applies in the way Plaintiffs say it does, they must still "demonstrate that they received different treatment from that received by other individuals *similarly situated*." *Shuman*, 422 F.3d at 151. That they cannot do. "The Equal Protection Clause does not forbid classifications," but rather "keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). And, "[i]n many respects, absent military and overseas voters are not similarly situated to [domestic] voters,"

especially with regard to their "absence from the country." *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012). "[U]nlike domestic absentee voters who may request an absentee ballot because it is inconvenient or difficult for them to vote at a polling station, military personnel deployed overseas lack the ability to vote in person. Voting by absentee ballot provides these men and women with their only meaningful opportunity to vote in state and federal elections while they are deployed abroad." *Doe v. Walker*, 746 F. Supp. 2d 667, 679–80 (D. Md. 2010).

For that reason, "[f]ederal and state law makes numerous exceptions and special accommodations for members of the military, within the voting context and without, and no one argues that these exceptions are somehow constitutionally suspect." *Obama for Am.*, 697 F.3d at 434. As an example, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") to "end[] the widespread disenfranchisement of military voters stationed overseas." *United States v. Alabama*, 778 F.3d 926, 928 (11th Cir. 2015). UOCAVA "requires that states extend additional protections to the UOCAVA absentee voting process that they might not extend to other absentee voters as a matter of state law"—for instance, a requirement that a state transmit an absentee ballot to such a voter forty-five days before an election if the UOCAVA voter requests it. *Id.* at 929–30. Section 3515 itself is a part of Pennsylvania's Uniform Military and Overseas Voters Act, which "extends to state and local elections the accommodations and protections for military and overseas voters found in federal law." Pa. Dep't of State, *Overview of the Uniform Military and Overseas Voters Act (UMOVA)* (Sept. 26, 2022), available at https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-UMOVA-Overview.pdf; *see also* 2012 Pa. Laws 189. It therefore fits within this tradition of accommodating military and overseas voters' unique circumstances. Section 3515, like UOCAVA, is "based on highly relevant distinctions between service members and the civilian

population," and "confer[s] benefits accordingly." *Obama for Am.*, 697 F.3d at 434. It therefore does not treat similarly situated persons differently, and Plaintiffs' equal protection claim accordingly fails.

Third, even if Plaintiffs could show differential treatment across similarly situated persons (which they cannot), rational basis review applies, and the date requirement easily satisfies it. Under equal protection analysis, "only suspect classes and fundamental rights receive intermediate or strict scrutiny." *Biener v. Calio*, 361 F.3d 206, 214–15 (3d Cir. 2004). Neither are present here. Domestic voters are not a protected class vis-à-vis uniform military and overseas voters; that distinction bears no resemblance to voting regulations that draw lines "on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969) (citation omitted).

Moreover, Plaintiffs cannot show that a fundamental right is at stake. "[A]bsentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny . . . the exercise of the franchise," and accordingly the fundamental right to vote does not extend to voting by absentee ballot. *Id.* at 807–08; *id.* at 807 ("It is . . . not the right to vote that is at stake here but a claimed right to receive absentee ballots."); *see also Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) ("[T]he fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail. . . . [U]nless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake."); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) ("[T]here is no constitutional right to an absentee ballot.").

Accordingly, the date requirement—even if military and overseas voters are exempted from it—"is presumed to be valid and will be sustained if the classification drawn by the statute is

rationally related to a legitimate state interest." *Cleburne Living Ctr.*, 473 U.S. at 440; *see also Biener*, 361 F.3d at 215 (applying rational basis scrutiny because the challenged regulation "d[id] not infringe upon a fundamental right" and the litigant was not in a "suspect class"). The date requirement vaults that low bar. Military and overseas voters certainly qualify as a "group[] who cannot easily get to the polls," *McDonald*, 394 U.S. at 807, and states are "justified in accommodating [military and overseas voters'] particular needs" through "special voting provisions" that "address problems that arise when military and overseas voters are *absent* from their voting jurisdictions," *Obama for Am.*, 697 F.3d at 435. "[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which . . . judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). Providing more lenient absentee ballot measures for military and overseas voters—who cannot vote in any other way—is easily within the General Assembly's discretion.

CONCLUSION

The Court should dismiss Plaintiffs' First Amended Complaint.

Dated: January 17, 2023

Respectfully submitted,

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