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

BETTE EAKIN, *et al.*, Plaintiffs, v. ADAMS COUNTY BOARD OF ELECTIONS, *et al.*, Defendants.	Case No. 1:22-cv-00340-SPB

PLAINTIFFS' RESPONSE TO AMICUS CURIAE BRIEF OF RESTORING INTEGRITY AND TRUST IN ELECTIONS, INC.

INTRODUCTION

Amicus curiae Restoring Integrity and Trust in Elections, Inc. ("RITE" or "Amicus") largely rehashes arguments already made by Intervenor-Defendants the Republican National Committee, National Republican Congressional Committee, and the Republican Party of Pennsylvania ("Intervenors") and by Berks and Lancaster Counties ("County Boards") (together, "Defendants"), but repetition does not make these arguments any stronger. As Plaintiffs explained in their Memorandum in Support of their Motion for Summary Judgment (ECF No. 288), their Consolidated Brief in Opposition to Defendants' Motions for Summary Judgment (ECF No. 318), and their reply briefs (ECF Nos. 330, 331), the Materiality Provision by its plain text extends beyond documents used to determine voter qualifications and prohibits the use of immaterial state-law requirements to discard the votes of qualified voters at all stages of the voting process, up to and including counting votes. *See* ECF Nos. 288 at 13–17, 318 at 12–17, 330 at 1–2. Amicus adds nothing to the discussion of those issues, and the erroneous statements in its brief—including, for instance, their claim that no case law prior to the Third Circuit's decision in *Migliori* indicated that the Materiality Provision "was intended to apply to the counting of ballots"—reveal RITE's limited familiarity with the subject matter. Amicus Br., ECF No. 335, ("Br.") at 11; *but see Sixth Dist. Of Afr. Methodist Episcopal Church v. Kemp*, No. 1:21-CV-01284-JPB, 2021 WL 6495360, at *14 (N.D. Ga. Dec. 9, 2021) (denying motion to dismiss claim applying Materiality Provision to absentee ballots); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) (applying Materiality Provision to enjoin rejection of absentee ballots); *Ford v. Tennessee Senate*, No. 06-2031, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (applying Materiality Provision to

failure to count ballots).[1]

RITE raises a single new assertion: that the Materiality Provision applies only to "ad hoc executive action" and does not reach action taken in accordance with state law. Br. at 17. Not only is this claim incompatible with the statutory text and the weight of authority—as demonstrated by cases cited in RITE's brief—but it is also inconsistent with RITE's own observations that the date requirement is unrelated to voter qualifications. The Court should reject RITE's unsupported theories and grant Plaintiffs' motion for summary judgment.

ARGUMENT

I. RITE's arguments restate those asserted by Intervenors which Plaintiffs have already thoroughly addressed.

Amicus begins by repeating Intervenors' assertion that the Date Provision furthers an interest in "protect[ing] the integrity of Pennsylvania's election" and similarly referencing the *Mihaliak* investigation. Br. at 2 (citing ECF No. 241 at 6). Setting aside the fact that state interests—a component of the *Anderson-Burdick* analysis—are irrelevant to a Materiality Provision claim, *see, e.g.*, ECF No. 330 at 2–5, RITE's reliance on a single instance of alleged fraud prevention suffers the same flaws as Intervenors' repeated references to it. "[A] single instance of alleged fraud related to a ballot that would have been rejected anyway because the elector had died prior to the Primary Election Day . . . does not support the drastic consequence of disenfranchising otherwise qualified Pennsylvania electors due to an omission that is unrelated to their qualifications or the timeliness of their ballot." *Chapman v. Berks Cnty. Bd. of Elections*, No.

[1] Like Defendants, Amicus in passing suggests that the Materiality Provision does not authorize a private right of action, Br. at 8 n.1, and is limited to racial discrimination, *id.* at 4, 8. Plaintiffs have addressed each of these claims in depth and refer the Court to their prior briefing rather than repeat those arguments here. *See* ECF No. 318 at 6–10 (Plaintiffs have private right to enforce Materiality Provision); ECF No. 331 at 4–5 (Materiality Provision not limited to racially discriminatory practices); *see also Migliori v. Cohen*, 36 F.4th 153, 162 n.56 (3d Cir. 2022) (rejecting argument that Materiality Provision "applies only to instances of racial discrimination").

355 M.D. 2022, 2022 WL 4100998, at *21 (Pa. Commw. Ct. Aug. 19, 2022) (recognizing "that the ballot at issue [in *Mihaliak*] had already been separated," *id.* at *21 n.14).

In the *Mihaliak* case, the handwritten date was irrelevant and unnecessary in detecting the fraudulent ballot and preventing it from being counted. ECF Nos. 288 at 24; 318 at 20–21; 320 ¶¶ 45–46, 49–50. And the evidence Amicus cites provides zero support for the contention that the handwritten date somehow sparked the investigation or criminal complaint. ECF No. 285-12. On the contrary, the affidavit of probable cause within the criminal complaint explicitly noted that "[d]ue to the above information, [the detective] request[ed] that a summons be issued." ECF No. 285-12 at 5. The information referenced provides the relevant factual background, including that: "Teresa J. Mihaliak was deceased on April 14, 2022," "[she] was removed from the voter rolls on April 25, 2022," "[her] ballot for the [Democratic] primary was received on April 28, 2022," and "Cheryl Mihaliak *told* [the detective] that she did vote for her mother." *Id.* (emphasis added). Amicus points to no evidence supporting the contention that the handwritten date on the ballot envelope led to the detection or investigation of the fraudulent ballot, and undisputed evidence shows that the *face of the ballot envelope* was irrelevant in the decision to set aside the ballot itself. *See* ECF Nos. 320 ¶¶ 49–50; 313 ¶¶ 73–74. Raising *Mihaliak* in passing, RITE makes no effort to explain how such flawed evidence supports any of its arguments.

Amicus also rehashes much of Intervenors' arguments that seek to limit the scope of the Materiality Provision, relying almost entirely on the same dissents and dicta cited in Intervenors' briefs. *Compare* Br. at 8–15 *with* ECF Nos. 282 at 6–8, 312 at 2–4, 325 at 2–4 (arguing that Materiality Provision limited to determination of voter qualifications); *compare* Br. at 15–17 *with* ECF Nos. 282 at 8–11, 312 at 4–6, 325 at 1–2 (arguing that Date Provision does not implicate right to vote). Plaintiffs already have responded to these arguments—by explaining that the Materiality

Provision's plain language rejects these attempts to evade its protections—and respectfully refer the Court to those responses. *See* ECF Nos. 288 at 15–16, 318 at 13–16, 330 at 1–2 (Materiality Provision is *not limited* to determination of voter qualifications); ECF Nos. 288 at 13–14, 318 at 12–13 (enforcement of Date Provision denies fundamental right to vote).

II. The Materiality Provision is not limited to "ad hoc executive actions."

Amicus's lone original contribution is the argument that the Materiality Provision "applies to ad hoc executive actions, not state laws that are duly enacted by the Legislature," Br. at 17, but Amicus cites no authority to support this argument. Further, despite claiming a purportedly dispositive distinction between "ad hoc executive actions" and "state laws that are duly enacted by the Legislature," *id.* at 17, Amicus never explains what it means for an executive action to be "ad hoc" in this context, nor why it matters in the application of the Materiality Provision (which includes no such term).

The premise of Amicus's argument instead appears to be that the Materiality Provision does not apply to any requirement that a state legislature designates as "material in determining whether [an] individual is qualified under State law to vote" because "States have plenary authority over voter qualifications, subject to constitutional limitations." *Id.* at 17. Even if that argument were correct, enforcement of the Date Provision still would violate the Materiality Provision: As Amicus earlier admits *in the same brief*, "the date requirement has nothing to do with determining voter qualification." *Id.* at 12; *see also* ECF Nos. 282 at 9, 311 ¶¶ 31–32, 312 at 2–4, 313 ¶¶ 31–32, 323 ¶¶ 31–32. Amicus makes no effort to explain how the Date Provision can both have "no relevance to determining whether an individual is qualified to vote under Pennsylvania law," Br. at 12, and also reflect a qualification imposed by the Legislature. Instead, Amicus engages in rhetorical sleight-of-hand, strategically omitting critical language to suggest that the only question is whether the "date requirement is, in other words, 'material . . . under State law.'" *Id.* at 19

(omission in original). But the question for the Materiality Provision is not whether the Date Provision is "unambiguous or mandatory" or material to *something* under State law; it is whether the Date Provision is "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Like virtually everyone else involved in this litigation, Amicus concedes that it is not: "That ends the inquiry." Br. at 12.

The few cases cited by Amicus do not support their sweeping argument. The court in *Schwier v. Cox* ruled that requiring voters to disclose their Social Security Number violated the Materiality Provision, but the basis for its ruling was *not* (as Amicus claims) that "state law had not established [disclosure] as a qualification," Br. at 18. Georgia state law in fact *did* require voters to provide their Social Security Numbers, but the court held that it was not material to voter qualification because "Georgia is not permitted to require this disclosure" under the Privacy Act. 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005). The court in *Martin v. Crittenden* enjoined a county from rejecting absentee ballots due to voters' failure to write their correct birth year on their absentee ballot envelopes—a practice that Georgia law allowed but did not require. *See* 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018).[2] And the information at issue in *Organization for Black Struggle v. Ashcroft* was the voter's name, address, and signature—per the court, "categories of required information [that] are not immaterial to voter qualification." 493 F. Supp. 3d 790, 804 (W.D. Mo. 2020). None of these cases even suggest—let alone establish—that any information required by state law is immune from Materiality Provision scrutiny. Without a shred of legal authority from any federal or state jurisdiction, Amicus's belief is just that—it is not law. And such

[2] The decision in *Martin* also supports Plaintiffs' argument that the Materiality Provision applies to information written on absentee ballots envelopes and directly contradicts Amicus's claim elsewhere in their brief that prior to *Migliori* no court had interpreted the "[M]ateriality [P]rovision to reach rules for casting a valid ballot," Br. at 7.

an interpretation would render the Materiality Provision entirely meaningless, as it would exempt *every* State law. This Court should not spend a moment longer contemplating it.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

Dated: May 19, 2023

Respectfully submitted,

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