

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.

No. 1:22-cv-339

Judge Susan Paradise Baxter

**BRIEF OF AL SCHMIDT IN RESPONSE TO INTERVENOR-
DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

The Republican National Committee and several affiliated committees have intervened in this action to advocate for disenfranchising qualified, predominately older citizens who neglect to handwrite a date (or who write an “incorrect” date) on the envelope used to return an absentee or mail-in ballot. To that end, they have asked the Court to dismiss plaintiffs’ First Amended Complaint.

Yet, as plaintiffs have correctly alleged, federal law forbids denying anyone’s right to vote for failing to properly supply information that “is not material in determining whether such individual is qualified under State law to vote in such election.” [52 U.S.C. § 10101\(a\)\(2\)\(B\)](#). Because a handwritten date on a ballot’s return envelope serves no purpose in the administration of Pennsylvania’s elections, it is not “material.” Section 10101 therefore forbids denying any Pennsylvanians’ right to vote on the basis that they failed to properly date their ballot’s return envelope.

The RNC—while offering arguments that defy statutory text and that would render § 10101(a)(2)(B) completely impotent—gives a perfunctory defense of the handwritten date’s function. *See* RNC Br. at 5-6 ([ECF No. 194](#)). It also insists that if § 10101(a)(2)(B) prohibits disenfranchising voters for failing to write a date on their envelope, then many of Pennsylvania’s other election regulations are at risk.

The Acting Secretary files this response brief to highlight two points. First, a voter's handwritten date on their ballot's return envelope serves no purpose in the administration of Pennsylvania's elections. In fact, requiring that county boards of elections cancel ballots based on that handwritten date introduces an opportunity for fraud that would not otherwise exist. Second, ruling that § 10101(a)(2)(B) prohibits county boards from disqualifying any ballot returned in an envelope lacking a handwritten date would not jeopardize other provisions of the Pennsylvania Election Code.

BACKGROUND

Citizens of Pennsylvania are qualified to vote if they: (1) are at least 18 years old on the day of the election; (2) have been a U.S. citizen for at least one month prior to the election; (3) have lived in Pennsylvania and in their election district for at least thirty days prior to the election; and (4) are not imprisoned for a felony conviction. [Pa. Const. art. VII, § 1](#); [25 P.S. § 2811](#); [25 Pa.C.S. § 1301\(a\)](#).¹ Each county board assesses compliance with these conditions when an individual

¹ See also [Mixon v. Commonwealth](#), 759 A.2d 442, 451 (Pa. Commw. Ct. 2000), *aff'd*, 783 A.2d 763 (2001) (holding that individuals with felony convictions, other than those currently incarcerated, may register to vote); [1972 Op. Atty. Gen. No. 121](#) (concluding that *Dunn v. Blumstein*, 405 U.S. 330 (1972), prohibits the enforcement of certain durational residency requirements longer than 30 days); [U.S. Const. amend. XXVI](#) (prohibiting denial of right to vote to citizens 18 years of age or older on account of age).

first registers to vote. [25 Pa.C.S. § 1328](#). County boards approve applications to register only for applicants that meet all eligibility criteria. *Id.* [§ 1328\(b\)](#).

A qualified, registered voter may apply to cast a ballot in an election as an “absentee elector” (under some conditions) or as a “mail-in elector.” [25 P.S. §§ 3146.1, 3150.11](#). County boards of elections must confirm that the applicant meets Pennsylvania’s eligibility criteria before approving any application. *Id.* [§§ 3146.2b, 3150.12b](#). County boards of elections begin mailing ballots to approved absentee and mail-in electors at least 14 days before an election. [25 P.S. §§ 3146.5\(b\)\(1\), 3150.15](#).

Identical procedures govern how approved voters complete and return both absentee and mail-in ballots. At any time between receiving the official ballot and 8 p.m. on Election Day, the voter secretly marks their ballot, places the ballot in a secrecy envelope marked “Official Election Ballot,” and then places the secrecy envelope in a return envelope. *Id.* [§§ 3146.6\(a\), 3150.16\(a\)](#). The return envelope has a pre-printed declaration attesting to the voter’s eligibility to vote, which the voter “shall then fill out, date and sign.” *Id.*

In addition, the return envelope contains a unique barcode associated with the voter that allows the ballot to be tracked through the Statewide Uniform Registry of Electors (SURE) System. See [Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* \(“2022 Envelope](#)

Guidance”), Version 3.0, at 2-3 (Sept. 26, 2022). After sealing the return envelope, the voter delivers the entire package to their county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a). An absentee or mail-in ballot is timely if returned to the voter’s county board of elections by 8 p.m. on Election Day. *Id.* §§ 3146.8(g)(1)(ii).²

County boards have a statutory obligation to track the date that every absentee or mail-in ballot was received and make that information available for public inspection. 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5). They have procedures for doing so—including stamping ballots as “received” and scanning return envelopes’ barcodes into the SURE system. See 2022 *Envelope Guidance*.

If the ballot package has been returned by 8 p.m. on Election Day, county boards are to “examine the declaration on the envelope of each ballot” (except those where the voter appears to have died before Election Day) and compare the information on the envelope to a list of absentee or mail-in voters. 25 P.S. § 3146.8(g)(3). If a county board has confirmed that the individual is entitled to vote, confirmed that the voter has provided identification (if required), and “is satisfied that the declaration is sufficient,” the return envelope shall be opened and the ballot shall be canvassed and counted. *Id.* § 3146.8(g)(3)-(4).

² Separate rules govern uniform military and overseas electors. 25 Pa.C.S. §§ 3501–3519.

In any election, thousands of voters do not perfectly comply with some part of the Election Code's instructions. Many voters forget, for example, to write a date on the declaration that is pre-printed on their return envelope.

In several recent elections, county boards have canvassed and counted ballots returned in envelopes missing a handwritten date. The Supreme Court of Pennsylvania ordered that Philadelphia and Allegheny Counties could do so for the 2020 General Election. See *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020). The Third Circuit ordered Lehigh County to do so for the 2021 Municipal Election. *Migliori v. Lehigh Cnty. Bd. of Elections*, 36 F.4th 153 (3d Cir. 2022). The Commonwealth Court ordered counties across the Commonwealth to do so for the 2022 Primary Election. *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 MD 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022); *McCormick for U.S. Senate v. Chapman*, No. 286 MD 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022).

Days before the 2022 General Election, however, the Supreme Court of Pennsylvania ordered counties “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.” *Order, Ball v. Chapman*, 102 MM 2022 (Pa. Nov. 1, 2022). That court issued its order despite being “evenly divided

on the issue of whether failing to count such ballots violates 52 U.S.C. § 10101(a)(2)(B).” *Id.*

A few days later, the Supreme Court of Pennsylvania clarified that for the 2022 General Election an “incorrectly dated” envelope meant “(1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022.” Order, *Ball v. Chapman*, 102 MM 2022 (Pa. Nov. 5, 2022).

ARGUMENT

I. Federal Law Prohibits Denying the Right to Vote Because of Voters’ Immaterial Mistakes

Federal law instructs that no one shall “deny the right of any individual to vote . . . 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).

For purposes of this statute, the right to vote has been denied if an individual has not been allowed to have their “ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election.” *Id.* § 10101(a)(3), (e). Section 10101(a)(2)(B), however, prohibits only some denials of the right to vote. By its

terms, § 10101 applies only when the right to vote has been denied because of (i) an “error or omission on any record or paper” (ii) that relates “to any application, registration, or other act requisite to voting.” *Id.* Section 10101(a)(2)(B) prohibits denying the right to vote for such errors or omissions unless the information the voter failed to correctly provide is “material in determining whether [the elector] is qualified under State law to vote in such election.” *Id.* § 10101(a)(2)(B).

This provision, enacted as part of the Civil Rights Act of 1964, was intended to end trivial requirements that “served no purpose other than as a means of inducing voter-generated errors that could be used to justify” denying the right to vote. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). It guards against “state election practices that increase the number of errors or omissions on papers or records related to voting and provide an excuse to disenfranchise otherwise qualified voters.” *League of Women Voters of Ark. v. Thurston*, No. 20-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021).

II. Omitting or Writing an Incorrect Date Is an Immaterial Mistake

Section 10101(a)(2)(B) prohibits setting aside ballots on the basis of a voter failing to accurately write a date on their ballot’s return envelope.

First, omitting a date from a ballot envelope or writing an “incorrect” date is an “error or omission on [a] record or paper.” 52 U.S.C. § 10101(a)(2)(B). Second,

writing a correct date is now an “act requisite to voting.” *Id.*; see also [Nov. 1 Ball Order](#). Third, counties that set aside ballots because of a missing or “incorrect” date have stopped voters from having their “ballot counted and included in the appropriate totals of votes cast.” [52 U.S.C. § 10101\(a\)\(3\), \(e\)](#). Fourth, mandating that voters accurately handwrite a date on their ballot’s return envelope serves no function in the administration of Pennsylvania elections. That date, therefore, is not “material in determining whether [the elector] is qualified under State law to vote in such election.” [52 U.S.C. § 10101\(a\)\(2\)\(B\)](#).

Federal and state courts in the Commonwealth have repeatedly come to the conclusion that the handwritten date has no utility. [Migliori, 36 F.4th at 164](#) (“Ignoring ballots because the outer envelope was undated, even though the ballot was indisputably received before the deadline for voting[,] serves no purpose other than disenfranchising otherwise qualified voters.”); [In re Canvass, 241 A.3d at 1077](#) (opinion announcing judgment) (“[I]n all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.”); [Berks, 2022 WL 4100998, at *20](#) (“[T]he parties have not

identified a specific purpose served by dating the declaration on the return envelope, and the Court cannot discern any.”).

Still, the RNC, drawing heavily from a dissenting opinion in Supreme Court of Pennsylvania’s 2020 *In re Canvass* decision, imagines possible roles the date might serve. But all conflict with the Pennsylvania Election Code and how Pennsylvania’s elections are administered.

A. Handwritten Envelope Dates Do Not Ensure Compliance with Any Statutory Voting Deadline

First, the RNC suggests that a handwritten date ensures that a voter completed their ballot within the statutorily permitted time frame. [RNC Br. at 6](#). That time frame is anytime between when the voter receives their blank ballot and 8 p.m. on Election Day. [25 P.S. §§ 3146.6\(c\), 3146.8\(g\)\(1\)\(ii\), 3150.16\(c\)](#). As explained below, since 1968, a handwritten date has not aided county boards’ identification of timely completed ballots.

The instruction that voters “shall ... date” the envelope used to return their mailed ballot was added to Pennsylvania’s Election Code in 1945. Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, § 1306 (attached as Exhibit 1). At that time, the Election Code imposed distinct deadlines for a voter to complete an absentee ballot (Election Day) and for a county board to receive it (more than two weeks later). *Id.*, sec. 10, §§ 1306-07. County boards were specifically instructed to set aside

during canvassing all ballots returned in envelopes dated sometime after Election Day. *Id.*, sec. 10, § 1307.

In 1968, when the General Assembly aligned the deadline for voters to complete and return their mailed ballot, it also eliminated the explicit requirement that county boards set aside envelopes dated sometime after Election Day. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, § 1308(a) (attached as Exhibit 2).

This history demonstrates that the date's intended purpose was to establish that a ballot was completed by Election Day even if it was permissibly received sometime afterward. This history also demonstrates that, as the General Assembly recognized in 1968, a date was not needed for that purpose once the deadlines to complete and return a ballot were made one and the same.

Indeed, now that there is a single deadline to complete and return a ballot, [25 P.S. §§ 3146.6\(c\), 3146.8\(g\)\(1\)\(ii\), 3150.16\(c\)](#), there is no instance in which the date is ever needed to confirm that a voter completed their ballot before Election Day.³ Any ballot returned by the statutory deadline necessarily was completed before that deadline.

And county boards have a statutory obligation to track the date that every absentee or mail-in ballot was returned and make that information available for

³ Nor is a date needed to confirm that a voter completed the ballot sometime after when county boards started mailing ballots for a given election. No voter will have access to a ballot until their county starts mailing them.

public inspection. 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5). They have procedures for doing so—including stamping ballots as “received” and scanning return envelopes’ barcodes into the SURE system. See 2022 Envelope Guidance; *In re Canvass*, 241 A.3d at 1077 (opinion announcing judgment); *Berks*, 2020 WL 4100998, at *6.

Using the date written on the ballot envelope—or the absence of a date—to enforce Pennsylvania’s timeliness deadlines would require county boards to cancel ballots even when the county board knows that the ballot arrived (and thus was completed) by the statutory deadline.

B. Handwritten Envelope Dates Are Not Used to Detect Fraud

Because in all cases county boards can independently verify if a ballot was completed by Election Day without reference to the date handwritten on the return envelope, the handwritten date is not a tool for catching fraudulently back-dated votes. *Contra* RNC Br. at 6. A ballot was either completed and returned by Election Day or it was not. So long as county boards assess a ballot’s timeliness by the date the board in fact received the ballot, writing an incorrect date on a return envelope cannot convert an untimely ballot into a seemingly timely one.

Ascribing importance to the date actually *introduces* a risk of fraud that would not otherwise exist. If counties must exclude ballots based on their review of the handwritten date, then that date can be manipulated to require that a county

board disqualify a ballot even if the board independently knows that the ballot was completed and received on time.

Attempting to justify its assertion that discarding thousands of otherwise proper votes from registered Pennsylvania voters would serve an anti-fraud interest, the RNC points to an incident from the 2022 Primary Election in which the handwritten date was cited as evidence in a criminal complaint against an individual who allegedly attempted to fraudulently vote in Lancaster County. *Id.*

But even there, the date played no role in determining that the ballot would not be counted. By the time the alleged fraud was discovered, county commissioners had already determined to exclude the ballot at issue because SURE system records showed—*without reference to the handwritten date*—that “the elector had died prior to the Primary Election Day.” [Berks, 2022 WL 4100998](#), at *21 n.14 (discussing testimony about this same incident).

As the affidavit of probable cause that the RNC attached to its motion explicitly states, the deceased individual had been removed from voting rolls *before* Lancaster County even received the ballot. [Affidavit of Probable Cause ¶ 2 \(ECF No. 194-1\)](#).⁴

⁴ The affidavit does not support the RNC’s claim that the date was “crucial evidence” in the criminal case. [RNC Br. at 6](#). The arrest affidavit makes clear that the allegedly fraudulent ballot was received nearly two weeks after the voter had died. Those circumstances should have been investigated no matter what was written on the envelope.

C. Handwritten Envelope Dates Are Not Used to Determine Voter Eligibility

Handwritten envelope dates also are not used to determine a voter's eligibility. While the RNC maintains that the date provides the point in time for measuring a voter's eligibility, [RNC Br. at 6](#), the RNC later forcefully (and correctly) disavows its own position, *id.* at 11-12.

In Pennsylvania, a person may vote if they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony conviction. *Supra* at 2. Whether the declaration on a return envelope is dated is not relevant to any of these criteria, which are judged *as of Election Day*. See [Pa. Const. art. VII, § 1](#) (imposing residency requirements for the time period “immediately preceding the election”); [25 P.S. § 2811\(2\), \(3\)](#) (same); *id.* [§ 3146.8\(d\)](#) (directing county boards to discard absentee and mail-in ballots cast by individuals who died before Election Day); [25 Pa. C.S. § 1301](#) (allowing anyone “who will be at least 18 years of age on the day of the next election” to register).

Nor, using the Supreme Court of Pennsylvania's *Ball* orders as guidance, could the handwritten date be used to judge a voter's eligibility. It appears under those orders that a voter complies with Pennsylvania's date requirement if they write *any* date within the applicable range. See *Nov. 5 Ball Order*. It does not matter whether the date written on a ballot-return envelope is in fact the date the

voter signed their declaration (assuming that would be a “correct” date). *Id.* The handwritten date cannot provide the moment at which a voter’s eligibility must be judged if it does not even matter whether the handwritten date is accurate.⁵

D. Handwritten Envelope Dates Are Not Used to Discern Voters’ Intentions

Finally, the date on a mailed ballot does not confirm that a voter wishes to vote by mail rather than in person. *Contra* RNC Br. at 6. A voter who chooses to vote by mail makes that intent clear when he or she applies to receive an absentee or mail-in ballot. A date on the return envelope is no more confirmation of a voter’s intent to vote absentee or by mail-in ballot than is applying for, completing, signing, and returning the ballot.

More critically, whether someone who has cast an absentee or mail-in ballot has misgivings about having done so is irrelevant. Election district registers identify which voters have requested an absentee or mail-in ballot. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1). Those voters may not vote in person at their polling place unless they surrender their blank absentee or mail-in ballot, and its envelope; otherwise, they may submit only a provisional ballot. *Id.* §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3). If a voter returns a properly completed absentee or mail-in ballot before the deadline and casts a provisional ballot at a

⁵ County boards, in any event, could not verify during canvassing that the handwritten date appearing on an envelope was the date the voter signed their envelope (again, assuming that is the “correct” date).

polling place, only the absentee or mail-in ballot is counted, regardless of the date written on it. *Id.* § 3050(a.4)(5)(ii)(F).

* * * * *

The Pennsylvania Supreme Court’s two *Ball* orders signal that, as a matter of Pennsylvania law, the “accuracy” of the date a voter writes on their ballot return envelope does not matter. So long as the date written falls within a certain range, it is not “incorrect.” As the Third Circuit has reasoned, if the accuracy of the date does not matter, “then it is hard to understand how one could claim that [the date] requirement has any use in determining a voter’s qualifications.” *Migliori*, 36 F.4th at 164.

III. Enforcing § 10101 Does Not Place Other Pennsylvania Election Regulations at Risk

The RNC mistakenly insists that an order that § 10101(a)(2)(B) forbids disqualifying the ballots implicated here would jeopardize a wide range of Pennsylvania’s election regulations. The RNC’s arguments badly distort—and at times completely ignore—the text of § 10101(a)(2)(B).

Many of the regulations that the RNC maintains are in jeopardy—such as prohibiting people from voting after Election Day or voting at the wrong location, *RNC Br. at 8*—are not an “error or omission on any *record or paper* relating to any application, registration, or other act requisite to voting.” 52 U.S.C. § 10101(a)(2)(B) (emphasis added). This “record or paper” limitation is significant

and enforced. See *Democratic Cong. Campaign Comm. v. Kosinski*, No. 22-1029, 2022 WL 2712882, at *21 (S.D.N.Y. July 13, 2022) (rejecting argument that § 10101(a)(2)(B) allowed voter to cast ballot at wrong location); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1372-73 (S.D. Fl. 2004) (rejecting argument that § 10101(a)(2)(B) allowed voter to return untimely mailed ballot).

Pennsylvania's rule that voters must place their ballot in a secrecy envelope also is not in doubt. The RNC questions the continuing validity of that requirement, arguing that omitting the secrecy envelope is "an 'omission' or 'an error' *involving* a 'record or paper.'" RNC Br. at 13 (emphasis added). But § 10101(a)(2)(B) does not apply to errors *involving* a record or paper. It applies to errors or omissions "*on* any record or paper." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Failing to write a date is an error on a record or paper. Forgetting to use the secrecy envelope is not.

Nor does § 10101(a)(2)(B) require that county boards figure out how to count ballots when a voter voted for more than one candidate. *Contra* RNC Br. at 13. Unlike a voter who neglects to write an envelope date, a voter who overvotes has not made an error or omission on some paper or record "relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). The voter has instead failed to identify her chosen candidate on the ballot itself.

Finally, Pennsylvania’s rule that voters must sign the declaration on their return envelope also is not at risk. *Contra* RNC Br. at 12-13. The signature is material. The signed declaration affirms the “statement of the elector’s qualifications.” 25 P.S. §§ 3146.4, § 3150.14. By omitting a signature, the person returning the ballot has not confirmed that they are a qualified voter, which is an omission that is material in determining if the person who completed the ballot is “qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

None of the RNC’s examples describes a voter failing to properly respond to a demand for information that is immaterial to their qualifications, which is what the § 10101(a)(2)(B) prohibits. *NAACP*, 522 F.3d at 1173 (explaining that §10101(a)(2)(B) was meant to address states requiring voters provide unnecessary information as a condition of voting); *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (same). The RNC’s suggestions that § 10101(a)(2)(B) will preempt all sorts of elections regulations are grossly overstated.

CONCLUSION

For the reasons set forth above, the envelope date is not “material” under 52 U.S.C. § 10101(a)(2)(B) and ordering that county boards may not cancel ballots just because a voter neglected to properly write a date on the return envelope does not jeopardize other Pennsylvania election regulations.

February 3, 2023

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