

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

PENNSYLVANIA STATE CONFERENCE
OF THE NAACP, *et al.*,

Plaintiffs,

v.

AL SCHMIDT, *et al.*,

Defendants.

Civil Action No.: 1:22-cv-00339

**MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Intervenor-Defendants the Republican National Committee, National Republican Congressional Committee, and the Republican Party of Pennsylvania support and seek to uphold free and fair elections on behalf of all Pennsylvanians. Intervenor-Defendants therefore respectfully move the Court to grant summary judgment against Plaintiffs and to uphold the General Assembly's duly enacted laws governing Pennsylvania's elections.

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 six 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 Ball v. Chapman*, 284 A.3d 1189 (Pa. Nov. 1, 2022) (unpublished).

Plaintiffs' suit is merely the latest effort to erode the General Assembly's date requirement. But Plaintiffs' two counts wholly fail "as a matter of law," Fed. R. Civ. P. 56(a), 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, the Pennsylvania Supreme Court declined to invalidate the date requirement under the federal materiality provision, *see Ball*, 284 A.3d at 1192, 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 does not deny anyone the right to vote or determine anyone's qualifications to vote. Neither can the Plaintiffs prevail on their novel and incorrect Equal Protection challenge. The Court should grant summary judgment and uphold the General Assembly's lawful and constitutional date requirement.

LEGAL STANDARD

"Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A plaintiff opposing summary judgment "may not rest upon mere allegation or denials of his pleading" or a "scintilla of evidence" in support of an essential element of his claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 256 (1986). Rather, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* Indeed, Rule 56 "mandates" entry of summary judgment against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, summary judgment is warranted against any plaintiff who pursues a legally deficient theory of liability. *See, e.g., id.*; Fed. R. Civ. P. 56(a).

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*, 284 A.3d at 1192. As three Justices of the Pennsylvania Supreme Court have observed, “[t]he date requirement ... carri[e]s an unquestionable purpose.” *Ball v. Chapman*, 289 A.3d 1, 10 (Pa. 2023) (internal quotation marks omitted). 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.” *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1090 (2020) (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy) (citing then-Judge Brobson’s “observ[ations] below”). 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. *See* SOF ¶¶ 46-53. The investigation was predicated upon the fraudster’s completion of the date field on the ballot declaration. *See* SOF ¶ 51. Indeed, the declaration contained only two pieces of information to be supplied by the voter: a signature and the date. *See* SOF ¶¶ 48-50. But under the Pennsylvania Supreme Court’s current precedent, the Lancaster County Board of Elections lacks authority to conduct signature comparisons, so it could not even check for a non-matching signature, much less use any non-matching signature to detect fraud by a third party. *See In re Nov. 3, 2020 Gen.*

Election, 240 A.3d 591 (Pa. 2020). Thus, the *only* evidence on the face of the ballot declaration indicating that someone other than the decedent had completed the ballot was the handwritten date of April 26, 2022, which was twelve days after the decedent had passed away. *See* SOF ¶¶ 50. Even Plaintiffs’ putative expert agreed that the date supplied by the *Mihaliak* fraudster was the only evidence of fraud on the face of the ballot and, thus, that the date requirement helped to detect fraud in that case. *See* SOF ¶¶ 52-53.

Plaintiffs’ two counts fail “as a matter of law.” Fed. R. Civ. P. 56(a). *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 misapplies hornbook Equal Protection principles to an alleged statutory exception that does not even exist. The Court should grant summary judgment 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

Three Supreme Court Justices already have concluded that the Third Circuit panel’s now-vacated 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 enter summary judgment against Plaintiffs on Count I.

A. Plaintiffs Lack A Private Right To Enforce The Materiality Provision

As an initial matter, the Court should dismiss Count I because neither 52 U.S.C.

§ 10101(a)(2)(B) nor 42 U.S.C. § 1983 grants Plaintiffs a right to sue. Section 10101 provides that only “the Attorney General may institute ... a civil action” under that statute. 52 U.S.C. § 10101(c). “[T]he negative implication of Congress’s provision for enforcement by the Attorney General is that the statute does not permit private rights of action.” *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); *see also Vote.Org v. Callanen*, 39 F.4th 297, 305 n.5 (5th Cir. 2022) (reserving question); *but see Schwier v. Cox*, 340 F.3d 1284, 1294-96 (11th Cir. 2003). Neither should the Court let Plaintiffs evade that limit through § 1983, which provides a private right of action to enforce only “unambiguously conferred right[s].” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002). And again, the fact that the materiality provision authorizes suits only by the Attorney General suggests Congress did not intend to permit private suits under § 1983. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (noting that “the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others” (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)) (alteration omitted)).¹

B. Application Of The Date Requirement Does Not Violate Federal Law

If the Court reaches the merits, it should also grant summary judgment against Plaintiffs on Count I because the General Assembly’s date requirement does not even implicate, let alone violate, the materiality provision. 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.

¹ The U.S. Supreme Court is currently considering a case in which the existence of a cause of action to enforce a federal statute under § 1983 is at issue. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, No. 21-806 (U.S. argued Nov. 8, 2022).

52 U.S.C. § 10101(a)(2)(B).

For at least three reasons, the “plain and unambiguous” text demonstrates that application of the General Assembly’s date requirement to preclude counting of undated or incorrectly dated absentee or mail-in ballots does not violate the materiality provision. *Castro v. DHS*, 835 F.3d 422, 429 (3d Cir. 2016) (“The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”). 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. 52 U.S.C. § 10101(a)(2)(B). The materiality provision therefore has no application to the date requirement because “[w]hen a mail-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.*; 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” (emphasis added)).

Indeed, the “*right to vote*” protected by the materiality provision, 52 U.S.C. § 10101(a)(2)(B) (emphasis added), is obviously different from the *act* of voting. An individual possesses the “right to vote” when she satisfies the state-law qualifications; states, including Pennsylvania, use registration to confirm those qualifications. See 25 P.S. § 1301; 25 Pa. C.S. § 1328(a)(1)(ii), (b)(2)(ii); SOF ¶¶ 145-46. But even after qualifying and registering, a voter “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, returning the ballot to the wrong location, or arriving at the wrong polling place. *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay). Such a voter has not been denied the *right* to vote, but instead has failed to complete the *act* of voting in compliance with state law. *See id.*; *see also Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004) (the materiality provision is not “intended to apply to the counting of ballots by individuals already deemed qualified to vote”).

The consequence of such noncompliance is not disqualifying the voter, stripping the voter’s eligibility to vote, or removing the voter from the list of registered voters, but rather declining to count the voter’s (invalid) ballot. *See Ball*, 284 A.3d 1189. Indeed, any eligible, registered voter who fails to comply with such rules *retains* the right to vote in any election in compliance with the state-law rules for voting. Accordingly, application of rules such as those requiring voting by Election Day, signing absentee or mail-in ballots, using secrecy envelopes, and voting at a specific location do not deny anyone the right to vote. Nor does application of the date requirement. *See Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay) (“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 (2020) (Mem.) (Kavanaugh, J., concurring)

(“[R]easonable election deadlines do not ‘disenfranchise’ anyone under any legitimate understanding of that term.”).

As the Fifth Circuit has reasoned, “[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). Yet that is precisely what Plaintiffs ask the Court to hold: according to Plaintiffs’ own putative expert, “disenfranchise[ment]” and denial of the right to vote occur whenever “an eligible voter[’s] ... ballot [is] not counted.” SOF ¶ 148; *see also id.* at ¶¶ 148-49 (“If a legally eligible voter’s ballot is not counted, it’s disenfranchisement” even where state law requires the ballot not to be counted). This faulty premise, irreconcilable with the Supreme Court’s jurisprudence, alone dooms Plaintiffs’ materiality challenge to the date requirement as “a matter of law.” Fed. R. Civ. P. 56(a); *see also Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay); *Rosario*, 410 U.S. at 757; *Timmons*, 520 U.S. at 358; *Brnovich*, 141 S. Ct. at 2338; *Democratic Nat’l Comm.*, 141 S. Ct. at 35 (Kavanaugh, J., concurring).

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 “that must be met in order to cast a ballot that will be counted.” *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of the application for stay); *see also Vote.Org*, 39 F.4th at 305 n.6. To fall within the scope of the materiality provision, “it is not enough that the error or omission be immaterial *to* whether the individual is qualified to vote; the paper or record must also be used ‘in determining’ the voter’s qualifications.” *Ball*, 289 A.3d at 38 (Opinion of Justice Brobson) (emphasis original).

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 (Alito, J., dissenting from the denial of the application for stay) (“There is no reason why the requirements that must be met in order to register (and thus be ‘qualified’) to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted.”); *see also Vote.Org*, 39 F.4th at 305 n.6. Indeed, 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 stripped of the right to vote or 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 (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 (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; *Ball*, 289 A.3d at 37-40 (Opinion of Justice Brobson).

The two other subsections of § 10101(a)(2) further underscore this point. Just as “a word is known by the company it keeps,” *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961), so too is a statutory provision, *see United States v. Tupone*, 442 F.3d 145, 151 (3d Cir. 2006) (“[T]he text of a statute must be considered in the larger context or structure of the statute in which it is found.”). 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). Thus, “like the other two [subsections],” the materiality provision “relates to determinations of *who* may vote—*i.e.*, voter qualifications,” not what voters must *do* to cast a valid ballot, *Ball*, 289 A.3d at 37 (Opinion of Justice Brobson) (emphasis original). Indeed, it would be unusual, to say the least, to sandwich a provision governing *all* paper-based election regulations between two voter-qualification provisions. “Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the State.” *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). There is no such clear intention here, and the Court should not find Plaintiffs’ purported federal authority over state elections without it.

This textual and commonsense construction comports with Congress’s purpose in enacting the materiality provision. Congress enacted the provision 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; *see also Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006) (“[W]ell-settled law establishes that § 1971 was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements.”); *Broyles v. Texas*, 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009) (same).

Congress’s purpose was to “forbid[] the practice of *disqualifying voters* for their failure to provide information irrelevant to their eligibility to vote.” *Schwier*, 340 F.3d at 1294 (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, not a limitation on rules that must be met for a ballot to be counted. *See Mississippi*, 380 U.S. at 138; *Schwier*, 340 F.3d at 1294; *Browning*, 522 F.3d at 1173.

Indeed, some courts have declined even to *consider* claims brought under the materiality provision when, as now, the plaintiff has failed to allege racial discrimination in application of the challenged state law. *See, e.g., Rokita*, 458 F. Supp. 2d at 839; *Broyles*, 618 F. Supp. 2d at 697. At minimum, that Congress adopted the materiality provision under the Fifteenth Amendment requires that it be strictly construed—and, thus, limited to state laws used to “determin[e]” whether an individual is or is not “qualified under State law to vote.” 52 U.S.C. § 10101(a)(2)(B); *see Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009); *City of Boerne v. Flores*, 521 U.S. 507, 525-26 (1997); *see also Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (“We are obligated to construe the statute to avoid constitutional problems if it is fairly possible to do so.”).

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). True, an absentee or mail-in ballot and accompanying declaration is a “record or paper.” *Id.* But casting a ballot—which requires completing the declaration, *Ball*, 289 A.3d at 22-23—constitutes the *act* of

voting, not an application, registration, or other act *requisite* to voting. *Ritter*, 142 S. Ct. at 1826 n.2 (Alito, J., dissenting from the denial of the application for stay). It would be an “awkward” statutory construction at best to extend the materiality provision to absentee and mail-in ballots and the date requirement. *Id.*; *see also Ball*, 289 A.3d at 26 (Opinion of Justice Wecht) (“Logic and ordinary rules of statutory construction ... dictate that an ‘act requisite to voting’ must be different from voting itself.”). Voting is voting; it is not an act requisite to voting.

Indeed, the “time-honored canon *ejusdem generis*[] ... teaches that where general words follow an enumeration of two or more things, those successive words refer only to ... things of the same general kind or class specifically mentioned.” *N. Sound Cap. LLC v. Merck & Co.*, 938 F.3d 482, 490 (3d Cir. 2019). Here, the two preceding items in § 10101(a)(2)(B)—“application” and “registration”—are acts “requisite to voting” and, in particular, acts to confirm a voter’s qualifications. Thus, “other act requisite to voting” must similarly refer to acts relating to voter qualification. *See Ball*, 289 A.3d at 38 n.11 (Opinion of Justice Brobson) (the “understanding that the scope of the [materiality provision] is limited to records or papers used in determining a voter’s qualifications is supported by the *ejusdem generis* canon of statutory construction”).

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

In their Amended Complaint, Plaintiffs offer two main arguments in support of their claim that the date requirement violates the federal materiality provision. Both are unpersuasive.

First, the entire thrust of Plaintiffs’ 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,” Am. Compl., **Ex. 1**, ¶ 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* Am. Compl., **Ex. 1**, ¶ 79. Plaintiffs are entirely correct that compliance with the date requirement is not a qualification 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 supra* Part I.B.

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.” Am. Compl., **Ex. 1**, ¶¶ 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—and is part and parcel with—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 in *Ball*, Acting Secretary Chapman agreed that the signature requirement is valid and mandatory and does not violate the federal materiality provision. SOF ¶ 43. Moreover, Plaintiffs’ own putative expert agreed that providing a signature is not a qualification to vote. SOF ¶ 147. 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.” Am. Compl., **Ex. 1**, ¶ 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* SOF ¶ 44. 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.” Am. Compl., **Ex. 1**, ¶ 78 (internal quotation marks omitted); *Ball*, 289 A.3d at 38-39 (Opinion of Justice Brobson) (“it would not surprise me at all to see, in future litigation, an argument that” requiring secrecy envelopes violates the materiality provision).

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” on a “record or paper,” and the overvote prohibition is “immaterial to whether the voter is qualified under State law to vote in [the] election.” Am. Compl., **Ex. 1**, ¶ 78 (internal quotation marks omitted).

These examples are illustrative of the disruption Plaintiffs' (wrong) interpretation of the materiality provision would cause. There are surely many more. To name just a few, Plaintiffs would also cast in doubt the validity of commonplace voter assistance declarations, and requirements that in-person voters sign pollbooks. *See* 25 P.S. §§ 3050, 3058. In fact, under Plaintiffs' reading "no election law that imposes informational requirements on a record or paper unrelated to determining voter qualification can survive a [§ 10101(a)(2)(B)] challenge." *Ball*, 289 A.3d at 39 (Opinion of Justice Brobson).

The mischief effected by Plaintiffs' proposed reading of the federal materiality provision would not be confined to Pennsylvania. Plaintiffs' misconstruction imperils scores of state laws nationwide, including signature requirements, *see, e.g.*, N.J. Stat. § 19:62-11; 15 Del. C. § 5514(a)(1), and overvote prohibitions, *see, e.g.*, 15 Del. C. § 4972(b)(6); A.R.S. § 16-611; Fla. Stat. § 101.5614(5); 10 Ill. Comp. Stat. Ann. 5/17-16; Ohio Rev. Code § 3505.28; N.C. Gen. Stat. § 163-182.1(a)(4).

In short, Plaintiffs' reading "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 are correct, numerous state election rules—such as the General Assembly's signature and secrecy-envelope requirements and overvote prohibition—have been invalid since Congress enacted the federal materiality provision nearly six decades ago. That 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*, 501 U.S. at 460; *see Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489

(2021) (applying federalism canon). The absurdity of discovering, sixty years after the fact, that the materiality provision declares *all* these commonplace rules invalid confirms the folly of Plaintiffs' interpretation. *See FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941) (“[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.”); *United States v. Am. Union Transp., Inc.*, 327 U.S. 437, 459 (1946) (Frankfurter, J., dissenting) (“[A] consistent and unexplained failure to exercise power not obviously conferred by legislation may be ... persuasive that the power claimed was never conferred.”).

Second, Plaintiffs cite to the Third Circuit's vacated opinion in *Migliori* as “persuasive” authority. Am. Compl., **Ex. 1**, ¶¶ 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 in Am. Compl., **Ex. 1**, ¶ 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). The Third Circuit's decision becoming moot prevented review by the Supreme Court, and the subsequent vacatur “eliminate[d] [the] judgment, review of which was prevented through happenstance.” *Id.* at 40. The Court should not rely on that untested—and accordingly erased—analysis. In all events, the Third Circuit's opinion was wrongly decided. *See supra* Part I.B.

Nor should the Court follow the two Commonwealth Court decisions from last year. *See* Am. Compl., **Ex. 1**, ¶ 58. Those decisions relied upon the now-vacated *Migliori* decision, have been superseded by the Pennsylvania Supreme Court’s holding in *Ball*, and were incorrect. *See* SOF ¶ 41; *supra* Part I.B. The Court should grant summary judgment against Plaintiffs on Count I.

II. MANDATORY APPLICATION OF THE DATE REQUIREMENT DOES NOT VIOLATE EQUAL PROTECTION

The Court should also grant summary judgment against Plaintiffs on Count II because mandatory application of the date requirement does not violate Equal Protection. The Equal Protection Clause “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. Am. Compl., **Ex. 1**, ¶¶ 83-88 (citing 25 Pa. C.S. § 3515(a)). Each premise fails.

A. Pennsylvania Law Does Not Exempt Military And Overseas Voters From The Date Requirement

Plaintiffs’ first premise—that Pennsylvania law applies the date requirement to domestic voters but not to military and overseas voters, *see* Am. Compl., **Ex. 1**, ¶ 86—is false. Plaintiffs’ lone contention is that Pennsylvania’s version of the Uniform Military and Overseas Voting Act (UMOVA) exempts military and overseas voters from the date requirement. *See id.* But UMOVA creates no express exemption from the date requirement. *See* 25 Pa. C.S. §§ 3501-3519. Moreover, the UMOVA mistake provision Plaintiffs invoke, 25 Pa. C.S. § 3515(a)(1), *see* Am. Compl., **Ex. 1**, ¶ 86—which has never been cited in any court decision—does not create such an

exemption *sub silentio*. Even Plaintiffs’ own putative expert agreed that the date requirement applies to overseas voters. *See* SOF ¶ 153.

The Court should decline at the threshold to adopt Plaintiffs’ novel and countertextual reading of UMOVA. “Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not,” this Court must “adopt the latter construction.” *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017). Plaintiffs’ unproven (and erroneous) construction of § 3515(a)(1) is an essential *premise* of their allegation of a constitutional violation, *see* Am. Compl., **Ex. 1**, ¶¶ 83-88, and, thus, flies in the face of this canon. It should be rejected for that reason alone.

Moreover, even a cursory textual review proves that reading § 3515(a)(1) not to create a *sub silentio* exemption from the date requirement not only is “reasonable” but, in fact, correct. *Herman*, 161 A.3d at 212. In particular, § 3515(a)(1) states in its entirety:

(a) Mistake, omission or failure to satisfy. – None of the following shall invalidate a document submitted under this chapter:

(1) A voter’s mistake or omission in the completion of a document *under this chapter* as 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) (emphasis added). For at least three reasons, this “mistake provision” does not exempt military and overseas voters from the date requirement by its plain terms.

First, Plaintiffs omit the mistake provision’s “under this chapter” limitation from their selective quotation, Am. Compl., **Ex. 1**, ¶ 86, but that limitation is dispositive here. The mistake provision applies only to “completion of a document under this chapter”—i.e., under UMOVA itself. 25 Pa. C.S. § 3515(a)(1). But *none* of the “document[s]” completed under the UMOVA “chapter” (chapter 35) are Pennsylvania absentee or mail-in ballots. *See id.* §§ 3501-3519; *compare also id.* §§ 3146.6(a), 3150.6(a). Instead, the “documents” completed under UMOVA

are special registration and application documents that facilitate military and overseas voters registering to vote and requesting ballots. *See id.* §§ 3505-3509. Thus, because UMOVA “is intended to be read in concert with the Election Code,” *id.* § 3519, UMOVA’s mistake provision does not even apply to, let alone excuse, military and overseas voters’ “mistakes or omissions in the completion of” absentee or mail-in ballots, including failure to comply with the date requirement, *id.* § 3515(a)(1).

Second, the mistake provision applies only to documents used to “determin[e] whether” a voter “covered” by UMOVA is “eligible to vote.” *Id.* It therefore has no application to documents, such as absentee and mail-in ballots and ballot declarations, that constitute the *act* of voting and have no bearing on determining whether a voter is “eligible to vote.” *Id.* (emphasis added); *see also Commonwealth v. Howard*, 257 A.3d 1217, 1222 (Pa. 2021) (“The best expression of [the General Assembly’s] intent is found in the statute’s plain language.”); *Fisher v. Commonwealth*, 501 A.2d 617, 619 (Pa. 1985) (“The supreme principle of statutory interpretation must be that each word used by the Legislature has meaning and was used for a reason, not as mere surplusage.”).

Third, consistent with the General Assembly’s direction that UMOVA “be read in concert with the Election Code,” 25 Pa. C.S. § 3519, the plain text confirms that when the General Assembly intended to exempt military and overseas voters from the Election Code’s global requirements, it did so expressly in UMOVA. Thus, UMOVA crafts special rules for military and overseas voters regarding a variety of voting-related practices, including voter registration, ballot applications, the deadline for returning ballots to election officials, and misspellings on write-in votes. *See, e.g., id.* §§ 3505-3515. But UMOVA is completely silent regarding—and creates no express exemption from—the date requirement. That the General Assembly adopted certain express exemptions from the Election Code in UMOVA but never even mentioned the date

requirement only further underscores it did not create an exemption from the date requirement. *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017) (“[W]hen interpreting a statute, we must listen attentively to what the statute says, but also to what it does not say.” (internal quotation marks omitted)). The General Assembly does not create statutory exemptions *sub silentio*, see *In re Appointment of Rodriguez*, 900 A.2d 341, 344 (Pa. 2003), and did not create a *sub silentio* exemption from the date requirement amongst the numerous express exemptions in UMOVA, compare *Thompson v. Thompson*, 223 A.3d 1272, 1278 (Pa. 2020) (“[I]f the General Assembly intended to permit trial courts to impose suspended sentences for civil contempt of a child support order, it would have expressly provided for this alternative. It did not.”).

Given UMOVA’s plain statutory text, it is unsurprising that the absentee and mail-in ballots that county election officials provided to military and overseas voters in 2022 included instructions to date the envelope and contained signature and date fields for the voter to complete. See SOF ¶¶ 119-20. There would have been no *reason* to include those instructions and fields if, as Plaintiffs contend, UMOVA exempts military and overseas voters from the date requirement. Even the Federal Write-in Absentee Ballot referenced in UMOVA, see 25 Pa. C.S. § 3510, contains a date field, see SOF ¶ 121, and voters who use that ballot must comply with the date requirement, see SOF ¶¶ 122-23.

Plaintiffs’ proposed contrary construction of UMOVA is countertextual and nonsensical. Plaintiffs focus on the mistake provision’s use of the word “document”—but they omit the dispositive “under this chapter” limitation from their selective quotation. Am. Compl., Ex. 1, ¶ 86. And Plaintiffs’ proposed reading makes no sense: if UMOVA exempted military and overseas voters from the date requirement *sub silentio*, it would also exempt them from the host of *other* requirements for completing an absentee or mail-in ballot that UMOVA does not even mention,

including the signature requirement and the overvote prohibition. *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.6(a). Such a construction would be *inconsistent*, rather than “*in concert*,” with the Election Code. 25 Pa. C.S. § 3519 (emphasis added).

The fact that 3 county boards of elections declined to set aside military ballots that failed to comply with the date requirement in the 2022 general election, *see* SOF ¶¶ 62, 103, 110, does not affect, much less bolster, Plaintiffs’ reading of UMOVA’s mistake provision. After all, the actions of county boards of elections do not change their obligations under state law—and those boards that counted noncompliant ballots did so in violation of state law. By contrast, the county boards of elections that declined to count military and overseas ballots that failed to comply with the date requirement, *see* SOF ¶¶ 68, 94, complied with state law. Any difference in approach across counties is remedied by the *noncompliant* boards coming into *compliance* with state law, not by ordering the *compliant* boards into *noncompliance* with state law as Plaintiffs ask this Court to do. *See* Am. Compl., Ex. 1, ¶¶ 83-88. The Court should grant summary judgment on Count II.

B. Exempting Military And Overseas Voters From The Date Requirement Would Not Violate The Equal Protection Clause

Even if UMOVA’s mistake provision created a *sub silentio* exemption from the date requirement, Count II still would fail because Plaintiffs cannot “demonstrate that [any voter] received different treatment from that received by other individuals *similarly situated*.” *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005).

“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).

Plaintiffs’ request for application for strict scrutiny, *see* Am. Compl., **Ex. 1**, ¶ 85, is misplaced. Neither non-military nor non-overseas voters are “suspect classes” entitled to heightened constitutional protection, *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004), and regulations on absentee and mail-in voting do not implicate “fundamental rights,” *id.*; *see also Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) (“[T]here is no constitutional right to an absentee ballot.”); *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807 (1969) (“[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.”). Thus, rational-basis scrutiny applies, *see Biener*, 361 F.3d at 214-15, and a rational basis clearly exists for excusing military and overseas voters from some requirements for absentee and mail-in voting, including the date requirement.

Indeed, “[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.

UMOVA, of which § 3515(a)(1) is part, “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(a)(1), 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.

Indeed, any exemption of military and overseas voters from the date requirement confers no unwarranted advantages as to in-person voting, *see id.* at 435, and relates directly to their “absen[ce] from their voting jurisdictions,” *id.* “[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). “In our nation’s recent history, active military personnel and their families have faced severe difficulties exercising their fundamental right to vote. For affected service members, the decision to serve their country was the very act that frequently deprived them of a voice in selecting its government.” *United States v. Alabama*, 778 F.3d 926, 928 (11th Cir. 2015). There is nothing “grossly awry” about easing the requirements to have one’s ballot counted for overseas military personnel, given the attendant difficulties. Thus, even if § 3501(a)(1) exempted military and overseas voters from the date requirement, *but see supra* II.A, it would not treat similarly situated persons differently,

and would survive rational-basis scrutiny. Plaintiffs' Equal Protection claim accordingly fails.

Finally, in all events, even if Plaintiffs' erroneous view of § 3515(a)(1) and the Constitution were correct, only a handful of county boards of elections violated the Equal Protection Clause on Plaintiffs' theory. After all, the only arguable "differential treatment," Am. Compl., **Ex. 1**, ¶ 86, was committed by boards that treated military and overseas ballots *differently* from domestic ballots. On Plaintiffs' own record, the only boards that engaged in such differential treatment are the 3 boards that (properly) declined to count domestic ballots that failed to comply with the date requirement but (improperly) counted such ballots from military and overseas voters. *See* SOF ¶¶ 62, 103, 110. Because "the nature and scope of the remedy are to be determined by the violation" and "federal-court decrees must directly address and relate to the constitutional violation itself," the Court may issue any injunction only against those 3 boards. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977). The Court cannot issue an injunction against those boards which engaged in no "differential treatment" even on Plaintiffs' theory, Am. Compl., **Ex. 1**, ¶ 86, because they either received no noncompliant ballots from military or overseas voters, *see* SOF ¶¶ 56, 57, 61, 63-65, 70, 71, 73, 74, 76-78, 80, 82, 86, 88, 92, 93, 95, 96, 105, 107, 108, 113, 115, or treated such voters *identically* to domestic voters by rejecting *all* noncompliant ballots, *see* SOF ¶¶ 68, 94.

Moreover, "when the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984). "The choice between these two outcomes is governed by the legislature's intent, as revealed by the statute at hand." *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017). In assessing which remedy to adopt, "a court should measure the intensity of commitment to the residual policy—the main rule, not the exception—and consider the degree of potential disruption

of the statutory scheme that would occur by extension as opposed to abrogation.” *Id.* at 75 (internal quotation marks omitted).

There is no basis for questioning the Pennsylvania General Assembly’s commitment to the date requirement. In fact, the General Assembly declared the section containing the date requirement “nonseverable” from the remainder of Act 77 and provided that “[i]f any provision of [that] act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” Act 77, P.L. 552, sec. 11 (Oct. 31, 2019); *see Rappa v. New Castle County*, 18 F.3d 1043, 1072 (3d Cir. 1994) (“When a federal court is called upon to invalidate a state statute, the severability of the constitutional portions of the statute are governed by state law.”). And invalidating undated or misdated UMOVA ballots would be significantly less disruptive than invalidating the date requirement given that there are far more domestic ballots than military and overseas ballots in Pennsylvania. *See* SOF ¶¶ 56-118.

“Put to the choice,” it is implausible that the General Assembly would have abrogated its date requirement wholesale so that a handful of undated and misdated UMOVA ballots could be counted. *Morales-Santana*, 582 U.S. at 76. Because the General Assembly would have “prefer[red] preservation of the general rule,” *id.*, the proper remedy from the Court would be to *enforce* the date requirement across the board, not invalidate it, *see also supra* Part I.B.

For these reasons, the Court may not issue the overly broad statewide injunction Plaintiffs seek. *See* Am. Compl., Prayer for Relief ¶ 1; *see also Milliken*, 433 U.S. at 282; *Morales-Santana*, 582 U.S. at 73; *supra* Part II.A.

CONCLUSION

The Court should grant summary judgment against Plaintiffs on both counts.

Dated: April 21, 2023

Respectfully submitted,

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

PENNSYLVANIA STATE CONFERENCE
OF THE NAACP, *et al.*,

Plaintiffs,

v.

AL SCHMIDT, *et al.*,

Defendants.

Civil Action No.: 1:22-cv-00339

INTERVENOR-DEFENDANTS' CONCISE STATEMENT OF MATERIAL FACTS

In support of their Motion for Summary Judgment, the Intervenor-Defendants the Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania submit the following concise statement of material facts.

I. THE PARTIES

A. Plaintiffs

1. Plaintiff The Pennsylvania State Conference of the NAACP is a “non-profit, non-partisan organization” which “engages in efforts to get out the vote.” **Ex. 1**, Am. Compl. ¶¶ 11-12 (Dkt. No. 121).

2. Plaintiff The League of Women Voters of Pennsylvania is a “nonpartisan statewide non-profit” whose “mission includes voter registration, education, and get-out-the-vote drives.” *Id.* ¶¶ 14-15.

3. Plaintiff Philadelphians Organized to Witness, Empower and Rebuild is “a Pennsylvania nonprofit” whose “civic engagement efforts include voter education programs, voter registration drives, information about applying for mail ballots, completing them properly

and returning them on time, and ‘Souls to the Polls’ efforts to encourage congregants to vote.” *Id.* ¶¶ 17-18.

4. Plaintiff Common Cause Pennsylvania is “a non-profit political advocacy organization and a chapter of the national Common Cause organization,” and “seeks to increase the level of voter registration and voter participation in Pennsylvania elections.” *Id.* ¶¶ 21-22.

5. Plaintiff Black Political Empowerment Project is “a non-profit, non-partisan organization” whose “work includes voter registration drives, get-out-the-vote activities, education and outreach about the voting process, and election-protection work.” *Id.* ¶¶ 24-25.

6. Plaintiff Make the Road Pennsylvania is “a not-for-profit, member-led organization” whose “work includes voter protection voter advocacy and voter education.” *Id.* ¶¶ 26-27.

7. Plaintiffs Barry M. Seastead, Mariene G. Gutierrez, Aynne Margaret Pleban Polinski, Joel Bencan, and Laurence M. Smith plead that they are registered voters in Pennsylvania. *Id.* ¶¶ 30, 32, 34, 35, 36.

B. Named Defendants

8. Defendant Al Schmidt is Acting Secretary of the Commonwealth. <https://www.dos.pa.gov/about-us/Pages/Secretary-of-the-Commonwealth.aspx>.

9. The Secretary of the Commonwealth has the duty “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act.” 25 P.S. § 2621(f).

10. Defendant County Boards of Elections have “jurisdiction over the conduct of primaries and elections in [their respective] count[ies], in accordance with the provisions of this act.” 25 P.S. § 2641(a).

C. Intervenor-Defendants

11. The Republican National Committee is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14).

12. The National Republican Congressional Committee is the national congressional committee of the Republican Party as defined by 52 U.S.C. § 30101(14).

13. The Republican Party of Pennsylvania is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15).

14. Any court order purporting to change the law and direct counting of undated or incorrectly dated mail-in or absentee ballots would inflict significant harm on Intervenor-Defendants. *See Ex. 2*, Intervenor-Defendants’ Resps. & Objs. To Plaintiffs’ First Set of Interrogs. #1.

15. Unlawful counting of ballots undermines the integrity of elections, generates voter confusion, and erodes public confidence in elections. Therefore, unlawful counting of ballots can discourage voters, including Republican voters, from voting or otherwise participating in elections and, thus, change the outcome of election contests in Pennsylvania. *See id.* at 7-8; *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008).

16. Intervenor-Defendants were the prevailing parties in the *Ball* litigation upholding the date requirement, so any court order invalidating the date requirement harms Intervenor-Defendants’ rights secured in that litigation. *See Ex. 2* at Interrog. #1.

17. As political parties, Intervenor-Defendants expend substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania and supporting Republican candidates up and down the ballot. *Id.*

18. These efforts include devoting time and resources toward training and education programs that ensure that Intervenor-Defendants and their voters understand the rules governing the election process, including applicable dates, deadlines, and requirements for voting by mail or absentee. *Id.*

19. The efforts also encompass training, education, and monitoring of the voting and vote counting process in Pennsylvania to ensure it is conducted lawfully. *Id.*

20. Any change in the laws governing Pennsylvania elections harms Intervenor-Defendants by rendering their training, voter education, and monitoring programs less effective, wasting the resources they have devoted to such programs, and requiring them to expend new resources to update those programs. *Id.*

21. For instance, the Republican Party of Pennsylvania has statutory rights to appoint poll watchers to observe casting, counting, and canvassing of ballots at the polling place, 25 P.S. § 2687(a), and an “authorized representative” to “remain in the room” at the county board of elections and observe the pre-canvass and canvass of “absentee ballots and mail-in ballots,” *id.* §§ 3146.8(g)(1.1)-(2). *See Ex. 2* at Interrog. #1.

22. The Republican Party of Pennsylvania has exercised these statutory rights in the past several election cycles and will do so again in future election cycles. *See Id.*

23. In conjunction with its Election Integrity Operations, the Republican Party of Pennsylvania devotes substantial time and resources toward the recruitment and training of poll workers, poll watchers, and volunteers throughout the 67 counties of the Commonwealth to assist voters on election day, to observe the casting and counting of ballots at the polling place, and to observe the pre-canvass and canvass of absentee and mail-in ballots at the county board of elections. *Id.*

24. As part of its Election Integrity Operations, the Republican Party of Pennsylvania also devotes substantial time and resources toward the recruitment and training of a “ground team” of lawyers throughout the Commonwealth who stand ready on Election Day to assist poll workers, poll watchers, and volunteers should questions arise as to elections laws or the voting process within the Commonwealth. *Id.*

25. The Republican Party of Pennsylvania’s Election Integrity Operations, training programs, and voter education programs include training and information regarding the requirements for voters to cast lawful and valid ballots, and the governing rules delineating unlawful and invalid ballots and preventing election officials from pre-canvassing, canvassing, or counting such ballots. *Id.*

26. Any change in the laws governing Pennsylvania elections harms the Republican Party of Pennsylvania by rendering its Election Day Operations, training programs, and voter education programs less effective, wasting the resources they have devoted to such programs, and requiring them to expend new resources to update those programs. *Id.*

27. Any change in the laws governing Pennsylvania elections could affect the outcome of an election in which Intervenor-Defendants, their voters, and their supported candidates exercise their constitutional rights to vote and to participate. *Id.*

28. The Third Circuit’s failure to enforce the date requirement in *Migliori v. Cohen* actually did change the outcome of an election in which a Republican candidate had prevailed. See **Ex. 3**, Cert. Pet. at 7-12, *Ritter v. Migliori*, No. 22-30 (U.S. July 7, 2022), https://www.supremecourt.gov/DocketPDF/22/2230/229591/20220707140738344_Ritter%20Petition.pdf.

II. THE DATE REQUIREMENT

29. Pennsylvania’s election laws provide a date requirement for absentee and mail-in voting. 25 P.S. § 3146.6(a); § 3150.16(a).

30. In both provisions, the wording of the date requirement is the same: “The elector shall then fill out, date and sign the declaration printed on such envelope.” 25 P.S. § 3146.6(a); § 3150.16(a).

A. The Date Requirement Has Been A Part Of Pennsylvania’s Election Code Since 1945.

31. The first version of the Election Code permitted some active military members to vote by mail. **Ex. 4**, Act of June 3, 1937, P.L. 1333, No. 320, §§ 1327-1330, 1937 Pa. Laws 1333, 1442-44.

32. In 1945, the mail ballot provision was amended to require that the jurat on the ballot-return envelope be dated. **Ex. 5**, Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, § 1306, 1945 Pa. Laws 29, 37.

33. Eighteen years later, the General Assembly enacted the date requirement in its current form, providing that “[t]he elector shall then fill out, date and sign the declaration printed on such envelope.” **Ex. 6**, Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1304, 1963 Pa. Laws. 707, 736.

34. In 2019, the General Assembly passed Act 77, extending the option to vote by mail to all qualified voters, and adopting the date requirement for such ballots. **Ex. 7**, Act 77, P.L. 552, sec. 8 (Oct. 31, 2019).

35. Act 77 also provides that section 8—containing the date requirement—is “nonseverable,” and that “[i]f any provision of this act or its application to any person or

circumstance is held invalid, the remaining provisions or applications of this act are void.” **Ex. 8**, Act 77, P.L. 552, sec. 11 (Oct. 31, 2019).

B. The Date Requirement Has Been A Subject Of Multiple Recent Lawsuits.

36. 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.

37. In 2020, a majority of the Pennsylvania Supreme Court held that the date requirement is mandatory and 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).

38. In the first two cases following that ruling, the Pennsylvania Commonwealth Court upheld mandatory application of the date requirement. *See In re Election in Region 4 for Downingtown 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).

39. 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). *See Ex. 9*, Compl., *Migliori v. Lehigh County Bd. of Elections*, No. 5:22-cv-397 (E.D. Pa. Jan. 31, 2022), ECF No. 1.

40. The Third Circuit agreed with the plaintiffs, but the U.S. Supreme Court 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.).

41. 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).

42. The Commonwealth Court twice invoked the Third Circuit decision 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).

43. Finally, in November 2022, the Pennsylvania Supreme Court exercised its original jurisdiction to reaffirm that the General Assembly’s date requirement is mandatory. *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).

44. In that litigation, Acting Secretary Leigh M. Chapman agreed that the signature requirement is valid and mandatory and does not violate the federal materiality provision. **Ex. 10**, Acting Sec’y Ans. 15–23, *Ball v. Chapman*, No. 102 MM 2022 (Oct. 19, 2022).

45. The Acting Secretary also conceded in that litigation that the secrecy envelope does not violate the federal materiality provision. *Id.* at 39 n.15.

46. In an opinion that followed, the Pennsylvania Supreme Court held that the date requirement refers to the “day upon which an elector signs the declaration,” and noted that “[t]o hold otherwise would be to require unnecessarily specific drafting on the part of the General Assembly.” *Ball v. Chapman*, 289 A.3d 1, 23 (Pa. 2023).

47. The Pennsylvania Supreme Court was evenly divided on whether the federal materiality provision invalidates the date requirement. *Id.* at 9.

C. Commonwealth v. Mihaliak

48. The date requirement has already been used to detect election fraud. *See Ex. 11*, Tr. of Hearing in *Chapman v. Berks County Bd. of Elections*, No. 355 MD 2022 (Pa. Commw. July 28, 2022), at 100-116, 141-153.

49. Last year, officials in Lancaster County discovered that an individual had cast a fraudulent ballot in her deceased mother's name in *Commonwealth v. Mihaliak*, No. CR-126-22 (June 3, 2022); *see Ex. 12*, Affidavit of Probable Cause ¶ 2, Police Criminal Complaint, *Commonwealth v. Mihaliak*, No. CR-126-22 (June 3, 2022) ("*Mihaliak Compl.*").

50. In Lancaster County, the only information a voter is required to supply on a ballot declaration is the date and a signature. *See Ex. 13*, Exemplar Ballot Declaration from Lancaster County Board; *see also Ex. 77*, Greenburg Dep. at 114:23-115:7.

51. Under the Pennsylvania Supreme Court's current precedent, county boards of elections lack authority to conduct signature comparisons, so they may not check ballots for a non-matching signature, much less use any non-matching signature to detect fraud by a third party. *See In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020).

52. In *Mihaliak*, the only evidence on the face of the ballot declaration indicating that someone other than the decedent had completed the ballot was the handwritten date of April 26, 2022, which was twelve days after the decedent had passed away. *See Ex. 12* ¶ 2.

53. The investigation into the election fraud committed in *Mihaliak* was predicated upon the date supplied on the ballot declaration. *See id.* ¶ 2.

54. Plaintiffs' putative expert agreed that the date supplied on the *Mihaliak* ballot declaration was the only piece of evidence of fraud on the face of the ballot. *Ex. 77* at 114:15-118:2.

55. Plaintiffs' putative expert agreed that the date on the ballot declaration helped to detect fraud in *Mihaliak*. *Id.* at 116:19-117:2.

III. THIS LITIGATION

56. Plaintiffs in this case filed suit on November 4, 2022, seeking to invalidate the General Assembly's date requirement. ECF No. 1.

57. Plaintiffs claim that the date requirement—which has been on the books in some form since 1945—violates a provision of the 1964 Civil Rights Act and the Equal Protection Clause of the U.S. Constitution. *Id.*

A. County Boards Of Elections' Responses To Discovery Requests Regarding The 2022 General Election.

58. Allegheny County Board of Elections responded as follows.

- a. It received 161,575 mail ballots, of which 151 were military ballots. **Ex. 14**, Allegheny Cnty. Bd.'s Am. Ans. to Interrog. #1.
- b. It set aside 1,009 mail ballots with undated or misdated ballot declarations. **Ex. 15**, Allegheny Cnty. Bd.'s Ans. to Interrog. #2.
- c. It did not receive any undated or misdated military ballots. *Id.* at Interrog. #15.

59. Beaver County Board of Elections responded as follows.

- a. It received 15,172 mail ballots, of which 48 were military-overseas ballots. **Ex. 16**, Beaver Cnty. Bd.'s Ans. to Interrog. #1.
- b. It received 182 mail ballots with undated or misdated ballot declarations, of which 41 were corrected or cured. *Id.* Of the non-cured mail ballots, 9 were also missing their inner/secretary envelopes. *Id.* "One voter who had an error on their ballot also had a naked ballot," and though that voter

“corrected the ballot envelope prior to [the board’s] notice being published,” “the ballot was not counted as the error on the ballot was not determined until the pre-canvassing began.” *Id.*

- c. “No timely-received military-overseas ballots were missing a date or signature or were dated incorrectly.” *Id.* at Interrog. #15.

60. Bedford County Board of Elections responded as follows.

- a. It received 2,868 mail ballots and 6 military-overseas ballots. **Ex. 17**, Bedford Cnty. Bd., et al. (“BCCZ”) Ans. to Interrog. #1.
- b. It did not set aside any mail ballots for a date issue. *Id.* at Interrog. #2.

61. Berks County Board of Elections responded as follows.

- a. It received 28,829 mail ballots, including 146 military-overseas ballots. **Ex. 18**, Berks Cnty. Bd.’s Ans. to Interrog. #1.
- b. It set aside 782 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.

62. Blair County Board of Elections responded as follows.

- a. It received 9,022 mail ballots, and 27 military-overseas ballots. **Ex. 19**, Blair Cnty. Bd.’s Ans. Interrog. #1.
- b. It set aside 55 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
- c. It did not receive any undated or misdated military ballots for which the declaration was on the outside of the return envelope. *Id.* at Interrog. #15.

63. Bradford County Board of Elections responded as follows.
- a. It received 2,787 mail ballots, and 16 military-overseas ballots. **Ex. 20**, Bradford Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 20 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. An additional 3 undated/misdated ballots lacked a secrecy envelope. *Id.*
 - c. It did not receive any undated or misdated military-overseas ballots. *Id.* at Interrog. #15.
64. Bucks County Board of Elections responded as follows.
- a. It received 87,321 mail ballots and 466 military-overseas ballots. **Ex. 21**, Bucks Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 357 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It received 11 military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
 - d. It counted military-overseas ballots with undated or misdated ballot declarations. *Id.*
65. Butler County Board of Elections responded as follows.
- a. It received 18,212 mail ballots. **Ex. 22**, Butler Cnty. Bd.'s Ans. Interrogs. #1.
 - b. It set aside 66 mail ballots with undated or misdated ballot declarations. *Id.*

- c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
66. Cambria County Board of Elections responded as follows.
 - a. It received 9,848 mail and military-overseas ballots. **Ex. 23**, Cambria Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 38 mail-in/absentee ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
67. Cameron County Board of Elections responded as follows.
 - a. It received 410 mail ballots and 2 military-overseas ballots. **Ex. 24**, Cameron Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 5 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
68. Carbon County Board of Elections responded as follows.
 - a. It received 4,823 mail ballots and 14 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 27 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.

69. Centre County Board of Elections responded as follows.
- a. It received 15,654 mail ballots and 126 military-overseas ballots. *Id.* at Interrog. #1.
 - b. It set aside 116 mail ballots with undated or misdated ballot declarations. **Ex. 25**, Centre County, Montour County and York County Bds.’ Supp. Ans. to Interrogs. #2.
70. Chester County Board of Elections responded as follows.
- a. It received 70,023 mail ballots and 638 military/overseas/federal absentee ballots. **Ex. 26**, Chester Cnty. Bd.’s Ans. to Interrogs. #1.
 - b. It set aside 116 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. An additional 19 mail ballots had no date and no signature. *Id.*
 - c. It set aside 12 military/overseas/federal absentee ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
71. Clarion County Board of Elections responded as follows.
- a. It received 12 mail ballots. **Ex. 27**, Clarion Cnty. Bd.’s Ans. to Interrogs. #1.
 - b. It set aside 12 mail ballots with undated or misdated ballot declarations. *Id.*
72. Clearfield County Board of Elections responded as follows.
- a. It received 4,564 mail ballots, including 8 military and civilian overseas ballots. **Ex. 28**, Clearfield Cnty. Bd.’s Ans. to Interrogs. #1 & Ex. “Clfd. 1.”

- b. It set aside 12 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
73. Clinton County Board of Elections responded as follows.
- a. It received 2,248 mail ballots and 14 military-overseas ballots. **Ex. 29**, Clinton Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 20 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
74. Columbia County Board of Elections responded as follows.
- a. It received 4,168 mail ballots and 11 military-overseas ballots. **Ex. 17** at Interrog. #7.
 - b. It set aside 29 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
75. Crawford County Board of Elections responded as follows.
- a. It received 5,917 mail ballots and 22 military-overseas ballots. **Ex. 30**, Crawford Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 49 mail ballots with undated or misdated ballot declarations. *Id.* at Interrogs. #2, 8. It set aside an additional 2 mail ballots with undated or misdated ballot declarations that also lacked a signature. *Id.* at Interrog. #8.

- c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
76. Cumberland County Board of Elections responded as follows.
- a. It received 26,298 mail ballots and 113 military-overseas ballots. **Ex. 31**, Cumberland Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 100 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
77. Dauphin County Board of Elections responded as follows.
- a. It received 25,839 mail ballots and 154 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 95 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
78. Delaware County Board of Elections responded as follows.
- a. It received 60,154 mail ballots. **Ex. 32**, Delaware Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 114 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.

79. Elk County Board of Elections responded as follows.
- a. It received 2,012 absentee/mail-in ballots and 19 military-overseas ballots. **Ex. 33**, Elk Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It received 10 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Of those, 7 voters either corrected the error or filed a provisional ballot. *Id.* at Interrog. #13.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
80. Erie County Board of Elections responded as follows.
- a. It received 26,766 mail-in ballots and 41 military-overseas ballots. **Ex. 34**, Erie Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 211 mail ballots with undated or misdated ballot declarations, including cured ballots. *Id.* at Interrog. #2. An additional 8 mail ballots with undated ballot declarations were also missing a signature. *Id.* at Interrog. #8. 113 of these ballots were cured. *Id.* at Interrog. #13.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
81. Fayette County Board of Elections responded as follows.
- a. It received 9,036 mail ballots and 33 military-overseas ballots. **Ex. 35**, Fayette Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 137 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Eleven of these "signed another voter's ballot return envelope. *Id.* at Interrog. #8. 93 "[v]oters whose timely received mail

ballots were set aside and/or segregated by Fayette County because the signed outer return envelope was missing a date or showed a date the county determined to be incorrect” “came to the Fayette County Election Bureau and cured their mail ballots.” *Id.* at Interrog. #13.

- c. It stated that it “did not timely receive any military-overseas ballots in the 2022 General Election on which the voter failed to date their voter declaration or included a date that the county deemed to be incorrect.” *Id.* at Interrog. #15.
- d. “Dates were not reviewed for military/overseas ballots that were timely received.” **Ex. 36**, Fayette Cnty. Bd.’s Resps. to Requests for Prod. of Docs. #3.

82. Forest County Board of Elections responded as follows.

- a. It received 447 mail ballots and 0 military-overseas ballots. **Ex. 37**, Forest Cnty. Bd.’s Ans. to Interrog. #1.
- b. It set aside 38 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Of these, two mail ballots were signed by the incorrect person. *Id.* at Interrog. #8. Two ballots were cured. *Id.* at Interrog. #13.

83. Franklin County Board of Elections responded as follows.

- a. It received 10,496 mail ballots and 68 military-overseas ballots. **Ex. 38**, Franklin Cnty. Bd.’s Ans. to Interrog. #1.
- b. It set aside 114 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Seven of those were also missing a signature. *Id.* at Interrog. #8.

84. Greene County Board of Elections responded as follows.
- a. It received 2,384 mail ballots and 7 military-overseas ballots. **Ex. 39**, Greene Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 11 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
85. Huntingdon County Board of Elections responded as follows.
- a. It received 2,452 mail ballots and 8 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 34 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
86. Indiana County Board of Elections responded as follows.
- a. It received 2,452 mail ballots and 8 military-overseas ballots. *Id.* at Interrog. #1.
 - b. It set aside 107 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
87. Jefferson County Board of Elections responded as follows.
- a. It received 2,278 mail ballots and 12 military-overseas ballots. *Id.* at Interrog. #1.
 - b. It set aside 23 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.

88. Juniata County Board of Elections responded as follows.
- a. It received 1,244 mail-in ballots and 7 military-overseas ballots. **Ex. 40**, Juniata Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside five mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Of those, two were also missing signatures. *Id.* at Interrog. #8. Two ballots were cured. *Id.*
 - c. In response to whether it counted "timely-received military-overseas ballots in the 2022 General Election if the voter failed to date their voter declaration or included a date that [it] deemed to be incorrect," it responded: "No." *Id.* at Interrog. #15. It set aside one military-overseas ballot with an undated ballot declaration. *Id.* at Interrog. #16. It was also missing a signature. *Id.*
89. Lackawanna County Board of Elections responded as follows.
- a. It received 20,759 mail ballots, including 29 military ballots and 26 civilian overseas ballots. **Ex. 41**, Lackawanna Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 160 mail ballots with undated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not deem any military-overseas ballots as incorrect. *Id.* at Interrog. #15.
90. Lancaster County Board of Elections responded as follows.
- a. It received 34,202 mail ballots and 188 military-overseas ballots. **Ex. 42**, Lancaster Cnty. Bd.'s Ans. to Interrogs. #1.

- b. It set aside 232 mail ballots which had undated or misdated ballot declarations. *Id.* at Interrog. #2. Of those, 51 had additional defects. *Id.* at Interrog. #8.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15; **Ex. 43**, Miller Dep. 96:15-98:4.
91. Lawrence County Board of Elections responded as follows.
- a. It received 6,888 mail ballots and 33 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 107 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
92. Lebanon County Board of Elections responded as follows.
- a. It received 10,771 mail ballots and 64 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 24 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
93. Lehigh County Board of Elections responded as follows.
- a. It received 35,425 mail-in/absentee ballots and 101 military/overseas/civilian ballots. **Ex. 44**, Lehigh Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 390 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. An additional 23 mail ballots had no date and no signature on their ballot declarations. *Id.*
 - c. It did not review military-overseas ballots for dates. *Id.* at Interrog. #15.

94. Luzerne County Board of Elections responded as follows.
- a. It received 29,002 mail ballots. **Ex. 45**, Luzerne Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 166 mail ballots with undated or misdated ballot declarations. **Ex. 46**, Luzerne Cnty. Bd.'s Am. Ans. to Interrogs. 16 of these voters voted provisionally. **Ex. 45** at Interrog. #7.
 - c. It “[d]o[es] not recall any” military-ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
95. Lycoming County Board of Elections responded as follows.
- a. It received 6,474 mail ballots. **Ex. 47**, Lycoming Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 36 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Six of these voters cast provisional ballots. *Id.* at Interrog. #12.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
96. McKean County Board of Elections responded as follows.
- a. It received 1,957 mail in ballots and 5 military-overseas ballots. **Ex. 48**, McKean Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 35 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It set aside 5 military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.

97. Mercer County Board of Elections responded as follows.
- a. It received 8,220 mail ballots. **Ex. 49**, Mercer Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 63 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. Though it received "12 mail ballots where the Declaration was unsigned," "[a]ny ballot that was both unsigned and missing a date were categorized as 'Unsigned' since this is a fatal defect outside the scope of current litigation." *Id.* at Interrog. #8.
 - d. In response to whether it counted "timely-received military-overseas ballots in the 2022 General Election if the voter failed to date their voter declaration or included a date that [it] deemed to be incorrect," it responded: "This issue did not arise in 2022." *Id.* at Interrog. #15.
98. Mifflin County Board of Elections responded as follows.
- a. It received 2,680 mail-in ballots and 8 military-overseas ballots. **Ex. 50**, Mifflin Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 13 mail-in/absentee ballots with undated ballot declarations, exclusive of ballots with other defects. **Ex. 51**, Mifflin Cnty. Bd.'s Resps. to Requests for Prod. of Docs. #2 & Ex. 1.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. **Ex. 50** at Interrog. #15.

99. Monroe County Board of Elections responded as follows.
- a. It received 15,651 mail ballots and 56 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 462 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Of these, 191 were cured. *Id.* at Interrog. #13.
100. Montgomery County Board of Elections responded as follows.
- a. It received 118,224 mail-in/absentee ballots and 914 military-overseas ballots. **Ex. 52**, Montgomery Cnty. Bd.'s Ans. to Interrog. #1.
 - b. It set aside 460 mail ballots with undated or misdated ballot declarations. *Id.* 44 of those ballots had other defects. *Id.* at Interrog. #2.
 - c. In Montgomery County, “[m]ilitary-overseas ballots were checked to make sure the declarations were complete. If the declarations were complete, the ballot was counted. No military-overseas ballots were set aside for having a missing or incorrect date.” *Id.* at Interrog. #15.
101. Montour County Board of Elections responded as follows.
- a. It received 1,718 mail ballots and 3 military-overseas ballots. **Ex. 25** at Interrog. #1.
 - b. It set aside 8 mail ballots with undated or misdated ballot declarations. **Ex. 17** at Interrog. #2.
102. Northampton County Board of Elections responded as follows.
- a. It received 36,401 mail/absentee ballots, including 91 UMOVA ballots. **Ex. 53**, Northampton Cnty. Bd.'s Ans. to Interrog. #1.

- b. It set aside 280 mail ballots with undated or misdated ballot declarations.
Id. at Interrog. #2.
103. Northumberland County Board of Elections responded as follows.
- a. It received 4,835 mail ballots and 30 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 14 mail ballots with undated or misdated ballot declarations.
Id. at Interrog. #2.
104. Perry County Board of Elections responded as follows.
- a. It received 2,340 mail ballots and 4 military ballots. **Ex. 54**, Perry Cnty. Bd.'s Ans. to Interrog. #1.
 - b. It set aside 35 mail ballots with undated or misdated ballot declarations.
Id. at Interrog. #2.
105. Philadelphia County Board of Elections responded as follows.
- a. It received 133,968 absentee and mail-in ballots, including military-overseas ballots. **Ex. 55**, Philadelphia Cnty. Bd.'s Ans. to Interrog. #1. It counted 127,934 absentee and mail-in ballots and 1,014 military-overseas ballots. *Id.*
 - b. It set aside 2,617 mail-in and absentee ballots. *Id.* at Interrog. #2. 580 of these voters submitted provisional ballots. *Id.*
 - c. It counted 13 military-overseas ballots with undated ballot declarations.
Id. at Interrog. #15.

106. Potter County Board of Elections responded as follows.
- a. It received 888 mail-in ballots, including 2 military-overseas ballots. **Ex. 56**, Potter Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 11 mail ballots with undated or misdated ballot declarations, not including voters who submitted provisional ballots or ballots with other defects. *Id.* at Interrog. #2.
107. Schuylkill County Board of Elections responded as follows.
- a. It received 8,657 mail ballots and 25 military-overseas ballots. **Ex. 57**, Schuylkill Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 59 mail ballots with undated or misdated ballot declarations, including one ballot which also was missing a signature and another where the date was missing from the voter assistance declaration. **Ex. 58**, Ex. 2 to Schuylkill Resp. to Requests for Prod. of Docs.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. **Ex. 57** at Interrog. #1.
108. Snyder County Board of Elections responded as follows.
- a. It received 2,286 mail ballots and 5 military-overseas ballots. **Ex. 17** at Interrog. #1.
 - b. It set aside 9 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
109. Somerset County Board of Elections responded as follows.
- a. It received 4,211 mail ballots, including 47 military-overseas ballots. **Ex. 59**, Somerset Cnty. Bd.'s Ans. to Interrogs. #1.

- b. It set aside 63 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. Two also did not contain signatures. *Id.*
 - c. It did not receive any military-overseas ballots with an undated or misdated outer return envelope. *Id.* at Interrog. #15.
110. Sullivan County Board of Elections responded as follows.
- a. It received 505 mail ballots and 4 military-overseas ballots. **Ex. 60**, Sullivan Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 4 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
111. Susquehanna County Board of Elections responded as follows.
- a. It received 3,247 mail-in ballots and 16 military-overseas ballots. **Ex. 61**, Susquehanna Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It did not set aside any mail ballots for undated or misdated ballot declarations. *Id.* at Interrog. #2.
112. Tioga County Board of Elections responded as follows.
- a. It reported that “[o]ut of 2,363 total ballots, 10 were returned.” **Ex. 62**, Tioga Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside four mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. When asked if it “count[ed] timely-received military-overseas ballots in the 2022 General Election if the voter failed to date their voter declaration

or included a date that [it] deemed to be incorrect,” it responded: “Ten such ballots were counted.” *Id.* at Interrog. #15.

113. Union County Board of Elections responded as follows.

- a. It received 2,997 mail ballots, including 41 military-overseas ballots. **Ex. 63**, Union Cnty. Bd.’s Ans. to Interrogs. #1.
- b. It set aside 23 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
- c. It “believes it did not receive any military-overseas ballots that were not counted based on a missing and/or incorrect date on the elector’s declaration on the return envelope.” *Id.* at Interrog. #16.

114. Venango County Board of Elections responded as follows.

- a. It received 3,027 mail ballots and 35 military-overseas ballots. **Ex. 17** at Interrog. #1.
- b. It set aside 42 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.

115. Warren County Board of Elections responded as follows.

- a. It received 2,266 mail ballots and 8 military ballots. **Ex. 64**, Warren Cnty. Bd.’s Ans. to Interrogs. #1.
- b. It set aside 18 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2. One of these ballots also did not have a signature. *Id.* at Interrog. #8.
- c. It did not receive any military-overseas ballots that were undated or misdated. *Id.* at Interrog. #15.

116. Washington County Board of Elections responded as follows.
- a. It received 19,569 mail ballots, including 51 military-overseas ballots. **Ex. 65**, Washington Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 66 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It reported that “none of the military-overseas ballots it received in the 2022 General Election were required to be set aside.” *Id.* at Interrog. #155.
117. Wayne County Board of Elections responded as follows.
- a. It received 4,692 mail ballots. **Ex. 66**, Wayne Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 55 mail ballots with undated or misdated ballot declarations. *Id.* at 8. Fewer than 10 of these were cured. *Id.* at Interrog. #2.
 - c. It did not receive any military-overseas ballots with undated or misdated ballot declarations. *Id.* at Interrog. #15.
118. Westmoreland County Board of Elections responded as follows.
- a. It received 34,599 mail ballots and 109 military-overseas ballots. **Ex. 67**, Westmoreland Cnty. Bd.'s Ans. to Interrogs. #1.
 - b. It set aside 95 mail ballots with undated or misdated ballot declarations. *Id.* at Interrog. #2.
 - c. It “did not receive any military-overseas ballots that were not counted based on a missing and/or incorrect date on the elector’s declaration on the return envelope.” *Id.* at Interrog. #15.

119. Wyoming County Board of Elections responded as follows.

- a. It received 2,029 mail ballots and 7 military-overseas ballots. **Ex. 68**, Wyoming Cnty. Bd.'s Ans. to Interrogs. #1.
- b. It set aside 17 mail ballots with undated ballot declarations. *Id.* One ballot also was missing a signature on the declaration. *Id.* at Interrog. #2.
- c. It reported that “[n]o military-overseas ballot was set aside for incorrect or missing date.” *Id.* at Interrog. #15.

120. York County Board of Elections responded as follows.

- a. It received 37,296 mail ballots and 185 military-overseas ballots. **Ex. 25** at Interrog. #1.
- b. It set aside 1,354 mail ballots with an undated or misdated ballot declaration. *Id.* at Interrog. #2.

B. Ballot Envelopes

121. Military/overseas voters were provided with ballot declarations to fill out. *See Ex. 69*, Montgomery County Declaration for Military-Overseas Ballot at 3; **Ex. 70**, Fayette County Declaration for Military-Overseas Ballot.

122. Those ballot declarations had date fields, and instructed voters to “SIGN AND DATE HERE.” *Id.*

123. The Federal Write-In Absentee Ballot (FWAB) also contains a date field. <https://www.fvap.gov/uploads/FVAP/Forms/fwab.pdf> (specifying “Today’s date”). *See Ex. 72*, Federal Write-In Absentee Ballot.

124. The fvap.gov website instructs voters to “[m]ake sure to follow your state instructions when filling out your FWAB.” <https://www.fvap.gov/eo/overview/materials/forms>. *See Ex. 73*, Federal Voting Assistance Program Guide.

125. The fvap.gov website's Pennsylvania guide in its "Hardcopy Instructions" directs voters to "sign and date the 'Voter Information' page" "[o]nce your FWAB is complete." <https://www.fvap.gov/guide/chapter2/pennsylvania>. See **Ex. 74**, Federal Voting Assistance Guide Regarding Pennsylvania Elections.

C. Mr. Jeffrey Greenburg's Putative Expert Testimony

126. Plaintiffs designated Mr. Jeffrey Greenburg to be an expert witness. See **Ex. 75**, Plaintiffs' Designation of Expert Witness.

127. Mr. Greenburg served as the director of elections for the Mercer County Bureau of Voter Registration and Elections from 2007 until July 2020. See **Ex. 76**, Greenburg Decl. ¶ 3.

128. Mr. Greenburg graduated from John Carroll University in 1982 with a bachelor of arts in History. **Ex. 76 Ex. 1**.

129. Mr. Greenburg never took any courses in elections or election administration. **Ex. 77**, Greenburg Dep. at 18:10-13.

130. Mr. Greenburg has never published any articles in a peer-reviewed journal or publication, and has never submitted any written works for peer review that were not published. *Id.* at 22:18-25.

131. Mr. Greenburg has never authored any studies about election administration. *Id.* at 23:2-4.

132. Mr. Greenburg's sole experience with statistical analysis of elections was to analyze the age of poll workers and to calculate the number of average voters registered in every county. *Id.* 23:8-24:4.

133. Mr. Greenburg's statistical analyses were never published anywhere. *Id.* at 24:5-7.

134. Mr. Greenburg has only ever administered elections in Mercer County, and has never administered a statewide election in Pennsylvania. *Id.* at 26:2-12.

135. Mr. Greenburg purports to offer the opinion that “older voters” (over age 65) “were disproportionately affected by the date requirement” in the November 2022 general election compared to voters under the age of 65. **Ex. 76 ¶ 32.**

136. This opinion is multiply flawed. *See Ex. 77* at 98:8-107:7.

137. In the first place, Mr. Greenburg’s opinion is limited to the discovery responses from 13 Pennsylvania counties and does not address any of the 54 other counties in Pennsylvania. *See Ex. 76 ¶ 32; Ex. 77* at 105:25-107:7.

138. Moreover, in the 13 counties Mr. Greenburg examined, he found a disproportionate effect by looking only at voters whose absentee or mail-in ballots were not counted due to the date requirement. *See Ex. 76 ¶ 32; Ex. 77* at 98:15-99:11.

139. Mr. Greenburg calculated the “percentage of voters” from that pool who were over the age of 65 and who were under the age of 65. **Ex. 77** at 98:18; *see also Ex. 76 ¶ 32.*

140. Mr. Greenburg, however, did not know the total number of voters in each age category who submitted absentee or mail-in ballots. *See Ex. 77* at 99:12-101:9.

141. Mr. Greenburg did not calculate the rate at which voters over 65 or voters under 65 use absentee or mail-in voting. *See Ex. 76 ¶ 32; Ex. 77* at 99:12-101:21.

142. Mr. Greenburg also did not calculate the rate at which voters in either category fail to comply with the date requirement. *See Ex. 77* at 103:9-105:19.

143. Mr. Greenburg conceded that voters over age 65 may be less affected by the date requirement if they use absentee and mail-in voting at a higher rate—or make mistakes in

completing the date field at a lower rate—than voters under age 65. *See Ex. 77* at 101:18-105:19.

144. Mr. Greenburg’s “disproportionately affected” opinion relied on data provided by Plaintiffs. *Ex. 76* at ¶ 28 n.4; ¶ 32 n.6.

145. The data provided by Plaintiffs was incomplete; they provided age data for voters in only 13 counties. *Ex. 76* at ¶ 32 n.6.

146. The data provided by Plaintiffs was internally inconsistent.

- a. Plaintiffs purported to exclude from their count ballots that failed some other requirement than the date requirement. *Ex. 76 Ex. 2*. But in Somerset, Franklin, Lancaster, Montgomery, Warren, Wyoming, and Crawford counties, Plaintiffs’ table failed to exclude such ballots. *Id.*
- b. Plaintiffs sometimes purported to exclude cured ballots from its count, but their table admits that those numbers are not consistently tracked. *Id.* Similarly, it does not take into account the list of ballots provided by Fayette County that specifies which ballots were cured. *See Ex. 71, Fayette Cnty. Bd.’s List of Undated Ballots.*

147. Mr. Greenburg testified that voters “are required to affirm that they meet the qualifications” to vote “on the voter registration application.” *Ex. 77* at 69:13-25.

148. Mr. Greenburg testified that voters “provide the information necessary for the boards to verify they are qualified” on “their voter registrations.” *Ex. 77* at 69:13-17.

149. Mr. Greenburg agreed that providing a signature is not a qualification to vote. *Ex. 77*, at 76:3-5.

150. Mr. Greenburg’s “definition of ‘disenfranchised’” was, “in [his] opinion,” “an eligible voter who, for one reason or another, their ballot was not counted.” **Ex. 76** at 90:8-14.

He stated in his deposition:

If a legally eligible voter’s ballot is not counted, it’s disenfranchisement. When you’re interpreting the law correctly or not, the ability for them to cast that ballot is not happening because of something that either they did or they omitted.

Ex. 77 at 93:3-15.

151. For purposes of his report, Mr. Greenburg classified such voters as “disenfranchise[d]” even if the “election official” “follow[ed] the law” in setting aside the voter’s ballot. *Id.* at 93:9-19.

152. Mr. Greenburg admitted that, in the *Mihaliak* case, the only piece of information on the face of the ballot indicating that a third party had attempted to vote someone else’s ballot was the handwritten date. *Id.* at 115:8-20.

153. Mr. Greenburg admitted that, in the *Mihaliak* case, the date requirement helped to identify fraud. *Id.* at 116:19-117:2.

154. Mr. Greenburg agreed that fraud involving mail ballots is possible now and in the future in Pennsylvania. *Id.* at 61:3-9.

155. Mr. Greenburg agreed that the date requirement applies to overseas voters. *Id.* at 84:2-4.

Dated: April 21, 2023

Respectfully submitted,

/s/ Kathleen A. Gallagher

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