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

BETTE EAKIN, ET. AL.	:	
	:	
Plaintiffs,	:	Case No. 1:22-CV-340-SPB
	:	
v.	:	
AL SCHMIDT, ET. AL.	:	
	:	
Defendants.	:	
	:	

RESPONSE OF DEFENDANT, LANCASTER COUNTY BOARD OF ELECTIONS, IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs are wrong to say that the material facts in this case are not genuinely disputed and that they are entitled to a judgment as a matter of law against the Lancaster County Board of Elections ("LCBOE"). Pls.' Br., ECF No. 288, p. 4. Plaintiffs have not presented evidence demonstrating undisputed material facts concerning their standing to sue LCBOE. And they have not presented evidence demonstrating undisputed material facts establishing LCBOE liability under the Supreme Court's holding in *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

As explained in LCBOE'S motion for summary judgment (ECF No. 280), each plaintiff lacks Article III standing to maintain any of their claims against LCBOE because no plaintiff has been injured by the conduct of LCBOE. Plaintiffs' motion offers nothing indicating that each plaintiff maintains standing. Instead, they treat standing vis-à-vis LCBOE as an afterthought. Article III standing is fundamental,

and plaintiffs have not presented evidence that demonstrates that no disputed issue of material facts exists concerning their standing as to LCBOE. Therefore, the Court should deny plaintiffs' motion for summary judgment.

Even if plaintiffs demonstrated no disputed fact regarding standing, the Court should still deny plaintiffs' motion because they have not established, as a matter of law, that LCBOE is liable under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). Under *Monell*, LCBOE can only be liable for conduct caused by its own "official policies and customs." *Porter v. City of Philadelphia*, 975 F.3d 374 (3d Cir. 2020). Here, plaintiffs' injuries, if they exist, did not result from official policies and customs of LCBOE. Rather, they were caused by the Pennsylvania Election Code and the orders of the Pennsylvania Supreme Court. Still, "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was **the moving force** behind the injury alleged." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404, (1997) (emphasis added). Plaintiffs have not and cannot present any evidence that LCBOE's own customs and policies were the moving force behind their alleged injuries. At a minimum, whether LCBOE's conduct was the moving force – as opposed to the identical conduct of the other 66 county defendants - behind plaintiffs' alleged injuries is a question for the jury.

Accordingly, the Court should deny plaintiffs' motion for summary judgment.

I. PLAINTIFFS HAVE NOT SET FORTH UNDISPUTED MATERIALS FACTS INDICATING THEY HAVE STANDING TO SUE LCBOE.

"Article III standing is essential to federal subject matter jurisdiction," *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016), and is "a threshold issue." *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000). It is well settled that "to meet the irreducible constitutional minimum of Article III standing, a plaintiff invoking federal jurisdiction bears the burden of establishing three elements. *Hartig.*, 836 F.3d at 269. A plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, (2016), as revised (May 24, 2016). Unlike at the pleading stage, at this stage of the proceedings, plaintiffs must produce *evidence* that they have standing to pursue their claims. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, (1992) (To survive a motion for summary judgment for lack of standing, "the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts.") Plaintiffs are wrong to say that the undisputed facts demonstrating they have met all three elements to maintain standing.

While plaintiffs are correct that since each plaintiff requests identical relief only one plaintiff needs to have standing, Pls.' Br., ECF No. 288, p. 9, plaintiffs still have not established at least one plaintiff has standing to sue LCBOE. Plaintiff Bette Eakin is surely not the one plaintiff that has standing to maintain claims against LCBOE. Eakin has not suffered any injury causally **related to the LCBOE's actions**. Eakin is a registered voter in Erie County. Am. Compl., ECF No. 228, ¶ 12. She has

never voted in Lancaster County and does not indicate that she intends to vote there. Also, it was the Erie County Board of Elections, not LCBOE, that informed Eakin that her ballot would be rejected if she did not enter a date on the ballot return envelope. *Id*. Eakin might have standing to sue the Erie County Board of Elections, she might have standing to sue the Commonwealth, but she does not have standing to sue LCBOE or any other county where she is not registered to vote and where she has never voted. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp.3d 889, 912 (M.D.Pa. 2022). (dismissing for lack of standing claims of voters, whose mailed ballot were not counted, because "[n]one of Defendant Counties received, reviewed, or discarded Individual Plaintiffs' ballots.") So, Eakin is not the plaintiff on which plaintiffs can rely upon to maintain standing.

The associational plaintiffs also cannot maintain standing as to the LCBOE. Plaintiffs claim that the AFT, DCCC, and DSCC, maintain standing to sue LCBOE "on behalf of their members and constituents." Pls. Br., ECF No. 288, p. 11 of 27. But to do that they must present evidence that "at least one **identified** member ha[s] suffered or would suffer harm" because of the actions of the LCBOE. *New Jersey Physicians, Inc. v. President of U.S.*, 653 F.3d 234, 241 (3d Cir. 2011) (quoting *Summers v. Earth Island Inst.,* 555 U.S. 488 (2009). While the associational plaintiffs claim "millions of members and constituents," Pls.' Br., ECF No. 288, p. 11 of 27, they cannot identify a single one that was injured by the actions of the LCBOE. They never identified any individual member suffering harm because of LCBOE conduct in their Rule 26 initial disclosures. They never identified any individual member suffering

harm because of LCBOE's conduct in answers to discovery. And they do not identify any individual member that suffered harm because of the conduct of LCBOE in support of their motion for summary judgment. So, plaintiffs cannot maintain standing against LCBOE because of the injuries to the members of the associational plaintiffs.

Even if the associational plaintiffs could identify a member impacted by the conduct of LCBOE, they still would not have standing to maintain claims for prospective relief. To have standing seeking prospective injunctive relief, the harm to the individual member must be certainly impending. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). But claims of future harm of this kind are not sufficient to confer standing because they are entirely speculative. *Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 165 (3d Cir. 2016) (Standing to seek injunctive relief requires a belief that the threat "must be actual and imminent, not conjectural or hypothetical.") Here, the associational plaintiffs' claims of future harm are speculative because the claims assume (a) that the unidentified members certainly vote in Lancaster County, (b) they certainly vote using absentee or mailed ballots and (c) they are certainly likely to submit the ballot with a missing or incorrect date. Standing based this type of "theoretical chain of events" is precisely what this Court rejected in *Boockvar v. Trump*, 493 F.Supp.3d 331 (W.D.Pa. 2020). There, this Court dismissed claims that the use of unmanned drop boxes for the receipt of mailed ballots would lead to an increased risk of fraud or vote dilution as "too speculative to be concrete." *Id.* at 377. This Court should again reject claims resting on the "possibility

of future injury based on a series of speculative events—which falls short of the requirement to establish a concrete injury." *Id.* at 377.

The associational plaintiffs have also not presented any evidence that they maintain standing to sue for their own injuries because they present no evidence that they diverted resources traceable **to the actions of LCBOE**.[1] Plaintiffs acknowledge that summary judgment requires a party to present evidence to support the motion and must go beyond bare allegations, assertions, and conclusions. Pls.' Br., ECF No. 288, p. 6-7. But that is precisely how plaintiffs proceed in establishing standing as to LCBOE, collapsing the fundamental element to a single conclusory sentence that "[h]ere Plaintiffs' injuries flow directly from Defendants' past and future refusal to count otherwise valid mail ballots that arrive in undated or misdated outer envelope." Pls. Br., ECF No. 288, p. 14 of 27. Instead, in the most conclusory manner, plaintiffs declare that their harms are caused by "each of the defendants." *Id.* The associational plaintiffs also point to a series of hypothetical circumstances regarding what the LCBOE would have done in the November 2022 election. But what LCBOE would

[1] The associational plaintiffs have submitted a number of declarations in support of there claim for standing. But none of those declarations can be used to support plaintiffs' motion because plaintiffs' failed to disclose the names of the individuals executing the declarations in their Rule 26(a) initial disclosures. *See* Fed.R.Civ.P. 37(c)(1). Plaintiff DCCC submits adeclaration from Devan Barber. *See* Pls. Appx., ECF No. 290, Ex. B. Plaintiff DSCC submits an affidavit from Erik Ruselowski. *Id.*, at Ex. C. Plaintiff AFT submitted a declaration from Arthur Steinberg. *Id.*, at Ex. D. Plaintiffs did not disclose Barber, Ruselowski, or Steinberg on their Rule 26 initial disclosures. A copy of plaintiffs' Rule 26 initial disclosures are attached here at Exhibit 1. Under Fed. R. Civ. P. 37(c)(1), "if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to **supply evidence on a motion** . . . .unless the failure was substantially justified or is harmless." Plaintiffs failure to disclose is not justified or harmless. It is prejudicial. Each of the 67 county defendants, including LCBOE, was denied the opportunity discover facts known by these individuals.

have done under a hypothetical set of circumstances in a past election is not sufficient to confer standing, indeed, it is irrelevant.

Still, plaintiffs admit that their conduct is traceable to the orders of the Pennsylvania Supreme Court who commanded LCBOE – and the other 66 county boards – not to count undated and incorrectly dated ballots. Pls'. Br., ECF No. 288, p. 4-6 of 27. They present no evidence distinguishing LCBOE's conduct from the other 66 county boards and do not present evidence that their alleged diversion of resources would have been any different had LCBOE decided to disregard the orders of the Supreme Court of Pennsylvania. For example, suppose LCBOE decided it would go rouge and announced it would nevertheless count undated or incorrectly dated ballots. Can the associational defendants credibly say have they would not have diverted resources to educate voters in the other 66 counties?

In sum, none of the plaintiffs have presented evidence of particularized and concrete harms caused **by the conduct of the LCBOE**. Plaintiffs might have suffered an injury. Plaintiffs might have suffered an injury because of the conduct of one of the other 66 county defendants or from the orders of the Pennsylvania Supreme Court. But they offer no evidence that they suffered an injury **because of the conduct of LCBOE**. Accordingly, the Court should deny defendants' motion for summary judgment.

II. PLAINTIFFS HAVE NOT ESTABLISHED MUNICIPAL LIABILITY AGAINST LCBOE UNDER *MONELL*.

Even if plaintiffs could establish standing against LCBOE, they still need to establish that LCBOE is liable under the Supreme Court's holding in *Monell*. Remarkably, plaintiffs do not even address the issue.

For purposes of determining liability under § 1983, counties' agencies, like LCBOE, are treated as municipal entities and the Court must address the scope of LCBOE's liability under *Monell*. *Reitz v. Cnty. of Bucks*, 125 F.3d 139, 144 (3d Cir. 1997). Under *Monell* and its progeny, LCBOE can only be "held liable for the violation of a constitutional right under 42 U.S.C. § 1983 [] when the alleged unconstitutional action executes or implements policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy." *Id.* Moreover, "under § 1983, local governments are responsible only for **their own illegal acts**." *Connick v. Thompson*, 563 U.S. 51, 60, (2011) (emphasis added and citations omitted) Once a plaintiff identifies the official policy or custom of the municipality, "[t]he plaintiff[s] must also demonstrate that, through its deliberate conduct, the municipality was **the moving force** behind the injury alleged." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404, (1997). How do plaintiffs suggest they satisfy this test? They do not explain. In all events, plaintiffs fail to establish liability under *Monell*.

To establish liability under § 1983, the plaintiffs must do more than to simply point to LCBOE it acted under "color of state law." *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003) ("[n]ot all state action rises to the level of a

custom or policy.") Rather, the law is clear, plaintiffs must show that LCBOE refused to count ballots pursuant to its own official policies and customs, not the policy of someone else. "In a § 1983 claim against a local government unit, liability attaches **when it is the government unit's policy or custom itself** that violates the Constitution." *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1027 (3d Cir. 1991) (emphasis added). Plaintiffs have not identified any **LCBOE** policy, custom, or practice that caused their injuries. Indeed, plaintiffs must concede that it was not LCBOE's own policy and custom that caused incorrectly or undated mailed ballots not to be counted in 2022. That resulted because of orders of the Pennsylvania Supreme Court.

Still, "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was **the** moving force behind the injury alleged." *Brown*, 520 U.S. at 404 (emphasis added). Plaintiffs have not presented and cannot present any evidence that the LCBOE conduct was **the** moving force behind their alleged injuries. As plaintiffs concede, LCBOE's conduct in not counting undated or incorrectly dated ballots was no different than conduct of the other 66 counties. Each county did not count undated or incorrectly dated ballots and they did so because they were ordered by the Supreme Court of Pennsylvania not to count them. Clearly, LCBOE's conduct alone was not **the** moving force behind the alleged injuries to the individual plaintiffs, each of whom is not a Lancaster County voter and who did not vote in Lancaster County. LCBOE's conduct was also not **the** moving

force behind the associational plaintiffs' alleged injuries. LCBOE conduct might be **a** moving force – among many – behind the plaintiffs' alleged injuries, but it is surely not **the** moving source of plaintiffs' alleged injuries.

There is no evidence that any official policy or custom of LCBOE was the moving force behind those injuries. Rather, the moving force, if there was one, was the Pennsylvania Supreme Court orders which compelled LCBOE to act. Still questions concerning whether LCBOE's conduct was the moving force for purposes of establishing liability *Monell* should be left to the jury. *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990) ("[a]s long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury.") Thus, at a minimum, plaintiffs' motion for summary judgment sets up a fact question on causation that the jury or finder of fact must determine at trial. Accordingly, the Court should deny plaintiffs' motion for summary judgment.

III. PLAINTIFFS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Assuming that somehow plaintiffs get over the hurdle of Article III standing and establishing liability under *Monell* (they don't), in all events, plaintiffs' claims fail as a matter of law. The materiality provision of 52 U.S.C. § 10101(a)(2)(B) is errors or omissions related to determining an individual's qualifications to vote. In particular, it is aimed at racially discriminatory practices used to stifle the ability of minorities to register to vote. It is not a rule of general applicability governing all

election practices. This conclusion is supported by the legislative history of statute, the text of statute, and the precedent interpreting statute.

Section 10101(a)(2)(B) was passed as part of the Civil Rights Act of 1964. PL 88-352, July 2, 1964, 78 Stat. 241. "The measure was at the time the latest entry in a spurt of federal enforcement of voting rights after a long slumber following syncopated efforts during Reconstruction." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). It was enacted with an "aim at eliminating racially motivated practices which restrict exercise of the elective franchise." *Ballas v. Symm*, 351 F.Supp. 876, 888–89 (S.D. Tex. 1972), aff'd, 494 F.2d 1167 (5th Cir. 1974). Although initially passed as part of the Civil Rights Act of 1964, the provisions of section 52 U.S.C. § 10101(a)(2)(b) were incorporated into the Voting Rights Act of 1965, PL 89-110, August 6, 1965, 79 Stat. 437. The VRA likewise had a single aim of eliminating racial discrimination in voting. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 534 (2013) ("The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem.") It is among a series of provisions intended to prevent race or color inhibiting the right to vote. 52 U.S.C. § 10101(a). Among those provisions are a prohibition on literacy tests, 52 U.S.C. § 10101(a)(2)(C), and penalties for voter intimidation, 52 U.S.C. § 10101(a)(3)(b).

The text of Section 10101 further supports its aim at eradicating racial discrimination in voting. Section 10101(a) states "race, color, or previous condition not to affect right to vote." 52 U.S.C. § 10101(a). Section 10101 guarantees the right

to vote "without distinction of race, color, or previous condition of servitude." 52 U.S.C.A. § 10101(a)(1).

Its legislative history and text have led courts to conclude that the primary purpose Section 10101(a)(2)(B) is "to address the practice of requiring unnecessary information for voter registration 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." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). It was "enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements." *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 839 (S.D. Ind. 2006), aff'd sub nom. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008). In sum, Section 10101(a)(2)(b) was designed to eliminate errors and omissions which could be used as a pretext to discriminate against black voters and to deny them the ability to vote. And Congress never intended it to apply, as plaintiffs wish here, to a broad swath of state imposed voting regulations. Here, there is no evidence that LCBOE's motivation for not counting undated or incorrectly dated ballots was to engage in racial discrimination. Accordingly, the Court should deny summary judgment.

CONCLUSION

LCBOE recognizes that the Court is being called upon to resolve an important dispute. But it is a dispute to which LCBOE should not be party. Plaintiffs have not demonstrated that they maintain standing to make LCBOE a proper party. And, even if they did, present no evidence that LCBOE can be liable on any of their claims to

maintain it as a party. Accordingly, it respectfully requests that the Court deny plaintiffs' motion for summary judgment against it and grant summary judgment in its favor dismissing all claims against it.

Respectfully submitted,

Date: May 5, 2023

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CERTIFICATE OF SERVICE

I hereby certify the foregoing has been filed electronically and is available for viewing and downloading from the Electronic Case Filing System of the United States District Court for the Western District of Pennsylvania. I further hereby certify that, in accordance with Fed. R. Civ. P. 5, service has been made upon counsel of record via ECF.

Respectfully submitted,

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