

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

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|------------------------------|---|---------------------------------|
| BETTE EAKIN, <i>et al.</i> , |) | |
| |) | |
| Plaintiffs, |) | Civil Action No.: 1:22-cv-00340 |
| |) | |
| v. |) | |
| |) | Judge Susan P. Baxter |
| ADAMS COUNTY BOARD OF |) | |
| ELECTIONS, <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

**INTERVENOR-DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

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

Plaintiffs' motion fails "as a matter of law," Fed. R. Civ. P. 56(a), to provide any basis for this Court to strike down the General Assembly's date requirement for absentee and mail-in ballots that the Pennsylvania Supreme Court upheld as mandatory just a few months ago, *see Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022). Indeed, Plaintiffs' memorandum in support of their motion largely recycles their meritless arguments from the motion to dismiss stage. But no amount of discovery can cure the legal flaws in Plaintiffs' meritless theory that the date requirement violates the federal materiality provision and the U.S. Constitution.

First, Plaintiffs' Count I rests on a counter-textual and non-sensical statutory reading. As Intervenor-Defendants have explained—and three U.S. Supreme Court Justices have agreed—the date requirement does not even *implicate*, let alone violate, the federal materiality provision. *See Ritter v. Migliori*, 142 S. Ct. 1824, 1824-25 (2022) (Mem.) (Alito, J., dissenting from the denial of the application for stay). In fact, Plaintiffs' contrary construction of the federal materiality provision would invalidate broad swaths of commonplace and commonsense voting rules nationwide, subjecting state election laws to federal superintendence that Congress did not intend and did not enact.

Second, Plaintiffs' constitutional claim in Count II asks the Court to depart from the Supreme Court's controlling caselaw and its decision in *Crawford v. Marion County Election*

Board, 553 U.S. 181 (2008). Plaintiffs, moreover, do not dispute that the date requirement was used to detect voter fraud in *Commonwealth v. Mihaliak*—or that the fraudster’s handwritten date was the only evidence of fraud on the face of the ballot envelope in that case. *See* Responsive Statement of Facts (“RSOF”) ¶¶ 137-39. Instead, Plaintiffs resort to mischaracterizing the record they compiled, including the testimony of their own putative expert witness, who never even examined or directly measured the benefits or alleged burdens of the date requirement. But even on those mischaracterizations, Plaintiffs’ constitutional claim makes no sense. Plaintiffs have not challenged the signature requirement that is part of the same state-law voting rule as the date requirement—and they never explain how requiring a signature can be constitutional but requiring voters to date the declaration they have successfully signed imposes an unconstitutional burden.

Plaintiffs’ claims fail on the law and the facts. The Court should deny Plaintiffs’ motion for summary judgment.

ARGUMENT

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

As Intervenor-Defendants already have explained, Plaintiffs’ claim that the date requirement violates the federal materiality provision fails as a matter of law. *See* ECF No. 282 at 4-16; *see also Ritter*, 142 S. Ct. at 1824-25 (Mem.) (Alito, J., dissenting from the denial of the application for stay). At the threshold, Plaintiffs lack a private right of action to enforce the materiality provision, and Count I fails for that reason alone. *See* ECF No. 282 at 4-5. But even if the Court reaches the merits, Count I still fails because the date requirement does not even implicate, let alone violate, the federal materiality provision. *See id.* at 5-16; *see also Ritter*, 142 S. Ct. at 1824-25 (Mem.) (Alito, J., dissenting from the denial of the application for stay). Indeed, Count I fails at least three essential elements of the federal materiality provision because

mandatory application of the date requirement does not affect a “determin[ation] whether such individual is qualified under state law to vote,” 52 U.S.C. § 10101(a)(2)(B), “deny the right of any individual to vote,” *id.*, or pertain to an “application, registration, or other act requisite to voting,” *id.*; *see also* ECF No. 282 at 5-16; *Ritter*, 142 S. Ct. at 1824-25 (Mem.) (Alito, J., dissenting from the denial of the application for stay). Each of these failures independently requires summary judgment against Plaintiffs on Count I. *See* ECF No. 282 at 5-16.

Plaintiffs offer five arguments in an attempt to shoehorn the date requirement into the narrow sweep of the federal materiality provision. All fail.

First, Plaintiffs concede that the “the date written on the mail ballot’s outer envelope” is not used in ““determining whether such individual is qualified under State law to vote in such election.”” ECF No. 288 at 16-17 (quoting 52 U.S.C. § 10101(a)(2)(B)). That concession *disproves* Plaintiffs’ materiality provision claim and forecloses Count I as a matter of law. *See* ECF No. 282 at 8-11. By its express terms, the materiality provision applies only to paper-based errors or omissions that affect a “determin[ation] whether such individual is qualified under State law to vote.” 52 U.S.C. § 10101(a)(2)(B); *see also* ECF No. 282 at 8-11. 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 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see also id.* (“[I]t would be absurd to judge the validity of voting rules based on whether they are material to eligibility.”). In other words, to fall within the narrow 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 v. Chapman*, 289 A.3d 1, 38 (Pa. 2023) (Opinion of Justice Brobson) (emphasis original).

Statutory context confirms this construction. The materiality provision is nested within and among other statutory sections that address voter qualifications. *See* ECF No. 282 at 9-10. Thus, like those other sections, the materiality provision “relates to determinations of *who* may vote—*i.e.*, voter qualifications,” not what voters must *do* to complete and cast a valid ballot, *Ball*, 289 A.3d at 37 (Opinion of Justice Brobson) (emphasis original).

Accordingly, because “the date written on a mail ballot’s outer envelope” is not used to determine any individual’s qualifications to vote, ECF No. 288 at 16-17, it does not even implicate, let alone violate, the federal materiality provision, *see* ECF No. 282 at 8-11. Count I fails as a matter of law for this reason alone.

Second, Plaintiffs argue that mandatory application of the date requirement “denies Pennsylvanians the right to vote.” ECF No. 288 at 13 (internal quotations omitted). Not so. Mandatory rules governing the act of completing and casting a ballot do not deny anyone the right to vote. *See* ECF No. 282 at 5-8; *see also Ritter*, 142 S. Ct. at 1824-25 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *Vote.org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) (“It 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). Thus, “[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, the right to vote has been “forfeit[ed]”: “that individual’s ballot is not counted because he or she did not follow the rules for casting a ballot.” *Id.*

After all, the consequence of failing to comply with the date requirement is not disqualifying the voter, stripping the individual’s right to vote, or removing the individual from

the list of eligible voters. *See Ball*, 284 A.3d at 1189; *see also* ECF No. 282 at 5-9. Indeed, that individual *retains* the right to vote in compliance with the state-law rules for completing and casting a ballot and on equal terms with all other eligible voters in Pennsylvania. *See Ball*, 284 A.3d at 1189; *see also* ECF No. 282 at 5-9. Instead, the consequence is that election officials carry out the General Assembly’s directive not to count the individual’s ballot—which is exactly what occurs when a voter shows up to the polls after Election Day, fails to use a secrecy envelope for or to sign an absentee or mail-in ballot, attempts to vote for too many candidates for a single office, returns the ballot to the wrong location, or arrives at the wrong polling place. *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.”); ECF No. 282 at 5-9.

Plaintiffs attempt to bolster their construction by invoking the statutory definition of “vote.” *See* ECF No. 288 at 13 (citing 52 U.S.C. § 10101(a)(3)(A), (e)). But the materiality provision covers only denials of the “*right*” to vote, not application of neutral and mandatory rules to the *act* of voting. 52 U.S.C. § 10101(a)(2)(B) (emphasis added); *see* ECF No. 282 at 5-7. The materiality provision therefore does not guarantee that an invalid ballot will be counted where an individual fails to cast it in compliance with state law, as Plaintiffs contend. *See Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see* ECF No. 282 at 5-9. In other words, the question is not, as Plaintiffs argue, whether mandatory application of the date requirement results in a ballot not being “counted.” ECF No. 288 at 13. Rather, the question is whether such mandatory application deprives any individual of the *right* to have their ballot counted where they have complied with the state-law rules for completing and casting it. *See* ECF No. 282 at 5-7; 52 U.S.C. § 10101(a)(2)(B). Mandatory application of the state-law date

requirement results in no such denial of the right to vote. *See Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see* ECF No. 282 at 5-9.

Plaintiffs' reliance on a Supreme Court decision that predated Congress's enactment of the materiality provision by nearly two decades, *see* ECF No. 288 at 13 (citing *United States v. Classic*, 313 U.S. 299, 318 (1941)), is equally unavailing. *Classic*, of course, did not address the meaning of the term "right to vote" in the then-nonexistent materiality provision. Nor does it stand for Plaintiffs' proposition that the right to vote encompasses a right to have a ballot "counted" where an individual fails to follow state-law rules for completing and casting it. *Classic*, 313 U.S. at 318; *see also* ECF No. 288 at 13. To the contrary, the voters in *Classic* had complied with the state's rules for casting a ballot; election officials were subject to federal criminal prosecution for failing to count and tally those valid ballots. *See* 313 U.S. at 324. *Classic* is thus entirely consistent with the Supreme Court's unwavering recognition that the application of mandatory state-law rules to the act of voting does not result in "disenfranchisement" or denial of the right to vote. *See* ECF No. 282 at 7-8 (citing *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from denial of the application for stay); *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973); *Timmons v. Twin Cty. Area New Party*, 520 U.S. 351 (1997); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 35 (2020) (Mem.) (Kavanaugh, J., concurring)).

Third, Plaintiffs argue that "correctly dating the outer envelope is ... an act requisite to voting" within the meaning of the materiality provision. ECF No. 288 at 15. That assertion, however, fails as a matter of straightforward statutory construction. The materiality provision lists "application, registration, and other act requisite to voting" as matters within its scope. 52 U.S.C. § 10101(a)(2)(B). Because "application" and "registration" refer to acts to confirm a voter's

qualifications, so too does “other act requisite to voting.” *See, e.g., 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”); ECF No. 282 at 11-12. It would be an “awkward” statutory construction at best to extend the materiality provision to absentee and mail-in ballots and the date requirement. *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *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. *See* ECF No. 282 at 11-12.

This proper construction of the statutory list leaves plenty of work for the “other act requisite to voting” term to do. In particular, this term prevents state and local election officials from circumventing the materiality provision by disqualifying voters and denying the right to vote based on practices they call something other than “application” or “registration.” The “other act requisite to voting” term therefore is part and parcel of Congress’s effort “to counteract state and local government tactics of using, among other things, burdensome registration requirements to disenfranchise African-Americans.” *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008).

Plaintiffs nonetheless suggest that this correct reading renders the “other act requisite to voting” list item “superfluous.” ECF No. 288 at 16. But, in fact, it is *Plaintiffs’* reading that renders items in the statutory list “entirely superfluous.” *Id.* Indeed, under Plaintiffs’ reading, “other act requisite to voting” would encompass not only “correctly dating an outer envelope” for an absentee or mail-in ballot but, in fact, *all* paper-based practices and rules related to voting. *Id.*

at 15; *see also* ECF No. 282 at 11-12. That reading, however, improperly renders the terms “application” and “registration” in the materiality provision “superfluous.” *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998). After all, if Congress meant to sweep all paper-based practices and rules into the “other act[s] requisite to voting” list item, there would have been no reason for it to include “application” and “registration” in the statutory list. *See, e.g., id.*; *Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004). But Congress did include “application” and “registration” in the list—and those terms delineate, rather than are subsumed by, the “other act requisite to voting” term that completes the list. *See, e.g., Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *Ball*, 289 A.3d at 26 (Opinion of Justice Wecht); *id.* 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”); *see also* ECF No. 282 at 11-12.

Moreover, the implications of Plaintiffs’ proposed reading are breathtakingly broad—and, unsurprisingly, incorrect. *See* ECF No. 282 at 12-16. Plaintiffs’ reading of the materiality provision “would subject virtually every electoral regulation” related to voting records and papers nationwide 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, under Plaintiffs’ reading, “no election law that imposes informational requirements unrelated to determining voter qualification can survive a [§ 10101(a)(2)(B)] challenge.” *Ball*, 289 A.3d at 39 (Opinion of Justice Brobson). For example, Plaintiffs’ reading would imperil the signature requirement contained in the same statutory sentence as the date requirement, the secrecy-envelope requirement, the overvote

prohibition, and even commonplace voter assistance declarations. *See* ECF No. 282 at 13-16. In fact, under Plaintiffs' reading, numerous state election rules in Pennsylvania and elsewhere have been invalid since Congress enacted the federal materiality provision nearly six decades ago. *See* ECF No. 282 at 15-16.

Merely to point out the implications of Plaintiffs' proposed reading of the materiality provision is to refute it. Congress did not hide the "elephant" of federal superintendence of all paper-based state voting practices and rules in the "mousehole" of the federal materiality provision or the "other act requisite to voting" list item. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018).

Fourth, Plaintiffs cite a handful of cases that they contend support their reading of the materiality provision. One is the Third Circuit's now-vacated panel decision in *Migliori*. *See* ECF No. 288 at 13-17. The Supreme Court's vacatur of that decision leaves it with no "precedential effect." *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979); *see also* ECF No. 288 at 16. The *Migliori* panel's incomplete and incorrect analysis is simply of no help to the Court. *See Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay).

Plaintiffs' other four cases are district court decisions, three of which are unpublished and none of which involves a final decision on the merits. *See Martin v. Crittenden*, 347 F. Supp. 3d 1302 (N.D. Ga. 2018) (temporary restraining order) (cited at ECF No. 288 at 14); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB, 2021 WL 6495360 (N.D. Ga. Dec. 9, 2021) (denying motion to dismiss) (cited at ECF No. 288 at 14); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-05174, 2021 WL 5312640 (W.D. Ark. Nov. 15, 2021) (denying motion to dismiss) (cited at ECF No. 288 at 14); *Ford v. Tenn. Senate*, No. 06-2031, 2006 WL 8435145 (W.D. Tenn. Feb. 1, 2006) (cited at ECF No. 288 at 14). None of these cases

meaningfully engaged the plain text of the materiality provision or its essential elements. Moreover, all of Plaintiffs' cases predate—and contravene—more persuasive authority from three Justices of the United States Supreme Court, the unvacated panel opinion of the Fifth Circuit, and Justices Brobson and Mundy in *Ball*. See *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *Vote.org*, 39 F.4th at 305 n.6; *Ball*, 289 A.3d at 37-39 (Opinion of Justice Brobson); see also *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370-71 (S.D. Fla. 2004) (the materiality provision “was designed to eliminate practices that could encumber an individual’s ability to register to vote”); *Thrasher v. Ill. Republican Party*, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013) (the “actual harms the statute protects against” is “discrimination in the registration of voters,” and “[c]ourts that have applied the statute have done so in the context of voter registration”); ECF No. 282 at 5-16. The Court should deny Plaintiffs’ motion for summary judgment.

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

As Intervenor-Defendants have already explained, Plaintiffs’ claim that the date requirement violates the Constitution fails as a matter of law. See ECF No. 282 at 17-25. In the first place, rational basis scrutiny applies to the date requirement because “there is no constitutional right to an absentee ballot”—and the requirement easily satisfies such scrutiny. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); see also ECF No. 282 at 17. Moreover, even if the Court applies the *Anderson/Burdick* framework, the date requirement easily satisfies it as well. See ECF No. 282 at 17-25; see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-91 (2008) (Opinion of Stevens, J.). Indeed, the commonsense date requirement’s “burdens” are too light and its justifications too reasonable to violate the Constitution. See ECF No. 282 at 17-25. After all, Plaintiffs do not challenge the signature requirement that is part of the same state-law voting rule

as the date requirement—and they never explain how it can be an unconstitutional burden to require voters to date the same declaration they have (successfully) signed. *See id.* at 19. The Court should deny Plaintiffs’ motion for summary judgment on Count II. *See id.*

Plaintiffs offer four arguments that the date requirement violates the Constitution under the *Anderson/Burdick* test. None is persuasive.

First, Plaintiffs suggest that the date requirement is a “non-trivial barrier[] to voting” because compliance purportedly requires “[i]dentifying and replicating the precise date format that county boards will accept, research cure procedures for ‘defective’ ballots, [and] making last-minute arrangements and traveling to county board offices to correct undated or misdated ballots.” ECF No. 288 at 19. Plaintiffs, however, identify no evidence to establish the existence of these alleged burdens: even their own putative expert conceded that he did not identify or attempt to measure directly the burdens that the date requirement imposes on any voter. RSOF ¶ 140. Thus, on the record Plaintiffs compiled, “it is not possible to quantify ... the magnitude of the burden imposed” by the date requirement, and Plaintiffs’ motion for summary judgment should be denied. *Crawford*, 553 U.S. at 200 (Opinion of Stevens, J.).

Nonetheless, even if Plaintiffs’ briefing is sufficient to prove the “burdens” imposed by the date requirement, any such burdens are minimal and easily pass constitutional muster. Take, for example, the first burden on Plaintiffs’ list: “[i]dentifying and replicating the precise date format that county boards will accept.” ECF No. 288 at 19. The Pennsylvania Supreme Court has made clear that the date requirement is “unambiguous” and requires the voter to write the “day upon which [the] elector signs the declaration.” *Ball*, 289 A.3d at 21-22 & n.129. Moreover, *every* county board of elections accepts as valid dates written in the standard “American” Month/Day/Year format. *See* RSOF ¶ 135. Thus, it is unsurprising that less than 1% of absentee

and mail-in ballots statewide were invalidated in the November 2022 election due to noncompliance with the date requirement—a rate *lower* than the invalidation rate under the secrecy-envelope requirement, which the Pennsylvania Supreme Court has upheld as mandatory and Plaintiffs do not challenge here. *See id.* ¶¶ 151-54; *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 380 (Pa. 2020).

The remaining purported burdens that Plaintiffs list—“researching cure procedures for ‘defective’ ballots, making last-minute arrangements[,] and traveling to county board offices to correct undated or misdated ballots,” ECF No. 288 at 19—are borne only by voters who fail to comply with the date requirement and choose to cure their absentee or mail-in ballot rather than to vote in person. In all events, even these burdens “surely do[] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Crawford*, 553 U.S. at 198 (Opinion of Stevens, J.). Indeed, “the usual burdens of voting” in person require “researching” ballot requirements and polling locations, “making” travel “arrangements,” and “traveling” to the correct polling place. ECF No. 288 at 19; *see also Brnovich*, 141 S. Ct. at 2344 (“Having to identify one’s own polling place and then travel there to vote does not exceed the usual burdens of voting.”).

Moreover, all of the alleged burdens Plaintiffs identify in their brief are *lower* than the burdens that the Supreme Court upheld as constitutional in *Crawford*. *See* 553 U.S. at 198. The photo-ID law challenged in *Crawford* imposed on voters “the inconvenience” of making a *separate* “trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph.” *Id.* Those burdens had to be borne *in addition to* the other research and travel burdens of voting in person—yet the Supreme Court still upheld them as minimal and constitutional. *See id.* All of the purported burdens Plaintiffs ascribe to the date requirement or

curing, *see* ECF No. 288 at 19, are *less* onerous than the burdens upheld in *Crawford*, *see* 553 U.S. at 198. They therefore do not violate the Constitution. *See* ECF No. 282 at 17-19.

Plaintiffs' statement that "10,657" ballots were not counted in the 2022 general election due to noncompliance with the date requirement, *see* ECF No. 288 at 18, also does not establish "a substantial burden on the right to vote, or even [indicate] a significant increase over the usual burdens of voting," *Crawford*, 553 U.S. at 198 (Opinion of Stevens, J.). According to Plaintiffs, those ballots "had no other defect that would have prevented them from being counted." ECF No. 288 at 18. Thus, the individuals who submitted those ballots complied with all other requirements for absentee or mail-in ballots, including the secrecy-envelope requirement and the signature requirement. *See id.* Yet Plaintiffs never explain how compliance with the date requirement can be unconstitutionally burdensome for voters who have complied with the secrecy-envelope requirement and the signature requirement, which is part of the same voting rule as the date requirement. *See id.*; *see also* ECF No. 282 at 19.

In all events, the 10,657 figure represents 0.93% of all absentee and mail-in ballots returned statewide, a lower noncompliance rate than under the secrecy-envelope requirement. *See* RSOF ¶ 151-54. That figure also pales in comparison to the estimated "43,000" Indiana citizens who lacked a photo ID in *Crawford*, where the Supreme Court upheld the photo-ID requirement against an *Anderson/Burdick* challenge. 553 U.S. at 202 n.20.

Second, Plaintiffs contend that "the consequences of noncompliance" with the date requirement—that the absentee or mail-in ballot is not counted unless cured—somehow factor into the burden analysis. *See* ECF No. 288 at 19. That is incorrect. The "burden" imposed by a voting rule for *Anderson/Burdick* purposes is the cost of compliance, not the consequence for noncompliance. That is why the Supreme Court in *Crawford* identified "the inconvenience of

making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph” as the “burden[s]” of obtaining a photo ID. 553 U.S. at 198. If Plaintiffs were correct that “the consequences of noncompliance” factor into the burden analysis, ECF No. 288 at 19, then *Crawford* should have invalidated the photo-ID requirement because the consequence for noncompliance was not being permitted to vote, *see* 553 U.S. at 185-86. Instead, *Crawford* upheld the requirement because the burdens imposed were minimal and justified. *See id.* at 200-04.

Likewise, if Plaintiffs’ position were correct, Pennsylvania’s rule requiring voters to return their absentee or mail-in ballots by Election Day would place a burden on voters whose ballots are not counted because they waited until after Election Day to complete them and place them in the mail. *See* ECF No. 288 at 19. This untenable implication alone refutes Plaintiffs’ contention that the *Anderson/Burdick* burden analysis considers “the consequences of noncompliance.” *Id.*

Moreover, even Plaintiffs’ own putative expert, Dr. Hopkins, conceded that the “impact” of the date requirement is not the “cost” of complying with it. RSOF ¶ 145-46. And Plaintiffs’ own cited cases foreclose their effort to conflate the consequences of noncompliance with the burden of compliance. The page Plaintiffs cite from *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (cited at ECF No. 288 at 19), says nothing about the consequences of noncompliance. Instead, it recounts the Eleventh Circuit panel’s conclusion that Florida’s standardless signature-matching regime placed compliance “out of [voters’] control” and therefore imposed a burden on voters. *See Dem. Exec. Comm.*, 915 F.3d at 1319-20.

Likewise, the page Plaintiffs cite from a Third Circuit panel’s pre-*Crawford* decision in *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 881 (3d Cir. 1997) (cited at ECF No. 288 at 19), says nothing about the consequences of noncompliance. Instead, it describes the burden on non-major political parties imposed by a New Jersey requirement that they “place [their]

candidates on the ballot in every Assembly district” in order to qualify for recognized “party” status. *See Council of Alt. Pol. Parties*, 121 F.3d at 881. Moreover, that decision issued in a preliminary injunction posture and over Judge Scirica’s dissent. *See id.* at 878. A later panel of the Third Circuit—in a decision Plaintiffs nowhere mention—*rejected* the *Anderson/Burdick* claim on final review of the merits. *See Council of Alt. Pol. Parties v. Hooks*, 179 F.3d 64, 70, 77, 80 (3d Cir. 1999) (Opinion of Alito, J.).

Nor is there any merit in Plaintiffs’ assertion that “county boards will inevitably reject voters’ mail ballots on an arbitrary basis.” ECF No. 288 at 20. As explained, *every* county board of elections accepts as valid a date written in the standard “American” Month/Day/Year format. *See* RSOF ¶ 135. Indeed, though Plaintiffs criticize county boards of elections for not accounting for the Day/Month/Year format, *see id.*; Plaintiffs’ SOF ¶¶ 17-18, they neglect to mention that some county boards of elections *expressly specified* that the date should be provided in the Month/Day/Year format, *see* RSOF ¶¶ 17-18. That some county boards may accept *additional* formats, *see* ECF No. 288 at 20, *reduces*, rather than increases, the burden on voters because it provides them multiple ways to cast a valid ballot, *see Crawford*, 553 U.S. at 201 (considering availability of “alternative” methods of voting). This case thus bears no resemblance to *Democratic Executive Committee of Florida*: in that case, there was no “uniform standard[] for matching signatures” and no single signature format that was accepted statewide, leaving voters with no clear option for satisfying the requirement. *See* 915 F.3d at 1319-20.

Third, Plaintiffs’ assertion that the date requirement imposes “disproportionate[]” burdens on “Black, Hispanic, and older voters,” ECF No. 288 at 18-19; *see also id.* at 21-22, fails as a matter of both law and fact. Once again, Plaintiffs’ proposed subgroup analysis improperly conflates the *cost* of complying with the date requirement with the *consequence* of noncompliance:

their argument that the date requirement “imposes the heaviest burdens on the least-resourced members of the electorate” rests on the alleged rate of noncompliance among such voters, not the cost of writing a date on a ballot that the voter already has signed and placed in a secrecy envelope in accordance with Pennsylvania law. ECF No. 288 at 22; *see id.* at 21.

Moreover, Plaintiffs’ proposed subgroup analysis is not proper under the *Anderson/Burdick* framework. *See, e.g., Crawford*, 553 U.S. at 204-09 (Scalia, J., concurring); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 637 (6th Cir. 2016) (“Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.”); *see also* ECF No. 282 at 24. This case illustrates precisely why. Plaintiffs do not allege (and have no evidence to suggest) that Act 77 of 2019—which extended the date requirement to mail-in ballots and reiterated it for absentee ballots—was enacted with a discriminatory purpose. *See, e.g., Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Abbott v. Perez*, 138 S. Ct. 2305, 2324-26 (2018). Nor is any such allegation credible: Act 77 resulted from a grand bipartisan compromise between the Republican-controlled General Assembly and Democrat Governor Tom Wolf. *See McLinko v. Commonwealth*, 279 A.3d 539, 543-44 (Pa. 2022). Moreover, Plaintiffs have not even attempted to, and cannot, satisfy the demanding burden to establish that Act 77 violates Section 2 of the Voting Rights Act. *See Brnovich*, 141 S. Ct. at 2337-40.

Plaintiffs’ proposed subgroup analysis is thus an attempt to pursue a theory of liability foreclosed by the Supreme Court’s Fourteenth Amendment and Section 2 caselaw. *See, e.g., Personnel Adm’r*, 442 U.S. at 272; *Abbott*, 138 S. Ct. at 2324-26; *Brnovich*, 141 S. Ct. at 2337-40. The Court should reject it for that reason alone.

In all events, the record Plaintiffs compiled fails to support a finding that any subgroup of voters experiences a heightened burden to comply with the date requirement, much less an unconstitutional one. *Compare Crawford*, 553 U.S. at 200-03 (Opinion of Stevens, J.) (rejecting proposed subgroup analysis); *Ne. Ohio Coal. for Homeless*, 837 F.3d at 631 (same); *see also* ECF No. 282 at 24-25. Plaintiffs simply mischaracterize the testimony of their own putative expert, Dr. Hopkins, when they contend that it “established that mail ballots submitted by Black, Hispanic, and older voters” are “more likely to have dating errors” than ballots submitted by other voters. ECF No. 288 at 21.

Dr. Hopkins never demonstrated any such thing. Nor could he have: Dr. Hopkins never measured the cost of complying with the date requirement or “attempt[ed] to measure how easy or difficult it is for voters to comply with the date requirement.” RSOF ¶ 144. In fact, Dr. Hopkins repeatedly disclaimed measuring the actual cost of the date requirement in deposition testimony which Plaintiffs do not bother acknowledging. *See id.* ¶¶ 143-45, 149.

Even if Dr. Hopkins had attempted to do so, however, he *never* identified the race of any voter. *See id.* ¶ 43. Accordingly, he could not opine that “Black” or “Hispanic” voters bear heightened burdens from the date requirement or even are “more likely to have dating errors” than other voters. *Contra* ECF No. 288 at 21. Instead, Dr. Hopkins purported to use regression analyses to predict the rate of noncompliance with the date requirement in hypothetical counties and census block groups with either a Black population percentage of 0% or 100% or a Hispanic population percentage of 0% or 100%. *See* RSOF ¶¶ 35, 38. And even Dr. Hopkins conceded that it is impossible from those analyses to determine whether a Black or Hispanic voter is less likely to comply with the date requirement than a white voter. *See id.* ¶¶ 36, 40; *see also* ECF No. 282 at 24-25. Plaintiffs’ contention that “[u]ndisputed evidence from ... Dr. Hopkins” establishes an

Anderson/Burdick violation against any subgroup of voters, ECF No. 288 at 21, is unsupported at best and misleading at worst.

In fact, Dr. Hopkins's analysis is not even adequate to support Plaintiffs' premise that, "in Pennsylvania, Black, Hispanic, and older residents tend to have lower levels of income, formal educational attainment, economic security, English language proficiency, literacy, and health" than other residents. ECF No. 288 at 21. During his deposition, Dr. Hopkins conceded that he relied upon national studies, not anything "specific to Pennsylvania," for that premise. RSOF ¶ 49. Moreover, even such "differences in employment, wealth, and education" would not be sufficient to establish an actionable burden on the right to vote from the date requirement or any other state-law voting rule. *Brnovich*, 141 S. Ct at 2343. After all, such differences, while regrettable, "may make it virtually impossible for a State to devise rules that do not have some disparate impact." *Id.* Allowing those differences to trigger the highest levels of *Anderson/Burdick* scrutiny "would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are a reasonable means of pursuing legitimate interests" and would improperly "transfer much of the authority to regulate election procedures from the States to the federal courts." *Id.* at 2341. The date requirement would be but the first casualty of Plaintiffs' erroneous subgroup methodology.

Fourth, Plaintiffs argue that the date requirement does not "serve[] any legitimate state interest." ECF No. 288 at 22 (emphasis original). But as Plaintiffs implicitly acknowledge, *see id.*, this position contradicts the Pennsylvania Supreme Court Justices who concluded that the date requirement serves "unquestionable purpose[s]," *Ball*, 289 A.3d at 10; *see also In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1090 (Pa. 2020) (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); ECF No. 282 at 19-23. It is also irreconcilable with the showing that the date requirement serves the crucial interests of

“safeguarding voter confidence” in Pennsylvania elections, solemnity, “detering and detecting voter fraud,” and “protecting the integrity and reliability of the electoral process.” *Crawford*, 553 U.S. at 191 (Opinion of Stevens, J.); *see also* ECF No. 282 at 19-23.

Plaintiffs’ effort to explain away the date requirement’s detection of voter fraud in *Commonwealth v. Mihaliak*, *see* ECF No. 288 at 24, falls flat. Plaintiffs miss the point when they note that the ballot of a person who passes away before Election Day is not counted under Pennsylvania law, *see id.*, because the fraud in *Mihaliak* was committed not by the decedent but instead by someone else, *see* RSOF ¶ 138. Plaintiffs do not and cannot dispute that the *only* evidence of third-party fraud on the face of the fraudulent ballot in *Mihaliak* was the handwritten date of April 26, 2022, which was twelve days after the decedent had passed away. *See id.* ¶¶ 137-39; ECF No. 282 at 19-20. Thus, in other words, there would have been no reason or basis to launch an investigation into voter fraud in that case but for the date requirement. *See* ECF No. 282 at 19-20. The date requirement thus demonstrably serves—and already has served—the State’s interest in “detering and detecting voter fraud.” *Crawford*, 553 U.S. at 191 (Opinion of Stevens, J.); *see also* ECF No. 282 at 19-20.

Finally, Plaintiffs are correct that the Sixth Circuit’s decision in *Northeast Ohio Coalition for the Homeless* is “instructive,” ECF No. 288 at 19, but they draw all the wrong lessons from it. There, the Sixth Circuit held that requiring voters to “accurately complet[e] the two fields” for “[b]irthdate and address information” is a “*small* burden.” *Ne. Ohio Coal.*, 837 F.3d at 632 (emphasis added). In fact, the Sixth Circuit upheld the challenged requirement as to provisional voters, and struck it down only as to absentee voters. *Id.* The Sixth Circuit’s rationale was that the State “did not even offer combatting voter fraud as a relevant interest” served by the requirement as applied to absentee voters. *Id.* at 633. *Northeast Ohio Coalition for the Homeless*

therefore underscores that state-law voting rules that combat voter fraud pass constitutional muster under the *Anderson/Burdick* framework—particularly where, as here, those rules already *have* detected voter fraud. *See id.* at 632-33; *see also* ECF No. 282 at 19-23; RSOF ¶¶ 137-39. Plaintiffs’ constitutional challenge to the date requirement in Count II fails as a matter of law.

CONCLUSION

The Court should deny Plaintiffs’ motion for summary judgment.

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Dated: May 5, 2023

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

Russell D. Giancola

PA. I.D. #200058

GALLAGHER GIANCOLA LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

Phone: (412) 717-1900

kag@glawfirm.com

rdg@glawfirm.com

John M. Gore (*pro hac vice*)

E. Stewart Crosland

Louis J. Capozzi III

Joshua S. Ha

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Phone: (202) 879-3939

jmgore@jonesday.com

scrosland@jonesday.com

Thomas W. King, III

Thomas E. Breth

DILLON, McCANDLESS, KING,

COULTER & GRAHAM, LLP

128 W. Cunningham St.

Butler, PA 16001

Phone: (724) 283.2200

tking@dmkcg.com

tbreth@dmkcg.com

Counsel for Intervenor-Defendants

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

BETTE EAKIN, *et al.*,

Plaintiffs,

v.

ADAMS COUNTY BOARD OF
ELECTIONS, *et al.*,

Defendants.

Case No. 1:22-cv-00340-SPB

**INTERVENOR-DEFENDANTS’ RESPONSE TO STATEMENT OF MATERIAL FACTS
IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

Intervenor-Defendants the Republican National Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania respectfully file these Responses to Plaintiffs’ Statement of Material Facts in Support of Motion for Summary Judgment and state as follows:

I. Mail Voting in Pennsylvania

1. Prior to 2020, voters in Pennsylvania were required to cast an in-person ballot on election day unless they met specific qualifications to submit an “absentee” ballot. 25 P.S. § 3146.1.

Intervenor-Defendants’ Response: Admitted.

2. In 2019, Pennsylvania enacted Act 77, an omnibus election bill that introduced significant amendments to Pennsylvania’s Election Code and created a new method of voting—“mail-in” ballots—which extended the option of voting by mail to all eligible citizens of the Commonwealth as an alternative to voting in person on election day. 25 P.S. 3150.11 *et seq.*

Intervenor-Defendants’ Response: Admitted.

3. Before submitting a completed mail-in or absentee ballot (collectively, “mail ballot”) to their county board of elections (“county board” or “BOE”), a voter must fill out the ballot, place the completed ballot in a secrecy envelope, and then place the secrecy envelope in an outer return envelope. 25 P.S. §§ 3146.6(a), 3150.16(a).

Intervenor-Defendants’ Response: Admitted.

4. The outer envelope of every mail ballot contains a voter declaration that Pennsylvania law instructs voters to “fill out, date and sign.” 25 P.S. §§ 3146.6(a), 3150.16(a) (the “Date Provision”).

Intervenor-Defendants’ Response: Admitted.

5. For a mail ballot to be considered timely received and eligible to be counted, it must reach the voter’s county board by 8:00 p.m. on election day. 25 P.S. §§ 3146.6(a), 3150.16(a).

Intervenor-Defendants’ Response: Admitted.

6. On November 1, 2022, the Supreme Court of Pennsylvania issued an order directing all county boards of elections to set aside and not count any mail-in or absentee ballot “contained in undated or incorrectly dated outer envelope[.]” *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022) (per curiam).

Intervenor-Defendants’ Response: Admitted.

7. On November 5, 2022, the Supreme Court of Pennsylvania issued a supplemental order stating that, for purposes of the 2022 general election only, the date on the outer envelope must be deemed incorrect if it (1) predated the earliest date state law permitted county boards to distribute mail ballots for that election, or (2) postdated election day. Ex. L. For purposes of future elections, the Supreme Court of Pennsylvania indicated in a subsequent opinion that the voter should enter the date they sign the declaration, but expressly left it to the discretion of each county

board to decide how to evaluate whether that written date “is, in truth, the day upon which [the voter] completed the declaration.” *Ball v. Chapman*, 289 A.3d 1, 23 (Pa. 2023).

Intervenor-Defendants’ Response: Admitted.

II. Defendants’ enforcement of the Date Provision in the 2022 general election.

8. In the 2022 general election, Pennsylvania’s county boards set aside any mail ballot that arrived in an outer envelope they regarded as undated or misdated. Ex. K (responses to Requests for Admission No. 5–8).

Intervenor-Defendants’ Response: Admitted.

9. In the 2022 general election, a total of 10,970 mail ballots were timely received but did not comply with the Date Provision. Ex. J (responses to Interrogatory 2).

Intervenor-Defendants’ Response: Admitted that this number is approximately correct.

10. In the 2022 general election, 10,657 of the 10,970 undated or misdated mail ballots received by county boards had no other defect that would have prevented them from being counted. Ex. J (responses to Interrogatories 2 and 8).

Intervenor-Defendants’ Response: Admitted that Plaintiffs’ number is approximately accurate. However, because some counties did not track whether the undated or misdated mail ballots had other defects, it is impossible to arrive at an exactly accurate number from the discovery responses in this case. *E.g., compare Ex. 1 at App.287 with Ex. 2 at App.274.*

11. In the 2022 general election, 45 of the 67 county boards provided no notice to voters that their mail ballots were set aside due to noncompliance with the Date Instruction. Ex. J (responses to Interrogatory 11).

Intervenor-Defendants’ Response: Admitted in part and denied in part.

Denied to the extent that Plaintiffs include Susquehanna County and Bedford County, because neither county rejected *any* ballots as undated or misdated. Ex. 3 at App.473; Ex. 4 at App.511.

12. In the 2022 general election, 37 of the 67 county boards provided voters no opportunity to cure their mail ballot if it was rejected under the Date Provision. Ex. J (responses to Interrogatory 12).

Intervenor-Defendants' Response: Admitted in part and denied in part.

Denied to the extent that Plaintiffs misconstrue Interrogatory 12, which asks only if “notified voters” were given opportunity to cure their ballots, and thus does not technically include those counties which provide opportunity to cure, but do not notify voters of defects. Ex. 5 at App.449. Also denied to the extent that Plaintiffs include Susquehanna County and Bedford County, because neither county rejected *any* ballots as undated or misdated. Ex. 3 at App.473; Ex. 5 at App.511.

13. In the 2022 general election, the Berks County BOE rejected a timely-received mail ballot on which the voter wrote the date “11/3/2023,” but would have counted the ballot had the voter written “11/3/2022.” Ex. F (Kauffman Dep.) at 84:18–86:7.

Intervenor-Defendants' Response: Admitted.

14. In the 2022 general election, the Berks County BOE rejected a timely-received mail ballot because the voter wrote their birthdate on the outer envelope, even though the county board's stamp on the outer envelope indicated that it had timely received the mail ballot on October 17, 2022. *Id.* at 86:8–87:19.

Intervenor-Defendants' Response: Admitted.

15. When evaluating the date written on a mail ballot's outer envelope for correctness, the Berks County BOE accounts for the possibility that a voter may use either a Month/Day/Year format or a Day/Month/Year format, and will accept the ballot if the date is considered correct using either format. *Id.* at 51:13–53:5.

Intervenor-Defendants' Response: Admitted.

16. In the 2022 general election, the Lancaster County BOE would have rejected a mail ballot contained in an envelope on which the voter had written a day and month but omitted the

year, even if the day and month were in the acceptable time range set by the Supreme Court of Pennsylvania's November 5, 2022 order. Ex. G (Miller Dep.) at 55:19–56:6.

Intervenor-Defendants' Response: Admitted. Intervenor-Defendants note, however, that the Lancaster County BOE's date line on the voter's declaration read: "Today's date (MM/DD/YYYY) (required)." Ex. 6.

17. In the 2022 general election, the Lancaster County BOE evaluated the date written on outer envelope assuming that the voter intended to use a Month/Day/Year format. *Id.* at 64:23–65:25.

Intervenor-Defendants' Response: Admitted. Intervenor-Defendants note, however, that Lancaster County BOE's date line on the voter's declaration read: "Today's date (MM/DD/YYYY) (required)." Ex. 7.

18. In the 2022 general election, the Lancaster County BOE would have rejected any mail ballot if its outer envelope contained a date that was incorrect if read using a Month/Day/Year format, even if the date was correct if read using a Day/Month/Year format. *Id.*

Intervenor-Defendants' Response: Admitted. Intervenor-Defendants note, however, that Lancaster County BOE's date line on the voter's declaration read: "Today's date (MM/DD/YYYY) (required)." Ex. 7.

19. In the 2022 general election, the Lancaster County BOE would have rejected a mail ballot with a handwritten date that read "11/25/22" even if the county board's stamp on the outer envelope indicated it had received the mail ballot on a date that fell within the acceptable range set by the Supreme Court of Pennsylvania's November 5 order. *Id.* at 78:9–79:21.

Intervenor-Defendants' Response: Admitted.

20. In the 2022 general election, the Lancaster County BOE would have rejected a mail ballot contained in an outer envelope on which the voter had written their birthdate, even if the county board's stamp on the outer envelope indicated it had received the mail ballot on a date that

fell within the acceptable range set by the Supreme Court of Pennsylvania’s November 5 order.
Id. at 80:10–82:10.

Intervenor-Defendants’ Response: Admitted, except that, in the cited testimony, the given date was the voter’s birthdate was not a part of the hypothetical.

21. In the 2022 general election, the Westmoreland County BOE rejected a mail ballot because its outer envelope had a handwritten date of “10/14/2023,” but would have counted that ballot if the last digit of that handwritten date was “2” instead of “3.” *Id.* at 76:13–77:22.

Intervenor-Defendants’ Response: On the understanding that Plaintiffs intended to cite to the McCloskey deposition, admitted.

22. In the 2022 general election, the Westmoreland County BOE rejected a mail ballot because its outer envelope had a handwritten date of “10/23/2033,” but would have counted the ballot if the last two digits of that handwritten date were “22” instead of “33.” *Id.* at 84:17–85:21.

Intervenor-Defendants’ Response: While noting that Plaintiffs did not include this portion of the testimony in their appendix, admitted.

23. In the 2022 general election, the Westmoreland County BOE rejected mail ballots with handwritten dates of “1/1/2022,” “8/17/2022,” “11/9/2022,” and “11/28/2022,” even though the county board’s stamp on those envelopes indicated that they were each received on a date that fell within the acceptable range set by the Supreme Court of Pennsylvania’s November 5 order.
Id. at 74:9–79:9, 85:24–86:24.

Intervenor-Defendants’ Response: While noting that Plaintiffs’ citations are incomplete and are not entirely included in their appendix, admitted.

24. In the 2022 general election, the Westmoreland County BOE rejected a mail ballot with a handwritten date reading “10/9/2021” despite admitting that it would be impossible for someone to have filled the mail ballot on October 9, 2021, and despite the fact that the county

board's stamp on the envelope indicated that it was timely received on October 13, 2022. *Id.* at 82:10–83:16.

Intervenor-Defendants' Response: While noting that Plaintiffs' citations are not included in their appendix, admitted.

25. In the 2022 general election, the Westmoreland County BOE rejected any mail ballot if its outer envelope contained a date that was incorrect if read using a Month/Day/Year format, even if the date was correct when read as using a Day/Month/Year format. *Id.* at 81:382:7, 83:20–84:14.

Intervenor-Defendants' Response: Denied. While Plaintiffs cite to portions of a deposition (which are not in Plaintiffs' appendix) indicating instances where a European dating convention was not used, Westmoreland County indicated that "there was one instance in the 2022 General Election where the European dating convention was accepted." Ex. 8 at App.761.

26. In the 2022 general election, the Westmoreland County BOE rejected a mail ballot contained in an outer envelope where the voter had written their birthdate. *Id.* at 87:3–24.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Denied to the extent that Plaintiffs incorrectly suggest that the deposition established that the date was that voter's birthdate. Ex. 9 at App.202.

27. In the 2022 general election, at least 17 counties rejected mail ballots contained in outer envelopes on which the voter wrote a date that was incorrect if read using a Month/Day/Year format (even if the date was correct if read using a Day/Month/Year format), while approximately 32 counties may have counted mail ballots in outer envelopes on which the written date was correct using a Month/Day/Year format *or* Day/Month/Year format. Ex. K (responses to Request for Admission No. 8).

Intervenor-Defendants' Response: Denied in part. Based on the responses collected in Plaintiffs' Exhibit K, Intervenor-Defendants count 39 counties who denied Request for Admission No. 8.

28. Absent a change in the law or judicial intervention, all of Pennsylvania’s county boards will not count mail ballots contained in envelopes that do not comply with the Date Provision. Ex. F (Kauffman Dep.) at 99:7–101:12; Ex. G (Miller Dep.) at 104:11–105:23, 111:16–112:9; Ex. H (McCloskey Dep.) at 88:13–89:6; Ex. K (responses to Request for Admission No. 5).

Intervenor-Defendants’ Response: Admitted that, absent a change in the law or judicial intervention, Pennsylvania’s date requirement is mandatory and valid.

III. The county boards do not (and cannot) use the written date on a mail ballot’s outer envelope to determine a person’s qualifications to vote.

29. To be eligible to vote in Pennsylvania, a person must (1) be at least 18 years old, (2) have been a citizen for at least one month, (3) have lived in Pennsylvania and that election district for at least 30 days, and (4) not be imprisoned for a felony. 25 Pa. C.S. § 1301(a); 25 P.S. § 2811.

Intervenor-Defendants’ Response: Admitted, except that Pennsylvania law provides that “if qualified to vote in an election district prior to removal of residence, [the elector] may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.” 25 P.S. § 2811(3). Additionally, Intervenor-Defendants note that Pennsylvania law also requires that the elector “shall have resided in the State ninety days immediately preceding the election.” 25 P.S. § 2811(2). Moreover, Pennsylvania law requires that an individual must not have “been confined in a penal institution for a conviction of a felony within the last five years” to “be eligible to register.” 25 Pa. C.S. § 1301(a).

30. The only information that county boards use to determine a person’s qualifications to vote is their age, citizenship status, length of residency in Pennsylvania and a given election district, and imprisonment status. Ex. E (Marks Dep.) at 102:5-9; Ex. F (Kauffman Dep.) at 33:20–34:8; Ex. G (Miller Dep.) at 36:17–38:3; Ex. H (McCloskey Dep.) at 31:17–32:16.

Intervenor-Defendants’ Response: Admitted in part. Intervenor-Defendants agree that age, citizenship status, length of residency in Pennsylvania and a given election district, and imprisonment status are relevant to a person’s qualifications to vote. However, Intervenor-Defendants deny that those are the *only* information relevant to a person’s qualifications to vote. An individual who is not imprisoned at the moment may still be ineligible to vote if he was “confined in a penal institution for a conviction of a felony within the last five years.” 25 Pa. C.S. § 1301(a).

31. No county board uses the date written on a mail ballot's outer envelope to determine that person's qualifications to vote. Ex. K (responses to Request for Admission No. 1); Ex. E (Marks Dep.) at 98:9–102:15.

Intervenor-Defendants' Response: Admitted.

32. The date written on a mail ballot's outer envelope does not provide information relevant to the determination of a person's age, citizenship status, length of residency in Pennsylvania and their election district, or imprisonment status. Ex. J (responses to Interrogatory 14); Ex. E (Marks Dep.) 68:4–9; Ex. F (Kauffman Dep.) at 32:17–34:8; Ex. G (Miller Dep.) at 36:17–25, 37:1–6, 37:7–11, 37:12–15, 37:16–38:3; Ex. H (McCloskey Dep.) at 31:17–22, 32:23–33:2, 33:3–7, 33:8–11, 32:12–16.

Intervenor-Defendants' Response: Admitted.

IV. The Date Provision's disparate impact

33. Plaintiffs' expert, Dr. Daniel Hopkins, performed linear regression analyses to identify whether the Date Provision disproportionately impacted certain demographic groups of voters in the November 2022 election. Ex. ¶¶ 21–22.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins performed linear regression analyses.

Otherwise denied because Dr. Hopkins's analyses do not identify whether, much less demonstrate, that the Date Provision disproportionately impacted certain demographic groups of voters in the November 2022 election. See *infra* Responses to ¶¶ 34-51.

34. Dr. Hopkins concluded that the Date Provision caused county boards of elections to reject mail ballots submitted by Black, Hispanic, and older voters, as well as voters with lower educational achievement at a disproportionately higher rate compared to other voters. *Id.* ¶¶ 10, 23.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Admitted to the extent that Dr. Hopkins purported to reach that conclusion.

Denied to the extent that Dr. Hopkins's linear regression analyses do not support that conclusion. See Ex. 10 at 69:19-21, 71:2-10. Dr. Hopkins admitted that he did not determine the race or ethnicity of any voter. See id. at 69:19-21, 71:2-10, 97:3-16.

35. Dr. Hopkins found that voters in counties with a higher proportion of Black and Hispanic residents were more likely to submit mail ballots that failed to comply with the Date Instruction than counties with a lower proportion of voters from those demographic groups. *Id.* ¶¶ 30–34.

Intervenor-Defendants' Response: Denied. Dr. Hopkins's linear regression analyses made no predictions about actual Pennsylvania counties. Instead, the analyses examined the predicted rate of compliance with the date requirement in hypothetical counties with either a Black population percentage of 0% or 100% or a Hispanic population percentage of 0% or 100%. See Ex. 11 ¶¶ 25-35. But Dr. Hopkins conceded that there are no counties in Pennsylvania with 100% Black or 100% Hispanic population and that he did not know whether there are any counties in Pennsylvania with a 0% Black or 0% Hispanic population. See Ex. 10 at 79:18-80:2, 81:25-83:4.

36. When considering the share of a county's population that identifies as Hispanic, Dr. Hopkins's county-level regression resulted in a coefficient of 0.1383, meaning that a county with exclusively Hispanic residents would be expected to reject mail ballots under the Date Provision at a rate 13.8 percentage points higher than a county with no Hispanic residents. *Id.* ¶ 32; *id.* at Ex. 1.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins purported to reach that conclusion with his linear regression analysis.

Denied to the extent that Dr. Hopkins's analyses did not predict compliance with the date requirement in actual Pennsylvania counties. In fact, Dr. Hopkins admitted that it is not possible from his county-level analysis to determine how much more or less likely, if at all, a Black or Hispanic voter is to cast a ballot that does not comply with the date requirement than a white voter. See Ex. 10 at 79:18-80:2, 81:25-83:4.

37. When considering the share of a county's population that identifies as Black, Dr. Hopkins's county-level regression resulted in a coefficient of 0.1351, meaning that a county with exclusively Black residents would be expected to reject mail ballots under the Date Provision at a rate 13.5 percentage points higher than a county with no Black residents. *Id.* ¶ 33; *id.* at Ex. 1.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins purported to reach that conclusion with his linear regression analysis.

Denied to the extent that Dr. Hopkins's analyses did not predict compliance with the date requirement in actual Pennsylvania counties. In fact, Dr. Hopkins admitted that it is not possible from his county-level analysis to determine how much more or less likely, if at all, a Black or Hispanic voter is to cast a ballot that does not comply with the date requirement than a white voter. See Ex. 10 at 79:18-80:2, 81:25-83:4.

38. In a separate analysis, Dr. Hopkins used a representative sample of counties to analyze the demographic characteristics of the actual voters whose mail ballots were rejected in the November 2022 election. *Id.* ¶¶ 36–41.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins's purported to engage in census block group analysis in only ten Pennsylvania's 67 counties. See Ex. 11 ¶¶ 36-57; Ex. 10 at 92:16-93:7.

Denied that Dr. Hopkins ever established that his sample of ten counties is representative of all 67 counties in Pennsylvania. Ex. 10. 93:2-97:2. Further, it is denied that Dr. Hopkins ever analyzed "the demographic characteristics of the actual voters whose mail ballots were rejected in the November 2022 election"; Dr. Hopkins examined the demographic characteristics of hypothetical census-block groups, not actual voters. See Ex. 10 at 97:3-98:19.

Dr. Hopkins admitted that he did not determine the race or ethnicity of any voter. See *id.* at 69:19-21, 71:2-10, 97:3-16. Rather, with respect to race, Dr. Hopkins's analysis was a regression analysis that purported to examine how the rate of noncompliance with the date requirement would change in a hypothetical census block group that experienced a change in population from either 0% to 100% Black or 0% to 100% Hispanic. See Ex. 11 ¶¶ 36-57; Ex. 10 at 101:16-102:17. Dr. Hopkins could not recall whether there were, in fact, any 100% Black, 100% Hispanic, 0% Black, or 0% Hispanic block groups in his data set. See Ex. 10 at 111:20-112:12.

39. In performing this individual-level analysis, Dr. Hopkins appended to each voter information about the block group in which they lived. Block groups are the smallest unit at which Census data is typically available publicly. *Id.* ¶ 36.

Intervenor-Defendants’ Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins performed this appending of information and that census block groups ordinarily are the smallest unit at which Census data is typically available publicly.

Denied that Dr. Hopkins performed an “individual-level analysis”; as explained in Intervenor-Defendants’ counter statement of facts, Dr. Hopkins examined the demographic characteristics of hypothetical census block groups, not individuals. *See supra* Response to ¶ 38.

40. The results of this individual-level analysis demonstrated “strong, statistically significant, and substantively meaningful relationships indicating that Hispanic, Black, and older voters are more likely to submit ballots that are rejected under the Date Provision.” *Id.* ¶¶ 42–44.

Intervenor-Defendants’ Response: Denied. Dr. Hopkins conceded that it is not possible from his individual and block-group level analysis to determine how much more or less likely, if at all, a Black or Hispanic voter is to cast a ballot that does not comply with the date requirement than a white voter. *See Ex. 10* at 107:10-17.

41. The results of Dr. Hopkins’s individual-level analysis indicated that in the 2022 general election, a voter living in an all-Hispanic block group would have been twice as likely to have their ballot rejected under the Date Provision compared to a voter living in a block group containing no Hispanic residents. *Id.* ¶ 43.

Intervenor-Defendants’ Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins purported to reach that conclusion with his census block group analysis.

Denied that Dr. Hopkins ever conducted an “individual-level analysis”; as explained in Intervenor-Defendants’ counter statement of facts, Dr. Hopkins examined the demographic characteristics of hypothetical census-block groups, not individuals. *See supra* Responses to Paragraphs 38 and 40.

42. The results of Dr. Hopkins's individual-level analysis indicated that age was positively correlated with rejection, meaning that the older a voter was, the more likely they were to submit an undated or misdated ballot. *Id.* ¶ 45; *id.* at Ex. 2.

Intervenor-Defendants' Response: Admitted that Dr. Hopkins's purported to reach that conclusion with his census block group analysis. Intervenor-Defendants note, however, that Dr. Hopkins's purported effect was that a 60-year old voter is "0.2 percentage points more likely to cast a mail ballot lacking a date" than a 20-year-old voter. Ex. 11 ¶ 52.

43. The sample counties' pattern of rejecting Hispanic, Black, and older voters' ballots at disproportionately higher rates remained the same even "when looking only at *undated* ballots" and also "when looking only at *misdated* ballots." *Id.* ¶¶ 49–57; *id.* at Exs. 3–4.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins purported to reach these conclusions.

Denied that any of Dr. Hopkins's analyses can show that Hispanic or Black voters' ballots were rejected at disproportionately high rates because Dr. Hopkins did not determine the race of any voter. *See supra* Responses to Paragraphs 38 and 40; Ex. 10 at 97:4-7.

44. There was also a significant relationship between mail ballot rejection pursuant to the Date Provision and educational achievement, indicating that voters lacking Bachelor's degrees were more likely to have their ballots rejected than those who have obtained Bachelor's degrees. *Id.* ¶ 47.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins's purported to reach that conclusion with as part of his census block group analysis.

Denied that Dr. Hopkins's analysis supported this conclusion. Dr. Hopkins considered levels of educational attainment in census block groups, not any individual voter's level of educational attainment. *See supra* Responses to Paragraphs 38 and 40; Ex. 10 at 97:8-10.

45. There was also a significant negative relationship between a voter’s successful use of mail voting in 2020 and the likelihood that their ballot would be rejected under the Date Provision, indicating that voters less familiar with the mail-voting process were more likely to make mistakes causing their mail ballot to be rejected than those with more experience. *Id.* ¶ 46.

Intervenor-Defendants’ Response: Admitted that Dr. Hopkins’s purported to reach that conclusion. Dr. Hopkins similarly noted that “[t]his result suggests that voters who are more familiar with the mail ballot process are less likely to make mistakes that cause their mail ballot to be rejected.” Ex. 10 at 108:21-109:3.

46. “Cost of voting” is a framework that political scientists have employed for decades to describe how procedural and administrative frictions in the voting process that increase the “cost” of voting lead to fewer citizens successfully navigating the voting process. *Id.* ¶ 12.

Intervenor-Defendants’ Response: Admitted that Dr. Hopkins’s report makes that assertion. Otherwise denied.

47. Even among those who cast a ballot in an election, procedural and administrative frictions that raise that cost of voting may prevent their ballot from being counted. *Id.* ¶ 13.

Intervenor-Defendants’ Response: Denied. Dr. Hopkins’s report says that “procedural frictions may prevent” voters “from successfully casting a vote,” Ex. 11 ¶ 13, not that such frictions “may prevent their ballot from being counted.”

48. Voters with fewer resources—including those with lower educational levels; less access to housing, transportation, childcare; less flexible jobs; less English-language fluency or experience reading technical language—are less able to overcome additional procedural frictions in the voting process. *Id.*

Intervenor-Defendants’ Response: On the understanding that Plaintiffs intended to cite to paragraph 14 of Dr. Hopkins’s report, admitted that Dr. Hopkins’s report makes that assertion. Otherwise denied.

49. Black, Hispanic, and older voters in Pennsylvania have, on average, lower levels of socioeconomic resources, including “educational attainment, income, economic security, English

language proficiency and literacy, and health,” and they are less likely, on average, to overcome procedural and administrative frictions in the voting process. *Id.* ¶ 16.

Intervenor-Defendants’ Response: Admitted in part and denied in part.

Admitted that Dr. Hopkins’s report makes this assertion.

Denied to the extent that Plaintiffs suggest Dr. Hopkins established that his conclusion is correct as to Pennsylvanian voters. Dr. Hopkins admitted that he did not cite to any Pennsylvania-specific source for this assertion, and that his report does not cite to any source to prove that national samples are instructive in Pennsylvania. Ex. 10 at 51:20-53:16.

50. When a voter’s mail ballot is rejected because of noncompliance with the Date Provision, they must take additional actions to ensure that their ballot is ultimately counted. *Id.* ¶ 19.

Intervenor-Defendants’ Response: Admitted.

51. The additional actions voters must take to ensure their rejected mail ballot is counted increase the cost of voting. *Id.* ¶ 19.

Intervenor-Defendants’ Response: Denied. Ballot curing is downstream of complying with the date requirement. Complying with the date requirement does not become more difficult because a curing mechanism is available.

V. The interests purportedly served by the Date Provision

A. Ensuring timely receipt of mail ballots

52. The Statewide Uniform Registry of Electors (“SURE”) system is the voter registration system in Pennsylvania used by all 67 county BOEs. Ex. G (Miller Dep.) at 114:11-14.

Intervenor-Defendants’ Response: Admitted.

53. SURE allows counties to verify a voter’s identification during the mail ballot application process, maintain their official voter rolls, and record returned mail ballots. Ex. E (Marks Dep.) at 44:6–10, 45:8–15, 68:19–69:6.

Intervenor-Defendants' Response: Admitted.

54. The county boards are statutorily required to record the date and time that they receive a mail ballot. *Id.* at 70:5–19; 25 P.S. § 1222(c)(19)–(20).

Intervenor-Defendants' Response: Admitted. See 25 P.S. § 3146.9(b), § 3150.17(b).

55. Each county board has a mechanism in place to identify which ballots were timely received, and that mechanism does not rely on the date written by voters on the mail-ballot's outer envelope. Ex. G (Miller Dep.) at 65:5–23.

Intervenor-Defendants' Response: On the understanding that Plaintiffs intended to cite to the Marks deposition, admitted.

56. The outer envelope for every mail ballot sent to a voter in Pennsylvania has a unique barcode. *Id.* at 69:7–19.

Intervenor-Defendants' Response: On the understanding that Plaintiffs intended to cite to the Marks deposition, admitted.

57. The Pennsylvania Department of State has instructed county boards to scan mail ballots into SURE as quickly as possible after they are received. Ex. E (Marks Dep.) at 82:20–83:17; Ex. E6.

Intervenor-Defendants' Response: Admitted.

58. As instructed by the Pennsylvania Department of State, Ex. E6, many counties scan the barcode on the outer envelope of a completed mail ballot upon receipt, which creates a record in the SURE system of the date and time that the county board received the mail ballot, Ex. E (Marks. Dep.) at 68:19–70:24, 116:12–119:8; Ex. F (Kauffman Dep.) at 55:25–56:22; Ex. G (Miller Dep.) at 114:11–24, 115:19–25; Ex. H (McCloskey Dep.) at 66:18–67:10.

Intervenor-Defendants' Response: Admitted.

59. As instructed by the Pennsylvania Department of State, Ex. E6, many counties also physically stamp the outer envelope with the date and time upon receiving a completed mail ballot. Ex. F (Kauffman Dep.) at 37:2–6, 77:8–24, 79:22–80:8; Ex. G (Miller Dep.) at 61:19–25, 69:11–23, 72:2–6, 85:19–86:5, 115:19–25; Ex. H (McCloskey Dep.) at 74:16–75:3, 110:9–13; Ex. K14 (“All incoming ballots are date stamped.”); Ex. K45 (“The envelopes are stamped with the date received.”).

Intervenor-Defendants’ Response: Admitted.

60. The date on which the voter fills out the ballot or signs the declaration on the outer envelope has no bearing on whether it was timely received by the county. Ex. E (Marks Dep.) at 128:5–12.

Intervenor-Defendants’ Response: Admitted.

61. The Berks County BOE does not use the handwritten date on a mail ballot’s outer envelope to determine whether the ballot was timely received. Ex. F (Kauffman Dep.) at 76:25–77:24.

Intervenor-Defendants’ Response: Admitted that Berks County “did not use the handwritten date on an outer return envelope to determine if a ballot (excluding military/civilian overseas ballots) was timely received.” Ex. 12 at App.557.

62. The Lancaster County BOE does not use the handwritten date on a mail ballot’s outer envelope to determine whether the ballot was timely received. Ex. G (Miller Dep.) at 85:17–86:5.

Intervenor-Defendants’ Response: Admitted.

63. The Westmoreland County BOE does not use the handwritten date on a mail ballot’s outer envelope to determine whether the ballot was timely received. Ex. H (McCloskey Dep.) at 74:1–75:3.

Intervenor-Defendants' Response: Admitted.

64. County boards can determine whether a mail ballot was timely received without ever looking at the date written on a mail ballot envelope. Ex. K (responses to Request for Admission No. 2).

Intervenor-Defendants' Response: Admitted.

B. Fraud prevention

65. The fact that the outer envelope of a mail ballot has no written date is not a reason to suspect fraud. Ex. G (Miller Dep.) at 118:11–17.

Intervenor-Defendants' Response: Denied. An incorrect date was already used to help determine that voter fraud took place. See Ex. 13 ¶ 2. Because a handwritten date led to detection of fraud, failing to provide a date can be a method of avoiding detection of fraud.

66. The fact that a voter wrote the wrong year on the outer envelope of a mail ballot is not a reason to suspect fraud. Ex. F (Kauffman Dep.) at 84:17–85:11; Ex. G (Miller Dep.) at 70:13–71:6; Ex. H (McCloskey Dep.) at 76:19–77:12.

Intervenor-Defendants' Response: Denied as speculative. An incorrect date was already used to help determine that voter fraud took place. See Ex. 13 ¶ 2.

67. The fact that a voter wrote a date on the outer envelope of a mail ballot that precedes the first date they could have received the ballot is not a reason to suspect fraud. Ex. G (Miller Dep.) at 70:13–18, 82:11–15; Ex. H (McCloskey Dep.) at 87:3–19.

Intervenor-Defendants' Response: Denied as speculative. Plaintiffs are extrapolating from testimony in which the deponent was asked about specific ballots. An incorrect date was already used to help determine that voter fraud took place. See Ex. 13 ¶ 2.

68. The fact that a voter wrote a date on the outer envelope of a mail ballot that falls after the date of the election is not a reason to suspect fraud. Ex. F (Kauffman Dep.) at 78:15–79:15, 84:18–85:11; Ex. H (McCloskey Dep.) at 76:19–77:9.

Intervenor-Defendants' Response: Denied as speculative. Plaintiffs are extrapolating from testimony in which the deponent was asked about specific ballots. An incorrect date was already used to help determine that voter fraud took place. See Ex. 13 ¶ 2.

69. The date written on a mail-ballot's outer envelope provides no help to a county board in preventing that voter from also casting an in-person ballot on election day. Ex. G (Miller Dep.) at 116:2–118:2.

Intervenor-Defendants' Response: Denied as speculative. Plaintiffs are extrapolating from testimony in which the deponent was asked about specific ballots. An incorrect date was already used to help determine that voter fraud took place. See Ex. 13 ¶ 2.

70. If a voter submits a mail ballot and then later casts an in-person provisional ballot on election day, the mail ballot will be counted and the in-person ballot will not be counted. *Id.* at 116:2–14.

Intervenor-Defendants' Response: Admitted.

71. If a voter submits a mail ballot and casts an in-person provisional ballot on election day, the date written on the mail-ballot's outer envelope provides no help to a county board in determining which ballot to count. *Id.* at 116:22–117:3.

Intervenor-Defendants' Response: Admitted.

72. No county identified, raised, or was made aware of any credible concern regarding fraud with respect to the way that voters wrote (or failed to write) the date on the outer envelope of their mail ballots in the November 2022 election. Ex. J (responses to Interrogatory No. 10); Ex. G (Miller Dep.) at 82:11–24; Ex. H (McCloskey Dep.) at 88:4–12.

Intervenor-Defendants' Response: Admitted in part and denied in part.

Denied to the extent that Pike County responded to Interrogatory No. 10 with "NA." Ex. 14 at App.453.

Further denied because Interrogatory No. 10 did *not* ask whether county boards were made aware of any fraud concerns. *Id.*

73. While a voter was referred to the district attorney in Lancaster County for allegedly voting on behalf of her deceased mother, the mother's ballot would never have been counted in that election because the county had already removed her from the voter rolls after receiving information indicating she had passed away. Ex. G (Miller Dep.) at 87:18–94:15.

Intervenor-Defendants' Response: Admitted. Intervenor-Defendants further note that, in that case, the handwritten date on the declaration was the only evidence on the face of the ballot envelope that a third party had fraudulently attempted to cast the ballot. See Ex. 13 ¶ 2.

74. County boards are provided notification of a voter's death by the Department of Health. Ex. F (Kauffman Dep.) at 35:23–36:3; Ex. G (Miller Dep.) at 101:24–102:5; 25 P.S. § 1505(a).

Intervenor-Defendants' Response: On the understanding that Plaintiffs intended to cite to 25 Pa. C.S. § 1505, admitted.

75. County boards do not use the date written on the outer envelope of a mail ballot to determine whether the voter passed away before election day or whether to count a ballot from such a person. Ex. F (Kauffman Dep.) at 36:20–37:25; Ex. H (McCloskey Dep.) at 36:12–23.

Intervenor-Defendants' Response: Denied as speculative. Plaintiffs do not cite evidence of the practice of all 67 Pennsylvania counties.

C. The Date Provision does not further any other state interest.

Intervenor-Defendants' Response: Denied to the extent that Plaintiffs are stating a legal conclusion and because the date requirement advances several state interests. See, e.g., *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1079–80 (Pa. 2020) (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); see also Ex. 15 at 100-116, 141-153.

76. The date written on the outer envelope of a mail ballot provides no information regarding the date on which the voter filled out that ballot or the truthfulness of the voter's affirmation. Ex. E (Marks Dep.) at 127:3–18, 135:6–21, 156:11–22, 204:6–19; Ex. G (Miller Dep.) at 61:11–16, 79:3–21; Ex. H (McCloskey Dep.) at 66:9–15, 70:5–10.

Intervenor-Defendants’ Response: Denied. The handwritten date in fact is supposed to reflect when the ballot declaration was filled out. *Ball v. Chapman*, 289 A.3d 1, 22-23 (Pa. 2023).

77. The Berks County BOE does not use the date written on a mail ballot’s outer envelope for any purpose other than to determine compliance with the Date Provision. Ex. F (Kauffman Dep.) at 39:22–40:2.

Intervenor-Defendants’ Response: Denied. In response to whether there is “any other reason why the Berks Board uses th[e] handwritten date . . . other than determining whether the ballot is compliant with legal requirements,” Mr. Kauffman testified only that he “[c]urrently” “can’t think of any.” Ex. 16 at App.78-79.

78. The Lancaster County BOE does not use the date written on a mail ballot’s outer envelope for any purpose other than to determine compliance with the Date Provision. Ex. G (Miller Dep.) at 113:23–114:8.

Intervenor-Defendants’ Response: Denied. Lancaster County has used an incorrect date to help determine that voter fraud took place. *See* Ex. 13 ¶ 2.

79. The Westmoreland County BOE does not use the date written on a mail ballot’s outer envelope for any purpose other than to determine compliance with the Date Provision. Ex. H (McCloskey Dep.) at 37:8–38:2.

Intervenor-Defendants’ Response: Denied to the extent that Plaintiffs are characterizing Mr. McCloskey’s testimony. While Mr. McCloskey did agree that Westmoreland County “uses the date on the envelope to determine whether the voter complied with the requirement to put the date on the envelope,” he did not say that was the *only* use of the date. Ex. 9 at App.183.

VI. Plaintiffs

A. Bette Eakin

80. Plaintiff Bette Eakin is a veteran and registered Democrat in Erie County. Ex. A (Eakin Decl.) ¶¶ 1–3.

Intervenor-Defendants' Response: Admitted.

81. In the 2022 general election, Ms. Eakin submitted a mail ballot to the Erie County Board of Elections before election day because of her medical condition, which required her to travel to Ohio to receive medical care through election day. *Id.* ¶ 4.

Intervenor-Defendants' Response: Admitted.

82. At the time she submitted her mail ballot, Ms. Eakin was undergoing care for a condition that has made her legally blind, forcing her to travel to a county board of elections office where she could obtain assistance in completing her ballot. An election worker helped Ms. Eakin request and obtain her mail ballot, complete the mail ballot, place the mail ballot in the secrecy and outer envelopes, and complete the declaration on the outer envelope. *Id.* ¶ 5.

Intervenor-Defendants' Response: Admitted.

83. Days later, when Ms. Eakin was receiving her medical treatment in Ohio, she received an email stating that her mail ballot had been rejected because there was a defect on her balloting materials, which she later learned was due to a missing date on the outer envelope. *Id.* ¶ 6. She was told that she would have to fix this error if she wanted her ballot to be counted. *Id.*

Intervenor-Defendants' Response: Admitted.

84. Voting is incredibly important to Ms. Eakin, and the news that her mail ballot had been rejected caused her to suffer significant emotional distress. *Id.* ¶ 7. Ms. Eakin suffers from post-traumatic stress disorder and a nervous disorder, and when she received the notification of her ballot's rejection, her anxiety skyrocketed. *Id.*

Intervenor-Defendants' Response: Admitted.

85. Ms. Eakin spent the rest of the day making phone calls to rectify the situation, and even missed scheduled medical care appointments to figure out how to ensure her ballot would be counted. *Id.*

Intervenor-Defendants' Response: Admitted.

86. Because Ms. Eakin was receiving medical treatment out of state, her husband had to immediately leave his hunting trip and drive two hours back to Erie so that he could help make sure Ms. Eakin's ballot was counted. *Id.* ¶ 8.

Intervenor-Defendants' Response: Admitted.

87. Ms. Eakin's husband had to first stop at her son's residence and have her son assist him in printing a form that would authorize him to act as her designated agent. *Id.* ¶ 9.

Intervenor-Defendants' Response: Admitted.

88. Ms. Eakin's husband then retrieved her ballot from where she submitted it, traveled to their local polling place, explained the situation, and submitted all materials at the last possible moment before the polling place closed. *Id.*

Intervenor-Defendants' Response: Admitted.

89. Ms. Eakin is very concerned that the Date Provision will force her to go through a similar saga in future elections. *Id.* ¶ 10.

Intervenor-Defendants' Response: Admitted.

90. Because of her disability, Ms. Eakin must rely on the assistance of others to complete a mail ballot like she did in 2022. But given her condition and anxiety disorders, going to her polling place on election day is extremely difficult and presents a serious risk to her health. *Id.*

Intervenor-Defendants' Response: Admitted.

B. DSCC

91. Plaintiff DSCC is the Democratic Party's national senatorial committee, as defined by 52 U.S.C. § 30101(14). Ex. B (DSCC Decl.) ¶ 2.

Intervenor-Defendants' Response: Admitted.

92. DSCC's mission is to support the election of candidates of the Democratic Party across the country, including in Pennsylvania, to the U.S. Senate. *Id.* ¶ 3.

Intervenor-Defendants' Response: Admitted.

93. DSCC works to accomplish its mission by, among other things, mobilizing and persuading voters through grassroots mobilization of volunteers and field organizers to conduct get-out-the-vote activities such as door knocking, text messaging, and phone calling. *Id.* ¶ 4.

Intervenor-Defendants' Response: Admitted.

94. DSCC also runs paid television, digital, and radio advertisements, as well as mailings, in support of Democratic candidates throughout the country, including in Pennsylvania. *Id.*

Intervenor-Defendants' Response: Admitted.

95. While most of DSCC's voter programs are focused on persuading eligible citizens to vote, DSCC also runs programs specifically geared toward explaining the voting process and how an eligible voter can successfully cast their ballot and have it counted. *Id.*

Intervenor-Defendants' Response: Admitted.

96. DSCC also separately allocates substantial personnel time and money for "curing" activities in multiple states where it anticipates close senatorial races. *Id.* ¶ 5.

Intervenor-Defendants' Response: Admitted.

97. DSCC's curing activities involve tracking data from counties, contacting voters whose ballots have been rejected, and helping them perform whatever task is necessary to ensure their ballot is ultimately counted, which varies by county. *Id.*

Intervenor-Defendants' Response: Admitted.

98. Since DSCC invests in persuading and mobilizing voters across the country, investing additional funds or personnel in one state will necessarily divert those resources from other states and key races. *Id.* ¶ 4.

Intervenor-Defendants' Response: Admitted.

99. The Date Provision frustrates DSCC's mission because it erects an obstacle to ensuring all mail ballots cast by Pennsylvanians who support Democratic Senate candidates are actually counted and impairs those Democratic candidates' electoral prospects. *Id.* ¶ 6.

Intervenor-Defendants' Response: Admitted.

100. In the 2022 general election, the Date Provision forced DSCC to divert substantial personnel time and money away from its advocacy and persuasion activities discussed above and instead towards explaining the Date Provision to voters and warning them of the consequences of failing to comply with the Date Provision. *Id.* ¶ 7.

Intervenor-Defendants' Response: Admitted.

101. The Date Provision also forced DSCC to divert resources in 2022 away from helping voters in other states cure their rejected ballots and instead towards identifying voters in Pennsylvania whose ballots had been rejected because of the Date Provision and helping them take the steps necessary to ensure their ballots would be counted. *Id.*

Intervenor-Defendants' Response: Admitted.

102. Absent the requested injunction, the Date Provision will continue to force DSCC to divert personnel time and money away from its advocacy and persuasion activities in Pennsylvania *and* in other states and instead towards educating voters in Pennsylvania about the Date Provision and the severe consequences of failing to correctly date the outer envelope of a mail ballot and towards researching how each county will go about determining whether the date written on a mail-ballot envelope is “correct,” and their respective procedures for curing such ballots. *Id.* ¶ 8.

Intervenor-Defendants’ Response: Admitted.

103. The Date Provision will also continue to force DSCC in future elections to divert resources away from efforts to assist voters in other states in resolving issues with their rejected ballots and towards helping voters in Pennsylvania ensure their undated or misdated mail ballots are ultimately counted. *Id.* ¶ 9.

Intervenor-Defendants’ Response: Admitted.

104. Democratic voters provide financial support in the form of political contributions to DSCC and candidates supported by DSCC on a regular basis, and also help select DSCC’s leadership and ultimately determine DSCC’s strategic and political direction by electing candidates to the United States Senate. *Id.* ¶ 10.

Intervenor-Defendants’ Response: Admitted.

105. In the 2022 general election, over 2.7 million Pennsylvanians cast a vote for the Democratic senatorial candidate. *Id.* ¶ 11.

Intervenor-Defendants’ Response: Admitted.

C. DCCC

106. Plaintiff DCCC is the Democratic Party’s national congressional committee as defined by 52 U.S.C. § 30101(14). Ex. C (DCCC Decl.) ¶ 2.

Intervenor-Defendants’ Response: Admitted.

107. DCCC's mission is to support the election of candidates of the Democratic Party from across the country, including those running in Pennsylvania's congressional districts, to the U.S. House of Representatives. *Id.* ¶ 3.

Intervenor-Defendants' Response: Admitted.

108. DCCC works to accomplish its mission by, among other things, running paid advertisements in support of Democratic candidates; engaging in grassroots mobilization of volunteers and field organizers to perform persuasion efforts such as door knocking, text messaging, and phone banking, all towards the goal of convincing voters to support Democratic candidates; running paid canvasses for its members' campaigns to boost voter turnout; and encouraging voters to exercise their right to vote, through paid television, social media, and radio advertisements, phone calls, and mailings for voter education, as well as paying for professionals to assist in the aforementioned get-out-the-vote efforts. *Id.* ¶ 4. DCCC also supports efforts of state parties throughout the country, including in Pennsylvania, to conduct these activities by providing money, staff and volunteer time, and ongoing coordination. *Id.*

Intervenor-Defendants' Response: Admitted.

109. DCCC also allocates and devotes staff, volunteers, and funds to assist voters in curing absentee or mail ballots in states where it anticipates there will be close congressional races. *Id.* ¶ 5. Helping voters cure their ballots involves contacting voters whose ballots have been rejected and helping them perform whatever task is necessary to ensure that their ballot is ultimately counted. *Id.* These activities require DCCC to devote substantial personnel time and money to track data from counties, contact voters, and assist them in completing the curing process established in each county. *Id.*

Intervenor-Defendants' Response: Admitted.

110. The Date Provision frustrates DCCC's mission because it erects an obstacle to ensuring all ballots cast by Pennsylvanians who support Democratic congressional candidates are actually counted, which harms those Democratic candidates' electoral prospects. *Id.* ¶ 6.

Intervenor-Defendants' Response: Admitted.

111. As a result of the Date Provision, DCCC will be forced to divert personnel time and money away from its persuasion and mobilization activities and instead towards educating voters about the Date Provision and the severe consequences of failing to correctly date the outer envelope of a mail ballot, as well as spending personnel time researching how each county will go about determining whether the date written on a mail-ballot envelope is "correct," and their respective procedures for curing such ballots. *Id.* ¶ 7.

Intervenor-Defendants' Response: Admitted.

112. The Date Provision will also force DCCC to divert the resources it has allocated for ballot curing activities in other states towards races in Pennsylvania, which impairs DCCC's ability to help voters and support Democratic candidates in other states. *Id.* ¶ 8.

Intervenor-Defendants' Response: Admitted.

113. DCCC also represents the interests of Democratic voters in Pennsylvania and considers those individuals to be DCCC's constituents. *Id.* ¶ 9. Democratic voters provide financial support in the form of political contributions to DCCC and candidates supported by DCCC on a regular basis, and also help select DCCC's leadership and ultimately determine DCCC's strategic and political direction by electing candidates to the United States House of Representatives. *Id.* DCCC asserts its claims on behalf of itself and its constituents in Pennsylvania. *Id.*

Intervenor-Defendants' Response: Admitted.

114. In the 2022 general election, more than 2.4 million Pennsylvanians cast a vote for the Democratic congressional candidate in their district. *Id.* ¶ 10.

Intervenor-Defendants' Response: Admitted.

D. AFT Pennsylvania

115. Plaintiff AFT Pennsylvania (the “Federation”) is the Pennsylvania affiliate of the American Federation of Teachers and a union of professionals representing approximately 25,000 members in 55 local affiliates across Pennsylvania. Ex. D (AFT Decl.) ¶¶ 2–3.

Intervenor-Defendants' Response: Admitted.

116. The Federation’s members include public school educators and support staff, higher-education faculty and support staff, and other public employees such as social workers. *Id.* ¶ 3. These members attend meetings of, and pay dues to, their local AFT affiliates (who in turn contribute funds to the Federation as a whole), as well as elect delegates to a biannual statewide convention, which elects the Federation’s leadership. *Id.* ¶ 4.

Intervenor-Defendants' Response: Admitted.

117. The Federation advocates for sound, commonsense public education policies, including high academic and conduct standards for students and greater professionalism for teachers and school staff, as well as excellence in public service through cooperative problem-solving and workplace innovations. *Id.* ¶ 5.

Intervenor-Defendants' Response: Admitted.

118. In furtherance of its mission, the Federation and its individual members devote significant resources towards advocating for education policies that improve the daily lives and livelihood of the Federation’s members, and correlatively, to ensure that those members are able to access the franchise to support these policies at the ballot box. These resources take the form of

direct contributions to candidates, running phone banks and canvassing, and sharing information with members about getting out the vote. *Id.* ¶¶ 6–7.

Intervenor-Defendants’ Response: Admitted.

119. Because Federation members typically have to work on election day, many turn to mail ballots to exercise their right to vote. *Id.* ¶ 8.

Intervenor-Defendants’ Response: Admitted that Federation members may choose to vote by mail. Denied to the extent that Plaintiffs are stating a legal conclusion that voting by mail is part of the right to vote.

120. Any provision or policy requiring the rejection of valid mail ballots with missing or incorrect dates (“the Date Provision”) threatens to disenfranchise members of the Federation who are unquestionably eligible to vote. *Id.*

Intervenor-Defendants’ Response: Denied. Applying Pennsylvania’s longstanding date requirement does not disenfranchise or threaten to disenfranchise anyone.

121. At least one Federation member had his mail ballot rejected in 2022 because of the Date Provision. *Id.* ¶ 9.

Intervenor-Defendants’ Response: Admitted.

122. For the 2022 general election, the Date Provision forced the Federation to spend resources on digital communications such as email newsletters and online publications to educate its members about the need to correctly date the outer envelope of mail ballots, and also to spend staff and member time reaching out to help its members and other Pennsylvania voters cure their ballots after they were rejected because of the Date Provision. *Id.* ¶ 10.

Intervenor-Defendants’ Response: Admitted.

123. The rejection of undated or misdated ballots frustrates the Federation’s mission of electing candidates who support the policies for which the Federation advocates, and will force the Federation to divert staff and member time in future elections from its advocacy efforts toward

educating its members and other voters specifically about the need to date their mail ballots and what to do if their ballot is rejected pursuant to the Date Provision. *Id.* ¶ 11. The Federation will also have to divert staff and member time helping voters whose mail ballots are rejected under the Date Provision ensure that their votes are ultimately counted. *Id.* And because the Federation has limited resources, the staff and member time spent on activities meant to mitigate the Date Provision's harms will necessarily divert resources away from the Federation's other core activities, including canvassing and get-out-the-vote efforts such as phone banking, door knocking, and rallying at community events like roundtables and book giveaways. *Id.*

Intervenor-Defendants' Response: Admitted.

INTERVENOR-DEFENDANTS' COUNTER STATEMENT OF MATERIAL FACTS

124. Pursuant to Local Rule LCvR 56.C.1.c, Intervenor-Respondents incorporate by reference their Concise Statement of Material Facts, ECF No. 283, as if same were set forth at length herein.

A. The Date Requirement

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

126. 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).

127. 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.

128. The U.S. Supreme Court vacated the Third Circuit’s panel decision in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022). See *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.).

129. 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).

130. 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).

131. 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. 17**, Acting Sec’y Ans. 15–23, *Ball v. Chapman*, No. 102 MM 2022 (Oct. 19, 2022).

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

133. 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).

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

135. Every county board of elections accepts as valid dates written in the standard “American” Month/Day/Year format. *See Ex. 18*, County Boards of Elections’ Responses to Requests for Admissions (Request #8).

B. The Date Requirement Serves “Unquestionable Purposes.”

136. In Lancaster County, the only information a voter is required to supply on a ballot declaration is the date and a signature. *See Exs. 6, 7*, Exemplar Ballot Declarations from Lancaster County Board.

137. 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).

138. 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. 13* ¶ 2.

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

C. Dr. Hopkins’s Putative Expert Testimony

140. Plaintiffs have proffered no evidence to establish that any voter bears Plaintiffs’ alleged burdens of the date requirement—namely, “[i]dentifying and replicating the precise date format that county boards will accept, research cure procedures for ‘defective’ ballots, [and] making last minute arrangements and traveling to county board offices to correct undated or misdated ballots,” ECF No. 488 at 19. *See Hopkins Dep.* 30:24-31:9; *see also id.* at 35:17-36:3.

141. Dr. Daniel Hopkins submitted a putative expert declaration. *See Ex. 11*.

142. Dr. Hopkins did not assess the benefits of the date requirement. *See Ex. 10* at 26:9-14.

143. Dr. Hopkins conceded, moreover, that he did not measure the cost to any voter of complying with the date requirement. *Id.* at 30:9-13 (“Q: Did you measure the cost of the date requirement in your report? A: Not directly. I measured -- what I did measure is its differential impacts on certain groups of voters.”); *id.* at 30:24-31:1 (“Q: Did you measure the cost to any individual of complying with the vote -- the date requirement? A: No.”).

144. Dr. Hopkins did not “attempt to measure how easy or difficult it is for voters to comply with the date requirement,” and did not “conduct any surveys or interviews of voters to ask them how easy or difficult it is to comply with the date requirement.” *Id.* at 31:2-9.

145. Dr. Hopkins conceded that what he measured is not actually the cost of complying with the date requirement. *Id.* at 33:5-11 (“Q: I believe you just said that what you measured is closely related to the cost of voting; is that right? A: I did say that, yeah. Q: Is it actually the cost of the date requirement? A: So the cost -- to answer your question, no.”).

146. Instead, rather than “directly” measure the cost of the date requirement, Dr. Hopkins purported to measure the date requirement’s “differential impact on certain groups of voters.” *Id.* at 30:9-13.

147. Thus, Dr. Hopkins purported to measure the rate of noncompliance with the date requirement among “certain groups of voters” and, thus, the rate at which “certain groups of voters” may experience the consequences of noncompliance with the date requirement. *Id.* at 30:14-23.

148. Dr. Hopkins's report purports to conclude that "the date requirement increases the cost of voting and imposes the heaviest burdens on individuals who are already highly vulnerable to cost increases and are less likely to overcome them." **Ex. 11** ¶ 20.

149. Dr. Hopkins's county-level analysis did not examine the cost to any individual or group of voters of complying with the date requirement. *See id.* at 71:25-72:15; *see also id.* at 33:5-11.

150. Rather, it examined "what county-level attributes are associated with counties which have higher or lower ratios of setting aside mail ballots." *Id.* at 72:7-11.

151. Dr. Hopkins calculated the statewide rejection rate for all absentee and mail-in ballots that do not comply with the date requirement as 0.93%, *see id.* ¶ 27, which is "similar" to but "slightly" lower than the rejection rate for ballots that do not comply with the secrecy envelope requirement, **Ex. 10** at 114:14-115:20.

152. Dr. Hopkins testified that the statewide rejection rate for noncompliance with the date requirement is 0.93%. **Ex. 10** at 83:5-84:22; *see also Ex. 11* ¶ 32.

153. Dr. Hopkins also co-authored an article which represented that "about ... 1 percent of mail ballots returned in Philadelphia were naked ballots which was similar to the estimated share statewide." **Ex. 10** at 113:20-114:5.

154. Though Dr. Hopkins represented that "1 percent is very similar to .93 percent," he conceded that "1 percent is greater than .93 percent." **Ex. 10** at 115:5-20.

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Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

Russell D. Giancola

PA. I.D. #200058

GALLAGHER GIANCOLA LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

Phone: (412) 717-1900

kag@glawfirm.com

rdg@glawfirm.com

John M. Gore (*pro hac vice*)

E. Stewart Crosland

Louis J. Capozzi III

Joshua S. Ha

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Phone: (202) 879-3939

jmgore@jonesday.com

scrosland@jonesday.com

Thomas W. King, III

Thomas E. Breth

DILLON, McCANDLESS, KING,

COULTER & GRAHAM, LLP

128 W. Cunningham St.

Butler, PA 16001

Phone: (724) 283.2200

tking@dmkcg.com

tbreth@dmkcg.com

Counsel for Intervenor-Defendants