

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

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

Plaintiffs,

v.

AL SCHMIDT, *et al.*,

Defendants.

Case No. 1:22-cv-00339

**INTERVENOR-DEFENDANTS' RESPONSE TO DEFENDANTS' COUNTY BOARDS  
OF ELECTIONS ADDITIONAL CONCISE STATEMENT OF MATERIAL FACTS  
AND RESPONSES TO INTERVENOR-DEFENDANTS'  
CONCISE STATEMENT OF MATERIAL FACTS**

Intervenor-Defendants the Republican National Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania respectfully file these Responses to the Defendants' County Boards of Elections Additional Concise Statement Of Material Facts And Responses To Intervenor-Defendants' Concise Statement Of Material Facts, Dkt. No. 311, and state as follows:

**RESPONDING COUNTIES' ADDITIONAL STATEMENT OF MATERIAL FACTS**

- I. **Philadelphia County Board of Elections ("Philadelphia County") does not use the handwritten date to determine the qualification of the voter, the timeliness of the ballot, or prevent fraud**

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

**Admitted that the handwritten date is not used to determine the qualification of the voter or the timeliness of the ballot.**

**Denied that the handwritten date is not used to prevent fraud. The handwritten date has already been used to detect voter fraud. See Dkt. No. 272 ¶¶ 48-55. It follows that the handwritten date is relevant for deterring and thereby preventing fraud.**

1. To vote by absentee or mail-in ballot in Philadelphia County, prospective voters must first send a voter application to Philadelphia County. APP-70 (Custodio Decl. ¶ 6).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio made this assertion in his declaration.**

2. Philadelphia County then reviews the application and determines whether the voter is registered and qualified to vote. APP-70-71 (Custodio Decl. 6, 12); 25 P.S. §§ 3146.2b, § 3146.8(g)(4), 3150.12b.

**Intervenor-Defendants' Response: Admitted that Mr. Custodio made this assertion in his declaration.**

3. If Philadelphia County approves the application, it mails an absentee or mail-in ballot package to the approved voter. APP-70 (Custodio Decl. ¶ 6).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio made that assertion in his declaration, on the understanding that he also declared that “if the voter is applying in person, the Board hands them the ballot package.” Dkt. No. 312 at 73 (APP-70).**

4. This review and approval process at the application stage confirms the voter's identity and eligibility to vote. APP-70-71 (Custodio Decl. 6, 12).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio made this assertion in his declaration.**

5. Philadelphia County's determination that an individual is qualified to vote is conclusive unless the voter's eligibility is challenged before Election Day. 25 P.S. §§ 3150.12b, 3146.8(g)(3)-(4).

**Intervenor-Defendants' Response: Admitted.**

6. Each absentee and mail-in ballot envelope contains a correspondence ID that is unique to both the voter and election for export to the Statewide Uniform Registry of Electors (SURE) system. APP-71-72 (Custodio Decl. ¶¶ 10, 16).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes that assertion in his declaration.**

7. When Philadelphia County receives absentee and mail-in ballot envelopes, it runs those envelopes through a sorting machine that scans the unique ID and records that the voter has returned an absentee or mail-in ballot. APP-70-71 (Custodio Decl. 8-10).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes this assertion in his declaration, on the qualification that he made this assertion for the "vast majority" of ballots rather than all ballots. Dkt. No. 312 at 73 (APP-70).**

8. This system prevents a voter from using outdated ballot material because Philadelphia County will only count absentee and mail-in ballot that contain the correspondence ID unique to both the voter and the election. APP-72 (Custodio Decl. 15-16).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes that assertion in his declaration.**

9. This process does not rely on the voter's handwritten date on the outer return envelope to determine the voter's qualifications to vote. APP-70-71 (Custodio Decl. 6, 12).

**Intervenor-Defendants' Response: Admitted.**

10. Philadelphia County also ensures that each absentee and mail-in ballot is timely received, because absentee and mail-in voter must fill out and return the ballot to Philadelphia County by 8:00 p.m. on Election Day. APP-70-71 (Custodio Decl. 6, 8-11) 25 P.S. §§ 3146.6, 3150.16.

**Intervenor-Defendants' Response: Admitted.**

11. Philadelphia County records the time it receives each returned absentee or mail-in ballot envelope. APP-70 (Custodio Decl. ¶ 9).

**Intervenor-Defendants' Response: Admitted.**

12. The vast majority of all ballots are run through the sorting machine, which stamps each ballot envelope with the date and time the ballot was returned to Philadelphia County. APP-70 (Custodio Decl. ¶ 9).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes that assertion in his declaration.**

13. A small number of ballots are manually marked with the date and time the ballot was returned to Philadelphia County. APP-70 (Custodio Decl. 8-9).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes that assertion in his declaration.**

14. Philadelphia County then confirms the timeliness of each absentee and mail-in ballot by referring to the date and time that it was either stamped by the sorting machine or manually marked by Philadelphia County. APP-71 (Custodio Decl. ¶ 11).

**Intervenor-Defendants' Response: Admitted.**

15. A voter's handwritten date is irrelevant to this process and is not used to determine whether a mail-in or absentee ballot is timely received. It serves no purpose to Philadelphia County. APP-71-72 (Custodio Decl. 12, 16). The Allegheny, Bucks, Chester, and Montgomery County Boards of Elections likewise do not use the handwritten date to determine whether a voter is qualified, or whether a ballot was timely. APP-79-80 (Allegheny County Response to Interrogatory No. 14); APP-85 (Bucks County Response to Interrogatory No. 14); APP-97 (Chester County Response to Interrogatory No. 14); APP-102-103 (Montgomery County Response to RFA Nos 1, 2).

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

**Admitted that the handwritten date is not used to determine whether the ballot was timely received or whether the voter is qualified.**

**Denied that the handwritten date "serves no purpose." For instance, the handwritten date has already been used to detect voter fraud. See Dkt. No. 272 ¶¶ 48-55.**

16. Philadelphia County has not identified any actual or suspected instances of voting-related fraud connected with absentee or mail-in ballots, and it has no reason to believe that non-enforcement of the handwritten date requirement would cause an increase in voter-related fraud. APP-72 (Custodio Decl. ¶¶ 15-16).

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

**Admitted that Mr. Custodio asserts in his declaration that Philadelphia County has not identified any actual or suspected instances of voting-related fraud connected with mail-in or absentee ballots returned in undated or misdated envelopes.**

**Denied that Philadelphia County “has no reason to believe that non-enforcement of the handwritten date requirement would cause an increase in voter-related fraud.” The handwritten date has already been used to detect voter fraud in Pennsylvania. See Dkt. No. 272 ¶¶ 48-55. That itself is reason to believe that failing to enforce the date requirement would lead to voter fraud going undetected.**

17. Philadelphia County will need to expend significant time and labor to check for a handwritten date that is not relevant to determining that any ballots were timely received, whether the voter is qualified to vote, or any other purpose. APP-71 (Custodio Decl. 12, 14).

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

**Admitted that Mr. Custodio asserts that enforcing the date requirement requires significant time and labor by the Board.**

**Denied that the handwritten date is not relevant to any purpose. For instance, the handwritten date has already been used to detect voter fraud. See Dkt. No. 272 ¶¶ 48-55.**

18. Philadelphia County receives many absentee and mail-in ballots each election cycle. APP-71-72 (Custodio Decl. ¶ 14).

**Intervenor-Defendants' Response: Admitted.**

19. For example, in the 2022 General Election, Philadelphia County received nearly 134,000 absentee and mail-in ballots before the Election Day deadline. APP-71-72 (Custodio Decl. ¶ 14).

**Intervenor-Defendants' Response: Admitted.**

20. Given the volume, Philadelphia County does not manually review the vast majority absentee and mail-in ballots. APP-71 (Custodio Decl. ¶ 13 & n.1).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes this assertion in his declaration, on the understanding that the Counties are also referring to paragraph 9. Dkt. No. 312 at 73 (APP-70).**

21. Rather, automated sorting machines are configured to recognize when a ballot is returned without a handwritten signature or without the internal secrecy envelope that is required by the Pennsylvania Election Code. APP-71 (Custodio Decl. ¶ 13 & n.1).

**Intervenor-Defendants' Response: Admitted.**

22. These machines cannot be configured to detect a ballot missing a "correct" handwritten date. APP-71 (Custodio Decl. ¶ 13 & n.1).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes this assertion in his declaration.**

23. To enforce the dating requirement, Philadelphia County is required to devote considerable extra time and labor to manually identify ballots that have a missing or incorrect date. APP-71-72 (Custodio Decl. ¶¶ 13-14).

**Intervenor-Defendants' Response: Admitted that Mr. Custodio makes this assertion in his declaration.**

**II. The dating requirement disproportionately affects elderly Pennsylvania residents.**

**Intervenor-Defendants' Response: Denied as unsupported for the reasons stated below.**

24. In the 2022 General Election, pursuant to orders of the Pennsylvania Supreme Court, Philadelphia County was required to segregate and not count 2,617 timely ballots by otherwise qualified voters solely because the voters failed to comply with the handwritten date requirement. APP-3 (Philadelphia County Response to Interrogatory No. 2).

**Intervenor-Defendants' Response: Admitted.**

25. None of the voters who submitted those ballots submitted replacement ballots, but 580 of those voters submitted provisional ballots. APP-3 (Philadelphia County Response to Interrogatory No. 2).

**Intervenor-Defendants' Response: Admitted.**

26. Elderly voters were disproportionately overrepresented in the number of segregated and uncounted ballots:

**Intervenor-Defendants' Response: Denied as unsupported.** Even if the numbers below are accurate, no data is provided as to the breakdown by age of the pool of voters who voted by absentee or mail-in ballot. In other words, no evidence is provided regarding the rate at which elderly voters and non-elderly voters used absentee or mail-in ballots, as opposed to other methods of voting. Because elderly voters may have used absentee or mail-in voting at a higher rate than non-elderly voters, the rate at which elderly voters' absentee or mail-in ballots were set aside may have been lower than the rate at which non-elderly voters' absentee or mail-in ballots were set aside. *See* Dkt. No. 272 ¶¶ 135-146.

- The median age of voters who submitted undated ballots is **64-years old**. The median jumps to **66-years old** for voters who submitted misdated ballots.

**Intervenor-Defendants' Response: Admitted that the cited meeting transcript makes this assertion as to Philadelphia County. Denied that this fact supports the Counties' assertion that "[e]lderly voters were disproportionately represented in the number of segregated and uncounted ballots."** *See also* Dkt. No. 272 ¶¶ 135-146.

- Voters **over the age of 50** submitted **nearly 75%** of undated ballots and **77%** of misdated ballots.

**Intervenor-Defendants' Response: Admitted that the cited meeting transcript makes this assertion as to Philadelphia County. Denied that this fact supports the Counties' assertion that "[e]lderly voters were disproportionately represented in the number of segregated and uncounted ballots."** *See also* Dkt. No. 272 ¶¶ 135-146.

- Voters **over the age of 60** submitted **more than 60%** of the undated ballots and **64%** of the misdated ballots.

**Intervenor-Defendants' Response:** Admitted that the cited meeting transcript says that voters over the age of 60 submitted 60.9% of the undated ballots and 64.1% of the misdated ballots in Philadelphia County. Denied that this fact supports the Counties' assertion that "[e]lderly voters were disproportionately represented in the number of segregated and uncounted ballots." *See also* Dkt. No. 272 ¶¶ 135-146.

- Voters over the age of 70 submitted more than 40% of misdated ballots and 37.5% of undated ballots.

**Intervenor-Defendants' Response:** Admitted that the cited meeting transcript says that voters over the age of 70 submitted 40.9% of the misdated ballots and 37.5% of the undated ballots in Philadelphia County. Denied that this fact supports the Counties' assertion that "[e]lderly voters were disproportionately represented in the number of segregated and uncounted ballots." *See also* Dkt. No. 272 ¶¶ 135-146.

- Voters in their 80s submitted approximately 14% of the undated and misdated ballots.

**Intervenor-Defendants' Response:** Admitted that the cited meeting transcript makes this assertion as to Philadelphia County. Denied that this fact supports the Counties' assertion that "[e]lderly voters were disproportionately represented in the number of segregated and uncounted ballots." *See also* Dkt. No. 272 ¶¶ 135-146.

- And more than 70 ballots from voters 90-years old and older were segregated and not counted as either misdated or undated.

APP-18-20 (Philadelphia County Board of Elections 11/18/2022 Meeting Transcript at 4-6, PHILA-000041-43).

**Intervenor-Defendants' Response:** Admitted that the cited meeting transcript says that 72 ballots from voters 90-years old and older were either misdated or undated. Denied that this fact supports the Counties' assertion that "[e]lderly voters were disproportionately represented in the number of segregated and uncounted ballots." *See also* Dkt. No. 272 ¶¶ 135-146.

27. "[T]hese percentages all are significantly higher than the percentage of Philadelphia's registered voters that these age groups represent." APP-20 (Philadelphia County Board of Elections 11/18/2022 Meeting Transcript at 6:2-5, PHILA-000043).

**Intervenor-Defendants' Response:** Admitted that the cited meeting transcript makes this assertion. Denied that this fact supports the Counties' assertion that "[e]lderly voters were disproportionately represented in the number of segregated and uncounted ballots." *See also* Dkt. No. 272 ¶¶ 135-146. Indeed, the relevant pool of



**voters is not all of Philadelphia’s registered voters, but those voters who chose to voter by absentee or mail-in ballot in the November 2022 general election.**

28. Philadelphia County’s review of the data suggests that enforcement of the dating requirement in the 2022 General Election also disproportionately impacted discrete Philadelphia communities, including areas with higher poverty rates and lower rates of educational attainment. APP-20 (Philadelphia County Board of Elections 11/18/2022 Meeting Transcript at 6:13-20, PHILA-000043).

**Intervenor-Defendants’ Response: Admitted that the cited meeting transcript makes this assertion. Denied to the extent that the term “disproportionately impacted” is vague. Also denied to the extent that this analysis mirrors Philadelphia County’s other analyses, which failed to measure the rate of utilization of absentee or mail-in ballots or the rate at which such ballots were set aside. Also denied to the extent that the Counties do not explain this analysis, and Intervenor-Defendants therefore cannot opine as to whether Philadelphia County’s “review of the data” “suggests” anything.**

RETRIEVED FROM DEMOCRACYDOCKET.COM

Dated: May 10, 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](mailto:kag@glawfirm.com)

[rdg@glawfirm.com](mailto: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](mailto:jmgore@jonesday.com)

[scrosland@jonesday.com](mailto: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](mailto:tking@dmkcg.com)

[tbreth@dmkcg.com](mailto:tbreth@dmkcg.com)

*Counsel for Intervenor-Defendants*