

**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 PLAINTIFFS' 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 Plaintiffs' Additional Concise Statement Of Material Facts And Responses To Intervenor-Defendants' Concise Statement Of Material Facts, Dkt. No. 315. Intervenor-Defendants reproduce below only those paragraphs from Plaintiffs' Responses To Intervenor-Defendants' Concise Statement Of Material Facts to which a further reply is warranted. Intervenor-Defendants also respond to Plaintiffs' Additional Concise Statement Of Material Facts. Intervenor-Defendants state as follows:

**PLAINTIFFS' RESPONSES TO INTERVENOR-DEFENDANTS' CONCISE
STATEMENT OF MATERIAL FACTS**

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

PLAINTIFFS' RESPONSE:

Disputed but immaterial. The cited provision does not contain the quoted language purporting to require voters to handwrite a date on the outer return envelope. Regardless, whether the 1963 Pennsylvania Election Code provisions relating to military absentee ballots included an envelope dating requirement is immaterial to the legal issues raised by the parties' cross-motions for summary judgment – *i.e.* whether applying the current version of Pennsylvania's Election Code so as to disenfranchise voters who did not handwrite the correct date on a mail ballot return envelope violates the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B), and the Equal Protection Clause.

Intervenor-Defendants' Reply: The quoted language appears in § 1306 of the cited statute. *See* Dkt. No. 273-10 (Ex. 10 to Appendix, Acting Sec'y Ans. 20-21, *Ball v. Chapman*, No. 102 MM 2022 (Oct. 19, 2022)). Moreover, the 1963 Act extended absentee voting beyond military personnel. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1301, 1963 Pa. Laws. 707, 736

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

PLAINTIFFS' RESPONSE:

Disputed as stated and immaterial. The record in this case, which is consistent with the record adduced in *Chapman v. Berks Cnty. Bd. of Elections* and *Commonwealth v. Mihaliak*, is that the date written on the outer envelope was *not* necessary to detect the election fraud at issue in the irrelevant *Mihaliak* case discussed by Plaintiffs at SMF 48-55. Indeed, the Board of Elections for Lancaster County, where the *Mihaliak* case arose, has now conceded for the purposes of Plaintiffs' motion for summary judgment in this case that the voter-written date on a return envelope is irrelevant to the counties' ability to identify and set aside ballots submitted by or on behalf of deceased voters. *See* Pls.' SMF (Dkt. 283) at ¶¶ 60-64; LCBOE SMF Resp. (Dkt. 302)

at ¶¶ 60-64. This is not surprising given that Christa Miller, the Lancaster County Board of Elections' Rule 30(b)(6) designee in this case and the election official who reported the voter fraud incident to local police, testified that the Lancaster County Board of Elections had already learned that Ms. Mihaliak's mother had died and removed her from the voter rolls before the Board received a mail ballot in her name. APP_00890-91 (Miller Tr.). The situation was consistent with practices across county boards of election, which remove deceased voters from voter rolls as a matter of course upon learning that a registered voter died before 8:00 P.M. on Election Day. 25 P.S. § 3146.8(d); APP_00888-892 (Miller Tr.) (confirming the Lancaster Board has a mechanism for removing people who die before Election Day from the voter rolls); *id.* at APP_00895-896 ("We receive Department of Health records, as all counties do. And we also use local obituaries or if someone has a death certificate that they have submitted to us."); *see also* APP_00911-912 (Westmoreland Tr.); APP_01191 (Greenburg Rpt.); APP_01016-1019, APP_01026-1029, APP_01032 (Greenburg Tr.).

Thus, as Ms. Miller admitted at deposition in this case, when the Lancaster Board received a mail ballot purporting to come from Ms. Mihaliak's mother weeks after her death, they knew the vote was invalid and would not have counted the vote regardless of the date written on the envelope. APP_00888-892. Specifically:

- Q. But just focusing on whether this was a valid vote, the date written on the envelope didn't matter one way or the other?
- A. Correct. When we received it back, as we had already removed her, that ballot would have been set to the side.

Id., APP_00892:10-15.

The testimony of a Lancaster commissioner cited in Intervenor-Defendants' SMF—which was adduced in a different case—indicates, at most, that the handwritten date on the envelope inserted by Ms. Mihaliak may have been helpful to prosecutors in building their case about the

already-invalidated ballot within the context of a criminal proceeding. SMF Ex. 11 at 145:16-23; *see also* Pls. SMF (Dkt. 283) at ¶ 60; LCBOE SMF Resp. (Dkt. 302) at a 60 (admitting that the “only other purported use for the voter-written date identified in discovery by any county is that considering the date written on a voter declaration might aid in prosecution of voter fraud relating to deceased voters”). But as the same commissioner admitted, “it did not affect whether [we] counted that ballot” because the county board had already removed Ms. Mihaliak’s deceased mother from the voter rolls. *Id.* at 145:24-146:1; *see also* APP_00888-892 (Miller Tr.). The record evidence in this case also indicates that law enforcement subsequently determined that there had been a fraud attempt after they questioned Ms. Mihaliak and she admitted her conduct. APP_01042.

In any event, any dispute over the purported value Mihaliak’s handwritten date had in prosecuting fraud in her case is immaterial to the legal issues raised by the parties’ cross-motions for summary judgment – *i.e.*, whether the voter-written dates on return envelopes are material to determining a voter’s qualifications to vote under the Materiality Provision. It is undisputed that, as confirmed by the Lancaster County Board of Elections representative who identified the fraud in that case, the date written on the Mihaliak envelope was immaterial to her eligibility to vote and was *not* used to determine whether the vote could be counted. *Id.*

Intervenor-Defendants’ Reply: Plaintiffs miss the point when they emphasize that “the date written on the Mihaliak envelope was immaterial to her eligibility to vote and was *not* used to determine whether the vote could be counted.” The election fraud in *Mihaliak* was not committed by the decedent but instead by a third party. *See* Dkt. No. 272 ¶¶ 48-55. Plaintiffs do not dispute that the handwritten date of April 26, 2022—which was twelve days after the decedent had passed away—was the only evidence on the face of the ballot indicating that someone other than the decedent had completed the ballot. *See id.* ¶ 52. Plaintiffs’ own putative expert agreed that the date supplied on the ballot declaration was the only piece of evidence of fraud on the face of the ballot, and that the date requirement helped to detect fraud in *Mihaliak*. *See id.* ¶¶ 54-55. That the ballot would not have been counted does not change the fact

that the handwritten date was the only evidence of third-party fraud on the face of the ballot.

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

PLAINTIFFS' RESPONSE:

Admitted and immaterial. By way of further response, Plaintiffs refer to their response to SMF 48 above, which is incorporated as if fully restated here. Plaintiffs further note that it is immaterial whether a signature and date is the only information supplied by the voter “on a ballot declaration”¹ because it is undisputed that voter-supplied information on the return envelope is not the county boards of elections’ source of information material to voter eligibility. Specifically, it is undisputed that county boards of elections determine eligibility to vote before issuing mail ballot packages to voters, based on information provided in their voter registration records and mail ballot applications. 25 P.S. § 3150.12b; *see also* APP_01136 (Pa. Dep’t of State Guidance); APP_00894 (Lancaster Dep.); APP_00916- 917 (Westmoreland Dep.); APP_00957-961 (Marks Dep.); APP_01182 (Greenburg Report); APP_001015, APP_001020-1025 (Greenburg Dep.). And it is undisputed that county boards of elections use independent sources to determine when an eligible voter has died before Election Day, regardless of what information is provided “on a ballot declaration.” *See* 25 P.S. § 3146.8(d); APP_00888-892 (Miller Tr.) (confirming the Lancaster Board has a mechanism for removing people who die before Election Day from the voter rolls); *id.* at APP_00895-896 (“We receive Department of Health records, as all counties do. And we

¹ For the purposes of these Responses, Plaintiffs assume that Intervenor-Defendants’ references to the “ballot declaration” are intended to reference the voter declaration printed on mail ballot *return envelopes*. Voter declarations are, as a matter of Pennsylvania law, printed on the outer return envelope and not the ballot itself. 25 P.S. § 3150.14. There is no dispute in this case about any information supplied on any ballot.

also use local obituaries or if someone has a death certificate that they have submitted to us.”); *see also* APP_00911-912 (Westmoreland Tr.); APP_01191 (Greenburg Rpt.); APP_01016-1019, APP_01026-1029, APP_01032 (Greenburg Tr.).

Intervenor-Defendants’ Reply: Plaintiffs again miss the point. Because counties lack authority to conduct signature matching under current Pennsylvania Supreme Court precedent, *see In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020), the handwritten date provided the *only* evidence of third-party fraud on the face of the ballot in *Mihaliak*.

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

PLAINTIFFS’ RESPONSE:

SMF 51 consists of statements of law to which no response is required. To the extent a response is required, Plaintiffs state that whether boards of elections are permitted to conduct signature comparisons is immaterial to the issues in this case, and Plaintiffs incorporate by reference to their responses to SMF 48 and 50 above as if fully restated here.

Intervenor-Defendants’ Reply: Intervenor-Defendants incorporate by reference their reply to Plaintiffs’ response to Paragraph 50 of Intervenor-Defendants’ concise statement of material fact. *See supra* ¶ 50.

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

PLAINTIFFS’ RESPONSE:

Disputed as stated and immaterial. The citation does not support the statement that the handwritten envelope date was the “only evidence” indicating a potential attempt at fraud.

Plaintiffs refer to their responses to SMF 48 and 50 above, which are incorporated as if fully restated here.

Intervenor-Defendants' Reply: Intervenor-Defendants fully explained why the date requirement provided the only evidence of fraud on the face of the ballot declaration in *Mihaliak*. Dkt. No. 272 ¶¶ 48-55. Intervenor-Defendants further incorporate by reference their reply to Plaintiffs' response to Paragraph 50 of Intervenor-Defendants' concise statement of material fact. *See supra* ¶ 50.

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

PLAINTIFFS' RESPONSE:

Disputed as stated and immaterial. The cited evidence does not support the statement that the investigation was "predicated" on the handwritten envelope date, as opposed to the fact that the Lancaster County Board of Elections received a ballot weeks after the voter died, and days after she was removed from the voter rolls. APP 00890-91 (Miller Tr.). Plaintiffs refer to their responses to SMF 48 and 50 above, which are incorporated as if fully restated here.

Intervenor-Defendants' Reply: Plaintiffs ignore that the affidavit of probable cause in *Mihaliak* expressly notes that the mail in ballot was "signed and dated April 26, 2022," even though "Teresa J. Mihaliak was deceased on April 14, 2022." Dkt. No. 273-12 ¶ 2 (Ex. 12 to Appendix, *Mihaliak* Criminal Complaint). Intervenor-Defendants further incorporate by reference their reply to Plaintiffs' response to Paragraph 50 of Intervenor-Defendants' concise statement of material fact. *See supra* ¶ 50.

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

PLAINTIFFS' RESPONSE:

Disputed and immaterial. Plaintiffs specifically dispute the characterization of cited testimony, which cannot be read to say that the date supplied on the envelope declaration in the *Mihaliak* case was the "only piece of evidence of fraud" in that case. Indeed, Mr. Greenburg

specifically testified during his deposition that the fact that the county board received Ms. Mihaliak's ballot after learning she was deceased and removing her from the voter rolls was also evidence of fraud "regardless of the handwritten date on that envelope." Pls.' Suppl. Appx., at APP_01581 (Greenburg Tr.). In any event, Mr. Greenburg is not qualified to opine on the quantum of evidence prosecutors had to build a fraud case against Ms. Mihaliak, as he does not purport to be an expert in the *Commonwealth v. Mihaliak* investigation and prosecution. By way of further response, Plaintiffs refer to their responses to SMF 48 and 50 above, which are incorporated as if fully restated here.

Intervenor-Defendants' Reply: Plaintiffs' response confirms that "the date supplied on the *Mihaliak* ballot declaration was the only piece of evidence of fraud on the face of the ballot." Mr. Greenburg agreed that a signature and a date were "the only two items required" on the ballot declaration. Dkt. No. 273-77 at 114:23-115:7 (Ex. 77 to Appendix, transcript of Greenburg Deposition). Thus, because counties lack authority to conduct signature matching under current Pennsylvania Supreme Court precedent, see *In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020), the handwritten date provided the *only* evidence of third-party fraud on the face of the ballot in *Mihaliak*.

Moreover, even if Plaintiffs are correct that "the fact that the county board received Ms. Mihaliak's ballot after learning she was deceased and removing her from the voter rolls" is "evidence of fraud," the voter roll is not on the face of the ballot. In all events, receiving a ballot after the voter's death indicates only that the voter died before receipt—not necessarily that, as in *Mihaliak*, someone else submitted the ballot.

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

PLAINTIFFS' RESPONSE:

Admitted in part and disputed in part as stated, but immaterial. By way of further response, Plaintiffs refer to their response to SMF 48 and 54 above, which are incorporated as if fully restated here. Plaintiffs note further that Mr. Greenburg does not purport to be an expert in the *Commonwealth v. Mihaliak* investigation and prosecution. Specifically, Mr. Greenburg explained

that any potential fraud inquiry related to the ballot of a voter who died before 8:00 P.M. on Election Day “doesn’t impact whether the county would count it” (*i.e.*, Mr. Greenburg’s area of expertise, in election administration), “but the fraud side is simply related to the law enforcement side” (*i.e.*, outside of Mr. Greenburg’s area of expertise). APP_01031. The reading of the *Mihaliak* complaint Intervenor Defendants had Mr. Greenburg conduct at his deposition is immaterial to the issues raised in the parties’ cross-motions for summary judgment in this case.

Intervenor-Defendants’ Reply: Plaintiffs’ response confirms that Mr. Greenburg agreed that the date requirement helped to detect fraud in *Mihaliak*. Intervenor-Defendants further incorporate by reference their replies to Plaintiffs’ responses to Paragraphs 50-54 of Intervenor-Defendants’ concise statement of material fact. See *supra* ¶¶ 50-54.

106. Potter County Board of Elections responded as follows.

- a. It received 888 mail-in ballots, including 2 military-overseas ballots.
Ex. 56, Potter Cnty. Bd.’s Ans. to Interrogs. #1.
- b. It set aside 11 mail ballots with undated or misdated ballot declarations, not including voters who submitted provisional ballots or ballots with other defects. *Id.* at Interrog. #2.

PLAINTIFFS’ RESPONSE:

Plaintiffs dispute the specific numbers identified for Potter County in SMF 106. The Potter County Board of Elections stated that it set aside 14 mail ballot envelopes that were submitted without a voter-written date. APP_00574. In any event, any dispute over the specific number of mail ballots set aside by Potter County, is immaterial to the legal issues presented in the parties’ cross-motions for summary judgment. Ultimately, it is undisputed that the Potter County Board of Elections received hundreds of mail ballots and set aside several of them based on the envelope dating issues challenged in this case.

Intervenor-Defendants' Reply: It is true that Potter County Board of Elections stated that it set aside 14 mail ballot envelopes that were submitted without a voter-written date. However, Potter County also noted that the voters of two of those ballots ended up casting a provisional ballot. See Dkt. No. 278 at 232 (APP_00576). Another of the undated ballots was also missing a signature. *Id.*

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

PLAINTIFFS' RESPONSE:

Admitted in part; disputed in part as stated. As set forth in the cited paragraphs from Mr. Greenburg's report, the information and data he relied upon originated from the Defendants' discovery responses and productions, as provided to him in the form of a summary table by Plaintiffs' counsel. By way of further response, Plaintiffs refer to their responses to SMF 135 and 137 above, which are incorporated as if fully restated here.

Intervenor-Defendants' Reply: Plaintiffs admit that they provided the tables upon which Mr. Greenburg relied for his opinions. See Dkt. No. 272 ¶ 144.

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

PLAINTIFFS' RESPONSE:

Disputed, but immaterial. As stated in Mr. Greenburg's report, the table included the data from the 13 counties that had provided it by February 23, 2023, the date on which he submitted his report. APP_01188. By way of further response, Plaintiffs refer to their responses to SMF 135 and 137 above, which are incorporated as if fully restated here.

Intervenor-Defendants' Reply: Plaintiffs admit that the table they provided Mr. Greenburg included data from only 13 of Pennsylvania's 67 counties. See Dkt. No. 272 ¶ 145; see also *id.* ¶ 144.

146. The data provided by Plaintiffs was internally inconsistent.

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

PLAINTIFFS' RESPONSE:

Disputed but immaterial. By way of further response, Plaintiffs refer to their responses to SMF 135 and 137 above, which are incorporated as if fully restated here, and adds the following specific responses to subpoints a. and b.:

- a. As stated in Mr. Greenburg's report, the summary table uses the numbers provided by the defendants in their responses to Interrogatory Request Number 2, which stated: "State how many mail ballots You received in connection with the 2022 General Election that were signed and timely received but set aside and/or segregated because they lacked a handwritten date on the outer return envelope or showed a date on the outer return envelope that You deemed to be incorrect. If you allowed voters to correct or cure the envelope-date issue, specify whether your response includes ballots that were ultimately corrected or cured." Crawford County's

response was “51,” APP_00233; Franklin County’s response was “114,” APP_00335; Lancaster County’s response was “232,” APP_00388; Somerset County’s response was “63,” APP_00598; Wyoming County’s response was “17,” APP_00714. Each of these responses is accurately recorded in the table. (Montgomery County amended its response to Request Number 2 on April 4, 2023, after Mr. Greenburg’s report was submitted, and so the table reflects the number reported prior to Montgomery County’s amendment.)

- b. As stated in Mr. Greenburg’s report, the summary table uses the numbers provided by the defendants in their responses to Interrogatory Request Number 2. If a county’s response to that request stated how many ballots had been cured, the table notes that number and does not count those cured ballots toward the cure.

Intervenor-Defendants’ Reply: Plaintiffs miss the point. By way of further response:

a. Plaintiffs correctly state the counties’ answers to Interrogatory #2. (Intervenor-Defendants do not comment on Montgomery County’s amended responses.) But Plaintiffs *ignore* Interrogatory #8 for those counties, which show that Plaintiffs’ numbers *include* ballots which had other defects that prevented them from being counted. *See* Dkt. No. 277 at 253, 352 (APP_00238, APP_00337); Dkt. No. 278 at 46, 256, 303, 371 (APP_00390, APP_00600, APP_00647, APP_00715). At the same time, they *exclude* such ballots from their count for Chester County. Dkt. No. 273-76 (Ex. 76 to Appendix). That is inconsistent.

b. Plaintiffs consider *only* Interrogatory #2 when they attempt to exclude cured ballots from their numbers. In response to requests for production, Fayette County provided more specific data. Dkt. No. 273-71 (Ex. 71 to Appendix, Fayette Board’s list of updated ballots). In all events, the counties varied in whether they tracked cured ballots. *Compare* Dkt. No. 273-44 (Ex. 44 to Appendix, where Lehigh County Board stated that it “did not track the number of ballots which were cured”), *with* Dkt. No. 278 at 154 (APP_00498 noting Northampton County tracked cured ballots). Accordingly, Plaintiffs’ number—which halfway attempts to exclude cured ballots—cannot be entirely accurate based on the discovery in this case.

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

PLAINTIFFS' RESPONSE:

Disputed and immaterial. Plaintiffs specifically dispute the characterization of cited testimony, which cannot be read to say that the date supplied on the envelope declaration in the *Mihaliak* case was the "only piece of information" available to uncover a third-party attempt to vote. By way of further response, Plaintiffs refer to their responses to SMF 48, 50 and 54 above, which are incorporated as if fully restated here.

Intervenor-Defendants' Reply: Plaintiffs do not dispute that the handwritten date was the only evidence of third-party fraud *on the face of the ballot* in *Mihaliak*. See Dkt. No. 272 ¶ 152. Intervenor-Defendants further incorporate by reference their replies to Plaintiffs' responses to Paragraphs 50-55 of Intervenor-Defendants' concise statement of material fact. See *supra* ¶¶ 50-55.

PLAINTIFFS' ADDITIONAL MATERIAL FACTS

1-114. Pursuant to LCvR 56(C)(2), Plaintiffs state that the additional material facts set forth in Plaintiffs' Local Civil Rule 56(B)(1) Statement (Dkt. 283) further refute the Moving Defendants' motions for summary judgment. Plaintiffs incorporate by reference paragraphs 1 through 114 of Plaintiffs' Local Civil Rule 56(B)(1) Statement as if fully restated here.

Intervenor-Defendants' Reply: Intervenor-Defendants' incorporate by reference the entirety of Intervenor-Defendants' Responses to Plaintiffs' Local Civil Rule 56(b)(1) Statement, Dkt. No. 305, as if fully restated here.

Dated: May 10, 2023

Respectfully submitted,

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