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

PLAINTIFFS' REPLY TO DEFENDANTS LANCASTER COUNTY, BERKS COUNTY, AND WESTMORELAND COUNTY BOARDS OF ELECTIONS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The briefs of the Lancaster County Board of Elections ("LCBOE"), Berks County Board of Elections ("BCBOE"), and Westmoreland County Board of Elections ("WCBOE") (collectively, "County Boards") raise meritless arguments in opposition to Plaintiffs' motion for summary judgment. ECF Nos. 306, 324, 309. Their objection to Plaintiffs' standing falls short because each County Board's implementation of the Date Provision injures Plaintiffs, their members, and their constituents; *Monell* does not immunize counties from liability for enforcing state law, especially where they exercise discretion in doing so; the Materiality Provision is not limited to cases involving race, as confirmed by the statute's text and structure; and the sign-and-date requirements of other statutes are simply irrelevant to the Materiality Provision analysis.

ARGUMENT

I. Organizational Plaintiffs have standing to sue the County Boards.

Plaintiffs have demonstrated that they, their members, and their constituents have been injured and, absent relief, will continue to be injured by the County Boards' implementation of the Date Provision. Specifically, DSCC, DCCC, and AFT ("Organizational Plaintiffs") have members or constituents in each county who are now at increased risk of having their votes disqualified by the respective county boards. These Plaintiffs not only have associational and third-party standing to protect the rights of those affected, *see* ECF Nos. 288 at 9–11; 318 at 3–5, but they also suffer direct injury because the county boards' enforcement of the Date Provision forces Plaintiffs to divert resources away from other activities and towards voter education and assisting voters to avoid disenfranchisement, *see* ECF Nos. 288 at 12, 318 at 5–6.

The County Boards' reliance on *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020), for the proposition that Plaintiffs' injuries are too speculative is misplaced. *Boockvar* involved completely unsubstantiated allegations of potential voting fraud, *id.*

at 377, whereas the County Boards have admitted that they have disqualified and will continue to disqualify voters pursuant to the Materiality Provision, *see* ECF No. 318 at 4. The future injury to Plaintiffs and their members is not speculative; it is certain to occur.[1]

II. Even if *Monell* applies (it does not), Plaintiffs' injuries are caused by the County Boards' policies with respect to the Date Provision.

None of the cases cited by the County Boards establishes that a county agency cannot be held liable for enforcing state law, nor do they require Plaintiffs to satisfy *Monell*. Instead, each addresses the circumstances under which a municipality may be held liable for the actions *of its employees or agents*—a point that the County Boards never address, instead omitting key language from their selective quotations. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("[U]nder § 1983, local governments are responsible only for their own illegal acts. They are not vicariously liable under § 1983 for their employees' actions."); *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 403 (1997) ("[*Monell*] recognized that a municipality may not be held liable under § 1983 solely because it employs a tortfeasor."); *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 583 (3d Cir. 2003) ("[Municipal defendant] cannot be held responsible for the acts of its employees under a theory of respondeat superior or vicarious liability."); *Colburn v. Upper Darby Twp.,* 946 F.2d 1017, 1027 (3d Cir. 1991) ("Liability will be imposed when the policy or custom itself violates the Constitution or when the policy or custom, while not unconstitutional itself, is the 'moving force' behind the constitutional tort of one its employees. Liability cannot be

[1] The County Boards assert in a footnote that declarations submitted by DSCC's Senior Advisor, DCCC's Chief Operating Officer, and AFT Pennsylvania's President should be excluded because Plaintiffs' initial disclosures did not identify these individuals by name. *See* ECF No. 306 at 6 n.1. First, arguments "relegated to a footnote" are waived. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 53 (3d Cir. 2016). Second, the argument is meritless because Plaintiffs disclosed that each entity and its employees likely would have discoverable information and identified the Executive Director of each organization, yet the County Boards did not seek *any* discovery from *any* Plaintiff in this case. Thus, the County Boards cannot now claim prejudice based on the testimony of senior employees testifying on behalf of Organizational Plaintiffs.

predicated, however, on a theory of respondeat superior or vicarious liability.").

The *Monell* analysis is intended to "ensure[] that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body *or of those officials whose acts may fairly be said to be those of the municipality*." *Brown*, 520 U.S. at 403–404 (emphasis added). There is no dispute that the act of disqualifying ballots is carried out by the County Boards themselves, thus the Supreme Court's reasoning in *Brown* is dispositive: "Where a plaintiff claims that a particular municipal action itself violates federal law . . . resolving these issues of fault and causation is straightforward. . . . [T]he conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains." *Id.* at 404–05. Because the County Boards are directly responsible for accepting or rejecting mail ballots, they can be held liable when such conduct violates federal law.

But even if the County Boards were correct that a municipality cannot be held liable for enforcing state law—again, a proposition for which they have cited no authority—the Third Circuit's opinion in *Doby v. DeCrescenzo*, 171 F.3d 858 (3d Cir. 1999), indicates that the discretion the County Boards possess when determining how to enforce the Date Provision is sufficient to bring them within the scope of § 1983. In *Doby*, plaintiffs challenged a municipal "involuntary commitment procedure" adopted pursuant to state law. In dicta, the court recognized that the Third Circuit had not "considered specifically whether municipalities or counties can be liable for enforcing state law," but ultimately concluded that "because the statute itself does not specify [implementation] . . . the county presumably [has] some discretion in deciding how to implement [the statute]." *Id*. at 868–69 (citing Sixth Circuit ruling which also "found the existence of such discretion determinative in deciding that a municipality could be held liable").

So too here. The Date Provision does not tell counties how to determine whether the date on a ballot declaration is "sufficient." 25 P.S. § 3146.8. The statutes instead leave voters and counties "entirely in the dark as to whether a ballot should be counted if, for example, a voter writes the date they mailed the ballot, rather than the date [they] signed or completed the ballot, or uses a date format that the county board does not recognize." ECF No. 228 ¶ 47. The Supreme Court of Pennsylvania subsequently has determined that the voter should enter the date they signed, "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.'" Resp. of Def. LCBOE to Concise Statement of Material Facts of Pls. (ECF No. 311) ("LCBOE Resp. CSMF") ¶ 7; *accord* Def. BCBOE's Resp. in Opp'n to Pls' Mot. for Summ. J. and Concise Statement of Material Facts (ECF No. 323) ("BCBOE Resp. CSMF") ¶ 7. Each county also exercises discretion in determining whether voters who submit an undated or misdated ballot will have an opportunity to cure or cast a replacement ballot. LCBOE Resp. CSMF ¶¶ 11–12; *accord* BCBOE Resp. CSMF ¶¶ 11–12. In other words, counties must institute policies and procedures to implement the Date Provision and thus can be held liable even under the County Boards' theory.[2]

III. The Materiality Provision is not limited to racially discriminatory practices.

The County Boards disregard the Materiality Provision's plain language and propose that it should be limited to "racially discriminatory practices" only. ECF No. 306 at 10–11. Never mind that the Provision's "plain terms" contain no mention of race, *see Bostock v. Clayton Cnty., Ga.*,

[2] In fact, the County Boards each admitted that they must set their own policy regarding how to enforce the Date Provision in future elections. *See* Appendix of Exhibits Accompanying Pls' Concise Statement of Material Facts (ECF No. 290) ("CSMF App.") at App.107–App.109 (Kauffman Dep. at 99:7–101:12); CSMF App. at App.557; CSMF App. at App.162–App.163, App.166–App.167 (Miller Dep. at 104:11–105:23, 111:16–112:9); CSMF App. at App.203–App.204, App.207 (McCloskey Dep. at 88:13–89:6, 110:9–23); CSMF App. at App.759; *see also* LCBOE Resp. CSMF ¶ 28; *accord* BCBOE Resp. CSMF ¶ 28.

140 S. Ct. 1731, 1742–43 (2020), but the fact that neighboring provisions 52 U.S.C. § 10101(a)(1) and 52 U.S.C. § 10101(e) explicitly consider race—a fact the County Boards rely on—actually *undermines* their argument. It is "generally presume[d] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (cleaned up). And since prohibiting racial discrimination in voting "is already explicitly achieved by another portion of" the same statute, incorrectly limiting the Materiality Provision to discriminatory laws would "render[]" it "superfluous." *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 307 (2003). Regardless, Plaintiffs also presented evidence that enforcement of the Date Provision has a racially discriminatory impact on Black and Hispanic voters. LCBOE Resp. CSMF ¶¶ 34–37, 40–41, 43; *accord* BCBOE Resp. CSMF ¶¶ 34–37, 40–41, 43.

IV. Berks County's perfunctory argument on voter accountability is inapposite.

BCBOE briefly opines on "accountability" and attempts to analogize the Date Provision to other statutes, but fails to connect those observations with Plaintiffs' claims. *Cf. Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023) ("arguments raised in passing . . . but not squarely argued, are considered forfeited"). Read most generously, BCBOE appears to argue that the Date Provision should survive the *Anderson-Burdick* test as it imposes a minimal burden and furthers state interests in accountability and preventing double voting. However, "even when a law imposes only a slight burden on the right to vote, *relevant* and legitimate interests of sufficient weight still must justify that burden." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318–19 (11th Cir. 2019) (emphasis added). Since BCBOE fails to demonstrate how the Date Provision is relevant to either of these alleged interests, this argument should be rejected.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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* *Admitted Pro Hac Vice*