

**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' RESPONSE TO INTERVENOR-DEFENDANTS' COUNTER
STATEMENT OF MATERIAL FACTS**

Pursuant to LCvR 56(C) and this Court's Case Management Order (ECF No. 227) and April 25, 2023 Order (ECF No. 303), Plaintiffs Bette Eakin, DSCC, DCCC, and AFT Pennsylvania hereby reproduce and respond to Intervenor-Defendants' Counter Statement of Material Facts (ECF No. 313) as follows:¹

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).

- **RESPONSE:** Undisputed. Intervenor previously asserted this fact in their initial Concise Statement of Material Facts (ECF No. 283), and Plaintiffs have already responded. Pls' Resp. to Intervenor-Defs' Concise Statement of

¹ Plaintiffs note that Intervenor did not "set[] forth in separately numbered paragraphs any other material facts that are allegedly at issue." LCvR 56(C)(1)(c). Instead, their "Counter Statement of Material Facts" is produced in paragraphs whose numbering continues after Plaintiffs' Concise Statement of Material Facts. Consequently, Plaintiffs reproduce those paragraph numbers, despite the fact that Intervenor's own Concise Statement of Material Facts concluded with paragraph 140. Furthermore, the vast majority of Intervenor's Counter Statement of Material Facts reproduce, identically or nearly-identically, their assertions from their Concise Statement of Material Fact.

Material Facts (ECF No. 320) (“CSMF Resp.”) ¶ 26.

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).

- **RESPONSE:** Undisputed. Intervenor-Defendants previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 27.

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.

- **RESPONSE:** This statement asserts a legal conclusion to which no response is required. To the extent a response is required, it is disputed as the Pennsylvania Supreme Court did not reach a conclusion on whether the date requirement violated federal law. *Ball v. Chapman*, 289 A.3d 1, 9 (Pa. 2023). Intervenor previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 33.

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.).

- **RESPONSE:** Plaintiffs dispute this assertion to the extent it suggests that the Supreme Court vacated the *Migliori* decision for any reason bearing on the merits. The Supreme Court vacated the *Migliori* decision because the case became moot while the appeal was pending. *Ritter v. Migliori*, 143 S. Ct. 297,

298 (2022).

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).

- **RESPONSE:** Plaintiffs object that this information is not material to the claims in this case, as the dissenting opinion of three justices has no legal effect and is of limited value as persuasive authority. *See also Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J.) (“[A]s is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded.”). Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 38.

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).

- **RESPONSE:** Undisputed. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 40.

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).

- **RESPONSE:** Disputed. In the cited source, Acting Secretary Chapman neither

argued that the signature requirement is “valid”—a term not defined by Intervenor—nor that it was mandatory under Pennsylvania law. Secretary Chapman also did not discuss whether the signature requirement violated the federal materiality provision. Instead, she argued that “the voter’s signature on a declaration by itself constitutes the voter’s attestation of their qualifications.” *Id.* at 16–17. Intervenor previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 41.

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.

- **RESPONSE:** Undisputed. However, Plaintiffs object that this information is not material to the claims in this case. Intervenor previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 42.

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).

- **RESPONSE:** Undisputed. Intervenor previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 43.

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

- **RESPONSE:** Undisputed. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 44.

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).

- **RESPONSE:** Disputed. Merely providing a date in the standard “American” Month/Day/Year format does not ensure a voter’s ballot will be deemed compliant with the Date Provision. County boards of elections have rejected ballots written in the “American” format. *See, e.g., Pls.’ Concise Statement of Material Facts* (ECF No. 289) (“CSMF”) ¶¶ 13, 23–24.

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.

- **RESPONSE:** Undisputed. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 47.

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).

- **RESPONSE:** Disputed. The Pennsylvania Supreme Court decision cited above

“prohibited [county boards of elections] from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.” *Id.* at 611. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 48.

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.

- **RESPONSE:** Undisputed, with the key language in the statement being “on the face of the ballot declaration.” Lancaster County had already received notice of decedent’s death, and there was no risk that the ballot would be counted. CSMF ¶ 73; Int-Defs’ Ex. 12, Aff. of Probable Cause ¶ 2 (“Teresa J. Mihaliak was deceased on April 14, 2022. [Crista] Miller said this was confirmed by an obituary and records from the Department of Health.”). The date “on the face of the ballot declaration” is not necessary to detect such issues; if the decedent’s ballot envelope had been undated or misdated, the ballot would have been detected and set aside nonetheless, as the county boards receive notification of a voter’s death from the Pennsylvania Department of Health by law. CSMF ¶ 74. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 49.

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

- **RESPONSE:** Disputed. That the Mihaliak investigation was “predicated” on the date written on the ballot return envelope is entirely unsupported by the cited source, which confirms only that: (1) Lancaster County received a mail ballot for Teresa J. Mihaliak on April 28; (2) the ballot’s return envelope was dated April 26; (3) Teresa J. Mihaliak passed away on April 14, as confirmed by an obituary and Department of Health records; and (4) Teresa J. Mihaliak was removed from the voter rolls on April 25, *before Lancaster County received her mail ballot*. Far from supporting the assertion that subsequent investigation was “predicated” on the date on the return envelope, the cited source instead demonstrates that the handwritten date was immaterial to the detection and removal of her ballot. *See also Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *21 n.14 (Pa. Cmwlth. Aug. 19, 2022) (“the ballot at issue had already been separated by the chief clerk because the scan of the return envelope revealed, through the SURE system, that the elector was deceased”). Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 50.

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.

- **RESPONSE:** Disputed. Plaintiffs have provided such evidence *ad nauseam*. E.g., CSMF ¶¶ 8–10, 13–27, 38–45, 50–51, 81–90, 95–103, 109–12, 121–23. Furthermore, Plaintiffs understand that Intervenor intended to cite ECF No. 288.

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

- **RESPONSE:** Undisputed. Intervenor previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 116.

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

- **RESPONSE:** Disputed only to the extent this assertion presupposes that the date requirement has benefits. Plaintiffs do not dispute that Dr. Hopkins did not assess whether or to what extent the date requirement has any benefits. Intervenor previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 117.

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.”).

- **RESPONSE:** Undisputed, with the understanding that Intervenor intended to assert that Dr. Hopkins did not “measure” the cost to any *individual* voter of complying with the date requirement. Intervenor previously asserted this fact

in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 118.

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.

- **RESPONSE:** Undisputed.

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.”).

- **RESPONSE:** Undisputed, with the understanding that Intervenors intended to assert that Dr. Hopkins did not measure the cost to any *individual* voter of complying with the date requirement. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 120.

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.

- **RESPONSE:** Disputed only to the extent that the term “purported” attempts to mischaracterize and undermine the quality, reliability, and expertise behind Dr. Hopkins’s analyses. Otherwise, undisputed. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 121.

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.

- **RESPONSE:** Disputed only to the extent that the term “purported” attempts to mischaracterize and undermine the quality, reliability, and expertise behind Dr. Hopkins’s analyses. Nonetheless, Plaintiffs do not dispute that Dr. Hopkins measured the disproportionate impact of the date requirement on Black, Hispanic, and older voters. Intervenors previously asserted this fact in their initial Concise Statement of Material Facts, and Plaintiffs have already responded. CSMF Resp. ¶ 122.

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