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

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

MEMORANDUM IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Third Circuit has rejected Plaintiffs' principal claim in this case: that Pennsylvania's date requirement for absentee and mail-in ballots violates the federal Materiality Provision. *See Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024). Among other things, the Third Circuit held that mandatory application of the date requirement does not deny any individual's "right to vote" because the date requirement is a ballot-casting rule that regulates *how* an individual exercises that right. *Id.* at 135 (citing *Ritter v. Migliori*, 142 S.Ct. 1824, 1824 (2022) (Alito, J., dissental)).

This holding that the date requirement does not infringe the "right to vote" logically forecloses Plaintiffs' remaining constitutional "right-to-vote" claim. But if this Court somehow deems the question open, Plaintiffs' right-to-vote claim suffers from at least three fatal defects that warrant summary judgment dismissing it.

First, the Constitution's right to vote does not guarantee a right to mail voting, so it does not limit a State's nondiscriminatory ballot-casting rules for mail voting where the State provides other methods to vote. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969). Pennsylvania allows all voters to vote in person without complying with the date requirement—so its date requirement for mail voting does not even implicate, let alone violate, anyone's constitutional right to vote. *See id.* To the contrary, if anything, Pennsylvania has generously *accommodated*, not violated, the right to vote through its voluntary provision of the convenience of mail voting.

Second, because the date requirement imposes, at most, only a "usual burden[]" on voting, it is immune from federal constitutional scrutiny under the *Anderson/Burdick* framework. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.); *see also*

id. at 204-09 (Scalia, J., concurring in judgment); *accord Brnovich v. DNC*, 594 U.S. 647, 669 (2021).

Third, even if the Court concludes that such *de minimis* burdens are subject to judicial scrutiny under the Supreme Court's *Anderson-Burdick* framework, the date requirement easily passes muster. The date requirement imposes no more than the usual burdens of voting and is amply justified by several compelling state interests: facilitating election administration, promoting solemnity in voting, and detecting fraud. Therefore, the date requirement is subject only to "rational basis review," *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020), which is of course "quite deferential," *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 153 (3d Cir. 2022) (cleaned up), and which it passes with flying colors. The Court should grant summary judgment, uphold the General Assembly's duly enacted, longstanding, and constitutional date requirement, and bring this case to an end.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A plaintiff opposing summary judgment "may not rest upon mere allegation or denials of his pleading" or a "scintilla of evidence" in support of an essential element of his claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 256 (1986). Rather, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* Indeed, Rule 56 "mandates" entry of summary judgment against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, summary judgment is warranted against any plaintiff who pursues a legally deficient theory of liability. *See, e.g.*, *id.*; Fed. R. Civ. P. 56(a).

ARGUMENT

The Third Circuit has already rejected Plaintiffs' contention that the date requirement violates the "right to vote." As the Third Circuit explained, "a voter who fails to abide by state rules prescribing how to make a vote effective is not 'denied the right to vote' when his ballot is not counted." *Pa. State Conf. of NAACP*, 97 F.4th at 133 (cleaned up). The Third Circuit "kn[e]w no authority" supporting the theory "that the 'right to vote' encompasses the right to have a ballot counted that is defective under state law" such as for noncompliance with a ballot-casting rule like the date requirement. *Id.*

It is now the law of the Third Circuit that the date requirement does not violate "the right to vote." *See id.* at 133-35. To be sure, the Third Circuit was discussing the statutory "right to vote" in the Materiality Provision. But Plaintiffs here (two of whom intervened in the Third Circuit appeal in the parallel *Pennsylvania State Conference of the NAACP* case, *see* CA3 ECF No. 129) and the dissenting judge argued that the "right to vote" in the Materiality Provision is *broader* than the constitutional right to vote. *Compare id.* at 138-39, *with* CA3 ECF No. 97 at 26-27. Moreover, there is no authority suggesting the right to vote protected by the Constitution is broader than the statutory right to vote recognized by Congress in the civil rights laws. *See Brnovich*, 594 U.S. at 669-70, (consulting "standard practice" at the time "when § 2 [of the Voting Rights Act] was amended" to determine what "furnish[es] an equal 'opportunity' to vote in the sense meant by § 2"); *Baker v. Carr*, 369 U.S. 186, 247 (1962) (Douglas, J., concurring) (the "right to vote" was "protected by the judiciary long before that right received [] explicit protection" in civil-rights statutes). *A fortiori*, the Third Circuit's conclusion that the date requirement does not violate the statutory right to vote means that it does not violate the constitutional right to vote either.

Plaintiffs' constitutional right-to-vote claim fails for this reason alone. But even if the Court believes that claim survives the Third Circuit's decision, it still should grant summary

judgment dismissing that claim for at least three reasons. *First*, the Constitution's right to vote does not guarantee the right to mail voting Plaintiffs claim here. *Second*, the date requirement imposes, at most, only a usual burden of voting, so it is immune from federal constitutional scrutiny under the *Anderson/Burdick* framework. *Third*, even if the *Anderson/Burdick* framework applies, the date requirement easily satisfies it.

I. THE CONSTITUTION'S RIGHT TO VOTE DOES NOT ENCOMPASS A RIGHT TO VOTE BY MAIL WHERE A STATE ALLOWS IN-PERSON VOTING.

Plaintiffs' right-to-vote claim fails right out of the gate because they assert a constitutional right to vote by mail—a right which the Supreme Court has held does not exist, as the Fifth Circuit recently reiterated. *See* Order Granting Stay Pending Appeal, *United States v. Paxton*, No. 23-50885, ECF No. 80-1 (5th Cir. Dec. 15, 2023) ("*Paxton* Stay Order"), at 5. Because there is no constitutional right to vote by mail, States that offer in-person voting do not "deny anyone the right to vote" when they enact laws regulating mail voting because such laws "only affect the ability of some individuals to vote by mail" while leaving intact the option to vote in person. *Id.* In States with in-person voting, "voting by mail is a privilege that can be limited without infringing the right to vote." *Id.*; *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020) (citing *McDonald*, 394 U.S. at 807-11).

Indeed, the Supreme Court's decision in *McDonald v. Board of Election Commissioners* dooms Plaintiffs' claim. In *McDonald*, pretrial detainees claimed Illinois was violating their right to vote by prohibiting them from voting by mail. *See* 394 U.S. at 803-06. The Supreme Court unanimously rejected that argument, holding that "absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny . . . the exercise of the franchise." *Id.* at 807-08. After all, the Court observed, there is no constitutional "right to receive absentee ballots." *Id.* at 807. Thus, in order to establish a right-to-

vote claim, the Court held, a litigant must show he is "absolutely prohibited from exercising the franchise" through *any* method. *Id.* at 809. The *McDonald* litigants could not meet that burden because Illinois made in-person voting available, and the plaintiffs had failed to prove Illinois would "in fact" bar them from voting in person. *Id.* at 808 & n.6.

The Supreme Court's conclusion that States which offer in-person voting do not deny the right to vote when they *decline to offer* mail voting, *see id.* at 807-08, necessarily means that States with in-person voting do not deny the right to vote when they *offer* and regulate mail voting, *Tex. Democratic Party*, 961 F.3d at 403-05; *Paxton* Stay Order 5. Indeed, laws regulating mail voting *accommodate* the right to vote by facilitating a "privilege" for voters to complete and cast ballots without voting in person. *Paxton* Stay Order at 5; *Tex. Democratic Party*, 961 F.3d at 403-05.

The Supreme Court's decision in *Crawford* reaffirms that States do not violate the constitutional right to vote when they regulate one method of voting—even if the regulation severely burdens some voters' use of that method—but provide another method of voting exempt from that regulation. 553 U.S. at 201 (opinion of Stevens, J.). The *Crawford* plaintiffs argued that elderly voters were severely burdened by the photo-identification requirement for in-person voting. *Id.* One of Indiana's counterarguments was that "the elderly and disabled are adequately accommodated through their option to cast absentee ballots, and so any burdens on them are irrelevant." *Id.* at 212 n.4 (Souter, J., dissenting). Unlike the dissent, the Court accepted Indiana's argument, concluding that one reason the requirement did not violate elderly voters' constitutional right to vote was that "the elderly in Indiana are able to vote absentee without presenting photo identification." *Id.* at 201 (opinion of Stevens, J.). *Crawford* thus reiterates that, even if a voting rule imposes a severe burden on the use of one method of voting, a constitutional right-to-vote claim is defeated if the State provides another method of voting exempt from that rule. *See id.*;

accord id. at 209 (Scalia, J., concurring in judgment) ("That the State accommodates some voters by permitting . . . the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative . . . ."). Indeed, even one of the *Crawford* dissenters suggested that the opportunity to vote by mail would defeat a right-to-vote challenge to an in-person voting rule. *Id.* at 239-240 (Breyer, J., dissenting). After all, in a situation where multiple voting options exist, voters are not "absolutely prohibited" from voting even if one option is burdensome. *McDonald*, 394 U.S. at 809; *Crawford*, 553 U.S. at 201.

So too here. Pennsylvanians unable or unwilling to write a date on their mail-ballot carrier envelopes can vote in person without having to comply with the date requirement. In other words, Pennsylvania "permits [voters] to vote in person; that is the exact opposite of 'absolutely prohibiting' them from doing so." *Tex. Democratic Party*, 961 F.3d at 404 (quoting *McDonald*, 394 U.S. at 808 n.7). Accordingly, Pennsylvania's provision and regulation of mail voting, including through the date requirement, does not violate any individual's constitutional right to vote. *See id.*; *Crawford*, 553 U.S. at 203; *McDonald*, 394 U.S. at 807-08. Instead, in Pennsylvania, as elsewhere, mail voting is a voluntary *accommodation* of the right to vote, which traditionally was exercised in person—so neither a State's voluntary "indulgence" in establishing mail voting nor its rules facilitating and regulating mail voting can *violate* the right to vote. *Crawford*, 553 U.S. at 209 (Scalia, J., concurring in judgment); *see McDonald*, 394 U.S. at 807-08; *cf. Pa. State Conf. of NAACP Branches*, 97 F.4th at 135 (date requirement does not deny the "right to vote").

Moreover, Plaintiffs' assertion of a constitutional right to mail voting is simply untenable. If Plaintiffs were correct that the Fourteenth and Fifteenth Amendment guarantee such a right, then Pennsylvania (and every other State) has been *required* to provide mail voting at least since ratification of those Amendments. But Pennsylvania did not provide universal mail voting until

2019, and many States do not provide it at all. That no court has ever held that States violate the Constitution when they choose not to provide mail voting underscores that there is no constitutional right to that method of voting. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 20 (2022) (instructing that scope of constitutional rights must be discerned from "history"); *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (cautioning against recognition of new constitutional protection not "deeply rooted in this Nation's history and tradition").

Plaintiffs have previously suggested that *McDonald* is not good law because it predates the *Anderson-Burdick* framework. ECF No. 318 at 17-18. But only the Supreme Court can overrule its own precedents, *see Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."), and it has never cast doubt upon—let alone overruled—*McDonald*. In fact, the Supreme Court favorably cited *McDonald* in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). And the case Plaintiffs previously cited to suggest *McDonald* is no longer good law, ECF No. 318 at 18—*Am. Party of Tex. v. White*, 415 U.S. 767 (1974)—reaffirmed that declining to offer absentee voting is constitutional where a State "afford[]s a comparable alternative means to vote." *Id.* at 795. As the Fifth Circuit held when rejecting the same arguments Plaintiffs advance in this case, "*McDonald* lives." *Tex. Democratic Party*, 961 F.3d at 406; *see Paxton* Stay Order at 5.

Plaintiffs have also attempted to distinguish *McDonald* by asserting that the plaintiffs in that case lost due to a failure of proof. *See* ECF No. 318 at 8. That may be true, but the point does not help Plaintiffs. As the Supreme Court explained in *Goosby v. Osser*, the *McDonald* plaintiffs' failure of proof was their failure to show that they were "in fact absolutely prohibited from voting by the State." 409 U.S. 512, 521 (1973) (quoting *McDonald*, 409 U.S. at 808 n.7). In *Goosby*, by

"sharp contrast," pretrial detainees *did* establish that Pennsylvania "absolutely prohibit[ted] them from voting." *Id.* at 521-22. The same was true in *O'Brien v. Skinner*, 414 U.S. 524 (1974). *See id.* at 529-30. By contrast, in *Crawford*, the Court refused to find that the identification requirement for in-person voting violated elderly voters' constitutional right to vote because they had the option to vote absentee without complying with the requirement. *See Crawford*, 553 U.S. at 201. And multiple lower courts have likewise held that the availability of alternative voting options precludes, or at least strongly weighs against, constitutional right-to-vote claims premised on a single method of voting, such as Plaintiffs' claim tied to mail voting. *See, e.g.*, *Tex. Democratic Party*, 961 F.3d at 404; *Paxton* Stay Order at 5; *see also Ohio Democratic Party v. Husted*, 834 F.3d 620, 628-29 (6th Cir. 2016).

Here, as in *McDonald* and *Crawford* and unlike in *Goosby*, Pennsylvania provides ample opportunities for individuals like Bette Eakin to vote without complying with the date requirement. Plaintiffs' right-to-vote claim, therefore, is foreclosed by *McDonald* and *Crawford*, and the Court should grant summary judgment dismissing it.

II. "USUAL BURDENS OF VOTING" LIKE THE DATE REQUIREMENT CANNOT VIOLATE THE RIGHT TO VOTE.

Even if *McDonald* did not control, Plaintiffs' claim still fails because they object only to the "usual burdens of voting"—which are not subject to judicial scrutiny under the Constitution's right-to-vote guarantee and, thus, do not trigger any judicial balancing analysis under the *Anderson/Burdick* framework. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *accord Brnovich*, 594 U.S. at 669.

Voting inherently requires voters to take steps that they may view as inconvenient. *See, e.g.*, *Brnovich*, 594 U.S. at 669. Traditionally, in order to vote, individuals have had to drive to a polling place, provide information to a voting official, wait in line, and fill out the ballot. *Id.* at

670. Such ordinary inconveniences—and state election rules imposing such burdens—have never been understood to implicate, let alone violate, any right to vote. *Id.* at 669 (holding that "[m]ere inconvenience" cannot establish a violation of the Voting Rights Act). After all, "[e]ven 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." *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissental). That is true of mail voting as well, where states must adopt rules, including deadlines and paperwork requirements, to make mail voting possible. *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 35 (2020) (Kavanaugh, J., concurral) ("[A] State's election [rule] does not disenfranchise voters who are capable of [following it] but fail to do so."); *accord Pa. State Conf. of NAACP*, 97 F.4th at 135.

State laws imposing these "usual burdens of voting" have never been subject to judicial scrutiny under the Constitution's right-to-vote guarantee—and no binding authority has *ever* invalidated such a law under the *Anderson/Burdick* balancing framework. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring); *accord Brnovich*, 594 U.S. at 669; *Pa. State Conf. of NAACP*, 97 F.4th at 135.

Moreover, the Third Circuit's holding that the date requirement cannot violate the Materiality Provision's statutory "right to vote" underscores that rules imposing the usual burdens of voting cannot violate the constitutional right to vote. *Pa. State Conf. of NAACP*, 97 F.4th at 133. As the Third Circuit explained, "a voter who fails to abide by state rules prescribing how to make a vote effective is not 'denied the right to vote' when his ballot is not counted." *Id.* Indeed, "[i]f state law provides that ballots completed in different colored inks, or secrecy envelopes containing improper markings, or envelopes missing a date, must be discounted, that is a legislative choice that federal courts might review if there is unequal application, but they have no power to

review under" a theory that the right to vote has been denied. *Id.* The Third Circuit reached this conclusion that neutral, nondiscriminatory ballot-casting rules do not violate the "right to vote" without conducting any balancing of the burdens imposed, and state interests served, by those rules. *See id.*

The reasons federal courts cannot wield the statutory or constitutional "right to vote" to second-guess state election rules that impose only the usual burdens of voting are fundamental. The Constitution expressly delegates to the States the power to regulate the "Times, Places, and Manner" of federal elections. U.S. Const. art. I, § 4, cl. 1. Using that power, "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *accord Council of Alt. Pol. Parties v. Hooks*, 179 F.3d 64, 70 (3d Cir. 1999) ("[S]tates have broad power to enact election codes that comprehensively regulate the electoral process."). Indeed, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Federal courts therefore must *defer* to—not deploy the open-ended *Anderson/Burdick* balancing test to assess—state voting laws like the date requirement that impose the usual burdens of voting incident to the State's necessary and "substantial regulation of elections." *Id.* The "sort of detailed judicial supervision of the election process" that subjecting such rules to the *Anderson/Burdick* framework would entail "would flout the Constitution's express commitment of th[at] task to the States," which must "weigh the costs and benefits of possible changes to their election codes." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in judgment). That approach

would also enmesh federal courts in a host of sensitive political disputes, forcing them to make judgments that frequently appear "political, not legal." *Rucho v. Common Cause*, 588 U.S. 684, 707 (2019); *see Alexander v. S.C. State Conf. of NAACP*, 144 S. Ct. 1221, 1236 (2024) ("[W]e must be wary of plaintiffs who seek to transform [the] federal courts into weapons of political warfare that will deliver victories that eluded them in the political arena." (cleaned up)); *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 561-62 (6th Cir. 2021) (Readler, J., concurring) (highlighting risks of overly broad application of *Anderson-Burdick* test).

As applied to ordinary election regulations that impose only the usual burdens of voting, such an approach cannot be right. Unsurprisingly, the Supreme Court and Third Circuit have already made that point clear. *See Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (instructing courts to avoid standard of review in right-to-vote cases that would "compel federal courts to rewrite state electoral codes"); *PA State Conf. of NAACP*, 97 F.4th at 133-35.

Plaintiffs may offer two arguments to support their position that nondiscriminatory ballot-casting rules that impose nothing more than the usual burdens of voting can nonetheless violate the right to vote. Both fail. *First*, Plaintiffs may argue that the Third Circuit's opinion is inapposite because the constitutional right to vote is *broader* than the statutory right to vote in the Materiality Provision. But that argument would invert and contradict their prior position that the "right to vote" in the Materiality Provision is broader than the constitutional right to vote. *See* CA3 ECF No. 97 at 26-27. It also makes no sense. The Supreme Court has never suggested that the constitutional "right to vote" is broader than that in the civil rights statutes. To the contrary, in *Brnovich*, the Court drew from constitutional-right-to-vote precedents to reject arguments that the "right to vote" in the Voting Rights Act should be interpreted more broadly. *See Brnovich*, 594 U.S. at 669 (extending "usual burdens of voting" rule from *Crawford*). That helps explain why

the Third Circuit found it "implausible that federal law bars a State from enforcing vote-casting rules that it has deemed necessary to administer its elections." *Pa. State Conf. of NAACP*, 97 F.4th at 135.

Second, Plaintiffs may point to the *Crawford* plurality's statement that "[h]owever slight [a] burden may appear . . . it must be justified by relevant and legitimate state interests." 553 U.S. at 191 (opinion of Stevens, J.). But the plurality's analysis makes clear that it was referring to burdens beyond the "usual burdens of voting." *Id.* at 198. After all, the Court concluded that Indiana's voter identification requirement was not a "substantial burden on the right to vote," meaning it triggered minimal scrutiny, and did not "represent a significant increase over the usual burdens of voting." *Id.* That the plurality applied only "minimal scrutiny" to a law that imposed a marginal "increase over the usual burdens of voting," indicates that a law imposing *only* the usual burdens of voting is subject to *no* judicial scrutiny. *Id.*

At an absolute maximum, the *Crawford* plurality opinion demonstrates that any judicial scrutiny of laws that impose the usual burdens of voting is so deferential as to effectively foreclose *Anderson/Burdick* challenges. *See id.*; *see also id.* at 209 (Scalia, J., concurring). That explains why Plaintiffs have not cited even a single binding *Anderson/Burdick* case striking down a law that imposed only the usual burdens of voting.

Here as well, Plaintiffs' right-to-vote challenge to the date requirement fails because writing a date on a piece of paper is the quintessential example of the "usual burdens of voting." *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring). Every State requires voters to write pieces of information on voting papers—both for in-person and mail voting. *See, e.g.*, 25 Pa. Cons. Stat. §§ 3146.6(a), 3150.16(a) (signature requirement); 25 Pa. Cons. Stat. § 3050 (requirement to maintain in-person voting poll books); *Electronic Poll Books*,

National Conference of State Legislatures (Oct. 25, 2019), ncsl.org/elections-and-campaigns/electronic-poll-books; *How States Verify Voted Absentee/Mail Ballots*, National Conference of State Legislatures (Jan. 22, 2024), ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots. Anyone who has voted in-person or by mail knows this. This is true even for States with the most generous voting regimes. *See, e.g.*, Minn. Stat. § 203B.07, subdiv. 2.

Because the date requirement imposes nothing more than the usual burdens of voting, it does not violate the right to vote. For this reason as well, the Court should grant summary judgment dismissing Plaintiffs' constitutional right-to-vote claim.

III. EVEN IF THE COURT APPLIES SCRUTINY UNDER THE *ANDERSON-BURDICK* TEST, THE DATE REQUIREMENT EASILY PASSES MUSTER.

Finally, even if the Court accepts Plaintiffs' invitation to engage in balancing under the *Anderson-Burdick* test, the date requirement easily passes muster. That framework requires courts to weigh the character and magnitude of the burden, if any, imposed by the law on protected rights against the State's interests in and justifications for the law. *Crawford*, 553 U.S. at 189-91 (opinion of Stevens, J.). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest," while those imposing "[l]esser burdens … trigger less exacting review, and [the] State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons*, 520 U.S. at 358-59 (1997) (cleaned up); *accord Mazo*, 54 F.4th at 153.

In determining a law's burden, courts can only consider the burden that the date requirement places on "voters as a whole"—not specific subgroups. *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 235-36 (5th Cir. 2020); *see Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *id.* at 205 (Scalia, J., concurring in judgment); *Burdick*, 504 U.S. at 436-37; *Ne. Ohio Coal. for*

the Homeless v. Husted, 837 F.3d 612, 631 (6th Cir. 2016). Claims of disparate impact must, instead, be brought under the Equal Protection Clause. *See Crawford*, 553 U.S. at 207-08 (Scalia, J., concurring in judgment).

A. *The Date Requirement Imposes, At Most, Only Minor Burdens Warranting Rational-Basis Review.*

Even if the Court rejects the showing that the date requirement imposes only the usual burdens of voting, *see supra* Part II, the date requirement is, at most, a minor burden subject to "rational basis review," *Mays*, 951 F.3d at 784; *see also Mazo*, 54 F.4th at 153.

Writing a date on a piece of paper is not burdensome. Signing and dating documents has been a regular and ordinary part of life for a long time. The forms provided in Pennsylvania statutes which provide spaces for both a signature and a date are too numerous to list here.[1] And as discussed above, every State requires individuals to write pieces of information on voting papers before casting a ballot. *See supra* at 12-13. Moreover, Plaintiffs have defended the legality of Pennsylvania's signature requirement for absentee and mail-in ballots—*which appears in the same statutory phrase as the date requirement*. ECF No. 318 at 23; *see* 25 P.S. §§ 3146.6(a), 3150.16(a). If it is not a significant burden to sign the mail-ballot envelope, it cannot be a significant burden to require voters to write a date *on the same declaration*.

Precedent reinforces the date requirement's *de minimis* burden. Writing a date on a document is far less onerous than "the inconvenience of making the trip to the [Bureau of Motor Vehicles], gathering . . . required documents, and posing for a photograph" upheld as minimal and constitutional in *Crawford*. 553 U.S. at 198 (opinion of Stevens, J.). It is also substantially less

[1] To name a few, see 57 Pa. C.S. § 316 (short form certificates of notarial acts); 23 Pa. C.S. § 5331 (parenting plan); 73 P.S. § 201-7(j.1)(iii)(3)(ii) (emergency work authorization form); 42 Pa. C.S. § 8316.2(b) (childhood sexual abuse settlement form); 73 P.S. § 2186(c) (cancellation form for certain contracts); 42 Pa. C.S. § 6206 (unsworn declaration).

burdensome than "[h]aving to identify one's own polling place and then travel there to vote," which "does not exceed the usual burdens of voting." *Brnovich*, 594 U.S. at 678 (internal quotation marks omitted).

Plaintiffs therefore cannot prove, and have not proven, that the date requirement imposes a meaningful burden in any case—let alone that the date requirement "lacks a plainly legitimate sweep" in order to maintain their facial challenge. *Mazo*, 54 F.4th at 152 (cleaned up).

B. *The Date Requirement Easily Satisfies Rational-Basis Review.*

Because Pennsylvania's date requirement imposes, at most, only modest burdens on voters, the Court must uphold it because it is supported by the "State's important regulatory interests." *Timmons*, 520 U.S. at 358-59. The Court's review of the State's interests is "quite deferential" and courts cannot "require elaborate, empirical [justification] of the weightiness of . . . asserted justifications." *Mazo*, 54 F.4th at 153 (cleaned up).

As a majority of the Pennsylvania Supreme Court has already held, the date requirement serves several weighty interests and an "unquestionable purpose." *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); *see also id.* at 1087 (opinion of Justice Wecht) (noting that "colorable arguments … suggest [the date requirement's] importance"). *First*, the date requirement "provides proof of when [an] 'elector actually executed [a] ballot in full.'" *Id.* at 1090 (opinion of Dougherty, J.). Such information facilitates the "orderly administration" of elections and is undoubtedly a legitimate state interest. *Crawford*, 553 U.S. at 196 (opinion of Stevens, J.). Admittedly, Pennsylvania election officials are required to timestamp a ballot upon receiving it, and they rely on that date when entering information into Pennsylvania's Statewide Uniform Registry of Electors ("SURE") system. *See Pa. State Conf. of NAACP v. Schmidt*, 2023

WL 8091601, at *21 (W.D. Pa. Nov. 21, 2023), *rev'd*, 97 F.4th 120. And there is every reason to think that *ordinarily* happens. *See id.* But the handwritten date serves as a useful backstop, and it would become quite important if a county failed to timestamp a ballot upon receiving it or if Pennsylvania's SURE system malfunctioned—a possibility Judge Matey has highlighted. *See Migliori v. Cohen*, 36 F.4th 153, 165 (2022) (Matey, J., concurring in judgment), *vacated Ritter v. Migliori*, 143 S. Ct. 297 (2022), *and majority holding disavowed*, *Pa. State Conf. of NAACP*, 97 F.4th at 128.

Second, the date requirement serves the State's interest in solemnity—*i.e.*, in ensuring that voters "contemplate their choices" and "reach considered decisions about their government and laws." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 15 (2018). Signature-and-date requirements serve a "cautionary function" by "impressing the parties with the significance of their acts and their resultant obligations." *Davis v. G N Mortg. Corp.*, 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003). Such formalities "guard[] against ill-considered action," *Thomas A. Armbruster, Inc. v. Barron*, 491 A.2d 882, 883-84 (Pa. Super. Ct. 1985), and the absence of formalities "prevent[s] … parties from exercising the caution demanded by a situation in which each ha[s] significant rights at stake," *Thatcher's Drug Store v. Consol. Supermarkets*, 636 A.2d 156, 161 (Pa. 1994). Traditional signing and dating requirements aid persons "to appreciate the seriousness of their actions," *id.*, and for that reason are required in a range of instruments, including "wills" and "transfer[s] of real property," *State v. Williams*, 565 N.E.2d 563, 565 (Ohio 1991).

Pennsylvania can surely require its citizens to exercise the same caution when engaging in the solemn civic exercise of voting. "Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation." *Minn. Voters All.*, 585 U.S. at 15. If States can require the formalities of signing and dating for wills and property transactions, they

most certainly can do the same for voting.

The Fifth Circuit recently recognized this point when it upheld Texas's wet signature requirement for voter registration forms. *Vote.Org v. Callanen*, 89 F.4th 459, 467 (5th Cir. 2023). The law at issue made voter registration more inconvenient because it required an applicant to submit a voter registration form with a wet signature rather than a digital one. *Id.* at 467-68. The Fifth Circuit upheld the challenged law, relying in part on the fact that an "original signature to a voter registration form carries 'solemn weight.'" *Id.* at 489.

Third, the date requirement advances the State's interests in "deterring 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 Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *In re Canvass*, 241 A.3d at 1091 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). Of course, "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 594 U.S. at 686. And here, the date requirement's advancement of the interest in preventing fraud is actual, not hypothetical: in 2022, the date requirement was used to detect voter fraud committed by a deceased individual's daughter in *Commonwealth v. Mihaliak*, No. CR-126-22 (June 3, 2022). *See* ECF No. 304, SOF ¶¶ 45-50. In fact, because current Pennsylvania Supreme Court precedent precludes county boards of elections from comparing the signature on the ballot envelope with one in the official record, *see In Re: Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 595 (Pa. 2020), 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* ECF No. 304, SOF ¶¶ 45-50. The date requirement clearly serves—at the very least—the interest of detecting election fraud.

Plaintiffs have previously attempted to explain away the *Mihaliak* case, insisting that the ballot would not have been counted even without the date requirement. ECF No. 288 at 24. But election officials not counting the ballot is not the only consequence of third-party ballot fraud; such fraud is also criminally punishable. *See, e.g.*, 25 P.S. § 3527; Pa. Crimes Code § 4101. Plaintiffs 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* ECF No. 304, SOF ¶¶ 45-50; ECF No. 282 at 19-20. 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 "deterring and detecting voter fraud." *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.).

C. *Plaintiffs' Likely Arguments Are Wrong.*

Plaintiffs are likely to advance several contrary arguments, but all are erroneous. *First*, Plaintiffs will likely exaggerate the date requirement's burdens, ECF No. 288 at 19, but the record does not support such claims. The only individual identified by Plaintiffs in their Amended Complaint is Bette Eakin. *See* ECF No. 304, SOF ¶¶ 1-2. But Ms. Eakin was able to vote in the November 2022 election with her husband's assistance, *see id.* ¶ 2, and there is no reason to think she will be unable to vote in the future.

Plaintiffs have also proffered the testimony of a putative expert witness, Dr. Hopkins. *See id.* ¶¶ 116-140. But Dr. Hopkins admitted that he did not measure or analyze the cost to any voter of complying with the date requirement. *See id.* ¶¶ 118-121, 127. He therefore offered no probative evidence on the question whether the date requirement imposes a "burden" on voters for purposes of the *Anderson/Burdick* framework. *See Crawford*, 553 U.S. at 198 (opinion of Stevens,

J.) (burden on voters is the cost of complying with the challenged rule, such as "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph" to comply with a photo-ID requirement).

Furthermore, Plaintiffs will likely highlight 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, but that 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, 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. ECF No. 288 at 18. 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, particularly when Pennsylvania allows all voters to vote in person without complying with the date requirement.

In any event, 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* ECF No. 304, SOF ¶ 139. A requirement that over 99% of mail voters complied with cannot be unconstitutionally burdensome.

Moreover, the 10,657 figure 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 for in-person voting against an *Anderson/Burdick* challenge—and did so even though Indiana did not allow the majority of voters to vote by any other method. 553 U.S. at 202 n.20 (opinion of Stevens, J.). And considering Plaintiffs' claims that they are investing substantial resources to

educate voters on how to write the date on the carrier envelope, ECF No. 289, ¶¶ 100, 111, 122, there is good reason to think that the rejection rate will only drop going forward.

Second, unable to reasonably claim the date requirement burdens all voters, Plaintiffs will likely argue that the date requirement disproportionately affects "older, Black, and Hispanic voters." ECF No. 304, SOF ¶¶ 121-125. Precedent forecloses this argument. Courts cannot engage in subgroup analysis under the *Anderson-Burdick* framework. *See, e.g.*, *Crawford*, 553 U.S. at 199-200 (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring in judgment); *Burdick*, 504 U.S. at 436-37; *Richardson*, 978 F.3d at 235-36 (finding error where district court did not analyze burden with respect to "voters as a whole"); *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 631 ("Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst."). Unsurprisingly, a federal court recently rejected a near-identical attempt to import subgroup analysis into the *Anderson-Burdick* framework. *See Ne. Ohio Coal. for the Homeless v. Larose*, 2024 WL 83036, at *7 (N.D. Ohio Jan. 8, 2024). Indeed, any attempt to shoehorn a challenge based upon racial or ethnic subgroups such as African-American or Hispanic voters into the *Anderson/Burdick* framework is particularly problematic because it would require the Court to circumvent the rigorous requirements for proving racial discrimination enshrined in the Fourteenth Amendment. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 551 (3d Cir. 2011). Plaintiffs cannot satisfy those requirements because they do *not* claim that the date requirement—which was reaffirmed in the bipartisan Act 77 by both Republicans and Democrats—was enacted with racially discriminatory intent, or that it has been applied in a discriminatory manner.

In any event, Plaintiffs have not provided through Dr. Hopkins or any other source any evidence to prove that any subgroup of voters experiences a heightened burden to comply with the

date requirement, much less an unconstitutional one. At most, Dr. Hopkins opines that "older, Black, and Hispanic voters" were "disproportionately likely" not to comply with the date requirement. ECF No. 304, SOF ¶¶ 121-122, 124-125. But that is evidence of the rate and attendant consequences of noncompliance, not the "burden" on voters of complying with the date requirement. *See Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). Even then, the effect Dr. Hopkins reports for "older" voters is that a 60-year-old voter is 0.2 percentage points more likely to fail to comply with the date requirement than a 20-year-old voter, ECF No. 304, SOF ¶ 138—a minor disparity hardly suggestive of anything more than the "usual burdens of voting," *see Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *see also id.* at 197-98 (burdens arising from "life's vagaries" not cognizable). Indeed, the Supreme Court recently warned against attributing significance to the exact same statistical disparity identified by Dr. Hopkins: 0.2%. *See Brnovich*, 594 U.S. at 680.

Dr. Hopkins, moreover, offers no evidence at all regarding any "Black" or "Hispanic" voter for the simple reason that he *never* determined the race or ethnicity of any voter. *See* ECF No. 304, SOF ¶ 126. Rather, he performed regression analyses regarding the expected rate of noncompliance with the date requirement in *counties* or *census block groups* with certain demographic characteristics. *See id.* ¶¶ 129, 136. In particular, Dr. Hopkins attempted to analyze how the rate of noncompliance would change in a hypothetical county or block group that experienced a change in population from either 0% to 100% Black or 0% to 100% Hispanic. *See id.* ¶ 136. But even Dr. Hopkins conceded that it is not possible from those analyses to determine whether a Black or Hispanic voter is more likely not to comply with the date requirement than a white voter. *See id.* ¶ 137. Plaintiffs have failed to show that the date requirement imposes an unconstitutional burden on any voter. Their *Anderson/Burdick* claim therefore fails.

Third, Plaintiffs will likely minimize Pennsylvania's interests in the maintenance of the General Assembly's date requirement. ECF No. 288 at 22. That argument contradicts the Pennsylvania Supreme Court, which has concluded that the date requirement serves "unquestionable purpose[s]." *Ball v. Chapman*, 289 A.3d 1, 10 (Pa. 2023); *see also In re Canvass*, 241 A.3d at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment). It also requires ignoring the recent *Mihaliak* case in which the date requirement was used to help detect and prosecute an election fraudster. *See supra* at 17-18. And, most importantly, Plaintiffs' argument requires this Court to second-guess the General Assembly's judgment that the date requirement is important. But as the Third Circuit recently explained, judicial "review of [a State's] interests" under the *Anderson-Burdick* test "is quite deferential." *Mazo*, 54 F.4th at 153 (cleaned up). Similarly, the Fifth Circuit recently reaffirmed that federal courts owe "considerable deference" to States' "election procedures so long as they do not constitute invidious discrimination." *Vote.Org*, 89 F.4th at 481.

Plaintiffs do not contend that the General Assembly enacted the date requirement with discriminatory intent, or that it has been applied in a discriminatory manner. Therefore, rather than second-guessing the Pennsylvania Supreme Court and the General Assembly, the Court should uphold the date requirement. *See Mazo*, 54 F.4th at 153; *Vote.Org*, 89 F.4th at 481.

Finally, Plaintiffs likely will point to the Third Circuit's statement that the "date requirement . . . serves little apparent purpose." *Pa. State Conf. of NAACP*, 97 F.4th at 125. But this statement is merely passing dictum, as it was irrelevant to the Third Circuit's holding. *See, e.g.*, *In re Nat'l Football League Players Concussion Inj. Litig.*, 775 F.3d 570, 583 n.18 (3d Cir. 2014). Indeed, it is apparent the Third Circuit did not give "full and careful consideration" to this point. *Id.* After all, it did not address the State's interests in documenting the date the voter

completed the ballot as part of trustworthy election administration or as a back-up safeguard where a county fails to scan the ballot or the SURE system malfunctions. *See Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment). It also did not address the State's interest in solemnity. *See supra* at 16-17. And it did not address the State's interest in deterring and detecting fraud or even mention the *Mihaliak* case. *See supra* at 17-18. That the date requirement may not be used for the "purpose" of "confirm[ing] timely receipt of the ballot or … determin[ing] when the voter completed it" for the mine-run of mail ballots, *Pa. State Conf. of NAACP*, 97 F.4th at 125, in no way undermines that the date requirement advances important State interests that this Court must defer to and uphold, *see supra* at 22.

CONCLUSION

The Court should grant summary judgment dismissing Plaintiffs' right-to-vote claim.

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Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher
PA I.D. #37950
THE GALLAGHER FIRM, LLC
436 Seventh Avenue, 31st Floor
Pittsburgh, PA 15219
Phone: (412) 308-5512
kag@gallagherlawllc.com

John M. Gore (*pro hac vice*)
E. Stewart Crosland (*pro hac vice*)
Louis J. Capozzi III (*pro hac vice*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 879-3939
jmgore@jonesday.com
scrosland@jonesday.com
lcapozzi@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