

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

BETTY EAKIN, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 1:22-cv-00340-SPB
	:	
ADAMS COUNTY BOARD OF	:	
ELECTIONS, <i>et al.</i> ,	:	
	:	ELECTRONICALLY FILED
Defendants.	:	

**BERKS COUNTY BOARD OF ELECTIONS' BRIEF IN
OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendant Berks County Board of Elections (“Berks County”) opposes Plaintiffs’ motion for summary judgment (doc. 287) and submits this supplemental brief in opposition to Plaintiffs’ motion.¹ For the reasons stated previously and the additional reasons below, the Court should deny Plaintiffs’ motion for summary judgment. Instead, the Court should grant summary judgment in favor of Berks County and against Plaintiffs and dismiss with prejudice all of Plaintiffs’ claims against Berks County.

¹ Berks County previously joined in and incorporated by reference the prior summary judgment motion and supporting brief and concise statement of material facts filed by Defendant Lancaster County Board of Elections (“Lancaster County”) (doc. 280, 284, 300). Berks County and Lancaster County previously filed responses and briefs in opposition to Plaintiffs’ motion for summary judgment (doc. 306, 311, 323, 324, 358). All of the facts and arguments in these prior filings relating to Plaintiffs’ claims against Berks County are reasserted and incorporated by reference herein to the extent they are still applicable. In addition to joining Lancaster County’s arguments in favor of dismissing Plaintiffs’ claims in this action, Plaintiffs also join and incorporate by reference any additional argument asserted by other defendant county boards of elections or Intervenor-Defendants in favor of dismissing Plaintiffs’ claims in this action to the extent they apply to Berks County.

I. Berks County incorporates its June 5, 2024 supplemental brief in support of Berks County's own summary judgment motion (doc. 379).

In its supplemental brief in support of its own summary judgment motion (doc. 379), Berks County makes four arguments: (1) the individual and organizational Plaintiffs do not have standing to sue Berks County, *see* doc. 379 at 2-3 (argument § II); (2) Plaintiffs' Materiality Provision claim must be dismissed based on the Third Circuit's decision in Case 339, *id.* at 3-4 (argument § III);² (3) Plaintiffs failed to comply with the requirement Fed. R. Civ. P. 5.1, *id.* at 4-6 (argument § IV);³ and (4) mandatory application of the Date Requirement does not violate the United States Constitution because, if it implicates a fundamental right at all,⁴ (a) it imposes no more than the usual burdens of voting and is amply supported by Pennsylvania's legitimate interests regarding its elections, *id.* at 8-14 (argument § V(A)), and (b) Plaintiffs cannot meet their burden of showing the alleged constitutional violations resulted from Berks County's own customs, practices or policies as opposed to Berks County's application of state law, as adopted by the Legislature and interpreted by the Pennsylvania Supreme Court, *id.* at 14-15 (argument § V(B)). Berks County reasserts and incorporates by reference all of those arguments in opposition to Plaintiffs' summary judgment motion.

² Plaintiffs' second supplemental memorandum in support of their summary judgment motion (doc. 380) does not argue the Third Circuit's decision in Case 339 does not apply to require dismissal of their Materiality Provision claim (Count I) in this case.

³ Plaintiffs have attempted to cure this failure by filing and serving notice to the Pennsylvania Attorney General of its constitutional challenge to the Date Requirement (doc. 382), although they claim doing so is not necessary. The Court properly filed a certification of Plaintiffs' constitutional challenge pursuant to 28 U.S.C. § 2403(b) and Fed. R. Civ. P. 5.1 (doc. 383) permitted the Pennsylvania Attorney General to intervene to present evidence and argument on the question of constitutionality.

⁴ As explained in Berks County's supplemental brief in support of its own summary judgment motion, voting by absentee or mail-in ballot is not a fundamental right. *See* doc. 379, at 6-7 (argument § V).

Nothing in Plaintiffs’ second supplemental memorandum in support of their summary judgment motion (doc. 380) refutes Berks County’s arguments supporting summary judgment in favor of Berks County. Berks County responds specifically to one point in Plaintiffs’ second supplemental memorandum in support of their motion.

Plaintiffs twice quote—once in their introduction and once at the end of their argument—a statement in the Third Circuit’s decision reversing this Court’s November 21, 2023 summary judgment order in related case *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, W.D. Pa. docket number 1:22-cv-00339 (“Case 339”) that the Date Requirement “serves little apparent purpose.” See doc. 380 at 1, 14 (quoting *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120, 125 (3d Cir. 2024)). That statement in the introductory paragraph of the Third Circuit’s opinion, taken in context, simply means the Date Requirement has little to do with determining the eligibility of absentee or mail-in voters’ right to vote. It does not mean the Date Requirement serves no legitimate purpose; to the contrary, the Pennsylvania Supreme Court concluded the Date Requirement serve a legitimate Commonwealth purpose. See *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election* (“*In re 2020 Canvass*”), 241 A.3d 1058, 1090 (Pa. 2020) (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy, concurring and dissenting) (“The Date Requirement serves several weighty interests and an “unquestionable purpose,” referring to now-Justice Brobson’s Commonwealth Court opinion); see also *id.* at 1087 (Opinion of Justice Wecht, concurring and dissenting) (“colorable arguments . . . suggest [the Date Requirement’s] importance”).

One of those legitimate Commonwealth interests is deterring and detecting voter fraud. *In re 2020 Canvass*, 241 A.3d at 1090-1091 (Opinion of Justice Dougherty, Chief Justice Saylor,

and Justice Mundy). The Date Requirement actually has advanced the Commonwealth's interest in preventing fraud. The Date Requirement led to the detection and successful prosecution of a Lancaster County woman's forgery and fraudulent submission of her deceased mother's mail-in ballot, leading to a guilty plea, two years of probation, and a four-year forfeiture of voting rights. *See Commonwealth v. Mihaliak*, CP-36-CR-0003315-2022 (Lancaster Cty. Jan. 20, 2022).

Plaintiffs attempt to minimize this concrete example that, by itself, shows the Date Requirement effectively serves—at a minimum—the Commonwealth's legitimate interest in preventing election fraud. Plaintiffs argue the Mihaliak investigation would have occurred anyway. Maybe it would have; maybe not. The ballot likely would not have been counted. But it was the voter's declaration **dated after the voter's death** that demonstrated unequivocally to authorities there was an attempt to submit a fraudulent vote, as opposed to the county's mere receipt after the voter passed away of an otherwise properly completed and mailed ballot.

II. Conclusion.

For the reasons set forth above and elsewhere, the Court should deny Plaintiffs' motion for summary judgment and instead grant summary judgment in favor of Berks County and against Plaintiffs and dismiss all of Plaintiffs' claims against Berks County.

Respectfully submitted,

Dated: June 21, 2024

SMITH BUKOWSKI, LLC

By: /s/ Jeffrey D. Bukowski
 Jeffrey D. Bukowski, Esquire
 PA Attorney I.D. No. 76102
JBukowski@SmithBukowski.com
 1050 Spring Street, Suite 1
 Wyomissing, PA 19610
 Telephone: (610) 685-1600
 Facsimile: (610) 685-1300

Attorneys for Berks County Board of Elections