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.	)	

INTERVENOR-DEFENDANTS' OPPOSITION TO
PLAINTIFFS' SUPPLEMENTAL 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)). 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'" or disenfranchised "when his ballot is not counted." *Id.* at 133. "[T]he failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of the right." *Id.* at 135 (quoting *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissental)).

The Third Circuit's decision, *a fortiori*, forecloses Plaintiffs' right-to-vote claim and their overheated allegation that the date requirement has "disenfranchised" voters who fail to comply with it, *see* ECF No. 380 at 1—a reality Plaintiffs' brief entirely ignores. Even if the Third Circuit's decision were not dispositive, Plaintiffs' claim is doomed for at least three other reasons, as Intervenor-Defendants have already explained. *See* ECF No. 378. *First,* because Pennsylvanians can vote in person without complying with the date requirement, applying the date requirement to mail voting cannot violate the Constitution's right to vote. *See id.* at 4-8. *Second*, the date requirement is not remotely severe; it is at most a "usual burden[] of voting," which cannot implicate the constitutional right to vote. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.); ECF No. 378 at 8-13. *Third*, even if subjected to interest-balancing under the *Anderson-Burdick* framework, the date requirement easily passes muster

because it helps to detect fraud, promotes solemnity in voting, and serves as a useful backstop in election administration. *See id.* at 15-18.

Plaintiffs offer several contrary arguments, but all fail. The Court should deny Plaintiffs' motion for summary judgment, grant Intervenor-Defendants' motion for summary judgment, and bring this case to an end.

ARGUMENT

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

As Intervenor-Defendants have already explained, Plaintiffs' right-to-vote claim fails right out of the gate because they necessarily assert a constitutional right to vote by mail—a right which the Supreme Court has held does not exist. *See* ECF No. 378 at 4-8. Indeed, because Pennsylvania does not extend the date requirement to in-person voting, the requirement cannot violate the right to vote. *See id.*

Plaintiffs try—and fail—to distinguish the Supreme Court's decision in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). Plaintiffs insist that *McDonald* merely "rested on failure of proof." ECF No. 380 at 2. Even if that were right, the point does not help Plaintiffs. As a later Supreme Court case interpreting *McDonald* pointed out, the *McDonald* plaintiffs' failure of proof—which is the same failure Plaintiffs feature here—was their failure to prove that they were "in fact absolutely prohibited from voting by the State." *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (quoting *McDonald*, 394 U.S. at 808 n.7). *That* is the demanding burden Plaintiffs asserting a violation of the constitutional right to vote must satisfy. *See McDonald*, 394 U.S. at 808; *Crawford*, 553 U.S. at 201 (opinion of Stevens, J.); Order Granting Stay Pending Appeal, *United States v. Paxton*, No. 23-50885, ECF No. 80-1 (5th Cir. Dec. 15, 2023); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020). Here,

"[Pennsylvania] permits the plaintiffs to vote in person; that is the exact opposite of 'absolutely prohibiting' them from doing so." *Id.* at 404 (quoting *McDonald*, 394 U.S. at 808 n.7). Plaintiffs' right-to-vote claim therefore fails as a matter of law.

Plaintiffs next assert that *McDonald* governs only the question of whether a State must make mail voting available *at all*. ECF No. 380 at 3. If a State *accommodates* voters by offering mail voting, Plaintiffs reason, any restrictions on that privilege "must not [be applied] in a discriminatory manner." ECF No. 380 at 3 (quoting *McDonald*, 394 U.S. at 807). Of course, Intervenor-Defendants *agree* with Plaintiffs that a State must administer mail voting in a "[non-]discriminatory manner." *Id.*; *accord Pa. State Conf. of NAACP*, 97 F.4th at 135. But Plaintiffs have not alleged—let alone proved—that the General Assembly's date requirement was enacted with discriminatory intent, or that it has been applied in a discriminatory manner. And *McDonald* nowhere suggests that regulations of a mail-voting privilege must be carefully scrutinized under the *Anderson-Burdick* test.

Indeed, the Supreme Court rejected that argument in *Crawford*. There, the Supreme Court concluded that the identification requirement for in-person voting did not violate 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 (opinion of Stevens, J.); *cf id.* at 212 n.4 (Souter, J., dissenting) (agreeing with Plaintiffs' current view). *Crawford* thus confirms that a State violates the right to vote only when it "absolutely prohibit[s]" an individual from voting, not when it subjects one method of voting to a regulation inapplicable to other methods of voting. *McDonald*, 409 U.S. at 808 n.7; *see also* ECF No. 378 at 5-6.

One line of cases Plaintiffs cite as support for their position—*Fish v. Schwab* from the Tenth Circuit and *Fish v. Kobach* from the District of Kansas—actually cuts the other way. *See*

Fish v. Schwab, 957 F.3d 1105 (10th Cir. 2020) (cited at ECF No. 380 at 5, 7, 8, 11); *Fish v. Kobach*, 309 F. Supp. 3d 1048 (D. Kan. 2018) (cited at ECF No. 380 at 13). The Kansas law challenged in those cases was a voter-registration rule, not a ballot-casting rule. *See Schwab*, 957 F.3d at 1111-12. Because registration was a mandatory prerequisite to voting under *every* available method Kansas offered, *see, e.g.*, *id.* at 1129 (Kansas provided "no backup option . . . to cast votes"), application of the rule "absolutely prohibited" voters who failed to comply "from voting," *McDonald*, 394 U.S. at 808 n.7. The rule therefore triggered *Anderson-Burdick* scrutiny. *See, e.g.*, *Schwab*, 957 F.3d at 1121-23 ("Both parties agree that this *Anderson-Burdick* balancing test applies here.").

Against *McDonald*, *Crawford*, *Fish*, and multiple Fifth Circuit stay opinions, Plaintiffs offer *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (11th Cir. 2019). *See* ECF No. 380 at 3. *Democratic Executive Committee* was a "motion panel decision"—just like a decision Intervenor-Defendants cite but Plaintiffs criticize on that basis, *see id.* (discussing *Tully v. Okeson*, 977 F.3d 608 (7th Cir. 2020))—and the Eleventh Circuit has subsequently explained that it has no "effect outside that case" due to its "necessarily tentative and preliminary nature" and the fact that the controversy became moot before the Eleventh Circuit could conduct plenary review of the merits. *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020); *see also Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) (declining to treat opinion Plaintiffs cite here as "binding precedent"). And, in all events, the non-binding, non-precedential *Democratic Executive Committee* decision cited *McDonald* precisely zero times, and did not address the argument that the constitutional right to vote cannot be violated by a regulation of one method of voting where another method remains available. *See* 950 F.3d at 792-95.

The district court opinion Plaintiffs cite, *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018) (cited at ECF No. 380 at 3), is likewise inapposite. That opinion also cited *McDonald* zero times and was not even a right-to-vote case. *See* 335 F. Supp. 3d at 214-222. Instead, it involved a procedural due process challenge to a State's signature-matching requirement. *See id.* It therefore offers no support to Plaintiffs here.

Mail voting is a privilege Pennsylvania has chosen to provide—not a constitutional right, as Plaintiffs appear to begrudgingly concede. ECF No. 380 at 2-3 (acknowledging *McDonald* stands for at least this point). The Supreme Court has made clear that, at least absent evidence of discrimination, the constitutional right to vote is not violated where a State regulates that privilege while leaving other avenues to vote available. *McDonald*, 394 U.S. at 807; *Crawford*, 553 U.S. at 201 (opinion of Stevens, J.). Accordingly, Pennsylvania's regulation of mail voting through the date requirement does not violate the constitutional right to vote. The Court should deny Plaintiffs' motion for summary judgment and grant Intervenor-Defendants' motion.

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

Even if *McDonald* did not control, both the Supreme Court and the Third Circuit have made clear that the "usual burdens of voting" cannot violate the right to vote. ECF No. 378 at 8-13. As the Third Circuit explained, "[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. *Pa. State Conf. of NAACP*, 97 F.4th at 133.

Plaintiffs do not grapple with this part of the Third Circuit's decision at all. Instead, they rush to make policy arguments under what they see as open-ended judicial balancing under the

Anderson-Burdick test. *See* ECF No. 380 at 4-14. But this Court should not apply *any* balancing test to evaluate a mere "usual burden[] of voting," *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.), for the reasons Intervenor-Defendants have explained, *see* ECF No. 378 at 8-13. Doing so here—particularly when Plaintiffs have ample other options to vote and the date requirement has been upheld by the Pennsylvania Supreme Court and the Third Circuit—would unduly aggrandize federal judicial power and allow "federal courts to rewrite state electoral codes." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005).

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

Even if this Court subjects the date requirement to scrutiny under the *Anderson-Burdick* test, the date requirement easily withstands it. When dealing with (at most) minor burdens on voting like the date requirement, this Court must apply "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). Intervenor-Defendants have already explained how the date requirement easily survives rational basis scrutiny. *See* ECF No. 378 at 13-23.

A. The Date Requirement Imposes, At Most, Minor Burdens on Voting.

As Intervenor-Defendants have explained, the date requirement imposes, at most, a miniscule burden on voting. *Id.* at 12-15. Individuals must sign and date documents *all the time*. Writing pieces of information on pieces of paper is a universal requirement for voting. Writing a date on a mail ballot is trivial compared to the burdens the Supreme Court has already deemed minor under the *Anderson-Burdick* test. *See Crawford*, 553 U.S. at 198 (opinion of Stevens, J.) (discussing "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering . . . required documents, and posing for a photograph"); *Brnovich v. DNC*, 594 U.S. 647, 678 (2021) (discussing "[h]aving to identify one's own polling place and then travel there to vote").

Plaintiffs offer several arguments in an attempt to play up the date requirement's burdens, but each fails. *First*, Plaintiffs assert that "older, Black, and Hispanic voters" were disparately impacted by the date requirement—relying on an analysis by Dr. Hopkins, their putative expert. ECF No. 380 at 12.

Plaintiffs, however, have not come close to proving disparate impact. 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.

In any event, disparate impact on "subgroups" like those identified by Plaintiffs, ECF No. 380 at 12, is *irrelevant* to constitutional right-to-vote claims—as multiple courts have recognized. *Crawford*, 553 U.S. at 199-200 (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring in judgment); *Burdick v. Takushi*, 504 U.S. 428, 436-37 (1992); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 235-36 (5th Cir. 2020) (finding error where district court did not analyze burden with respect to "voters as a whole"); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016) ("Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst."); *Ne. Ohio Coal. for the Homeless v. Larose*, 2024 WL 83036, at *7 (N.D. Ohio Jan. 8, 2024); *see also* ECF No. 378 at 13-14. After all, allowing plaintiffs to prove right-to-vote claims through a showing of disparate impact on a subgroup would allow them to circumvent the strict legal standards applicable to claims under the Equal Protection Clause. *See Crawford,* 553 U.S. at 207-08 (Scalia, J., concurring in judgment); *see also 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); ECF No. 378 at 13-14.

While ignoring Intervenor-Defendants' considerable authority on this point, Plaintiffs can muster only a single district court citation. ECF. No. 380 at 12 (citing *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018)). That lone opinion misread *Crawford*, relied on a now-vacated district court opinion from Indiana, and still recognized that "mere inconvenience[s]" like "having to travel to vote" do not violate the constitutional right to vote. *See League of Women Voters of Fla.*, 314 F. Supp. 3d at 1216-17. As for Plaintiffs' out-of-

context quote from *Anderson v. Celebrezze*, the Supreme Court there was discussing ballot-access rules that on their face discriminated against minor political parties, which implicates First Amendment considerations that a neutral ballot-casting rule like the date requirement does not. *See* 460 U.S. 780, 792-94 (1983). By contrast, *Crawford* clarified that subgroup analysis is inappropriate when discussing *generally-applicable* voting regulations that do not facially discriminate against categories of voters. 553 U.S. at 199-200 (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring in judgment).

Second, Plaintiffs claim that evidence of the number of voters who have *failed to comply* with a voting regulation establishes the regulation's *burden* on voters. ECF No. 380 at 13. Intervenor-Defendants have already explained why this is legal error. ECF No. 378 at 18-19. And even if it were not, Plaintiffs misinterpret the record evidence of the ballot rejection rate, which underscores that the date requirement is *not* burdensome. Plaintiffs note that "10,657" ballots were rejected in the 2022 general election due to noncompliance with the date requirement, ECF No. 380 at 11, a number that pales in comparison to the number of voters who lacked compliant identification in *Crawford*, *see* ECF No. 378 at 19. Moreover, that number is only 0.93% percent of all absentee and mail-in ballots returned statewide in the 2022 general elections—a *lower* noncompliance rate than the secrecy-envelope requirement. *See id*. A requirement that over 99% of mail voters complied with cannot be unconstitutionally burdensome. *See id.*; *compare Schwab*, 957 F.3d at 1128 (challenged rule resulted in 12.4% of all voter registrations being rejected).

Third, Plaintiffs claim that writing a date on a piece of paper is too difficult because voters must "replicat[e] the precise date format that their specific county board will accept." ECF No. 280 at 13. But Plaintiffs do not—and cannot—dispute that *every county* will accept a date written in the standard American format. *See id.* And Plaintiffs have not presented evidence that any

Pennsylvania voter does not know how to write a date in that format. *See id.*

Fourth, Plaintiffs acknowledge that traveling to a county board office to cure a failure to comply with the date requirement "may not be severe." *See id.* at 14. In fact, *Crawford* said this burden is only minor. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). But Plaintiffs believe that even this burden is decisive because the date requirement cannot survive rational basis review. ECF No. 380 at 14. That is wrong. *See* ECF No. 378 at 15-18.

B. The Date Requirement is Amply Supported by Legitimate State Interests.

Plaintiffs also attempt to minimize the legitimate state interests supporting the date requirement. They ignore the Third Circuit's instruction that consideration of these interests must be "quite deferential." *Mazo*, 54 F.4th at 153. And they ignore that, at most, "rational basis review" applies. *Mays*, 951 F.3d at 784. Instead, they invite this Court to second-guess the General Assembly and Pennsylvania Supreme Court's conclusions that the date requirement serves 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"). The Court should decline that invitation.

Moreover, even on their own terms, Plaintiffs' quibbles with the state interests supporting the date requirement make little sense.

First, Plaintiffs argue that promoting solemnity in voting is not a legitimate state interest. ECF No. 380 at 6-8. They entirely ignore the Fifth Circuit's recent contrary conclusion in *Vote.Org. v. Callanen*, 89 F.4th 459, 467 (5th Cir. 2023). There, the Fifth Circuit upheld a voter-registration law requiring a wet signature, relying in part on the fact that an "original signature to a voter registration form carries 'solemn weight.'" *Id.* at 489. Commonplace sign-and-date

requirements serve the same purpose, which is why Pennsylvania has mandated them in many contexts. ECF No. 378 at 14, 16-17.

Second, Plaintiffs ignore the date requirement's important role as a backstop in election administration. *See 2020 Gen. Election*, 241 A.3d at 1090 (opinion of Dougherty, J.). They do not grapple with the fact, for example, that the handwritten date could prove important if county boards fail to timestamp ballots upon receiving them or if Pennsylvania's SURE system malfunctions. *Migliori v. Cohen*, 36 F.4th 153, 165 (2022) (Matey, J., concurring in judgment), *vacated by Ritter v. Migliori*, 143 S. Ct. 297 (2022), *and majority holding disavowed*, *Pa. State Conf. of NAACP*, 97 F.4th at 128.

Third, Plaintiffs continue to ignore the record and to assert the date requirement plays no role in detecting fraud. ECF No. 380 at 9-10. They brazenly assert that "noncompliance with the date requirement is not a reason to suspect fraud." *Id.* at 9. But it could be. That is precisely what happened in the *Mihaliak* case, where a handwritten date was used in a prosecution against a woman who had voted her deceased mother's ballot after she died. *See* ECF No. 378 at 17-18.

Struggling to grapple with that point, Plaintiffs employ misdirection. They assert that the fraudulent ballot in *Mihaliak* would not have been *counted* even absent the handwritten date. ECF No. 380 at 9-10. To be sure, the SURE system flagged the ballot because the elector was deceased. *Id.* 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; ECF No. 378 at 18. That is precisely what happened in *Mihaliak*, where the fraudster pleaded guilty, was sentenced to probation, and was barred from voting for four years. *See Commonwealth v. Mihaliak*, CP-36-CR-0003315-2022 (Lancaster Cnty. Jan. 20, 2022).

Moreover, if the handwritten date had been missing or had not post-dated the decedent's

death, law enforcement may not have investigated further and may have been unable to prove the ballot was fraudulently cast. In that scenario, there would have been nothing to suggest that the ballot was cast by anyone but the deceased elector prior to her death. The handwritten date ruled out that possibility, and that is why prosecutors used it to prove the ballot was fraudulent. *See* ECF No. 304, SOF ¶¶ 45-50; ECF No. 282 at 19-20.

The Supreme Court has made clear that States do not need to point to actual evidence of election fraud within their borders in order to adopt rules designed to deter and detect it. *Brnovich*, 594 U.S. at 686. Yet here, where the date requirement has *actually been used* to detect and prosecute fraud, the State's interest in "deterring and detecting voter fraud" is unquestionably advanced. *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.). That that date requirement advances that interest alone is sufficient to uphold it. *See id.* And if more were somehow needed, the date requirement's fraud deterrence and detection function also serves the related vital State interest of preserving and promoting voter "[c]onfidence in the integrity of our electoral process" that is so "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.").

CONCLUSION

The Court should deny Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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