

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

PENNSYLVANIA STATE	:	
CONFERENCE OF THE NAACP, <i>et al.</i> ,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	No. 1:22-cv-00339-SPB
v.	:	
	:	
AL SCHMIDT, <i>et al.</i> ,	:	
	:	
Defendants.	:	ELECTRONICALLY FILED
	:	

**BRIEF OF DEFENDANT BERKS COUNTY BOARD OF ELECTIONS IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT SEEKING
DISMISSAL WITH PREJUDICE OF CLAIMS ASSERTED IN
PLAINTIFFS’ SECOND AMENDED COMPLAINT**

Defendant Berks County Board of Elections (“Berks County”) has moved for summary judgment and requests dismissal with prejudice of Plaintiffs’ remaining claims in Counts II and III of Plaintiffs’ Second Amended Complaint (doc 413). As explained below, Plaintiffs’ claims against Berks County in Count II (Equal Protection claim) and Count III (First and Fourteenth Amendment Right-to-Vote Claim) should be dismissed because Plaintiffs lack standing to assert either of these claims against Berks County. Moreover, enforcing the Pennsylvania Election Code’s statutory requirement that voters not only sign but also write the correct date on the voter declaration on the outer envelope used to submit their absentee and mail-in ballots (the “Date Requirement”) does not violate either the Equal Protection Clause or the right to vote guaranteed by the First and Fourteenth Amendments to the United States Constitution.¹

¹ Berks County incorporates by reference the arguments in Intervenor-Defendants’ summary judgment motion and supporting brief (doc. 433 and 434), and the summary judgment motions and supporting briefs of the other defendant county boards of elections to the extent the arguments asserted therein support granting summary judgment for Berks County.

I. SUMMARY OF ARGUMENT

Plaintiffs' Equal Protection claim (Count II) and newly asserted right-to-vote claim (Count III) suffer from the following fatal flaws that warrant granting summary judgment in favor of Berks County and against Plaintiffs on Plaintiffs' remaining constitutional claims.

First, Plaintiffs lack standing to pursue both their Equal Protection and right-to-vote claims against Berks County. *See infra* Section III.

Second, Plaintiffs' Equal Protection claim fails because there is no evidence Berks County treats military and overseas absentee ballots differently from domestic absentee or mail-in ballots. *See infra* Section IV.

Third, the Third Circuit's decision in *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024), reversing this Court's order on Plaintiffs' Materiality Provision claim forecloses Plaintiffs' First and Fourteenth Amendment constitutional right-to-vote claim. The Third Circuit concluded that the challenged 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 133-35. That conclusion applies equally to Plaintiffs' newly asserted right-to-vote claim. *See infra* Section V.

Fourth, Berks County's enforcement of the Pennsylvania Election Code's Date Requirement does not violate Plaintiffs' right to vote guaranteed by the First and Fourteenth Amendments to the United States Constitution. *See infra* Section VI.

Accordingly, the Court should grant summary judgment in favor of Berks County and against Plaintiffs and finally put to rest the legality and constitutionality of the Pennsylvania Election Code's Date Requirement.

II. FACTUAL AND PROCEDURAL HISTORY.

On November 21, 2023, this Court entered an Order granting in part and denying in part Berks County's motion for summary judgment after concluding that none of the individual plaintiffs, and all but a few organizational plaintiffs have standing to assert their claims against Berks County. (Doc. 348 (Order) at 5.) There is a discrepancy between the Court's Order and its Opinion regarding plaintiff Make the Road Pennsylvania's standing to sue Berks County. The Court's Order dismissed for lack of standing the claims against Berks County asserted by all the plaintiffs except for the Pennsylvania State Conference of the NAACP ("NAACP") and The League of Women Voters of Pennsylvania ("League") (doc. 348 (Order) at 5); the Court's Opinion says that in addition to the NAACP and the League, Make the Road Pennsylvania ("MTRP") also has standing to pursue its claims against Berks County (doc 347 (Opinion) at 15-26 & n.12 (discussion), 33-34 (chart)). Berks County assumes the Court ruled that the NAACP, the League, and MTRP all have standing to assert their claims against Berks County. (Berks County will refer below to the NAACP, the League, and MTRP, collectively, as "Plaintiffs").

The Court granted declaratory judgment in favor of Plaintiffs on their claim that enforcing the challenged Date Requirement violates the Materiality Provision of the federal civil rights act, 52 U.S.C. §10101(a)(2)(B) (Amended Complaint Count I), but it did not reach the question of summary judgment on their Equal Protection claim (Amended Complaint Count II). (Order, doc. 348 at 4-5; Opinion, doc. 347 at 74-76. The Third Circuit reversed the Court's entry of summary judgment on Plaintiffs' Materiality Provision claim and remanded the case for further proceedings on Plaintiffs' remaining Equal Protection claim. (Doc. 384.) This Court ordered the parties to file supplemental summary judgment papers on Plaintiffs' remaining Equal Protection claim. (Doc. 385.)

On May 17, 2024, Plaintiffs moved for leave to file a Second Amended Complaint (doc. 387). After briefing and oral argument, on June 14, 2024, the Court granted Plaintiffs' motion (doc. 412), and Plaintiffs filed their Second Amended Complaint (doc. 413). The Court ordered the defendants to answer Plaintiffs' Second Amended Complaint, and further ordered the parties to file renewed summary judgment motions on Plaintiffs' remaining Equal Protection and First and Fourteenth Amendment right-to-vote claims (doc. 412).

On June 28, 2024, Berks County filed its Answer to Plaintiffs' Second Amended Complaint (doc. 422) and now moves for summary judgment on the remaining claims against it.

III. All the Plaintiffs lack standing to assert their remaining Equal Protection and First and Fourteenth Amendment right-to-vote claims against Berks County.

The Court previously concluded that none of the individual Plaintiffs have standing to assert their Equal Protection claim against Berks County because they have not pleaded, let alone provided evidence of any injury in fact stemming from an equal protection violation directly traceable to Berks County. (Doc. 347 at 12-13.) Indeed, the individual Plaintiffs' declarations demonstrate that none of them is registered to vote in Berks County, and none of them has voted in Berks County. (Doc. 347 at 10-12.) For the same reasons, none of the individual Plaintiffs has standing to assert the new First and Fourteenth Amendment right-to-vote claim against Berks County. Thus, Court must grant summary judgment for Berks County and dismiss with prejudice the individual Plaintiffs' remaining Equal Protection claim (Count II) and their new right-to-vote claim (Count III) against Berks County.

The Court also previously concluded only three of the six organizational Plaintiffs—NAACP, the League, and MTRP—had standing direct organizational standing to assert their Material Provision claims against Berks County. (Doc. 347 at 16-17, 33-34.) The Court also

previously concluded that none of the organizational Plaintiffs (including NAACP, the League, or MTRP) have standing to pursue their Equal Protection claims against Berks County or the other county boards of elections.² (Doc. 347 at 33-34 (chart).) For the same reason the Court concluded none of the organizational Plaintiffs have standing to pursue their Equal Protection claim (Count II) against Berks County, none of the organizational Plaintiffs have standing to pursue their right-to-vote claim (Count III) against Berks County.

To the extent the Court reconsiders or otherwise does not apply its Equal Protection claim standing conclusion to the organizational Plaintiffs' new right-to-vote claim (Count III), or if the Court believes it should apply to Plaintiffs' new right-to-vote claim the Court's prior organizational standing conclusion that NAACP, the League, and MTRP have standing to pursue their Materiality Provision claim against Berks County, doing so would be a mistake. The U.S. Supreme Court's June 13th decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 144 S. Ct. 1540 (2024) ("*FDA*"), fundamentally alters the Court's analysis of organizational standing. Applying *FDA*, the Court must conclude NAACP, League, and MTRP do not have organizational standing to assert their remaining Equal Protection and First and Fourteenth Amendment right-to-vote claims against Berks County.³

The Court's previous organizational injury-in-fact standing analysis relied on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), for the proposition that there is organizational standing "when an organization must divert resources to counteract the allegedly

² The Court concluded, however, that each of the organizational Plaintiffs has standing to pursue their Equal Protection claim (Count II) against the Secretary of the Commonwealth.

³ If Plaintiffs' Materiality Provision claims were still pending, the application of *FDA* to those claims would similarly require the Court to reverse its prior organizational standing conclusion regarding NAACP, League, and MTRP as to that claim also.

unlawful conduct.” (Doc. 347 at 14.) The Supreme Court’s recent *FDA* decision fundamentally changes that analysis and alters the outcome.

In *FDA*, the Supreme Court squarely addressed the organizational plaintiffs’ argument in that case that they had standing because the challenged FDA action “‘impaired’ their ‘ability to provide services and achieve their organizational missions’” and “‘forced’ the associations to ‘expend considerable time, energy, and resources’ drafting citizen petitions to FDA, as well as engaging in public advocacy and public education, all to the detriment of other spending priorities.” *FDA*, 602 U.S. at 394, 144 S. Ct. at 1563. In response to the organizational plaintiffs’ assertion in *FDA*, the Supreme Court firmly stated, “an organization that has not suffered a concrete injury caused by a defendant’s action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant’s action.” *Id.* at 394, 144 S. Ct. at 1563-1564. In reaching this conclusion, the Supreme Court distinguished the unique facts of its decision in *Havens*, and clarified that *Havens* does not stand for the “expansive theory” that standing exists when an organization diverts its resources in response to a defendant’s actions. *Id.* at 395, 144 S. Ct. at 1564.

“*Havens* was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context. So too here.” *Id.* Otherwise, under the expansive organizational standing theory Plaintiffs press in this case, “all the organizations in America would have standing to challenge almost every [] policy that they dislike, provided they spend a single dollar opposing those policies. *Havens* does not support such an expansive theory of standing.” *Id.* “An organization cannot manufacture its own standing in that way.” Finally, the Court rejected the argument that if the plaintiffs in *FDA* did not have standing, no one would have standing to challenge the FDA’s actions. *Id.*

In this case, the organizational Plaintiffs attempt to manufacture their own standing by relying on their alleged diversion of resources to address Defendants' alleged unlawful application of the Date Requirement to voters' absentee and mail-in ballots, as required by the Pennsylvania Supreme Court's interpretation of the Election Code provisions at issue. (Doc. 413 at 4-7, 10-12 (2d Am. Compl. ¶¶ 11-13 (NAACP), 14-16 (League), and 26-28 (MTRP).) These organizational Plaintiffs' alleged diversion of resources is insufficient to establish organizational standing because their diversion of resources does not rise to the level of directly affecting and interfering with any of their **core business activities**, as required under *FDA*. *FDA*, 602 U.S. at 395, 144 S. Ct. at 1564.

Because none of the individual Plaintiffs and none of the organizational Plaintiffs—including NAACP, the League, and MTRP—have standing to pursue their remaining Equal Protection claim (Count II) and First and Fourteenth Amendment right-to-vote claim (Count III) against Berks County, the Court must grant Berks County's motion for summary judgment and dismiss with prejudice those claims.

Even if the Court determines any of these organizational Plaintiffs has established standing and thus reaches the merits of their remaining claims, for the reasons set forth below, Berks County is still entitled to summary judgment in its favor on those claims.

IV. There is no evidence Berks County treats military and overseas absentee ballots differently from domestic absentee or mail-in ballots.

In Count II of the Amended Complaint, Plaintiffs claim Berks County violated their rights under the Fourteenth Amendment’s Equal Protection Clause because, by faithfully applying the provisions of the Pennsylvania Election Code requiring voter declarations on the outer envelope of absentee and mail-in ballots be correctly dated, 25 P.S. §§ 3146.6(a), 3150.16(a) (collectively, the “Date Requirement”), Berks County allegedly “invalidate[s] the mail ballots of otherwise qualified domestic voters based on trivial paperwork errors while counting the mail ballots of military and overseas voters who make the same immaterial mistake.” Amended Complaint (doc. 121) ¶ 87.

With respect to the challenged Date Requirement, Plaintiffs have no evidence to support their claim that Berks County treats military and overseas absentee ballots differently than it treats domestic civilian absentee or mail-in ballots. In response to Plaintiffs’ interrogatories, Berks County stated that it received 146 military/overseas absentee ballots in the 2022 General Election, *see Exhibit A* (Deposition Transcript of Cody L. Kauffman taken Feb. 17, 2023 (“C. Kauffman Dep.”) Ex. 2, at 1 (Response ¶ 1)), and that Berks County did not set aside any of those 146 military/overseas absentee ballots for violation of the Date Requirement, *Exhibit A* (C. Kauffman Dep.) Ex. 2, at 6-8 (Response ¶¶ 15-22)).⁴ Clarifying Berks County’s written

⁴ Plaintiffs’ Concise Statement of Material Facts (doc. 276 & 283) and appendices Vol. I, III, and VI in support of their prior summary judgment motion (doc. 277, 279, 281) include many references to Berks County Rule 30(b)(6) representative Cody Kauffman, Esquire’s deposition transcript, *see* doc. 276 & 283 ¶¶ 12, 14, 15, 37, 39, 47-50, 53-56, 59, 63-65, 88, 91-92, 97, 102-104, 113 (doc. 279, Appx. Vol. III, APP_00800-849) and doc. 281, Appx. Vol. V, APP_01169-1172), and Berks County’s interrogatory responses, doc. 276 & 283 ¶¶ 34(e), 35, 36(d), 42-43, 59, 91, 104, 111 (doc. 277, Appx. Vol. I, APP_00077-00086). Berks County relies on Attorney Kauffman’s deposition testimony and its interrogatory responses (C. Kauffman Dep. Ex. 2) to

(Text of footnote continued on next page . . .)

interrogatory responses, Berks County First Assistant Solicitor Cody L. Kauffman, Esquire testified that the reason Berks County did not set aside any military/overseas absentee ballots for violation of the Date Requirement in the 2022 General Election is because none of those 146 absentee ballots had a missing or incorrect date on the voter declaration on the outer envelope.

Exhibit A (C. Kauffman Dep.) at 103-105 and Dep. Ex. 2.⁵

Because there is no evidence that Berks County treated or treats military and overseas absentee ballots differently from domestic civilian absentee or mail-in ballots, Plaintiffs' remaining Equal Protection claim against Berks County must be dismissed.

Even if there were evidence that Berks County treated or treats military and overseas absentee ballots differently than domestic absentee and mail-in ballots when it comes to applying the challenged Date Requirement, Plaintiffs base their Equal Protection claim against Berks County on the alleged difference in how Pennsylvania law—not Berks County custom, practice or policy—treats military and overseas ballots. Amended Complaint ¶ 86 (“Yet state law applies a different rule to military and overseas voters who vote by mail, stating that a ‘voter’s mistake or omission in the completion of a document’ shall not invalidate their ballot ‘as long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote.’ 25 Pa. C.S. § 3515(a).”).

Plaintiffs have not demonstrated, as required, that the alleged violation of the Equal Protection Clause is based on Berks County’s customs, practices or policies. *Colburn v. Upper*

support its summary judgment motion. For the Court’s convenience, these materials are attached hereto as **Exhibit A**.

⁵ Military/overseas absentee ballots are the same as “UOCAVA ballots” referenced by Plaintiffs’ counsel in Attorney Kauffman’s deposition.

Darby Township, 946 F.2d 1017, 1027 (3d Cir. 1991) (“In a § 1983 claim against a local government unit, liability attaches when it is the government unit’s policy or custom itself that violates the Constitution.”) Because Plaintiffs’ Equal Protection claim alleges they are being treated differently than military and overseas absentee voters based on Pennsylvania law—and not based on any custom, practice or policy of Berks County, which is bound to follow Pennsylvania law and binding interpretation caselaw⁶—Plaintiffs’ Equal Protection claim against Berks County also fails for that independent reason.

Finally, Plaintiffs’ Equal Protection claim fails because military and overseas absentee voters are not similarly situated to domestic absentee or mail-in voters. Military and overseas absentee voters have different eligibility and timing requirements for submission of their absentee ballots. Military and overseas absentee ballots must be completed and mailed by 11:59 PM the day before election day, and the county election office must receive those completed ballots no later than 5:00 PM seven days following election day. A separate uniform act applies, in conjunction with the Election Code, to military and overseas absentee voters.

⁶ See *Ball v. Chapman* (102 MM 2022), 289 Pa. 1, 28 (Pa. 2023) (“The Election Code commands absentee and mail-in electors to date the declaration that appears upon ballot return envelopes, and failure to comply with that command renders a ballot invalid as a matter of Pennsylvania law.”) Because of the timing, the Pennsylvania Supreme Court in *Ball v. Chapman* issued an Order dated November 1, 2022 and a supplemental Order dated November 5, 2022. The Supreme Court’s November 1, 2022 Order said, “The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes.” The Court’s November 5, 2022 supplemental Order defined, for purposes of the November 8, 2022 general election, “incorrectly dated outer envelopes” as “(1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022. Pursuant to these Orders and the Court’s Majority Opinion issued February 8, 2023, the county boards of elections are required by law to set aside and not count domestic absentee and mail-in ballots “contained in undated or incorrectly dated outer envelopes.”

See 25 Pa. C.S.A. §§ 3501-3519 (Uniform Military and Overseas Voter Act). And by virtue of being overseas or on military deployment, if their absentee ballot is rejected for any reason, military and overseas absentee voters are unable to come into the county election office to cure any mistakes or arrange to vote in person in their precinct on election day. Therefore, even if Pennsylvania law requires military and overseas absentee ballots to be treated differently when it comes to the Date Requirement, there is a lawful basis for that different treatment.

V. The Third Circuit’s decision reversing this Court’s order on Plaintiffs’ Materiality Provision claim forecloses Plaintiffs’ First and Fourteenth Amendment constitutional right-to-vote claim.

The Third Circuit rejected Plaintiffs’ principal claim in this case that Pennsylvania’s date requirement for absentee and mail-in ballots violates the Materiality Provision of the federal civil rights act. See *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024). In rejecting Plaintiffs’ Materiality Provision claim, the Third Circuit concluded, among other things, 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., dissenting)). The Third Circuit explained that “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. Rather, “the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right.” *Id.* at 135 (quoting *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting)).

The logic of the Third Circuit’s conclusion that the date requirement does not infringe the “right to vote” also forecloses Plaintiffs’ new constitutional “right-to-vote” claim (Count III). Although the Third Circuit discussion of the statutory “right to vote” in connection with

Plaintiffs' Materiality Provision claim, Plaintiffs here and the dissenting judge in the Third Circuit argued the "right to vote" in the Materiality Provision is **broader** than the constitutional right to vote. *See id.* at 138-39 (Schwartz, J., dissenting); CA3 ECF Doc. No. 151 at 41-42.

There is no authority supporting an assertion that 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 v. DNC*, 594 U.S. 647, 669-70 (2021) (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).

Accordingly, the Third Circuit's conclusion that the date requirement does not violate the statutory right to vote means that it also does not violate the constitutional right to vote. But even if the Court considers this issue unresolved by the Third Circuit's decision, Plaintiffs' Equal Protection and right-to-vote claims suffer from the following fatal flaws that warrant granting summary judgment in favor of Berks County on Plaintiffs' remaining constitutional claims.

VI. Berks County's enforcement of the Pennsylvania Election Code's Date Requirement does not unlawfully burden Plaintiffs' right to vote in violation of the First and Fourteenth Amendment.

The provision of the Election Code at issue—the Date Requirement—requires the electors' declaration on outer envelope of their absentee or mail-in ballot to be both signed and dated. That declaration is returned to the electors' county board of elections with their mail-in or absentee ballot. The additional burden on voters of writing the correct date on their declarations after signing them is minimal or non-existent.

A. Enforcement of the Date Requirement does not violate the United States Constitution.

At the threshold, regulation of absentee and mail-in voting such as the Date Requirement does not implicate “fundamental rights.” *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004). There is no federal constitutional right to vote by absentee or mail-in ballot. *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 406 (5th Cir. 2020); see also *McDonald v. Board of Election Comm’rs*, 394 U.S. 802, 807 (1969) (“[A]bsentee 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.”). Thus, the *Anderson-Burdick* framework Plaintiffs seek to invoke is inapplicable. See *Mazo v. N.J. Sec’y of State*, 54 F.4th 124, 137 (3d Cir. 2022).

Instead, rational basis scrutiny applies. See *McDonald*, 394 U.S. at 809. For the reasons explained below, the Date Requirement is constitutional under that test because it “bear[s] some rational relationship to a legitimate state end.” *Id.* But even applying the *Anderson-Burdick* framework, the Date Requirement is constitutional.

Anderson-Burdick, when it applies, 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 v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-91 (2008) (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 v. Twin Cty. Area New Party*, 520 U.S. 351, 358-59 (1997).

B. The date requirement is constitutional because it imposes no more than the usual burdens of voting and is amply justified by the State's interests in protecting the integrity of its elections.

The commonsense Date Requirement's "burdens" are too light and its justifications too reasonable to violate the Constitution. The U.S. Supreme Court's decision in *Crawford* demonstrates as much. The plaintiffs in that case claimed that an Indiana law requiring in-person voters to present a photo ID imposed an unconstitutional burden under the *Anderson-Burdick* framework. *See* 553 U.S. at 185 (Opinion of Stevens, J.). The Supreme Court noted that because the plaintiffs brought a facial challenge "that would invalidate the statute in all its applications, they bear a heavy burden of persuasion." *Id.* at 200. The plaintiffs, however, did not introduce "evidence of a single, individual Indiana resident who [would] be unable to vote" under the challenged law. *Id.* at 187 (internal quotation marks omitted). The Supreme Court ultimately held the plaintiffs had failed to carry that burden and rejected their claim. *See id.* at 200-04.

The Supreme Court analyzed the character and magnitude of the burden imposed by the photo ID requirement. *See id.* at 198. The Supreme Court recognized that the law placed some burden on voters, particularly voters who lacked a photo ID. *See id.* The Supreme Court noted that voters who did not already have a photo ID must bear "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph." *Id.* The Supreme Court concluded, however, that such inconvenience "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.*

The Supreme Court also addressed the state's asserted interests in adopting the photo ID

requirement—“deterring and detecting voter fraud,” “moderniz[ing] election procedures,” and “safeguarding voter confidence.” *Id.* at 191. The Supreme Court concluded that those interests were “legitimate” and that the photo ID requirement “is unquestionably relevant to the state’s interest in protecting the integrity and reliability of the election process.” *Id.* Accordingly, the Supreme Court held that the plaintiffs’ unconstitutional burden claim failed. *See id.* at 200-04.

Plaintiffs’ unconstitutional burden claim likewise fails because the Date Requirement imposes no more than the “usual burdens of voting.” *Id.* at 198. Plaintiffs concede that the signature requirement is constitutional. The fact that Plaintiffs (in this case and Case 340) have not contested the constitutionality of the signature requirement demonstrates the Date Requirement is similarly lawful.

Signing one’s name is at least as “burdensome” as writing the date the declaration is signed. If the signature requirement is valid and not unconstitutionally burdensome, then so too is the Date Requirement. It cannot be a significant burden to require voters to write a date on the same declaration they are required to sign. Moreover, any burden in writing the date is a lesser burden 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 v. Democratic Nat’l Committee*, 594 U.S. 647, 676 (2021) (internal quotation marks omitted). And signing one’s name and dating the voter declarations are certainly less onerous than “the inconvenience of making the trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph,” which was upheld as minimal and constitutional in *Crawford*, 553 U.S. at 198 (Opinion of Stevens, J.).

The Date Requirement advances “legitimate” and “unquestionably relevant” state interests related to “protecting the integrity and reliability of the election process.” *Id.* at 191.

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* (“*In re 2020 Canvass*”) 241 A.3d at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see also id.* at 1087 (Opinion of Justice Wecht) (“colorable arguments . . . suggest [the Date Requirement’s] importance”).

First, the Date Requirement advances the Commonwealth’s interests in “detering 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. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *In re 2020 Canvass*, 241 A.3d at 1091 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). “And 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.

The Date Requirement’s advancement of the Commonwealth’s interest in preventing fraud is actual, not hypothetical. Two years ago, the Date Requirement was used to detect a Lancaster County woman’s forgery and fraudulent submission of her deceased mother’s mail-in ballot, leading to her guilty plea and sentencing on January 20, 2023 of two years of probation and forfeiture of her voting rights for four years. *See Commonwealth v. Mihaliak*, CP-36-CR-0003315-2022 (Lancaster Cty. Jan. 20, 2022). Because current Pennsylvania Supreme Court precedent precludes county boards of elections from comparing signatures on ballot envelopes with those in the official record, 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 id.* This example shows the Date Requirement

effectively serves—at a minimum—the Commonwealth’s legitimate interest in preventing election fraud.

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.” *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1887-88 (U.S. 2018); *Tashjian v. Republican Party*, 479 U.S. 208, 221-22 (1986) (state has “legitimate interests” in “providing for educated and responsible voter decisions.”). The formalities that attend voting—namely, that the “elector shall then fill out, **date and sign** the declaration printed,” 25 P.S. § 3146.6(a) (emphasis added); § 3150.16(a)—encourage such deliberation, see *Ball*, 289 A.3d at 10 (the date “provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at the polling place”).

“Signature requirements have long been recognized as fulfilling cautionary functions in protecting an individual’s rights.” *State v. Williams*, 565 N.E.2d 563, 565 (Ohio 1991). Formalities like signing and dating requirements serve the “cautionary function” by “impressing the parties with the significance of their acts and their resultant obligations.” See *Davis G N Mortg. Corp.*, 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003). These 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 help people “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,” *Williams*, 565 N.E.2d at 565.

Pennsylvania can 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.” *Minnesota Voters Alliance*, 138 S. Ct. at 1888. If states can require the formalities of signing and dating for wills and property transactions, they can do the same for voting. The Election Code’s Date Requirement is inextricably intertwined with the signature requirement. Together they focus voters “on the important decisions immediately at hand.” *Id.* Indeed, everyday experience confirms that signatures are frequently accompanied by dates—to name an easy example, on checks.

Pennsylvania law often pairs signature and date requirements in its statutes.⁷ Similarly, forms set forth in Pennsylvania statutes that provide spaces for both a signature and a date are too numerous to list here. A few examples include 57 Pa. C.S.A. § 316 (short form certificates of notarial acts); 23 Pa. C.S.A. § 5331 (parenting plan); 73 P.S. § 201-7(j.1)(iii)(3)(ii) (emergency work authorization form); 42 Pa. C.S.A. § 8316.2(b) (childhood sexual abuse settlement form); 73 P.S. § 2186(c) (cancellation form for certain contracts). It thus makes no sense to analyze the signature requirement and the date requirement separately—they appear in

⁷ See, e.g., 75 Pa. C.S.A. § 1731(c.1) (form rejecting uninsured motorist protection “must be signed by the first named insured and dated to be valid”); *id.* § 1738(e) (form rejecting stacked limits of underinsured motorist coverage “must be signed by the first named insured and dated to be valid”); 62 P.S. § 1407-C(c)(1) (“In order to decline participation in the health information exchange, a patient must sign and date a form declining participation.”); 20 Pa. C.S.A. § 5484(c), (d) (requiring “dated signature of the attending physician” on DNR bracelets and necklaces); 35 Pa. C.S.A. § 5203(b)(2) (“The patient executing and filing a voluntary nonopioid directive form with a practitioner shall sign and date the form.”); 73 P.S. § 517.7(d)(4) (arbitration clause “shall not be effective unless both parties have assented as evidenced by signature and date, which shall be the date on which the contract was executed”); 35 Pa. C.S.A. § 52B02(b)(4) (“The treatment agreement form under subsection (a)(3) shall ... include ... [t]he signature of the individual and the date of signing.”).

the same statutory clause, govern the same document, and together perform a cautionary function.

How can a voter be held accountable for a false declaration stating, among other things, “I have not already voted in this election,” unless the voter’s declaration is both signed and dated? It is not onerous or unusual to legally require a declarant to sign and date a declaration or affidavit stating certain facts are true.

Pennsylvania’s statute on unsworn declarations, 42 Pa. C.S.A. § 6206, requires both signature **and dating**, as follows:

§ 6206. Form of unsworn declaration.

An unsworn declaration under this chapter must be in substantially the following form:

I declare under penalty of perjury under the law of the Commonwealth of Pennsylvania that the foregoing is true and correct.

Signed on the.....day of.....,
at.....
(date).....(month).....(year).....
(county or other location, and state).....
.....
(country).....
(printed name).....
(signature).....

Federal law provides another example of such a requirement. 28 U.S.C. § 1746 provides that when any matter is required or permitted to be supported, evidenced, established, or proved by a sworn written declaration, verification, certificate, statement, oath or affidavit, an unsworn declaration, verification, certificate, statement, oath or affidavit may be provided instead, with like force and effect, to support, evidence, establish or prove the matter at issue, as long as the unsworn declaration is in a writing that is subscribed to be true under penalty of perjury, **and dated**, in a specified form (depending on whether it is executed within or without the United States, its territories, possessions, or commonwealths).

Regardless of where it is executed, both forms require the declarant to provide the date on which the declaration is executed:

(1) If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)”.

See 28 U.S.C. § 1746.

Third, the Date Requirement advances the State’s interest in “safeguarding voter confidence” in Pennsylvania elections. *Crawford*, 553 U.S. at 191 (Opinion of Stevens, J.). Pennsylvania law has long imposed the Date Requirement, which encourages “citizen participation in the voting process” by ensuring voters that Pennsylvania elections are free, fair, trustworthy, and untainted by fraud, *Crawford*, 553 U.S. at 197 (Opinion of Stevens, J.).

Because the Date Requirement imposes a minimal burden on voting and effectively furthers several weighty Commonwealth interests such as protecting the integrity and reliability of the election process the Election Code’s Date Requirement does is constitutional, and thus Plaintiffs’ proposed amendment is futile.

VII. CONCLUSION.

The individual Plaintiffs and the organizational Plaintiffs all lack standing to sue Berks County on Plaintiffs’ Equal Protection claim (Count II) or their First and Fourteenth Amendment “right to vote” claim (Count III). Thus, the Court must dismiss those claims on that basis alone.

But even if the Court reaches the merits of Plaintiffs’ remaining claims, Berks County’s enforcement of the Date Requirement in the Pennsylvania Election Code and binding

interpreting caselaw does not violate the Equal Protection clause or unlawfully burden Plaintiffs' "right to vote" in violation of the First and Fourteenth Amendment. Therefore, Plaintiffs' Equal Protection claim (Count II) and newly asserted right-to-vote claim (Count III) are legally insufficient and not factually supported by the evidence. Accordingly, the Court should grant summary judgment for Berks County and against Plaintiffs and dismiss with prejudice Plaintiffs' remaining claims.

Respectfully submitted,

Dated: July 5, 2023

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