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

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al.*,	)	
Plaintiffs,	)	Civil Action No.: 1:22-cv-00339
v.	)	Judge Susan P. Baxter
LEIGH M. CHAPMAN, *et al.*,	)	
Defendants.	)	

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

In sixty-eight pages of briefing from Plaintiffs, the Acting Secretary, supporting counties, and the United States, there is not one convincing reason for the Court to invalidate Pennsylvania's longstanding date requirement. Thus, as Intervenor-Defendants have explained, the Court should dismiss Plaintiffs' First Amended Complaint. *See* ECF No. 194.

I. THE MATERIALITY PROVISION DOES NOT APPLY.

The four briefs filed in opposition repeat each other's arguments that this Court should read the federal materiality provision, 52 U.S.C. § 10101(a)(2)(B), to invalidate Pennsylvania's longstanding date requirement. None is persuasive.

To begin, Plaintiffs continue to urge this Court to rely on the Third Circuit's vacated decision in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), because, in their view, "[n]othing has changed since *Migliori*." ECF No. 228 at 13. In fact, much has changed—not the least of which is that the Supreme Court vacated *Migliori*. *Ritter v. Migliori*, 143 S. Ct. 297 (2022). The entire purpose of that vacatur is that the moot *Migliori* decision should not "spawn[] any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). It therefore is not precedential. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979).

Neither is it persuasive. The Third Circuit was wrong, and the Court should not make the same mistake. *Ritter v. Migliori*, 142 S. Ct. 1824, 1826 (2022) (Alito, J., dissenting from the denial of the application for stay) (noting that *Migliori v. Cohen* was "very likely incorrect"). The motion to dismiss provided three statutory grounds to demonstrate that there is no basis to invalidate Pennsylvania's date requirement. The briefs in opposition fail to undermine them.

First, the materiality provision prohibits only "deny[ing] the right of any individual to vote," 52 U.S.C. § 10101(a)(2)(B), and enforcing the date requirement does not deny anyone the "right to vote." The opposing briefs remarkably assert that "[r]efusing to count a person's vote is a denial of the right to vote." ECF No. 223 at 8; ECF No. 228 at 21; ECF No. 224 at 10-11. But by that logic, "[r]efusing to count" the vote of a person who came to the polls on Wednesday instead of Tuesday "is a denial of the right to vote." The counties in fact charge into that absurdity, *see* ECF No. 223 at 8 (such a voter "has also in some sense been denied the right to vote), confirming that their construction of the materiality provision is incorrect.

The statutory argument pressed by the counties and the Acting Secretary is illustrative of their confusion. The counties point to the definition of "vote" as including "casting a ballot, and having such ballot counted and included." ECF No. 223 at 8 (quoting 52 U.S.C. § 10101(e)); *see also* ECF No. 224 at 10-11. But what is at issue is not the meaning of "vote," but of the "*right to* vote." A voter who shows up to the polls on the wrong day has not "voted," but she most certainly had the right to vote on equal terms with every other voter. So, too, did the individual voter Plaintiffs here; "the failure to follow [the date requirement] constitutes the forfeiture of the right to vote, not the denial of that right." *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting).

Second, the materiality provision applies only to those errors or omissions affecting a "determin[ation] whether such individual is qualified under State law to vote," 52 U.S.C.

§ 10101(a)(2)(B), not to rules, like the date requirement, that have nothing to do with registration. Plaintiffs' reading would subject every paper-based voting requirement to an illogical measuring line. But "[t]here is no reason why the requirements that must be met in order to register (and thus be 'qualified') to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted." *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting).

The attempts to reassure the Court that Plaintiffs' reading would not disrupt ordinary election regulations ring hollow. For example, Plaintiffs flatly assert that "failure to sign the voter declaration on the mail ballot Return Envelope" would not be invalidated because "the voter's signature (or the lack thereof) on the envelope *is* material to determining whether they are qualified to vote." ECF No. 228 at 22-23; *see also* ECF No. 223 at 5 n.2; ECF No. 229 at 13-14; ECF No. 224 at 21. But they admit that "Pennsylvania law establishes the only qualifications to be entitled to vote" are "age, citizenship status, residence in the election district, and felony incarceration." ECF No. 228 at 19. Those qualifications do *not* include whether the voter signed his ballot declaration, which under Plaintiffs' theory is an *attestation* of qualification, not qualification itself. Indeed, if somehow the signature requirement is "material" under Plaintiffs' reading, then the date requirement—which appears in *exactly the same statutory clause* as the signature requirement—is material, too.

Plaintiffs may not selectively apply their crabbed statutory reading. That it would eliminate a requirement which *no one* argues is invalid confirms their reading is wrong. And for good measure, Plaintiffs' reading would also place in doubt the validity of commonplace voter assistance declarations and requirements that in-person voters sign pollbooks. *See* 25 P.S. §§ 3050, 3058. There is nothing "narrow" about Plaintiffs' position. ECF No. 228 at 23.

Third, Plaintiffs and their supporting briefs have failed meaningfully to dispute the oddity of defining an "act requisite to voting" as including voting itself. Instead, they fall back on insisting that voting is "requisite to voting," and continue to insist on a most implausible reading of the statute. As three Justices of the Supreme Court have already opined, the materiality provision "must be given a strained meaning in order to make it applicable to the validity of a rule about filling out a mail-in ballot." *Ritter*, 142 S. Ct. at 1826 n.2 (Alito, J., dissenting). And it is not "mere rhetoric," *see* ECF No. 229 at 13, to insist that words in a statute be given "their ordinary, contemporary, common meaning," *Perrin v. United States*, 444 U.S. 37, 42 (1979). An "act requisite to voting" is simply not an ordinary way to refer to the very act of *voting*.

Neither does it "conflate the ballot itself with the form on the Return Envelope" to say that filling out the ballot declaration on the envelope containing the absentee or mail-in ballot is the act of voting. See ECF No. 228 at 26. Plaintiffs are wrong to suggest that it somehow makes a difference that one paper is a ballot and the other is the envelope containing the ballot, when both must be mailed together and received in order for the vote to count. The Court should dismiss the First Amended Complaint.[1]

II. PENNSYLVANIA'S DATE REQUIREMENT IS CONSTITUTIONAL.

Plaintiffs stand alone in arguing that the date requirement violates the federal Constitution. *See* ECF No. 223 at 3 n.1. They provide no convincing argument for that outlandish conclusion.

First, in order for Plaintiffs to succeed, they must show that state law requires differential application of the date requirement to military/overseas ballots, on the one hand, and civilian

[1] Intervenor-Defendants preserve the argument that 52 U.S.C. § 10101(a)(2)(B) does not provide a private right of action, and that 42 U.S.C. § 1983 does not provide a separate basis to sue. All must acknowledge that there is a circuit split on these questions. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016).

ballots, on the other. The only reason Plaintiffs provide for expecting such treatment is 25 Pa. C.S. § 3515(a), which they view as a state-law "materiality" provision. ECF No. 228 at 28. But in reading that statute, Plaintiffs commit the same errors they commit in interpreting the federal materiality provision. Without even showing a legal basis for distinguishing between military/overseas ballots and domestic ballots, Plaintiffs' argument falters at the first step.

Second, even if there is differential treatment, military and overseas voters are not similarly situated. Plaintiffs rely on *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012), to argue that there is no distinction between military and overseas voters and domestic voters. ECF No. 228 at 29-30. Even if that is true for *in-person* voting (the type of voting at issue in *Obama for Am.*), that is not the case for absentee voting. *See* 697 F.3d at 435 (noting "special voting provisions in federal and [state] law" that "address problems that arise when military and overseas voters are *absent* from their voting jurisdictions").

Third, Plaintiffs argue that "more than a rational basis is required when the franchise is at stake." ECF No. 228 at 30. But what is at issue here are *absentee* voting regulations: "[i]t is . . . not the right to vote that is at stake here but a claimed right to [vote] absentee ballots." *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969) (citation omitted). And although there will certainly be opportunity to demonstrate other legitimate bases for any legislative distinction in the treatment of absentee ballots here, Intervenor-Defendants have already provided one. Military and overseas voters can often *only* vote via absentee ballot; it is the legislature's prerogative to ease the burden of voting in such instances. *See Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

CONCLUSION

The Court should dismiss Plaintiffs' First Amended Complaint.

Dated: February 8, 2023

Respectfully submitted,

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
PA I.D. #37950
Russell D. Giancola
PA. I.D. #200058
GALLAGHER GIANCOLA LLC
436 Seventh Avenue, 31st Floor
Pittsburgh, PA 15219
Phone: (412) 717-1900
kag@glawfirm.com
rdg@glawfirm.com

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