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.	)	

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

Plaintiffs and their supporting counties do not provide any convincing reason for the Court to invalidate Pennsylvania's longstanding date requirement. The Court should dismiss Plaintiffs' First Amended Complaint. *See* ECF No. 228.

I. THE MATERIALITY PROVISION DOES NOT APPLY.

Plaintiffs' and the counties' briefs repeat many of 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 convincing.

To begin, both 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), which Plaintiffs view as "highly persuasive authority," ECF No. 266 at 2; *see also* ECF No. 267 at 5-6 & n.3, 9. They are wrong. The entire purpose of the Supreme Court's 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 It therefore is not precedential.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); *see also Vote.Org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) (disagreeing with *Migliori*).

In any event, the Third Circuit was wrong, and the Court should not make the same mistake. *See Ritter v. Migliori*, 142 S. Ct. 1824, 1826 (2022) (Alito, J., dissenting from the denial of the application for stay) (Third Circuit's decision was "very likely incorrect"). The motion to dismiss provided three independent statutory grounds to demonstrate that there is no basis to invalidate Pennsylvania's date requirement. Plaintiffs have failed 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." Plaintiffs argue that because the statute defines "vote" to include "hav[ing] [a] ballot counted," *any* "prohibit[ion]" on "county boards from counting otherwise valid mail ballots"

constitutes a denial of the right to vote. ECF No. 266 at 12-13. But that argument illustrates Plaintiffs' confusion. By their 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. 267 at 8.

Indeed, what is at issue here is not the meaning of "vote," but the meaning of the "*right to* vote." A person who shows up on the wrong day has not "voted," but she had the *right* to vote. So, too, did 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, Plaintiffs contend that "Clauses 1 and 2" of the materiality provision, "not Clause 3," are what "delineate the *type* of voting regulation required," and accuse Intervenor-Defendants of "rewrit[ing]" the statute. ECF No. 266 at 14. Wrong again. In fact, Plaintiffs' method of haphazardly picking apart clauses in isolation ignores the Supreme Court's instruction that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. USPS*, 546 U.S. 481, 486 (2006). Plaintiffs say nothing of the two subsections surrounding the materiality provision, both of which deal with voter qualification. *See* 52 U.S.C. § 10101(a)(2)(A), (C). Plaintiffs' disruptive theory that the materiality provision covers *all* state-law voting regulations thus inserts an elephant between two mice.

In fact, reading the statute as a whole demonstrates that the materiality provision applies only to those errors or omissions that affect a "determin[ation] whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). It does not apply to rules, like the date requirement, that have nothing to do with registration. *See Ball v. Chapman*, No. 102 MM 2022, 2023 WL 2031284, 2022 Pa. LEXIS 1879, at *24 (Pa. Feb. 8, 2023) (Opinion of Justice Brobson).

Plaintiffs 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); *see also Ball*, 2023 WL 2031284, 2022 Pa. LEXIS 1879, at *26 (Opinion of Justice Brobson).

Plaintiffs' various attempts to reassure the Court that their reading would not disrupt ordinary election regulations ring hollow. Plaintiffs try to avert the Court's gaze from those "other election rules" by saying they are "not at issue in this case" and suggesting that "[t]he Materiality Provision is not a formula that can be applied mechanically to all Election Code provisions devoid of context." ECF No. 266 at 15. But this attempt to change the subject fails. Intervenor-Defendants have already explained how Plaintiffs' reading would invalidate a whole host of commonplace election rules, and "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Suarez Martinez*, 543 U.S. 371, 380 (2005). Unsurprisingly, Plaintiffs do not even attempt to defend the "necessary consequences" of their implausible reading. Nor does Plaintiffs' rote recitation that "courts must presume Congress says what it means and means what it says" advance the ball. ECF No. 266 at 15. Congress neither said *nor* meant to invalidate all of those election regulations, and Plaintiffs did not discover some new meaning or statement sixty years after the fact.

The counties attempt to salvage their reading of the materiality provision by arguing that a signature is somehow relevant to whether a voter is qualified. ECF No. 267 at 5 n.2. But all that Pennsylvania requires to be qualified to vote is being at least 18 years of age on the date of the election; having been a citizen of Pennsylvania for at least one month; having lived in the relevant election district for at least 30 days; and not being imprisoned for a felony. *See* 25 P.S. § 1301.

Those qualifications do *not* include whether the voter signed his ballot declaration, which under the counties' reading is an *attestation* of qualification, not a qualification itself. If the signature requirement is material to qualification, then so is the date requirement, which is part and parcel of a single mandate with the signature requirement. *See* 25 P.S. §§ 3146.6(a); 3150.16(a); *see also In re Canvass of Absentee & 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).

Third, Plaintiffs' insistence that voting is an "act requisite to voting" continues to violate the principle that words in a statute be given "their ordinary, contemporary, common meaning," *Perrin v. United States*, 444 U.S. 37, 42 (1979). As three Justices of the Supreme Court have 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). An "act requisite to voting" is not an ordinary way to refer to the very act of *voting*. Neither should the Court accept Plaintiffs' distinction between casting a ballot and dating the very envelope that contains the ballot (and in which the ballot is delivered). However one draws the line, complying with the date requirement is not an "act requisite to voting."[1]

II. PENNSYLVANIA'S DATE REQUIREMENT IS CONSTITUTIONAL.

Plaintiffs stand alone in arguing to the Court that the date requirement somehow violates the United States Constitution. *See* ECF No. 267 at 3 n.1 ("The Responding Counties take no position on the merit of the separate constitutional claims raised by Plaintiffs in these actions."). They provide no convincing argument for that outlandish conclusion.

[1] Intervenor-Defendants continue to 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).

First, Plaintiffs appear to argue that "[t]he burdens imposed by the Date Instruction are severe." ECF No. 266 at 20. That ignores *Crawford v. Marion County Election Board*, in which six Justices upheld a voter ID requirement where noncompliance resulted in not even permitting the voter to cast a ballot. *See* 553 U.S. 181 (2008) (plurality op). Moreover, six Justices agreed in *Crawford* that a voting regulation which imposed on many voters "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph" did *not* impose a severe burden. *Id.* at 198 (plurality op.); *id.* at 209 (Scalia, J., concurring in the judgment). Merely requiring voters to write *the date of signing* next to their signatures, *see Ball*, 2023 WL 2031284, 2022 Pa. LEXIS 1879, at *13, is indisputably a lesser burden than that.

Second, Plaintiffs argue that the state interest underlying the longstanding date requirement is somehow insufficient. ECF No. 266 at 20. Given that the burden of complying with the date requirement is *de minimis*, it is dubious whether the Court should engage in balancing at all. But in all events, the interests discussed even at this preliminary stage easily justify the date requirement. Plaintiffs argue that "the question here is not whether forcing voters to write a date on an envelope could possibly produce evidence of fraud." ECF No. 266 at 22. But it is not just "possible"—Intervenor-Defendants have already produced an instance where it *actually* produced evidence of fraud. And, regardless, "a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). Plaintiffs cannot simply wave away Pennsylvania's "compelling interest in preserving the integrity of its election process," *id.* at 2347 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)), by ignoring instances of its demonstrated efficacy.

CONCLUSION

The Court should dismiss Plaintiffs' First Amended Complaint.

Dated: March 14, 2023

Respectfully submitted,

/s/ Kathleen A. Gallagher

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