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
AL SCHMIDT, *et al.*,	)	
Defendants.	)	

OMNIBUS REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Case **Page**

Statutes

Plaintiffs', the Acting Secretary's, and the supporting counties' briefs only confirm that the Court should uphold Pennsylvania's longstanding date requirement. The Court should grant Intervenor-Defendants' motion for summary judgment. *See* Dkt. Nos. 270, 271.

I. THE MATERIALITY PROVISION DOES NOT APPLY HERE.

The three briefs in opposition repeat each other's arguments and their arguments at the motion to dismiss stage 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 reliance on the Third Circuit's vacated decision in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), as "persuasive" authority, Dkt. No. 313 at 7 n.6. The Supreme Court vacated *Migliori*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022), so it no longer "spawn[s] any legal consequences," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950), and is not precedential, *see County of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979).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"). Intervenor-Defendants 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 "[d]eclining to count a person's vote *is* denying the right to vote under the" materiality provision. Dkt. No. 313 at 14 (internal quotation marks and citation omitted); *see also* Dkt. No. 310 at 13; Dkt. No. 298 at 16-17. 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* Dkt. No. 310 at 13, confirming that their construction of the materiality provision is incorrect.

The statutory argument pressed by all three is illustrative of their confusion. They point to the definition of "vote," *see* Dkt. No. 313 at 14 (quoting 52 U.S.C. § 10101(e)); Dkt. No. 310 at 13; Dkt. No. 298 at 16-17, 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 [its] denial." *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 qualification. 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—on a form affirming their qualifications—*is* material to determining whether they are qualified to vote." Dkt. No. 313 at 16; *see also* Dkt. No. 310 at 11 n.4; Dkt. No. 298 at 22; *accord* Dkt. No. 229 at 13-14. But Plaintiffs' own putative expert agreed that providing a signature is not a qualification to vote. Dkt. No. 272 ¶ 149. Indeed, if the signature requirement is "material"

under Plaintiffs' reading, then the date requirement—which appears in *the same statutory clause* and serves the same function as the signature requirement—is material, too. That Plaintiffs' crabbed reading would eliminate a requirement which *no one* argues is invalid confirms it is wrong.

Plaintiffs' other attempts to limit the damage of their interpretation fare no better. They dismiss the possibility that the secrecy-envelope requirement might be the next casualty, Dkt. No. 313 at 16, thereby ignoring that two Justices of the Pennsylvania Supreme Court have already indicated that such arguments will be a natural consequence if Plaintiffs win the day, *see Ball v. Chapman*, 289 A.3d 1, 38 (Pa. 2023) (Opinion of Justice Brobson and Justice Mundy). Plaintiffs also argue that election officials can still "ask[] voters for extra information on election-related paperwork"; they just may not refuse to count ballots that fail to supply that information. Dkt. No. 313 at 14, 16. But that option would be futile; "a mandate without consequence is no mandate at all," *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 391 (Pa. 2020) (Wecht, J., concurring), and a state cannot expect responses to requests if voters can ignore them at their pleasure.

Third, 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). Plaintiffs argue that, while completing a ballot is not an "act requisite to voting," completing a ballot *declaration* is. Dkt. No. 313 at 20; *see also* Dkt. No. 310 at 15. But they 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. *See* Dkt. No. 271 at 11-12.

Contrary to the Acting Secretary's argument, *see* Dkt. No. 298 at 17-18, Intervenor-Defendants' construction of "other act requisite to voting" leaves plenty of work for it to do, *see* Dkt. No. 304 at 5-8. Moreover, the Acting Secretary's argument that "the declaration is like a

registration application" is incorrect. Dkt. No. 298 at 18. In fact, as Plaintiffs have noted, mail ballot packages are sent only after verifying that the recipients are qualified to vote. Dkt. No. 305 ¶ 7. And it is at registration that "the county board of elections first determines [voters'] eligibility to vote." *Id.* ¶ 4. Ballot application and voter registration forms are thus used to determine an individual's qualifications to vote. Ballot declarations are not, and that difference takes them out of the materiality provision's scope. *See* Dkt. No. 271 at 4-17; Dkt. No. 304 at 2-11.

Fourth, the Plaintiffs' and Acting Secretary's attempts to minimize the date requirement's utility fall flat. See Dkt. No. 313 at 15 n.12; Dkt. No. 298 at 9-13. It is not a "hypothes[i]s" that the date requirement can be used to detect fraud, *contra* Dkt. No. 298 at 9; it has already *actually* been used to detect fraud in *Commonwealth v. Mihaliak*, *see* Dkt. No. 272 ¶ 48-55. In fact, it is the Acting Secretary who hypothesizes when he theorizes that the "circumstances" in *Mihaliak* "should and would have been investigated no matter what was written on the envelope." Dkt. No. 298 at 13. That speculation cannot change the fact that, in *Mihaliak*, the affidavit of probable cause expressly noted the incorrect date on the ballot envelope as a basis for the investigation. *See* Dkt. No. 271 at 3-4. The Court should grant summary judgment against Plaintiffs.[1]

II. PENNSYLVANIA'S DATE REQUIREMENT IS CONSTITUTIONAL.

Even the Acting Secretary agrees that Plaintiffs' Equal Protection claim fails as a matter of law. *See* Dkt. No. 298 at 22-24. For their part, Plaintiffs provide no convincing argument to support their meritless constitutional claim in Count II. *See* Dkt. No. 271 at 17-25.

First, Plaintiffs invoke UMOVA's mistake provision, *see* Dkt. No. 313 at 20-21, but still fail to establish that it exempts military and overseas voters from the date requirement, *see*

[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. *See, e.g.*, *NEOCH v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016).

25 Pa. C.S. § 3515(a) (applying only to "document[s] under this chapter"). That UMOVA "prevails" in any conflict with the Election Code, Dkt. No. 313 at 25 (quoting 25 Pa. C.S. § 3519), is of no moment because there is no conflict where UMOVA does not even address the date requirement, *see* Dkt. No. 271 at 19-21. Rather, UMOVA's mistake provision applies only to documents used to "determin[e] whether" a voter "covered" by UMOVA is "eligible to vote." Dkt. No. 271 at 19. Plaintiffs do not even address, let alone refute, that dispositive point.

Second—as even the Acting Secretary agrees, *see* Dkt. No. 298 at 22-24—Plaintiffs cannot demonstrate that military and overseas voters (who may only vote by mail) are similarly situated to domestic voters (who may also vote in person) for purposes of the date requirement, *see* Dkt. No. 271 at 21-25. Their Equal Protection claim fails for this reason alone.

Third, Plaintiffs suggest that "substantial justification" is required for the (nonexistent) alleged differential treatment here, Dkt. No. 313 at 24, but rational-basis scrutiny applies and is easily satisfied, *see* Dkt. No. 271 at 21-25; Dkt. No. 298 at 22-24. Military and overseas voters can often vote *only* by mail; it is the General Assembly's prerogative to ease the burden of voting in such instances. *See Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

Finally, Plaintiffs' argument that the Court should remedy the (nonexistent) alleged constitutional defect by exempting *everyone* from the date requirement, *see* Dkt. No. 313 at 25, contravenes the governing law and the General Assembly's clear intent—upheld by the Pennsylvania Supreme Court—to make the date requirement mandatory for all absentee and mail-in voters, *see* Dkt. No. 271 at 24-25.

CONCLUSION

The Court should grant summary judgment against Plaintiffs.

Dated: May 10, 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