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

PENNSYLVANIA STATE CONFERENCE OF THE NAACP, *et al*., *Plaintiffs*, v. AL SCHMIDT, in his official capacity as Acting Secretary of the Commonwealth, *et al*, *Defendants*.	Case No. 1:22-cv-00339-SPB

INTERVENOR-DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND

Plaintiffs offer no reason whatsoever, let alone a "cogent reason," why they have waited until now to seek to bring an *Anderson/Burdick* challenge in this longstanding suit regarding Pennsylvania's Date Requirement for absentee and mail-in ballots. *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 629 (3d Cir. 2013). Nor could Plaintiffs have done so, had they tried: this suit has been pending for more than 18 months; the plaintiffs in the parallel *Eakin* case brought an *Anderson/Burdick* challenge to the Date Requirement in November 2022; and, even after the *Eakin* plaintiffs filed suit, Plaintiffs here did not seek to add an *Anderson/Burdick* claim the first time they amended their complaint. Rather, as Plaintiffs implicitly acknowledge, they took a "wait-and-see approach," *see Jang v. Bos. Sci. Scimed, Inc.*, 729 F.3d 357, 368 (3d Cir. 2013), and sought leave to file a second amended complaint only after "the Third Circuit's reversal of summary judgment" on their principal claim, ECF No. 388 at 5.

This belated attempt at a third bite at the apple runs afoul of Rule 15(a)—and improperly seeks to resurrect this case against county boards of elections. Accordingly, the Court should deny

Plaintiffs' Motion. At a minimum, if the Court nonetheless grants Plaintiffs leave to amend, it should issue a new schedule for the parties to address the new claim.

BACKGROUND

Plaintiffs filed their original complaint on November 4, 2022 asserting only a single claim: that the Date Requirement violates the Materiality Provision of the Civil Rights Act of 1964. Compl., ECF No. 1. Three days later, the *Eakin* plaintiffs filed a parallel challenge to the Date Requirement asserting both a Materiality Provision claim and an *Anderson/Burdick* claim. *See* Compl., ECF No. 1, *Eakin v. Adams Cnty. Bd. of Elections*, No. 22 CV 340 (W.D. Pa. filed Nov. 7, 2022). Plaintiffs here filed an Amended Complaint on November 30, 2022 to add an Equal Protection claim, but did not seek to add an *Anderson/Burdick* claim. *See* ECF No. 121.

The parties conducted discovery, and Plaintiffs did not seek leave to make any further amendments to their complaint at that time. Instead, after the close of discovery, the parties filed and fully briefed cross-motions for summary judgment on Plaintiffs' Materiality Provision and Equal Protection claims. *See* ECF Nos. 267–82, 294, 297–98, 304, 308–10, 313, 318, 323. The Court eventually granted summary judgment to Plaintiffs on the Materiality Provision claim and declined to rule on the Equal Protection claim. *See* ECF No. 347. The Court also dismissed 55 county boards of elections for lack of standing. *See id.* at 34. On appeal, the Third Circuit reversed the grant of summary judgment and remanded for further proceedings on the Equal Protection claim. *See* COA Mandate, ECF No. 384 at 3.

The Court issued an order on May 8, 2024 granting the parties 21 days, until May 29, 2024, to file dispositive motions on the Equal Protection claim. *See* ECF No. 385. Plaintiffs filed their Motion seeking leave to file a second amended complaint nine days later, on May 17. *See* ECF

No. 387. For the first time in this 18-month-old litigation, Plaintiffs now seek to add the same *Anderson/Burdick* challenge the *Eakin* plaintiffs have been pursuing since November 2022. *Id.*

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR LEAVE TO AMEND

The Court should deny Plaintiffs' Motion because Plaintiffs "undu[ly] delayed" bringing it, Plaintiffs' proposed amendment would "prejudice the opposing part[ies]" such as county boards of elections and Intervenor-Defendants, and the proposed amendment is "futile." *Mullin v. Balicki*, 875 F.3d 140, 149 (3d Cir. 2017) (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)).

First, Plaintiffs have waited over 18 months—through a prior amendment of their complaint, discovery, summary judgment proceedings, an appeal to the Third Circuit, and the Third Circuit's denial of rehearing, all while the *Eakin* plaintiffs' *Anderson/Burdick* claim was pending—to now seek leave to add an *Anderson/Burdick* claim to this suit. The "undue delay" inquiry under Rule 15(a) examines the gap between when amendment became possible and when it was sought, with particular "focus on the movant's reasons for not amending sooner." *Id.* at 151. Thus, courts deny motions to amend when the moving party offers "no cogent reason" for the delay in seeking the amendment. *CMR D.N. Corp.*, 703 F.3d at 629. The Third Circuit has also directed courts to deny leave to amend when the basis for the amendment "was available earlier to the moving party" but the moving party failed to act upon it. *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 280 (3d Cir. 2004). And courts should deny leave to amend when the opposing party took a "wait-and-see approach" rather than diligently pursuing its rights. *Jang*, 729 F.3d at 368.

Plaintiffs here have offered *no* reason for their delay in seeking this amendment, let alone a "cogent" one. *CMR D.N. Corp.*, 703 F.3d at 629. Plaintiffs have been on notice of a potential alleged *Anderson/Burdick* claim since the *Eakin* plaintiffs brought one on November 7, 2022—

which *Plaintiffs describe as presenting "the same facts" as their proposed amendment*. ECF No. 388 at 2 (emphasis added). But Plaintiffs did not seek to add an *Anderson/Burdick* claim at that time, including in their first amended complaint. *See* ECF No. 121; *compare In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d at 280 (leave to amend should be denied where basis for the amendment "was available earlier to moving party"); *Jang*, 729 F.3d at 368 (leave to amend should be denied "when a movant has had previous opportunities to amend a complaint"). Plaintiffs also suggest in passing (and inconsistently) that the factual basis of their *Anderson/Burdick* claim became evident through "discovery," ECF No. 388 at 1, but they do not identify what those facts are. Moreover, they did not seek leave to add the claim at the close of discovery either. Instead, they waited until *after* the parties fully briefed cross-motions for summary judgment, this Court ruled on those motions and dismissed 55 county boards of elections, and the Third Circuit completed appellate proceedings. *See id.* at 5 (Plaintiffs sought leave "following the Third Circuit's reversal of summary judgment"). The Court should "decline[] to reward [Plaintiffs'] wait-and-see approach to pleading." *Jang*, 729 F.3d at 368. It should deny Plaintiffs' Motion.

Plaintiffs offer no basis to excuse their lack of any reason for this significant delay. The three cases they cite are inapposite. Two of those cases arose when plaintiffs *had* raised their new claims in the district court prior to summary judgment and appeal, and amendment was appropriate to formally conform the pleadings to the claims timely presented. *See Adams v. Gould Inc.*, 739 F.2d 858, 868–69 (3d Cir. 1984) (cited at ECF No. 388 at 5); *Bradley v. Kemper Ins. Co.*, 121 F. App'x 468, 471 (3d Cir. 2005) (cited at ECF No. 388 at 5). And the plaintiff in the other case did not seek leave to amend under Rule 15. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312 (11th Cir. 2004) (cited at ECF No. 388 at 5–6). Accordingly, none of these cases sanctioned granting leave to amend where a parallel suit involving what the plaintiff describes as "the same

facts" put the plaintiff on notice of the claim 18 months earlier, but the plaintiff declined to take advantage of prior opportunities to add the claim. ECF No. 388 at 2.

Second, Plaintiffs' proposed amendment would "prejudice opposing part[ies]." *Mullin*, 875 F.3d at 149. After all, the proposed amendment "would bring a new theory into the case" more than 18 months "after the beginning of the litigation." *CMR D.N. Corp.*, 703 F.3d at 630. Due to the Third Circuit's decision on the Materiality Provision and this Court's ruling on Plaintiffs' standing, no county board of elections faces any liability in this lawsuit. *See* ECF No. 347 at 33-34. Plaintiffs cannot now "bring a new theory into the case"—which has been available to them for more than 18 months—to resurrect their moribund suit against county boards of elections. *See, e.g.*, *CMR D.N. Corp.*, 703 F.3d at 630; *Jang*, 729 F.3d at 368.

For their part, Intervenor-Defendants have prevailed on Plaintiffs' principal Materiality Provision claim and have already explained why individual Plaintiffs' Equal Protection claim against the Secretary fails as a matter of law. *See* ECF Nos. 270–272, 304, 318. Allowing Plaintiffs to amend their complaint to inject a new claim at this late juncture will impose substantial additional "cost" on Intervenor-Defendants and other parties forced to defend against it, including the costs of "prepar[ing] to defend against new facts or new theories," reviewing the record, briefing any summary judgment motions on that claim, and participating in any appellate proceedings related to the claim. *Jang*, 729 F.3d at 368; *see also CMR D.N. Corp.*, 703 F.3d at 629 (undue delay alone can constitute prejudice sufficient to justify denying leave to amend).

Moreover, as noted, Plaintiffs also contend that the factual basis of their *Anderson/Burdick* claim became evident through "discovery," ECF No. 388 at 1, but they have not identified *what* specific facts in the record they believe support that claim. As a result, Intervenor-Defendants are left to guess as to the factual theory Plaintiffs now propose to pursue. In any event, litigating a

new claim now would likely require "additional discovery" related to the 2023 and 2024 elections, such as whether, and how, county boards of elections (who either have already been dismissed or otherwise no longer face liability in this case) are applying Pennsylvania's date requirement. *Jang*, 729 F.3d at 368.

It is no answer to suggest, as Plaintiffs do, that Intervenor-Defendants already are defending against the *Anderson/Burdick* claim in *Eakin*. *See* ECF No. 388 at 2. Plaintiffs are simply wrong that *Eakin* involves the "same defendants" as this case, *id.*, since no county board of elections faces liability any longer here, *see* ECF No. 347 at 33-34. Moreover, if Plaintiffs actually thought the *Eakin* plaintiffs were pursuing the same claim on "the same facts," ECF No. 388 at 2, Plaintiffs would have no reason to assert that the factual basis of this claim arose through "discovery" in this case, *id.* at 1—and no reason to seek leave to add a (redundant) claim here. And, as explained, that the *Eakin* plaintiffs brought an *Anderson/Burdick* claim more than 18 months ago warrants *denying*, not granting, Plaintiffs' Motion.

Finally, Plaintiffs' proposed amendment is "futile." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) ("futility" means that the "complaint, as amended, would fail to state a claim upon which relief could be granted" under Rule 12(b)(6)). As Intervenor-Defendants have explained in the *Eakin* litigation, any *Anderson/Burdick* challenge to the Date Requirement fails under Rule 12(b)(6). *See Eakin* ECF No. 196 at 16–23; *Eakin* ECF No. 240 at 16–22. Intervenor-Defendants acknowledge that the court rejected this argument in *Eakin*, *see* ECF No. 342, but maintain that any *Anderson/Burdick* claim Plaintiffs now seek to add warrants dismissal such that their proposed amendment is futile, *see In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1434. The Court should deny Plaintiffs' Motion.

II. THE COURT SHOULD GRANT APPROPRIATE TIME FOR THE PARTIES TO ADDRESS ANY NEW *ANDERSON/BURDICK* CLAIM

At a minimum, if the Court grants Plaintiffs' Motion, it should accord all parties appropriate time to address any new *Anderson/Burdick* claim. Plaintiffs have committed to putting the cart before the horse, telling the Court that they will file a motion for summary judgment on the *Anderson/Burdick* claim by the May 29 deadline for summary judgment motions on their Equal Protection claim. *See* ECF No. 388 at 6. It is simply premature for Plaintiffs to seek summary judgment on a claim that has not yet even been added to the case—and the Court should enter an order directing them not to do so.

Moreover, it is both premature and prejudicial to force any other party to seek or to defend summary judgment on Plaintiffs' rushed timeline. After all, opposing parties will need to review the as-yet-undisclosed factual basis for Plaintiffs' new claim, determine whether additional discovery is warranted, review the record in this case, and develop their legal arguments *before* they can litigate any summary judgment motions.

Thus, at minimum, the Court should adopt the following schedule for proceedings on any *Anderson/Burdick* claim it allows Plaintiffs to add at this juncture of the case:

- Plaintiffs' factual proffer: The Court should set a deadline for Plaintiffs to proffer whatever facts they believe support an *Anderson/Burdick* claim
- Motion to take additional discovery: The Court should allow parties opposing Plaintiffs' new claim sufficient time to review Plaintiffs' factual proffer and to file any motions to seek additional discovery, such as within 14 days of Plaintiffs making their factual proffer

- Motions for summary judgment: Due 28 days after the close of discovery, if any discovery is sought, or 28 days after the expiration of time to move for additional discovery if no additional discovery is sought
- Oppositions to Plaintiffs' motion for summary judgment: Due 28 days after the later of the close of discovery or Plaintiffs filing a motion for summary judgment
- Remaining response and reply briefs due as specified in the Court's rules

This timeline is the minimum the Court should accord for summary judgment motions and briefing on any new *Anderson/Burdick* claim. Indeed, the Court has granted the parties 21 days to file summary judgment motions on the Equal Protection claim they have been litigating for virtually this entire case, *see* ECF No. 385, as well as to file summary judgment motions on the *Anderson/Burdick* claim pending in *Eakin* for over 18 months, *see Eakin* ECF No. 375. The additional minimal time requested above is reasonable and appropriate to allow the parties to address any new claim at this juncture of the case.

Alternatively, in the interest of judicial economy and efficiency, the Court may wish to postpone the current May 29 deadline for summary judgment motions on Plaintiffs' Equal Protection claim, and to conform that deadline with the later deadlines for summary judgment motions (such as those suggested above) on any new *Anderson/Burdick* claim added to this case.

CONCLUSION

The Court should deny Plaintiffs' Motion.

Dated: May 24, 2024

Respectfully submitted,

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