

**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> ,	:	
	:	ELECTRONICALLY FILED
Defendants.	:	

**BRIEF OF DEFENDANT BERKS COUNTY BOARD OF ELECTIONS ON THE
IMPACT OF *BLACK POLITICAL EMPOWERMENT PROJECT V. SCHMIDT* ON
THIS COURT’S PENDING SUMMARY JUDGMENT MOTIONS**

Pursuant to this Court’s September 3, 2024 text-only order (doc. 454), defendant Berks County Board of Elections (“Berks County”) submits this brief addressing the impact of the decision in *Black Political Empowerment Project v. Schmidt*, No. 283 M.D., 2024 WL 400321 (Pa. Commw. Ct. Aug. 30, 2024) (“*Black Political Empowerment*”) on the pending summary judgment motions in this case. In short, *Black Political Empowerment* has no impact on the pending summary judgment motions for three reasons.

First, in *Black Political Empowerment*, the Commonwealth Court of Pennsylvania, one of two Pennsylvania intermediate-level appellate courts, decided the state constitutional challenge under its original as opposed to appellate jurisdiction. More importantly, the Commonwealth Court recognized that despite the spate of state and federal litigation challenging the voter declaration dating requirements in the Pennsylvania Election Code¹ after the Election Code was

¹ See Sections 1306 and 1306-D of the Election Code, 25 P.S. §§ 3146.6(a) and 3150.16(a) (“Dating Requirements”). Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3, and thereafter amended by the Act of October 31, 2019, P.L. 552, No. 77 (“Act 77

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

amended by Act 77 of 2019, the legal challenge before it—whether the Dating Requirements violate the Free and Fair Elections Clause of the Pennsylvania Constitution—was “the first of its kind.” *Black Political Empowerment*, 2024 WL 400321, at *1.

A federal district court should generally decline to reach a federal constitutional issue if a dispute regarding a state law can be decided on state constitutional grounds. *See Clay v. Sun Ins. Office Limited*, 363 U.S. 207, 209-212 (1960); *see also Gordon v. East Goshen Township*, 592 F. Supp.2d 828, 844-846 (E.D. Pa. 2009); *Liberty Curtin Concerned Parents v. Keystone Central School Dist.*, 81 F.R.D. 590, 597-599 (M.D. Pa. 1978). However, a federal district court is not bound by a decision on an issue of state constitutional law by an intermediate-level state court of appeals when the state’s highest court has not yet decided the same issue. *See C.I.R. v. Bosch’s Estate*, 387 U.S. 456, 465 (1976); *see also Sheridan v. NGK Metals Corp.*, 614 F. Supp.2d 536, 546 (E.D. Pa. 2008).

In the present case, the Pennsylvania constitutional issue has not yet been finally resolved. The Commonwealth Court’s decision in *Black Political Empowerment* was immediately appealed to the Pennsylvania Supreme Court, and the briefs of appellants, appellees, and amici curiae have been filed. *See Black Political Empowerment Project v. Schmidt*, 68 MAP 2024. This Court should not give any weight to the Commonwealth Court’s decision. The Pennsylvania Supreme Court is presently considering and may reverse the

of 2019” or (“Act 77”). Section 1306 relates to voting by absentee electors and provides, in relevant part, that an absentee “elector shall ... fill out, date and sign the declaration printed on” the second, or outer, envelope “on which is printed the form of declaration of the elector,” among other things. *See* 25 P.S. § 3146.6(a). Section 1306-D was added to the Election Code by Act 77, relates to voting by mail-in electors, and similarly provides, in relevant part, that a mail-in “elector shall ... fill out, date and sign the declaration printed on” the second, or outer, envelope “on which is printed the form of declaration of the elector,” among other things. *See* 25 P.S. § 3150.16(a).

decision of the Commonwealth Court. That is especially true here in light of the strong and persuasively reasoned dissenting opinion of Commonwealth Court Judge Patricia A.

McCullough (described further below), and the Pennsylvania Supreme Court's November 2022 decision in *Ball v. Chapman* rejecting previous state law challenges to the Dating Requirements. *See C.I.R. v. Bosch's Estate*, 387 U.S. at 465. If that happens, it will be necessary to decide the federal constitutional issues in the pending summary judgment motions.

Second, because 65 of the 67 county boards of elections (including Berks County) were not parties to *Black Political Empowerment*,² the declaratory and injunctive relief ordered within the decision in *Black Political Empowerment* is not binding on Berks County or the other 65 non-participating county boards of elections.

Third, as it considers the pending summary judgment motions, this Court should carefully consider Part II of Judge McCullough's dissenting opinion in *Black Political Empowerment*, 2024 WL 400321 at *42-62 (McCullough, J., dissenting), because it very closely tracks the logic and reasoning of the Third Circuit's March 27, 2024 decision reversing this Court's previous order in this case³ granting summary judgment in favor of Plaintiffs on their claim under the Materiality Provision of the federal Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). *See Pennsylvania State Conf. of NAACP Branches v. Secretary of the Commonwealth of Pennsylvania*, No. 23-3166, 97 F.4th 120, 129-139 (3d Cir. 2024).

² Only the Philadelphia County Board of Elections and the Allegheny County Board of Elections were party respondents in *Black Political Empowerment*, and the Commonwealth Court's Order enjoins only those two county boards of elections from strictly enforcing the Dating Requirement of the Pennsylvania Election Code at issue in this case.

³ *Pennsylvania State Conf. of NAACP Branches v. Secretary of the Commonwealth of Pennsylvania*, No. 1:22-cv-00339, 703 F. Supp.3d 632 (W.D. Pa. 2023).

More specifically, Judge McCullough’s dissenting opinion persuasively reasons that the statutory Dating Requirements at issue do not make voting so difficult that they effectively deny the franchise. *Black Political Empowerment*, 2024 WL 400321 at *45-48 (McCullough, J., dissenting). The Dating Requirements are ballot-casting rules and, as such, they do not affect voter eligibility. *Id.* at *48-51 (McCullough, J., dissenting). Voters do not suffer constitutional harm when their ballot is rejected for failing to follow neutral ballot-casting rules duly enacted by the General Assembly, because ballot-casting rules do not implicate voting eligibility, *i.e.*, the “right” to vote. *Id.* at *51-52 and *52-57 (McCullough, J., dissenting).

For the above reasons, this Court should address and decide the pending summary judgment motions on Plaintiffs’ federal constitutional claims.

For all the reasons set forth in support of Berks County’s motion for summary judgment and previous briefs, the Court should grant summary judgment for Berks County and against Plaintiffs and dismiss with prejudice Plaintiffs’ remaining claims.

Respectfully submitted,

SMITH BUKOWSKI, LLC

Dated: September 13, 2024

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

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and LCvR 5.6, the undersigned hereby certifies that the foregoing document was electronically filed on the below date with the Court's CM/ECF system, which transmitted a Notice of Electronic Filing of the filed document on counsel of record and/or each party in the case who is registered as a Filing User.

Dated: September 13, 2024

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