

IN THE SUPREME COURT OF PENNSYLVANIA

No. 68 MAP 2024

BLACK POLITICAL EMPOWERMENT PROJECT, et al.,

Petitioners,

v.

AL SCHMIDT, in his official capacity as Secretary of the Commonwealth, et al.,

Respondents.

**BRIEF OF *AMICI CURIAE* REPUBLICAN LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES BRYAN CUTLER,
PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE KIM
WARD AND MAJORITY LEADER OF THE PENNSYLVANIA SENATE
JOE PITTMAN IN SUPPORT OF APPELLANTS**

**CHALMERS, ADAMS, BACKER &
KAUFMAN, LLC**

Zachary M. Wallen

Pa. ID No. 309176

301 South Hills Village Drive

No. LL200-420

Pittsburgh, PA 15241

(412) 200-0842

(412) 235-5001 (facsimile)

zwallen@chalmersadams.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici Curiae, Republican Leader of the Pennsylvania House of Representatives Bryan Cutler, President Pro Tempore of the Pennsylvania Senate Kim Ward, and Majority Leader of the Pennsylvania Senate Joe Pittman (collectively the “Legislative Leaders” or “*Amici Curiae*”) hereby file this *amici curiae* brief pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(1)(i) in support of Appellants (Intervenor-Respondents in the proceedings below).

This case concerns the constitutionality of election laws enacted by the Pennsylvania General Assembly (the “General Assembly”), including the Legislative Leaders. The provisions challenged here have been the subject of numerous challenges, under a plethora of legal theories, over the past several election cycles. The Legislative Leaders have either moved to intervene or filed an *amicus curiae* brief in a number of these cases, including in the proceedings below.

The Legislative Leaders possess a strong legal interest in protecting their exclusive authority, as legislators in the General Assembly, to enact—or repeal—legislation concerning the administration of elections in Pennsylvania, a role which Petitioners ask this Court to usurp. Accordingly, the Legislative Leaders file this

¹ No party’s counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

amici curiae brief to bring issues to this Court’s attention about which they possess both a heightened interest and unique viewpoint.

SUMMARY OF ARGUMENT

The Commonwealth Court’s troubling and unprecedented decision must be reversed. As aptly summarized by Judge McCullough:

In no prior case has this Court or our Supreme Court applied the Free and Equal Elections Clause to declare unconstitutional a provision that regulates the manner and method of casting ballots. Nor has any Pennsylvania court ever applied ‘strict scrutiny’ in considering whether neutral, generally-applicable manner-of-voting regulations enacted by the General Assembly violate the Free and Equal Elections Clause. And yet, to reach its desired end, the Majority today (1) finds jurisdiction where it does not exist, (2) ignores more than a century of sound Pennsylvania Supreme Court precedent interpreting the Free and Equal Elections Clause, (3) applies strict scrutiny without any authority for doing so, (4) accepts Petitioners’ invitation to usurp the role of the General Assembly and re-write Act 77 of 2019 (Act 77), and, in a twist of tragic irony, (5) voids altogether absentee and mail-in voting in Pennsylvania.

Black Pol. Empowerment Project v. Schmidt, 283 M.D. 2024, 2024 Pa. Commw. Unpub. LEXIS 464, at *124-25 (Pa. Commw. Ct. Aug. 30, 2024) (McCullough, J., dissenting) (“*BPEP*”).

This decision is wrong on the merits, and improperly usurps the constitutional prerogative of the General Assembly to legislate for the Commonwealth’s elections.

Were that not enough, the court below entered an unconstitutional order that plainly violates the Equal Protection Clause of the U.S. Constitution. If left in place, this decision will foment chaos in the 2024 presidential election.

The Legislative Leaders respectfully ask this Court to reverse the decision of the court below, or alternatively, to remand this matter for further proceedings that include all necessary parties.

BACKGROUND

The Pennsylvania Constitution provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5 (“Free and Equal Elections Clause”). Few cases have been brought under it, and even fewer such challenges were successful.

In an early case applying the provision, this Court elaborated that:

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Winston v. Moore, 91 A. 520, 523 (Pa. 1914). More recently, this Court summarized that “the actual and plain language of” the clause is to “mandate[] that all voters have an *equal opportunity* to translate their votes into representation.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). (emphasis added) (“*LWV*”).

This history shows that the dating requirement Petitioners challenge is not inconsistent with the history, meaning, and intent of the Free and Equal Election Clause. “Each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives.” *LWV* at 814 (emphasis in original). As explained below, the dating requirement does not violate this fundamental precept.

ARGUMENT

I. The Dating Requirement Is Constitutional.

A. The Dating Requirement Does Not “Clearly, Palpably and Plainly” Violate the Constitution.

A bedrock principle of judicial review in Pennsylvania is the “judicial presumption that our sister branches take seriously their constitutional oaths.” *Stilp v. Commonwealth*, 905 A.2d 918, 938-39 (Pa. 2006). “It is well settled that a statute is presumed to be constitutional and will not be declared unconstitutional unless it *clearly, palpably and plainly violates the constitution.*” *Purple Orchid v. Pa. State Police*, 813 A.2d 801, 805 (Pa. 2002) (internal citations omitted) (emphasis added). Because of this high standard, “the party challenging the constitutionality of a statute has a heavy burden of persuasion.” *Id.* For the reasons discussed below, the dating requirement *is* constitutional, and Petitioners have not come close to meeting their “heavy burden” of showing that the dating requirement “clearly, palpably and plainly violates the constitution.” *Id.*

B. The Dating Requirement Is Not Subject to Strict Scrutiny Review.

The court below claimed that the dating requirement for absentee and mail-in ballots should be subject to strict scrutiny. But this presupposes that the dating requirement “burdens” and “interferes with” the right to vote in the first place. It does not.

The court below relied on *In re Nomination of Berg*, 712 A.2d 340, 342 (Pa. Commw. Ct. 1998), *aff’d*, 713 A.2d 1106 (Pa. 1998), to argue that “laws which affect a fundamental right, such as the right to vote . . . are subject to strict scrutiny” (emphasis added). But the *Berg* Court actually “declined to employ the strict scrutiny standard of review on the ground that no fundamental rights were affected by” the challenged requirement. *Berg*, 713 A.2d at 1106. That is because merely “affecting” a right is not enough—“a discriminatory law must have a real and appreciable *impact* on voters’ rights before the strict scrutiny test of reasonable necessity would be applied in the challenge.” *Cavanaugh v. Shaeffer*, 444 A.2d 1308, 1311 (Pa. Commw. Ct. 1982) (citing *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (emphasis added)); *see also William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 458 (Pa. 2017) (“[W]here a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny.”). “Only where a law imposes a *severe* burden on the right to vote is it subject to strict scrutiny.” *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1257 n. 22 (Pa.

Commw. Ct. 2017) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added)).

Far from being a “burden” or having a “real and appreciable impact on voters’ rights” (much less a “severe” one), writing the date on the ballot envelope as part of the voter declaration is one of the easiest steps in the entire voting process—significantly easier than finding a mailbox or dropbox at which to deposit a ballot and little more burdensome than licking (or peeling and sticking) the flap of the completed envelope. Another court recently “conclude[d] that the burden imposed by the handwritten date requirement is slight” *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 U.S. Dist. LEXIS 46352, at *24 (E.D. Pa. Mar. 16, 2022) (rejecting a strict scrutiny standard and considering only whether Pennsylvania has “important regulatory interests . . . to justify the restrictions”).²

The dating requirement is far less burdensome than other challenged election procedures that were not subjected to strict scrutiny analysis. For example, in *Berg*, the petitioner challenged Pennsylvania’s requirement that prospective gubernatorial candidates obtain 100 signatures from ten counties on their nominating petition. *Berg*, 712 A.2d at 340. A similar requirement for state Supreme Court candidates was previously challenged in *Cavanaugh v. Shaeffer*, 444 A.2d at 1308. In both cases,

² Importantly, while this District Court decision was later overruled on other grounds, this part of the decision (declining to apply strict scrutiny) was not appealed to the Third Circuit. *See Migliori v. Lehigh Cty. Bd. of Elections*, No. 22-1499, Appellant’s Brief (ECF # 32) (filed March 29, 2022).

this Court concluded that the ballot access requirements did not have a “real and appreciable impact” on the right to vote and therefore applied the rational basis test, rather than strict scrutiny. *Berg*, 713 A.2d at 1109 (quoting *Cavanaugh*, 444 A.2d at 1311).

In support of applying strict scrutiny, the court below also relied on the Commonwealth Court’s unreported decision in *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 Pa. Commw. Unpub. LEXIS 756 (Pa. Commw. Ct. Jan. 17, 2014), challenging the implementation of Pennsylvania’s 2012 voter identification law. While a voter identification requirement is itself constitutional, the *Applewhite* court found issues with PennDOT’s implementation of the law. In that case, the court applied strict scrutiny analysis only after it found that “[h]undreds of thousands of electors in Pennsylvania lack[ed] compliant photo ID” and concluded that the law would have “the effect of disenfranchising them **through no fault of their own**” because PennDOT had failed to create a process allowing these hundreds of thousands of potential voters to obtain sufficient identification in time to be able to vote. *Id.* at *54 (emphasis added). Effectively disenfranchising voters **through no fault of their own** is *not* the situation here; instead, at worst, an “individual’s vote [may not be] counted *because he or she did not follow the rules for casting a ballot,*” which is not a denial of “the right to vote.” *Ritter v. Migliori*, 142 S.Ct. 1824, 1825 (2022) (Alito, J., dissenting) (emphasis added). “Even the most permissive voting

rules must contain some requirements, and the failure to follow those rules constitutes the *forfeiture* of the right to vote, not the *denial* of that right.” *Id.* (emphasis added).

The court below failed to explain how writing a date imposes a “severe” burden that “make[s] it so difficult for some voters to exercise the franchise that it effectively amounts to a denial of the franchise itself. *BPEP* at *100. This Court should follow the practical wisdom in *Berg* that “[t]o subject every voting regulation to strict scrutiny . . . would tie the hands of states seeking to assure that elections are operated equitably and efficiently.” 713 A.2d at 1109 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)).

The effect of applying strict scrutiny to run-of-the-mill voting procedures cannot be overstated. As the U.S. Supreme Court has cautioned, “[e]lection laws will invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual’s right to vote and his right to associate with others for political ends.’” *Burdick*, 504 U.S. at 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). “Consequently, to subject **every** voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a

compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* (emphasis added).

The lower court would effect a mammoth shift in Pennsylvania jurisprudence if every state election regulation were subject to strict scrutiny. This level of analysis is unwarranted in the present case, and the decision of the court below should be reversed.

II. The Dating Requirement Does Not Abridge Any Voter’s Right to Participate in the Electoral Process.

The Free and Equal Election Clause permits reasonable election administration regulations, if those regulations do not impair or unduly burden the right to vote itself. *See LWW* at 809. The dating requirement falls squarely within this permissible category, a reasonable regulation directing the manner of exercising the right to vote. It is a minor procedural requirement that does not prevent any eligible voter from casting one’s ballot or having one’s vote counted if the voter complies. The requirement applies equally to all absentee and mail-in voters, without discriminating against any particular group or class of voters.

A. The Dating Requirement Does Not Impair Anyone’s *Right To Vote* or Make Voting So Difficult as to Amount to a Denial.

The court below correctly frames the Free and Equal Elections Clause as recognizing “[t]he fundamental *right to vote*. . .” *BPEP* at *5 (emphasis added). As this Court observed, the Free and Equal Elections Clause “strike[s] . . . at all

regulations of law which shall impair the *right* of suffrage,” and when legal voters are “denied the *right* to vote, the election is not free and equal.” *LWV* at 809, 813 n.71 (emphasis added).

But “[e]ven the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, *not the denial of that right.*” *Ritter v. Migliori*, 142 S.Ct. at 1825 (Alito, J., dissenting) (emphasis added). This is precisely why the Third Circuit recently concluded that the “individuals are not ‘denied’ the ‘right to vote’ if non-compliant ballots [lacking a date] are not counted.” *Pa. State Conference of the NAACP Branches v. Schmidt*, 97 F.4th 120, 135 (3d. Cir. 2024).³ While arising in the context of the Materiality Provision, the Third Circuit nonetheless centered its analysis specifically on whether the “date and sign” requirement impaired the *right* to vote, ultimately concluding that there was “no authority that the ‘right to vote’ encompasses the right to have a ballot counted that is defective under state law.” *Id.* at 133; *see also Ball v. Chapman*, 289 A.3d 1, 22 (Pa. 2022) (“[F]ailure to comply with the date requirement would render a ballot invalid in any election after 2020. Pennsylvania’s candidates,

³ *NAACP* is the latest of a series of cases concerning whether the “date and sign” requirement violated the Materiality Provision of the Federal Civil Rights Act, which provides that “[n]o person acting under color of law shall . . . deny the *right* of any individual to vote in any election because of an error or omission . . . if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

electors, and local officials therefore were on notice that ballots must be dated, and that failure to provide a date would result in disqualification.”).

Indeed, just as multiple federal courts have agreed that the “date and sign” requirement does not deny the “right to vote” for purposes of the Civil Rights Act, the same holds true for purposes of the Pennsylvania Constitution, where a violation would require the *right* to vote to be impaired.

The history of Free and Equal Elections Clause cases makes this plain. In two such cases, election deadlines were extended when a natural disaster or emergency was found to impede voters’ ability to timely cast their ballots. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); *In re General Election-1985*, 531 A.2d 836, 838-39 (Pa. Commw. Ct. 1987). In these instances, the courts concluded that the original election deadlines would have made voting “so difficult as to amount to a denial” of the *right* to vote. *Winston v. Moore*, 91 A. at 523.

The other applications of the Free and Equal Elections Clause arose in the contexts of voting districts that either explicitly or implicitly denied certain Pennsylvanians their *right* to vote. In the early 20th century, a new school district was created that overlapped with the boundaries of two existing school districts. *See In re New Britain Borough Sch. Dist.*, 145 A. 597 (Pa. 1929). This Court found that residents of the two former school districts would “be deprived of their *right* to vote for school directors as allowed in all other fourth-class districts.” *Id.* at 599

(emphasis added). A similar result came when the legislative redistricting act of 1937 excluded ten municipalities from any legislative district, obviously resulting in voters in those communities being “deprived of the *right* to vote for a representative in the General Assembly.” *Shoemaker v. Lawrence*, 31 Pa. D.&C. 681, 686 (Dauphin Co. C.C.P. 1938) (emphasis added).

More recently, this Court struck down the General Assembly’s 2011 congressional redistricting plan on the basis that it allegedly “subordinate[d] the traditional redistricting criteria in service of achieving unfair partisan advantage,” which would “undermine[] voters’ ability to exercise their *right* to vote in free and ‘equal’ elections.” *LWV* at 821.

Contrary to these determinations, which were based on an abridgement of the *right* to vote, every eligible Pennsylvania voter currently “has the *right* to cast his [or her] ballot”. *Winston*, 91 A. at 523; *see also Ritter*, 142 S.Ct. at 1825 (“When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot.”). Nor does the dating requirement “deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston*, 91 A. at 523. Instead, the dating requirement is an exceptionally easy step to complete that does not impose any significant additional burden on voters beyond the other steps they must already take to complete and return their ballot. Voters must

already fill out and sign the declaration on the envelope, which includes other attestations and identifying information. The simple step of writing the date on the envelope does not meaningfully increase the burden or complexity of the process.

The dating requirement does not deny Pennsylvanians their right to vote (or make voting so difficult as to effectively impair the right), nor preclude them from having their ballot counted if they record the date on the ballot envelope; thus the requirement falls outside the ambit of what is proscribed by the Free and Equal Elections Clause.

B. The Dating Requirement Does Not Discriminate Against or Unduly Burden Certain Voters.

Not only does the dating requirement not impede any individual Pennsylvanian's right to vote, it also does not benefit (or hinder) any group of voters. This is especially relevant in light of the history of the Free and Equal Elections Clause, which was first introduced to the Pennsylvania Constitution following a century of economic, religious and ethnic factionalism and a bloody revolution against a heavy-handed British Crown. *See LWV*, 178 A.3d at 804-08. The Free and Equal Elections Clause should thus be "viewed against the backdrop of . . . intense and seemingly unending regional, ideological, and sectarian strife" as an attempt to end "the dilution of the right of the people of this Commonwealth to select representatives" of their choosing. *Id.* at 808-09. Charles Buckalew, a delegate to Pennsylvania's 1873 Constitutional Convention, explained that the intent of the Free

and Equal Elections Clause was to “exclude not only all invidious discriminations between individual electors, or classes of electors, but also between different sections or places in the State.” Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania: Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883); *see also* *LWV*, 178 A.3d at 809 (explaining that the Pennsylvania Supreme Court “has ascribed the same expansive meaning to the terms ‘free and equal’ in Article I, Section 5” as Buckalew).

The dating requirement does not disfavor any particular geographic, economic, religious, ethnic, regional, ideological or partisan faction. Far from discriminating against any voter “on the basis of his or her particular beliefs or view,” *LWV*, 178 A.3d at 809, or based on the “sections or places in the State” where they live, Buckalew, *An Examination of the Constitution of Pennsylvania, supra*, “[e]very voter is treated alike” by the ballot signature requirement, “[e]very voter has the same right as any other voter, and every voter has the right to cast his ballot and have it counted,” *Commonwealth ex rel. Jones v. King*, 5 Pa. D.&C. 515, 518 (Dauphin Co. C.C.P. 1924).

In fact, Pennsylvania courts have rejected challenges under the Free and Equal Elections Clause when the challenged law applies equally to all voters. *See, e.g., Working Families Party v. Commonwealth*, 209 A.3d 270, 282 (Pa. 2019) (upholding that Pennsylvania’s “anti-fusion” statutes because minority party supporters had “the

same right as every other voter”); *City Council of Bethlehem v. Marcincin*, 515 A.2d 1320, 1324 (Pa. 1986) (upholding a term limits ordinance because it “neither ‘denies the franchise’ to the electors nor dilutes the vote of any segment of the constituency”); *Shankey v. Staisey*, 257 A.2d 897, 899 (Pa. 1969) (upholding a ballot access statute because “minority party candidates and their supporters” had to “secure the same showing of public support before being put on the ballot as required by a majority party candidate”); *King*, 5 Pa. D.&C. at 518 (upholding a ballot access law because “[e]very voter is treated alike”).

In light of the intent behind the Clause and the history of its interpretation, this Court should reject Petitioners’ claim.

III. The Legislative History of the Dating Requirement Further Belies Petitioners’ Arguments.

Courts have consistently recognized that state legislatures have a legitimate interest in enacting reasonable procedural requirements to ensure the integrity and reliability of the electoral process. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (upholding voter ID law as a reasonable procedural requirement to deter fraud and promote public confidence in elections). While “those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause,” *id.*, as explained above, the dating requirement is a reasonable and non-discriminatory regulation of the electoral process that does not deprive any Pennsylvanian of the right to vote. The requirement falls well within the General

Assembly's plenary authority to establish procedures for the orderly and secure administration of elections and is entirely consistent with the intent and meaning of the Free and Equal Elections Clause.

A. The Legislative History of Act 77 Demonstrates a Clear Commitment by the General Assembly to Free and Equal Elections.

Petitioners argue that the dating requirement enacted by the General Assembly curtails voting rights, but in reality, the General Assembly is responsible for the most significant voting expansion in the Commonwealth in a generation.

The dating requirement has a long history as a part of the Commonwealth's Election Code. In 1963, absentee voting was extended from military voters to the general public. *See* Act No. 37, Session of 1963, Pub. L. No. 707, § 22. Even then, absentee voting was only permitted for those with a statutorily-defined reason for doing so, such as a physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. In order to cast an absentee ballot, a Pennsylvania voter was required to provide a permissible reason to do so and would have to return his or her absentee ballot no later than 5:00 PM on the Friday before the election. *Id.*

Since that 1963 enactment, the procedure for completing and submitting an absentee ballot has remained consistent. In particular, after marking his or her ballot, a Pennsylvania absentee voter must:

[F]old the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.' This

envelope shall then be placed in the second one, on which is printed the form of declaration of the elector . . . *The elector shall then fill out, date and sign the declaration printed on such envelope.* Such envelope shall then be securely sealed and the elector shall send same by mail . . . or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added).

In 2019, the General Assembly dramatically expanded the ability for Pennsylvanians to vote by mail, creating a new category of “no excuse” mail-in voting through Act 77. For reasons including consistency with other non-in-person ballot forms, and familiarity for voters, Act 77 maintained identical procedures for filling out, dating and signing the ballot return envelope for no-excuse mail-in ballots that had always applied with respect to absentee ballots. *Compare* 25 P.S. § 3150.16(a) (procedure for mail-in ballots) *with* 25 P.S. § 3146.6(a) (procedure for absentee ballots). Far from making it harder to vote, the upshot of Act 77 was making it dramatically *easier* for Pennsylvanians to cast a ballot on or before election day.⁴

⁴ Even after the enactment of Act 77, legislators on both sides of the aisle have continued to propose changes to the Election Code, such as to the dating requirement. *See, e.g.*, House Bill 2090, Regular Session 2021-22 (which would have also deemed “a missing or inaccurate date [on] an absentee or mail-in ballot shall not be a fatal defect for the ballot.”). The court below seized on these ongoing legislative proposals as “telling in their substance.” *See BPEP* at *106 n.55. The court both ignores the fact that: a) these proposals, are by their nature, proposed, rather than enacted legislation; and b) the fact that a proposal exists highlights the fact that the inclusion of the dating requirement was an intentional act of the General Assembly.

B. The Dating Requirement Serves a Clear Purpose as a Part of the General Assembly’s Comprehensive Election Code.

Despite Petitioners’ glib pronouncements to the contrary, numerous courts have recognized that the requirement that electors date and sign their absentee or mail-in ballot return envelope serves a variety of important election administration purposes. For example,

The date on the ballot envelope provides proof of when the “elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot[.]” The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.

In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020) (“2020 Canvass”) (Dougherty, J., concurring and dissenting) (citation omitted); *see also Ritter v. Lehigh Cty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1, at *10-11 (Pa. Commw. Ct. Jan. 3, 2022) (same).

The *Migliori* District Court similarly concluded that these statutory provisions serve “an important public interest in the integrity of an election process that ensures fair, efficient, and fraud-free elections is served by compliance with the statute mandating the handwritten date requirement.” *Migliori*, 2022 U.S. Dist. LEXIS 46352, at *38-39. And as Judge Leeson further observed:

An elector's compliance with the signature and date requirement is an important guard against fraud. Where an elector fully complies with the instructions on the outer envelope, the electoral authorities conducting the election can be assured of the date on which the ballot was executed. Where, however, the outer envelope remains undated, the possibility for fraud is heightened, as individuals who come in contact with that outer envelope may, post hoc, fill in a date that is not representative of the date on which the ballot was executed.

Id. at *38.

A practical example comes from a recent Lancaster County election fraud case concerning a mail-in ballot cast 12 days after a voter's death. There the date supplied on the ballot declaration was the only piece of evidence of fraud on the face of the ballot, and in conjunction with the Commonwealth's SURE system, the date on the ballot declaration helped to detect fraud. *See Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022. Inexplicably, the court below acknowledges the concrete example of the *Mihaliak* case, but then ignores it in its analysis.

As the U.S. District Court for the Western District of Pennsylvania previously concluded, "the Pennsylvania legislature 'weigh[ed] the pros and cons,' and adopted a broader system of 'no excuse' mail-in voting as part of the Commonwealth's Election Code." *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 395 (W.D. Pa. 2020) (citing *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)). "And the key point is that the legislature made that judgment in the context of erecting a broader election scheme that authorizes other forms of voting and has

many . . . safeguards in place to catch or deter fraud and other illegal voting practices.” *Id.* at 396. “In this larger context, the Court cannot say that the balance Pennsylvania struck across the Election Code was unreasonable, illegitimate, or otherwise not ‘sufficiently weighty to justify’” *Id.*

Lastly, as noted in Part III.A above, the General Assembly mirrored the existing ballot return procedures for absentee ballots when crafting Act 77 to create no-excuse mail-in voting. Again, this was an intentional approach to remain consistent with laws governing absentee ballot procedures, and maintain familiarity for voters wishing to take advantage of mail-in voting who may have previously cast an absentee ballot.

* * *

Therefore, given the General Assembly’s⁵ well-recognized constitutional plenary power to prescribe the time, place, and manner of the Commonwealth’s elections, the clear legislative mandate of what is required of the elector, and the

⁵ The court below wrote that “although they are not ‘the government’ for purposes of strict scrutiny, Republican Party Intervenors are, notably, the only parties to this case that seek to have the dating provisions upheld under the Constitution.” *BPEP* at *103. The Legislative Leaders note that they would vigorously defend the challenged provisions if permitted to intervene in this matter. However, the decisions of Pennsylvania’s courts have drastically reduced legislative standing. *See, e.g., Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 849 (Pa. 2024); *Ball*, 284 A.3d at 1192; *In re November 3, 2020 Gen. Election*, 244 A.3d 317, 317 (Pa. 2020); *Pa. Democratic Party*, 238 A.3d at 355. The Legislative Leaders would respectfully suggest that if the courts would prefer to see “adequate advocacy” (*PA Democratic Party*, 238 A.3d at 355) from the government, they should revisit this line of cases, especially in light of this Court’s recent broad expansion of standing in *Shirley v. Pa. Legislative Reference Bureau*. 318 A.3d 832 (Pa. 2024).

election-administration purposes of the statute, the statute in question is an important part of Pennsylvania's Election Code that should be modified only by legislative enactment.

IV. The Decision of the Court Below Will Cause Chaos if Left to Stand.

A. The Proceedings Below Failed to Join All Indispensable Parties, Resulting in an Equal Protection Violation.

Pursuant to the Declaratory Judgments Act (DJA), “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” 42 Pa. Cons. Stat. § 7540. Here, Petitioners sought “declaratory and injunctive relief against Al Schmidt, in his official capacity as Secretary of the Commonwealth. . . , the Philadelphia County Board of Elections. . . , and the Allegheny County Board of Elections.” *BPEP*, at *6-7. However, Petitioners and the court below ignored the other 65 county election boards, despite a proper preliminary objection that Petitioners had failed to join indispensable parties.

A court **must** join indispensable parties to an action, or, if not possible, dismiss the action “[w]henever it appears by suggestion of the parties or otherwise . . . that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b). Indispensable parties are those “whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such

rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975).

Significantly, “[t]he absence of indispensable parties *goes absolutely to the jurisdiction*, and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264-65 (Pa. 1955) (emphasis added); *see also Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) (“unless all indispensable parties are made parties to an action, a court is powerless to grant relief. Thus, the absence of such a party goes absolutely to the court’s jurisdiction.”) (citations omitted); *Fiore v. Oakwood Plaza Shopping Center, Inc.*, 585 A.2d 1012, 1020 (Pa. Super. Ct. 1991) (“In this Commonwealth, the issue of failure to join an indispensable party cannot be waived; if such a party is not joined, a court is without jurisdiction to decide the matter”).

This Court has laid out a series of factors to consider as to whether a party is indispensable, namely: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994). Here, by failing to join all of the county boards of elections in these circumstances, Petitioners failed to join indispensable parties.

Indeed, this case is emblematic of why, in a declaratory judgment action, “all persons shall be made parties who have or claim any interest which would be affected by the declaration. . .” 42 Pa. Cons. Stat. § 7540. Here, per the Commonwealth Court’s Order, it “DECLARED that the Election Code’s dating provisions are invalid and unconstitutional. . .” *BPEP* at *121-22. While “Respondents . . . are PERMANENTLY ENJOINED from strictly enforcing the dating provisions of the Election Code” (*BPEP* at *122), this declaration does not affect the other 65 county election boards “not parties to the proceeding.” 42 Pa. Cons. Stat. § 7540.

Indeed, those county boards have been ordered by this Court that “failure to comply with the date requirement would render a ballot invalid in any election after 2020 . . . that ballots must be dated, and that failure to provide a date would result in disqualification.” *Ball*, 289 A.3d at 22.

As such, by failing to join indispensable parties, Petitioners and the court below have created a situation where two county election boards have been enjoined by a lower court from doing what all counties have been ordered to do by this Court. The result is that different counties within Pennsylvania will be counting ballots based on different standards—a distinction that is arbitrary and disparate, and therefore, a clear Equal Protection violation. *See* U.S. Const. amend. XIV, § 1 (“no

State shall ... deny to any person within its jurisdiction the equal protection of laws.”).

The Supreme Court of the United States has held that “there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State.” *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *see also Bush v. Gore*, 531 U.S. 98, 106-07 (2000) (finding Equal Protection violation by different counties counting ballots by different standards).

Given Petitioners’ and the Commonwealth Court’s failure to join the other county election boards, this matter must be dismissed, or alternatively remanded for further proceedings that include all of the Commonwealth’s boards of elections.

B. The Court Below Usurped the Power of the General Assembly to Legislate for Pennsylvania’s Elections.

It is axiomatic that “[t]he judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceeds along suspect lines.” *Mercurio v. Allegheny Cty. Redev. Auth.*, 839 A.2d 1196, 1203 (Pa. Commw. Ct. 2003) (internal citations omitted). Indeed, courts should be cautious before:

[S]woop[ing] in and alter[ing] carefully considered and democratically enacted state election rules when an election is imminent.

That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State’s interest in running an orderly, efficient

election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.

Democratic Nat'l Comm. v. Wis. State Legis., 141 S. Ct. 28, 31 (2020) (Roberts, C.J., concurring). That is precisely why Justice Wecht wrote in *2020 Canvass* that “[a] court’s only ‘goal’ should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said*.” 241 A.3d at 1082 (Wecht, J., concurring and dissenting) (emphasis in original).

“While the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Pa. Democratic Party*, 238 A.3d at 374. Moreover, this Court has previously “determined that the Election Code’s command [regarding the dating requirement] is unambiguous and mandatory.” *Ball*, 289 A.3d at 21-22 (enjoining undated ballots from being counted). Thus, the only way around that “unambiguous and mandatory” application would be for this Court to find that the dating requirement impacts the *right* to vote (which it doesn’t, as discussed in Part II.A), **and** to find discrimination in a statute that, by its express terms treats all voters **equally**.

As such, this Court should reverse the court below and respect the right of the General Assembly to legislate for Pennsylvania’s elections.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court uphold the General Assembly's constitutional power and responsibility as the Commonwealth's "democratically-elected representatives to weigh the pros and cons of various balloting systems," *Weber*, 347 F.3d at 1106, and prevent chaos in a presidential election, by reversing the decision of the court below.

Dated: September 3, 2024

Respectfully submitted,

/s/ Zachary M. Wallen

Zachary M. Wallen

Pa. ID No. 309176

CHALMERS, ADAMS, BACKER &
KAUFMAN, LLC

301 South Hills Village Drive

Suite LL200-420

Pittsburgh, PA 15241

(412) 200-0842

(412) 235-5001 (facsimile)

zwallen@chalmersadams.com

Counsel for Amici Curiae

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Amicus Curiae Brief contains 6,377 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

Counsel for Amici Curiae

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Zachary M. Wallen

Counsel for Amici Curiae

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