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68 MAP 2024

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 68 MAP 2024

BLACK POLITICAL EMPOWERMENT PROJECT, et al.,

Petitioners-Appellees,

v.

AL SCHMIDT, et al.,

Respondents,

v.

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervenor-Appellants

Appeal of: Republican Party of Pennsylvania and Republican National Committee

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BRIEF OF APPELLEES

On Appeal from the Order of the Commonwealth Court of Pennsylvania, 283 MD 2024, entered August 30, 2024.

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I. INTRODUCTION

Since 2020, thousands of Pennsylvania voters who timely submitted mail ballots have been disenfranchised because they omitted a handwritten date, or wrote an "incorrect" date, on the outer mail ballot envelope. Two federal courts have confirmed, based on a complete record including discovery from the Commonwealth and all 67 counties, that this voter-written date serves no purpose. It plays no role in establishing a ballot's timeliness or voter eligibility and is not used to detect fraud. No one disputes any of that.

Appellants ignore the uncontested facts. On the law, they propose a radically neutered construction of the Free and Equal Elections Clause—one that contravenes two centuries of jurisprudence and this Commonwealth's traditions, eliminating protections against subverting the right to vote, as well as the right to have ballots "honestly counted," *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Whether the Free and Equal Elections Clause—one of the pillars of our constitutional edifice—protects mail ballot voters from the arbitrary disenfranchisement at issue here is a question of first impression. The Court should now affirm the relief granted by the Commonwealth Court, preventing another round of unconstitutional mass disenfranchisement that was set to ensue in this November's election, and upholding the Clause's fundamental guarantee.

II. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commonwealth Court correctly hold that enforcement of a purposeless envelope-dating provision to disenfranchise thousands of voters in every election violates the fundamental right to vote guaranteed by the Pennsylvania Constitution's Free and Equal Elections Clause?

Suggested answer: Yes.

2. Should this Court re-interpret the Election Code's envelope-dating provisions set forth at 25 P.S. §§ 3146.6(a), 3150.16(a) as merely directory, to avoid the constitutional violation triggered by interpreting the provisions as requiring disenfranchisement for non-compliance?

Suggested answer: Yes.

III. COUNTER-STATEMENT OF THE CASE

A. Origins of the Date Provision

The Election Code has long provided an absentee ballot option for certain Pennsylvania voters. *See* 25 P.S. §§ 3146.1–3146.9. In 1963, the General Assembly added to the absentee ballot provisions a requirement that the "elector shall...fill out, date and sign [a] declaration printed on" the outer envelope used to return absentee ballots. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1306. At the same time, the Code's canvassing provision was amended to instruct county boards to set aside ballots returned in envelopes bearing a date after the election, *id.*, sec. 24 § 1308(c).

Thus, for a time in the 1960s, the Election Code directed use of the handwritten envelope date as part of the determination whether absentee ballots were timely.

In 1968, the Legislature updated the Code to make ***date of receipt*** the sole factor in determining timeliness of absentee ballots, eliminating the requirement to set aside ballots based on the envelope date. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, §§ 1308(a) & (c). Thus, while the instruction to "fill out, date, and sign" the envelope declaration remained after 1969, the only date used to determine an absentee ballot's timeliness was date of receipt.

In 2019, the Legislature enacted Act 77, which provides all eligible voters the option of no-excuse mail-in voting. The Legislature largely repurposed the Code's absentee-ballot provisions in the new mail ballot provisions, including the instruction from § 3146.6(a) to "fill out, date, and sign" a declaration printed on the return envelope. The Legislature's Republican Party leadership stated below that absentee-ballot language was adopted wholesale "to minimize the complexities of legislative drafting," (6/24/24 Br. of *Amici Curiae* Bryan Cutler, et al., 24), ***not*** because the legislature made any determination that the voter-written date served some purpose in administering the mail ballot process.

B. The Mail Ballot Process[1]

A voter seeking to vote by mail must complete an application to their county elections board that includes their name, address, and proof of identification. 25 P.S. §§ 3146.2, 3150.12. The requisite information allows boards to verify the voter's qualifications to vote in Pennsylvania—namely, they are over 18-years old, have been a citizen and resided in the election district for at least one month, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301(a).

The board then confirms the applicant's qualifications by verifying proof of identification and comparing the application information with the voter's record. 25 P.S. §§ 3146.2b, 3150.12b.[2] The board's eligibility determinations are conclusive unless challenged. *Id*. §§ 3146.2c, 3150.12b(3).

After verifying voter identity and eligibility, the board sends a mail-ballot package that contains a ballot, a secrecy envelope marked with the words "Official Election Ballot," and a pre-addressed return envelope containing a pre-printed voter declaration form. *Id.* §§ 3146.6(a), 3150.16(a). Both the mail ballot itself and the

[1] For ease of reference, "mail ballots" includes both absentee and mail ballots unless otherwise noted. The rules governing treatment of absentee and mail ballots are identical.

[2] *See also* Pa. DOS, Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures, at 2, https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-DOS-Guidance-Civilian-Absentee-Mail-In-Ballot-Procedures-v3.pdf (last updated Apr. 3, 2023).

"form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth." *Id.* §§ 3146.3(b), 3146.4, 3150.13(b).

At "any time" after receiving their mail-ballot package, the voter marks their ballot, places it in the secrecy envelope and the return envelope, completes the declaration, and delivers the ballot, by mail or in person, to their county board. *Id.* §§ 3146.6(a), 3150.16(a). The date written on the return envelope is not used to determine or confirm voter identity, eligibility, or timeliness of the ballot. Rather, a mail ballot is timely if the board receives it by 8 p.m. on Election Day. *Id.,* §§ 3146.6(c), 3150.16(c).

Upon receipt, the board must stamp the return envelope with the date of receipt to confirm its timeliness and log the receipt in the Statewide Uniform Registry of Electors ("SURE") system, the voter database used to generate poll books. *See* 25 P.S. §§ 3146.9 (b)(5); 3150.17(b)(5) (requiring boards to "maintain a record of...the date on which the elector's completed mail-in ballot is received by the county board"); *see also* Op. 77; Appellants Br. ("Br."), 45. The poll books each county generates from the SURE system show which voters requested and returned mail ballots. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1).

Mail ballots are verified pursuant to 25 P.S. § 3146.8(g). Any verified ballot submission that is not challenged is counted and included with the election results. *Id*., § 3146.8(g)(4). After the counties count the ballots, the Secretary has the duty

"[t]o receive from [them] the returns of primaries and elections, to canvass and compute the votes cast…; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections...." *Id.* § 2621(f).

C. Litigation over the Date Provision

Millions of Pennsylvania voters have voted mail ballot since Act 77 passed in 2019. Litigation over the validity of mail ballots received in un- and mis-dated envelopes began almost immediately. A series of state and federal cases have interpreted the Election Code's envelope-dating provisions and considered the application of the federal Materiality Provision, 52 U.S.C. § 10101(a)(2)(B). None of those cases presented a claim under the Free and Equal Elections Clause.

In 2020, this Court conducted a statutory analysis of the date provision and issued a split decision with four Justices ruling in favor of counting timely ballots received in the 2020 election. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election ("In re 2020")*, 241 A.3d 1058, 1076-79 (Pa. 2020), *cert. denied*, 141 S. Ct. 1451 (2021), (opinion announcing judgment ["OAJC"]); *id.*, 1088 (Wecht, J., concurring and dissenting). In these fast-moving, consolidated post-election appeals, appellants (political campaigns seeking to disqualify ballots) postulated governmental interests that supposedly supported strict enforcement of the date provision. Without any record testing these theories, six Justices split over

whether the purported interests appeared sufficiently "weighty" to justify interpreting the Code's date instruction as "mandatory."[3] *See id.*, 1076-79 (OAJC) (date provision was "a directory, rather than a mandatory, instruction" because purported interests were not "weighty"); *id.*, 1090-91 (Dougherty, J., concurring and dissenting) (crediting purported "weighty interests" to interpret the provision as mandatory).

In early 2022, Lehigh County voters disenfranchised by the date requirement in the 2021 municipal election filed a federal Materiality Provision challenge. A unanimous Third Circuit panel held that the Materiality Provision prohibited disenfranchising voters for inconsequential envelope-dating errors. *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir.), *vacated as moot*, 143 S. Ct. 297 (2022). Following *Migliori*, state courts directed county boards to count ballots despite envelope-dating errors in the 2022 primary. *See Chapman v. Berks Cnty. Bd. of Elections, et al.*, No. 355 MD 2022, 2022 WL 4100998 (Pa. Cmwlth. Aug. 19, 2022); *McCormick, et al. v. Chapman, et al.*, No. 286 MD 2022, 2022 WL 2900112 (Pa. Cmwlth. June 2. 2022).

In October 2022, after Lehigh County counted the ballots at issue in *Migliori* and certified all 2021 election results, the U.S. Supreme Court vacated the Third

[3] The seventh Justice opined that a plain-text reading should be applied to interpret "shall ... date" as mandatory regardless of any "weighty interests," but voted with the plurality in the OAJC to require the counting of such ballots for the 2020 election only. *Id.*, 1079-80 (Wecht, J.).

Circuit's opinion for mootness pursuant to *United States v. Munsingwear*, 340 U.S. 36 (1950). 143 S. Ct. 297. Within days of that non-merits *vacatur*, the Republican Party (Appellants here) filed a King's Bench petition in this Court seeking to enjoin officials from counting mail ballots received in envelopes with a missing or "incorrect" voter-written date. Appellants filed their King's Bench petition mere weeks before Election Day.

In the context of another fast-moving case without a factual record, this Court granted the petition, applying the bottom-line conclusion from *In re 2020*—that the date provisions are mandatory under the Election Code. *Ball v. Chapman*, 289 A.3d 289 A.3d 1, 21-22 (Pa. 2023) (citing *In re 2020*, 241 A.3d at 1086-87 (Wecht, J.) & 1090-91 (Dougherty, J.)). The Court did not revisit the *In re 2020* debate regarding whether "weighty interests" supported mandatory application of the date requirement. And it was not presented with any constitutional claim under the Free and Equal Elections Clause. One week before Election Day, the *Ball* Court ordered that ballots arriving in un- or incorrectly-dated return envelopes be set aside in the 2022 general election. *Id.* Consequently, county boards across the Commonwealth adjusted quickly on the eve of Election Day to set aside ballots with missing or incorrect envelope dates.

D. Election Officials Confirm the Date Provision Serves No Purpose.

Following *Ball,* voters facing disenfranchisement and non-partisan voting-rights organizations filed a federal Materiality Provision case in 2022 against the Secretary and all 67 county boards.[4] *See Pa. State Conf. of NAACP v. Schmidt ("NAACP I")*, 703 F. Supp. 3d 632 (W.D. Pa. 2023), *rev'd on other grounds*, 97 F.4th 120 (3d Cir. 2024).

NAACP was the first time all parties—including Appellants here, who intervened and participated fully—conducted full discovery, including interrogatories, depositions and admissions, to develop a record regarding the voter-written date's role (if any) in election administration and its impact on voters.[5] Interrogatory responses from the Secretary and all 67 county boards, supplemented by deposition testimony, confirmed ***no*** party or entity responsible for election administration uses the date for any reason—including to determine timely receipt or voter qualifications—other than to disenfranchise voters who did not write a "correct" date. *See NAACP I,* 703 F.Supp.3d at 668 ("County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on

[4] The plaintiffs in *NAACP* raised only federal claims in that federal litigation. They did not raise the Free and Equal Elections Clause, which is not referenced in the federal court opinions. *Cf. Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984) (limiting federal courts from enforcing state constitutional rights against state actors).

[5] In *NAACP*, Appellants were able to serve requests, notice depositions, and cross-examine all testifying witnesses. Accordingly, Appellants agreed in the proceedings below that elements of the record developed in *NAACP I* may be relied upon in this case and are subject to judicial notice. *See* Op. 24, n.28.

the Return Envelope for any purpose related to determining a voter's age..., citizenship..., county or duration of residence..., felony status..., or timeliness of receipt) (internal record citations omitted). Based on this fulsome record, the district court granted summary judgment, finding that the date provision is "wholly irrelevant" to election administration. *NAACP I*, 703 F. Supp. 3d at 678.

While a divided Third Circuit panel subsequently reversed based on a novel legal interpretation of the federal Materiality Provision, that court endorsed the district court's findings about the date provision. Indeed, the majority agreed that the date provision "serves little apparent purpose." *Pa. State Conf. of NAACP Branches v. Schmidt ("NAACP II")*, 97 F.4th 120, 125 (3d Cir. 2024). It agreed that the date plays no role in determining a ballot's timeliness. *Id.,* 125 & 127.[6] It also agreed that the date is not used to determine voter qualifications. *Id.,* 129 ("No party disputed that election officials 'did not use the handwritten date...for any purpose related to determining' a voter's qualification under Pennsylvania law."). And the court did not disturb the district court's conclusion that the date requirement is not used to detect fraud. *See NAACP I*, 703 F. Supp. at 679, n.39 (single instance of purported

[6] *See also NAACP I*, 703 F. Supp. at 679 ("Irrespective of any date written on the outer Return Envelope's voter declaration, if a county board received and date-stamped a...mail ballot before 8:00 p.m. on Election Day, the ballot was deemed timely received.... [I]f the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope").

fraud in Lancaster County was "detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope"); *see also NAACP II,* 97 F.4th at 139-40 (Shwartz, J., dissenting) (handwritten date "not used to...detect fraud.").[7]

This lawsuit followed *NAACP II* and is the first to raise a claim under the Free and Equal Elections Clause.

E. Enforcement of the Date Requirement Disenfranchises Thousands of Pennsylvania Voters in Each Election.

Though the date serves no discernible purpose, the Secretary has issued guidance and directives to county boards following *Ball* that timely mail-ballot submissions with a missing or incorrect date must be segregated and excluded from tabulation. Pa. DOS, "Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures," v.3.0 (April 3, 2023), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-DOS-Guidance-Civilian-Absentee-Mail-In-Ballot-Procedures-v3.pdf; Pa. DOS, "Directive Concerning the Form of Absentee and Mail-in Ballot Materials, v.2.0 (July 1, 2024) ("Mail Ballot Directive"), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-

[7] *Cf. In re 2020*, 241 A.3d at 1076-77 (because ballots received after 8:00p.m. on Election Day cannot be counted, there is no "danger that any of these ballots was...fraudulently back-dated").

Directive-Absentee-Mail-in-Ballot-Materials-v2.0.pdf; *see also* A442[8] (4/19/24 DOS Email).

Meanwhile, thousands of mail ballots have been set aside in every election. In the 2022 general election, enforcement of the date provision disenfranchised over 10,000 voters. *E.g.*, *NAACP II,* 97 F.4th at 127. Thousands more were disenfranchised for this reason in the 2023 municipal elections, and again in the 2024 Presidential primary. *See* A403 (Shapell Decl.), ¶ 12.

Enforcement of the date provision has disenfranchised eligible voters throughout Pennsylvania, from all walks of life, and across the political spectrum. *See* Op. 80-81, n.56-59 (citing voter-witness declarations).[9] It has also led to arbitrary results among counties, further underscoring its lack of value to election administration. For example, in the 2022 general election:

- Many counties set aside ballots where the envelope date was correct but missing the year; others counted such ballots. *NAACP I*, 703 F. Supp. At 681, n.43.

- More than 1,000 timely-received ballots were set aside because of "an obvious error by the voter in relation to the date," such as writing a month prior to September or a month after November 8. *Id.,* 681. The

[8] References herein to page numbers A400-A516 refer to selections from the record below that Appellees attach as an Appendix to this Brief for the Court's convenience. Appellees anticipate that the separate record on appeal will not be compiled before Briefing is closed and therefore attach true and correct copies of any document from the record below referenced in Appellees' Brief.

[9] For ease of reference, true and correct copies of the voter-witness declarations are provided in the attached Appendix, A405-A441.

district court found that this "shows the irrelevance of any date written by the voter on the outer envelope." *Id.*

- Counties took varying approaches to dates written in the international format (*i.e.*, day/month/year). *Id.*, 681-82.

- Counties set aside hundreds of timely-received ballots with obviously unintentional slips of the pen. *Id.*

And many counties *counted* ballots with necessarily "incorrect" envelope dates. For example:

- "[S]ome counties precisely followed [the prescribed] date range even where the date on the return envelope was an impossibility because it predated the county's mailing of ballot packages to voters." *Id.*, 680.

- One county counted a ballot marked September 31—a date that does not exist. *Id.,* 681, n. 45.

- Counties took inconsistent approaches to voters who mistakenly wrote their birthdates. *Id*.

While Appellants attempt to relitigate the determination that the date provision is meaningless, they have not controverted the factual record underlying the *NAACP* courts' determinations. These facts, and election officials' admissions that the date serves no purpose, remain undisputed. *Cf.* Op. 24, n.28 ("the parties agreed that there are no factual issues in this case, that no stipulations of fact were required, and that this matter involves only legal issues").

IV. SUMMARY OF THE ARGUMENT

Enforcement of the date provision to reject thousands of timely votes does severe damage to Pennsylvanians' right to vote. Pennsylvania's Free and Equal

Elections Clause firmly establishes the right to vote as a fundamental that may not be diminished by the government. The Clause "strike[s]...at all regulations...which shall impair the right of suffrage…." *League of Women Voters v. Commonwealth ("LWV")*, 178 A.3d 737, 740-41 (Pa. 2018) (citation omitted). And under this Clause, this mass disenfranchisement cannot continue.

Appellants' argument hinges on a radical position that the Free and Equal Elections Clause is powerless against so-called "ballot-casting rules." This concept appears nowhere in the Election Code, and nor does the phrase "ballot-casting rule" appear in any Pennsylvania judicial opinion prior to the dissent below in this case. This proposed new constitutional carveout is irreconcilable with this Court's unequivocal mandate that the Free and Equal Elections Clause be "given the broadest interpretation, one which governs ***all aspects*** of the electoral process[.]" *LWV*, 178 A.3d at 814 (emphasis added).

The majority below faithfully applied controlling precedent requiring that a restriction on fundamental rights satisfy strict scrutiny. And the majority correctly recognized that no party has identified any compelling government interest to justify repeated mass disenfranchisement based on whether voters handwrite a purposeless date on return envelopes.

Appellants ignore the uncontroverted facts in continuing to advance disproven theories about how the voter-written date might have some use to someone. But

Appellants were unable to support those theories when provided a full opportunity to develop a record in *NAACP*. The federal courts have already confirmed, based on that record, that Appellants' justifications are unfounded, and that the voter-written date is "wholly irrelevant" to election administration. *NAACP I*, 703 F. Supp. at 678; *see also NAACP II*, 97 F.4th at 125. As the majority did below, this Court should reject Appellants' invitation to relitigate these theories without any new reasoning or factual basis. And given the abject lack of reason for disenfranchising voters who trip over the date requirement, the finding of a Free and Equal Elections Clause violation may be upheld under any standard.

Alternatively, the Court may uphold the result below based on statutory interpretation grounds. *See* Op. 82-83 n.61. Under the doctrine of constitutional avoidance, and given the subsequent evidence extinguishing the "weighty interests" presented to this Court in 2020, Appellees respectfully suggest this Court can revisit its interpretation of the date provision and hold instead that "dating the declaration is a directory, rather than a mandatory, instruction." *In re 2020*, 241 A.3d at 1076. Adopting this interpretation would avoid the constitutional violation inevitably triggered by mandatory disenfranchisement of thousands of Pennsylvanians for noncompliance with a rule that serves no purpose.

In all events, the Free and Equal Elections Clause cannot tolerate the mass disenfranchisement at issue here, and the Commonwealth Court correctly rejected Appellants' efforts to avoid that conclusion with specious procedural arguments:

- *This Court has already rejected challenges to the constitutionality of the date requirement.* Br. 1-2, 26-29. This is false. No Pennsylvania court previously decided the constitutional question raised in this case.
- *The Commonwealth Court lacked original jurisdiction. Id*. 4, 10-17. Appellants rely on a misreading of the unreported Commonwealth Court decision in *Republican National Committee v. Schmidt* ("*RNC II*"), No. 447 MD 2022 (Pa. Cmwlth. Mar. 23, 2023). Unlike the petitioners there, Appellees challenge a state-wide rule that the Secretary is statutorily responsible for enforcing.
- *Petitioners failed to name indispensable parties.* Br. 4,17-22. Appellants' position is based on a flawed premise, rejected by this Court in *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 582–83 (Pa. 2003), that plaintiffs must join every party who may be impacted by declaratory judgment actions challenging statewide legislation.
- *The relief granted requires invalidation of Act 77.* Br. 55-59. The court below correctly recognized that Appellees seek to halt the unconstitutional ***enforcement*** of the envelope dating provision in a way that disenfranchises

voters for non-compliance; they do not seek to excise "shall ... date," or any other language, from Act 77. Including a date line on mail ballot return envelopes and asking voters to fill it out is not the problem; disenfranchising voters when they make a meaningless error in filling it out is. *See In re 2020*, 241 A.3d at 1079 (citing *PDP*, 238 A.3d at 378). The nonseverability provision is not implicated.

None of Appellants' arguments support reversal. This Court should affirm.

V. ARGUMENT

A. Disenfranchising Voters Due to Noncompliance with the Date Provision Violates the Free and Equal Elections Clause.

1. Appellants' Proposed Limitations on the Right to Vote Are Irreconcilable with the Free and Equal Elections Clause.

In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: "Elections 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. The Clause means not only that voters must have "the same free and equal opportunity to select his or her representatives," Br. 29, but also that: "each voter under the law has the right to cast [their] ballot and have it honestly counted," *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); that "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," *id.*; that "no constitutional right of the

qualified elector is subverted....," *LWV*, 178 A.3d at 810; and that elections must "be kept open and unrestricted to the voters of our Commonwealth," *id.*, 804.

Any rule that requires disqualification of votes for noncompliance is, on its face, a restriction on voting. Yet Appellants' principal merits argument is that the Free and Equal Elections Clause—perhaps the signal achievement of our Commonwealth's Constitution—is toothless in the face of a pointless rule driving mass disenfranchisement in every election. Such a radical diminishment of the Clause's ambit cannot be squared with this Court's longstanding jurisprudence, and if accepted, would invite sinister applications. This Court should reject Appellants' parched and parsimonious view of this noble provision.

The Free and Equal Elections Clause is uniquely broad in scope and powerful in its protective force. As this Court detailed in *LWV*, the right to vote in this Commonwealth emanates from a proud tradition that predates the country's founding and guarantees broader protections than the federal Constitution:

> Pennsylvania's Constitution, when adopted in 1776, was widely viewed as "the most radically democratic of all the early state constitutions." Ken Gormley, "Overview of Pennsylvania Constitutional Law," as appearing in Ken Gormley, ed., *The Pennsylvania Constitution A Treatise on Rights and Liberties*, 3 (2004). Indeed, our Constitution, which was adopted over a full decade before the United States Constitution, served as the foundation—the template—for the federal charter. *Id.* Our autonomous state Constitution, rather than a "reaction" to federal constitutional jurisprudence, stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth.

LWV, 178 A.3d at 802. Our framers envisioned the right to vote as "that most central of democratic rights[.]" *Id.*, 741; *see also PDP*, 238 A.3d at 386-87 (Wecht, J. concurring) ("No right is more precious….Other rights, even the most basic, are illusory if the right to vote is undermined.").

Accordingly, the "plain and expansive sweep of the words 'free and equal'" is "indicative of the framers' intent that ***all aspects*** of the electoral process, to ***the greatest degree possible***, be kept open and ***unrestricted*** to the voters of our Commonwealth...." *Id.*, 804 (emphases added). It "strike[s]…at ***all*** regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise." *Id*., 809 (citation omitted) (emphasis added).

Ignoring this text, history, and precedent, Appellants posit massive new carveouts from the Clause's protections. Their arguments represent an extreme departure from first principles.

First, Appellants suggest—and the dissent endorsed—a novel exemption from the Clause's protection for the invented category of "ballot-casting" rules. Such an exception does not exist. Indeed, the idea of some separate category of "ballot-casting" rules is not grounded in the Election Code or found anywhere in 250 years of precedent.[10] Adopting this exemption now would require the Court to overturn

[10] The Election Code undercuts the concept of a "ballot-casting" stage that includes dating the return envelope. Based on a plain reading of the Code's mail ballot procedures, completion of the

longstanding jurisprudence applying the Free and Equal Elections Clause to "all aspects of the electoral process," *Id.*, 804, and would render the Clause impotent even against Jim Crow-era requirements like literacy tests, or a requirement to write the voter's paternal grandfather's name on the return envelope. Appellants' theories would immunize such blatant infringements on the right to vote from any constitutional scrutiny so long as they involve "ballot-casting."

Appellants' radical carveout is irreconcilable with this Court's recognition that the Clause must apply in a "broad and robust" manner." *Id.,* 814. And their misrepresentation that Pennsylvania courts have never applied the Clause to a "ballot-casting rule" ignores a history of cases protecting the right to vote against unwarranted restrictions. For example, this Court applied the Clause to the mail-ballot-receipt deadline—clearly a "ballot-casting" rule—during the November 2020 election. *PDP,* 238 A.3d at 371–72. The Commonwealth Court, following remand instructions from this Court, also previously applied the Clause to invalidate a statute requiring people casting ballots in person to show photo identification. *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 WL 4497211, at *6 (Pa. Cmwlth. Oct.

envelope declaration is not itself "ballot casting." The Code provides separate sets of rules that apply to the ballot on one hand and the return envelope declaration on the other. *Compare* 25 P.S. § 3146.3(b) (concerning the form of ballots), *with id*. § 3164.14 (concerning the form of return envelope with voter declaration). Lumping the envelope dating requirement together with "ballot-casting" is a novel concept coined earlier this year by two federal judges in *NAACP II,* which finds no support in the Code or any Pennsylvania case.

2, 2012). This Court also affirmed a ruling that a registration ban on people released from prison within the previous five years violates the Clause. *Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Cmwlth. 2000) (*en banc*), *aff'd without opinion*, 783 A.2d 763 (Pa. 2001). These decisions build on older cases applying the Clause to invalidate statutes that barred certain categories of people ***from casting ballots***. *See*, *e.g.*, *McCafferty v. Guyer*, 59 Pa. 109, 112 (1868) (there is no "power of the legislature to disfranchise one to whom the Constitution has given the rights of an elector"); *Page v. Allen*, 58 Pa. 338, 353 (1868) (enjoining enforcement of statute that added ten days to constitutional residency requirement for voting).

All of this is consistent with this Court's recent emphasis that "the words 'free and equal' as used in Article I, Section 5, have a broad and wide sweep." *LWV*, 178 A.3d at 809.[11]

Second, Appellants deploy partial quotes from this Court to claim that voting rules are only subject to any constitutional scrutiny when they "make it so difficult [to vote] as to amount to a denial" of the franchise. Br. 3, 30, 32. But this Court's decisions, in cases like *Berg* and *Applewhite II*, make clear that voting rules or practices that "affect" or "infringe upon" the right to vote must all be consistent with

[11] Meanwhile, *PDP* is the only authority Appellants cite for their incorrect assertion that Pennsylvania courts "routinely upheld ballot-casting rules—such as the declaration mandate and the secrecy-envelope rule—against challenges under the Clause." Br.31. As explained below, however, *PDP* did not address the constitutionality of the declaration mandate or secrecy envelope requirement. *See infra,* 23-24.

the Free and Equal Elections Clause's basic requirements. *See infra*, 26-27. Notably, Appellants' (and the dissent's, at 24-25) argument repeats a partial quote from *Winston* (Br. 3, 4, 30), but omits critical language that the Clause extends to restrictions that "effectively" deny the right to vote ***or*** "deny the franchise itself" ***or*** "subvert" that right. *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523). Here, enforcement of the date provision actually ***and*** effectively denies voters the right to have their ballots included—or at minimum subverts the right. Op. 77.

Third, Appellants wrongly suggest (Br. 31) that the Clause protects "only" the "opportunity to cast a vote in the election, not that every voter will successfully avail himself or herself of that opportunity."[12] But the Clause applies broadly, to "***all*** aspects of the electoral process." *LWV*, 178 A.3d at 804 (emphasis added). The fundamental right to vote under the Pennsylvania Constitution extends beyond just the right to register or fill out a ballot; it encompasses "the right to cast [a] ballot ***and***

[12] The dissent's supposition that "[n]o reasonable person would find the obligation to sign and date a declaration to be difficult or hard or challenging," Dissent 34, ignores the undisputed facts that the date line trips thousands of people in every election, including over 10,000 eligible voters in the 2022 general election. While the dissent downplays the constitutional significance of excluding 0.85% of all ballots cast, Dissent 40, discarding 10,000 votes is constitutionally problematic. *LWV*, 178 A.3d at 813 n.71 (an election is not "free and equal" when "**any substantial number** of legal voters are, from any cause, denied the right to vote.") (emphasis added). This is more than the entire population of Sullivan and Cameron Counties combined; surely disenfranchising enough people to fill two counties constitutes "a constitutionally intolerable ratio of rejected ballots." *PDP*, 238 A.3d at 389 (Wecht, J., concurring).

have it honestly counted." *Winston*, 91 A. at 523 (emphasis added). The date requirement obviously impairs the right to have a ballot "counted."[13]

The majority thus correctly rejected Appellants' invitation to neuter the Free and Equal Elections Clause and thereby abandon this Commonwealth's traditions and a century of jurisprudence. A voting rule that serves no purpose other than to disenfranchise thousands every election cannot be immune from all scrutiny under the Free and Equal Elections Clause.

2. This Court Has Not Addressed Constitutionality of Disenfranchising Voters Due to Envelope-Dating Errors.

Appellants' arguments also hinge on the fiction that this Court rejected Free and Equal Elections Clause challenges to the date provision in *Ball* and *PDP*. Br. 27-28. *Ball* involved no Free and Equal Elections Clause challenge—this Court reaffirmed statutory interpretation from *In re 2020*. Indeed, half of the Justices in *Ball* acknowledged that "failure to comply with the date requirement would not compel discarding votes in light of the Free and Equal Elections Clause...." 289 A.2d at 27 n.156. That footnote was the only mention of the Free and Equal Elections

[13] While Appellants dismiss as "nonsense" the idea that enforcing the dating requirement to reject votes denies the right to vote, Br. 32, it is an idea that has been endorsed by at least three of the six Justices who presided in *Ball*, who expressly found that rejecting a ballot based on non-compliance with the envelope-dating rule "denies the right of an individual to vote…." *Ball*, 289 A.3d at 25 (quoting 52 U.S.C. § 10101(a)(2)(B)). The Commonwealth Court also agreed in *Chapman*, 2022 WL 4100998, *27. Additionally, four out of the six federal circuit judges considering the question under federal law in the *Migliori* and *NAACP* cases concluded likewise. That is a lot of judicial firepower supporting what Appellants dismiss as "nonsense."

Clause in the *Ball* Court's analysis.[14] Even the dissent below did not entertain Appellants' strained reading of *Ball*. And the majority correctly found Appellees "raise[] an issue of first impression[.]" Op. 59.

Nor does *PDP* foreclose Appellees' constitutional claim. *Id*., 67-68. The petitioners in *PDP* raised no constitutional challenge to enforcement of the date provision. Petitioners there claimed only that the Free and Equal Elections Clause affirmatively requires that voters be given ***notice and an opportunity to cure***" minor errors before mail ballots were rejected. 238 A.3d at 372 (emphasis added). They did not seek a ruling on the antecedent question, namely, whether enforcing the date provision to reject timely ballots is unconstitutional. This Court decided only that "the Boards are not required to implement a 'notice and opportunity to cure' procedure" because the petitioners had "cited no constitutional or statutory basis" for imposing such a requirement on all counties. *Id.*, 374. This case raises an entirely different issue. Op. 68 ("notice and opportunity to cure procedures are **not** at issue in this case" (emphasis in original).[15]

[14] Appellants rely on a fleeting reference in the portion of the *Ball* opinion describing the parties' respective positions, which noted an assertion in the Secretary's brief that the RNC's interpretation of the statute "***could*** *implicate* the Free and Equal Elections Clause." *Ball*, 289 A.3d at 16 (emphasis added). The Court was not describing any claim or defense under the Free and Equal Elections Clause, nor did it conduct any constitutional analysis.

[15] *PDP* petitioners separately raised a Free and Equal Elections argument against enforcement of the secrecy envelope requirement. *See* 238 A.3d at 376. As in *Ball*, however, this Court analyzed only a statutory construction of this separate Election Code requirement, *id.*, 378-80.

In sum, there has been substantial litigation regarding ***statutory interpretation*** of the date provision in the Election Code, and ***different*** constitutional challenges involving ***other*** Election Code provisions, but before this case no court has addressed whether disenfranchising voters for noncompliance with the date provision is unconstitutional.[16]

3. Strict Scrutiny Applies to the Date Requirement's Restriction on the Fundamental Right to Vote.

Appellants do not dispute, and this Court has repeatedly reaffirmed, that the right to vote guaranteed by the Free and Equal Elections Clause is fundamental. *See*, *e.g.*, *PDP*, 238 A.3d at 361 (employing a construction of the Election Code that "favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate"); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (observing that "the right to vote is fundamental and 'pervasive of other basic civil and political rights'") (citing *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)).

Accordingly, the majority applied strict scrutiny "because the date provisions impose a significant burden on one's constitutional right to vote, in that they restrict the right to have one's vote counted to only those voters who *correctly* handwrite

[16] The Third Circuit, in *NAACP II*, did not and could not opine on the enforceability of the date requirement under the Free and Equal Elections Clause. The court held only that enforcing the date requirement does not violate a *federal statute*, relying on a novel theory that the statute categorically does not apply to mail ballot-related paperwork. There was no state constitutional claim in *NAACP* and there is no reference to the Free and Equal Elections Clause anywhere in the federal court's opinions. *Cf. Pennhurst*, 465 U.S. 89.

the date on their mail ballots and effectively deny the right to all other qualified electors who seek to exercise the franchise by mail…but make minor mistakes regarding the handwritten date on their mail ballots' declarations." Op. 75 (emphasis in original). That is correct—as was the conclusion that, by "effectively deny[ing]" the right to vote, enforcement of the date provision to exclude a person's ballot from being counted imposes a "severe" and "significant" burden on that right. Op. 75.

But this Court need not conclude that the burden on a fundamental right is "severe" to apply strict scrutiny. *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) ("[W]here the fundamental right to vote is at issue, a strong state interest must be demonstrated"). Laws that "infringe upon," "affect," or "burden" the fundamental right to vote may trigger such review, even absent a "severe" burden. *See*, *e.g.*, *Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth.), *aff'd*, 552 Pa. 126 (1998) ("It is well settled that laws which affect a fundamental right, such as the right to vote...are subject to strict scrutiny.")[17]; *James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984) (where a "fundamental right has been burdened, another standard of review is applied: that of strict scrutiny")[18]; *see also LWV,* 178 A.3d at 810 (quoting *Winston*,

[17] While Appellants note that *Berg* "declined to apply strict scrutiny" (Br., 40), it expressly did so upon finding that the case did not involve denial of fundamental right to vote, and not because strict scrutiny does not apply when the right to vote is at issue. 712 A. 2d at 342-44.

[18] Neither Appellants nor the dissent explain why infringements on the fundamental right to vote should be subject a lower level of scrutiny, while infringements on any other fundamental right triggers strict scrutiny. *See*, *e.g.*, *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum.*

91 A. at 523) (elections are "free and equal" 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*." (emphasis added)); *Applewhite v. Commonwealth* ("*Applewhite II*"), No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Cmwlth. Jan. 17, 2014) (laws that "infringe[] upon qualified electors' right to vote" are analyzed "under strict scrutiny.") Regardless what terminology one uses to describe the harsh result here, losing the right to have one's vote included due to a meaningless mistake is an "extremely serious matter" that triggers strict scrutiny under Pennsylvania law. *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) ("The disfranchisement of even one person validly exercising his right to vote is an extremely serious matter."); *see supra*, 25-26.

As the majority held, under strict scrutiny, Appellants "bear the heavy burden of proving that the law in question, i.e., the dating provision, is 'narrowly drawn to advance a state interest of compelling importance.'" Op. 75 (quoting *PDP*, 238 A. 3d at 385); *see also, e.g.*, *Appeal of Gallagher*, 41 A.2d at 632-33 (the power to

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Servs., 309 A.3d 808, 945 (Pa. 2024)("the right to reproductive autonomy, like other privacy rights, is fundamental .... Accordingly, we would remand to the Commonwealth Court to apply strict scrutiny based on the framework of the Section 26 analysis); *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 294 A.3d 537, 957 (Pa. Cmwlth. 2023) ("Petitioners' equal protection claim is based on a fundamental right to education, the alleged impingement of which should be reviewed under strict scrutiny").

throw out ballots based on minor irregularities "must be exercised ***very sparingly*** and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election ***except for compelling reasons***" (emphasis added)).[19]

Appellants cannot show that enforcing the envelope-dating rule on pain of disenfranchisement clears that bar. The majority thus correctly held, "the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud. It is therefore apparent that the dating provisions are virtually meaningless and, thus, serve no compelling government interest." Op.76. Indeed, Appellants ***nowhere*** dispute that the dating provision would fail strict scrutiny.

Appellants' rhetoric about the majority's view—that it "would imperil every 'reasonable, non-discriminatory restriction[]' the General Assembly has enacted 'to ensure honest and fair elections' in Pennsylvania," Br. 41—is alarmist and overblown. The dating provision has nothing to do with "ensur[ing] honest and fair

[19] The dissent's refrain that legislative enactments enjoy a presumption of constitutionality misses the point. The presumption of constitutionality gives way to a strict scrutiny analysis where, as here, a fundamental right is at stake. *See Berg* 712 A.2d at 342*; see also LWV*, 178 A.3d at 803 ("Although plenary, ...legislative power is subject to restrictions enumerated in the Constitution"; "the people have delegated general power to the General Assembly, with the express exception of certain fundamental rights reserved to the people in Article I").

elections," and the majority's opinion is concerned only with one meaningless restriction that serves no purpose other than mass disenfranchisement.

4. Enforcement of the Irrelevant Date Provision Cannot Survive Even Lesser Constitutional Scrutiny.

A mandatory date requirement cannot survive even a lower level of scrutiny because it serves no purpose. Even under federal law, burdens on the right to vote "***[h]owever slight*** that burden may appear…must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (emphasis added). Indeed, Appellants conceded below that the date provision is in fact a "burden" on the right to vote that must serve the "State's important regulatory interests" to survive. GOP Br. 52. It does not.

The majority correctly held: "as has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud. It is therefore apparent that the dating provisions are virtually meaningless and, thus, serve no compelling government interest." Op. 76.

Appellants wrongly claim that a majority of this Court has "recognized" that the dating provision serves an "unquestionable purpose." Br. 45 (citing *In re 2020*, 241 A.3d at 1090 (Dougherty, J.)). But the OAJC in *In re 2020* stated the opposite: "a signed but undated declaration is sufficient and ***does not implicate any weighty***

interest." 241 A.3d at 1078 (emphasis added). A ***minority*** of the Court viewed the dating provision as serving such interests.

Moreover, *In re 2020* had no record. The case was filed and quickly decided immediately after Election Day in 2020—the first election with expanded mail voting. Consequently, the Court decided the issues in a vacuum, based only on the political campaigns' ***theories*** about how the date ***might*** be used. Since then, however, we have history in the form of multiple elections and subsequent decisions, including a comprehensive discovery process—involving the Secretary, all 67 counties and Appellants in this case. That discovery produced a record disproving all the hypothetical "weighty interests." *See also NAACP II*, 97 F.4th at 125 (agreeing that the date provision "serves little apparent purpose"); *NAACP I*, 703 F. Supp. 3d at 678 (agreeing after a review of the full record that the voter-written date on the outer return envelope is "wholly irrelevant"); Op. 76 ("[C]ounsel for the Secretary confirmed that none of the county boards of elections use the handwritten date for any purpose, and he further relayed that the only reason the date is included on absentee and mail-in ballot envelope declarations is because such requirement is in the Election Code.").

While failing to address, much less refute, the record and admissions generated since this Court decided *PDP* and *Ball*, Appellants again repackage three theoretical purposes served by the date provision. None survive any level of scrutiny.

First, Appellants fail to cite a single example to support their claim that the date provision serves as a "useful backstop" for determining whether a ballot is timely. Br. 45. Nor do they refute the majority or the Third Circuit's conclusion that the handwritten date is not "used to determine the ballot's timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties' timestamping and scanning procedures serve to verify that." *NAACP II*, 97 F.4th at 129. Appellants' pure conjecture—that the handwritten date ***might*** be used to determine timeliness, ***if*** there were ***both*** a failure to timestamp *and* a failure of the SURE scanning procedure, is far too speculative to qualify as an "important regulatory interest." *See* Op. 76-78.[20]

Second, Appellants cite no authority, from Pennsylvania or anywhere else, for the claim that the date provision serves some supposed interest in "solemnity." Br. 45-46. This is not even a legitimate government interest that might theoretically justify a voting restriction. *See In re 2020*, 241 A.3d at 1089, n.54 (Wecht, J.) ("It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require."). None of Appellants' cited cases involves requirements to date or sign

[20] *Cf. In re 2020 Canvass,* 241 A.3d at 1086 n.40 ("The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.").

documents.[21] And whatever purported interest might exist in "solemnity" is accounted for by the other requirements for successfully submitting a mail-in ballot—including that the voter submit an application, have their identification verified, and that they sign a declaration stating, "I am qualified to vote the enclosed ballot and I have not already voted in this election."[22] *See* 25 P.S. §§ 3146.4, 3146.6, 3150.14, 3150.16. The voters who were disenfranchised here did all of that. Appellants offer no reason to think that, after completing all these steps, a voter's failing to handwrite a date on the envelope (or for that matter, making a minor mistake in handwriting the date, as thousands have done) shows that those voters did

[21] The cases Appellants cite for their "solemnity" point are strikingly off-topic. *Minnesota Voters All. v. Mansky* is a case about a Minnesota law banning voters from wearing political buttons inside polling places and does not mention signatures, dates, or even any variation of the root word "solemn." 585 U.S. 1 (2018). *Davis v. G N Mortg. Corp.*, is a parol evidence rule decision in a case involving mortgage prepayment penalties, which addresses the value of "legal formalities" generally and again does not mention signature and date requirements. 244 F. Supp. 2d 950 (N.D. Ill. 2003). *Thomas A. Armburuster, Inc. v. Barron* is a statute of frauds case involving a corporate shareholder's alleged oral guarantee of the corporation's debt, which addressed the requirement that a guarantee be in writing, not the purpose of any sign-and-date requirements. 491 A.2d 882 (Pa. Super. Ct. 1985). *Thatcher's Drug Store v. Consol. Supermarkets* is another case about the validity of an oral agreement, which did not mention sign-and-date requirements. 636 A.2d 156 (Pa. 1994). *Vote.org v. Callanen*, the ***only*** case cited by Appellants to mention the concept of "solemnity," is a federal Materiality Provision case that ruled on the materiality of a wet signature requirement but did not mention a handwritten date requirement. 89 F.4th 459 (5th Cir. 2023).

[22] Indeed, a missing or incorrect date commonly does *not* deprive a document of its legal effect. For example, with respect to declarations signed under penalty of perjury in accordance with federal law (28 U.S.C. 1746), "the absence of a date does not render the declaration invalid if extrinsic evidence could demonstrate the period when the document was signed." *Peters v. Lincoln Elec. Co*., 285 F.3d 456, 475–76 (6th Cir. 2002). Here, the "period when the [envelope] was signed" is known and undisputed, because mail-in ballots were sent to voters on a date certain and are not accepted by county boards after 8:00 p.m. on Election Day.

not "contemplate their choices" and "reach considered decisions about their government and laws." Br. 45-46.

Third, Appellants invoke the repeatedly debunked talking point that the date provision helps detect voter fraud because, in a single instance in the 2022 primary, a ballot was submitted with a date twelve days after the voter had died, and the fraudster was convicted. Br. 46-47. But as the undisputed record in *NAACP* shows, the Lancaster County Board of Elections had learned of the death of the voter and had ***already removed*** her from the rolls long before it received the ballot, and accordingly would not have counted the ballot regardless of the handwritten date on it. *See NAACP I*, 703 F. Supp. at 679 n.39 ("[T]he county board's own Rule 30(b)(6) designee testified that the fraudulent ballot was first detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope.").[23] This is consistent with this Court's determination that the date

[23] Appellants have repeatedly misrepresented the Lancaster County example by characterizing the date written on the envelope as the "only evidence" of fraud "on the face of the fraudulent ballot." Br. 47. *See also* Op. 36, n.33. They should not be permitted to relitigate this point, which has been squarely rejected based on the Lancaster Board's admissions. *NAACP I*, 703 F. Supp. at 679, n.39. It is undisputed that the Lancaster Board learned of the voter's death weeks earlier and removed her from the voter rolls even before receiving a ballot in her name. A.507-509 (Miller Tr.), 87:18-94:15. The receipt of a ballot so long after the voter's death was itself evidence of fraud, as was her daughter's admission to law enforcement that she completed the ballot and signed her mother's name after her death. Police Criminal Complaint, A395. In any event, to the extent the government has an interest in preventing election fraud, the fraud is prevented in the case of deceased voters by reliance on SURE data and Department of Health records, without the need to reference a handwritten envelope date. A510-A511, 100:25-102:18.

provision is not used to determine whether a ballot was "fraudulently back-dated." *In re 2020*, 241 A.3d at 1077 (no danger of fraudulent backdating because ballots received after 8:00 p.m. on Election Day are not counted).[24]

In sum, the lack of any *bona fide* government interest served by the date provision, Op. 77, means enforcement of the date provision to disenfranchise cannot satisfy intermediate, or even rational basis, scrutiny. *Cf. Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1252 n.6 (Pa. 2016) (Wecht, J., concurring) (**"**Where stops the reason, there stops the rule.").

5. Appellants' Reliance on Law Extrinsic to the Pennsylvania Constitution Is Misplaced.

In searching for authority to support their arguments, Appellants ultimately leave Pennsylvania behind. They urge the Court to adopt their proposed new limits on the Free and Equal Elections Clause based on inapposite federal cases, or cases from other states. Br. 48-54. That cannot be right.

The federal cases Appellants cite (Br .50-54) are entirely irrelevant to this Court's analysis under the Pennsylvania Constitution. This Court has expressly held that the Free and Equal Elections Clause, with its special purpose and unique history,

[24] Appellants also assert that "States do not need to point to evidence of election fraud within their borders in order to adopt rules designed to deter and detect it." Br.47. The problem with this argument is there is zero evidence the date requirement was "designed to deter and detect" fraud in the first place – and a wealth of evidence in the record showing that the date requirement does not serve this purpose in any event.

requires "a separate analysis" from any federal constitutional claims. *See LWV*, 178 A.3d at 812. And in any event, even federal case law would not support the constitutionality of completely meaningless restrictions on voting. As the U.S. Supreme Court held in *Crawford v. Marion County Election Board* (a case cited nine times in Appellants' brief): "***However slight*** that burden may appear…***it must be justified*** by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. 181, 191 (2008) (emphasis added).[25]

And Appellants' reliance on constitutional decisions from other states, (Br. 48-50), are irrelevant to the protections afforded by Pennsylvania's Constitution. They cite no case that has rejected a claim that a similarly pointless restriction on mail-in ballots violates the other states' respective Free and Equal Elections Clause. Instead, they announce that they "are aware of *zero* cases applying any other State's 'free and equal election' clause to invalidate a neutral ballot-casting rule." Br. 50 (emphasis in original).

[25] The other federal cases cited by Appellants do not bolster the suggestion that "minor" voting regulations escape any level of review. In *McDonald v. Board of Election Commissioners* for example, the Court reviewed the bases for a state's decision to deny the ability to vote by absentee ballot to "judicially incapacitated" individuals awaiting trial and concluded the policy was "reasonable." 394 U.S. 802, 809 (1969). The Court did not stop at the determination that this restriction did not "absolutely prohibit[]" voters "from exercising the franchise." *Id.*, 809. Similarly, in *Timmons v. Twin Cities Area New Party*, the Court applied a "less exacting review" (not no review) of the reasons underlying a restriction on voting that it deemed to be less "severe," but still required the state in that case to demonstrate an "important regulatory interest" to support the "lesser burdens." 520 U.S. 351, 358 (1997).

But such cases certainly exist. For instance, the Kentucky Supreme Court held that, although a statute required each write-in voter to write the "name of his choice" on the ballot, the Kentucky Constitution required counting votes from 148 voters who wrote the candidate's initials instead. *McIntosh v. Helton*, 828 S.W.2d 364, 365–67 (Ky. 1992).[26] Similar examples can be found in rulings from Missouri and Delaware.[27]

In any event, though they may have pale imitations of our Clause, other states do not share "[o]ur Commonwealth's centuries-old and unique history [that] has influenced the evolution of the text of the Free and Equal Elections Clause, as well as [this] Court's interpretation of that provision." *LWV*, 178 A.3d at 804. What matters here is the right to vote as guaranteed by this Commonwealth's singular charter and this Court's cases safeguarding that right from any and all unjustified burdens.

[26] Appellants discount *McIntosh* as "applying" rather than "invalidating" a rule. Br. 50 n.3. That distinction is nonsensical. *McIntosh* held that the Clause required counting voter submissions that did not strictly comply with a statute, just as Appellees here seek.

[27] *See*, *e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) (invalidating a voter ID law under a state constitutional provision guaranteeing "[t]hat all elections shall be free and open"); *Young v. Red Clay Consolidated School*, 159 A.3d 713, 799 (Del. Ch. 2017) (holding that family-focused events at polling places violated the Free and Equal Elections Clause because the events created congested parking lots and impeded elderly voters from reaching the polls). Appellants urge that *Weinschenk* is distinguishable because it applied to in-person voting and impacted "hundreds of thousands of people," Br. 50, n.3, but the Clause's application is not limited to in-person voting, nor does it require six-figure disenfranchisement to spring into action. Appellants say *Young* is not "apt," *id.*, but like the instant case it involved "inhibit[ing] voting," including by "the elderly." 159 A.3d at 766.

B. The Date Provision Should Be Reinterpreted Under the Canon of Constitutional Avoidance.

Alternatively, this Court may affirm the relief granted below on statutory-interpretation grounds. In particular, this case presents compelling reasons for the Court to re-interpret the date provision as "directory," which would avoid the constitutional violation of disenfranchising thousands of Pennsylvanians for a trivial mistake. In *Ball*, the Court applied a bottom-line conclusion pieced together from the multiple *In re 2020* opinions—that, as a matter of statutory interpretation, the date provision should be construed as mandatory. 289 A.3d at 21-22 (citing *In re 2020*, 241 A.3d at 1086-87 (Wecht, J.) & 1090-91 (Dougherty, J.)). The Court should now revisit that conclusion for three reasons.

First, as shown herein and confirmed by the majority, mandatory application of the date provision to disqualify timely ballots unavoidably leads to mass disenfranchisement in violation of the Free and Equal Elections Clause. The constitutional claim was not raised or addressed in *Ball* or *In re 2020.* Revisiting the statutory interpretation in light of the constitutional violation established here aligns with the Court's overarching mandate to interpret provisions of the Election Code "in order to favor the right to vote," so as "to enfranchise and not to disenfranchise." *Wieskerger*, 290 A.2d at 109 (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)); *see also Ball*, 289 A.3d at 27 n.156 (citing Pa. Const. art. I, § 5 and *PDP*, 238 A.3d at 361) ("[F]ailure to comply with the date requirement would not compel the

discarding of votes in light of the Free and Equal Elections Clause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise").

Second, the theoretical "weighty interests" credited by several Justices in *In re 2020* have not been borne out by the facts. *See In re 2020*, 241 A.3d at 1090-91 (Dougherty, J.)); *see also Ball*, 289 A.3d at 21-22. Three Justices concluded in *In re 2020* that the "shall…date" language in the Election Code is mandatory rather than merely directory based on the existence of supposed "weighty interests" like the need to prevent the "backdating" of envelopes. 241 A.3d at 1090-91. These posited weighty interests were necessary to those Justices' conclusion under the applicable legal framework, which then became the basis of the *Ball* ruling. *Ball*, 289 A.3d at 21-22 (citing *In re 2020*, 241 A.3d at 1086-87 (Wecht, J.) & 1090-91 (Dougherty, J.)).

Justice Dougherty (joined by then-Chief Justice Saylor and Justice Mundy) reasoned that the Code's "shall...date" language is mandatory ***because it is supported by so-called "weighty interests***." *In re 2020*, 241 A.3d at 1090-91 (emphasis added). In so doing, these three Justices engaged with the same analysis as the OAJC and every previous case considering rejection of ballots for "minor irregularities." *Compare Weiskerger*, 290 A.2d at 109 ("shall" language in the Code requiring use of "blue, black or blue-black ink" to mark ballots was "merely

directory" absent sufficiently weighty interests), *and Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955) (ballot with a stray check mark must be counted despite Code provision that ballots "marked by any other mark than an (X)...shall be void"; voters "are not to be disenfranchised" based on such "minor irregularities...except for compelling reasons"), *with Pierce*, 843 A.3d at 1231-32 (Code provision requiring in-person ballot delivery was mandatory because it was "supported by a weighty interest"). But as discussed above, *supra*, 6-8, subsequent litigation has shown that concerns about "backdating" envelopes and other interests cited in *In re 2020* are inconsistent with the counties' purposes and practices. *Supra, 8-11.* Simply put: The premise for the statutory interpretation from *In re 2020* (which was subsequently accepted as settled in *Ball*) no longer holds.

Third, Appellees' proposed interpretation is consistent with the overall structure of the Election Code. The Code's canvassing provision, 25 P.S. § 3146.8, requires county boards to review voter declarations on mail and absentee ballot return envelopes for sufficiency. 25 P.S. § 3146.8(g)(3). Such ballots must be canvassed and counted once the board confirms that the declaration is signed by the appropriate person who is entitled to vote and "is satisfied that the declaration is sufficient." *Id.* This provision contains no reference to the voter-written date in connection with the sufficiency determination.

Consistent with the canon of constitutional avoidance,[28] and in order to avoid the persistent violation of the Free and Equal Elections Clause, the Court should hold as a matter of statutory construction that the date provision is merely directory, and not mandatory, such that an undated or misdated declaration duly signed by the relevant eligible voter may still be deemed "sufficient" at the canvassing stage pursuant to § 3146.8(g)(3).

C. Appellants' Procedural Arguments Fail.

Appellants raised a plethora of procedural arguments below, and the majority below properly rejected each of them. None of those arguments provides a basis to undo the majority's reasoned decision on the merits.

1. The Commonwealth Court and This Court Have Subject-Matter Jurisdiction.

The majority correctly concluded that it had subject matter jurisdiction and that the Secretary is an indispensable party to this litigation. Op. 48. And it correctly rejected Appellants' assertions that the Secretary's issuance of guidance is the sole basis for jurisdiction in this case. It is not.

Appellees did not simply challenge the substance of the Secretary's guidance, but rather the enforcement of a statutory requirement that the Secretary is

[28] *See*, *e.g., Hartford Accident & Indem. Co. v. Ins. Comm'r of Commonwealth,* 482 A.2d 542, 549 (Pa. 1984).

legislatively charged with implementing.[29] *See* Op. 47 (noting Appellees named the Secretary "based on his duties under the Election Code with respect to…**the form of absentee and mail-in ballots and the form of the ballots' declarations**") (emphasis in original).

The Secretary is an indispensable party because the Secretary implements the mandatory statutory provision whose enforcement is challenged as unconstitutional—sections 1306 and 1306-D of the Election Code—by prescribing the form of the declaration and uniform instructions. 25 P.S. §§ 3146.6, 3150.16. Under those, it is incumbent on the Secretary to prescribe forms that contain a date field just as much as it is incumbent upon the counties to ensure, under current law, that the voter fills out the date field.

Consistent with these statutory duties, the Secretary's recent July 1, 2024 Mail Ballot Directive relies on Sections 201, 1304, and 1304-D of the Election Code, 25 P.S. §§ 2621, 3146.4, 3150.14 as authority for its issuance. Because the Mail Ballot Directive was issued pursuant to the Secretary's statutory authority, it is not mere "guidance" and counties ***must*** follow it. Among other things, this Directive includes a new requirement that counties are not free to ignore: The form of the outer

[29] The majority referenced the Secretary's guidance to provide context regarding the enforcement of the date provision. Op. 47. The importance of the majority's discussion of the guidance is 1) the Secretary continues to instruct counties not to count ballots with missing or incorrect dates; and 2) counties are applying the Secretary's instruction and enforcing the date provision inconsistently.

declaration envelope that contains the disputed date field must be edited by the counties to include the current year pre-filled. A154-A155. None other than the Secretary may decide the text, content, shape, size or form of the declaration envelope. The counties' implementation role is on the "back end." They make sure that the voters comply by inserting the date.

Further, the outcome of this case impacts the Secretary's duties to receive from county boards the returns of primaries and elections, to canvass and compute the votes cast for candidates, to proclaim the results of such primaries and elections, and to issue certificates of election to successful candidates. Op. 47. (citing 25 P.S. § 2621(f)). Enforcement of the date provision directly bears on whether the Secretary's performance of such certification duties complies with law. Both the Secretary and the boards named in this suit are responsible for carrying out—in different ways—the unconstitutional enforcement of the envelope-dating requirement, and therefore are proper parties in this constitutional challenge.

Appellants' contrary arguments fail. *First*, they argue that jurisdiction is foreclosed by the holding in *RNC II*, No. 447 MD 2022 (Pa. Cmwlth. Mar. 23, 2023), which involved county boards' adoption of "notice and cure" programs. Br. 12-13. The Commonwealth Court's unpublished opinion in *RNC II* is obviously distinguishable because the Election Code is ***completely silent*** on whether and to what extent county boards must adopt "notice and cure" program and equally silent

about the Secretary's role around such a program. Interpreting its own prior case, the majority correctly held that, unlike this lawsuit, the Secretary had no legislatively mandated duty with respect to the "notice and cure" issues before it in *RNC II*. *Id.* Instead, petitioners in *RNC II* (represented by the same lawyers as Appellants) attempted to conjure jurisdiction based exclusively on the Secretary's general responsibilities. Fundamentally unlike this case, petitioners in *RNC II* did not "make any clams implicating the limited duties and responsibilities of the Acting Secretary under the Election Code," Op. 46.

Second, Appellants focus on the remedy that the majority ordered prohibiting enforcement of the date provision and contend that it has no effect on the Secretary's statutory duties. Br. 16. Appellants' focus on the relief ordered is misplaced because subject matter jurisdiction depends on the grant of statutory authority to the Secretary regarding the challenged provision and his duties to certify the election results.[30] The Secretary must ensure that he does not certify election results where

[30] Appellants abandoned their organizational standing arguments below after they and the Democratic Party intervenors were permitted to participate in the case as parties. *Cf. Albert v. 2001 Legislative Reapportionment Comm'n,* 790 A.2d 989, 995 n.6 (Pa. 2002) (where some petitioners established standing, "the claims raised in the[ir] petitions are properly before the Court," despite other co-petitioners' standing issues). Appellants now hint that the organizational plaintiffs here are not sufficiently "aggrieved" by the Secretary's challenged conduct because "his actions bear no 'causal connection' to their alleged harm from enforcement of the requirement." Br. 15. If it mattered, the Commonwealth Court correctly held that the organizational plaintiffs all have standing, because the continued implementation of the envelope-date requirement by both the Secretary and the county boards is causing them concrete harms. Op. 59-62. The majority examined the extensive, unchallenged declarations from each organization establishing its

counties unconstitutionally exclude certain mail ballots. And the outcome of this lawsuit will also inform the Secretary's future performance of his statutory authority.

None of Appellants' cases require a different result.[31] Pennsylvania courts have consistently held that the heads of administrative agencies responsible for implementing a statute and defending it against constitutional challenges are necessary parties in a suit challenging the constitutionality of a statute. *See, e.g.*, *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1217 (Pa. Cmwlth. 2018) (Secretaries of Revenue and Agriculture were proper parties in constitutional challenge to statute); *cf. Allegheny Reprod. Health*, 309 A.3d at 848 (DHS was appropriate necessary party because constitutional challenge to Abortion Control Act implicated its "administrative functions"); *Allegheny Sportsmen's League v. Ridge,* 790 A.2d 350, 355 (Pa. Cmwlth. 2002) (State Police Commissioner, as government official charged with ultimate responsibility of enforcing and

"substantial, direct, and immediate interest in the outcome of the litigation," *Allegheny Reproductive Health*, 309 A.3d at 832, including the diversion of resources as a result of the envelope-date requirement's continued enforcement. A443-A484 (Petitioner Declarations).

[31] For example, in *Foreman v. Chester-Upland School District*, 941 A.2d 108, 113 (Pa. Cmwlth. 2008), the Department of Education was not an indispensable party because the suit was brought against a local school district and the department's statutory authority was not at issue. And in *Pennsylvania State Education Association v. Department of Community and Economic Development*, 50 A.3d 1263, 1277 (Pa. 2012), the Office of Open Records *was* an indispensable party in a suit challenging the constitutionality of OOR's statutory adjudicatory process. *Scherbick v. Community College of Allegheny County*, 387 A.2d 1301, 1303 (Pa. 1978) is inapposite because it did not involve constitutional challenges to enforcement of a statute at all.

administering provisions of the Firearms Act, was proper party). Consistent with this authority, the Secretary, as the chief election official in Pennsylvania, has been a proper party in every other action presenting issues of statewide practice under the Election Code—including in *Ball,* where ***Appellants named the Secretary*** in their suit regarding the envelope-date provision.[32]

In sum, the Secretary has specific "duties and responsibilities" to enforce the date provision in an unconstitutional manner. The majority's determinations that the Secretary is a proper and indispensable party, and accordingly that the court had subject matter jurisdiction, must be affirmed. Alternatively, if this Court has any remaining doubts as to the original subject matter jurisdiction of the Commonwealth Court in this case, this Court can, and should, reach the merits of this dispute by exercising its own extraordinary jurisdiction pursuant to 42 Pa.C.S. § 726, because this case presents an issue of immediate public importance.

[32] *See e.g. Banfield v. Cortes*, 922 A.2d 36, 44 (Pa. Cmwlth. 2007) (Secretary was indispensable party due to duties outlined in Election Code), *aff'd*, 631 Pa. 229 (2015); *Applewhite v. Commonwealth*, 617 Pa. 563, 567 (2012) (Secretary was indispensable party when statutory provision was challenged under the Free and Equal Election Clause); *McLinko v. Commonwealth*, 270 A.3d 1243, 1266 (Pa. Cmwlth. 2022) (Secretary was indispensable party due to duties of certifying and administering elections in constitutional challenges regarding legality of mail-in ballots), *rev'd on other grounds McLinko v. Dept. of State,* 279 A.3d 539 (Pa. 2022); *Bonner v. Chapman*, 298 A.3d 153, 159 (Pa. Cmwlth. 2023) (Secretary was indispensable party due to Secretary's duty to implement provisions of Election Code).

2. Non-party County Boards of Elections Are Not Indispensable.

Appellants do not dispute that the County Respondents are proper defendants. They claim, however, that the case should be dismissed for failure to name all 67 county boards as indispensable parties. Br. 21-24. That is wrong.

As an initial matter, Appellants overstate the extent to which non-party county boards may be interested in the outcome of this litigation. In this case, none of the other 65 boards have sought to intervene, which "militates against finding that any of those county boards are indispensable to this case." Op. 53. And with all 67 boards named in the *NAACP* litigation, the vast majority either signed stipulations agreeing not to contest the requested relief or did not substantively respond to the litigation. *NAACP I*, W.D. Pa. No. 1:22-cv-00339, ECF Nos. 157 (Order approving stipulation with 33 boards), 192 (Order approving stipulation with 8 additional boards), 243 (stipulation with 22 additional county boards); 445 (stipulation with Westmoreland County Board).

In any event, none of the 65 non-party boards is so indispensable that their non-joinder might support reversal. In determining whether an absent party is indispensable, Pennsylvania courts focus on the relief sought and whether the absent party's "rights are so connected with the claims of the litigants" that the relief requested could not be granted "without impairing those rights." *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495, 496 (Pa. Cmwlth. 2002) (quotation marks and citation

omitted). Here, the 65 unnamed Pennsylvania counties are not indispensable to either of the forms of relief sought. *See* Op. 52.

As to Appellees' request for injunctive relief, Appellees obtained an order enjoining the boards in the Pennsylvania counties with the most impacted voters from continuing to enforce the date provision to disenfranchise voters. No other board is indispensable to adjudicating this request for relief.

Appellees also obtained a declaration on the generally applicable question of what the Free and Equal Elections Clause requires. This Court's decision reviewing ***that*** determination will be statewide precedent. And this practical reality resolves the argument about supposedly "varying standards" from county to county, Dissent 7; Br. 5, 20 (citing *Bush v. Gore*, 531 U.S. 98, 106-07 (2000)).[33] Should this Court affirm the declaration as a matter of law, its holding would have precedential force for all county boards (and would provide clarity for all counties and all voters as to

[33] *Bush v. Gore* is inapposite. There, the Court held that "the absence of specific standards" in the "recount mechanisms implemented in response to the decisions of the Florida Supreme Court" failed to "satisfy the minimum requirement for nonarbitrary treatment of voters" under the Equal Protection Clause. 531 U.S. 98, 105-106 (2000). Here, the majority's decision does lack for specific standards that would lead to arbitrary treatment; it declares that disenfranchising voters for a meaningless paperwork error violates the Pennsylvania Constitution. Implementing that decision is straightforward: count timely mail ballots notwithstanding the trivial mistake. Indeed, the invocation of *Bush v. Gore* is especially misguided because thousands of voters are ***currently*** being subjected to arbitrary treatment due to inconsistent enforcement of the envelope-dating rule announced in *Ball*. *See infra*, 12-13. To advance the "nonarbitrary treatment of voters," 531 U.S. at 105-106, this Court should affirm.

what the law requires. That would not impair any non-party's "rights," because they have no right to deviate from what the Constitution requires.

The basic fact that boards are generally required to follow this Court's decisions on questions of constitutional law does not make them indispensable parties to any particular suit. If the Declaratory Judgments Act required joinder of all persons affected by a challenge to legislation, "the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity" of state actions that commonly affect the interests of large numbers of people. *City of Phila. v. Commonwealth*, 838 A.2d 566, 582–83 (Pa. 2003). And future voting litigation would unnecessarily be choked with burdensomely large numbers of parties. That is not the law.

3. The Relief Granted Below Does Not Implicate the Federal Elections Clause.

Appellants suggest (Br.54-55) that the U.S. Constitution prohibits Pennsylvania courts from exercising their basic judicial functions, including reviewing state action or the application of state law for compliance with the provisions of the state constitution. The U.S. Supreme Court reached ***exactly the opposite conclusion*** in *Moore v. Harper*, 600 U.S. 1 (2023).

There, the Court firmly "rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the

rules governing federal elections." *Id.*, 26. This Court rejected the same Elections Clause argument in *LWV,*178 A.3d at 811.

Moore expressly held that "state legislatures remain bound by state constitutional restraints" when they make the rules that apply in federal elections, 600 U.S. at 32, reaffirming that "[s]tate courts retain the authority to apply state constitutional restraints" via the power of judicial review accorded to them by their state constitutions, *id.*, 37; *see also id.*, 38 (Kavanaugh, J., concurring) ("[S]tate laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution.").

This is not the highly exceptional case where a state court has acted so far outside its normal ambit as to "transgress the ordinary bounds of judicial review" in a manner that implicates the federal Elections Clause. *Moore*, 600 U.S. at 36. Here, the majority applied the Pennsylvania Constitution consistent with decades of prior cases reviewing state election rules and practices, including ones that affect federal elections, for compliance with the Free and Equal Elections Clause. *Supra*, 17-23; *see also, e.g.*, *PDP*, 238 A.3d at 371–72; *Page*, 58 Pa. at 364–65; *Mixon*, 759 A.2d at 452; *Applewhite II*, 2014 WL 184988, at *62-64.

Indeed, this is an ***easier*** case than *Moore*, which involved the North Carolina Supreme Court's rejection of a congressional districting plan on the grounds that partisan gerrymandering was inconsistent with principles of state constitutional law,

including North Carolina's version of a Free and Equal Elections Clause. 600 U.S. at 7–14. Even in that context—where the state court essentially fashioned a new right of action against partisan gerrymandering based on broad principles of state constitutional law—the Supreme Court had no trouble confirming that state courts may exercise judicial review to ensure that the enactments of the state legislature comport with the state constitution.

Here, unlike in *Moore*, no legislative body is even a party in this case, and the RNC has no standing to assert whatever rights might be granted to the General Assembly by the U.S. Constitution. And even if the issue were properly presented, this case fits easily within the capacious "ordinary bounds of judicial review" standard. Enforcement of the Free and Equal Clause is part of the Pennsylvania courts' ancient and inalienable role in safeguarding the fundamental rights independently guaranteed by the Pennsylvania Constitution through judicial review. *See LWV*, 178 A.3d at 812. Appellees seek no more and no less in this case.

4. The Relief Appellees Seek Does Not Require Invalidation of any Part of Act 77, Much Less Its Entirety.

The Commonwealth Court correctly held that the relief sought here does not implicate Act 77's nonseverability provision and, contrary to the ominous claims by the dissent and Appellants, would not require striking "no-excuse" mail voting in Pennsylvania "on the eve of the 2024 general election." Br. 57-58; Dissent 51. Appellees sought an order directing the Secretary and boards to cease treating the

date provision as a reason to disenfranchise thousands of voters and a declaration that it is unconstitutional to reject timely mail ballots based on that basis. Such rulings do not invalidate "any provision of [the] act or its application" triggering the Act's nonseverability provisions, as Appellants argue, Br. 56, 58.

For starters, Appellees do not ask this Court to re-write, amend, or strike any provision of Act 77. In other words, the Court need not invalidate or excise "shall...date" from section 3146.6 to grant the relief sought. Nor do Appellees seek an order barring voters from being directed to date mail ballot declaration forms, or continuing to include a date field next to the signature line. Appellees seek a ruling that enforcement of the date provision cannot, consistent with the Free and Equal Elections Clause, result in rejecting timely mail ballots. That does not invalidate any provision or application of Act 77, let alone all of it, particularly given that the provision addressing the sufficiency of the voter declaration on the return envelope—section 3146.8(g)—predates Act 77. *Cf. Bonner v. Chapman*, 298 A.3d 153, 168-69 (Pa. Cmwlth. 2023) (*en banc*) (finding that Act 77 nonseverability clause was not implicated by prior successful challenges to the dating requirement).

Moreover, even a holding that the date provision or its application is invalid would not require the Court to invalidate all of Act 77. Pennsylvania courts regularly deem it appropriate to sever provisions in statutes containing similar nonseverability clauses, because "it is not for the legislature to 'dictate the effect of a judicial finding

that a provision in an act is 'invalid,'" *PDP*, 238 A.3d at 397 n.4 (Donohue, J., concurring and dissenting) (citations and quotations marks omitted). It is the province of the courts to determine constitutionality, and to fashion legal and equitable relief. *See generally Stilp v. Commonwealth*, 905 A.2d 918, 970-~~9~~81 (Pa. 2006) (declining to enforce identical nonseverability provision and noting significant "separation of powers concerns").

In *Stilp*, the Court confronted a "boilerplate" nonseverability provision identical to the one in Act 77. 905 A.2d at 973. The Court ultimately severed the provision of the legislation at issue that "plainly and palpably violated…the Pennsylvania Constitution" from "the otherwise-constitutionally valid remainder of [the legislation]." *Id.*, 980-81. As *Stilp* observed, the Court "has never deemed nonseverability clauses to be controlling in all circumstances." *Id.*, 980. Indeed, the Court had previously severed a statutory provision that contained a nonseverability clause in *Pennsylvania Federation of Teachers v. School District of Philadelphia*, 484 A.2d 751, 754 (Pa. 1984), which was significantly more specific than the one in *Stilp* and in Act 77; it "render[ed] sections 2, 3 and 4 of the [challenged] Act void '[i]n the event a court of competent jurisdiction rules finally that the salary deductions mandated in these sections are legally or constitutionally impermissible.'" *Id*. In holding that those deductions were indeed constitutionally impermissible, *see id.*, 753, the Court nonetheless severed them from the broader

act, finding that a strict application of the nonseverability provision would not be sensible in light of the nature of the Court's specific constitutional holding. *Id.*, 754; *cf. Stilp*, 905 A.2d at 979-80 (a nonseverability clause that "'serve[s] an in terrorem function' or operates to 'guard against judicial review altogether by making the price of invalidation too great'…'intrude[s] upon the independence of the Judiciary and impair[s] the judicial function.").

Likewise, the application of Act 77's nonseverability provision is neither required nor sensible here. The undisputed facts are that the date provision serves no purpose, benefits nobody, and disenfranchises thousands. It is easily severed from the rest of Act 77. Accordingly, even an order striking the date provision from the text of Act 77–relief that, to be clear, Appellees ***do not seek***–would not require the rest of Act 77 to be disturbed.

Nor is there any evidence to support Appellants' claim, repeated by the dissent, that the date provision "was a crucial compromise that led to Act 77's passage. Br. 56; Dissent 53-54. Their reliance on a two-person colloquy on the House floor discussing the severability clause of Act 77 (Br.57) does not prove that the dating provisions "were non-negotiable sections of Act 77 that were essential to those compromises and, accordingly, are not severable." Dissent 54.

The colloquy itself focuses on discrimination relating to the availability of braille ballots, not on enforcement of the date requirement to reject timely-returned

mail ballots. And cherry-picking an exchange between two members of the House is no way to interpret a statute because "remarks and understanding of individual legislators are not relevant in ascertaining the meaning of a statute." *McCormick v. Columbus Conveyer Co*., 564 A.2d 907, 910 n.1 (Pa. 1989); *see also, e.g.*, *In re Martin's Estate*, 74 A.2d 120, 122 (Pa. 1950) ("[I]n ascertaining the legislative meaning...what is said in debate is not relevant....").

To the contrary, invalidating the entire Act, as called for by the dissent and Appellants, would effectively override the General Assembly's intent to open no-excuse mail voting to all eligible Pennsylvania voters, simply because a single pointless provision in a single section of the Act has been enforced in an unconstitutional manner. Millions of Pennsylvania voters have come to rely on the mail-in voting option created by Act 77, and millions of dollars in public funds have been spent to facilitate this option in the years since its passage. Moreover, the dissent and Appellants would have this Court invalidate ***all*** of the other provisions of Act 77, including those that have nothing to do with voting by mail, such as provisions eliminating straight party ticket voting or providing 90 million dollars of financing for the purchase of new voting equipment (which has already been spent). Invalidating the entire Act would needlessly nullify "years of careful [legislative] consideration and debate…on the reform and modernization of elections in Pennsylvania." *McLinko v. Commonwealth*, 279 A.3d 539, 543 (Pa. 2022). Such an

outcome would be unreasonable if not absurd, and it should be presumed that "the General Assembly does not intend a result that is absurd[]…or unreasonable." 1 Pa.C.S. § 1922(1).

The relief ordered by the Commonwealth Court vindicates Act 77's larger aims to expand mail ballot voting to all and harmonizes that aim with the requirements of the Free and Equal Elections Clause. This Court should affirm.

CONCLUSION

The decision below should be affirmed.

Dated: September 4, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/ *Stephen Loney*

CERTIFICATION OF WORD COUNT

I hereby certify, pursuant to Pa.R.A.P. 2135 that this Memorandum does not exceed 14,000 words. I certify that this Memorandum contains 13,960 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ *Stephen Loney*