

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT
PROJECT, PHILADELPHIANS
ORGANIZED TO WITNESS, EMPOWER AND
REBUILD, MAKE THE ROAD
PENNSYLVANIA, ONEPA ACTIVISTS
UNITED, NEW PA PROJECT EDUCATION
FUND, CASA SAN JOSE, PITTSBURGH
UNITED, LEAGUE OF WOMEN VOTERS OF
PENNSYLVANIA, AND COMMON CAUSE
PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as
Secretary of the Commonwealth,
PHILADELPHIA COUNTY BOARD OF
ELECTIONS, AND ALLEGHENY COUNTY
BOARD OF ELECTIONS,

Respondents,

and

DEMOCRATIC NATIONAL
COMMITTEE, PENNSYLVANIA
DEMOCRATIC PARTY,

Intervenor-Petitioners,

and

REPUBLICAN NATIONAL COMMITTEE,
REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Respondents.

No. 283 MD 2024

**BRIEF OF INTERVENOR-PETITIONERS DEMOCRATIC NATIONAL
COMMITTEE AND PENNSYLVANIA DEMOCRATIC PARTY IN
SUPPORT OF PETITIONERS' APPLICATION FOR SUMMARY RELIEF**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	4
I. THE FREE AND EQUAL ELECTIONS CLAUSE ESTABLISHES VOTING AS A FUNDAMENTAL RIGHT	4
A. The Clause’s Text Safeguards The Right To Vote, Including The Right To Have One’s Vote Counted	5
B. The Clause’s History Reinforces Its Broad Text	6
C. The Pennsylvania Supreme Court Has Consistently Construed The Clause As Broadly Protecting Voting Rights	7
II. THE DATE REQUIREMENT SERVES NO PURPOSE	8
III. ENFORCEMENT OF THE DATE REQUIREMENT VIOLATES THE FREE AND EQUAL ELECTIONS CLAUSE	17
A. Statutes That Like The Date Requirement, Mandate The Disqualification of Ballots Trigger Strict Scrutiny	17
B. The Date Requirement Cannot Satisfy Strict Scrutiny	20
C. The Date Requirement Cannot Satisfy Any Other Level Of Scrutiny	20
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Appeal of Gallagher</i> , 41 A.2d 630 (Pa. 1945).....	8, 19
<i>Appeal of James</i> , 105 A.2d 64 (Pa. 1954)	8
<i>Appeal of Norwood</i> , 116 A.2d 552 (Pa. 1955).....	8, 18, 19
<i>Ball v. Chapman</i> , 289 A.3d 1 (Pa. 2023).....	2, 3, 13, 14, 16, 17
<i>Banfield v. Cortes</i> , 110 A.3d 155 (Pa. 2015).....	4, 18, 20
<i>Harper v. Virginia State Board of Elections</i> , 383 U.S. 663 (1966).....	1
<i>In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election</i> , 241 A.3d 1058 (Pa. 2020)	3, 13-16
<i>In re Coatesville Area School District</i> , 244 A.3d 373 (Pa. 2021)	11, 12
<i>In re Luzerne County Return Board</i> , 290 A.2d 108 (Pa. 1972).....	8
<i>In re Nomination Papers of Nader</i> , 858 A.2d 1167 (Pa. 2004).....	1
<i>In re Petitions to Open Ballot Boxes</i> , 188 A.2d 254 (Pa. 1963).....	8, 19, 20
<i>Khan v. State Board of Auctioneer Examiners</i> , 842 A.2d 936 (Pa. 2004)	4, 18
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	5-7
<i>McCormick for U.S. Senate v. Chapman</i> , 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022)	15
<i>Page v. Allen</i> , 58 Pa. 338 (1868)	5, 7
<i>Pennsylvania Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020)	4, 18
<i>Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania</i> , 97 F.4th 120 (3d Cir. 2024)	2, 3, 11, 12
<i>Pennsylvania State Conference of NAACP v. Schmidt</i> , 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023).....	12

<i>Perles v. County Return Board of Northumberland County</i> , 202 A.2d 538 (Pa. 1964).....	7-8
<i>Petition of Cioppa</i> , 626 A.2d 146 (Pa. 1993)	6
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914)	5, 7

Docketed Cases

<i>Pennsylvania State Conference of NAACP v. Schmidt</i> , No. 1-22-cv-00339 (W.D. Pa.)	3
<i>Eakin v. Adams County Board of Elections</i> , No. 1:22-cv-00340 (W.D. Pa.)	3

Constitutional and Statutory Provisions

Pennsylvania Constitution	
article I, section 5	2, 4
article I, section 25	6
Pennsylvania Constitution of 1776	
chapter I, section 7	6
chapter II, section 6	7
Pennsylvania Constitution 1790 article IX, section 5	7
4 Pennsylvania Code §183.7	10
25 Pennsylvania Consolidated Statutes	
§1505	11
§3302	10
25 Pennsylvania Statutes	
§3146.6	1, 9
§3146.9	9
§3150.6	1
§3150.12	10
§3150.12b	10
§3150.15	10
§3150.16	9
§3150.17	9

Other Authorities

Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, version 4.0* (April 3, 2023)9

RETRIEVEDFROMDEMOCRACYDOCKET.COM

INTRODUCTION

In every election since 2020, respondents—the Secretary of the Commonwealth, and the Philadelphia County and Allegheny County Boards of Elections—have disenfranchised qualified voters who submitted timely mail and absentee ballots. Respondents denied these thousands of Pennsylvanians their fundamental right to vote solely because the voters misdated or did not date their ballots’ return envelopes. But while the election code requires mail and absentee voters to correctly date their return envelopes (*see* 25 P.S. §§3146.6, 3150.6), that “date requirement” serves no cognizable purpose. It does not, for instance, serve to measure the timeliness of a mail or absentee ballot; timeliness is instead determined based on when the ballot is scanned into Pennsylvania’s mail-ballot tracking system.

In any event, no purpose for the date requirement that respondents might try to establish in this litigation could warrant deprivation of what has long been recognized as one of the most important of all rights. As the Pennsylvania Supreme Court has explained, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *In re Nomination Papers of Nader*, 858 A.2d 1167, 1180 (Pa. 2004) (quotation marks and subsequent history omitted); *accord, e.g., Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966). Respondents’ enforcement of

the date requirement violates this fundamental right—a right expressly protected by the Free and Equal Elections Clause of the Pennsylvania Constitution, which provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, §5.

Enforcement of the date requirement has been litigated numerous times in recent years. But no prior case resolves whether enforcement of the requirement violates the Free and Equal Elections Clause—although three members of the (then-six-member) Pennsylvania Supreme Court stated in dicta last year that it would, *see Ball v. Chapman*, 289 A.3d 1, 27 n.156 (Pa. 2023) (Wecht, J., joined by Todd, C.J., and Donohue, J.), *cited infra* p.17. Other cases in which the requirement was challenged instead held that: (1) as a matter of statutory interpretation, the election code does in fact “require[] the disqualification of ballots that arrive in undated or incorrectly dated return envelopes,” *Ball*, 289 A.3d at 23 (majority opinion); and (2) as a matter of federal law, enforcement of the date requirement does not violate the Voting Rights Act’s Materiality Provision, *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120, 139 (3d Cir. 2024) (“NAACP”). And still other challenges to the date requirement (which remain pending) were brought under the First and Fourteenth Amendments of the U.S. Constitution rather than under the Pennsylvania Constitution. *See* Second

Amended Complaint (Doc. 413), *Pennsylvania State Conference of NAACP v. Schmidt*, No. 1-22-cv-00339 (W.D. Pa. June 14, 2024); Amended Complaint (Doc. 228), *Eakin v. Adams County Board of Elections*, No. 1:22-cv-00340 (W.D. Pa. Feb. 9, 2023).

Notably, in the *NAACP* case just cited, the courts concluded that the date requirement serves no cognizable purpose. Specifically, the Third Circuit agreed with the district court's ruling—based on an extensive record—that the “date requirement ... serves little apparent purpose,” with not one of Pennsylvania's 67 boards of elections using it “to confirm timely receipt of the ballot or to determine when the voter completed it.” 97 F.4th at 125. In *Ball*, meanwhile, the Pennsylvania Supreme Court acknowledged the similar view of the Acting Secretary of the Commonwealth: Because the election code provides other ways to ensure that voters are eligible and their ballots are timely cast, the date requirement serves “no purpose other than as a means of inducing voter-generated errors that could be used to justify denying the right to vote.” 289 A.3d at 18 (quotation marks omitted).¹

Because the date requirement serves no purpose, there can be no state interest in enforcing it. That is dispositive here; Pennsylvanians' fundamental right to vote

¹ Although three justices expressed a different view in dissenting in a prior case, *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1090-1091 (Pa. 2020) (Dougherty, J., concurring in part and dissenting in part) (hereafter “*In re 2020 Canvass*”), the court has never adopted that view—rightly so, for the reasons explained herein.

cannot be impaired (as the date requirement does) for no reason. Indeed, although the lack of any purpose means the requirement would be unenforceable under any level of scrutiny, Pennsylvania Supreme Court precedent instructs that denying the franchise by disqualifying ballots triggers strict scrutiny, i.e., such disqualification can stand only “if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose.” *Banfield v. Cortes*, 110 A.3d 155, 176 n.15 (Pa. 2015) (quoting *Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 947 (Pa. 2004)). Because the date requirement advances no purpose whatsoever, it obviously cannot satisfy strict scrutiny.

“[I]n enforcing the Free and Equal Elections Clause, this Court possesses broad authority to craft meaningful remedies when required.” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 371 (Pa. 2020). Exercising that broad authority, the Court should enjoin the invalidation of any ballot based solely on a failure to comply with the date requirement.

ARGUMENT

I. THE FREE AND EQUAL ELECTIONS CLAUSE ESTABLISHES VOTING AS A FUNDAMENTAL RIGHT

The Free and Equal Elections Clause of the Pennsylvania Constitution (hereafter “Clause”) guarantees the fundamental right to vote. It reads: “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. This Clause,

which “has no federal counterpart,” is part of what made “Pennsylvania’s Constitution, when adopted in 1776, ... the most radically democratic of all the early state constitutions.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (hereafter “*LWV*”). The Clause’s text and history, as well as case law interpreting and applying it, underscore the extent of its protection for the right to vote.

A. The Clause’s Text Safeguards The Right To Vote, Including The Right To Have One’s Vote Counted

As the Pennsylvania Supreme Court has explained, the Clause’s text is “clear[] and unambiguous[],” using “the broadest possible terms.” *LWV*, 178 A.3d at 804. The “plain and expansive sweep of the words ‘free and equal,’” the court elaborated, 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 [the] Commonwealth.” *Id.* And of particular relevance to this case, the court has repeatedly explained that “the minimum requirements for ‘free and fair’ elections” include that “‘each voter under the law has the right to cast his ballot *and have it honestly counted.*’” *Id.* at 810 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)) (emphasis added).

The placement of the Clause’s expansive text within the constitution, confirms that the right to vote is a “sacred right” under Pennsylvania law. *Page v. Allen*, 58 Pa. 338, 347 (1868). Article I of the constitution (the Declaration of Rights) “is an

enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.” *LWV*, 178 A.3d at 803-804. The constitution itself provides that “[e]verything in [Article I] is excepted out of the general powers of government and *shall forever remain inviolate.*” Pa. Const. art. I, §25 (emphasis added).

B. The Clause’s History Reinforces Its Broad Text

The evolution of the Free and Equal Elections Clause likewise demonstrates the Commonwealth’s “longstanding and overriding policy ... to protect the elective franchise.” *Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993).

The Pennsylvania Constitution of 1776 included the first iteration of the Free and Equal Elections Clause, which stated “[t]hat all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office.” Pa. Const. of 1776 ch. I, §7. This provision was one of several significant changes in the constitution in favor of democratic governance, including expanding the right to vote to all “freemen” twenty-one and older. *Id.* ch. II, §6. At the time, this was considered “universal suffrage.” *LWV*, 178 A.3d at 807.

Less than fifteen years later, a second constitutional convention took place, at which the Clause was amended to read simply: “[E]lections shall be free and equal.”

Pa. Const. of 1790 art. IX, §5. This language, which remains in the Clause today, strengthened the Clause—replacing the suggestive “ought” with the directive “shall;” inserting “equal”; and removing “all prior ambiguous qualifying language.” *LWV*, 178 A.3d at 808. The 1790 constitution’s voting-related provisions also affirmed that voting is a “high” and “sacred right.” *Page*, 58 Pa. at 347.

The Clause was last amended in 1874 to add its second clause (“and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”), which addressed then-recent federal military interference in a Philadelphia election. *LWV*, 178 A.3d at 827.

C. The Pennsylvania Supreme Court Has Consistently Construed The Clause As Broadly Protecting Voting Rights

Consistent with its text and history, Pennsylvania courts give the Clause “expansive meaning.” *LWV*, 178 A.3d at 809. The Pennsylvania Supreme Court has explained, for example, that to be “free and fair,” any “regulation of the right to exercise the franchise [must] not deny the franchise itself, or make it so difficult as to amount to a denial” of the “constitutional right” to vote. *Winston*, 91 A. at 523. More generally, the court has explained that in cases implicating the right to vote, the court’s “goal must be to enfranchise and not to disenfranchise.” *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). Indeed, the court has long made clear that “[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter.” *Perles v. County Return Board of*

Northumberland County, 202 A.2d 538, 540 (Pa. 1964). Therefore “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.*

The Pennsylvania Supreme Court’s expansive reading of the Free and Equal Elections Clause is consistent with the court’s robust protection of the right to vote even in cases not expressly involving the Clause. Indeed, the court has repeatedly limited the enforcement of election-code provisions that would otherwise disqualify ballots for voters’ errors. “The power to throw out a ballot for minor irregularities,” the court has repeatedly said, “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.” *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945), *quoted in Appeal of Norwood*, 116 A.2d 552, 554 (Pa. 1955). In other words, “[t]echnicalities should not be used to make the right of the voter insecure.” *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954). While election regulations that serve to “prevent fraud” may be enforced, *In re Luzerne County*, 290 A.2d at 109, defects that “are not willful errors” should not invalidate a ballot. *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963).

II. THE DATE REQUIREMENT SERVES NO PURPOSE

As elaborated below, *see pp.16-19*, the date requirement—again, the election code’s mandate that mail- and absentee-ballot voters date the outer envelope

containing their mail ballots—cannot provide a basis for denying Pennsylvanians their fundamental right to vote. It cannot provide a basis for doing so because the requirement, as a matter of law, serves no government interest.

A. The election code itself establishes that a voter’s handwritten date on a mail- or absentee-ballot envelope is irrelevant to determining the ballot’s timeliness; timeliness is instead evaluated based on when a ballot is *received* by the county board of elections. In particular, the code provides the following regarding the “[d]eadline” for mail and absentee ballots: “a completed mail-in ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. §3150.16(c); *accord* 25 P.S. §3146.6(c) (same for absentee ballots). Accordingly, county boards must “maintain a record of ... [t]he date on which the elector’s completed mail-in ballot is received by the county board.” 25 P.S. §3150.17(b)(5); *accord* 25 P.S. §3146.9(b)(5) (same for absentee ballots). Department of State guidance similarly requires county boards to “stamp the date of receipt on the ballot-return envelope” and “record the receipt of absentee and mail-in ballots daily in the Statewide Uniform Registry of Electors (SURE) system.” Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, version 4.0* at 2 (April 3, 2023). In short, the date requirement does nothing to determine whether a mail or absentee ballot has been timely submitted.

B. The requirement likewise does nothing to determine a voter's eligibility; eligibility is determined before mail and absentee ballots are even sent to voters. Under Pennsylvania law, an individual must "apply ... for an official mail-in ballot," 25 P.S. §3150.12(a), and "[t]he county board of elections, upon receipt of any [such] application ... shall determine the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant's permanent registration card," *id.* §3150.12b(a); *accord* 25 Pa. C.S. §3302(a)-(b) (similar for absentee ballots). Only upon "receipt and approval of an application filed by a qualified elector ..., shall [the board] deliver or mail official mail-in ballots." 25 P.S. §3150.15; *accord* 25 Pa. C.S. §3302(c) (similar for absentee ballots).

C. The date requirement plays no role in detecting fraud either. For example, the date on a mail- or absentee-ballot envelope is not used to determine whether a ballot was fraudulently submitted in the name of a deceased voter. The Department of Health is responsible for informing voter-registration commissions when an individual dies. 25 Pa. C.S. §1505(a). And the commission in turn is responsible for inputting that information into the SURE system, 4 Pa. Code §183.7(a)(7), so that if a deceased voter submits a mail or absentee ballot, the potential fraud is flagged for the county board. The handwritten date requirement has no role to play in this process.

D. If more were needed, the recent *NAACP* litigation has confirmed that, in practice, the date requirement is useless—resulting in judicial rulings that, for reasons explained in this subsection, respondents and respondent-intervenors are collaterally estopped from challenging.

As the Third Circuit in *NAACP* explained, the record there showed that none of the Commonwealth's 67 counties has ever used the date requirement for any purpose. 97 F.4th at 125. In particular, the requirement is “irrelevant to whether a vote is received timely” and “not used ... to determine when the voter completed it.” *Id.* Rather, a ballot's timeliness “is established both by a receipt stamp placed on the envelope by the county board and separately through scanning of the unique barcode on the envelope.” *Id.* at 127. The date requirement also “bears no relation ... to whether a voter is qualified under Pennsylvania law to vote.” *Id.* at 131; *accord id.* at 139-140 (Shwartz, J., dissenting).

Given *NAACP*, respondents are collaterally estopped from arguing that the date requirement serves any purpose. (That likely explains why respondents have, in this case, “agreed that there are no outstanding questions of fact, nor factual stipulations required,” Order Granting Application for Intervention (June 10, 2024).) Estoppel “avoid[s] the ‘cost and vexation’ of repetitive litigation, conserv[es] judicial resources,” and “encourag[es] reliance on adjudication.” *In re Coatesville Area School District*, 244 A.3d 373, 379 (Pa. 2021). It applies where: “[1] the issue

is the same as in the prior litigation; [2] the prior action resulted in a final judgment on the merits; [3] the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and [4] the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action.” *Id.*

All four elements are met here. First, the relevant issue—whether the date requirement serves any purpose—is the same here as it was in the *NAACP* appeal. That the requirement is purposeless was in fact a key holding of the district court’s summary-judgment decision, which was based on an extensive factual record, *see Pennsylvania State Conference of the NAACP v. Schmidt*, 2023 WL 8091601, at *20-22 (W.D. Pa. Nov. 21, 2023) (recounting undisputed facts). And the Third Circuit affirmed this holding, explaining that “[n]o party disputed that election officials” do not use the handwritten date for any purpose related to determining a voter’s qualification, the ballot’s timeliness, or when the voter signed the declaration. 97 F.4th at 129. Second, the Third Circuit entered a final judgment on the merits in *NAACP*, issuing its mandate on May 8, 2024. Dkt. No. 66, *NAACP*, No. 23-3166 (3d Cir. May 8, 2024). Third, all respondents and respondent-intervenors were parties to the *NAACP* appeal. *See NAACP*, 97 F.4th at 123-124. Finally, all respondents and respondent-intervenors had a full and fair opportunity to litigate whether the date requirement serves any purpose in *NAACP*. As noted, the district court reached its conclusion only after assessing a voluminous summary

judgment record developed over four months of discovery, taken from each of the Commonwealth's 67 boards of elections. And respondents and respondent-intervenors were free to make any arguments on appeal to challenge that conclusion.

E. As noted at the outset, in *In re 2020 Canvass*, three justices argued in a partial dissent that the date requirement serves three purposes:

- “the date on the ballot envelope provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place”;
- “the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot”;
- “[t]he date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.”

241 A.3d at 1090-1091 (op. of Dougherty, J.) (quotation marks omitted).

As explained in the following paragraphs, none of these purposes is one that constitutes a valid state interest and that the date requirement actually serves. And the Pennsylvania Supreme Court has never agreed that the requirement serves any of these purposes. In *Ball v. Chapman*, the court *recounted* (in the “Background” section of its opinion) that the dissenters in *In re 2020 Canvass* had made these arguments about purpose. *See Ball*, 289 A.3d at 10. But the court’s “Analysis” made no mention of purpose—or the dissenters’ views about purpose—and the court’s actual holding was simply that, as a matter of statutory interpretation, “the date requirement is unambiguous and mandatory,” *id.* at 20, and that ballots that

arrived in undated or misdated envelopes accordingly cannot be counted, *see id.* at 20-23.²

Ball's apparent unwillingness to adopt the dissenters' arguments about purpose was well-founded. None of the three purposes the dissenters posited withstands scrutiny.

First, the dissenters asserted that “the date on the ballot envelope provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place.” 24i A.3d at 1090 (quotation marks omitted). But there is no basis for the dissenters' unstated assumption that “execut[ing] the ballot in full” is in any way a meaningful concept (legally or otherwise). Nor is there any basis for their unstated assumption that correctly dating the outer *envelope* is part of “execut[ing] the *ballot*.” In any event, it is not true that the date necessarily “provides proof of when the elector actually executed the ballot in full,” *id.* (quotation marks omitted). For example, a voter might sign and date the envelope before completing the ballot—perhaps to ensure that she did not forget to do so afterwards—and then might not complete the ballot until a later day. This Court made much the same point in a single-judge opinion, noting that the purposes the dissenters “identified were, at least implicitly, based on the belief that the date

² Should this Court conclude that *Ball* did hold that the date requirement serves a purpose, the Democratic National Committee and Pennsylvania Democratic Party preserve the argument that that holding is wrong and should be overruled.

written on the exterior envelope was the actual date the ballot was completed,” but that in reality, “it would be difficult to determine whether the date accurately reflects the day the ballot was” completed. *McCormick for U.S. Senate v. Chapman*, 2022 WL 2900112, *12-13 (Pa. Commw. Ct. June 2, 2022) (unreported opinion). And even if the dating of the envelope *did* necessarily prove when the ballot was “executed ... in full,” *In re 2020 Canvass*, 241 A.3d at 1090 (op. of Dougherty, J.), such proof serves no state purpose. The dissenters posited that it serves the purpose of “ensuring [the voter’s] desire to cast [a mail ballot] in lieu of appearing in person at a polling place.” *Id.* But that is not true either. What shows the voter’s “desire” to cast a mail ballot is her *submission of the ballot*. If the dissenters’ contrary suggestion were correct, then the many thousands of voters who have forgotten to date their envelopes before submission would have all shown up to vote in person, because the absence of a date would—in the dissenters’ telling—have meant those voters didn’t actually “desire to cast [a mail ballot] in lieu of appearing in person at a polling place,” *id.* That is untenable.

Second, the dissenters posited that “the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot.” 241 A.3d at 1090. But the dissenters did not explain how the date on an envelope is or could be used “to measure the elector’s eligibility.” That is no doubt because, as explained, the election code requires officials to verify eligibility before a mail or absentee ballot

is even sent. *See supra* Argument II.B. Neither the code itself nor counties' on-the-ground implementation involves using the date to verify voter eligibility. *See id.*; *accord Ball*, 289 A.3d at 38-39 (Brobson, J., joined by Mundy, J., concurring in part and dissenting in part). Again, the *In re 2020 Canvass* dissenters engaged with none of this.

Third, the dissenters asserted that “[t]he date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.” 241 A.3d at 1091. But here too, the dissenters did not explain this assertion—likely because, as explained, under the election code, the date has nothing to do with either timeliness or detecting and preventing fraud. *See supra* Argument II.A, C. Timeliness is established under the code by receipt date rather than the date on the envelope (no doubt precisely because the accuracy of a date on an envelope typically cannot be independently verified, whereas receipt date can). Likewise, the election code provides—and counties actually use—mechanisms other than the date to ensure that invalid ballots are not counted. Indeed, the specter the dissenters raised of “fraudulent back-dated votes,” 241 A.3d at 1091, makes no sense. If an envelope is “back-dated,” i.e., if a voter, at some time *after* the deadline to submit a mail ballot, writes a date on the envelope that is *before* that deadline, the ballot will not be counted because the envelope will not be received before the deadline.

In short, nothing in the *In re 2020 Canvass* partial dissent changes the dispositive point explained earlier: Both as a matter of state law and (if it matters) as a matter of every county board of elections' actual practice, the date requirement serves no purpose.

III. ENFORCEMENT OF THE DATE REQUIREMENT VIOLATES THE FREE AND EQUAL ELECTIONS CLAUSE

Because the date requirement serves no purpose, the level of judicial scrutiny applied here is ultimately irrelevant. Even under the most forgiving scrutiny, the Free and Equal Elections Clause means that the fundamental right to vote cannot be denied for no reason. The Court therefore need not address the applicable level of scrutiny—just as three members of the (then-six-member) Pennsylvania Supreme Court did not address it when they stated last year in *Ball* that a “failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause.” 289 A.3d at 27 n.156 (Wecht, J., joined by Todd, C.J., and Donohue, J.). Pennsylvania Supreme Court precedent make clear, however, both that strict scrutiny applies here and the date requirement cannot survive such scrutiny.

A. Statutes That, Like The Date Requirement, Mandate The Disqualification of Ballots Trigger Strict Scrutiny

The Pennsylvania Supreme Court analyzes claims under the Free and Equal Elections Clause by weighing the alleged “violat[ion of] the fundamental right to

vote” or alleged “disparate treatment of any group of voters” against the state interest supposedly advanced by the challenged regulation. *Banfield*, 110 A.3d at 178. The magnitude of the state interest required to uphold a challenged regulation depends on the severity of the burden it places on citizens’ exercise of the franchise. On one end of the spectrum, “[w]hen a statute significantly interferes with the exercise of [the] fundamental right” to vote, it must be narrowly tailored to promote a compelling state purpose. *Id.* at 176 n.15; accord *Appeal of Norwood*, 116 A.2d at 555. When an election regulation “do[es] not severely restrict the right to vote,” the Pennsylvania Supreme Court has been more deferential—so long as the regulation genuinely advances the Commonwealth’s interest in ensuring “honest and fair elections.” *Pennsylvania Democratic Party*, 238 A.3d at 369-370 (quoting *Banfield*, 110 A.3d at 176-177).

More specifically, the Pennsylvania Supreme Court has held repeatedly that disqualifying ballots “significantly interferes with the exercise of [the] fundamental right” to vote, and that such a disqualification can “be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose.” *Banfield*, 110 A.3d at 176 n.15 (quoting *Khan*, 842 A.2d at 947). In other words, enforcement of a regulation that, like the date requirement, results in the disqualification of ballots triggers strict scrutiny.

Indeed, the state high court has referred again and again in the election context—even where the Free and Equal Elections Clause was not formally invoked, in fact—to the need for a compelling state interest to justify the disqualification of ballots. In *Appeal of Norwood*, for example, the court reversed a county board’s disqualification of a ballot that was not marked in compliance with state law, holding that “the power to throw out ... ballot[s] for minor irregularities,” whether the ballots of “an individual voter or a group of voters,” is not to be “exercised ... at an election except for compelling reasons.” 116 A.2d at 555. Likewise, in reversing the disqualification of ballots in *Appeal of Gallagher*, the court reiterated that voters are not to be disenfranchised “at an election except for compelling reasons.” 41 A.2d at 454-455.

As with the state laws challenged in these various cases, enforcing the date requirement would mean that “minor irregularities”—here, misdated or undated ballot-return envelopes—“render[] the votes void[]” and thus would “disenfranchise these vote[r]s.” *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. As in the cases just discussed, therefore, the date requirement could be enforced only if doing so furthered a compelling state interest.

Enforcement would also have to be narrowly tailored in order to survive. In *In re Petitions to Open Ballot Boxes*, the Pennsylvania Supreme Court held that ballots could be disqualified for having stray marks only where doing so was

narrowly tailored to further the state's interest in preventing voting fraud—i.e., where there was evidence that the stray marks on a ballot were “willful[ly] ... placed on the ballots by the voters for the purpose of identifying their ballots,” because that could suggest that “fraud was involved.” 188 A.2d at 255, 256.

B. The Date Requirement Cannot Satisfy Strict Scrutiny

Because the date requirement advances no purpose—let alone a compelling state interest that the requirement is narrowly tailored to advance—it cannot satisfy strict scrutiny. The only reason *any* election official in Pennsylvania would examine the date written on any ballot-return envelope is to determine whether to disqualify the ballot based on a “minor irregularit[y],” *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. Such purposeless disqualification is not even “rationally related to the Commonwealth’s interest in ensuring honest and fair elections,” *Banfield*, 110 A.3d at 177, so it would fail even the most lenient form of judicial scrutiny. It assuredly cannot be squared with the robust protection for the right to vote provided by the Free and Equal Elections Clause and safeguarded by a long line of Pennsylvania Supreme Court cases interpreting and applying that clause.

C. The Date Requirement Cannot Satisfy Any Other Level Of Scrutiny

In any event, the level of scrutiny is not dispositive here. As explained, the date requirement serves no state interest. Thus, under any standard of scrutiny—strict, intermediate, or rational-basis—the date requirement is unconstitutional.

CONCLUSION

Petitioners' requested summary relief should be granted and respondents enjoined from disqualifying any mail or absentee ballot solely on the ground that it was submitted in an undated or misdated ballot-return envelope.

June 24, 2024

Seth P. Waxman
(admitted *pro hac vice*)
**WILMER CUTLER PICKERING
HALE AND DORR LLP**
2100 Pennsylvania Ave. N.W.
Washington, D.C. 20037
(202) 663-6000
seth.waxman@wilmerhale.com

Respectfully submitted,

/s/ Clifford B. Levine
Clifford B. Levine
Pa. Id. No. 33507
Alice B. Mitinger
Pa. Id. No. 56781
David F. Russey
Pa. Id. No. 84184
**DENTONS COHEN & GRIGSBY
P.C.**
625 Liberty Ave.
Pittsburgh, PA 15222
(412) 297-4998
clifford.levine@dentons.com

CERTIFICATE OF COMPLIANCE

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

/s/ Clifford B. Levine
CLIFFORD B. LEVINE

RETRIEVEDFROMDEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served on all counsel of record on June 21, 2024 by this Court’s electronic filing system.

/s/ Clifford B. Levine
CLIFFORD B. LEVINE