

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**68 MAP 2024**

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**BLACK POLITICAL EMPOWERMENT PROJECT, *et al.*,**  
**Petitioners-Appellees,**

**v.**

**AL SCHMIDT, SECRETARY OF THE COMMONWEALTH, *et al.*,**  
**Respondents-Appellees**

**Appeal of: Republican National Committee and Republican  
Party of Pennsylvania, Intervenors-Appellants**

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**THE SECRETARY OF THE COMMONWEALTH'S BRIEF**

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## INTRODUCTION

In 1968, the General Assembly amended the Election Code to eliminate a requirement that election officials set aside absentee ballots based on issues with the date of the voter's declaration. It did so after separate amendments to the Code aligned the deadline for completing an absentee ballot and the deadline for the receipt of an absentee ballot, making the declaration date inconsequential.

For the ensuing decades, officials did not discard ballots based on missing or incorrect dates. But after Act 77 of 2019 made mail voting widely available, issues regarding the declaration date spawned multiple lawsuits, including *In re Canvass of Absentee & Mail-in Ballots of November 3 2020 General Election*, 241 A.3d 1058 (Pa. 2020) and *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023).

The upshot of these decisions is that election officials are now operating under the pre-1968 rules. And as a result, tens of thousands of timely ballots from eligible voters have been thrown out because of an inconsequential voter error in the handwritten declaration date. Indeed, in the numerous cases that have addressed this issue, one critical fact

has become unimpeachably clear: no election official ever uses the handwritten declaration date for any election purpose—other than to disenfranchise voters who made mistakes.

Commonwealth Court’s decision should be affirmed for two separate reasons.

First, the text, structure, and historical development of the Election Code all demonstrate that the legislature did not intend for ballots to be set aside because the voter made an error in the handwritten date. Requiring such ballots to be set aside has proven to be a chaotic and unworkable rule that has created inconsistencies across the Commonwealth and has imposed needless burdens on election officials. Principles of stare decisis supply insufficient reason to proceed under the rule announced in *In re Canvass* and *Ball*, which (just as this Court forecasted) have raised more questions than they answered.

Second, rejecting mail ballots due to declaration-date errors violates the Free and Equal Clause of the Pennsylvania Constitution. That clause, at minimum, prohibits denying an individual’s right to vote for not complying with a rule that serves no purpose in election administration. And while the handwritten date once served a purpose, it no longer

does—and has not since 1968. Commonwealth Court, like other courts before it, recognized this fact and correctly held that discarding ballots based on declaration-date errors therefore violates the Constitution.

As Pennsylvania's chief elections official, the Secretary has a responsibility to ensure that elections across the Commonwealth are administered smoothly and, where the Election Code or Constitution requires statewide practices, are administered consistent with those practices. And, like county officials of all political persuasions, he seeks to ensure that eligible, registered voters can vote and have their vote counted, so that election outcomes reflect the will of the voters. Requiring county boards to disregard ballots with date errors impedes the smooth running of elections and disenfranchises voters for no purpose whatsoever. Neither the Election Code nor the Constitution permit this outcome.

## STATEMENT OF THE QUESTIONS INVOLVED

**Question 1.** Does the Election Code, contrary to this Court's holdings in *In re Canvass of Absentee & Mail-in Ballots of November 3 2020 General Election*, 241 A.3d 1058 (Pa. 2020) and *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), prohibit rejecting timely mail ballots from qualified voters on the basis that the voter failed to correctly write a date on the declaration returned with a mail ballot?

*Suggested answer:* Yes

**Question 2.** Does rejecting timely mail ballots from qualified voters because the voter failed to correctly write a date on the declaration returned with a mail ballot violate the Pennsylvania Constitution?

*Suggested answer:* Yes

**Question 3.** Would ruling that it is unconstitutional to reject timely mail ballots from qualified voters on the basis that the voter failed to correctly write a date on the declaration returned with a mail ballot invalidate all of Act of October 31, 2019, P.L. 552, No. 77?

*Suggested answer:* No

**Question 4.** Did Commonwealth Court have jurisdiction?

*Suggested answer:* Yes.

## STATEMENT OF THE CASE

### I. Mail Voting in Pennsylvania

Pennsylvanians may vote if on Election Day they are at least 18 years old, have been a citizen and lived in their election district for 30 days, and are not imprisoned for a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a). Information on registered voters is housed in county-specific voter rolls within the Statewide Uniform Registry of Electors (“SURE”) system.

Historically, registered Pennsylvanians voted in person, with limited exceptions for absentee voting. In 2019, however, Pennsylvania expanded mail voting to all registered voters. Act of Oct. 31, 2019, P.L. 552, No. 77 (“Act 77”). As a result, registered, eligible Pennsylvanians may now submit a ballot: (i) in person; (ii) absentee; or (iii) through no-excuse mail-in voting. Procedures applicable to absentee ballots and no-excuse mail ballots (collectively, “mail ballots”) are materially identical.

To vote by mail ballot, a registered voter must apply to their county board of elections and provide proof of their eligibility to vote. 25 P.S. §§ 3146.2, 3150.12; *see also id.* §§ 3146.2b, 3150.12b. Shortly before an election, county boards send anyone approved to vote by mail a package with a ballot, a secrecy envelope, and a pre-addressed return envelope

specific to that election. *Id.* §§ 3146.4, 3150.14. Each return envelope has a pre-printed declaration stating that the voter is qualified to vote in the election and has not already voted. *Id.* §§ 3146.4, 3150.14. It also has a pre-printed SURE barcode unique both to the voter requesting the mail ballot and the election. *Pa. State Conf. of NAACP v. Schmidt* (“*NAACP I*”), 703 F. Supp. 3d 632, 666 (W.D. Pa. 2023), *rev’d and remanded Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.* (“*NAACP II*”), 97 F.4th 120 (3d Cir. 2024).<sup>1</sup>

Voters are instructed to complete their ballot, place it in the secrecy envelope, and then place the secrecy envelope in the return envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The Election Code states that voters “shall

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<sup>1</sup> It was proper to rely on facts from *NAACP I*, and the other cases cited later in this brief. Those facts, developed after discovery from the Secretary, every county board of election, and several experts, are “not subject to reasonable dispute” because they “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Pa.R.E. 201(b)(2). Courts “may take judicial notice of pleadings and judgments in other proceedings where appropriate. That is particularly so where [] the other proceedings involve the same parties.” *Moss v. Pa. Board of Probation and Parole*, 193 A.3d 1130, 1137 n.11 (Pa. Cmwlth. 2018); *see also Lycoming Cnty. v. Pa. Labor Relations Bd.*, 943 A.3d 333, 335 n.8 (Pa. Cmwlth. 2007). The Third Circuit reversed *NAACP I* but noted its agreement that declaration dates “serve little apparent purpose.” *NAACP II*, 97 F.4th at 125.



then fill out, date and sign the [return-envelope] declaration.” *Id.* §§ 3146.6(a), 3150.16(a). Voters must complete their ballot before 8 p.m. on Election Day. *Id.* §§ 3146.6(a), 3150.16(a).

Counties’ canvassing of mail ballots is governed by Section 1308 of the Election Code, which pre-dated Act 77. Act 77, § 7; *see also* 25 P.S. § 3146.8.

Further, counties must maintain records of when each mail ballot was received. *Id.* §§ 3146.9(b)(5), 3150.17(b)(5). The Department of State advises counties to “stamp the date of receipt on the ballot-return envelope” and “record the receipt of absentee and mail-in ballots daily in the [SURE] system.” *See Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*, Version 4.0 (Apr. 3, 2023).<sup>2</sup> Counties follow this guidance. *See NAACP I*, 703 F. Supp. 3d at 666-67; *Chapman v. Berks Cnty. Bd. of Elections*, 355 MD 2022, 2022 WL 4100998, at \*6 (Pa. Cmwlth. Aug. 19, 2022) (describing county commissioners’ testimony).

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<sup>2</sup> Available at: <https://www.pa.gov/content/dam/copapwp-pa-gov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf>.

Counties also scan the return envelope's barcode into the SURE system to create an electronic record of when a ballot was received. *NAACP I*, 703 F. Supp. 3d at 666-67; *Berks*, 355 MD 2022, 2022 WL 4100998, at \*6, \*19. These independent measures confirm a mail ballot was received (and thus necessarily completed) by the statutory deadline.

When canvassing timely mail ballots, county election officials must be satisfied that a voter's "declaration is sufficient." 25 P.S. § 3146.8 (g)(3). If a county is satisfied that the declaration is sufficient (and other conditions not relevant here are met), the ballots "shall be counted and included with the returns of the applicable election." *Id.* § 3146.8(g)(4).

After the county has completed its canvassing, it must submit its final and accurate returns to the Secretary. *Id.* §§ 3154(f), 3158. Counties must certify their final and accurate results to the Secretary within 20 days of Election Day. *Id.* § 2642(k). The Secretary must then complete his own tabulation, computation, and canvassing of the votes cast for certain offices. *Id.* § 3159.

## II. Relevant Litigation History

Before 2020, election officials routinely canvassed mail ballots without regard to the handwritten date on the return envelope. Only after the General Assembly expanded the availability of mail-in voting did anyone challenge ballots returned in envelopes with undated or misdated declarations. As a result, there has been litigation about this issue in almost all subsequent elections.

Most relevant here, this Court has addressed declaration dates twice.

It first did so just weeks after the 2020 general election, when the Court considered challenges to the decisions of the Allegheny and Philadelphia County boards of elections to count mail ballots returned with undated declarations. *See generally In re Canvass of Absentee & Mail-in Ballots of Nov. 3 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020).

Five days after granting applications to exercise extraordinary jurisdiction (which were filed two weeks after Election Day), this Court issued a 3-3-1 decision that the ballots should be counted in 2020. Three Justices concluded that, under the Election Code, mail ballots returned

with a signed but undated declaration should be canvassed under all circumstances. *Id.* at 1076-78 (announcing judgment). One Justice disagreed with that statutory conclusion but agreed that omitting a date should not disqualify voters under the facts of that case. *Id.* at 1085-89 (Wecht, J., concurring). Three other Justices wrote that ballots returned with undated declarations must always be rejected. *Id.* at 1090-91 (Dougherty, J., dissenting).

Then, in a case filed directly in this Court just three weeks before the 2022 general election, a six-member Court issued a brief order directing that county boards must “refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes.” *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022). A supplemental order issued four days later (and three days before Election Day) directed what constituted an “incorrect” date for that election. *Suppl. Order, Ball v. Chapman*, 102 MM 2022 (Pa. Nov. 5, 2022).

Opinions in *Ball* came several months later. The lead opinion explained that *In re Canvass* was binding precedent requiring that mail

ballots returned with any declaration-date error be rejected. *Ball v. Chapman*, 289 A.3d 1, 20-22 (Pa. 2023).

### **III. Thousands of Eligible Voters Make Declaration-Date Errors Each Election**

Experience has shown that since Act 77 created no-excuse mail voting, thousands of registered, eligible electors in every election fail to write a correct date on the declaration returned with their timely mail ballot. App. 12, 17.

In the only presidential election since Act 77, 2,349 eligible voters in Allegheny County alone returned a mail ballot by the statutory deadline with a signed but undated declaration. *In re Canvass*, 241 A.3d at 1063 (announcing judgment). In Philadelphia County, 8,329 eligible voters returned a mail ballot by the statutory deadline with a signed declaration on which the voter had neglected to handwrite either a date or the voter's name or address (the last two of which are no longer required). *Id.*

For the 2022 general election, around 1,244,000 people returned a mail ballot. And counties set aside about 10,500 timely returned mail ballots from eligible voters solely because the declaration returned with the ballot was not correctly dated. *NAACP I*, 703 F. Supp. 3d at 668. Re-

jection rates varied significantly among counties: in Philadelphia, for example, more than two percent of mail ballots were set aside due to date errors. *See id.* at 678 (Philadelphia set aside 2617 ballots); Allegheny & Philadelphia Br. at 4 n.5, 283 MD 2024 (Pa. Cmwlth. June 24, 2024) (Philadelphia received 129,000 mail ballots total).

For the 2023 primary election, about 597,000 voters returned a mail ballot. Based on SURE—which underreports rejected ballots—counties reported cancelling about 4,918 of those ballots because of date errors.<sup>3</sup>

For the 2023 general election, about 613,746 voters returned a mail ballot. Because of the timing of the ruling in *NAACP I* some, but not all, counties canvassed mail ballots in the 2023 general election with declaration-date errors. In the 52 counties known to have rejected ballots for declaration-date errors, 1,354 ballots were reported as being cancelled out of about 250,580 mail ballots returned.

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<sup>3</sup> Counties use SURE to track the status of mail ballots. Starting with the 2023 primary, the Department adjusted SURE to allow counties to indicate a mail ballot was cancelled because of a declaration-date error (as well as other error types). Data from SURE entries underreports the number of date errors because not all counties enter cancellation codes and those that do can assign a ballot only one error type. For example, if a voter neither signed nor dated the declaration, that may be reported in SURE as a ballot cancelled either for a signature error or a date error.

For the 2024 primary election, around 715,811 people returned a mail ballot. Counties reported cancelling about 4,468 of those ballots because of date errors.

## SUMMARY OF ARGUMENT

1. During canvassing of mail ballots, declarations returned with the ballot are reviewed to confirm the “declaration is sufficient.” 25 P.S. § 3146.8(g)(3). If the declaration is (and there are no other issues under the Code) the ballot “shall be counted.” *Id.* § 3146.8(g)(4). The plain meaning of “sufficient” and the history of the Election Code unambiguously dictate that a mail ballot cannot be rejected because the declaration lacks a correctly written date. The contrary conclusion reintroduces a requirement that the General Assembly removed from the Code in 1968, which is when declaration dates ceased to serve any purpose. While this Court reached a contrary conclusion *In re Canvass and Ball*, every factor relevant to applying the doctrine of stare decisis weighs against continuing forward with those decisions.

2. Our Constitution prohibits depriving eligible voters of the right of suffrage for failing to perform an act that that has no relationship

to ensuring orderly and free, honest, and fair elections. If under the Election Code declarations without a correct date are insufficient, and the accompanying ballots may not be canvassed, then that rule violates the Pennsylvania Constitution. And because declaration dates have served no function since 1968, rejecting timely mail ballots from qualified voters for declaration-date errors fails that enduring constitutional standard.

3. Such a constitutional ruling would not invalidate all of Act 77. The requirement that ballots with insufficient declarations be rejected comes from the original version of the Election Code, not Act 77's amendments to it.

4. The Secretary, who is the routine defendant in matters regarding required statewide election practices, is an indispensable party here. Commonwealth Court, therefore, had jurisdiction. If there is any doubt, this Court can exercise jurisdiction under 42 Pa.C.S. § 726.



## ARGUMENT

### **I. This Court Should Rule That the Election Code Does Not Allow Rejecting Ballots Because of Declaration-Date Errors**

Before Commonwealth Court, the Secretary noted that “if this case advances to the Supreme Court the Secretary will urge the Supreme Court to revisit its interpretation of the Election Code.” Secretary Br. at 1, 283 MD 2024 (Pa. Cmwlth. June 24, 2024).<sup>4</sup>

That time has come. Under the Election Code, timely mail ballots from qualified electors cannot be rejected on the basis that the voter neglected to correctly handwrite a date on the mail ballot’s return envelope. This Court held otherwise in *In re Canvass and Ball*. But in each, the Court was forced to consider this critically important statutory question on exceedingly abridged schedules and without fully developed legal or factual arguments. Now, the Court, for the first time, has the time, relevant legal arguments, and factual record needed to properly resolve this issue. Stare decisis does not provide a sufficient reason to adhere to the past decisions.

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<sup>4</sup> Commonwealth Court, too, observed that the parties had announced that intention. App. 82-83 n.61; *see also* RNC Br. at 28.

**A. The Election Code Does Not Allow Rejecting Ballots Because of Declaration-Date Errors**

Since its enactment in 1937, the Election Code has provided for some form of voting by mail. And since that time, it has separated instructions to voters on how to complete a mail ballot from instructions to election officials on how to canvass those ballots. Requirements to set aside ballots for delineated deficiencies are consistently placed in the canvassing section. *See generally* 25 P.S. § 3146.8.

From the beginning, the Code's canvassing section has required election officials to determine whether a mail ballot declaration (or its historic corollary) is "sufficient"; if it is, and if there are no other applicable instructions to set the ballot aside, then the ballot must be counted. That sufficiency review has never included evaluating the declaration date. Rather, for the period that declaration dates served a purpose (1945-1968), there was an explicit instruction in the canvassing section that election officials must set aside mail ballots for certain dating issues. But the General Assembly eliminated that explicit requirement in 1968 when separate amendments to the Election Code eliminated the declaration date's purpose. Since then, the Code has not permitted setting aside mail ballots due to declaration-date errors.

## 1. The Election Code Separately Addresses Canvassing Mail Ballots and Voting Mail Ballots

Different sections of the Election Code govern how voters should complete a mail ballot and how election officials should canvass mail ballots. While 25 P.S. § 3146.6 describes “voting by absentee electors,” and 25 P.S. § 3150.16 does the same for “voting by mail-in electors,” it is Section 1308 of the Code, codified at 25 P.S. § 3146.8, that governs the “canvassing of official absentee ballots and mail-in ballots.” All mail ballots “shall be canvassed in accordance” with that subsection. *Id.* § 3146.8(a).

Consistent with that, where there are explicit instructions not to canvass certain mail ballots, those instructions are found in § 3146.8. For example, except for certain military and overseas ballots not relevant here, mail ballots must be received by 8 p.m. on Election Day to be canvassed. 25 P.S. § 3146.8(g)(i)(ii). Ballots returned by someone who died before Election Day must be rejected. *Id.* § 3146.8(d). Ballots returned in a secrecy envelope with a mark that reveals a voter’s identity, political affiliation, or preferred candidate shall be “declared void.” *Id.* § 3146.8(g)(4)(ii).

This Court has recognized that § 3146.8 supplies the relevant standards for resolving disputes about the canvassing of mail ballots.

That section guided this Court's determination that mail ballots cannot be rejected based on an analysis of the voter's signature. *In re Nov. 3 2020 Gen. Election*, 240 A.3d 591, 605-11 (Pa. 2020). Likewise, this Court reviewed § 3146.8 to determine if county boards may canvass and count mail ballots not placed in the inner secrecy envelope. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 375, 378-80 (Pa. 2020).

Past and proposed amendments to the Election Code corroborate that § 3146.8 governs when, as a statutory matter, mail ballots are canvassed.

For example, in 1945, the General Assembly added the "shall ... date" language to the Code in the section instructing voters on absentee procedures. Act of Mar. 9, 1945, P.L. 29, No. 17, § 10 (amending Section 1306 of the Code), App. 543-544. At the same time, the General Assembly added to the separate section *governing canvassing* a mandate that county boards examine return envelopes and "set aside unopened" envelopes on which the "jurat bears a date later than the date of the election." *Id.* § 10 (amending what was then Section 1307 of the Code), App. 544-545.

The General Assembly did the same in 1963, when it added the declaration still used today. Voters were instructed that they “shall ... fill out, date and sign the declaration printed on [the outer ballot-return] envelope.” Act of Aug. 13, 1963, P.L. 707, No. 379, § 22 (amending Section 1306 of the Code), App. 578-579. But in the separate canvassing section, the Code instructed that each “county board of election shall examine the declaration and if the same bears a date later than the date of such primary or election, the envelope shall be set aside unopened.” *Id.* § 24 (amending Section 1308 of the Code), App. 583-585.

Likewise, in 2021, when the General Assembly passed sweeping changes to the Election Code (which the Governor vetoed), the amendments would have added language *to the canvassing section* directing that county boards could not canvass ballots returned with an undated declaration. *See* HB 1300, Session of 2021, § 20 (proposing amendments to Section 1308 of the Code); *Ball*, 289 A.3d at 15 n.68.

Recognizing that the Code separately directs which mail ballots county boards must canvass or not obviates the need to parse the Code’s voter instructions to “weigh in each instance whether to interpret the

mandatory statutory language as being mandatory in fact.” *In re Canvass*, 241 A.3d at 1081 (Wecht, J.). The “shall ... date” language certainly is an instruction that voters are meant to follow. But that instruction does not clearly dictate what consequence follows from failing to comply.

Indeed, the Election Code is replete with instructions directed to everyone involved in the voting process: voters, candidates, political parties, county boards, district election workers, the Secretary of the Commonwealth, and others. The word “shall” appears thousands of times, in connection with virtually every step to be taken in the planning and execution of an election. *E.g.*, 25 P.S. § 3004 (“The county election board shall provide machines in good working order, and shall preserve and keep them in repair.”); *id.* § 2673 (“The county board shall be notified immediately upon the determination of any such tie vote [for judge or inspector of elections].”); *id.* § 2838.1 (“The secretary of any political party shall certify and forward to the Secretary of the Commonwealth a copy of the party rules ....”); *id.* § 3031.10(g) (“The members of the district election board shall arrive at the polling place at least one-half hour before the opening of the polls.”); *id.* § 3055(a) (voters “shall retire to one of the voter compartments, and draw the curtain or shut the screen door”); *id.*

§ 3055(d) (voters “shall fold [their] ballot ... in the same way it was folded when received” before returning it). The purpose of many of these requirements is plainly not to impose specific consequences for failure to take certain steps.<sup>5</sup>

In this regard, the voter directions for mail ballots fit in logically with the rest of the Code. The “shall ... date” text appears among instructions to voters, along with the deadline for completing the mail ballot, that the ballot should be completed in secret, and with a certain color pen or pencil. 25 P.S. §§ 3146.6(a), 3150.16(a). Yet, the mere existence of an instruction that voters “shall ... date” the mail ballot declaration does not mean the General Assembly intended that ballots with an undated declaration be set aside any more than it means the intended consequence was for the county to, for example, rely on its own stamped date instead, or send the voter’s ballot back to them to be fixed, or invite the voter to write a date, or count the ballot regardless. Instead, whether a ballot with

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<sup>5</sup> This is an ordinary construct. For example, it is unlawful to litter in certain water ways. 30 Pa.C.S. § 2503(a). But that prohibition itself says nothing about what happens if someone does litter. The penalty must be separately defined. *Id.* § 2503(c).

an incorrectly dated declaration should be canvassed is determined by what the General Assembly instructs in Section 1308.

**2. A Declaration is Sufficient Without the Date, Which Has Served No Purpose Since 1968.**

Under Section 1308, canvassing of mail ballots requires election officials to be “satisfied that the declaration is sufficient.” 25 P.S. § 3146.8(g)(3). If the declaration is, and there is no provision of § 3146.8 that requires setting the ballot aside, then the mail ballot “shall be counted and included with the returns of the applicable election district.” *Id.* § 3146.8(g)(4). The current version of § 3146.8 makes no mention of declaration date, much less instructs county boards to set mail ballots aside for declaration-date errors. Any consideration of declaration date, therefore, must occur as part of the sufficiency analysis.

1. The central statutory question, then, is what makes a declaration “sufficient,” which must be determined based on evidence of the General Assembly’s intention. 1 Pa.C.S. § 1921(a). Statutory text is the best evidence, *id.* § 1921(b), and text should be read in context, with words bearing their common meaning. *Crown Castle NG E. LLC v. Pa. Pub. Util. Comm’n*, 234 A.3d 665, 674 (Pa. 2020). The “former law” may also assist understanding the General Assembly’s intention. 1 Pa.C.S. § 1921(c); *In*



*re Nov. 3 Gen. Election*, 240 A.3d at 609 (looking to the history of § 3146.8(g)(3) to determine if county boards were authorized to reject mailed ballots based on signature analysis).

The longstanding definition of “sufficient,” (a word included as part of the original Election Code, *see infra* at 24-25) is “[o]f a quantity, extent, or scope adequate to a certain purpose or object.” *Sufficient*, Oxford English Dictionary (2d ed.) (dating this use of “sufficient” to 1380). By choosing the word “sufficient,” the legislature made clear that less than perfect compliance with the voting instructions was acceptable for a ballot to be counted, so long as the declaration achieves its purpose.

The purpose of the declaration is for the voter to swear to their eligibility. *See* 25 P.S. §§ 3146.4, 3150.14. Indeed, the entire purpose of a county boards’ review under § 3146.8(g)(3) is to consult various sources—including the declaration and voter lists—to confirm that the sources “verif[y] his right to vote.” *Id.* § 3146.8(g)(3).

A signature alone is sufficient for a voter to attest to their eligibility, and thus for the declaration to serve its particular purpose in county boards’ eligibility verification. A signed, but undated, declaration is no less an affirmative statement by the voter than is a signed and dated one

(and the date itself serves no further function, *infra* at 49-55). In fact, the Election Code clearly treats a signature alone as sufficient for the declaration to achieve its purpose, as it imposes criminal penalties on anyone who falsely *signs* a declaration. *See* 25 P.S. § 3553. If a signature alone is sufficient to treat the declaration as an affirmative statement by the signatory where it is false, it surely is sufficient to do so where the declaration is true.

2. The history of the Election Code confirms that a signed but undated declaration is “sufficient” and must be canvassed.

**1937.** When the Code was first enacted only some active military members could vote absentee. Act of June 3, 1937, P.L. 1333, No. 320, §§ 1327-1330, App. 525-527.

Absentee ballots were returned in an envelope printed with “the affidavit of the [voter], together with the jurat of the officer in whose presence the ballot is marked and before whom the affidavit is made.” *Id.* § 1328, App. 525-526. Voters had to “subscribe and swear to the affidavit” and the jurat had to “be subscribed by the [witnessing] officer,” but neither the affidavit nor jurat had to be dated. *Id.* § 1329, App. 526.

During canvassing, county boards were required to “compare the signature of such absent voter with his signature upon any register or other record in their possession.” *Id.* § 1330, App. 525-527. If a county board was “satisfied that the signatures correspond and that the affidavit and jurat are **sufficient**,” it was supposed to process the ballot. *Id.* (emphasis added), App. 526.

Because there was no instruction to date either the affidavit or jurat, the boards’ determination of whether the affidavit and jurat were “sufficient” did not include any assessment of whether either was dated.

**1941.** When the General Assembly amended the Code in 1941, it retained a direction that voters must complete their absentee ballot on or before Election Day as well as language that county boards should canvass ballots received by the second Friday *after* Election Day. Act of Aug. 1, 1941, P.L. 672, No. 273, § 4 (amending Sections 1303 and 1306 of the Code), App. 533-534. The amendments added a new requirement that county boards “set aside” during canvassing any ballot with a return envelope that “bear[s] a postmark later than the date of the particular Election Day involved.” *Id.* § 4 (amending what was then Section 1307 of the Code), App. 534-535. **After** setting aside those untimely ballots, county

boards were to review whether the “affidavit and jurat are sufficient.” *Id.*, App. 535.

**1945.** In 1945, the General Assembly added language stating that voters’ jurat “shall be ... dated.” Act of Mar. 9, 1945, P.L. 29, No. 17, § 10 (amending Section 1306 of the Code), App. 543-544. Voters still had to complete the ballot on or before election day, *id.*, App. 543, and for a general election a ballot could be counted if received by the second Friday after Election Day, *id.* § 10 (amending what was then Section 1307 of the Code), App. 544. Consistent with the new dating instruction to voters, counties were specifically directed to “set aside” all ballots in which the “jurat bears a date later than the date of the election.” *Id.*, App. 544-545. The written date, then, replaced the postmark as the necessary evidence a ballot was *timely completed*. Again, after setting aside ballots based on the jurat date, counties were to review the remaining ballots to determine whether “the affidavit and jurat are sufficient.” *Id.*, App. 545.

**1963.** Amendments in 1963 consolidated civilian and military absentee procedures and replaced the separate affidavit and jurat with the single declaration in use today. Act of Aug. 13, 1963, P.L. 707, No. 379, § 22 (amending Section 1304 of the Code), App. 576-577. The previous

instruction to date the jurat became an instruction that the “elector shall ... fill out, date and sign the declaration printed on [the outer ballot-return] envelope.” *Id.* § 22 (amending Section 1306 of the Code), App. 578-579. Voters still had to mark the ballot on or before election day, and it would be counted if received before the second Friday after Election Day. *Id.*, § 24 (amending Section 1308 of the Code), App. 583-585. The Code’s canvassing section was amended to instruct counties to set aside ballots returned with declarations bearing a date after Election Day. *Id.*, App. 583. After setting aside ballots based on the declaration date, counties were to review whether the “declaration is sufficient.” *Id.*, App. 584.

**1968.** In 1968, the General Assembly aligned, for the first time, the deadline for absentee voters to complete their ballot and for county boards to receive those ballots (making each deadline 5 p.m. the Friday before Election Day). Act of Dec. 11, 1968, P.L. 1183, No. 375, § 8, (amending Section 1308 of the Code), App. 603.<sup>6</sup> After creating a single deadline, the General Assembly *removed* the requirement that counties

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<sup>6</sup> Act 77 changed this uniform deadline to 8 p.m. on Election Day.

set aside ballots based on the date appearing on the ballot-return declaration. *Id.*, App. 603. In all other ways—including reviewing the declaration for sufficiency—the Code was materially unchanged.

**2019.** When Act 77 was passed, all registered, qualified voters were given the option to vote by mail. Act 77 adopted wholesale the pre-existing text and procedures for absentee voting. The General Assembly did not create a new canvassing section, but instead directed that no-excuse mail-in ballots be canvassed under the same procedures for absentee ballots.

This statutory genealogy confirms, first, that when the General Assembly meant for counties to set aside ballots based on an examination of the date, it said so explicitly. That explicit instruction was removed in 1968 when it became unnecessary. It is improper to now assume that the General Assembly meant for declaration-date issues to result in cancelling ballots when the General Assembly removed that very instruction.

Second, this history proves that what it means for a declaration to be “sufficient” is unrelated to its date. Assessing if a “declaration is sufficient” has *never* included review of a date. Instead, before 1968, the Election Code consistently instructed county boards of elections to *first* set

aside mail ballots bearing dates or postmarks after election day, and *then* to examine whether the declaration is sufficient. When the General Assembly aligned the deadlines in 1968, it removed the requirement to set ballots aside based on the date but retained the sufficiency assessment.

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To determine whether the General Assembly intended a ballot to be set aside, the Court must look to § 3146.8 and its instructions to county boards. Because this section no longer requires county boards to set aside mail ballots based on the declaration date, and because a declaration is sufficient without regard to the declaration date, the Election Code does not authorize setting aside ballots based on declaration-date errors.

**B. *In re Canvass* and *Ball* Should Not Be Followed**

Although this Court reached a different conclusion in *In re Canvass*, as the discussion above shows, that decision was, respectfully, incorrect. It (and *Ball*) should be overruled.

Stare decisis is an insufficient reason to continue forward under this Court's prior decisions. Stare decisis promotes predictability and important reliance interests but does not "demand unseeing allegiance to things past." *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*,

309 A.3d 808, 850 (Pa. 2024). Whether it is appropriate to keep to past decisions depends on the “quality of [the past decision’s] reasoning, the workability of the rule it established, its consistency with other related decisions” as well as “reliance on the decision” and the age of the decision (older decisions requiring a more compelling case to be overturned). *Commonwealth v. Alexander*, 243 A.3d 177, 196-97 (Pa. 2020). In this instance, every consideration cuts decisively in favor of correcting the statutory analysis from *In re Canvass* and *Ball*.

1. Through no fault of the Court’s, the reasoning behind *In re Canvass* and *Ball* is incomplete. In *In re Canvass*, this Court had granted an application for extraordinary jurisdiction that was filed two weeks after the day of the 2020 general election. *See* Appl. for Extraordinary Relief, *In re Canvass*, 89 EM 2020 (Pa.). There was a need for urgent resolution. This Court acted accordingly, issuing its order just five days after granting applications for extraordinary jurisdiction, allowing for the election to move toward the Secretary’s final certification. But the need to move quickly interfered with the ability of the parties (which did not include the Secretary) to present this Court with fully developed arguments on



what was then a novel issue. Nor had there been any factual development regarding the use of declaration dates.

Unsurprisingly under the circumstances, the Court's opinion could not account for the history of the Election Code described above, was not as attuned to the structure of the Code or the text of the section governing canvassing of mail ballots, and offered hypotheses that the parties did not yet have the factual record to conclusively address.

When this Court revisited the question in *Ball*, the matter again arose in an expedited posture, on a King's Bench petition just three weeks before the 2022 general election. Although the parties had better developed the relevant legal arguments, the factual record remained underdeveloped. *Ball*, 289 A.3d at 14-16. And while the parties disagreed about whether *In re Canvass* was binding precedent, no party asked the Court to overturn *In re Canvass* if the Court concluded that decision was precedent requiring treating declaration-date errors as disqualifying. *Ball*, 289 A.3d at 20 (summarizing parties' positions). As a result, although this Court acknowledged arguments that were not before it in *In re Canvass*, *id.* at 14-16, its conclusion that *In re Canvass* was precedent and

required rejecting ballots with declaration-date errors was the end of the matter, *id.* at 20-22.

Because of the timing of *In re Canvass* and because no party in *Ball* asked this Court to revisit *In re Canvass*, this Court has not yet had the opportunity to fully engage the statutory analysis presented above.

2. Further, the rule that emerged from *In re Canvass* and *Ball* is unworkable.<sup>7</sup> In *Ball*, this Court rightly forecasted the practical challenge of determining whether a declaration date is correct. *Ball*, 289 A.3d at 23; *see also id.* at 36 (Brobson, J., concurring and dissenting) (suggesting that counties can reject ballots with “facially correct [declaration] date[s]” after further scrutiny). In the elections since *Ball*, there have been persistent questions about what qualifies as a correct date.

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<sup>7</sup> The RNC, which filed *Ball* a mere three weeks before the 2022 election, brazenly claims that Commonwealth Court’s decision here “threatens to unleash chaos.” RNC Br. at 1. Affirming here, however, will relieve counties of the burden of having to review the date on *every single* mail-ballot envelope and making difficult determinations about whether a date is correct. It will not cause any “voter confusion,” *contra* RNC Br. at 59, or negatively affect voters at all. Voters instead will be protected from losing their right to vote based on an inconsequential error.

The Department has tried to aid counties with guidance, App. 259, 357-58, and minimize the opportunity for error by redesigning the declaration, *see* Directive Concerning the Form of Absentee and Mail-in Ballot Materials, Version 2.0 (July 1, 2024), App.151-156; *see also* Directive Concerning the Form of Absentee and Mail-in Ballot Materials, Version 1.0 (Nov. 28, 2023).<sup>8</sup> But guidance is not binding (though usually followed) and cannot address every conceivable question. Nor can design work solve all problems. *Contra* RNC Br. at 37-38. And evidence has shown that counties are inconsistent in their application of the rule announced in *In re Canvass and Ball*. App. 61; *NAACP I*, 703 F. Supp. 3d at 681-82. More to the point, requiring election officials to review declaration dates impairs sound election administration. *Infra* at 57-59.

3. Additionally, as discussed above, the analytical approach in *In re Canvass*—looking to the mail voting instruction sections instead of the county canvassing instruction section—is out of line with other decisions

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<sup>8</sup> Available at: <https://www.pa.gov/content/dam/copapwp-pa-gov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/2023-Directive-Absentee-Mail-in-Ballot-Materials.pdf>.

of this Court determining what ballots should be canvassed and the structure of the Election Code. *Supra* at 17-18.

4. Nor have *In re Canvass* and *Ball* engendered reliance interests or settled expectations. *Allegheny Reprod.*, 309 A.3d at 888. Rather, the consequence of failing to correctly date a declaration, and what constitutes a correct date, has been the focus of persistent (and still on-going) litigation. In fact, challenges under the U.S. Constitution to rejecting timely mail ballots from qualified voters because of declaration-date errors remain pending in federal courts. Docket, *Pa. State Conf. of NAACP v. Schmidt*, 22-339 (W.D.Pa.); Docket, *Eakin v. Adams Cnty. Bd. of Elections*, 22-340 (W.D.Pa.).

Other cases have challenged, or attempted to challenge, what constitutes a correct date. *E.g.*, *In re Six Ballots in 2024 Gen. Primary Election*, No. 629 CD 2024, 2024 WL 3290384 (Pa. Cmwlth. July 3, 2024); *In re Contest of Nov. 7 2023 Election of Towamencin Twp.*, 318 A.3d 420 (Pa. Cmwlth. 2024); *Schellberg v. Centre Cnty. Bd. of Elections*, 2024-1220 (Centre Cnty. C.C.P. May 24, 2024). But these cases have barely scratched the surface of this issue. *See NAACP I*, 703 F. Supp. 3d at 681 (discussing rejected ballots where the voter “omitted the year; omitted

the month; omitted the day; included a day that does not exist; put the date elsewhere on the envelope; or included a cross-out to correct an erroneous date” as well as “[a]dditional inconsistencies [from] differing utilization of standard dating conventions”) (cleaned up).

Moreover, there may still be more challenges coming based, at least, on the fact that the rule from *In re Canvass* and *Ball* disproportionately affects older voters. App. 16, 61; County Amicus at 10-15.

5. Nor has there been any legislation enacted based on this Court’s decisions. *Allegheny Reprod.*, 309 A.3d at 888. Moreover, because *In re Canvass* and *Ball* implicate the franchise, it is less likely that the ordinary legislative process will result in the correction of judicial errors. *Cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

6. Finally, *In re Canvass* and *Ball* are very recent decisions that have not generated subsequent legal development that rely on their outcome. *Allegheny Reprod.*, 309 A.3d at 887.

## II. **Rejecting Ballots Because a Voter Failed to Correctly Write a Declaration Date Is Unconstitutional**

If this Court instead concludes that a mail ballot declaration is sufficient only if correctly dated, enforcing that requirement by rejecting timely ballots from qualified voters is unconstitutional. That is because elections are not free, and the right of suffrage is not freely exercised, *see* Pa. Const. art. I, § 5, if voters must perform acts that have no relationship to ensuring orderly and free, honest, and fair elections as a prerequisite to having their ballot counted.

### A. **Pennsylvania’s Constitution Protects Against Unreasonable Interferences with the Right of Suffrage**

In Pennsylvania, “the right to vote is fundamental and pervasive of other basic civil and political rights.” *Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015) (cleaned up). Eligible Pennsylvanians have a constitutionally guaranteed right to vote in elections that are “free and equal.” Pa. Const. art. I, § 5; *see also* Pa. Const. art. I, § 26; Pa. Const. art. VII, § 1. 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.<sup>9</sup>

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<sup>9</sup> These rights have been guaranteed in every version of Pennsylvania’s Constitution. Pa. Const. of 1776, art. I, § VII & art. II, § 6; Pa. Const. (*continued*)...

Section 5 (or the Free and Equal Clause) is written in “the broadest possible terms,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018), and affords an array of important protections. Its assurance of both the “free exercise of the right of suffrage” and that elections be “free and equal” requires that: “[1] all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, [2] conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *League of Women Voters*, 178 A.3d at 804.

To keep the electoral process open and unrestricted to the greatest degree possible, the Free and Equal Clause strikes “at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 809 (quoting Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883)). This Court has been “consistent over the years,” *id.*, that Section

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of 1790, art. III, § 1 & art. IX, § 5; Pa. Const. of 1838, art. III, § 1 & art. IX, § 5; Pa. Const. of 1874, art. I, § 5 & art. VIII, § 1.

5 demands, at a minimum, that elections must be “public and open to all qualified electors alike”; that every voter must have “the same right as every other voter”; that every voter must have “the right to cast his ballot and have it honestly counted”; that regulations “of the right to exercise the franchise [may] not deny the franchise itself, or make it so difficult as to amount to a denial”; and that “no constitutional right of the qualified elector [may be] subverted or denied him,” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Further, all aspects of the electoral process must be free of unreasonable burdens on the right of suffrage. Regulations that impair (or outright deny) the right of suffrage but further no interest in ensuring orderly and honest elections impose unreasonable, and thus unconstitutional, burdens. Pennsylvania’s election regulations have been tested against this standard for over a century. *E.g.*, *Independence Party Nomination*, 57 A. 344, 345 (Pa. 1904) (“[The right of suffrage] cannot be denied, qualified, or restricted, and is only subject to such regulation as to the manner of exercise as is necessary for the peaceable and orderly exercise of the same right in other electors.”); *see also Banfield*, 110 A.3d at



176-77 (“[T]he state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.”); *In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 308 (Pa. 1974) (“Unreasonable impairment or unnecessary restrictions upon [the right of suffrage] cannot be tolerated.”).<sup>10</sup>

Consistent with this standard, this Court has held that compliance with neutral rules that do not reasonably further an interest in orderly and honest elections cannot be enforced by denying a qualified elector their right to vote. *Contra* RNC Br. at 30-31. These decisions have ensured that the right to suffrage remains free. Pa. Const. art. I, § 5.

In *Appeal of Norwood*, for example, this Court held that a ballot marked with a “✓” should be counted, even though the Election Code specifically directed that, “Any ballot marked by any other mark than an (X) in the space provided for that purpose shall be void and not counted.” 116 A.2d 552, 553 (Pa. 1955) (citing 25 P.S. § 3063). Echoing the text of Section 5, the Court noted that “the right of suffrage is the most treasured

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<sup>10</sup> Because rejecting mail ballots is unconstitutional under this standard, App. 84 n.62, the Court need not decide if strict scrutiny applies. *Contra* RNC Br. at 38-42.

prerogative of citizenship.” *Id.* That right can be conditioned on compliance with rules that serve an election interest, such as preserving voter anonymity, but not on compliance with rules that do not. *Id.* at 554-55.

Likewise, in *Appeal of Gallagher*, a ballot with several stray marks next to the name of the voter’s preferred candidate and the words “no good” next to the disfavored candidate was not rejected despite § 3063’s clear instruction that it must be. 41 A.2d 630, 631-32 (Pa. 1945). Ballots, this Court reasoned, should not be discarded for “minor irregularities”; instead, “voters are not to be disenfranchised at an election except for compelling reasons.” *Id.* at 632; see also *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256-57 (Pa. 1963) (holding that non-compliance with § 3063 could not result in rejecting ballots even after statutory amendments made following *Norwood*).

Similarly, clear statutory language that a ballot must be marked in blue or black ink did not permit rejecting ballots marked in red ink. *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). The use of a different color ink did not make the ballot identifiable or otherwise interfere with any discernable election-administration interest. *Id.*

Likewise, in *In re Recount*, a ballot returned without removal of a pre-printed number was counted despite that text of the Election Code unambiguously stating that “[a]ny ballot deposited in a ballot box ... without having the said number torn off shall be void and shall not be counted.” *In re Recount*, 325 A.2d at 308 (citing 25 P.S. § 3055). Echoing the text of Section 5, the Court wrote:

[I]t is important to be reminded that the right of suffrage is the most treasured prerogative of citizenship in this nation and this Commonwealth. It is this right that made the American dream distinctive, where men were to be governed not by the state but by themselves. Unreasonable impairment or unnecessary restrictions upon this right cannot be tolerated whether the contest be for the selection of the President of the United States or the district committeeman.

*Id.* So, while legislation that furthers actual election aims—such as voter anonymity, the integrity of the vote, and timely resolution of an election, to name a few—is permissible and necessary, “regulatory measures must not ever be permitted to unduly infringe upon the exercise of the right to vote” and must not amount to an unreasonable encroachment upon the franchise and the legislative enactment should not be interpreted to require such a result.” *Id.* at 309.

Although the RNC brushes these cases away as statutory interpretation cases rather than cases protecting Pennsylvania’s constitutional

right to vote freely, RNC Br. at 39-40, in each of *Norwood*, *Gallagher*, *In re Luzerne*, and *In re Recount*, this Court confronted unambiguous statutory language. And in each, this Supreme Court explained that (notwithstanding that statutory text) non-compliance with unambiguous voting rules cannot be used to impair the right of suffrage if the voting rule is divorced from any election-related purpose.

This Court also has interpreted ambiguity or silence in the Election Code to avoid needlessly depriving eligible voters of the franchise. *Shambach v. Bickart*, 845 A.3d 793, 798 (Pa. 2004); *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.3d 1223, 1231 (Pa. 2004); *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954); *Appeal of McCaffery*, 11 A.2d 893, 895-96 (Pa. 1940). This statutory-interpretation principle derives from the objectives that animate the Free and Equal Clause: “[A]n honest and just election” that ascertains “the intention of the voter.” *Appeal of James*, 105 A.2d at 65. To achieve that end, election laws must be interpreted “in favor of the right to vote” and “statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.” *Id.* (quoting 29 C.J.S. Elections, § 7). Indeed, Pennsylvania’s long-minted rule of statutory interpretation follows from the

“constitutionally protected right to an equal, nondiscriminatory electoral process.” *Berks*, 355 MD 2022, 2022 WL 4100998, at \*13.

Although Pennsylvania’s strong constitutional protections of the right to vote have no equally forceful federal counterpart, *see League of Women Voters*, 178 A.3d at 804, the U.S. Constitution imposes similar limits. It, too, demands that burdens on voting rights be justified by sufficient regulatory interests. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Pa. Democratic Party*, 238 A.3d at 384-85 (comparing protections under Pennsylvania Constitution to those described in *Burdick*); *Banfield*, 110 A.3d at 177 (same).

Likewise, weighing a regulations’ purpose against the burdens imposed on the right to vote is a common protection in states that are constitutionally compelled to keep their elections “free and equal” (or even just “free” or “free and open”) and that shield voters from interference with “the free exercise of the right of suffrage.” *E.g., Montana Democratic Party v. Jacobsen*, 545 P.3d 1074, 1089-93 (Mt. 2024) (citing Mont. Const. art. II, § 13); *League of Women Voters of Delaware, Inc. v. Dep’t of Elections*, 250 A.3d 922, 934-36 (Del. Ch. 2020) (citing Del. Const. art. I, § 3); *Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 100 N.E.3d 326,

330-32 & n.17 (Mass. 2018) (citing Mass. Const. Part I, art. IX); *Crum v. Dunn*, 390 P.3d 971, 973-74 (N.M. 2017) (citing N.M. Const. art. II, § 8); *Guare v. New Hampshire*, 117 A.3d 731, 735-36 (N.H. 2015) (citing N.H. Const. Part. 1, art. XI); *Meyer v. Lamm*, 846 P.2d 862, 874-76 (Colo. 1993); *Craig v. Peterson*, 233 N.E.2d 345, 348 (Ill. 1968) (citing what is now Ill. Const. Art. III, § 3).

Protecting voting rights from unreasonable regulations is commonplace even among states with less muscular protections than those enshrined in the Pennsylvania Constitution. *State ex rel. Frederick v. Zimmerman*, 37 N.W.2d 473, 480 (Wisc. 1949) (“Legislation regulating the exercise of the elective franchise ... must be reasonable.”); *State v. Erickson*, 137 N.W. 385, 386 (Minn. 1912) (holding election regulation “must be reasonable, uniform, and impartial; they must not be such as to defeat indirectly the constitutional rights of an elector or unnecessarily obstruct the exercise thereof”); see also *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (Mich. 2007); *Burr v. Voorhis*, 128 N.E. 220, 221-22 (N.Y. 1920).

The standard that this Court should apply here is therefore both deeply rooted in Pennsylvania and common throughout the country.<sup>11</sup>

**B. This Court May Answer the Constitutional Question Raised Here**

There is no basis, as the RNC urges, for this Court to abdicate its responsibility to ensure compliance with Pennsylvania's constitutional protections of free elections and the free exercise of suffrage.

1. The constitutional question raised here was not resolved in *Pennsylvania Democratic Party*. *Contra* RNC Br. at 26-27.<sup>12</sup> This Court ruled that the Constitution does not require county boards to contact voters whose mail ballots will be rejected for fatal defects but did not address the antecedent issue of which errors might be fatal. *Pa. Democratic Party*, 238 A.3d at 374. The same is true of *Ball*. *Contra* RNC Br. at 27. The

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<sup>11</sup> Application of this enduring and common standard would not violate the U.S. Constitution. *Contra* RNC Br. at 54-55. For one, the U.S. Constitution demands a similar (but less robust) evaluation. *Burdick*, 504 U.S. 434. For another, the U.S. Constitution's "Elections Clause does not insulate state legislatures from the ordinary exercise of judicial review." *Moore v. Harper*, 600 U.S. 1, 22 (2023).

<sup>12</sup> This Court resolved only that *In re Canvass* had already held that the Election Code requires rejecting mail ballots for declaration-date errors. *Ball*, 289 A.3d at 20-22.

constitutional issue raised here was not one of the three granted for review. King's Bench Order, *Ball v. Chapman*, 102 MM 2022 (Pa. Oct. 21, 2022).

2. Nothing in this Court's precedent suggests Section 5 serves only the "three functions" that the RNC invents based on *League of Women Voters*. RNC Br. at 29-30. That decision repeatedly expounded upon "expansive sweep" of the clause's text, which mandates "in the broadest possible terms" that all elections must be "kept open and unrestricted to the voters of our Commonwealth." 178 A.3d at 804.

3. Nothing in the Pennsylvania Constitution silently creates a discrete class of elections regulations (which the RNC characterizes as "ballot-casting rules") completely insulated from constitutional review. *Contra* RNC Br. at 24, 43. Rather, the Pennsylvania Constitution (like the U.S. Constitution) protects "all aspects of the electoral process." *League of Women Voters*, 178 A.3d at 804; *see also United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections.").



**C. Rejecting Ballots Because a Voter Failed to Write a Declaration Date Unreasonably Interferes with the Right of Suffrage**

Requiring election officials to deny the right to vote to anyone who fails to properly write a declaration date is an unreasonable burden because such a rule does not advance any interest in free, honest, or fair elections. Since 1968, there has been no reason for officials to review a voter's declaration date or to reject a ballot based on the content (or absence) of that date.

**1. Rejecting Ballots for Declaration-Date Errors Burdens the Right of Suffrage**

Cancelling mail ballots because of declaration-date errors "impairs the right of suffrage." *League of Women Voters*, 178 A.3d at 809.

For an individual voter, it leads to disenfranchisement. *Ball*, 289 A.3d at 20-22. Across the Commonwealth, cancelling ballots for declaration-date errors produces a constitutionally "intolerable ratio of rejected ballots." *Pa. Democratic Party*, 238 A.3d at 389 (Wecht, J., concurring); *see also supra* at 11-13 (noting thousands of ballots reported as cancelled for date errors in each election). In some recent elections, the number of voters who fail to write a correct date has been greater than the margin separating candidates in certain contests. *In re Contest of Nov. 7, 2023*

*Election of Towamencin Twp.*, 318 A.3d 420 (Pa. Cmwlth. 2024); *Migliori v. Cohen*, 36 F.4th 153, 163-64 (3d Cir. 2022), *vacated as moot by Ritter v. Migliori*, 143 S.Ct. 297 (2022).

The RNC insists that “there is nothing difficult” about correctly dating the declaration and that the number of people who fail to comply with the rule is irrelevant. RNC Br. at 32-35. It is hard, however, to conceive of evidence more indicative of the difficulty of complying with the dating requirement than the number of people who fail. And the thousands of (predominately older) voters who fail to handwrite a correct declaration date in election after election makes clear that for a meaningful portion of the electorate the difficulty of compliance is not trivial.

Moreover, the RNC’s view of the burden is overly narrow. This Court has not tolerated disenfranchising voters for failing to perform a subjectively “easy” task. In *Norwood* and *Gallagher*, for example, voters had not complied with the requirement to mark their ballot with an “x.” *Supra* at 39-40. Writing an “x” is easier than writing a correct date. In *In re Luzerne*, the issue was what color ink could be used. *Supra* at 40. Writing in the most readily available ink colors is no harder than writing a correct date, and yet this Court concluded using red ink was allowed.

These decisions make sense because jumping through pointless hoops as a condition of having a ballot counted is not a “usual burden” of voting, *contra* RNC Br. at 34, no matter how “easy” it might be to do so. Here, then, the burden to weigh must account for the absolute disenfranchisement imposed for failing to perform an inconsequential task.

## **2. Rejecting Ballots for Declaration-Date Errors Serves No State Interest**

The burden here is unreasonable because rejecting ballots for declaration-date errors serves no election purpose.

**1. The Date Serves No Function.** The Election Code creates detailed rules for Pennsylvania’s qualified, registered electors who opt to vote by mail. Most significant here, everyone who votes by mail must complete their ballot, place the ballot in a secrecy envelope, and place the secrecy envelope in a larger pre-addressed return envelope. *Supra* at 5-7. Each return envelope has printed on it a declaration that requires the voter to attest they are qualified to vote in the election and have not already voted. *Id.* Voters are directed to “fill out, date and sign the declaration.” *Id.* And voters must complete their ballot before 8 p.m. on Election Day. *Id.*

Most of these rules have a reasonable connection to advancing the administration of Pennsylvania's election. By signing the declaration, the voter swears, under penalty of perjury, that they are qualified to vote the ballot being returned. 25 P.S. § 3553. The secrecy envelope can reasonably be understood to further a constitutional interest in secret ballots. Pa. Const. art. VII, § 4. Return deadlines allow election officials to timely perform their responsibilities so that winning candidates can assume office without delay.

But as Commonwealth Court found, declaration dates do not have a legal or factual purpose. App. 76-78, 82. Indeed, the lack of purpose has been repeatedly and conclusively demonstrated in numerous state and federal cases, most compellingly in two with extensive evidence about the date's function.

In the first case, the Department of State's Deputy Secretary of Elections and county commissioners from three counties that refused to canvass mail ballots with undated declarations testified about declaration dates and the canvassing of mail ballots. *See Berks*, 355 MD 2022, 2022 WL 4100998, at \*5-6. Their testimony confirmed that the date is not

used to determine a voter's qualifications, determine whether they already voted, preserve confidentiality, or confirm a ballot was completed and returned on time. *Id.* at \*18-\*20. Nor did the Election Code suggest any purpose for writing a date or how the date is used. *Id.* at \*18. As a result, Commonwealth Court concluded that “there is **no factual or legal basis** for concluding that the dating provision serves [any identified] interest.” *Id.* at \*18 (emphasis in original).

In the second case, discovery was taken from every county board of elections, the Department of State, and expert witnesses about the date's function. The undisputed facts showed that counties do not rely on the declaration date to track whether a ballot was returned on time—counties independently track whether ballots were received on time through measures such as scanning the ballot envelope into the SURE system or time stamping. *NAACP I*, 703 F. Supp. 3d at 666-67, 679. Further, “county boards of elections did not use the handwritten date on the return envelope for any purpose related to determining a voter's age, citizenship, county or duration of residence, or felony status.” *Id.* at 679-80. In fact, the undisputed record established that the declaration date is “wholly

irrelevant.” *Id.* at 678. The date a voter signs the declaration “is untethered from any other requirement on the ballot” because the only significant date under the Election Code is the date the ballot is received. *Id.* at 679.

Other courts that have reviewed Pennsylvania’s date requirement also have readily concluded that the declaration date serves no function. *NAACP II*, 97 F.4th at 125 (“The date requirement, it turns out, serves little apparent purpose.”); *Migliori*, 36 F.4th at 163-64 (explaining that the handwritten declaration date serves no function).

In fact, before *In re Canvass* and *Ball* required otherwise, counties would count ballots no matter what date a voter wrote. *Migliori*, 36 F.4th at 163-64; *Berks*, 355 MD 2022, 2022 WL 4100998, at \*18. That it did not matter what date a voter wrote further confirms that the date no longer serves a purpose.

Even in *Ball*, five Justices expressly recognized that there is no connection between the handwritten date on the return envelope and a voter’s qualifications. 289 A.3d at 24 & n.139 (announcing judgment); *see also id.* at 39 (Brobson, J., concurring and dissenting) (observing that the

declaration date would not “have any bearing on determining voter qualification at all.”).

As for theories about what the date *might* do, robust factual development has proven otherwise.

First, the date does not confirm a ballot was completed within the required time frame. *Contra* RNC Br. at 45. Ballots and ballot return envelopes are unique to each election. No ballot can be completed before being mailed to the voter. And because the deadlines to complete and return a ballot are the same, if a ballot is timely received by a county board, it necessarily was timely completed by the voter. Counties independently track timeliness by time stamping mail-ballot envelopes, by logging them in SURE, and by separating timely and untimely ballots. *NAACP I*, 703 F. Supp. 3d at 666-67, 679; *Berks*, 355 MD 2022, 2022 WL 4100998, at \*6, \*19; *see also Ball*, 289 A.3d at 16 n.77. The RNC imagines the date might be useful as a backstop, RNC Br. at 45, but no county uses declarations in that way. *See NAACP I*, 703 F. Supp. 3d at 678-81. Nor could dates function in such a way because there is no way to verify that the date written is accurate and, even if accurate, the date does not indicate when a ballot was received.

Second, dates do not establish the moment for measuring voter eligibility. Eligibility is evaluated as of election day, not the day the voter dated the return envelope. *See* 25 P.S. § 2811; 25 Pa.C.S. § 1301; *see also Ball*, 289 A.3d at 16 n.77. And because the handwritten date does not identify any meaningful point in time, it also does not prevent fraud. Backdating an envelope cannot lead to a ballot being counted if it has not been delivered by the statutory deadline. There is no point in backdating a declaration if the date is not used to determine whether the ballot was timely received and otherwise carries no importance. Only where the date affects whether the ballot will be counted could a motivation to alter it could possibly exist.

The RNC cites a criminal complaint from Lancaster County as supposed evidence of the date's anti-fraud function, RNC Br. at 46-47, but Lancaster election officials have twice stated under oath that the date had no relevance to detecting that the ballot at issue was invalid.<sup>13</sup> To

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<sup>13</sup> A Lancaster County Commissioner testified that the date “did not affect whether [we] counted that ballot.” App. 617-620. Likewise, Lancaster County’s election director—the complaining witness referenced in the criminal affidavit—testified that “regardless of the date written on the envelope, that vote would not have counted.” App. 508.



the extent the date had any non-electoral utility in this circumstance, affirming Commonwealth Court here would not undermine it. The Election Code would still instruct voters to date the declaration. The only change would be that counties could not reject ballots with missing or incorrect declaration dates. *Bonner v. Chapman*, 298 A.3d 153, 168 (Pa. Cmwlth. 2023).

Third, a declaration date does not help election officials determine if an elector intended to vote by mail ballot rather than in person. Anyone who has requested a mail ballot cannot vote at a polling place on election day unless they bring their mail ballot to the polls and surrender it. 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3). Someone who arrives at their polling place on election day having requested a mail ballot but without that ballot can vote only provisionally. *Id.* §§ 3146.6(b)(1)-(2), 3150.16(b)(1)-(2). And if the voter both successfully returns a mail ballot and casts a provisional ballot at the polling place, only the mail ballot may count. *Id.* § 3050(a.4)(5)(ii)(F); *see also Ball*, 289 A.3d at 16 n.77.

Fourth, the General Assembly has not embraced the solemnity that the RNC ascribes to the date. RNC Br. at 45-46. The declaration a voter is instructed to sign is an attestation of their eligibility to vote in that

election. 25 P.S. §§ 3146.4, 3150.14. ***By signing the declaration alone***, an elector subjects himself to criminal charges if he knows the statement is false. *Id.* § 3553.

**2. Declaration Dates are a Relic.** Tracing the Election Code's history confirms that the date rule was meant to confirm the ballot was completed on time during a period in history when the deadline to complete a ballot and return it were different. *Supra* at 24-28. But dates stopped serving that—or any—function once the completion and receipt deadline were aligned in 1968. *Supra* at 27-28. Notably, after aligning the two deadlines, the General Assembly ***removed*** the prior instruction to set aside mail ballots bearing dates after the deadline to complete the ballot. *Id.*

When the General Assembly passed Act 77, it adopted wholesale the existing procedures for absentee ballots—including the dating remnant. *Compare* 25 P.S. §§ 3146.1-3146.7 (absentee) *with id.* §§ 3150.11-3150.16 (no-excuse mail in); *see also, e.g.*, Cutler Amicus at 17 (explaining that Act 77 adopted identical procedures to those that applied to absentee voting).

The declaration date, then, is among the “vestiges remaining in the Election Code” of prior voting rules. *In re Nov. 3 Gen. Election*, 240 A.3d 591 at 610 n.24. While rejecting absentee ballots based on a declaration date once served a legitimate function, it is now the case that a rule “once considered constitutionally permissible may come to significantly interfere with the fundamental right to vote in light of conditions existing in contemporary society.” *Chelsea Collaborative*, 100 N.E.3d at 334.

**3. Reviewing Declaration Dates Harms Election Administration.** Not only is there no utility to rejecting mail ballots for declaration-date errors, requiring that county boards reject mail ballots returned in envelopes they deem to have a date error impairs free, honest, and fair elections in at least three discrete ways.

First, election officials have significant and demanding responsibilities between Election Day and the deadline to certify an election’s returns to the Secretary, which is just 20 days after an election. 25 P.S. § 2642(k). The Secretary has his own certification obligations that follow those of the counties. 25 P.S. § 3159. If officials must reject mail ballots because of declaration-date errors, they must engage in the laborious process of reviewing voters’ handwritten dates and determining if they are

correct. Forcing already burdened election officials to engage in this time-intensive but gratuitous work occupies resources that can, and should be spent, performing tasks that further the free, honest, and fair administration of an election. County Amicus at 17-18.

Second, as experience has shown, requiring counties to review and reject mail ballots based on declaration dates leads to inconsistent and varying practices within and across counties, specifically as to what qualifies as a sufficient date. App. 61; *NAACP I*, 703 F. Supp. 3d at 680-82. Requiring election officials to do so also demands disenfranchising undisputedly qualified individuals even where the county is certain their ballot was completed and returned on time, as happened in the 2022 general election. *NAACP I*, 703 F. Supp. 3d at 680-82 These variations and acts of disenfranchisement do not advance voter confidence, which “is essential to the functioning of our participatory democracy.” *Pa. Democratic Party*, 238 A.3d at 387 (Wecht, J., concurring); see also *League of Women Voters*, 178 A.3d at 814 (recognizing the importance of election rules that do not discourage participation in election). Affirming will provide a return to uniformity that has been disrupted since *Ball*.

Third, ascribing importance to the date requirement introduces risks that would not otherwise exist. If counties need not review the handwritten date, there is no incentive for anyone to manipulate it. But requiring that voters write a correct date for their declaration to be “sufficient” makes the date a piece of information that can be manipulated such that a timely completed, properly returned ballot is not counted. While the Secretary is not aware of any evidence that such manipulation has occurred, no similar risk exists if counties simply count timely-received ballots cast by registered voters regardless of whether the voter wrote the correct date on the ballot envelope.

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Depriving thousands of qualified electors of their right to vote for failing to perform what is now an entirely meaningless act is not a reasonable regulation needed to ensure a free, honest, and fair election. *Banfield*, 110 A.3d at 176-77; *accord Pa. Democratic Party*, 238 A.3d at 369. Nor is erecting gratuitous roadblocks and then disenfranchising eligible voters who stumble over them consistent with the constitutional impera-

tive that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.”

*Pa. Democratic Party*, 238 A.3d at 369.

### **III. Affirming Commonwealth Court’s Judgment Would Not Invalidate All of Act 77**

Act 77 includes a clause that reads: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are non-severable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11. Commonwealth Court correctly held that its finding that rejecting timely received mail ballots from qualified voters who made a declaration-date error would not invalidate all of Act 77 under this provision.

While Commonwealth Court reached the correct result, the relevant analysis is, in the first instance, simpler than that which it performed. The constitutional infirmity here arises if, under § 3146.8(g)(3), a declaration must be correctly dated to be “sufficient.” Holding that such a rule is unenforceable as a constitutional matter does not invalidate any provision of Act 77 because § 3146.8(g)(3) and the sufficiency standard are not from Act 77. *See* Act 77, § 7. The sufficiency standard has been in

the Election Code since 1937. *Supra* at 24-25. That should be the end of the severability analysis.

But there can be more. Non-severability provisions are not “inexorable commands.” *Stilp v. Commonwealth*, 905 A.2d 918, 972 (Pa. 2006); *see also Pa. Democratic Party*, 238 A.3d at 397 n.4 (Donahue, J., concurring and dissenting). Rather than apply boilerplate non-severability provisions, severability is governed by the common law principle (now codified) that statutory provisions are severable” except when “the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one” or when “the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” 1 Pa.C.S. § 1925. This standard is “specific [and] cogent,” and “both emphasizes the logical and essential interrelationship of the void and valid provisions, and also recognizes the essential role of the Judiciary in undertaking the required analysis.” *Stilp*, 905 A.2d at 970.

Applying the correct standard, Act 77 can stand—and fulfill its purpose—if mail ballots returned with declaration-date errors are canvassed and counted.

Act 77 was a sea change to Pennsylvania’s elections. Among other things, it eliminated straight-ticket voting, *see* Act 77, § 6; created no-excuse mail-in voting, *id.* § 8; changed voting machine requirements, *id.* § 3; and moved the voter registration deadline from 30 to 15 days before an election, *id.* § 4. It is absurd to think that the legislature intended to invalidate the entirety of Act 77—and to nullify “years of careful [legislative] consideration and debate ... on the reform and modernization of elections in Pennsylvania,” *McLinko v. Dep’t of State*, 279 A.3d 529, 543 (Pa. 2022)—because non-compliance with a demand that voters provide inconsequential information cannot result in disenfranchisement, App. 88. That is tautologically true as the basis for an order here would be that rejecting mail ballots because of declaration-date errors serves no purpose.<sup>14</sup>

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<sup>14</sup> By contrast, the remainder of Act 77 likely would have been invalid if this Court had ruled in *McLinko* that no-excuse mail-in voting is unconstitutional.



Enforcing a non-severability clause like that found in Act 77 would create exactly the problems 1 Pa.C.S. § 1925 aims to avoid. Act 77 is an amendatory statute that added some new provisions to the Election Code and modified others. Both the newly added and modified sections have been subject to further amendments four times since Act 77 was passed. See Act of Nov. 27, 2019, P.L. 673, No. 94; Act of Mar. 27, 2020, P.L. 41, No. 12; Act of Jul. 11, 2022, P.L. 745, No. 66; Act of Jul. 11, 2022, P.L. 1577, No. 88. Carving out just the parts of the Code that were added through Act 77 would render significant parts of it incoherent.

Further, amendatory statutes do not exist in their own right. When an amendatory statute is passed, “the amendment shall be construed as merging into the original, become a part thereof, and replace the part amended, and the remainder of the original statute and the amendment shall be read together and viewed as one statute passed at one time.” 1 Pa.C.S. § 1953. In other words, once an amendatory statute is enacted, it ceases to have an independent identity and there is nothing left to be invalidated under a non-severability clause.

This analysis tracks Justice Donahue’s concurring opinion in *Pennsylvania Democratic Party*. Act 77 set 8 p.m. on Election Day as the deadline for mail ballots to be received. Act 77, § 7. For the 2020 general election, this Court ordered that mail ballots could be canvassed even if received after that deadline. *Pa Democratic Party*, 238 A.3d at 370-72. Appellants here argued that the Court’s order should trigger the non-severability provision. *Id.* at 367. But this Court did not adopt that view and Justice Donahue, joined by Chief Justice Saylor and Justice Mundy, specifically questioned whether Act 77’s non-severability provision was enforceable at all and whether its “boilerplate” language could govern the Court’s review of any severability questions. *Id.* at 397 n.4 (Donahue, J., concurring and dissenting). Similarly, if Act 77’s non-severability clause applies here, then this Court’s order in *In re Canvass* should have triggered the non-severability provision. Yet not a single Justice even suggested the provision might have that effect despite that this court considers severability “even where the parties failed to argue [it].” *Stilp*, 905 A.2d at 970.

Last, as an *en banc* panel of Commonwealth Court previously and correctly held, declaring that timely mail ballots from qualified voters

cannot be rejected for declaration-date errors does not invalidate any statute—whether in Act 77 or otherwise. *Bonner*, 298 A.3d at 168. Such a declaration does not strike any language from the Election Code or direct electors not to date their declaration. *Id.* at 168; *see also* App. 89. There is no Pennsylvania precedent that a non-severability clause is triggered by a judicial order “that did not declare the provision invalid.” *Bonner*, 298 A.3d at 169.

#### **IV. Commonwealth Court Had Jurisdiction**

Finally, Commonwealth Court had jurisdiction.<sup>15</sup>

Commonwealth Court has original jurisdiction when the Commonwealth or a Commonwealth officer is an indispensable party to the action. 42 Pa.C.S. § 761(a)(1). An officer is indispensable where the specific “claim and the relief sought” implicate a “right or interest” of the Commonwealth party that is “essential to the merits of the issue.” *Centolanza v. Lehigh Valley Diaries, Inc.*, 658 A.2d 336, 339 (Pa. 1995).

The Secretary is Pennsylvania’s chief election official. He has critical responsibilities for administering Pennsylvania’s elections. *See* 25

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<sup>15</sup> If this Court disagrees, it should assume plenary jurisdiction over this matter. 42 Pa.C.S. § 726.

P.S. § 2621. Consequently, he (or the Department) is routinely a party when declaratory actions raise what the Election Code, the Pennsylvania Constitution, or federal law requires in Pennsylvania as a statewide election practice.<sup>16</sup>

Specifically, the Secretary prescribes the form of the declaration at issue and has redesigned it in the last year in response to this Court's decisions. *Supra* at 33. He also has issued guidance about when ballots with declaration-date errors should be counted. App. 47; *see also* App. 258-59, 274-75. That guidance is not binding but counties routinely solicit and follow it.

Beyond that, resolution of this appeal will dictate whether a certain class of ballots “shall be counted and included with the returns” that are transmitted from the counties to the Secretary. *Id.* § 3146.8(g)(4); *see also id.* §§ 2642(k), 3154(f), 3158. Even more, upon receipt of those returns,

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<sup>16</sup> *E.g.*, *NAACP II*, 97 F.4th 120 (declaration-date errors); *Ball*, 289 A.3d 1 (declaration-date errors); *McLlinko*, 279 A.3d 539 (constitutionality of no-excuse mail-in voting); *In re Nov. 3 Gen. Election*, 240 A.3d 591 (signature analysis for mail ballots); *Pa. Democratic Party*, 238 A.3d 345 (five statewide voting questions, including some about mail ballot rules); *Bonner*, 298 A.3d 153 (non-severability of Act 77); *Zimmerman v. Secretary*, 33 MD 2024, 2024 WL 3979110 (Pa. Cmwlth. Aug. 23, 2024) (canvassing locations).

the Secretary “shall forthwith proceed to tabulate, compute and canvass the votes cast for all” statewide races, judicial race, and state and federal congressional races “and shall thereupon certify and file in his office the tabulation thereof.” *Id.* § 3159; *see also id.* § 2621(f).<sup>17</sup> Resolution of this appeal will directly bear on these aspects of the Secretary’s duties. *See Berks*, 355 MD 2022, 2022 WL 4100998, at \*9 (concluding that these statutory duties gave the Secretary an interest in whether returns received from the counties include all ballots that must legally be counted).

The RNC’s contrary argument, RNC Br. at 12, rests on a single-judge, unpublished (although correct) decision that “is easily distinguished.” App. 47. In *RNC v. Schmidt*, the RNC challenged “several County Boards [that had] taken it upon themselves to develop and implement” so-called “notice and cure” procedures. *RNC v. Chapman* (“*RNC I*”), 447 MD 2022, 2022 WL 16754061, at \*1 (Pa. Cmwlth. 2022) (denying preliminary injunction); *see also* App. 46. Counties’ varying procedures were implemented under the ***discretionary powers*** that the Election

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<sup>17</sup> The *Ball* petition—filed by the RNC, *cf.* RNC Br. at 14 (discussing “the *Ball* petitioners”)—also cited § 2621(f) and § 3159 as reasons to name the Secretary. Pet. at 9, *Ball*, 102 MM 2022 (Oct. 16, 2022).

Code affords county boards to makes rules necessary for the guidance of electors. 25 P.S. § 2642(f); *see also RNC I*, 447 MD 2022, 2022 WL 16754061, at \*4, \*18. The Code does not require or forbid any particular practice and the Secretary (although he supports counties that opt to develop some form of notice and cure procedure) **had not** (and has not) issued guidance to counties about notice-and-cure procedures. *Contra RNC Br.* at 12-13; *see also RNC v. Schmidt*, 447 MD 2022 (Pa. Cmwlth. Mar. 23, 2023), App. 381. The RNC had alleged the Secretary was indispensable based on the guidance he issued regarding the issue involved *in this appeal*, which did not make him indispensable for an action about an unrelated election practice. App. 374, 379-80. The circumstances there do not resemble those here.

Nor did including only two county boards in this action deprive Commonwealth Court of jurisdiction. This case is positioned similarly to *In re Canvass* (which this Court later explained in *Ball* had announced the interpretation of the Election Code all counties were expected to follow), in which the Philadelphia and Allegheny Boards of Elections were

the only two participating counties. 241 A.3d at 1062-63. Just as there was no issue in *In re Canvass*, there is no issue here.<sup>18</sup>

The suggestion that failing to join the remaining counties will lead to inter-county variation is meritless. *See* RNC Br. at 19. Whether a county board is a party here or not, it must follow what the Code and Pennsylvania Constitution require of it, as definitively interpreted by this Court. That is a common consequence of litigation. Definitive statutory and constitutional interpretations are followed by entities subject to those laws whether they were a party to litigation or not.

*Ball* is no impediment. *Contra id.* The **orders** entered in *Ball* required only that counties exclude certain ballots during the 2022 general election. *Ball*, 284 A.3d 1189; Suppl. Order, *Ball*, 102 MM 2022 (Pa. Nov. 5, 2022). For every election after the 2022 general election, county boards and the Secretary follow *In re Canvass* and *Ball* not as a matter of their

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<sup>18</sup> Mandating that every county board be included in every case raising a statewide election issue would, in many cases, be a practical impossibility because a petitioner may not have standing to name every county board of election. Such a rule also would also needlessly burden over-taxed county boards, *see* Chew Amicus at 15 n.5., many of which are regularly inactive (even as a party) in litigation that might ultimately determine how the board performs its duties.

orders, but as precedent as to what the Election Code requires of them. There is recourse available against any official that flouts what the Constitution requires of them.

A judicial declaration that timely mail ballots from qualified voters cannot be rejected for declaration-date errors can easily be implemented uniformly. *Contra Bush v. Gore*, 531 U.S. 98, 106 (2000) (“The problem here inheres in the absence of specific standards to ensure its equal application.”); *contra* RNC Br. at 20. Indeed, such a judicial declaration would **remedy** inconsistencies that have resulted following *Ball. NAACP I*, 703 F. Supp. 3d at 679-81 (describing those inconsistencies).

## CONCLUSION

For the reasons above, Commonwealth Court’s judgment should be affirmed.



September 4, 2024

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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.

Dated: September 4, 2024

*/s/ Jacob B. Boyer*

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## **CERTIFICATE OF LENGTH**

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 13,969 words. I have relied on Word's word count function to determine the length of this brief.

Dated: September 4, 2024

*/s/ Jacob B. Boyer*

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