

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

**BLACK POLITICAL  
EMPOWERMENT PROJECT,  
POWER INTERFAITH, MAKE THE  
ROAD PENNSYLVANIA, ONEPA  
ACTIVISTS UNITED, NEW PA  
PROJECT EDUCATION FUND,  
CASA SAN JOSÉ, 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,**

**v.**

**REPUBLICAN NATIONAL  
COMMITTEE and REPUBLICAN  
PARTY of PENNSYLVANIA,**

**Intervenor-Respondents,**

**v.**

**DEMOCRATIC NATIONAL  
COMMITTEE and PENNSYLVANIA  
DEMOCRATIC PARTY,**

**Intervenor-Petitioners.**

**No. 283 MD 2024**

**Original Jurisdiction**

**MEMORANDUM OF LAW IN  
SUPPORT OF PETITIONERS'  
APPLICATION FOR  
SUMMARY RELIEF**

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## INTRODUCTION

In every election since 2020, thousands of Pennsylvania voters have had their mail ballots rejected because they did not handwrite the date on, or wrote some “incorrect” date on, the outer mail ballot envelope. This mass disenfranchisement continues despite the undisputed fact that the date written on the outer envelope is utterly useless. It plays no role in establishing a mail ballot’s timeliness or the voter’s eligibility and is not used to detect fraud. Thousands more voters will undoubtedly face disenfranchisement on the same basis in this November’s presidential election. This severe penalty for a meaningless technical mistake violates Article I, Section 5 of the Pennsylvania Constitution – the “Free and Equal Elections” clause.

The Free and Equal Elections clause establishes the right to vote as a fundamental individual right that may not be diminished by the government. The clause “strike[s]...at all regulations...which shall impair the right of suffrage....” *League of Women Voters v. Commonwealth (“LWV”)*, 178 A.3d 737, 740-41 (Pa. 2018) (citation omitted). Under any standard of review, refusing to count a person’s ballot because of an irrelevant missing or incorrect handwritten date on the mail ballot envelope unjustifiably burdens this right.

Petitioners initiated this case with a Petition for Review and Application for Special Relief in the Nature of a Preliminary Injunction, seeking to enjoin enforcement of the date requirement. On June 10, 2024, following a status

conference at which all parties appeared—including intervenors the Republican National Committee (“RNC”), the Republican Party of Pennsylvania (“RPP”), the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”)—the Court issued an order noting that “all the parties agreed that there are no outstanding questions of fact, nor factual stipulations required, and that this matter involves purely legal questions.” June 10, 2024 Order. Accordingly, all parties “agreed that disposing of this matter via cross-applications for summary relief was the most expeditious means of resolving the legal issues in dispute.” *Id.* To expedite this matter, Petitioners agreed to convert their Application for Special Relief in the Nature of a Preliminary Injunction and supporting materials to this Application for Summary Relief.

Granting this Application is necessary to protect the franchise of Petitioners’ members and constituents, and thousands more Pennsylvania voters whose mail ballots will otherwise not be counted in the November 2024 election purely because of a meaningless error. This Court should permanently enjoin the practice of enforcing this date requirement to exclude otherwise valid, timely mail ballots submitted by qualified Pennsylvania voters.

## STATEMENT OF UNDISPUTED FACTS

### **A. Pennsylvania's Mail Ballot Procedures**

Pennsylvania has long provided absentee ballot options for voters who cannot attend a polling place on Election Day. *See* 25 P.S. §§ 3146.1–3146.9. With the enactment of PL 552, Act No. 77 of 2019, Pennsylvania adopted “no excuse” absentee or mail-in voting, allowing *all* registered voters to cast their vote by submitting a mail ballot without having to show cause why they cannot make it to the polls on Election Day.

A voter seeking to vote by mail must complete an application that includes their name, address, and proof of identification and send the completed application to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. As part of the mail-ballot application process, voters provide all the information necessary for county boards of elections to verify that they are qualified to vote in Pennsylvania, namely, that they are at least 18 years old, have been a U.S. citizen for at least one month, have resided in the election district for at least 30 days, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301(a).

After the application is submitted, the county board of elections confirms applicants' qualifications by verifying their proof of identification and comparing the information on the application with information contained in a voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also* Press Release, Pa. Dep't of State, Guidance

Concerning Civilian Absentee and Mail-In Ballot Procedures, at 2, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2023-04-03-DOS-Guidance-Civilian-Absentee-Mail-In-Ballot-Procedures-v3.pdf> (last updated Apr. 3, 2023). The county board's determinations as to qualifications at this stage are conclusive as to voter eligibility unless challenged prior to five p.m. on the Friday before Election Day. 25 P.S. §§ 3146.2c, 3150.12b(3).

Once the county board verifies the voter's identity and eligibility, it sends a mail-ballot package that contains a ballot, a secrecy envelope marked with the words "Official Election Ballot," and the pre-addressed outer return envelope, on which a voter declaration form is printed (the "Return Envelope"). *Id.* at §§ 3146.6(a), 3150.16(a); *see also id.* § 3146.4 (the mail ballot packet "shall contain the two envelopes, the official absentee ballot, [and] . . . the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else."). In addition, the "form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth." *Id.* § 3146.4; *cf id.* §§ 3146.3(b) (the form of absentee ballots "shall be determined and prescribed by the secretary of the commonwealth"); 3150.13(b) (same for the mail-in ballot form).

At "any time" after receiving their mail-ballot package, the voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. *Id.* §§ 3146.6(a), 3150.16(a). The voter then completes the voter

declaration form printed on the Return Envelope and delivers the ballot, in the requisite envelopes, by mail or in person, or by other designated method, to their county board of elections. The statutory provision establishing mail voting provides the elector “shall . . . fill out, date and sign the declaration printed on [the] envelope” before returning the completed ballot. 25 P.S. §§ 3146.6 (absentee ballots), 3150.16 (other mail-in ballots). However, the date written on the outer return envelope is not used to determine or confirm voter identity, eligibility, or timeliness of the ballot. A mail ballot is timely so long as the county board of elections receives it by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c).

Upon receipt of a mail ballot, county boards of elections stamp the Return Envelope with the date of receipt to confirm its timeliness and log it in the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system, the voter registration system used to generate poll books. *Cf. Pa. State Conf. of NAACP v. Schmidt (“NAACP I”)*, No. 1:22-CV-339, 2023 WL 8091601, \*32 (W.D. Pa. Nov. 21, 2023), *rev’d on other grounds*, 97 F.4th 120 (3d Cir. 2024) (“When the ballot is received, the county boards of elections stamp or otherwise mark the return envelope with the date of receipt to confirm its timeliness and then log it into the SURE system.”). Poll books kept by the county show which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(1), 3150.16(b)(1).

Mail-in ballots<sup>1</sup> are then verified consistent with procedures set forth in §§ 3146.8(g)(3) and (g)(4). Any ballot that has been so verified by the county board of elections, and has not been challenged, is counted and included with the election results. *Id.* § 3146.8(g)(4). Respondent Schmidt has the duty “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections. . . .” 25 P.S. § 2621(f).

Pennsylvania’s adoption of mail voting has been a boon for voter participation in the Commonwealth. For example, in 2020, 2.7 million Pennsylvanians voted by absentee or mail ballot. *Report on the 2020 General Election*, PA. DEP’T OF STATE, at 9 (May 14, 2021), <https://www.dos.pa.gov/VotingElections/Documents/2020-General-Election-Report.pdf>. In the April 2024 primary election, close to 700,000 Pennsylvania voters returned mail ballots. *See Pennsylvania 2024 Primary Election Ballot Counting Status*, PA. DEP’T OF STATE, [https://www.vote.pa.gov/About-Elections/Documents/PADOS\\_ENRSupplementalBoard\\_2024Primary.042624.pdf](https://www.vote.pa.gov/About-Elections/Documents/PADOS_ENRSupplementalBoard_2024Primary.042624.pdf) (last updated Apr. 26, 2024).

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<sup>1</sup> For ease of reference, the term “mail ballots” is used herein to encompass both absentee and mail ballots. The relevant rules governing the treatment of absentee and mail ballots are identical.

## **B. The Date Requirement Serves No Purpose**

The Supreme Court of Pennsylvania has ruled, strictly as a matter of statutory construction divorced from any constitutional considerations, that these provisions<sup>2</sup> require voters to write a date on the envelope, and that ballots arriving in undated or misdated envelopes cannot be counted. *Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023). As the United States Court of Appeals for the Third Circuit subsequently concluded, the date requirement “serves little apparent purpose.” *Pa. State Conf. of NAACP Branches v. Sec’y Pa.* (“*NAACP II*”), 97 F.4th 120, 125 (3d Cir. 2024).

The federal circuit court confirmed this lack of purpose in the context of a litigation involving the Secretary of State, all 67 Pennsylvania county boards of elections, and the same political party intervenors who are now party to this case. The record in that case—developed through fulsome discovery exploring the purported functions and purposes of the envelope dating requirement—left no dispute that the voter-written date on the outer return envelope is “wholly irrelevant.” *NAACP I*, 2023 WL 8091601, at \*31.

Critically, the date a voter places on the ballot does not play a role in determining a ballot’s timeliness. *NAACP II*, 97 F.4th at 127. Instead, timeliness is

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<sup>2</sup> The Pennsylvania Supreme Court’s statutory analysis in *Ball* was limited to the language in sections 3146.6 and 3150.16 that the voter “shall . . . date” the declaration printed on the return envelope. It did not address the interaction of that language with the Election Code’s canvassing provision, which pre-dates Act 77 and calls for the “the county board” to determine whether “the declaration is sufficient.” 25 P.S. § 3146.8(g)(3).

established by the time and date on which the county board of elections actually receives the ballot, which is confirmed when the board scans a unique barcode on the envelope and applies its own date stamp. *Id.*; see also *NAACP I*, 2023 WL 8091601, at \*32 (“Irrespective of any date written on the outer Return Envelope’s voter declaration, if a county board received and date-stamped a . . . mail ballot before 8:00 p.m. on Election Day, the ballot was deemed timely received. . . . [I]f the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope”). See generally 25 P.S. §§ 3146.6(c), 3150.16(c). Because a mail ballot must be received by a County Board of Elections before 8:00 p.m. on Election Day to be counted, the date on the envelope is not necessary and is not used by any County Board to determine timeliness. *NAACP II*, 97 F.4th at 129.

Nor is the handwritten date used to determine voter qualifications. “The voter who submits his mail-in package has already been deemed qualified to vote—first, when his application to register is approved and again when his application for a mail -ballot is accepted.” *NAACP II*, 97 F.4th at 137. Thus, the voter declaration (including the handwritten date on the declaration) “is not even remotely a form used in Pennsylvania’s voter qualification process.” *Id.*; see also *id.* at 129 (“No party disputed that election officials ‘did not use the handwritten date. . . for any purpose related to determining’ a voter’s qualification under Pennsylvania law.”).



The date requirement is also irrelevant to, and is not used for the purpose of, detecting fraud. Because ballots received by county boards of elections after the 8:00 p.m. election day deadline are ineligible to be counted, only ballots received before the deadline are counted. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election (“In re 2020 Canvass”)*, 241 A.3d 1058, 1076-77 (Pa. 2020); *see also NAACP II*, 97 F.4th at 129. This eliminates any “danger that any of these ballots was. . . fraudulently back-dated.” *In re 2020 Canvass*, 241 A.3d at 1077; *see also NAACP II*, 97 F.4th at 139-40 (Shwartz, J., dissenting) (handwritten date “not used to. . . detect fraud.”); *NAACP I*, 2023 WL 9081601 at \*31 n.39 (purported fraud was “detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope”).

### **C. The Date Requirement Disenfranchises Thousands of Pennsylvania Voters in Each Election**

Despite serving no discernible purpose, Respondent Schmidt and his predecessors have issued guidance to county boards of elections that timely-submitted mail-in ballots with a missing or incorrect date on the return envelope must be segregated and excluded from tabulation. *See* App ¶16. Consequently, the date requirement has caused thousands of Pennsylvanians’ ballots to be set aside in every election since 2020. Over 10,000 voters were disenfranchised in the 2022 general election because of the date requirement. *NAACP II*, 97 F.4th at 127 (“thousands of Pennsylvania mail-in voters” in the November 2022 election did not

have their votes counted because they did not date, or misdated, their ballots); *see also id.* at 144 (Shwartz, J., dissenting) (“more than 10,000 eligible voters had their timely-ballots disqualified” because they did not sign, or misdated, their ballots). In the 2023 municipal elections, thousands of eligible Pennsylvania voters’ absentee and mail ballots were rejected due to application of the envelope dating provision.<sup>3</sup> And thousands more were disenfranchised in the 2024 Presidential primary because of the date requirement.<sup>4</sup> *See* Ex. 1 (5/27/24 Decl. of A. Shapell [“Shapell Decl.”]) at ¶ 12.

Eligible Pennsylvania voters of all walks of life and across the political spectrum were disenfranchised by Respondents’ continued enforcement of the envelope dating rule in the 2024 primary election. Among them were Philadelphia voter Bruce Wiley, York County voter Kenneth Hickman, and Dauphin County voter Lorine Walker, who did not learn until after the primary that there was a problem with their mail ballot submissions (*see* Exs. 5 [Wiley Decl.], 7 [Hickman Decl.], 12 [Walker Decl.]), and Allegheny County voter Joanne Sowell, who was

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<sup>3</sup> Following the U.S. District Court’s December 2023 determination in *NAACP I* that the envelope dating provision violates the federal Materiality Provision, several counties reversed course and counted these ballots. That decision was later reversed on the merits by the Third Circuit’s decision in *NAACP II* on March 27, 2024.

<sup>4</sup> Petitioners note that the precise number of votes impacted by this issue is currently unknown, as several counties still have not entered all ballot cancelations in the SURE system for the 2024 primary. It is already clear as of the date of this filing, however, that the date requirement again impacted at least 4,000 Pennsylvania voters even in this low-turnout election. *See* Shapell Decl. at 12.

boarding a flight when she saw an email that her ballot would not be counted because of an envelope dating issue (Ex. 3 [Sowell Decl.]). They also included faithful voters who dutifully participate in every election—like Stephen Arbour of Montgomery County and Chester County voter Joseph Sommar, (*see* Exs. 6 [Arbour Decl.], 9 [Sommar Decl.])—and others like Vietnam veteran Otis Keasley of Allegheny County, Philadelphia voter Eugene Ivory, Janet Novick and Phyllis Sprague of Bucks County, and Berks County voter Mary Stout, whose health, mobility, and/or family circumstances prevented them from voting or attempting to cure their mail ballots in person (*see* Exs. 2 [Keasley Decl.], 4 [Ivory Decl.], 8 [Novick Decl.], 10 [Sprague Decl.], 11 [Stout Decl.]).

Each of these voters timely applied for, received, and returned their mail ballot packages with signed voter declarations on the Return envelopes. Each of their ballots was received prior to the 8:00 pm deadline on April 23, 2024. And thousands of other ballots received before the 8:00 pm deadline were similarly not counted because of enforcement of the dating requirement.

Enforcement of the date requirement in this manner has led to arbitrary and inconsistent results among counties that further underscore the irrelevance of the voter-written date to any election administration function. Although some counties have previously accepted misdated mail ballots, others have rejected otherwise timely, valid ballots, disenfranchising voters for reasons having nothing to do with

the voter's eligibility or the timeliness of the ballot. For example, in the 2022 general election:

- Many counties refused to count ballots where the envelope date was correct but missing the year (even though they only could have been signed in 2022), while other counties counted such ballots. *NAACP I*, 2023 WL 8091601, at \*33, n.43.
- More than 1,000 timely-received ballots were set aside and not counted because of “an obvious error by the voter in relation to the date,” such as writing a month prior to September or a month after November 8. *Id.* at \*33. The district court in *NAACP* found that this “shows the irrelevance of any date written by the voter on the outer envelope.” *Id.*
- Counties took varying approaches to counting ballots with dates that appeared to use the international format (*i.e.*, day/month/year), with some counties basing the date range “strictly on the American dating convention” and others “tr[ying] to account for both the American and European dating conventions.” *Id.* Counties also refused to count hundreds of timely-received ballots with obviously unintentional slips of the pen, such as a voter writing in the wrong year. *Id.*

Meanwhile, many counties *count* ballots with necessarily “incorrect” envelope dates. For example:

- “The record reveals that some counties precisely followed [the prescribed] date range even where the date on the return envelope was an impossibility because it predated the county’s mailing of ballot packages to voters.” *NAACP I*, 2023 WL 8091601, at \*33.
- At least one county counted a ballot marked September 31—a date that does not exist. *Id.* at \*33, n. 45
- Counties also took inconsistent approaches to voters who mistakenly wrote their birthdates on the date line. *Id.* at \*33.

**D. No Court Has Addressed the Constitutionality of Disenfranchising Voters Due to Date Errors Under the Free and Equal Elections Clause of the Pennsylvania Constitution**

While there has been substantial litigation regarding the date requirement, no court has previously addressed whether disenfranchising voters for noncompliance with the date requirement is unconstitutional under the Free and Equal Elections Clause of the Pennsylvania Constitution. In *Ball v. Chapman*, the Pennsylvania Supreme Court decided, purely as a matter of statutory construction, that the Election Code’s instruction that voters “shall...date” absentee and mail-in ballots requires that undated or misdated ballots not be counted. 289 A.3d 1, 28 (Pa. 2023). No party to that litigation raised a claim that applying the date requirement in this way violated the Free and Equal Elections clause,<sup>5</sup> and the Pennsylvania Supreme Court did not hold, suggest, or indicate that the Free and Equal Elections clause allows county boards to disenfranchise voters as a consequence for noncompliance with the date requirement. Notably, however, three of the six then-sitting Justices in *Ball* opined that “failure to comply with the date requirement would *not* compel the discarding of votes in light of the Free and Equal Elections Clause....” *Ball*, 289 A.3d at 27

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<sup>5</sup> In *Ball*, amici argued that the Free and Equal Elections Clause should be considered, but only in connection with the statutory construction question of whether the date requirement is mandatory. No respondent or any amici for respondents argued that *even if* the date requirement is determined to be mandatory, enforcing or applying it to disenfranchise is unconstitutional.

n.156 (opinion of Wecht, J., joined by Todd, C.J. and Donohue, J.) (emphasis added). No Justice has expressed a contrary view.<sup>6</sup>

Nor did the United States Court of Appeals for the Third Circuit, in *NAACP II*, opine on the constitutionality of the date requirement under the Free and Equal Elections Clause. Indeed, consistent with *Pennhurst State Sch. v. Halderman*, doctrine, 465 U.S. 89 (1983), no claim that enforcement of the date requirement violated any provision of the Pennsylvania Constitution could have been brought in that case.<sup>7</sup> In *NAACP II*, the Third Circuit held only that the date requirement does not violate a federal statute, on the theory that the statute categorically does not apply to mail ballot-related paperwork. There is no reference to the Free and Equal Elections Clause anywhere in the federal court's opinions.

## ARGUMENT

### **I. STANDARD OF REVIEW**

"To justify the award of a permanent injunction, the party seeking relief 'must establish [1] that his right to relief is clear, [2] that an injunction is necessary to avoid an injury that cannot be compensated by damages, and [3] that greater injury will result from refusing rather than granting the relief requested.'" *Kuznik v.*

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<sup>6</sup> The *Ball* Court also deadlocked 3-3 on the question of whether the date requirement violates the Materiality Provision of the 1964 Civil Rights Act.

<sup>7</sup> In any event, while five Petitioners here were also Plaintiffs in the *NAACP* litigation, Petitioners OnePA Activists United, New PA Project Education Fund, Casa San Jose, and Pittsburgh United had no role in that case.

*Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 489 (Pa. 2006) (quoting *Harding v. Stickman*, 823 A.2d 1110, 1111 (Pa. Commw. Ct. 2003)). “However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law.” *Buffalo Twp. v. Jones*, 813 A.2d 659, 663-64 (Pa. 2003) (internal citations and quotation marks omitted); see also *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560 (Pa. Commw. Ct. 2022) (same). When a party seeks a permanent injunction on a motion for summary relief, they must also show that “no material issues of fact are in dispute.” *Jubelirer v. Rendell*, 953 A. 2d 514, 521 (Pa. 2008). Here, the parties have agreed that “there are no outstanding questions of fact, nor factual stipulations required, and that this matter involves purely legal questions.” June 10, 2024 Order.

## **II. PETITIONERS ARE ENTITLED TO PERMANENT INJUNCTIVE RELIEF**

### **A. Petitioners’ Right to Relief Is Clear**

Not counting votes based solely on non-compliance with a meaningless handwritten date requirement strips voters of the franchise and violates the fundamental right to vote protected by the Free and Equal Elections clause. Conversely, counting such ballots is consistent with decades of holdings from the Pennsylvania Supreme Court that the Free and Equal Elections clause “should be given the broadest interpretation, one which governs all aspects of the electoral

process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *LWI*, 178 A.3d at 814; *see also, e.g., Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993) (noting the "longstanding and overriding policy in this Commonwealth to protect the elective franchise") (citations omitted). And counting the ballots notwithstanding a meaningless mistake on the outer return envelope is consistent with the Pennsylvania Supreme Court's mandate that—even when there is some error on the ballot itself—"ballots containing mere minor irregularities should only be stricken for compelling reasons." *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (citations omitted); *see also In re Luzerne Cnty. Return Bd. (Appeal of Wieskerger)*, 290 A.2d 108, 109 (Pa. 1972) (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)) (acknowledging the "flexible" approach to ministerial requirements of the Election Code "in order to favor the right to vote").

1. **Diseafranchising Voters Due to Noncompliance with the Date Requirement Violates the Free and Equal Elections Clause of the Pennsylvania Constitution.**

- a. ***The Right to Vote Is a Fundamental Right Guaranteed by the Free and Equal Elections Clause.***

"No 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." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386-87 (Pa. 2020) (Wecht, J.



concurring); *see also LWW*, 178 A.3d at 741 (right to vote is “that most central of democratic rights”). In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. That right means not only that elections must be “public and open to all qualified electors” with “every voter ha[ving] the same right as any other voter,” but also that “each voter under the law has the right to cast [their] ballot and have it honestly counted,” and that “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

The Free and Equal Elections Clause is part of the Pennsylvania Constitution’s Declaration of Rights, which 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.” *LWW*, 178 A.3d at 803. In accordance with the “plain and expansive sweep of the words ‘free and equal,’” these words are “indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth. . . .” *Id.* at 804. *See also Winston*, 91 A. at 523 (Free and Equal Elections Clause implicates right to have ballot

“counted” and prohibits “regulation[s]” that “deny the franchise”). The clause “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *LWV*, 178 A.3d at 809 (citation omitted). Among other things, an election is not “free and equal” when “any substantial number of legal voters are, from any cause, denied the right to vote.” *Id.* at 813 n.71.

Pennsylvania’s Constitution was adopted in 1776 and “is the ancestor, not the offspring, of the federal Constitution,” which was adopted in 1787. *Id.* at 741. It “stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth.” *Id.* at 802. With respect to the right to vote, the Pennsylvania Constitution “provides a constitutional standard, and remedy, even if the federal charter does not.” *Id.* at 741. Indeed, the United States Constitution contains no provision analogous to the Free and Equal Elections Clause. *Id.* at 804.

In sum: Voting is a fundamental right in Pennsylvania. *LWV*, 178 A.3d at 803 (the right to vote is a “fundamental right[] reserved to the people in Article I of our Constitution.”); *Applewhite v. Commonwealth* (“*Applewhite I*”), 54 A.3d 1, 3 (Pa. 2012) (in which the Commonwealth stipulated that “the right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one.”); *Kuznik*

*v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 503 (Pa. 2006) (right to vote is "fundamental" under Pennsylvania law).

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

"It is well settled that laws which affect a fundamental right, such as the right to vote. . . are subject to strict scrutiny." *Petition of Berg*, 712 A.2d 340, 342 (Pa. Commw. Ct. 1998), *aff'd*, 713 A.2d 1106 (Pa. 1998); *Applewhite v. Commonwealth* ("*Applewhite II*"), No. 330 M.D. 2012, 2014 WL 184988, at \*20 (Pa. Commw. Ct. Jan. 17, 2014) (laws that "infringe[] upon qualified electors' right to vote" are analyzed "under strict scrutiny."); *see also, e.g., James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302, 1306 (Pa. 1984) (where a "fundamental right has been burdened, another standard of review is applied: that of strict scrutiny").

Under a strict scrutiny analysis, the government bears the burden of proving that the law in question serves a "compelling governmental interest." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also In re Nader*, 858 A.2d 1167, 1180 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 636 Pa. 16 (Pa. 2016) ("where a precious freedom such as voting is involved, a compelling state interest must be demonstrated"). If the government cannot satisfy this heavy burden, the law (or its application) is unconstitutional. *In re Nader*, 858 A.2d at 1181.

Applying the date requirement to exclude ballots with undated or misdated declarations restricts the right to have one's vote counted to those voters who

correctly handwrite the date on their mail-in ballot envelopes. Accordingly, the enforcement of date requirement denies the right to vote for all duly qualified and registered voters who either do not date or misdate their ballot envelope. The Pennsylvania Supreme Court has long held that “voting” includes having one’s ballot counted:

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

*Winston*, 91 A. at 523 (emphasis added). Accordingly, this court should apply strict scrutiny review and require the government to prove that enforcement of the requirement to disenfranchise those who fall out of compliance with it serves a compelling state interest.<sup>8</sup>

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<sup>8</sup> Although the date requirement in fact denies the right to vote to those who do not comply with it, this Court need not decide that this constitutes disenfranchisement in order to determine that strict scrutiny applies here. That is because strict scrutiny applies not just when a fundamental right has been denied outright, but when state conduct “affects,” “burdens,” or “infringes upon” a fundamental constitutional right. *See supra* at 19-20. *See also Winston*, 91 A. at 523 (Free and Equal Clause prohibits “regulations” that make it “difficult” to vote). Enforcement of the date requirement to exclude noncompliant ballot packages unquestionably restricts, affects, burdens and/or infringes upon the right to vote.

*c. The Date Requirement Cannot Survive Strict Scrutiny.*

The date requirement serves no compelling government interest. Indeed, it serves no interest at all. As shown above and in several prior litigations, the date requirement is not used to determine (1) the timeliness of a voter's ballot, (2) a voter's qualifications, or (3) fraud. *See supra*, 6-9. In these circumstances, the date requirement cannot stand. The fundamental right to vote enshrined in the Pennsylvania Constitution cannot be waylaid by the enforcement of a paperwork rule that serves no purpose.

Even absent constitutional considerations, a rule devoid of any underlying purpose is unworthy of enforcement. As Justice Wecht wrote in *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1252 n.6 (Pa. 2016) (Wecht, J., concurring), "*cessante ratione legis cessat lex*," or "[w]here stops the reason, there stops the rule." When a rule is not only unsupported by reason but *also* infringes on fundamental constitutional rights, it must give way to those rights.

While post-hoc justifications were initially proffered about how, in theory, the date requirement might serve some purpose, *see, e.g., In re 2020 Canvass*, 241 A.3d at 1090 (Dougherty, J., concurring in part, dissenting in part), strict scrutiny analysis cannot hinge on justifications that are "hypothesized or invented *post hoc* in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (quoting *U.S. v. Virginia*, 518 U.S. 515, 533 (1996)); *Bethune-Hill v. Virginia State*

*Bd. of Elections*, 580 U.S. 178, 179 (2017) (courts must look to “the actual considerations . . . not *post hoc* justifications the legislature in theory could have used but in reality did not”).<sup>9</sup>

In any event, none of the post-hoc justifications contemplated in 2020, prior to the fulsome exploration of the handwritten date requirement by multiple courts, withstands scrutiny. This is consistent with the Third Circuit’s observation just two months ago that the date requirement “serves little apparent purpose,” *NAACP II*, 97 F.4th at 125, as well as with the Republican intervenors’ concession that “there are no outstanding questions of fact, nor factual stipulations required, and that this matter involves purely legal questions.” June 10, 2024 Order. After years of litigation over the date requirement, including discovery from the Commonwealth of Pennsylvania and all 67 county boards of election in the *NAACP* case, it is now beyond legitimate dispute that election officials do not use, and have no use for, the handwritten dates on mail ballot return envelopes. Taking each of the purported purposes in turn:

- I. Post hoc justification number one: the date requirement purportedly “ensures the elector completed the ballot within the proper time*

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<sup>9</sup> The Pennsylvania Supreme Court has emphasized that it is “guided by” the U.S. Supreme Court’s application of “strict scrutiny” review where the same standard applies under the Pennsylvania Constitution.” *Kroger Co. v. O’Hara Twp.* 392 A.2d 266, 274 (Pa. 1978). See generally *James v. SEPTA*, 477 A.2d 1302, 1305-06 (Pa. 1984) (citing U.S. Supreme Court standard to define strict scrutiny).

*frame.*” *In re 2020 Canvass*, 241 A.3d at 1091 (Dougherty, J. concurring in part, dissenting in part). There can be no dispute that the handwritten date plays no role in determining whether the ballot is timely because a ballot has to be received by 8:00 p.m. on Election Day to be counted. *See supra*, 7-8; *NAACP II*, 97 F.4th at 129 (“Nor is it used to determine the ballot’s timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties’ timestamping and scanning procedures serve to verify that. Indeed, not one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 election.”); *id.* at 155 n.31 (Shwartz, J. dissenting), (“a voter whose mail-in ballot was timely received could have only signed the declaration at some point between the time that he received the mail-[in] ballot from election officials and the time election officials received it back. Election officials discarded ballots received after the Election Day deadline. . . .”); *NAACP I*, 2023 WL 8091601, at \*32 (“Irrespective of any date written on the outer Return Envelope’s voter declaration, if a county board received and date-stamped a . . . mail ballot before 8:00 p.m. on Election Day, the ballot was deemed timely received . . . . [I]f the county board received

a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope”).

2. *Post hoc justification number two: the date requirement was theorized to “prevent[] the tabulation of potentially fraudulent back-dated votes.” In re 2020 Canvass, 241 A.3d at 1091 (Dougherty, J. concurring in part, dissenting in part).* Again, there is no danger of back-dated ballots being counted, because election officials simply do not count ballots received after the 8:00 p.m. Election Day deadline, regardless of the date written on the outer envelope. *See supra*, 3-4.
3. *Post hoc justification number three: the date requirement is used to “establish[] a point in time against which to measure the elector’s eligibility to cast the ballot.” Id. at 1090.* It is now beyond dispute, particularly given the Commonwealth’s and county boards’ admissions in *NAACP*, that the handwritten date plays zero role in determining a voter’s eligibility to vote. *See supra*, 3. In addition to the parties’ admissions, the Election Code itself establishes that eligibility to vote by mail is confirmed at the time the county board issues mail ballot packets to eligible voters who request them. 25 P.S. §§ 3146.2b, 3150.12b; *see also* Press Release, Ballot Procedures, *supra*, p. 4. The county board’s determinations are conclusive as to voter eligibility



unless challenged prior to five p.m. on the Friday before Election Day. 25 P.S. §§ 3146.2c, 3150.12b(3). Eligibility is then re-confirmed during the canvass, when the county board confirms that the voter was indeed eligible to vote as of Election Day. *See, e.g., id.* § 3146.8(d) (requiring canvassers to reject ballots of voters who submitted ballots on time but died before the opening of the polls on election day); *cf.* 25 Pa.C.S. § 1301 (establishing qualifications to register for persons who are “at least 18 years of age on the day of the next election”). The voter-written date on the return envelope is entirely irrelevant in this process.

4. *Post hoc justification number four: the handwritten date was said to “provide[] 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.’”* *In re 2020 Canvass*, 241 A.3d, at 1079. This rationale does not suggest a legitimate purpose for the date requirement; signing and mailing the ballot, with or without a date, sufficiently demonstrates a desire to cast one’s vote by mail in lieu of appearing in person. Nor, in any event, is the handwritten date used to determine when the voter executed their ballot. *Id.* at 1077. As the Election Code specifically states, “at any time after receiving an official absentee ballot, but on or before eight o’clock P.M. the day of the primary or election, the elector

shall, in secret, proceed to mark the ballot[.]” 25 P.S. §§ 3146.6(a); 3150.16(a) (emphasis added) A voter whose mail ballot was timely received could *only* have signed the voter declaration form in between the date their county board sent the mail-ballot packages and the Election-Day deadline. Therefore, pinpointing *when* the voter marked the ballot within the statutory timeframe is irrelevant and not even contemplated by the statute.

In sum, application of an unjustified, and unjustifiable, rule has disenfranchised tens of thousands of Pennsylvania voters and will disenfranchise thousands more in future elections. The Free and Equal Elections Clause forbids this perverse result. *LWV*, 178 A.3d at 813 n. 71 (“[W]hen any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal.”); *Pa. Democratic Party v. Boockvar*, 238 A.3d at 364 (“in enforcing the Free and Equal Elections Clause,” courts “possess broad authority to craft meaningful remedies when required.”) (citation omitted).

***d. The Date Requirement Cannot Survive any Level of Scrutiny.***

Even if a lesser level of scrutiny than strict scrutiny applied here, the date requirement would still be an unjustified and unconstitutional restriction on the right to vote. Pennsylvania recognizes two lesser levels of scrutiny. Under intermediate scrutiny, a law will survive if the Commonwealth can show that the law serves an

“important regulatory interest.” *Boockvar*, 238 A.3d at 385. Under rational basis analysis, the Commonwealth must prove that there is a rational basis for the restriction. *Id.* The date requirement cannot survive either of these levels of scrutiny because it serves no purpose at all. *See supra*, 2-4; *see generally Nixon v. Commonwealth*, 839 A.2d 277, 289 (Pa. 2003) (declaring statute unconstitutional where there was not “a real and substantial relationship to the interest the General Assembly is seeking to achieve”); *Curtis v. Kline*, 666 A.2d 265, 269-70 (Pa. 1995) (declaring statute unconstitutional under rational basis test because it failed to “promote [a] legitimate state interest or public value”); *Gambone v. Commonwealth*, 101 A.2d 634, 636-37 (Pa. 1954) (declaring unconstitutional a law that was “wholly unreasonable and arbitrary and bears no rational relation to” the purported government interests).

**2. Petitioners Preserve the Argument That the Envelope Dating Provision Should Be Reinterpreted Under the Canon of Constitutional Avoidance So as Not to Disenfranchise.**

Petitioners recognize that the Pennsylvania Supreme Court held in *Ball* that, as a matter of statutory interpretation, the envelope dating provision should be construed as mandatory. 289 A.3d at 28. For preservation purposes, however, Petitioners respectfully submit that the date requirement—particularly when read in conjunction with the canvassing provision at section 3146.8(g)(3)—is susceptible to more than one reasonable interpretation, and that under various doctrines of statutory

interpretation, including the canon of constitutional avoidance,<sup>10</sup> the requirement should be interpreted as directory and not mandatory, such that an undated or misdated declaration may still be deemed “sufficient” under section 3146.8(g)(3), in order to avoid a violation of the Free and Equal Elections Clause.

**B. A Permanent Injunction Is Necessary to Avoid an Injury That Cannot Be Compensated by Damages**

The right to vote is the most precious right held by citizens of a free country. *See supra*, 16-17. Without a permanent injunction, an immaterial provision of the Election Code will continue to be applied to strip that right from thousands of Pennsylvanians, including Petitioners’ members. It is hard to imagine a clearer or more devastating example of an injury that cannot be compensated by damages. “[T]here is no possibility of meaningful postdeprivation process when a voter’s ballot is rejected.” *Self Advocacy Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020). Thus, “[t]he disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.” *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964). Petitioners accordingly satisfy the second requirement for a permanent injunction.

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<sup>10</sup> *See, e.g., Harford Accident & Indem. Co. v. Ins. Comm’r of Commonwealth*, 482 A.2d 542, 549 (Pa. 1984) (“It is a cardinal principle that ambiguous statutes should be read in a manner consonant with the Constitution.”); *In re Luzerne Cnty.*, 290 A.2d at 109 (the Election Code must be interpreted “in order to favor the right to vote,” and “to enfranchise and not to disenfranchise”) (citing *Appeal of James*, 105 A.2d 64).

Moreover, the organizational petitioners are irreparably harmed by unconstitutional enforcement of a statute that forces them to waste the resources they need to carry out their respective missions. *Applewhite*, 2014 WL 184988, at \*7-8. Absent an injunction, that will be the case here: The organizational plaintiffs' resources will be diverted to helping mitigate mass disenfranchisement due to the enforcement of the envelope date requirement.

The mission and core activities of each Petitioner includes mobilizing and educating Pennsylvania voters. *See* Ex. 14 (5/24/24 Decl. of T. Stevens ["Stevens Decl."]) at ¶¶ 3-4; Ex. 15 (5/27/24 Decl. of D. Royster ["Royster Decl."]) at ¶¶ 3-4; Ex. 16 (5/25/24 Decl. of D. Robinson ["Robinson Decl."]) at ¶¶ 5-7; Ex. 17 (5/27/24 Decl. of S. Paul ["Paul Decl."]) at ¶¶ 5-8; Ex. 18 (5/27/24 Decl. of K. Kenner ["Kenner Decl."]) at ¶¶ 5-9; Ex. 19 (5/27/24 Decl. of M. Ruiz ["Ruiz Decl."]) at ¶ 8; Ex. 20 (5/27/24 Decl. of A. Hanson ["Hanson Decl."]) at ¶¶ 8-9; Ex. 21 (5/24/24 Decl. of A. Widstrom ["Widstrom Decl."]) at ¶¶ 5-6; Ex. 22 (5/24/24 Decl. of P. Hensley-Robin ["Hensley-Robin Decl."]) at ¶¶ 5-8. And each of them conducts activities and initiatives core to their respective missions that do *not* otherwise involve helping people mitigate the consequences of not complying with the envelope dating requirement, including get-out-the-vote efforts, engaging potential voters who have not already attempted to vote, and broader civic engagement programs. *See, e.g.*, Stevens Decl. at ¶¶ 4, 6, 10; Royster Decl. at ¶¶ 4, 7; Robinson

Decl. at ¶¶ 7, 11-12; Paul Decl. at ¶¶ 5, 7-10, 17-18, 20-21; Kenner Decl. at ¶¶ 7-16; Ruiz Decl. at ¶¶ 6-18; Hanson Decl. at ¶¶ 5, 7-10; Widestrom Decl. at ¶¶ 5-6, 9; Hensley-Robin Decl. at ¶¶ 6-8, 11.

The prohibition on counting ballots from undated and misdated envelopes has forced and will force the Petitioners to continue diverting scarce resources to educating voters regarding compliance with meaningless requirements, rather than devoting those resources to the substantive matters that are central to their missions. See Stevens Decl. at ¶¶ 5-11; Royster Decl. at ¶¶ 6-8; Robinson Decl. at ¶¶ 8-12; Paul Decl. at ¶¶ 10-22; Kenner Decl. at ¶¶ 14-20; Ruiz Decl. at ¶¶ 17-19; Hanson Decl. at ¶¶ 10-17; Widestrom Decl. at ¶¶ 7-11; Hensley-Robin Decl. at ¶¶ 9-11. Such expenditure of organizational resources to educate voters in the face of election-administration policies that violate the Pennsylvania Constitution gives rise to per se irreparable harm. *Ball*, 289 A.3d, at 19-20; cf. *Applewhite*, 2014 WL 184988, at \*7 (“The right to vote, fundamental in Pennsylvania, is irreplaceable, necessitating its protection before any deprivation occurs. Deprivation of the franchise is neither compensable nor reparable by after-the-fact legal remedies, necessitating injunctive and declaratory relief”).

**C. Greater Injury Would Result from Denying the Injunction Than from Granting It.**

Petitioners comfortably satisfy the third and final requirement for injunctive relief: Refusing to enforce a rule with no purpose harms no one. But enforcing that

rule will continue to strip thousands of registered and qualified voters of the franchise. See *ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (affirming the district court's finding that "the government lacks an interest in enforcing an unconstitutional law"); see also *One Three Five, Inc. v. City of Pittsburgh*, 951 F. Supp. 2d 788, 825 (W.D. Pa. 2013) (finding that "injunctive relief is in the public's interest when governmental action is likely to be declared unconstitutional 'because the enforcement of an unconstitutional law vindicates no public interest.'" (citing *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013); *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2005), *aff'd*, 542 U.S. 656 (2004) (finding "that the public interest was 'not served by the enforcement of an unconstitutional law.'"). The resulting harm to those voters and the system at large is significant. When even a relatively small number of mail ballots are set aside, application of the date requirement can impact the outcome of close races, sowing distrust in election results and further highlighting the harm done by denying qualified voters their voice in a given election.<sup>11</sup>

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<sup>11</sup> See, e.g., Katherine Reinhard and Robert Orenstein, *Cohen wins Lehigh County judicial election by 5 votes*, PENNSYLVANIA CAPITAL-STAR (June 17, 2022), <https://penncapital-star.com/election-2022/cohen-wins-lehigh-county-judicial-election-by-5-votes/> (noting impact on municipal election results after counting 257 mail ballots received in undated envelopes following *Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022), *vacated as moot*, 143 S. Ct. 297 (2022)); Dan Sokil, *Towamencin supervisors race lied after Montgomery County election update*, THE REPORTER ONLINE (Nov. 27, 2023), <https://www.thereporteronline.com/2023/11/27/towamencin-supervisors-race-lied-after-montgomery-county-election-update/> (noting impact on Towamencin Township supervisor results after counting six impacted mail ballots following *NAACP I*); Borys

At the same time, there is no countervailing public interest to support enforcement of a meaningless technical requirement that no respondent (or any other county board) relies upon for any purpose. Moreover, a ruling that prevents county boards from rejecting mail ballots based on envelope dating issues would not cause harm to election officials administering elections going forward. Such a ruling would not require any changes to the envelope and declaration forms, instructions, or methods of distributing or receiving mail ballots. If anything, it would relieve election officials of the obligation to parse whether an envelope needs to be set aside for failure to “correctly” complete an inconsequential date requirement.

**D. None of the Procedural Objections Raised by Intervenor Respondents Justifies Denial of Summary Relief**

The proposed preliminary objections filed with Intervenor Respondents’ motion for leave to intervene advance a plethora of supposed procedural issues with Petitioners’ claims. None of those arguments is valid or should get in the way of the Court’s resolution of the straightforward legal issues presented here.

**1. The Relief Sought by Petitioners Would Not Require Invalidity of any Part of Act 77, Much Less Its Entirety**

The relief petitioners seek does not implicate Act 77’s nonseverability provision, and accordingly would not require striking Act 77 in its entirety.

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Krawczeniuk, *Court says six mail-in ballots in state 117th House District race should count*, WVIA NEWS (May 8, 2024), <https://www.wvia.org/news/local/2024-05-08/050824luz-117thhouse> (noting potential impact on outcome of state house race if six outstanding mail ballots are counted in Luzerne County).



Petitioners seek a declaration that it is unconstitutional under the Free and Equal Elections Clause to *enforce* the Election Code’s date requirement in a manner that excludes timely ballots received from qualified voters. Petitioners do not ask this Court to re-write, amend, or strike any portion of Act 77. Indeed, they do not seek an order barring Respondents from continuing to direct voters to date mail ballot declaration forms, or from continuing to include a date field next to the signature line. Petitioners simply seek a ruling that enforcement of the date requirement against a voter cannot, consistent with the Free and Equal Elections Clause, result in determinations that signed voter declarations are insufficient or rejections of timely mail ballots.

The Court need not invalidate or excise the “shall . . . date” language from section 3146.6 to grant this relief. Rather, petitioners are seeking an order directing that counties cease treating the immaterial handwritten date on the return envelope as so significant that failure to strictly comply with it results in loss of the franchise. A declaration that it is unconstitutional to reject timely mail ballots *based on* the date requirement would not invalidate any portion of Act 77, let alone all of it, particularly given that the provision addressing the sufficiency of the voter declaration on the Return Envelope—section 3146.8(g)—predates Act 77. *Cf. Bonner v. Chapman*, 298 A.3d 153, 168-169 (Pa. Commw. Ct. 2023) (*en banc*)

(finding that Act 77 nonseverability clause was not implicated by prior successful challenges to the dating requirement).

Moreover, even a holding that the date requirement is *invalid* would not require the Court to invalidate all of Act 77. Pennsylvania courts regularly deem it appropriate to sever statutory provisions in statutes containing nonseverability clauses, because “it is not for the legislature to “dictate the effect of a judicial finding that a provision in an act is ‘invalid,’” *Boockvar*, 238 A.3d at 397 n.4 (Donohue, J., concurring and dissenting) (citations and quotations marks omitted). It is the province of the Courts to determine constitutionality, and to fashion legal and equitable relief. *See generally Stilp v. Commonwealth*, 905 A.2d 918, 970-981 (Pa. 2006) (declining to enforce boilerplate nonseverability provision and noting significant “separation of powers concerns”). Especially where, as here, the undisputed facts are that the date requirement serves no purpose, there can be no policy or other rationale to require a Court to invalidate Act 77 wholesale, if the Court holds that enforcing the pointless dating directive in a way that would reject timely mail ballots is unconstitutional.

In *Stilp*, the Pennsylvania Supreme Court confronted a “boilerplate” nonseverability provision identical to the one in Act 77. 905 A.2d at 973. The Court ultimately severed the provision of the legislation at issue that “plainly and palpably violated...the Pennsylvania Constitution” from “the otherwise-constitutionally valid

remainder of [the legislation].” *Id.* at 980-81. As *Stilp* observed, the Pennsylvania Supreme Court “has never deemed nonseverability clauses to be controlling in all circumstances.” *Id.* at 980. Indeed, as *Stilp* noted, the Supreme Court previously severed a statutory provision that contained a nonseverability clause in *Pennsylvania Federation of Teachers v. School District of Philadelphia*, 484 A.2d 751, 754 (Pa. 1984). The provision there was significantly more specific than the one in *Stilp*, or the one presented in Act 77; it “render[ed] sections 2, 3 and 4 of the [challenged] Act void ‘[i]n the event a court of competent jurisdiction rules finally that the salary deductions mandated in these sections are legally or constitutionally impermissible.’” *Id.* In holding that those deductions were indeed constitutionally impermissible, *see id.* at 753, the Court nonetheless severed them from the broader act, finding that a strict application of nonseverability provision would not be sensible in light of the nature of the Court’s specific constitutional holding. *Id.* at 754; *cf. Stilp*, 905 A.2d at 979 (a nonseverability clause that “serve[s] an in terrorem function’ or operates to ‘guard against judicial review altogether by making the price of invalidation too great’ ‘intrudes upon the independence of the Judiciary and impairs the judicial function.’”).

Here too, this Court need not invite the devastating consequences that would come with applying the nonseverability provision of Act 77 in this case in the absurd manner suggested by Intervenor Respondents. Invalidating the entire act would

effectively override the General Assembly's intent to open no-excuse mail voting to all eligible Pennsylvania voters, simply because a single pointless provision in a single section of the Act has been applied in an unconstitutional manner. Millions of Pennsylvania voters have come to rely on the mail-in voting option created by Act 77, and millions of dollars in public funds have been spent to facilitate this option in the handful of years since its passage. Moreover, Intervenor Respondents would have this Court invalidate *all* of the other provisions of Act 77, including those that have nothing to do with voting by mail, such as provisions eliminating straight party ticket voting or providing 90 million dollars of financing for the purchase of new voting equipment (which has already been spent). Invalidating the entire act would needlessly nullify "years of careful [legislative] consideration and debate...on the reform and modernization of elections in Pennsylvania." *McLinko v. Commonwealth*, 279 A.3d 539, 543 (Pa. 2022). Such an outcome would be unreasonable, not to mention absurd, and it should be presumed that "the General Assembly does not intend a result that is absurd[]...or unreasonable." 1 Pa.C.S. § 1922(1).

## **2. Respondents Are All Proper Parties**

Each Respondent is a proper party here. Among other things, the Secretary of the Commonwealth is required under the Election Code with to "receive from county boards of elections the returns of primaries and elections, to canvass and

compute the votes cast for candidates and upon questions as required” by the Election Code, 25 P.S. § 2621(f). The Secretary is also charged with “determin[ing] and prescrib[ing]” the form of absentee and mail-in ballots (*id.* §§ 3146.3(b) (absentee ballots), § 3150.13(b) (mail-in ballots)) and their envelopes (*id.* §§ 3146.4 (absentee ballots), 3150.14(a) (mail-in ballots)). Pursuant to these authorities, the Secretary has issued guidance to county boards of elections that timely-submitted mail-in ballots with a missing or incorrect date on the return envelope must be segregated and excluded from tabulation, including guidance issued on November 3, 2022, April 3, 2023, and April 19, 2024. Ex. 13. The Pennsylvania Supreme Court noted that the issuance of such guidance was the basis for the Republican National Committee’s petition concerning the dating requirement in *Ball*, 289 A.3d, at 8, 13.

The County Boards of Elections are also assigned duties under the Election Code that are implicated by the Petition. They are responsible for administering elections in their counties, 25 P.S. § 2641, including reviewing and processing applications for absentee and mail ballots, *id.* §§ 3146.2b, 3150.12b; sending a mail-ballot package that includes an outer envelope on which the voter declaration form is printed, *id.* §§ 3146.6(a), 3150.16(a); and pre-canvassing and canvassing absentee ballots, including examining the voter declaration, *id.* § 3146.8(g). They are also responsible, in accordance with Commonwealth Secretary guidance, with stamping

the Return Envelope with the date of receipt, or otherwise tracking the date of receipt of a mail ballot to confirm its timeliness in the Department of State's SURI system.

In conjunction with the Application for Preliminary Injunction, each of the Petitioners has submitted a declaration indicating the counties in which it conducts election activities, including one or both of the County Respondents. Ex. 14 ¶ 4, Ex. 15 ¶ 4, Ex. 16 ¶ 7, Ex. 17 ¶ 6 Ex. 18 ¶ 6, Ex. 19 ¶ 8, Ex. 20 ¶ 8, Ex. 21 ¶ 5, Ex. 22 ¶ 5. It is not necessary to join additional county boards, nor are they indispensable parties, because Plaintiffs do not seek relief against them.<sup>12</sup>

### CONCLUSION

For the reasons set forth herein, and in the accompanying Application for Summary Relief, Petitioners respectfully request that the Court grant this Application and enter a permanent injunction in the form attached hereto.

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<sup>12</sup> Of course, should this Court and/or the Pennsylvania Supreme Court declare as a matter of law that Respondents' application of the envelope dating requirement is unconstitutional, other county boards of elections would be expected to heed that ruling. But the prospect of having to follow the law does not make them indispensable parties. As the Pennsylvania Supreme Court has stated, if the Declaratory Judgments Act were construed to require joinder of all persons who could be affected by a challenge to legislation "the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity" of state actions that commonly affect the interests of large numbers of people. *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 582-83 (Pa. 2003).

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