Received 7/8/2024 4:44:17 PM Commonwealth Court of Pennsylvania

Filed 7/8/2024 4:44:00 PM Commonwealth Court of Pennsylvania
283 MD 2024

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,

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenors.

Case No. 283 MD 2024
Original Jurisdiction

MEMORANDUM IN OPPOSITION TO PETITIONERS' APPLICATION FOR SUMMARY RELIEF

TABLE OF CONTENTS

Page

INTRODUCTION 1

COUNTERSTATEMENT REGARDING FACTS 5

STANDARD OF REVIEW 7

ARGUMENT 7

I. THE COURT SHOULD DISMISS THE PETITION DUE TO ITS MYRIAD PROCEDURAL DEFECTS 7

A. Petitioners Lack Standing To Sue The Secretary 7

B. This Court Lacks Subject Matter Jurisdiction Because The Secretary Is Not A Proper Or Indispensable Party 13

C. The Court Lacks Subject Matter Jurisdiction Over Any Claims Against The Boards 14

D. In The Alternative, Petitioners Failed To Join Indispensable Parties 15

II. THE COURT SHOULD ENTER JUDGMENT AGAINST PETITIONERS BECAUSE THEIR CLAIMS FAIL ON THE MERITS 17

A. The Pennsylvania Supreme Court Has Rejected Free and Equal Elections Challenges To The Date Requirement 17

B. The Date Requirement Does Not Violate The Free and Equal Elections Clause 20

1. The Date Requirement Comports With The Free and Equal Elections Clause's Equal-Opportunity Guarantee 20

2. Pennsylvania Law Forecloses Petitioners' Request For Strict Scrutiny 27

3. Movants' Various Alternative Approaches Misstate The Law 34

C. Other States' "Free And Equal Elections" Precedents And Federal Right-To-Vote Precedents Foreclose Petitioners' Claims 40

TABLE OF CONTENTS
(continued)

Page

D. The Date Requirement Easily Satisfies Rational-Basis Scrutiny, If Applicable. 42

E. Invalidating The Date Requirement Would Violate The U.S. Constitution. 49

F. Declaring The Date Requirement Unconstitutional Would Strike Act 77 And Universal Mail Voting In Pennsylvania. 49

III. PETITIONERS' REQUESTED RELIEF VIOLATES THE PENNSYLVANIA AND U.S. CONSTITUTIONS 53

IV. PETITIONERS ARE EQUITABLY BARRED FROM RECEIVING INJUNCTIVE RELIEF BEFORE LITIGATION CONCLUDES 54

CONCLUSION 59

TABLE OF AUTHORITIES

Page

CASES

Abbott v. Perez,
585 U.S. 579 (2018) 54

Appeal of Gallagher,
41 A.2d 630 (Pa. 1945) 31

Appeal of James,
105 A.2d 64 (Pa. 1954) 30

Appeal of Norwood,
116 A.2d 552 (Pa. 1955) 31

Applewhite v. Commonwealth,
No. 330 M.D. 2012, 2014 WL 184988
(Pa. Commw. Ct. Jan. 17, 2014) 29, 30

Ball v. Chapman,
289 A.3d 1 (Pa. 2023) ..... *passim*

Banfield v. Cortés,
110 A.3d 155 (Pa. 2015) 38

Bell v. Gannaway,
227 N.W.2d 797 (Minn. 1975) 23, 32

Benezet Consulting LLC v. Sec'y Commonwealth of Pa.,
26 F.4th 580 (3d Cir. 2022) 50

Brnovich v. DNC,
594 U.S. 647 (2021) 24, 44

Bush v. Gore,
531 U.S. 98 (2000) 4, 16, 54

Chapman v. Berks Cnty. Bd. of Elections,
No. 355 M.D. 2022, 2022 WL 4100998
(Pa. Commw. Ct. Aug. 19, 2022) 10, 16

Chelsea Collaborative, Inc. v. Sec'y of Commonwealth,
100 N.E.3d 326 (Mass. 2018) 41

Citibank, N.A. v. Citytrust,
756 F.2d 273 (2d Cir. 1985) 57

Craig v. Peterson,
233 N.E.2d 345 (Ill. 1968) 41

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008) 23, 24, 42, 44

Curtis v. Kline,
666 A.2d 265 (Pa. 1995) 37

DeWalt v. Bartley,
24 A. 185 (Pa. 1892) 39

DNC v. Wis. State Legislature,
141 S. Ct. 28 (2020) 55, 56

Donald J. Trump for President, Inc. v. Boockvar,
493 F. Supp. 3d 331 (W.D. Pa. 2020) 51

FCC v. Beach Communications,
508 U.S. 307 (1993) 43, 45

Firearm Owners Against Crime v. Papenfuse,
261 A.3d 467 (Pa. 2021) 9, 14

Gambone v. Commonwealth,
101 A.2d 634 (Pa. 1954) 37

Guare v. New Hampshire,
117 A.3d 731 (N.H. 2015) 41

In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election,
241 A.3d 1058 (Pa. 2020) 8, 46

In re Coatesville Area Sch. Dist.,
244 A.3d 373 (Pa. 2021) 49

In re Luzerne Cnty. Return Bd.,
290 A.2d 108 (Pa. 1972) 30

In re Nader,
858 A.2d 1167 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016) 28

In re Petitions to Open Ballot Boxes,
188 A.2d 254 (Pa. 1963) 30, 31, 32

In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007) 41

Ins. Fed'n of Pa. Inc. v. Commonwealth, Ins. Dep't,
970 A.2d 1108 (Pa. 2009) 33

James v. Se. Pa. Transp. Auth.,
477 A.2d 1302 (Pa. 1984) 28

Kerns v. Kane,
69 A.2d 388 (Pa. 1949) 15, 16, 53

Kuznik v. Westmoreland Cnty. Bd. of Comm'rs,
902 A.2d 476 (Pa. 2006) 29, 54, 55

League of Women Voters v. Commonwealth,
178 A.3d 737 (Pa. 2018) ..... *passim*

League of Women Voters of Wis. Educ. Network v. Walker,
851 N.W.2d 302 (Wis. 2014) 41

Marcellus Shale Coal. v. Dep't of Env't Prot.,
216 A.3d 448 (Pa. Commw. Ct. 2019) 7

Mays v. LaRose,
951 F.3d 775 (6th Cir. 2020) 32

McDonald v. Bd. of ElectionComm'rs,
394 U.S. 802 (1969) 32, 42

McLinko v. Dep't of State,
279 A.3d 539 (Pa. 2022) 51

Migliori v. Cohen,
36 F.4th 153 (3d Cir. 2022) (Matey, J., concurring in judgment),
vacated Ritter v. Migliori, 143 S. Ct. 297 (2022) 46

Migliori v. Lehigh Cnty. Bd. of Elections.,
No. 5:22-cv-00397, 2022 WL 802159 (E.D. Pa. Mar. 16, 2022) 46

Minn. All. for Retired Ams. Educ. Fund v. Simon,
62-cv-24-854 (Minn. Dist. June 6, 2024) 23, 50, 58

Mixon v. Commonwealth,
759 A.2d 442 (Pa. Commw. Ct. 2000) 20

Montana Democratic Party v. Jacobsen,
545 P.3d 1074 (Mont. 2024) 41

Moore v. Harper,
600 U.S. 1 (2023) 49

Nixon v. Commonwealth,
839 A.2d 277 (Pa. 2003) 37

Pa. Democratic Party v. Boockvar,
238 A.3d 345 (Pa. 2020) ..... *passim*

Pa. State Conf. of NAACP v. Schmidt,
2023 WL 8091601 (W.D. Pa. Nov. 21, 2023), *rev'd*, *Pa. State Conf. of NAACP v. Sec'y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024) ..... *passim*

Pap's A.M. v. City of Erie,
812 A.2d 591 (Pa. 2002) (cited at Pet. Br. 19) 28

Peake v. Commonwealth,
132 A.3d 506 (Pa. Commw. Ct. 2015) 50

Perles v. Cnty. Return Bd. of Northumberland Cnty.,
202 A.2d 538 (Pa. 1964) 31

Petition of Berg,
713 A.2d 1106 (Pa. 1998) 3, 28, 29

Petition of Cioppa,
626 A.2d 146 (Pa. 1993) 30

Polydyne, Inc. v. Philadelphia,
795 A.2d 495 (Pa. Commw. Ct. 2002) 15

Powers v. Harris,
379 F.3d 1208 (10th Cir. 2004) 43, 45

Purcell v. Gonzalez,
549 U.S. 1 (2006) 55, 56

Republican National Committee v. Schmidt,
No. 447 M.D. 2022 slip op. (Pa. Commw. Ct. Mar. 23, 2023) ..... *passim*

Republican Party of Pa. v. Boockvar,
141 S. Ct. 643 (2020) 55

Seagram & Sons, Inc. v. Hostetter,
384 U.S. 35 (1966) 43

Shambach v. Bickhart,
845 A.2d 793 (Pa. 2004) 30

Shankey v. Staisey,
257 A.2d 897 (Pa. 1969) 39

Stilp v. Commonwealth,
905 A.2d 918 (Pa. 2006) 51, 52

Tex. Democratic Party v. Abbott,
961 F.3d 389 (5th Cir. 2020) 32, 42

United States v. Mosley,
238 U.S. 383 (1915) 36

Vote.Org v. Callanen,
89 F.4th 459 (5th Cir. 2023) 46

Winston v. Moore,
91 A. 520 (Pa. 1914) ..... *passim*

Ziccarelli v. Allegheny Cnty. Bd. of Elections,
2:20-cv-1831-NR, 2021 WL 101683 (W.D. Pa. Jan. 12, 2021) 8

CONSTITUTIONAL AND STATUTORY AUTHORITIES

Pa. Const. Article I, § 5 21

Pa. Const. Article VII, § 6 ..... 4, 15, 53

25 P.S. § 2811 23

25 P.S. § 3146.6 2

42 Pa. C.S. § 761 ..... 11, 13, 14

OTHER AUTHORITIES

M. Barnes & E. Chemerinsky, *The Once and Future of Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059 (2011) 43

G. Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) 33

Pa. House of Representatives, State Gov't Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State's Election Guidance* (Jan. 21, 2021) 10, 45

Pa. R.A.P. 1532 7

INTRODUCTION

Sometimes, silence speaks louder than words. For all the words that Petitioners, the Democratic Intervenors, and the Secretary (collectively, "Movants"), devote to their latest joint assault on the General Assembly's date requirement, two of their omissions independently decide this case and render everything else they say irrelevant.

First, Movants do not even address the lion's share of the procedural defects in this suit that the Republican National Committee and Republican Party of Pennsylvania (collectively, "Republican Intervenors") pointed out in their Preliminary Objections now docketed with the Court. *See* June 10, 2024 Order. Most glaringly, no Movant explains how this Court has subject matter jurisdiction. Only the Petitioners address this issue at all—in one paragraph. *See* Pet. Br. 36-37.

Thus, neither they nor any of their allies even *mention*—let alone take seriously—Judge Ceisler's opinion in *Republican National Committee v. Schmidt*, No. 447 M.D. 2022 slip op. at 20 (Pa. Commw. Ct. Mar. 23, 2023) (attached as Exhibit A), on which Republican Intervenors' Preliminary Objections are based, *see* Prelim. Objs. 24-33. Yet that case is entirely on point. Petitioners' only basis for suing the Secretary is his non-binding Guidance regarding the date requirement. *See* Pet. Br. 37. Thus, under *Republican National Committee*, the Secretary is not a proper or indispensable party. *See* Republican Intervenors' Summary Relief Br. 11-

15 ("Summary Relief Br."); *Republican Nat'l Comm.*, Ex. A at 13-14, 18-22; *see also* Respondent Boards Statement 6 (confirming that they "have set aside and not counted absentee and mail-in ballots that arrive in undated or misdated outer return envelopes" "in compliance with the Pennsylvania Supreme Court's order in *Ball*," not the Secretary's Guidance) ("Boards Br.").

Accordingly, again under *Republican National Committee*, the proper defendants—the ones who actually decide whether mail-ballot declarations are properly filled out—are the 67 county boards of elections. *See* Summary Relief Br. 15-18; *Republican Nat'l Comm.*, Ex. A at 13-14, 18-28.[1] But as Judge Ceisler held, naming the county boards is insufficient to invoke this Court's jurisdiction—and Petitioners named only two county boards, Allegheny County and Philadelphia County (collectively, "the Boards"), in any event. *See* Summary Relief Br. 15-18; *Republican Nat'l Comm.*, Ex. A at 13-14, 18-28. Indeed, the only differences between *Republican National Committee* and this case are that the Republican petitioners in *Republican National Committee* joined all 67 county boards, while Petitioners here, now supported by the Democratic Party, have joined only the two Boards. Thus, because the Court lacked jurisdiction in *Republican National Committee*, it lacks jurisdiction here, too.

[1] This Brief uses "mail ballot" to refer to both an absentee ballot, *see* 25 P.S. § 3146.6, and a mail-in ballot, *see id.* § 3150.16.

Second, Movants fail to plausibly distinguish the Pennsylvania Supreme Court's controlling decisions rejecting their Free and Equal Elections claim: *Pennsylvania Democratic Party*—which upheld the *entire* declaration mandate of which the date requirement is part—and *Ball*. *See* Summary Relief Br. 28-31. Movants, moreover, fail to cite a *single* case invalidating a ballot-casting rule under the Free and Equal Elections Clause. Not one. This confirms what Republican Intervenors have already proven: the Clause serves important functions, but it does not give the Judiciary a freewheeling license to second-guess and usurp the General Assembly's power to set ballot-casting rules. Summary Relief Br. 31-40; *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) ("While the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature.").

Movants offer various other merits arguments, but all fail. There is no precedential support for Petitioners' and Democratic Intervenors' invitation to wield the Free and Equal Elections Clause to apply strict scrutiny to any ballot-casting rule that results in a vote not "being counted"—a shocking proposal that, unsurprisingly, even the Secretary does not endorse. In fact, the Pennsylvania Supreme Court's precedent *forecloses* applying strict scrutiny here. *See Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998) ("To subject every voting regulation to strict scrutiny … would tie the hands of states seeking to assure that elections are operated equitably

and efficiently."); *Pa. Democratic Party*, 238 A.3d at 372-80 (not applying strict scrutiny to challenges to declaration mandate or secrecy-envelope rule). There is no basis in Pennsylvania, analogous state, or federal constitutional law for Movants' various proposed interest-balancing tests. Summary Relief Br. 43-54. Invalidating the date requirement would also violate the Elections and Electors Clauses of the U.S. Constitution. *Id.* at 54-55. And barring enforcement of the requirement would invalidate all of Act 77 and universal mail voting in Pennsylvania. *Id.* at 55-58.

Even if Petitioners could overcome these fatal omissions in their arguments, they cannot prove that this Court may even grant their requested relief. Petitioners did not seek any relief against the two Boards in their Petition, *see* Pet. ¶ 92, but now purport to do so, *see* Pet. App'n ¶ 73. Any such relief, however, would render the date requirement non-mandatory in two counties but leave it mandatory in the other 65 counties. It therefore would violate the Pennsylvania Constitution's requirement that "[a]ll laws regulating the holding of elections by the citizens … shall be uniform throughout the State," Pa. Const. art. VII, § 6, and the Equal Protection Clause, *Bush v. Gore*, 531 U.S. 98 (2000).

Finally, the equities counsel against awarding the Petitioners any relief at this late juncture. Even after the Pennsylvania Supreme Court refused to accept their Free and Equal Elections argument in *Ball*, Plaintiffs waited a year and a half to resurrect this claim—instead pursuing various other failed attacks on the date

requirement. They waited to pursue this several-times-over backup theory until the middle of a contentious election year. As the Pennsylvania Senate leaders point out, "Petitioners and their counsel" have "treat[ed] the Pennsylvania and federal judiciary like a roulette wheel, constantly testing out novel theories hoping they will eventually win something." Legislators' Br. 26. This gamesmanship threatens to destabilize Pennsylvania's election rules, undermine confidence in election integrity, and damage the credibility of the Pennsylvania Judiciary. It will also harm Republican Intervenors. The Court should not reward Movants' last-minute maneuvering. Rather, as explained more fully below, the Court should deny Petitioners' Application for Summary Relief and grant Republican Intervenors' opposing Application for Summary Relief.

COUNTERSTATEMENT REGARDING FACTS

Petitioners err when they suggest that the parties, including Republican Intervenors, agreed to the facts—and *only* the facts—presented in their Petition and Application for Special Relief in the Nature of a Preliminary Injunction. *See* Pet. App'n 5. Indeed, Republican Intervenors' Preliminary Objections were also "in the record at the June 10, 2024 status conference," *id.*, but Petitioners' brief makes clear that they do not agree to the facts presented there, *see* Prelim. Objs. ¶ 146 (noting that the date requirement serves "unquestionable purpose[s]").

Instead, the parties agreed that, for the sake of judicial efficiency, there was no need for further discovery or an evidentiary hearing before the Court could consider applications for summary relief. That is because "[t]he facts necessary to decide" this case and the various defenses "are well-known to the parties," as "fulsome discovery" and factual and legal presentations have already taken place in prior date-requirement litigation. Pet. App'n 5. Thus, as the Secretary has explained, the parties may invoke facts and evidence from those prior cases here, as well as other matters appropriate for judicial notice. *See* Sec'y Br. 5 n.3.

The Secretary and the Boards agree because they rely upon facts that were not presented in the Petition or preliminary injunction application. *See, e.g.*, Sec'y Br. 19-21 (discussed *infra* 25-27); Boards Br. 3-4. Republican Intervenors also highlight below facts and evidence that have repeatedly been presented in prior date-requirement litigation, including cases in which Petitioners and the Secretary were parties or *amici*. Those include the rejection rate for mail ballots due to noncompliance with the secrecy-envelope requirement upheld in *Pennsylvania Democratic Party*, *see infra* 26-27, as well as "pleadings and judgments," Sec'y Br. 5 n.3, from *Commonwealth v. Mihaliak*, which underscores the date requirement's anti-fraud purpose, *see infra* 46-47; *Ball v. Chapman*, 289 A.3d 1, 15 (Pa. 2023) (noting evidence from *Mihaliak*); *Pa. State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *31 n.39 (W.D. Pa. Nov. 21, 2023) (similar), *rev'd*, *Pa. State Conf. of*

NAACP v. Sec'y Commonwealth of Pa., 97 F.4th 120 (3d Cir. 2024). Petitioners make no mention of any of these facts and evidence, even though they are properly before the Court. *See* Sec'y Br. 5 n.3.

STANDARD OF REVIEW

"At any time after the filing of a petition for review in an appellate or original jurisdiction matter," this Court "may on application enter judgment if the right of the applicant thereto is clear." Pa. R.A.P. 1532(b). "Summary relief is similar to summary judgment under the Pennsylvania Rules of Civil Procedure." *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 216 A.3d 448, 458 (Pa. Commw. Ct. 2019). Summary relief therefore is not appropriate where the applicant has no "clear" right to "the requested relief under the law." *Id.*

ARGUMENT

I. THE COURT SHOULD DISMISS THE PETITION DUE TO ITS MYRIAD PROCEDURAL DEFECTS.

The Court should grant summary relief and dismiss the Petition for lack of standing, lack of subject matter jurisdiction, and failure to join indispensable parties. *See* Prelim. Objs. 13-37; Summary Relief Br. 11-24. Movants largely ignore these procedural defects, and fail to overcome them.

A. Petitioners Lack Standing To Sue The Secretary.

Republican Intervenors have already shown that Petitioners lack standing to sue the Secretary. *See* Summary Relief Br. 11-15. In truth, to make the point,

Republican Intervenors could have simply copied and pasted this Court's decision in *Republican National Committee v. Schmidt* and just changed the petitioners' names.

Republican National Committee is indeed indistinguishable from this case. The Secretary's only action Petitioners challenge is the Secretary's Guidance. *See* Pet. ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36, 42-43, 79; Pet. Br. 37. But as this Court explained in *Republican National Committee*, the Secretary "does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards." *Republican Nat'l Comm.*, Exhibit A at 20 (the Secretary's "duties and responsibilities" under the Election Code "are limited"). Accordingly, as Judge Ceisler and other courts have held, any Secretary guidance regarding administration of elections does not affect the county boards' legal obligations and is not legally binding or enforceable against them. *See Republican Nat'l Comm.*, Exhibit A at 13-14, 18-22; *see also In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020) ("[T]he Secretary has no authority to definitively interpret the provisions of the Election Code."); *Ziccarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at *5 n.6 (W.D. Pa. Jan. 12, 2021) ("[U]nder Pennsylvania law, the Secretary's pre-election guidance is just that—guidance. County boards of

elections ultimately determine what ballots to count or not count in the first instance.").

Thus, there is no "causal connection" between the Secretary's Guidance and Petitioners' alleged harm of county boards not counting noncompliant mail ballots. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 473 (Pa. 2021). Accordingly, moreover, a court order invalidating the Guidance would not "redress" Petitioners' alleged harm. *See id.* at 474. Petitioners therefore lack standing to sue the Secretary. *See* Summary Relief Br. 11-15.

The two Boards' Statement of Position confirms this result. The Boards do not even *mention* the Secretary's Guidance. *See* Boards Br. 1-6. Instead, they clarify that they "have set aside and not counted absentee and mail-in ballots that arrive in undated or misdated outer return envelopes" "*in compliance with the Pennsylvania Supreme Court's order in Ball*." *Id.* at 6 (emphasis added). And they "will continue to do so, absent an order from this Court or the Pennsylvania Supreme Court directing [them] to handle such ballots in a different manner." *Id.* In other words, invalidation or recission of the Secretary's Guidance will not result in the Boards counting noncompliant ballots. *See id.* The Secretary's Guidance thus has no causal connection to Petitioners' alleged harm, that harm cannot be redressed by an order against the Secretary, and Petitioners lack standing to sue the Secretary. *See id.*; *see also* Summary Relief Br. 11-15.

Notably, too, the Secretary does not endorse Petitioners' theory that his Guidance injures them by binding county boards. After all, saying so would imperil other guidance the Secretary may wish to issue and require reversing the Secretary's prior contrary representations to this Court. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *10 (Pa. Commw. Ct. Aug. 19, 2022) (the Secretary acknowledging he "does not have the authority to direct the Boards to comply with [a court order]"); Pa. House of Representatives, State Gov't Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State's Election Guidance*, (Jan. 21, 2021), at 23-25 (previous Secretary acknowledging that a Secretary's guidance is not directory), *available at* https://tinyurl.com/4wxjvd4c.

Petitioners do not counter any of this. They merely assert that "the issuance of [the Secretary's] guidance was the basis for the Republican National Committee's petition concerning the dating requirement in *Ball*." Pet. Br. 37. Petitioners are correct that the *Ball* petitioners—who included Republican Intervenors here—named the Secretary as a respondent and challenged the Secretary's then-existing Guidance. *Ball*, 289 A.3d at 8. But that is inconsequential here for at least three reasons.

First, *Ball* involved an exercise of the Pennsylvania Supreme Court's King's Bench power, *see id.* at 8 n.2, which is not constrained by the statutory limits on this

Court's jurisdiction at issue in *Republican National Committee*, *see* 42 Pa. C.S. § 761(a)(1); *see also* Summary Relief Br. 15-18.

Second, the guidance challenged in *Ball* created a "lack of clarity" regarding whether county boards were required to enforce the date requirement—and threatened to cause inconsistent enforcement of the requirement across the Commonwealth in the 2022 general election. *See* 289 A.3d at 13, 19-20. In particular, at the time of *Ball*, Commonwealth Court opinions and "vacated" federal court opinions offered "contradictory" holdings regarding whether the date requirement is mandatory. *Id.* at 19. The challenged Secretary's guidance was an "unambiguous" statement advocating one of those "competing" holdings. *Id.* It therefore created a risk that some county boards would enforce the requirement while others might not. *See id.* The *Ball* petitioners sought the Pennsylvania Supreme Court's "clarity" so that all county boards would apply the date requirement consistently. *See id.* at 13, 19-20.

Here, by contrast, there is no "lack of clarity" or "contradictory" judicial precedent, *id.* at 13, 19, because *Ball* and *Pennsylvania State Conference of the NAACP* unambiguously require all county boards to enforce the date requirement and not to count noncompliant ballots. *See, e.g.*, Boards Br. 6. The Guidance Petitioners challenge reflects this uniformity in decisional law. Thus, unlike in *Ball*, Petitioners are not seeking to prevent inconsistent application of the date

requirement (but, in fact, to *create* it, *see infra* Parts I.D, III). Instead, they "facially challenge[] an existing interpretation of settled law," which the Pennsylvania Supreme Court has held is insufficient to establish standing. *See Ball*, 289 A.3d at 19.

Third, the *Ball* petitioners *also* named all 67 county boards of elections and, thus, could secure a uniform order directing all 67 boards to enforce the date requirement. *See id.* at 1. That is exactly what happened in *Ball*, where the Pennsylvania Supreme Court issued a remedial order directed only to the boards, *not* to the Secretary. *See* 284 A.3d 1189, 1192, November 1, 2022 Order (attached as Exhibit B) ("The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting . . .")) ("*Ball* Order"). In fact, the *Ball* order did not require the Secretary to do *anything*—including rescind or modify the challenged guidance whose position among "contradictory" judicial precedent *Ball* overruled. *See id.* Petitioners here, however, have named only the two Boards, so if they were to secure any relief, it would not bind the 65 other county boards. *See infra* Parts I.D, III.

Thus, *Republican National Committee*—which issued *after Ball*—controls the question before this Court. Movants saw Republican Intervenors' arguments on this point in the Preliminary Objections *before* Movants filed their current briefs. *See* Prelim. Objs. 9-10, 23-27. Yet remarkably, Movants say *nothing* about *Republican National Committee*. Any belated response in their opposition briefs is,

quite frankly, sandbagging, as Republican Intervenors will not have an opportunity to reply.

B. This Court Lacks Subject Matter Jurisdiction Because The Secretary Is Not A Proper Or Indispensable Party.

This Court lacks jurisdiction under 42 Pa. C.S. § 761(a)(1). *See* Summary Relief Br. 15-18. Although the Secretary is an "officer" of the Commonwealth, his joinder in this case does not establish jurisdiction because he is not an "indispensable party to the action." *Republican Nat'l Comm.*, Exhibit A at 17. The relief Petitioners seek obviously *must* be "accomplished in the absence of" the Secretary because any order invalidating the Guidance will *not* result in any county board of elections counting undated or misdated mail ballots. *Id.* at 17-18; *supra* Part I.A; Summary Relief Br. 11-18; *see also* Boards Br. 6.

Once again, *Republican National Committee* is dispositive. *See Republican Nat'l Comm.*, Exhibit A at 18-22. There, because the then-Acting Secretary's guidance was not binding on county boards, Judge Ceisler held that "meaningful relief" could be accomplished in his absence through suits against county boards and, thus, that he was not an indispensable party. *Id.* Judge Ceisler therefore dismissed the case for lack of subject matter jurisdiction. *See id.* at 18-28.

The same is true here, and the Court should dismiss the Petition for lack of jurisdiction. *See* Summary Relief Br. 15-18. Petitioners can obtain the relief they seek only by suits against county boards filed in each board's home county. *See id.*

Once again, Republican Intervenors previously made this argument at length in a filing Movants saw before filing their briefs. *See* Prelim. Objs. 23-27. Once again, Movants say nothing in response.

C. The Court Lacks Subject Matter Jurisdiction Over Any Claims Against The Boards.

This Court also lacks jurisdiction over any claims Petitioners purport to plead against the two Boards. *See* Summary Relief Br. 19-20. *First*, the Petition seeks no redress against the two Boards. *See* Pet. ¶ 92; Summary Relief Br. 19; *Firearm Owners Against Crime*, 261 A.3d at 474. *Second*, even if Petitioners can fix that pleading failure by purporting to seek relief against the Boards now, *see* Pet. App'n ¶ 73, the Court still lacks jurisdiction because the Boards are local authorities, not "agencies" of the "Commonwealth government," 42 Pa. C.S. § 761(a)(1); Summary Relief Br. 19-20. As Judge Ceisler previously held in *Republican National Committee*, county boards are not "Commonwealth agencies" whose joinder can bring a case within the Court's original jurisdiction. *Republican Nat'l Comm.*, Exhibit A at 22; Summary Relief Br. 19-20.

Republican Intervenors also made this argument in their Preliminary Objections, *see* Prelim. Objs. 31-33, yet Movants say nothing relevant in response.

D. In The Alternative, Petitioners Failed To Join Indispensable Parties.

Even if the Court had jurisdiction and Petitioners had sought relief against the two Boards, the Court still should dismiss the Petition because Petitioners failed to join indispensable parties: the 65 other county boards of elections. Summary Relief Br. 21-24.

The other county boards are indispensable parties for two reasons. *First*, any order purporting to affect the other county boards' enforcement of the date requirement (which cannot issue in a case in which they are not parties, *see* Summary Relief Br. 21-23), affects "rights" and obligations they hold that "are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Polydyne, Inc. v. Philadelphia*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002); *see also* Summary Relief Br. 21-23.

Second, ordering just the two Boards *not to enforce* the date requirement would create disuniformity across the Commonwealth because the 65 other boards are bound to *continue to enforce* it under *Ball*. *See* Summary Relief Br. 23-24; Boards Br. 6. As a result, voters who cast undated or misdated mail ballots in Allegheny or Philadelphia Counties, on the one hand, would not be treated "alike" with voters who cast such ballots in any of the other 65 counties. *Kerns v. Kane*, 69 A.2d 388, 393 (Pa. 1949). Any order creating this disuniformity would violate the Pennsylvania Constitution. *See* Pa. Const. art. VII, § 6 ("All laws regulating the

holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the [s]tate ..."); *Kerns*, 69 A.2d at 393 ("To be uniform in the constitutional sense, such a law must treat all persons in the same circumstances alike."); *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914) (similar). It would also violate the U.S. Constitution's Equal Protection Clause. *See Bush*, 531 U.S. at 106-07 (courts violate Equal Protection Clause when they order different "counties [to] use[] varying standards to determine what [constitutes] a legal vote" in the same election); *see also* Summary Relief Br. 23-24.

Movants' only response to these problems is a footnote in Petitioners' brief, which obliquely addresses only the second point. Petitioners insist "other county boards of elections would be expected to heed [a] ruling" from this Court or the Pennsylvania Supreme Court invalidating the date requirement in a case in which they are not named parties. Pet. Br. 38 n.12. But there is no basis for that insistence: Like the Boards named here, the 65 unnamed boards remain bound to "compl[y] with the Pennsylvania Supreme Court's order in *Ball*" absent a court order "directing [*them*] to handle such ballots in a different manner." Boards Br. 6; *see also Ball* Order; Summary Relief Br. 23-24; *Chapman*, 2022 WL 4100998 (involving county boards that declined to count noncompliant ballots notwithstanding prior Commonwealth Court opinion), *overruled on other grounds*, *Ball*, 289 A.3d 1. Such

an order, however, may issue against them only in a case in which they are named parties. It cannot issue here. *See* Summary Relief Br. 23-24.

The Court should decline Petitioners' request to create disparate election rules across the Commonwealth in violation of the Pennsylvania Constitution and U.S. Constitution shortly before a presidential election. It should deny Petitioners' Application and grant Republican Intervenors' Application.

II. THE COURT SHOULD ENTER JUDGMENT AGAINST PETITIONERS BECAUSE THEIR CLAIMS FAIL ON THE MERITS.

Even if Petitioners could overcome the myriad procedural defects in this suit, the Court should still enter judgment against them because their claims fail on the merits. *See* Summary Relief Br. 24-58.

A. The Pennsylvania Supreme Court Has Rejected Free and Equal Elections Challenges To The Date Requirement.

The Court should reject Petitioners' Free and Equal Elections challenge to the date requirement because the Pennsylvania Supreme Court has already done so. *See* Summary Relief Br. 28-31.

In *Pennsylvania Democratic Party*, the Pennsylvania Supreme Court upheld mandatory application of the *entire* declaration mandate for mail ballots—which encompasses the "fill out, date, *and* sign" requirements—without requiring an opportunity to cure, 238 A.3d at 372-74 (quoting 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added)); *see also* Summary Relief Br. 28-29. Indeed, the Free and Equal

Elections Clause does not require counting mail ballots that "voters have filled out incompletely or incorrectly," even where voters have committed only "minor errors" on the declaration. *Pa. Democratic Party*, 238 A.3d at 374; *see also id.* at 373 ("so long as a voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative[s] of his or her choice," which is all the Clause guarantees). That is because the Clause "leaves the task of effectuating [its] mandate" to "the Legislature." *Id.* at 374. It thus rests with the General Assembly to decide both "the procedures for casting and counting a vote by mail" and whether even "minor errors" in complying with those procedures warrant rejection of the ballot. *Id.*; *see* Summary Relief Br. 28-29.

Here, the General Assembly has decided that the date requirement portion of the declaration mandate upheld in *Pennsylvania Democratic Party* is itself mandatory—and that even "minor errors" in complying with it warrant rejection of a mail ballot. 238 A.3d at 374. The date requirement therefore does not violate the Free and Equal Elections Clause. *See id.* The Pennsylvania Supreme Court reiterated this conclusion in *Ball*, when it rejected a statutory challenge to the date requirement in the face of Free and Equal Elections arguments. *See Ball*, 289 A.3d at 14-16 & n.77; *see* Summary Relief Br. 29-31.

Petitioners do not address *Pennsylvania Democratic Party*'s holding on this point. *See* Pet. Br. 13. They also claim that the Free and Equal Elections challenge

to the date requirement was not before the Court in *Ball*. *See id.* Petitioners are mistaken. *See* Brief for Respondents in *Ball*, 2022 WL 18540590, at *37 ("Imposing draconian consequences for insignificant errors could, as is the case here [] implicate the Constitution's Free and Equal Elections Clause[.]"); Democratic Intervenors' *Ball* Br., 2022 WL 18540587, at *1-2 & *8-10 (discussing alleged lack of purpose), *29-32 (making argument under Free and Equal Elections Clause and urging Court to apply interest-balancing test). While those arguments partially sounded in constitutional avoidance, the Pennsylvania Supreme Court did *not* accept or acknowledge any constitutional problem with mandatory application of the date requirement, demonstrating that it saw no serious constitutional question in the case.

Indeed, the court expressly *noted* that it heard and considered Free and Equal Elections challenges to the date requirement. *See Ball*, 289 A.3d at 14–15 (discussing Free and Equal Elections arguments raised by the parties); *id.* at 16 n.77 (discussing alleged lack of "functionality" of the date requirement). Not a single Justice endorsed those challenges.

Movants claim that a footnote in Justice Wecht's opinion supports their position because it refers to the Free and Equal Elections Clause in a part of the opinion not speaking for the court. *See* Pet. Br. 13. But he was referring to interpreting potential ambiguities in the federal Materiality Provision—*not* the date requirement. *See Ball*, 289 A.3d at 27 n.156. While actually speaking for the court,

Justice Wecht held that the date requirement is unambiguous and mandatory. *See id.* at 20-23. And neither he nor any other Justice suggested the date requirement violates the Free and Equal Elections Clause. *See, e.g., id.* at 14-16 & n.77, 20-23.

Instead, the court upheld the date requirement in an opinion that remains binding on county boards and this Court. *See, e.g.*, Boards Br. 6. For this reason alone, the Court should deny Petitioners' Application and grant Republican Intervenors' Application.

B. The Date Requirement Does Not Violate The Free and Equal Elections Clause.

Even if the Court concludes that the Pennsylvania Supreme Court has not resolved this precise question, it should still reject Petitioners' Free and Equal Elections claim because controlling law makes clear that the date requirement comports with the Clause. *See* Summary Relief Br. 31-48.

1. The Date Requirement Comports With The Free and Equal Elections Clause's Equal-Opportunity Guarantee.

Petitioners bear a heavy burden of proof. They must overcome the strong presumption of constitutionality, *see Mixon v. Commonwealth*, 759 A.2d 442, 447 (Pa. Commw. Ct. 2000), by showing that the date requirement "clearly, palpably, and plainly violates the Constitution," *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801 (Pa. 2018). Their Free and Equal Elections claim thus requires them to prove that the date requirement "make[s] it so difficult [to vote] as to amount

to a denial" of "the franchise." *Id.* at 810. Petitioners and the other Movants have not done so and cannot do so. As part of the constitutional declaration mandate and like the constitutional secrecy-envelope rule, the date requirement is a neutral, non-discriminatory ballot-casting rule that does not violate the Free and Equal Elections Clause. *See Pa. Democratic Party*, 238 A.3d at 372-80; Summary Relief Br. 31-36.

Indeed, the Pennsylvania Supreme Court has *never* invalidated a neutral ballot-casting rule under the Clause. *See* Summary Relief Br. 31. Even now, Movants have failed to identify any such case. Nor could any such case exist: The Free and Equal Elections Clause's plain text and history, and the authoritative case-law construing it, make clear that it does not constrain the General Assembly's authority to adopt neutral ballot-casting rules like the date requirement.

The Clause directs that "[e]lections shall be free and equal," Pa. Const. art. I, § 5, and delegates the "task of effectuating that mandate to the Legislature," *Pa. Democratic Party*, 238 A.3d at 374. It therefore does not empower Pennsylvania courts to second-guess the General Assembly's policy judgments when it comes to adopting ballot-casting rules, to "create statutory language that the General Assembly chose not to provide," or "to rewrite the Election Code to align with a litigant's notion of good election policy." *Id.* at 373.

Rather, what the Clause guarantees is that all Pennsylvania voters "have the same free and equal *opportunity* to select [their] representatives." *League of Women*

Voters, 178 A.3d at 814 (emphasis added). This equal-*opportunity* guarantee does not ensure that all voters will avail themselves of the opportunity. It therefore does not *exempt* voters from having to comply with neutral ballot-casting rules the General Assembly enacts to govern how voters complete and cast their ballots, such as the declaration mandate of which the date requirement is part and the secrecy-envelope requirement. *See id.*; *see Pa. Democratic Party*, 238 A.3d at 372-80; *see* Summary Relief Br. 31-36. Instead—as the Secretary explained in *Pennsylvania Democratic Party*—the Clause guarantees that all voters will be *subject to* the same ballot-casting rules and will enjoy "equally effective power to select the representatives of [their] choice" so long as they "follow[]" those rules. 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809).

The date requirement therefore comports with the Clause. It grants *every* Pennsylvania voter "the same free and equal opportunity" to vote by mail in compliance with the date requirement or to vote in person *without even being subject to* the date requirement. *League of Women Voters*, 178 A.3d at 814. In other words, it carries out the Clause's guarantee that all Pennsylvania voters wield "equally effective power to select [their] representative[s]" so long as they "follow[] the requisite voting procedures." *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809).

Nor does the date requirement "make it … difficult" to vote, let alone "so difficult as to amount to a denial" of "the franchise." *League of Women Voters*, 178 A.3d at 810; *see* Summary Relief Br. 35-36. In the first place, Pennsylvania law permits *all* voters to vote in person without complying with the date requirement, *see, e.g.*, 25 P.S. § 2811, and a requirement that is inapplicable to an entire universally available method of voting does not make voting "so difficult as to amount to a denial" of "the franchise," *League of Women Voters*, 178 A.3d at 810. That is especially true here, where according to Petitioners' own figures, the majority of Pennsylvania voters vote in person and, thus, are not even subject to the date requirement. *See* Summary Relief Br. 35; *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975) (recognizing that legislative regulation of the mail voting "privilege" cannot violate the right to vote).

In the second place, even when it comes to mail voting, the date requirement is not "so difficult" to comply with "as to amount to a denial" of "the franchise." *League of Women Voters*, 178 A.3d at 810; *see* Summary Relief Br. 35-40. Petitioners' own position contemplates as much, since they do not challenge the "fill out" and "sign" aspects of the constitutional declaration mandate—and they offer no explanation as to how *dating* the declaration is more difficult. Moreover, signing and dating documents is a mandatory and common feature of life, and it amounts to nothing more than the "usual burdens of voting" in Pennsylvania and across the

country. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring); *see also* Summary Relief Br. 35-37. "[B]ecause voting necessarily requires some effort and compliance with some rules, the concept of a voting system … that furnishes an equal 'opportunity' to cast a ballot"—such as Pennsylvania's system under the Free and Equal Elections Clause—"must tolerate the 'usual burdens of voting.'" *Brnovich v. DNC*, 594 U.S. 647, 669 (2021) (quoting *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.)); *see also League of Women Voters*, 178 A.3d at 814 (Free and Equal Elections Clause guarantees "equal opportunity").

Indeed, dating a ballot declaration is far less difficult than performing other tasks—such as filling out the *entire* declaration, *including* the signature and date fields, or placing the ballot in a secrecy envelope—that the Pennsylvania Supreme Court has upheld under the Free and Equal Elections Clause. *See Pa. Democratic Party*, 238 A.3d at 372-80. And dating a ballot declaration is far less difficult than tasks the U.S. Supreme Court has upheld as non-burdensome and constitutional. *See, e.g.*, *Crawford*, 533 U.S. at 198 ("the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering … required documents, and posing for a photograph" to obtain a photo identification); *Brnovich*, 594 U.S. at 678 ("Having to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting.'").

Movants *never* explain how complying with the date requirement is difficult, let alone "so difficult as to amount to a denial" of "the franchise." *League of Women Voters*, 178 A.3d at 810. They offer no evidence or argument regarding the objective *burden* imposed by the date requirement—which is the gravamen of the analysis under controlling case-law. *See id.*; *see also* Summary Relief Br. 38.

Instead, they apparently believe that an unconstitutional difficulty is shown by the mere number of mail ballots that were not counted in past elections due to noncompliance with the date requirement. *See* Pet. Br. 9-10. They are mistaken. Indeed, the only support any Movant cites for this position is the Secretary's citation to a solo concurrence by Justice Wecht, who suggested he might deem a rule unconstitutional if it results in an "intolerable ratio of rejected ballots." Sec'y Br. 18 (citing *Pa. Democratic Party*, 238 A.3d at 389 (Wecht, J., concurring)). That concurrence has not been accepted as the law in Pennsylvania. Rather, the Pennsylvania Supreme Court's Free and Equal Elections jurisprudence turns on the *objective* burden imposed by the challenged rule—*i.e.*, whether the challenged rule "make[s] [voting] so difficult as to amount to a denial" of "the franchise"—not the number of voters who fail to comply with it. *League of Women Voters*, 178 A.3d at 810; Summary Relief Br. 38.

But even if the number of noncompliant ballots were relevant, Petitioners' own figures demonstrate that the date requirement does not result in an "intolerable

ratio of rejected ballots," Sec'y Br. 18, or impose an unconstitutional burden. Those figures show that only 0.85% of mail ballots returned statewide in the 2022 general election were rejected due to noncompliance with the requirement. *See* Summary Relief Br. 38-39. They also show that the rate of noncompliance *decreased* to only 0.56% in the 2024 primary elections. *See id.* at 39.

The Secretary recites numbers from recent elections that have not been part of the record in prior date-requirement cases and are not recited by Petitioners. *See supra* 5-7. In any event, those numbers only further confirm that the date requirement does not impose an unconstitutional burden. The Secretary reports noncompliance rates of 0.84% in the 2022 general election (10,500 out of 1,244,000), 0.82% for the 2023 primary election (4,918 out of 597,000), 0.54% in the counties that enforced the date requirement in the 2023 primary election (1,354 out of 250,580), and 0.62% in the 2024 primary election (4,468 out of 715,811). *See* Sec'y Br. 19-21.

In other words, more than 99% of Pennsylvania mail voters complied with the date requirement even on all of the figures Petitioners and the Secretary point to. A requirement that over 99% of mail voters complied with—and that the majority of Pennsylvania voters did not have to comply with because they voted in person—cannot be "so difficult" to comply with "as to amount to a denial" of the "franchise." *League of Women Voters*, 178 A.3d at 810; *see also* Summary Relief Br. 37-40. And

these noncompliance rates are lower than the historic noncompliance rate under the secrecy-envelope requirement that the Pennsylvania Supreme Court upheld in *Pennsylvania Democratic Party*. *See* 238 A.3d at 376-80; Summary Relief Br. 39.[2]

Movants therefore have wholly failed to show that compliance with the date requirement is "so difficult as to amount to a denial" of "the franchise." *League of Women Voters*, 178 A.3d at 810. Instead, they attempt to move the goalposts, offering a smattering of arguments to stretch the Free and Equal Elections Clause to subject the date requirement to searching judicial scrutiny. Each of these arguments is irreconcilable with the Clause and controlling case-law.

2. Pennsylvania Law Forecloses Petitioners' Request For Strict Scrutiny.

Petitioners and Democratic Intervenors first argue that the Court should apply strict scrutiny to *any* election regulation that results in ballots not being counted because voting is a "fundamental" right. Pet. Br. 16-20; Dem. Br. 17-20. This

[2] The Boards also point to figures regarding an alleged "disproportionate[]" effect of the date requirement on "elderly Pennsylvania voters," Boards Br. 3, that are not mentioned by Petitioners, *see supra* 5-7. Even on their face, those figures are not probative for at least two reasons. For one, they come only from Philadelphia County and a single election, not from the Commonwealth as a whole or multiple elections, so they say virtually nothing about "elderly Pennsylvania voters" statewide across elections. Boards Br. 3. For another, they say nothing about the *rate* at which elderly voters and other voters *used* mail ballots. *See id.* at 3-4. Accordingly, they are entirely consistent with the (very real) possibility that elderly voters vote by mail at a higher rate than other voters and, thus, have a *lower* noncompliance rate with the date requirement than other voters. *See id.*

audacious proposal has no legal basis—and, in fact, Pennsylvania law *forecloses* it. *See* Summary Relief Br. 40–41. As the Pennsylvania Supreme Court has explained, "to subject every voting regulation to strict scrutiny" would unduly "tie the hands of" the General Assembly when it "seek[s] to assure that elections are operated equitably and efficiently." *Petition of Berg*, 713 A.2d at 1109 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). And wielding the Free and Equal Elections Clause to achieve that outcome would turn the Clause on its head: "While the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature," not the Judiciary. *Pa. Democratic Party*, 238 A.3d at 374; *see also Winston*, 91 A. at 522 ("regulat[ing] elections" is quintessentially "legislative" function).

Thus, it is unsurprising that *none* of the cases Petitioners and Democratic Intervenors cite supports extending strict scrutiny to the date requirement. Some are not even voting-related cases. *See, e.g.*, *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (Pa. 1984) (cited at Pet. Br. 19); *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002) (cited at Pet. Br. 19). Another was a ballot-access challenge brought under the First Amendment, not a ballot-casting challenge brought under the Free and Equal Elections Clause. *See In re Nader*, 858 A.2d 1167 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016) (cited at Pet. Br. 19).

The other cited cases recognize that voting is a fundamental right but actually *rule out* extending strict scrutiny to ordinary ballot-casting rules. *See* Pet. Br. 16-19; Dem. Br. 17-20; *see also* Summary Relief Br. 40-43. The most obvious example is *Pennsylvania Democratic Party* (cited Pet. Br. 16; Dem. Br. 18), where the Pennsylvania Supreme Court agreed that the right to vote is fundamental, but did not apply strict scrutiny to the challenged ballot-casting rules, including the declaration mandate of which the date requirement is part. *See* 238 A.3d at 372-80. The same is true of *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476 (Pa. 2006) (cited at Pet. Br. 18-19), where the Pennsylvania Supreme Court again noted that voting is a fundamental right but did not apply strict scrutiny. And both this Court and the Pennsylvania Supreme Court expressly declined to apply strict scrutiny in *Petition of Berg* (cited at Pet. Br. 19), *see* 712 A.2d 340, 342-43 (Pa. Commw. Ct. 1998); 713 A.2d at 1109.

Petitioners' and Democratic Intervenors' proposed approach thus contravenes their own cited authorities. The lone case Petitioners cite that mentioned strict scrutiny in connection with adjudicating challenges to an election regulation is unpublished and easily distinguishable. *See Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014) (cited at Pet. Br. 19). That case dealt with a voter-ID law that, critically, state officials were not "implement[ing]" "according to its terms." *Id.* at *9. Because the ID-issuance

process was "fraught with illegalities" and other problems, it was "difficult to obtain" a valid ID. *Id.* at *18. Indeed, the Court found that "hundreds of thousands" of people were at risk of being denied access to voting "through no fault of their own." *See id.* at *20 & n.25. In those circumstances, the Court agreed that the regulation "ma[de] it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.* at 19 (quoting *Winston*, 91 A. at 523).

Applewhite thus confirms that the Free and Equal Elections standard is whether the challenged regulation "makes it so difficult [to vote] as to amount to a denial" of "the franchise." *See id.*; Summary Relief Br. 33 (quoting *Winston*, 91 A. at 523). The date requirement is constitutional under that standard because it does not block anyone—let alone "hundreds of thousands" of voters—from voting "through no fault of their own." *Applewhite*, 2014 WL 184988 at *20 & n.25.

Beyond these cases, the vast majority of cases Movants cite involved *statutory construction*, not constitutional challenges under the Free and Equal Elections Clause. *See, e.g., Shambach v. Bickhart*, 845 A.2d 793, 796-99 (Pa. 2004) (identifying statutory ambiguity and "liberally constru[ing]" statute) (cited at Pet. Br. 16); *Petition of Cioppa*, 626 A.2d 146, 148-49 (Pa. 1993) (identifying rule of statutory construction but holding provision was unambiguous) (cited at Pet. Br. 16; Dem. Br. 6); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (holding as to "proper interpretation" of statute) (cited at Pet. Br. 16; Dem. Br. 7-8); *In re*

Petitions to Open Ballot Boxes, 188 A.2d 254, 256 (Pa. 1963) (applying statute) (cited at Dem. Br. 8, 19-20); *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954) (cited at Pet. Br. 16; Dem. Br. 8); *Appeal of Norwood*, 116 A.2d 552, 554-55 (Pa. 1955) (applying Pennsylvania secret-ballot rule and concluding voter did not "identif[y]" himself within meaning of statute) (cited at Dem. Br. 8, 18-19); *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 538-40 (Pa. 1964) (refusing to consider argument raised for first time on appeal and declining to reach statutory arguments) (cited at Pet. Br. 28; Dem. Br. 7-8); *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) (interpreting and applying statute) (cited at Dem. Br. 8, 19).

Such authority is irrelevant here because the Pennsylvania Supreme Court has already construed the date requirement and held it to be unambiguous and mandatory. *See Ball*, 289 A.3d at 20-23; *see also* Pet. Br. 27-28. That helps explain why Movants avoid analogizing the facts of any of those cases to those here—preferring instead to splice irrelevant statements from their context.

Democratic Intervenors come the closest of any of the Movants to attempting to analogize to existing precedent, but their attempt falls short. In particular, they assert that three cases—*Appeal of Norwood*, *Appeal of Gallagher*, and *In Re Petitions to Open Ballot Boxes*—prove that Pennsylvania "need[s] a compelling state interest to justify the disqualification of ballots." Dem. Br. 19. But none of these cases applied the Free and Equal Elections Clause or *any* sort of constitutional

scrutiny. In all three cases, the court was applying Pennsylvania's *statutory* secret-ballot rule. *See Norwood*, 116 A.2d at 554-55; *Appeal of Gallagher*, 41 A.2d at 631-32; *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. As with Movants' other statutory-interpretation cases, these cases are irrelevant in light of *Ball*, say nothing about the Free and Equal Elections Clause, and provide no basis to extend strict scrutiny to—much less to invalidate—the date requirement.

If more were somehow needed, Petitioners' and Democratic Intervenors' premise—that the date requirement implicates a "fundamental" right, *see* Pet. Br. 16; Dem. Br. 17—flies in the face of existing case-law. To be sure, the right to vote is fundamental. Federal and state courts across the country, however, have held that there is no fundamental right *to vote by mail* and, thus, that laws regulating voting by mail do not implicate a fundamental right. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-08 (1969); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020). Rather, absentee and mail voting are conveniences "designed to make voting more available to some groups who cannot easily get to the polls" and, thus, "do not themselves deny … the exercise of the franchise." *McDonald*, 394 U.S. at 807-08. And "[s]ince the privilege of absentee voting" or mail voting "is granted by the legislature, the legislature may mandate the conditions and procedures for such voting." *Bell*, 227 N.W. at 802.

Indeed, if there were a fundamental right to vote by mail, then Pennsylvania was in material breach of its voters' constitutional rights until 2019, when the General Assembly first enacted universal mail voting in Act 77. Merely to state that proposition is to prove the conclusion. Petitioners' and Democratic Intervenors' proposed strict-scrutiny approach contemplates a fundamental right to mail voting and, thus, fails for that reason as well.

Finally, Movants do not address the implications of applying strict scrutiny to every, or even some, mandatory ballot-casting rules. Those implications are stunning. *See* Summary Relief Br. 41-42. Petitioners' and Democratic Intervenors' proposed approach would invert the Free and Equal Elections Clause and, in effect, dramatically rewrite the Pennsylvania Constitution and its separation of powers.

After all, the Clause delegates the "task of effectuating" its "free and equal" mandate to the General Assembly, *Pa. Democratic Party*, 238 A.3d at 374, but extending strict scrutiny to ballot-casting rules would improperly transfer the "legislative" function of regulating elections to the Judiciary. *Winston*, 91 A. at 522; *see also Pa. Democratic Party*, 238 A.3d at 373-74. Courts would be forced to routinely "second-guess the policy choices of the General Assembly," *Ins. Fed'n of Pa. Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009), under a standard of review that is "strict in theory, but fatal in fact," G. Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court:*

A Model For Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). Numerous ordinary ballot-casting rules—including the secrecy-envelope and signature requirements—would certainly be declared unconstitutional. *Contra Pa. Democratic Party*, 238 A.3d at 372-80.

The Court should decline the invitation to amend the Pennsylvania Constitution under the guise of this case and, instead, faithfully apply the Free and Equal Elections Clause to uphold the date requirement portion of the General Assembly's constitutional declaration mandate. *See id.* at 373-74; Summary Relief Br. 31-48.

3. Movants' Various Alternative Approaches Misstate The Law.

Petitioners, Democratic Intervenors, and the Secretary propose three alternative approaches for extending judicial scrutiny to the date requirement under the Free and Equal Elections Clause. All contravene the Clause's plain text and history, as well as the governing case-law.

First, Petitioners and the Democratic Intervenors assert that the Free and Equal Elections Clause creates a "right to have one's vote counted" *regardless* of the individual's compliance with ballot-casting rules. Pet. Br. 19; Dem. Br. 5. For this notion, Petitioners cite *Winston v. Moore*, which recognized that each eligible voter has the "right to cast his ballot and have it *honestly* counted." 91 A. at 523 (emphasis added). *Winston* itself makes clear that this reference to "honest

counting" means that ballots must be counted according to uniform rules and that similarly situated voters must be treated "alike," *id.*; election officials could not, for example, decline to count votes just because they were cast in Cumberland County. But "honest[] count[ing]" *according to* uniform rules is not an *exemption from* the rules. *Id.* Thus, neither *Winston* nor the "honestly counted" principle have *ever* been understood to liberate voters from the obligation to follow the General Assembly's ballot-casting rules—and Movants offer no authority that they have.

Indeed, had *Winston* done so, the Pennsylvania Supreme Court would have been required to strike down the declaration mandate and secrecy-envelope requirement in *Pennsylvania Democratic Party*—but it instead *upheld* both sets of rules. *See* 238 A.3d at 372-80. And *Winston* itself could not have reaffirmed the General Assembly's authority to set ballot-casting rules, so long as it does not "make [voting] so difficult as to amount to a denial" of "the franchise itself." *Winston*, 91 A. at 523. *That* is the standard of review for ballot-casting rules under the Clause. *See also* Summary Relief Br. 23-27.

That standard is a high one—and it makes perfect sense. What the Clause guarantees is that all Pennsylvania voters have "the same free and equal opportunity to select [their] representatives," *League of Women Voters*, 178 A.3d at 814, "so long as [they] follow[] the requisite voting procedures" established by the General Assembly. *Pa. Democratic Party*, 238 A.3d at 373. Only procedures that deny the

"franchise" violate this equal-opportunity guarantee. *See League of Women Voters*, 178 A.3d at 810.

In that respect, federal right-to-vote jurisprudence is similar. The U.S. Supreme Court long recognized that the "right to vote" entailed a right to require election officials to count a ballot *so long as* it is "lawful and regular" and thus "entitled to be counted." *United States v. Mosley*, 238 U.S. 383, 385-86 (1915). It did not contemplate a right to be *free* from neutral, generally applicable state laws governing the act of casting a ballot. *See, e.g.*, *id.* As the Third Circuit and Justice Alito recently explained, "[e]ven the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Pa. State Conf. of NAACP*, 97 F.4th at 133-35 (Ambro, J.) (quoting *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissental)); *see also* Summary Relief Br. 25-26.

Second, Petitioners hedge their bet on strict-scrutiny review by contending that *Pennsylvania Democratic Party* established a three-tiered test to evaluate election regulations under strict scrutiny, intermediate scrutiny, and rational-basis review. Pet. Br. 26-27 (citing *Pa. Democratic Party*, 238 A.3d at 385). And, they insist, the date requirement should at least be assessed under one of those "two lesser levels of scrutiny." *Id.* But *Pennsylvania Democratic Party* did no such thing. In the portion of the opinion Petitioners cite, the Pennsylvania Supreme Court was not

discussing the Free and Equal Elections Clause or even the Pennsylvania Constitution. Instead, it was discussing what it believed was the relevant standard for a *federal* right-to-vote claim under the First and Fourteenth Amendments (and *upheld* Pennsylvania's residency requirement for poll watchers under that standard). *See Pa. Democratic Party*, 238 A.3d at 380-86. The remainder of the opinion conclusively confirms this reading: when the *Pennsylvania Democratic Party* court discussed the petitioner's challenges to ballot-casting rules under the Free and Equal Elections Clause, it made no mention of the tiers of scrutiny or *any* type of scrutiny. *See id.* at 372-80.

Petitioners' other cited cases, *see* Pet. Br. 27, also do not support extending rational-basis scrutiny to the date requirement. None addressed the Free and Equal Elections Clause or a voting-related law. *See Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (due process and restrictions on employment); *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995) (federal Equal Protection Clause and restrictions on right to parent); *Gambone v. Commonwealth*, 101 A.2d 634 (Pa. 1954) (due process and restrictions on size of retail signs).

Third, unsurprisingly, the Secretary does not sign onto Petitioners' bid for strict or intermediate scrutiny. Instead, he argues that all ballot-casting rules must merely be "reasonable, non-discriminatory regulations." Sec'y Br. 16. That proposed test sounds exactly like rational-basis review. Democratic Intervenors also

concede that, if strict scrutiny does not apply, a test resembling rational-basis review does. Dem Br. 18 ("When an election regulation does not severely restrict the right to vote, the Pennsylvania Supreme Court has been more deferential—so long as the regulation genuinely advances the Commonwealth's interest in ensuring honest and fair elections." (cleaned up)). As previously explained and confirmed below, the date requirement *easily* satisfies that standard. Summary Relief Br. 45-54; *infra* Part II.D.

But in truth, there is no support even for the Secretary's and Democratic Intervenors' invitation to use rational-basis or "reasonable, non-discriminatory" review to second-guess ordinary ballot-casting rules. The cases cited by the Secretary do not justify his proposed test, much less invalidation of the date requirement portion of the General Assembly's declaration mandate. *See* Sec'y Br. 16. For example, the discussion the Secretary points to in *Banfield v. Cortés*, 110 A.3d 155 (Pa. 2015), did not address the Free and Equal Elections Clause or a challenge to a ballot-casting rule. *See* 110 A.3d at 176-77. Instead, it addressed challenges under various other provisions of the Pennsylvania and U.S. Constitutions to the Secretary's certification of electronic voting machines used only in certain counties. *See id.*; *see also* Sec'y Br. 17 (citing *Banfield* in support of standard for federal constitutional claims). The Pennsylvania Supreme Court, moreover, *rejected* all of those challenges. *See* 110 A.3d at 176-77. *Banfield* thus

is doubly irrelevant: it does not suggest, much less prescribe, the analysis for Petitioners' Free and Equal Elections challenge to a ballot-casting rule, and its *rejection* of constitutional challenges lends no support for *accepting* Petitioners' constitutional challenge here.

DeWalt v. Bartley, 24 A. 185 (Pa. 1892) (cited at Sec'y Br. 16), was also not a ballot-casting challenge, but a Free and Equal Elections challenge to a law establishing rules for candidates to qualify for the ballot, prohibitions on electioneering in polling places, rules for poll watchers, and measures to protect ballot secrecy. *See* 24 A. at 186-88. If anything, that case supports *upholding* the date requirement: The Pennsylvania Supreme Court upheld the law because "[t]here is no doubt of the power of the legislature to regulate elections" and the law did not make voting "so difficult and inconvenient as to amount to a denial" of the franchise. *Id.* at 186. The same is true of the date requirement. *See* Summary Relief Br. 31-48.

Independence Party Nomination was a statutory interpretation case, not a constitutional case, that in any event reaffirmed that "the Legislature has the power to regulate the details of place, time, manner, etc." for elections. *Independence Party Nominations*, 57 A. 344, 345 (Pa. 1904) (interpreting provision as to party nominations) (cited at Sec'y Br. 16). And *Shankey v. Staisey*, 257 A.2d 897 (Pa.

1969) (cited at Sec'y Br. 16), upheld against a *federal* Equal Protection Clause challenge a rule regulating ballot access by minor political parties. *Id.* at 899, 902.

More bizarrely still, the Secretary claims that *Pennsylvania Democratic Party* applied his "reasonableness" test to challenged regulations. Sec'y Br. 16. It did not. The court *upheld* the secrecy-envelope rule and the rejection of mail ballots due to signing and dating errors, without engaging in any sort of interest-balancing or evaluating the policies supporting those rules. *Pa. Democratic Party*, 238 A.3d at 372-80. And it reaffirmed that the Free and Equal Elections Clause "leaves the task of effectuating [its] mandate to the Legislature." *Id.* at 374. *Pennsylvania Democratic Party* thus decisively rejected the invitation to scrutinize the General Assembly's policy choice to adopt the date requirement. This Court should, too.

C. Other States' "Free And Equal Elections" Precedents And Federal Right-To-Vote Precedents Foreclose Petitioners' Claims.

The law of other States with "free and equal" elections constitutional provisions confirms that summary relief against Petitioners is warranted. *None* of those States has applied its version of that provision to invalidate a ballot-casting rule. *See* Summary Relief Br. 43-45.

Petitioners and Democratic Intervenors say nothing of this point. The Secretary offers a string cite of six out-of-state cases without analysis or even parentheticals. *See* Sec'y Br. 17. Notably, *none* of the six state constitutional provisions implicated in the Secretary's cited cases corresponds to the twelve state

constitutional provisions that the Pennsylvania Supreme Court has identified as analogous to the Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 813 n.71. And none of the cited cases features ballot-casting rules similar to the date requirement, let alone rejects one. *See Montana Democratic Party v. Jacobsen*, 545 P.3d 1074, 1082 (Mont. 2024) (voter-registration and ballot-distribution rules); *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 331-32, 341 (Mass. 2018) (upholding voter-registration rule); *Guare v. New Hampshire*, 117 A.3d 731, 736 (N.H. 2015) (voter-registration rule); *League of Women Voters of Wis. Educ. Network v. Walker*, 851 N.W.2d 302, 313-14 (Wis. 2014) ("assum[ing] without deciding, that reasonableness functions as an independent limit on election regulation" and upholding challenged provision); *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (Mich. 2007) (applying federal-right-to-vote standard and upholding voter-identification provision); *Craig v. Peterson*, 233 N.E.2d 345, 348 (Ill. 1968) (statutory interpretation).

In at least two ways, federal right-to-vote precedent likewise confirms that Petitioners err in seeking *any* judicial scrutiny of the date requirement—and that their claim fails. Summary Relief Br. 45-46. In the first place, the date requirement cannot implicate, let alone violate, any right to vote because it regulates only mail voting and is inapplicable to in-person voting. *See id.* Courts considering federal

right-to-vote challenges have held that regulations on just one method of voting cannot violate the right to vote where an alternative method of voting remains available and not subject to the regulation. *See McDonald*, 394 U.S. at 807-808; *Crawford*, 553 U.S. at 201 (opinion of Stevens, J.); *Tex. Democratic Party*, 961 F.3d at 403-05; Summary Relief Br. 45-46. And it is especially implausible that Act 77—which Petitioners acknowledge "has been a boon for voter participation in the Commonwealth," Pet. Br. 6—violates the Free and Equal Elections Clause or denies any right to vote merely by insisting that mail ballots be dated.

In the second place, regulations that impose only the usual burdens of voting likewise do not implicate, let alone violate, the right to vote—and the date requirement is just such a regulation. *See* Summary Relief Br. 36-37, 47-49; *supra* 23-24. When dealing with only the usual burdens of voting, courts should respect the dignity and autonomy of citizens and presume that they are capable of reading ballot-casting instructions and doing simple things like signing and dating a document. *See* Legislators' Br. 14-15 (making this point). The Court should reject Petitioners' invitation to do just the opposite.

D. The Date Requirement Easily Satisfies Rational-Basis Scrutiny, If Applicable.

Even if Movants were correct that controlling precedent allowed this Court to analyze the date requirement under rational-basis review, *see* Pet. Br. 26-27; Dem. Br. 18, or "reasonable, non-discriminatory" review, *see* Sec'y Br. 16, the Court still

should uphold the date requirement because it passes this deferential version of review with flying colors, *see* Summary Relief Br. 46-54.

Rational-basis review is one of the most forgiving standards of review in American law, and laws reviewed under this standard are "overwhelmingly likely to be upheld." M. Barnes & E. Chemerinsky, *The Once and Future of Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059, 1077 (2011). Courts must uphold a law under rational-basis review if there is *any* conceivable basis to uphold it. *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993). And those attacking a statute's rationality "have the burden to negat[e] every conceivable basis which might support it." *Id.* Courts, moreover, are "not bound by the parties' arguments as to what legitimate state interests [a policy] seeks to further," but are instead "obligated to seek out other conceivable reasons for validating a state [law]." *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004). Courts cannot deem a law irrational just because it may not succeed in bringing about its goals. *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50 (1966). Nor can a court "overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice." *Powers*, 379 F.3d at 1217 (citing *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979)).

On the burden side of the scale, the date requirement imposes only trivial burdens on voters that are significantly *smaller* than the burdens imposed by voting

rules that have already been upheld by the Pennsylvania Supreme Court and the United States Supreme Court. *See supra* 23-24; *see also Pa. Democratic Party*, 238 A.3d at 372-80; *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *Brnovich*, 594 U.S. at 678; Summary Relief Br. 34-38, 49.

Oddly, Petitioners and the Democratic Intervenors do not actually offer arguments as to how the date requirement burdens voters. They focus instead on the fact that less than 1% of mail ballots are rejected due to noncompliance with the date requirement—a fact that *proves* that the date requirement is not unconstitutionally burdensome. *See supra* 25-27. And they certainly do not grapple with how courts assess burden under the type of balancing standard they want this Court to adopt. *See* Summary Relief Br. 47-49.

On the state-interest side of the scale, the date requirement is more than amply justified by several such interests, including the interests in orderly election administration, solemnity, and deterring and detecting election fraud. *See id.* at 49-54. Movants' various attempts to rebut this showing fail.

To start, Movants try to narrow the universe of state interests the Court can consider, suggesting that only the precise interests previously outlined by Justice Dougherty can be considered, Pet. Br. 22-26; Dem. Br. 13, or even that only interests explicitly identified by the Legislature itself are relevant, Pet. Br. 21-22. But as Movants admit, the authorities they cite for this proposition pertain to "strict

scrutiny" review, not rational-basis review. *See id.* at 21. Strict scrutiny has no application here, *see supra* Part II.B.2—and rational-basis review operates differently.

Under rational-basis review, those attacking a statute "have the burden to negate every conceivable basis which might support it." *Beach Communications*, 508 U.S. at 315 (cleaned up); *Powers*, 379 F.3d at 1217 (courts are "obligated to seek out other conceivable reasons for validating a state [law]"). Therefore, this Court must consider not only the justifications for the law presented by the Pennsylvania Supreme Court and Republican Intervenors, but also whether *any other* justifications could support the law. *Beach Communications*, 508 U.S. at 315.

In any event, Movants have failed to rebut the interests Republican Intervenors previously identified (in this case as well as others) as supporting the date requirement. *First*, Movants try and fail to discount the date requirement's role in election administration. *See, e.g.*, Dem. Br. 9. As the Secretary explains, he has issued *guidance* that county boards *should* stamp a mail ballot upon receiving it and *should* enter the time the ballot was received in the SURE System. Sec'y Br. 6; *see also* Pet. Br. 23; *Pa. State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *21. And, the Secretary insists, county boards ordinarily do that. Sec'y Br. 7.

But the Secretary does not (and cannot) claim that county boards will *always* follow these procedures. If a county board did not timestamp a mail ballot upon

receipt—even by mistake—then the handwritten date *might* need to be used to determine whether the ballot was timely. Indeed, Judge Matey recognized that the date requirement would serve an important role in this situation, or if there was a problem with the SURE system. *See Migliori v. Cohen*, 36 F.4th 153, 165 (3d Cir. 2022) (Matey, J., concurring in judgment), *vacated Ritter v. Migliori*, 143 S. Ct. 297 (2022), *and majority holding disavowed, Pa. State Conf. of NAACP*, 97 F.4th at 128. The happenstance of present procedures cannot render the General Assembly's *statute* unconstitutional, or prevent it from insisting on a useful backstop in election administration. *Cf. In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d 1058, 1091 (Pa. 2020) (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy).

Second, Movants simply ignore the fact that signature-and-date obligations are universal and promote solemnity in filling out important documents. That is why Pennsylvania requires signatures and dates *all the time*. *See* Summary Relief Br. 36 & n.2, 51. And the Fifth Circuit recently cited this interest when it upheld a challenged voting law requiring an original signature on documents. *Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023).

Third, Movants insist the date requirement cannot detect and deter fraud. *See, e.g.*, Dem. Br. 10. But the date requirement has *already* been used to detect and deter fraud. Summary Relief Br. 51-52; *see also Migliori v. Lehigh Cnty. Bd. of Elections.*,

No. 5:22-cv-00397, 2022 WL 802159, at *14 (E.D. Pa. Mar. 16, 2022) (Leeson, J.) (explaining this point). In *Commonwealth v. Mihaliak*, prosecutors used the handwritten date as evidence that an individual fraudulently cast a ballot in her deceased mother's name. CP-36-CR-0003315-2022 (Lancaster Cnty. 2022); *see* Exhibit C (*Mihaliak* charging document).

The Democratic Intervenors suggest that, in cases like that, ballots would not be counted and potential fraud would be flagged because the SURE System notes when electors die. Dem Br. 10; *see also Pa. State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *31 n.39. But *Mihaliak* demonstrates how the date requirement still plays a significant role in identifying fraud. The fraudster could have argued that her mother filled out the ballot, placed it in the mail, and died before it was received by the county board. But the handwritten date—written after the mother died—disproved that obvious defense and helped prosecutors secure a guilty plea and sentence. *See Mihaliak*, CP-36-CR-0003315-2022.

Finally, Movants point to the Third Circuit's statement that the date requirement "serves little apparent purpose." *Pa. State Conf. of NAACP*, 97 F.4th at 125; Pet. Br. 7; Dem. Br. 3, 11-12. That statement was dictum, and the Third Circuit never addressed the State's interests in documenting the date the voter completed the ballot as part of trustworthy election administration, solemnity, or in deterring or

detecting fraud. *See* Summary Relief Br. 53-54. It therefore is not even persuasive with respect to the questions presented here. *See id.*

Bizarrely, the Democratic Intervenors (alone) argue that the Third Circuit's statement collaterally estops Republican Intervenors from defending the date requirement. Dem. Br. 11-12. That is silly multiple times over. For one thing, the Third Circuit did not say that the date requirement serves *no* purpose; it opined there was "*little apparent* purpose." *Pa. State Conf. of NAACP Branches*, 97 F.4th at 125 (emphasis added). Moreover, the issue whether the date requirement advances any state interests was *irrelevant* in that case addressing the federal Materiality Provision—as the Republican Intervenors argued, the district court agreed, *see Pennsylvania State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *22-34, and the Third Circuit acknowledged by upholding the date requirement notwithstanding its own statement, *see* 97 F.4th 120. Thus, the issue "whether the date requirement serves any purpose" is not "the same" as the issue presented in the federal case, there is no "final judgment on the merits" of that issue, and no party had a "full and fair opportunity to litigate the issue" in the federal case. Dem. Br. 11-12 (citing *In re Coatesville Area Sch. Dist.*, 244 A.3d 373, 379 (Pa. 2021)). Democratic Intervenors' collateral estoppel argument therefore fails on its own terms. *See* Dem Br. 12.

If anything, under Democratic Intervenors' logic, *Movants* are collaterally estopped from relitigating whether the date requirement denies "the right to vote."

Pa. State Conf. of NAACP, 97 F.4th at 133. That issue *was* presented in the federal case, the issue "is the same" in this case, the Third Circuit entered "a final judgment on the merits" of it, and Petitioners, Democratic Intervenors, and the Secretary "had a full and fair opportunity to litigate"—and *did* litigate—"the issue in the prior action." *In re Coatesville Area Sch. Dist.*, 244 A.3d at 381; *see supra* Part II.B. The should deny Petitioners' Application and grant Republican Intervenors' Application.

E. Invalidating The Date Requirement Would Violate The U.S. Constitution.

Invalidating the date requirement would be such an unprecedented and unreasonable interpretation of the Free and Fair Elections Clause that it would violate the Federal Constitution. Summary Relief Br. 54-55. Movants say nothing in response on this point. Putting Pennsylvania law on the rack to satisfy Petitioners' political agenda would only invite review by the U.S. Supreme Court. *Moore v. Harper*, 600 U.S. 1, 34-36 (2023). The Court should deny Petitioners' Application for this reason alone.

F. Declaring The Date Requirement Unconstitutional Would Strike Act 77 And Universal Mail Voting In Pennsylvania.

Finally, if this Court *were* to accept Petitioners' argument that the date requirement is unconstitutional, it would necessarily mean striking universal mail voting in Pennsylvania under Act 77's non-severability provision. *See* Summary Relief Br. 55-58.

Movants offer two responses. *First*, they claim that declaratory relief against *enforcement* of the date requirement would not result in any provision of Act 77 being "held invalid." Act 77 § 11; Pet. Br. 32-33. That proposed workaround does not work.

A challenge to a law on constitutional grounds may take the form of a "facial" challenge, or an "as-applied" challenge. *E.g., Benezet Consulting LLC v. Sec'y Commonwealth of Pa.*, 26 F.4th 580, 585 (3d Cir. 2022); *Peake v. Commonwealth*, 132 A.3d 506, 517 (Pa. Commw. Ct. 2015). "[A]n 'as applied' challenge is a claim that the operation of a statute is unconstitutional in a particular case while a *facial challenge indicates that the statute may rarely or never be constitutionally applied*." *Benezet*, 26 F. 4th at 585 (citing 16 C.J.S. Constitutional Law § 243) (emphasis added). Importantly, "as-applied relief must be limited to the specific plaintiffs and circumstances of the litigation." *Id.* (citing *Doe v. Reed*, 561 U.S. 186 (2010)). Here, Petitioners are bringing a facial challenge: The relief they seek would affect *all* voters and, on their theory of how the Secretary's guidance work, bind all county officials. Pet. ¶ 79. And because Plaintiffs bring a facial challenge, a remedy in their favor would result in a provision of Act 77 being "held invalid" and, thus, trigger the non-severability provision. Act 77 § 11.

Even if the Court could somehow conceive of Petitioners' claims as being as-applied, an order in their favor would still have the effect of holding a provision of

Act 77 "invalid." *Id.* After all, accepting Petitioners' argument requires this Court to say that the General Assembly's command to date mail ballots is "invalid" under the Pennsylvania Constitution. Therefore, Act 77's non-severability provision would apply. *See McLinko v. Dep't of State*, 279 A.3d 539, 609-610 (Pa. 2022) (Brobson, J., dissenting) (recognizing Act 77's non-severability provision presents an open question).

Second, Petitioners claim that Act 77's non-severability provision is unenforceable. Pet. Br. 34-36. They rely on *Stilp v. Commonwealth*, which confronted a "boilerplate" non-severability provision. 905 A.2d 918, 973 (Pa. 2006). But *Stilp* recognized that "as a general matter, nonseverability provisions are constitutionally proper." *Id.* at 978. That is especially true where non-severability provisions arise from "the concerns and compromises which animate the legislative process." *Id.* And here, the non-severability provision was an important reason Act 77 was passed as part of a difficult and historic political compromise in which Democrats gained a vast expansion of mail voting and Republicans bargained for regulations of mail voting designed to promote orderly election administration and election integrity. *See* Summary Relief Br. 56-58; Legislators' Br. 24; *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 396 (W.D. Pa. 2020) (explaining that Act 77 represented a "balance" between expanding voting options and adopting establishing "safeguards . . . to catch or deter fraud and other illegal

voting practices.'"). Now Movants, including the Democratic Party, seek to preserve the Democratic Party's part of the bargain in Act 77 while excising the agreed-upon exchange given to Republicans. That opportunism is legitimately foreclosed by Act 77's non-severability provision. *See Stilp*, 905 A.3d at 978.

Petitioners respond that they do not understand why the Republican legislators would care about the date requirement, which they deem "pointless." Pet Br. 36. Yet Democratic legislators have, in the past couple years, introduced multiple proposals to repeal the date requirement. *See* Legislators' Br. 20-22. These proposals have been debated by the General Assembly. *Id.* None of those efforts has succeeded because a controlling bloc of the General Assembly obviously continues to believe the date requirement is important—as several leaders in the Pennsylvania Senate confirm to the Court in their *amicus* brief. *Id.* Instead of seeking legislative change in court, Petitioners, Democratic Intervenors, and the Secretary should try to convince their elected representatives that the date requirement is "pointless." Pet Br. 36.

Petitioners also object that enjoining Act 77 would have negative public policy consequences. Pet. Br. 35-36. Petitioners brought this lawsuit, so those consequences would be of Petitioners' making. Act 77's non-severability provision was obviously designed to protect the political compromises in the Act from opportunistic lawsuits like this one that seek to rebalance the Act in favor of one

political party. If Petitioners are truly worried about imperiling the rest of Act 77 and universal mail voting in Pennsylvania, they can dismiss their Petition.

III. PETITIONERS' REQUESTED RELIEF VIOLATES THE PENNSYLVANIA AND U.S. CONSTITUTIONS.

Petitioners did not seek any relief against the two Boards in their Petition, *see* Pet. ¶ 92, but now purport to ask the Court for a declaration and injunction requiring "Respondents" to count mail ballots with a missing or incorrect date, Pet. App'n ¶ 73.

Even if the Court believes that Petitioners can show a constitutional defect in the date requirement—and can amend their Petition through their Application—it still should deny their requested relief. Enjoining just two county boards would result in disparate treatment of identically situated voters across the Commonwealth based on their county of residence. In particular, that relief would compel the 2 Boards *to count* ballots that fail to comply with the date requirement, while the 65 other boards would remain compelled *not to count* such ballots under *Ball*. *See* 289 A.3d 1; Boards Br. 6; *supra* Part I.D.

Any such relief, therefore, would not "treat all persons in the same circumstances alike," *Kerns*, 69 A.2d at 393; *Winston*, 91 A. at 524, and therefore would violate the Pennsylvania Constitution's mandate that "[a]ll laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the state," Pa. Const. art. VII, § 6. And by requiring "counties

[to] use[] varying standards to determine what [constitutes] a legal vote" in an election for the same office, such relief would also violate the Equal Protection Clause of the U.S. Constitution, *see Bush*, 531 U.S. at 106-07; *see also* Summary Relief Br. 23-24. The Court therefore should deny Petitioners' requested relief regardless of its view of the merits.

IV. PETITIONERS ARE EQUITABLY BARRED FROM RECEIVING INJUNCTIVE RELIEF BEFORE LITIGATION CONCLUDES.

Finally, even if the Court believes Petitioners are likely to succeed on the merits, it should deny injunctive relief until litigation concludes for equitable reasons. As Petitioners acknowledge, "[t]o 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." Pet. Br. 14 (quoting *Kuznik*, 902 A.2d at 489).

In *Kuznik*, the Pennsylvania Supreme Court applied this standard to reverse an injunction issued by this Court in favor of voters just over three months before an election. *See* 902 A.2d at 488-508. The court reasoned in part that the petitioners could not carry their burden on the third prong because their requested relief would result in "voter confusion" and "chaos." *Id.* at 504-07.

So too here, Petitioners in all events cannot satisfy their burden on the third prong because any harm from denying an injunction is outweighed by the harm to

Pennsylvania, Pennsylvania voters, and Republican Intervenors. In the first place, invalidating a sovereign State's law "clearly inflicts irreparable harm," *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018), and does irreparable "damage … to the authority of" the General Assembly, *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurral).

Enjoining the date requirement would also impose irreparable harm on Pennsylvania voters—particularly if such an injunction issues now, on the eve of the 2024 general election. Such an injunction will lead to "voter confusion" and "chaos," *Kuznik*, 902 A.2d at 503-07 (reversing injunction in part on this basis), and a "consequent incentive to remain away from the polls," *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); *see also* Declaration of Angela Alleman ¶ 32 (attached as Exhibit D) ("Alleman Decl."). "Voters who fear their legitimate votes will be outweighed by fraudulent ones" that will go undetected with the date requirement enjoined "will feel disenfranchised." *Purcell*, 549 U.S. at 4. There will be rushed appeals to the Pennsylvania Supreme Court and, potentially, the U.S. Supreme Court. *See, e.g.*, *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020) (equally divided vote in October 2020 on whether to stay Pennsylvania Supreme Court rule change). The date requirement—which has already bounced in and out of effect repeatedly over the last few election cycles, would likely be put back into effect, confusing voters. *See* Legislators' Br. 25; Alleman Decl. ¶ 32.

At the same time, a judicial order barring enforcement of something as mundane and commonsensical as the date requirement would erode public confidence in the integrity of Pennsylvania's elections and Pennsylvania's courts. *See, e.g.*, *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurral) (noting importance of "judicial restraint" in this context); *id. at* 30 (Gorsuch, J., concurral) ("Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes."). Such "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; Alleman Decl. ¶ 32.

Moreover, enjoining the date requirement would inflict irreparable harm on Republican Intervenors. Republican Intervenors' substantial efforts to train and educate poll watchers, volunteers, candidates and voters regarding the date requirement would be wasted—and could not be recovered if any injunction is later reversed. *See* Alleman Decl. ¶¶ 11-23. Republican Intervenors, moreover, would be required to invest unrecoverable resources in revising their training and voter education programs. *See id.* ¶¶ 26-28. An injunction would threaten to confuse Republican voters, reduce voter confidence in Pennsylvania's elections, and reduce turnout by Republican voters. *See id.* ¶ 32. It would also alter the competitive environment in which Republican Intervenors, their candidates, and their voters seek to elect Republicans to office. *See id.* ¶ 33. And it could even alter the outcome of

elections to Republican Intervenors' detriment, as has happened in three recent Pennsylvania elections in which the date requirement was not enforced. *See id.* ¶¶ 34-38. In all three of those elections, the Republican candidate would have prevailed if the date requirement had been enforced, but another candidate was declared the winner when election officials declined to enforce the date requirement and counted noncompliant ballots. *See id.*

There is no basis to inflict these harms on the public and Republican Intervenors now—particularly in light of Petitioners' substantial delay and strategic forum-shopping in bringing their Free and Equal Elections challenge. *See, e.g.*, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("Delay in seeking enforcement of [asserted] rights, however, tends to indicate at least a reduced need for" the "drastic" step of injunctive relief). Petitioners have been crusading against the date requirement for years. They argued that mandatory application of the date requirement would violate the Free and Equal Elections Clause in late 2022. *See supra* 18-19. After that gambit to eliminate the date requirement failed, they tried several *other* theories in various federal and state courts. One and a half years later, they try again—in the middle of a contentious presidential election in which Pennsylvania's electoral votes may be dispositive.

Such inequitable conduct forecloses granting any remedy against the date requirement until this litigation concludes. A Minnesota court recently denied

injunctive relief in a lawsuit challenging a mail-ballot casting rule solely on equitable grounds—even where it *agreed* with the plaintiffs on the merits and accepted that the challenged rule "could result in the unlawful disenfranchisement of many eligible voters." *Minn. All. for Retired Ams. Educ. Fund v. Simon*, 62-cv-24-854 (Minn. Dist. June 6, 2024) (slip op. at 28) (Exhibit E). The court reasoned that changing the rule before the election would be inequitable because it would cause a "scramble" shortly before the election. *Id.* at 29. Further, the plaintiffs had "been on notice [of the challenged rule] for years" but only "brought [the] action at the beginning of the 2024 election year." *Id.*

That principle is even more obviously applicable here. Whereas the *Minnesota Alliance* plaintiffs at least filed suit "at the beginning" of 2024, *id.*, Petitioners waited to file until May 29. *See* Pet. And to reiterate the words of the Pennsylvania Senate leaders: "Petitioners and their counsel" have "treat[ed] the Pennsylvania and federal judiciary like a roulette wheel, constantly testing out novel theories hoping they will eventually win something." Legislators' Br. 26. Movants say precisely nothing to justify waiting until the middle of 2024 to file this politically charged lawsuit. This Court should not reward such maneuvers. It should reject Plaintiffs' tardy request for relief against the date requirement and withhold any order against the date requirement until this litigation concludes in an orderly manner.

CONCLUSION

The Court should deny Petitioners' Application for Summary Relief and grant Republican Intervenors' Application for Summary Relief.

Dated: July 8, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher
PA I.D. #37950
THE GALLAGHER FIRM, LLC
436 Seventh Avenue, 31st Floor
Pittsburgh, PA 15219
Phone: (412) 308-5512
kag@gallagherlawllc.com

John M. Gore (*pro hac vice*)
Stewart Crosland
Louis J. Capozzi III
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 879-3939
jmgore@jonesday.com
scrosland@jonesday.com
lcapozzi@jonesday.com

Thomas W. King, III
Thomas E. Breth
DILLON, McCANDLESS, KING, COULTER & GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
Phone: (724) 283.2200
tking@dmkcg.com
tbreth@dmkcg.com

Counsel for Republican Intervenors