IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 283 MD 2024

POLITICAL EMPOWERMENT PROJECT, MAKE THE ROAD PENNSYLVANIA, ONEPA ACTIVISTS UNITED, NEW PA PROJECT EDUCATION FUND, CASA SAN JOSE, PITTSBURGH UNITED, LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, AND COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, PHILADELPHIA COUNTY BOARD OF ELECTIONS, AND ALLEGHENY COUNTY BOARD OF ELECTIONS,

Respondents.

BRIEF IN RESPONSE TO SUMMARY RELIEF APPLICATIONS FOR PROPOSED INTERVENOR DOUG CHEW IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WESTMORELAND COUNTY BOARD OF ELECTIONS

Matthew H. Haverstick (No. 85072)
Shohin H. Vance (No. 323551)
Francis G. Notarianni (No. 327461)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Eml: mhaverstick@kleinbard.com
svance@kleinbard.com
fnotarianni@kleinbard.com
Attorneys for Proposed Intervenor Doug Chew

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I. INTRODUCTION

"What fair mind can pronounce this an ***abuse*** of legislative power, so gross, so palpable and so plain as to become an unconstitutional act?" *Patterson v. Barlow*, 60 Pa. 54, 80 (1869) (emphasis in original). This was the Court's inquiry when confronted with a similar challenge 150 years ago. The answer today is the same as was given in *Patterson*: ***None***.

II. STANDARD OF REVIEW

Under this Court's settled jurisprudence, summary relief should be granted where the moving party's right to relief is clear as a matter of law and no material issues of fact are in dispute. *See* Pa.R.A.P. 1532 (b) (providing that summary relief permits a court to "enter judgment if the right of the applicant thereto is clear"); *MFW Wine Co., LLC*, *v. Pa. Liquor Contr. Bd.*, 231 A.3d 50, 56 (Pa. Cmwlth. 2020) ("An application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute." (quotation omitted)). In ruling on summary relief, the evidence is viewed in the light most favorable to the non-moving party. *Flagg v. Int'l Union, Security, Police, Fire Prof'ls. of America*, 146 A.3d 300, 305 (Pa. Cmwlth. 2016).

Accordingly, when a party seeks dismissal of claims through summary relief, the moving party must establish that the law will not permit recovery on the claims and the right to relief in the form of dismissal is clear as a matter of law. *Bonner v. Chapman*, 298 A.3d 153, 161 (Pa. Cmwlth. 2023).

III. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Does this Court lack subject matter jurisdiction because Petitioners failed to join indispensable parties, *i.e.*, the sixty-five other county boards of elections?

Suggested Answer: Yes.

2. Does this Court lack subject matter jurisdiction because Respondent Schmidt is not an indispensable party?

Suggested Answer: Yes.

3. Should Petitioners' claims be dismissed because they do not have a clear right to relief on their claim that Sections 25 P.S. §§ 3146.6(a) and 3150.16(a) violate Article I, Section 5 of the Pennsylvania Constitution?

Suggested Answer: Yes.

IV. COUNTER-STATEMENT OF THE CASE

A. Factual and Procedural Background[1]

On May 28, 2024, Petitioners Black Political Empowerment Project, POWER Interfaith, Make the Road Pennsylvania, OnePA Activists United, New PA Project Education Fund, Casa San Jose, Pittsburgh United, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania filed a Petition for Review against Respondents Al Schmidt, in his capacity as Secretary of the Commonwealth, the Philadelphia County Board of Elections, and the Allegheny County Board of Elections seeking declaratory and injunctive relief to prevent Respondents from enforcing the Election Code's requirement that voters date the declaration on the outer envelope of mail-in and absentee ballots. *See* 25 P.S. §§ 3146.6(a); 3150.16(a).

According to Petitioners, the Election Code gives Respondent Schmidt the authority to: "implement absentee and mail voting procedures throughout the Commonwealth[,]" PFR ¶ 38, prescribe the form of the declaration printed on the outer envelopes of absentee and

[1] For purposes of this Summary Relief Application, Commissioner Chew's factual rendition is based on the facts alleged in the PFR. Contrary to Petitioners' representations, these facts ***are not*** "undisputed," and Commissioner Chew otherwise denies these facts.

mail ballots, *see* PFR ¶ 39 (citing 25 P.S. §§ 3146.4; 3150.14), receive election returns from county boards of elections; canvass and compute votes as required by the Election Code; proclaim election results; and issues certificates of elections, *see* PFR ¶ 41 (citing 25 P.S. § 2621(f), and issue guidance to county boards of elections regarding absentee and mail ballots that contain a missing or incorrect date on the outer envelope. *See* PFR ¶ 42.

Before the 2024 primary election, Respondent Schmidt redesigned the outer envelope for absentee and mail ballots to include a pre-filled "20" at the start of the year. *See* PFR ¶ 40. Notwithstanding this change, Petitioners allege that voters across the Commonwealth continued to make inconsequential envelope dating mistakes even on the DOS redesigned envelope." *See id*. Petitioners further allege that Since November 2023, Respondent Schmidt has issued guidance to county boards of elections to not count absentee and mail ballots that are undated or incorrectly dated. *See* PFR ¶ 42-43. Petitioners observe that Respondent Schmidt and his predecessors, in other litigation, have regularly argued that undated and wrongly dated absentee and mail ballots should be counted. *See* PFR ¶ 68.

With regard to Respondents Allegheny and Philadelphia County Boards of Elections, Petitioners aver that each Board is "responsible for administering elections in their respective counties." PFR ¶ 44(a)-(i) (citing 25 P.S. §§ 2641, 2642, 3146.2b, 3146.6, 3146.8, 3150.12b, 3150.16). Those duties include, receiving returned absentee and mail ballots and examining the voter declaration for compliance with the dating requirement when the boards canvass those ballots. *See id.*

Petitioners allege that Respondents' application of the dating requirement "to reject timely mail ballots submitted by eligible voters based solely on the inadvertent failure to add a meaningless, superfluous handwritten date next to their signature on the mail ballot Return Envelope is an unconstitutional interference with the exercise of the right to suffrage in violation of the Free and Equal Elections Clause." PFR ¶ 84; *see* Pa. Const. art. I, § 5. In this connection, Petitioners emphasize that "the date written on the envelope is not used to establish whether the mail ballot was submitted on time." PFR ¶ 51 (citing *Pa. State Conf. of NAACP Branches v. Secretary Com. of Pa.*, 97 F.4th 120, 129 (3d Cir. 2024)).

Petitioners aver that in the 2024 primary election, "enforcement of the dating provision again resulted in the arbitrary and baseless rejection of thousands timely ballots." PFR ¶ 57. Petitioners assert that in the 2024 primary election, "several thousand timely absentee and mail-in ballots were rejected because of the envelope dating provision." PFR ¶ 58. Petitioners attached to their PFR affidavits of various voters from several different counties who submitted otherwise timely absentee or mail ballots but had them rejected because the ballots were undated or wrongly dated. *See* PFR ¶ 76(a)-(k).

Petitioners acknowledge that the date requirement "survived previous court challenges" but maintain that this is the first challenge to the requirement under Article I, Section 5. *See* PFR ¶¶ 60-61. Petitioners argue that Article I, Section 5 requires election laws to be applied in a manner that enfranchises, rather than disenfranchises voters. *See* PFR ¶ 83. Petitioners assert that the "[c]ontinued application of the" dating requirement "will result in the disenfranchisement of eligible voters" unless it is enjoined. PFR ¶ 85.

As such, Petitioners ask this Court to declare "that enforcement of the Election Code's envelope dating provisions, 25 P.S. §§ 3146.6(a),

3150.16(a), to reject timely mail ballots submitted by eligible voters, based solely on" wrongly or incorrectly dated outer envelopes "is unconstitutional under the Free and Equal Elections Clause, Pa. Const. art. I, § 5." PFR WHEREFORE Cl ¶¶ (a)-(b). Petitioners also seek to enjoin further enforcement of Sections 3146.6(a), 3150.16(a). *See id*.

On June 7, 2024, the Republican National Committee and Republican Party of Pennsylvania (Republican Party Intervenors) and the Democratic National Committee and the Pennsylvania Democratic Party (Democratic Party Intervenors) filed applications to intervene. On June 10, 2024, this Court granted both applications to intervene.

Also on June 10, this Court issued a scheduling order that set deadlines for the parties to submit cross-applications for summary relief, and briefs in support thereof, (June 24, 2024), and briefs in opposition to the cross-applications for summary relief (July 8, 2024).

On June 11, 2024, Proposed Intervenor, Westmoreland County Commissioner Doug Chew, in his official capacity as a member of the Westmoreland County Board of Elections, filed an Application to Intervene. Commissioner Chew sought to intervene to defend his duty

to administer elections and enforce the Election Code's dating requirement.

On June 12, 2024, this Court ordered the parties who oppose Commissioner Chew's intervention to file an answer to the Application to Intervene by noon on June 18, 2024. *See* Order (dated 6/12/24). The Court further ordered that any party who did not file an answer "will be considered by the Court to be unopposed to the Application to Intervene." *Id.*

On June 18, 2024, Petitioners and Respondent Schmidt filed Answers to Commissioner Chew's Application to Intervene; all other parties did not file an answer and therefore did not oppose Commissioner Chew's application.

On June 20, 2024, Commissioner Chew filed an Application to File Reply Brief in Further Support of Application to Intervene and attached to that Application a Reply Brief as well as an Answer and New Matter to the PFR. That same day, this Court granted the Commissioner Chew's Application to File Reply Brief in Further Support of Application to Intervene and docketed the Reply Brief. The Court also held the Application in abeyance pending the disposition of

Commissioner Chew's Application to Intervene to the extent it requested the Court to docket the attached Answer and New Matter. Commissioner Chew's Application to Intervene is pending.

B. Prior Unsuccessful Challenges to the Date Requirement

This is the latest in a series of challenges to the dating requirement. The prior decisions examined the Election Code's plain language and whether the dating requirement violated the Civil Rights Act of 1964.

In *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (OAJC) (*In re 2020 Canvass*), the Supreme Court considered whether "shall" as used in Sections 3146.6(a) and 3150.16(a) was mandatory such that the failure to date the declaration on the outer envelope resulted in the absentee or mail ballot being set aside. *See id.* at 1061-62. A four-justice majority concluded that the obligation to date the declaration was mandatory, but granted relief prospectively.

Next, in *Ritter v. Lehigh Cty. Bd. of Elections*, 1322 C.D. 2021, 2022 WL 16577 (Pa. Cmwlth. Jan. 3, 2022), this Court concluded that notwithstanding *In re Canvass*'s fractured nature, "a majority of

Justices (4 of them) . . . generally agreed that . . . the undated mail-in ballots must be set aside." *Id*. at *7. The Pennsylvania Supreme Court denied allocatur in *Ritter*.

The plaintiffs in *Ritter* filed a federal lawsuit claiming that the date requirement violated the materiality provision in the Civil Rights Act of 1964. *See Migliori v. Lehigh Cty. Bd. of Elections*, No. 22-cv-00397, 2022 WL 802159 at *1 (E.D. Pa. Mar. 16, 2022) (*Migliori I*). The district court concluded that the plaintiffs lack the capacity to challenge the date requirement because the materiality provision, *see* 52 U.S.C. § 10101(a)(2)(B) (the "Materiality Provision"), did not allow for a private cause of action. *See id*. at * 13. The Third Circuit reversed, concluding that there is a private cause of action, and that the dating requirement violated the materiality provision. *See Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022) (*Migliori II*). The Supreme Court ultimately vacated the judgment of the Third Circuit and remanded the case with instructions to dismiss the case as moot. *See Ritter v. Migliori,* ____U.S. ____, 143 S.Ct. 297, 214 L.Ed.2d 129 (2022) (Mem.).

Following Third Circuit and Supreme Court dispositions, the Secretary of State issued guidance suggesting that county boards of

elections could count undated or wrongly dated absentee and mail ballots. *See Ball v. Chapman*, 289 A.3d 1, 12 (Pa. 2023). This guidance prompted a new challenge to the date requirement. In *Ball*, the Supreme Court reaffirmed its holding in *In re Canvass*, *see Ball*, 289 A.3d at 20-23, and was evenly divided on the question of whether the dating requirement violated the federal materiality provision. *See id*. at 28.

Finally, although the Federal District Court for the Western District of Pennsylvania held that the dating requirement violated the Materiality Provision, *see Pennsylvania State Conf. of NAACP v. Schmidt*, __F.3d__, 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023) (*NAACP I*), that decision was reversed by the Third Circuit Court of Appeals, which held that the requirement does not violate the federal statute at issue. *See Pa. State Conf. of NAACP Branches v. Secretary Com. of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024) (*NAACP II*). The Third Circuit concluded: we hold that the Materiality Provision only applies when the State is determining *who* may vote. In other words, its role stops at the door of the voting place. The Provision does not apply to rules, like the

date requirement, that govern *how* a qualified voter must cast his ballot for it to be counted." *Id.* (emphasis in original).

From *In re Canvass* to *NAACP*, state and federal appellate courts have all concluded that the dating requirement is mandatory and enforceable.

V. SUMMARY OF ARGUMENT

Petitioners' Application for Summary Relief should be denied for two overarching reasons. *First*, and most fundamentally, this Court lacks jurisdiction over this action because of the multiple overlapping jurisdictional defects. *Second*, even if this Court were to reach the merits of the constitutional claim, none of the arguments offered in support of invading the dating requirement withstand scrutiny.

VI. ARGUMENT

A. This Court does not have subject matter jurisdiction over the Petition.

In their thinly veiled effort to assemble a lineup of sympathetic "respondents," Petitioners overlooked the most rudimentary prerequisite to obtaining relief: jurisdiction. It is axiomatic that failure to join all necessary and indispensable parties deprives a court of subject matter jurisdiction. *See Bucks Cnty. Servs., Inc. v. Philadelphia*

Parking Auth., 71 A.3d 379, 387 (Pa. Cmwlth. 2013). Generally, a party is indispensable "when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988); *see also City of Philadelphia v. Com.*, 838 A.2d 566, 581 (Pa. 2003) ("The basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of him or her." (cleaned up)). Moreover, where a declaratory judgment is sought, "all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action." *Id.*; *see also* 42 Pa.C.S. § 7540(a) ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.").

Here, examining the nature of Petitioners' central claim and the relief they seek, Petitioners have failed to include at least two sets of indispensable parties.

1. Because the Attorney General is the only officer statutorily obligated to defend the constitutionality of legislative enactments, he is an indispensable party.

First, because Petitioners have mounted a facial challenge to the constitutionality of a duly enacted statute, the Attorney General of the Commonwealth of Pennsylvania is plainly an indispensable party. Specifically, as the Pennsylvania Supreme Court has recognized, "in Pennsylvania, the Attorney General is the Commonwealth official statutorily charged with defending the constitutionality of all enactments passed by the General Assembly, regardless of the nature of the constitutional challenge or the opinion of any other state official concerning a given statute's validity." *City of Philadelphia*, 838 A.2d at 582-83 (citing 71 P.S. § 732–204(3) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes ...."). Accordingly, in the context of "a facial constitutional attack upon an act of the General Assembly, the Attorney General stands in a representative capacity for, at a minimum, all non-Commonwealth parties having an interest in seeing the statute upheld." *Id.* at 583.

Although the *City of Philadelphia* Court ultimately declined to find the Attorney General indispensable, the basis for its holding

further confirms that, under the present circumstances, justice cannot be done without the Attorney General. *First*, unlike *City of Philadelphia*, the Commonwealth is not a party to this action. *Id.* at 582 (finding it "significant" that the Commonwealth was a party). *Second*, none of the parties are represented by the Attorney General. *See Stilp v. Commonwealth*, 910 A.2d 775, 785 (Pa. Commw. Ct. 2006) ("[W]here a constitutional challenge to a legislative enactment may potentially affect a large number of parties whose joinder would render litigation unmanageable, participation by the Attorney General and representation by the presiding officers of both chambers and by minority leaders of both chambers may be sufficient to confer jurisdiction."), *aff'd sub nom. Stilp v. Com., Gen. Assembly*, 974 A.2d 491 (Pa. 2009).[2] *Third*, unlike *City of Philadelphia*, which revolved around procedural restrictions on the legislative power under the State Constitution, this case involves a substantive challenge to a statute.[3]

Moreover, examining the circumstances of this case, there should

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[2] *City of Philadelphia*, 838 A.3d at 572 ("It is therefore significant that the Commonwealth and the Governor, both of whom are represented here by the Attorney General, are parties to this lawsuit.").

[3] *See id.* ("[I]t bears noting that this case is somewhat unusual in that the crux of the challenge centers, not upon any substantive aspect of the legislation at issue, but upon the procedure by which it was adopted.).

be little doubt that justice cannot be done in the absence of the Attorney General. To understand this point, several points bear emphasizing.

First, in an abdication of responsibility that is rarely seen, the Secretary has joined Petitioners' request to have declared unconstitutional a statute enacted by a democratically elected legislature and signed into law by a democratically elected Governor. While a refusal to vigorously defend the constitutionality of a challenged statute is unseemly in its own right, the Secretary's actions here are anathema. Rather, *Commonwealth v. Pownall*, 278 A.3d 885, 889 n.2 (Pa. 2022) (noting the unusual specter of a county district attorney challenging the constitutionality of a criminal statute and refusing to "attribute [the] position" to the Commonwealth).

But if that were not enough, despite ostensibly seeking relief against all sixty-seven county boards of elections, Petitioners have only named two boards (*i.e.*, less than three percent of the boards of elections in Pennsylvania) as respondents. And those two hand-picked "respondents" have also made clear that they, too, have no interest in defending the constitutionality of the statute. Instead, like the Secretary, they see no "purpose" behind the statute and, thus, would

like this Court to do away with it.

So who is charged with defending this law? As currently constituted, the responsibility for this task is now left to a political party and a member of one of the remaining sixty-five boards of elections. But Commissioner Chew and the RNC do not—and cannot—represent the interests of the Commonwealth and its citizens, who elect an Attorney General every four years for precisely situations like the present one. In short, justice cannot be done without participation by the Attorney General.

2. Every Pennsylvania Board of Elections is an indispensable party and, thus, Petitioners' failure to name them deprives this Court of jurisdiction.

Related to the above, as explained in Commissioner Chew's opening brief, because Petitioners seek relief that would purport to bind all sixty-seven counties, all sixty-seven boards of elections (and not merely the two handpicked by Petitioners) are necessary and indispensable.

Petitioners' rejoinder that the other sixty-five county boards of elections are not indispensable parties is unintelligible. According to Petitioners, they were not required to name the other county boards of

elections because "each of the Petitioners has submitted a declaration indicating the counties in which it conducts election activities, including one or both of the County Respondents." Pet. Br. at 38. Interpretation: Petitioners can seek a declaration that a statutory provision enforced by sixty-seven boards of elections is unconstitutional based, in no small part, on allegations concerning the conduct of all sixty-seven boards; but somehow, only two of the sixty-seven boards must be present. After calling into question the actions of non-named county boards of elections, Petitioners wryly observe that they do not seek relief against those boards of elections.[4] Petitioners cannot have it both ways. No matter how Petitioners spin it, they were required to name the other sixty-five county boards of elections whose conduct is being directly challenged by Petitioners.[5]

To support their argument, Petitioners rely solely on *City of Philadelphia*. But that case is of little help.

To begin, unlike the present circumstances, the extant litigants in

[4] To be clear, as developed above, Petitioners do not seek relief against *any* board of elections.

[5] To state the obvious, Petitioners named only the Allegheny and Philadelphia County Boards of Elections because those boards' interests are aligned with Petitioners. *See* Allegheny and Philadelphia County Boards of Elections' Statement of Position at 2.

City of Philadelphia were vigorously defending the rights of the absent parties. Furthermore, in *City of Philadelphia*, the Supreme Court concluded that a large group of tangentially related persons were not indispensable parties in an action challenging the constitutionality of a law that "reorganized the governance of the Pennsylvania Convention Center." *Id.* 570-71. The Respondents in *City of Philadelphia* argued that the following parties were indispensable: "the new Convention Center Authority board members, the four counties with new appointment powers relative to the Convention Center Authority, the Public Utility Commission, PICA and all of its bondholders, and the City's firefighters' and police officers' unions." *Id.* at 581. The Supreme Court concluded those parties were not indispensable because "requiring the participation of all parties having any interest which could potentially be affected by the invalidation of a statute would be impractical," and run contrary to the Declaratory Judgment Act's intended remedial goal. *See id.* at 583. But that holding does not apply here because the other sixty-five county boards of elections are not merely "interested" in this case; rather, they are "'officers charged with the enforcement of the challenged statute[.]'" *Id.* (quoting *White House*

Milk Co. v. Thomson, 81 N.W.2d 725, 729 (Wis. 1957).

In this regard, none of the limiting principles to the indispensable party requirement recognized by the Supreme Court, *see id*. at 582 (interests involved are indirect or incidental or "where a person's official designee is already a party"), are present here. As detailed in Proposed Intervenor's Brief in Support of Summary Relief, *see* Proposed Intervenor Br. at 16-23, as well as in the Petition for Review, *see* PFR ¶¶ 44, 64(a)-(f), each county board of elections independently administers the Election Code—including the date requirement. The enforcement authority of the sixty-five other county boards of elections is therefore directly implicated by Petitioners' claims.

Moreover, and most fundamentally, justice cannot be afforded "without violating the dues process rights of absent parties[.]" *Orman v. Mortgage I.T.*, 118 A.3d 403, 407 (Pa. Super. 2014). To explain, Petitioners have named only two county boards of elections while directly challenged the conduct of non-named county boards of elections. *See*, *e.g.*, *See* PFR ¶¶ 76(a)-(k) (referencing affidavits attached to the Petition from voters from counties other than Allegheny and Philadelphia Counties). Justice cannot be done unless the other county

boards have the opportunity to defend their enforcement on the absentee and mail-in provisions. Even if Petitioners' blanket and unsupported assertion that "other county boards of elections would be expected to heed" a ruling that the date requirement is unconstitutional is correct (it is not), that argument misses the mark. Notwithstanding whether a judgment against two county boards of elections is binding on all county boards of elections, the sixty-five other county boards of elections must be afforded the chance to defend their conduct; otherwise, their due process rights are violated.

The named county boards of elections are not fair proxies for the other county boards of elections because, as Petitioners acknowledge, each county board of elections enforces the date requirement in a different manner. Moreover, the two named county boards of elections have not defended the date requirement even though, at present, all county boards of elections are required by law to enforce it. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023).

In short, therefore, *City of Philadelphia* does not change the calculus. Here, there are sixty-seven readily identifiable interested parties whose interests are directly defined by the Election Code and

are being challenged by Petitioners here.

B. Because the Secretary, who is the only Commonwealth party, is not an indispensable party, this Court lacks jurisdiction over this action.

Petitioners' basis for naming Secretary Schmidt is that he is required to "'receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for the candidates and upon questions as required' by the Election Code." Pet. Br. at 36 (quoting 25 P.S. § 2621(f)).[6] But these general duties do not give Secretary Schmidt any authority to *enforce* the absentee and mail-in ballot requirements. In this regard, the fact that Secretary Schmidt is required to receive and compute totals from county boards of elections—after the county boards of elections determine whether a absentee or mail-in ballot satisfies the Election Code's strictures—is inconsequential.

In fact, that is precisely why, for example, a person who seeks to challenge a canvassed mail-in ballot is required to appeal the county board's decision and is not required to appeal from the Secretary's

[6] It is entirely irrelevant that Secretary Schmidt determines and describes the form of the absentee and mail-in ballots. *See* Pet. Br. at 37. Those general duties have nothing to do with the enforcement of the date requirement at issue here.

computation of the results. *See* 25 P.S. 3157(a). As explained by this Court recently: "The Board did not make any 'decision regarding the computation or canvassing of the returns' when it submitted its unofficial returns on April 30, 2024. *See* 25 P.S. § 3157(a). By that time, the Board had already decided to compute and canvass the disputed ballots[.]" *In re Six Ballots in the 2024 General Primary Election*, 629 C.D. 2024, *slip. op.* at 9 (Pa. Cmwlth. July 3, 2024). Stated otherwise, by the time Secretary Schmidt gets the unofficial results, the work is done by the county boards of elections.

For this reason, Secretary Schmidt lacks the "'powers or duties with respect to the law's enforcement or administration.'" *Stedman v. Lancaster Cty. Bd. of Commissioners*, 221 A.3d 747, 757 (Pa. Cmwlth. 2019) (quoting *Wagaman v. Attorney General of the Com., of Pa.*, 872 A.2d 244, 246-47 (Pa Cmwlth. 2005)); *see id.* (explaining that "the official who is charged with the *enforcement* ***and*** *administration* of the statute at issue" is the a necessary party) (brackets and quotations omitted; emphasis supplied).

Moreover, this Court has already concluded that the Secretary was not an interested party in the context of a petition for review

challenging county boards of elections notice and cure procedures with regard to absentee and mail-in ballots. *See Republican National Committee v. Commonwealth*, 447 M.D. 2022, *slip. op.* at 3 (Pa. Cmwlth. Mar. 23, 2023). There, as here, petitioners relied on the Secretary's general duties under the Election Code, as well as her duty to provide administrative guidance to county boards of elections, to name her as a party. *See id.* at 18-19. This Court disagreed with petitioners and emphasized the Secretary's "limited" and "general" duties and observed that the "heart of the case" was the county boards of elections' enforcement of the Election Code. *See id.* at 20. This Court therefore dismissed the Secretary from the action and concluded that it did not have original jurisdiction over the matter pursuant to 42 Pa.C.S. § 761(a)(1).

There is no reason to deviate from *Republican National Committee*'s sound holding. As there, the heart of the matter here is the county boards of elections' authority to enforce the absentee and mail-in ballot provisions of the Election Code. This Court should therefore dismiss Secretary Schmidt from this action as a non-indispensable

party and conclude that it lacks original jurisdiction pursuant to 42 Pa.C.S. § 761(a)(1).

C. Because Petitioners cannot obtain relief against *any* county board of elections, a decision in their favor will not terminate the controversy or uncertainty, thereby rendering declaratory judgment inappropriate.

It is well-settled that declaratory relief is only granted where it is likely to terminate a controversy or settle an uncertainty. *See McCord v. Pennsylvania Gaming Control Bd.*, 9 A.3d 1216, 1220 (Pa. Cmwlth. 2010). Here, the controversy cannot be settled unless an order is entered against boards of elections. But Petitioners sought relief against Secretary Schmidt only and are therefore foreclosed from obtaining relief against any county board of elections. *See* PFR Prayer for Relief (averring that Petitioners have suffered and will continue to suffer due to the "unlawful acts, omissions, policies, and practices of ***Respondent*** [singular]" and requesting the court to "enter judgment in their favor and against the Secretary of State") (emphasis added). This Court should not extend the equitable relief beyond that sought by Petitioners where, as here, such an extension would require the Court to grant relief against a party from whom relief was never sought.

As a general principle, a court in equity may not grant relief beyond that which has been requested. *See Williams Tp. Bd. of Supervisors v. Williams Tp. Emergency Co., Inc.*, 986 A.2 914, 921 (Pa. Cmwlth. 2009) ("a chancellor in equity may fashion a remedy that is narrower than the relief requested, he or she may not grant relief that exceeds the relief requested"). Accordingly, this court cannot grant any relief against any count board of elections.

The general principle that courts may grant relief that is somewhat different from the prayer for relief, which was recognized in recognized in *Annenberg v. Commonwealth*, 757 A.2d 338 (Pa. 2000), is inapplicable here. *See Annenberg*, 757 A.2d at 348 (noting that a "court may grant any appropriate relief that conforms to the case made by the pleadings although it is not exactly the relief which has been asked for by the special prayer"). Specifically, *Annenberg* involved an *extension* of relief against a party from whom relief was originally sought and *not*, as here, an extension of relief to include a party against whom relief was never sought in the first instance.

To explain, the *Annenberg* court affirmed the lower courts' decision to award monetary relief notwithstanding that the petitioners

sought only declaratory and injunctive relief. *Id.* Noting that the party's right to a refund was already at issue in the related underlying administrative proceedings, the Court explained that "if [it] did not review at this juncture what relief is due," it would "most likely be compelled to review this issue later" in any event. *Id.* Thus, "to achieve the interests of justice in an expeditious fashion[,] the Court declined to strictly adhere to the prayer for relief. *Id.* The interests animating *Annenberg* are not present here because Petitioners have never sought relief against the Allegheny or Philadelphia County Board of Elections.

In this connection, the court would not merely be extending the form of relief sought, but would, in fact, be fashioning an entirely new remedy against a party from whom relief was not sought in the first instance. That result is untenable; especially in a multi-defendant context where a petitioner can seek different forms of relief against different respondents. *See generally*, Pa.R.Civ.P. 1019(a), 1020(a) & 1028(a)(3). In the multi-defendant context, respondents would experience extreme prejudice if they were forced to somehow defend against claims never made against them. *Accord Weiss v. Equibank*, 460 A.2d 271, 274 (Pa. Super. 1983) (purpose of Pa.R.Civ.P. 1019(a) is to

have the complaint "apprise the defendant of the nature and ***extent*** of the plaintiff's claim so that the defendant has notice of what the plaintiff intends to prove at trial and may prepare to meet such proof with his own evidence." (emphasis added)).

Because the relief that Petitioners would seek to "expand" was never sought against the Allegheny and Philadelphia County Boards of Elections in the first place, such relief is not "consistent with and agreeable to the case pleaded and proven." *Kline v. Travelers Personal Security Ins. Co.*, 223 A.3d 677, 685 (Pa. Super. 2019) (quotations omitted). Indeed, even Petitioners' general prayer for relief, which asks this Court to "[p]rovide such other and further relief as this Honorable Court deems just and appropriate[,]" when read in context, should be limited to such further relief against Secretary Schmidt only because he was the only party from whom relief was sought.

Accordingly, this Court should decline Petitioners invitation to extend its Prayer for Relief to the Allegheny and Philadelphia Boards of Elections, since doing so would be inconsistent with the procedural rules that require specifically pleaded causes of actions to afford respondents a fair opportunity to defend themselves.

D. Because Petitioners have failed to state a viable claim under the Free and Equal Elections Clause, the Court should deny their Application and dismiss this action.

The pervasive and overlapping jurisdictional infirmities aside, Petitioners' Application is also substantively defective. As developed below, although presented under the auspices of the Free and Equal Elections Clause, the arguments against the constitutionality of the dating requirement have little to do with the constitutional provision in question; rather, what this Court has been presented with is a clumsily repackaged rendition of legal theories that, when litigated to conclusion, have been rejected in every forum. Accordingly, as set forth in Commissioner Chew's principal brief and developed further below, this Court should not only deny Petitioners' Application, but it should also grant Commissioner Chew's Application and dismiss this case.

1. Claims under the Free and Equal Elections Clause are analyzed under the well-settled "gross abuse" or "plain, palpable, and clear abuse" standard.

Most fundamentally, Petitioners' Application is chiefly predicated on an inapposite constitutional standard. Specifically, the lynchpin of the DNC and Petitioners' argument is that and the dating requirement is subject to "strict scrutiny" thus, cannot pass constitutional muster

unless it is "narrowly tailored" to achieve a "compelling governmental interest." This paradigm, however, is drawn from *federal* constitutional law. And because "the Free and Equal Elections Clause has no federal counterpart," none of the standards discussed by the DNC and Petitioners—least of all "strict scrutiny"—are applicable here. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). Rather, as this Court has recognized, "[the Pennsylvania] Supreme Court has applied a 'gross abuse' standard to determine whether election statutes violate the 'free and equal' clause[.]" *In re Nomination Papers of Rogers*, 908 A.2d 948, 954 (Pa. Cmwlth. 2006) (Colins, P.J.) (quoting *Winston v. Moore*, 91 A. 520, 522-23 (Pa. 1914)). And of central import here, the "gross abuse" inquiry, the Court explained, is "considerably" less exacting than that employed by the federal courts and cautioned that it "giv[es] substantial deference to the judgment of the legislature."[7]

[7] The substantial deference standard articulated by *In re Nomination Papers of Rogers* is firmly rooted in an unbroken line of Supreme Court precedent that dates to at least the *Patterson* Court's decision, which held that "the power to regulate elections is a legislative one, which has always been exercised by the General Assembly since the foundation of the government." *Patterson*, 60 Pa. at 75; Subsequently, in *Winston*, the Supreme Court again reaffirmed that "[t]he power to regulate elections is legislative, and has always been exercised by the lawmaking

Indeed, twelve years later, the distinction drawn by *In re Nomination Papers of Rogers* was crystalized in *League of Women Voters*. Discussing the history of the provision, the Court reiterated that it "entertains as distinct claims brought under the Free and Equal Elections Clause of our Constitution and the federal Equal Protection Clause, and [] adjudicate[s] them separately, utilizing the relevant Pennsylvania and federal standards." *League of Women Voters*, 178 A.3d at 813 (citing *Shankey v. Staisey*, 257 A.2d 897, 899 (Pa. 1969)). In describing the relevant inquiry under the Free and Equal Elections Clause, the Court acknowledged that it "has infrequently relied on this provision to strike down acts of the legislature pertaining to the conduct

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branch of the government." *Winston*, 244 Pa. at 454; *accord, e.g.*, *Rowe ex rel. Schwartz v. Lloyd*, 36 A.2d 317, 318 (Pa. 1944); *Oughton v. Black*, 61 A. 346, 349 (Pa. 1905) *Wilson v. Philadelphia Cnty.*, 179 A. 553, 554 (Pa. 1935); *Appeal of Cusick*, 20 A. 574, 575 (Pa. 1890). In fact, the *Winston* Court explained that its research has revealed that "no act dealing solely with the details of election matters has ever been declared unconstitutional by this court[,]" since "ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law." *Id.* at 455. Ultimately, therefore, the Court held that "[i]n the absence of any express constitutional limitation upon the power of the Legislature to make laws regulating elections and providing for an official ballot, nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted." *Id.*

The Dauphin County Court of Common Pleas, sitting as the Commonwealth Court, has also recognized and applied the "gross abuse" standard. *See, e.g.*, *Commonwealth ex rel. Jones v. King*, 5 Pa. D. & C. 515, 518 (Com. Pl. 1924).

of elections," but explained that "[its] view as to what constraints [the Free and Equal Elections Clause] places on the legislature in these areas has been consistent over the years." Specifically, the *League of Women Voters* panel relayed, acts of the General Assembly in this sphere will not be invalidated absent a showing of "plain, palpable and clear abuse of the power which actually infringes the rights of the electors." (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (Pa. 1869)).

The Secretary, for his part, acknowledges that the Free and Equal Elections Clause is not conterminous with the federal constitutional standard, but suggests that the both "demand[] that burdens on voting rights be justified by sufficient regulatory interests." Br. at 17.[8] This formulation is not only contrary to the clear mandate from *League of Women Voters*, but also contravenes the Secretary's advocacy when the actions of the executive branch have been challenged under the Free and Equal Elections Clause. *See, e.g.*, *Banfield v. Cortes*, 110 A.3d 155,

[8] In this connection, it bears emphasizing that, in decoupling the Free and Equal Elections Clause from the Equal Protections Clause, the Court did not hold that claims under the State Constitution are subject to stricter scrutiny, or a more exacting standard. Rather, the thrust of *League of Women Voters* was that Article I, Section has a broader ***sweep*** than the United States Constitution and, thus, applies where the Equal Protection Clause may not. In short, the overriding principle relayed by *League of Women Voters* is that there is no federal analogue.

176 (Pa. 2015) ("As there must be substantial governmental regulation to ensure that elections are fair, honest, and orderly, the Secretary asserts that the Commonwealth Court has applied a 'gross abuse' standard to review claims challenging the constitutionality of election statutes."); *National Election Defense Coalition v. Boockvar*, 266 A.3d 76, 83 (Pa. Cmwlth. 2021) ("The Secretary asserts that Petitioners have likewise failed to state a claim for relief under Count VI of the Petition [alleging a violation of the Free and Equal Elections Clause], because Petitioners have not alleged sufficient facts demonstrating a plain, palpable, and clear abuse of power that actually infringes on the exercise of their voting rights with respect to the Secretary's certification of the ExpressVote XL machines, as is required to make out their constitutional claims.").

Viewed through this lens, Petitioners have not—and cannot—carry their "heavy burden" of showing that the dating requirement "clearly, plainly, and palpably" violates the Free and Equal Elections Clause. *Accord League of Women Voters*, 178 A.3d at 801 ("[A] statute is presumed to be valid, and will be declared unconstitutional only if the challenging parties carry the heavy burden of proof that the enactment

clearly, palpably, and plainly violates the Constitution." (internal quotation marks and citation omitted).

2. Because the dating requirement does not create an obstacle that renders the exercise of the franchise impossible or unreasonably difficult, the constitutional challenge fails.

As this Court recognized a century ago, when presented with a challenge under the Free and Equal Elections Clause, "[t]he test as to the constitutionality of such legislation is whether it denies the franchise or renders its exercise ***so difficult and inconvenient as to amount to a denial***." *Commonwealth ex rel. Jones v. King*, 5 Pa. D. & C. 515, 518 (Pa. CCP Dauph. Cnty. Pls. 1924) (citing *Winston* and *Patterson*).[9] The dating requirement neither denies the right of suffrage, nor does it render it "so difficult" as to amount to a denial. To the contrary, dating a mail-in ballot declaration is a minimal burden with which countless Pennsylvanians have complied. So minimal, in

[9] *See also Appeal of Cusick*, 20 A. at 578 (acknowledging that "[i]t may be that the careless voter who does not value his privilege sufficiently to see, as every one can see with very little trouble, that his name is placed upon the registry lists, and who gives no thought to the means to establish his right to vote until he comes to the poll to deposit his ballot, may suffer some inconvenience, and in some instances lose his vote," but finding this possibility insufficient to establish a constitutional violation).

fact, that approximately 710,000 voters in the 2024 primary election were able to comply with this mandate.

Indeed, Petitioners do not meaningfully argue that providing a handwritten date imposes a burden on voters—let alone one that is unreasonable and so difficult that it is tantamount to total denial of the right to vote. Nor could they, since whatever minor "difficulties" may be posed by writing a date fall well short of a constitutional infirmity.

In this regard, this Court look no further than *Patterson*, where the Court explained that "[i]ndividuals may experience difficulties, and some may even lose their suffrages by the imperfection of the system; but this is no ground to pronounce a law unconstitutional, unless it is a clear and palpable abuse of the power in its exercise." *Patterson*, 60 Pa. at 83. Driving the point home, the *Patterson* Court further emphasized that "hardship is not the test of the constitutionality of a law[,]" *id.* and concluded "we, as a court, have no right to put our hands upon the whole system, on grounds of mere hardship, or for defects of regulation, which are not clear and palpable violations of the letter or very spirit of the Constitution." *Id.* at 85. Ultimately, *Patterson*'s rationale is equally applicable here:

> I cannot understand the reasoning which would deny to the legislature this essential power to define the evidence which is necessary to distinguish the false from the true. The logic which disputes the power to prohibit masqueraders in elections, on the ground that it affects their freedom or equality, must also deny the power to repress the social disorders of a city, because the same Bill of Rights declares that all men are free and equal and independent and have the right of pursuing their happiness.

Id. at 82-83; *see also Appeal of Cusick*, 20 A. 574, 577 (Pa. 1890) ("It certainly imposes no hardship upon the voter to require him to swear, to the best of his knowledge and belief, when and where he was born.").

To the extent Petitioners' attempt to characterize the burden as "disenfranchisement," rather than what it truly is—*i.e.*, writing a date date—such a construct is unavailing. This type of "disenfranchisement" has never been "disenfranchisement" that Courts hav Indeed, sixty years ago, the Pennsylvania Supreme Court rejected a theory of "disenfranchisement" remarkably similar to the one advanced here, explaining "[s]uch alleged disfranchisement is more superficial than real," and that "if there was any disfranchisement the voters carelessly or unthinkingly disfranchised themselves." *In re Primary Election Apr. 28, 1964*, 203 A.2d 212 (Pa. 1964). Justice Roberts's concurrence elaborated, explaining "the voter who undertook to operate levers

contrary to instructions and to established custom or who chose not to pull any lever at all is no more entitled to have his 'vote' counted than the voter who failed to appear at the polls." *Id.* at 221. As aptly summarized by Justice Roberts, "[t]he application of this kind of paternalism would ignore the fact that 24 out of every 25 voters who entered the voting booths in the districts in question voted correctly, regularly and in accordance with the instructions to voters." *Id.* In short, the source of "disenfranchisement" Petitioners complain of is not from the application of this neutral requirement, but from the error of those who fail to follow the law.[10]

Examples of such "disenfranchisement" under Petitioners' construct are legion: the deadline for receipt of mail-in ballots

[10] *See also In re Canvass of Absentee Ballots of Gen. Election*, 39 Pa. D. & C.2d 429, 432 (C.P. Montgomery Cty. 1965) ("The voter, by failing to observe the statutory requirements, has disfranchised himself[.]" (quoting *In re Canvass of Absentee Ballots of Apr. 28, 1964, Primary Election*, 34 Pa. D. & C.2d 419, 422-23 (C.P. Philadelphia Cty. 1964)); *In re Whitpain Twp. Election Case*, 44 Pa. D. & C. 374, 384 (C.P. Montgomery Cty. 1942); *Case of Loucks*, 1893 WL 3125, at *4 (Pa. Quar. Sess. 1893); *Long v. Kochenderfer*, 1894 WL 3768 (Pa. Quar. Sess. 1894); *see also Rary v. Guess*, 198 S.E.2d 879, 880 (Ga. 1973) (holding that "a voter has disenfranchised himself" when he fails to follow a statutory mandate for voting); *see generally Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'").

disenfranchises those voters whose ballots arrive late; prohibiting polls from opening before 7:00 a.m. makes it impossible or inconvenient for some voters to cast a ballot; requiring polls to close at 8:00 p.m. disenfranchises those who find it more convenient to vote after 8:00 p.m.; the deadline for applying for a mail-in ballot also disenfranchises, as it precludes those who submit their applications late from voting.[11] The list could continue, but the point is clear: the burden imposed by this regulation is not "disenfranchisement;" rather, it is a burden of handwriting the correct date.

To the extent the Secretary claims that "cancelling ballots for declaration date errors produces a constitutionally 'intolerable ratio of rejected ballots[,]'" Br. at 18 (quoting *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J., concurring)), that argument is unpersuasive. The ratio of ballots with undated or misdated voter declarations in the most recent election, according to the Secretary's own data, was 0.6% of all mail-in ballots submitted. While a violation

[11] Notably, none of these "disenfranchising" obstacles are relevant to determining a voter's qualifications or preventing fraud. There is no reason to believe that allowing polls to open at 6:00 a.m. and close at 9:00 p.m., for example, would increase instances of fraud; nor are these arbitrary deadlines necessary to confirm a voter's qualifications.

of the Free and Equal Elections Clause may occur "if a substantial number or percentage of qualified electors are deprived of their right to vote[,]" no authority is offered (either binding or persuasive) for the notion that such a rate of rejection is considered "substantial" in the context of the Free and Equal Elections Clause.

Decisions from federal courts, which, as noted above, apply a more stringent standard, are also instructive. In *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179 (9th Cir. 2021), for instance, a group of voters alleged an undue burden on the right to vote from the state's election-day deadline for correcting missing signatures on mail-in ballots. Finding this burden to be minimal, the *Hobbs* Court reasoned that, to the extent the burden of signing the ballots or correcting a missing signature by the deadline "results in voters' not casting a vote in an election, that result was not caused by [the statutory requirements]," but by the voters' "own failure to take timely steps to effect their [vote]." *Id.* at 1189 (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)).

As in *Hobbs* and *In re Primary Election Apr. 28, 1964*, the alleged disenfranchisement results not from the requirement that they date the declarations on their mail-in ballots, but from their own failure to

complete their ballots as required. To determine otherwise and measure the burden of a voting prerequisite by the consequence of a voter's noncompliance would be to find that every voting prerequisite imposes the same burden and is subject to the same degree of strict scrutiny. *Hobbs*, 18 F.4th at 1188.[12]

3. Because the dating requirement is reasonably related to a proper legislative function and does not create an obstacle that renders the exercise of the suffrage impossible or unreasonably difficult, the constitutional challenge fails.

Against this backdrop, the challenge to the dating requirement cannot survive. The central theory undergirding Petitioners' Application is that the dating requirement "serves no purpose" and—since its enforcement results in rejection of several thousand noncompliant ballots—the statutory mandated is unconstitutional. As

[12] *See also New Georgia Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1291 (N.D. Ga. 2020) (finding that a voter assistance ban for absentee ballots was a moderate burden justified by the state interest in orderly administration of elections); *Harding v. Edwards*, 487 F. Supp. 3d 498, 515 (M.D. La. 2020) (concluding that the statutory requirements limiting who can vote by mail was a burden to be evaluated under *Anderson-Burdick*); *League of Women Voters of Ohio v. Larose*, 489 F. Supp. 3d 719, 735-37 (S.D. Ohio 2020) (finding signature-matching requirements for absentee voting to impose a moderate burden that was justified by the state's interests in combatting fraud and promoting orderly election administration).

explained below, even if this Court is inclined to treat ***alleged*** facts as ***established*** facts, the challenge to the dating requirement fails.

To begin, given that none of the parties urging this Court to invalidate the dating requirement have identify or applied the correct legal standard, it is unclear how a "lack of purpose" behind a statute fits into the inquiry required by Free and Equal Elections Clause. Indeed, although little authority is offered in this regard—either binding or otherwise—a review of prior decisions suggest that courts have been rightly hesitant to enter into this inquiry.[13]

Nevertheless, assuming *arguendo* that a statute's alleged lack of purpose plays some role in the constitutional analysis contemplated by the Free and Equal Elections Clause, examined under the proper rubric, the substantive arguments in this respect fail because the dating requirement does, in fact, serve a purpose. And that purpose furthers interests that are plainly consistent with the limitations prescribed by the Free and Equal Elections Clause.

[13] *See, e.g.*, *In re Nomination Papers of Rogers*, 908 A.2d at 955 ("While we may well question whether the "2 percent" is the best way to achieve the valid state interest of eliminating ballot clutter, we cannot conclude that the method chosen by the legislature constitutes a "gross abuse" of discretion.").

In this regard, it bears reiterating at the outset that the dating requirement Petitioners challenge ***does not*** apply to a ballot as such, but rather, a signed voter declaration, attesting, on pain of criminal penalty,[14] that the elector, *inter alia*, (1) is qualified to vote from the stated address; (2) has not already voted in the election; and (3) is qualified to vote the enclosed ballot. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1065 (Pa. 2020) (citing 25 P.S. § 3150.14). Accordingly, while the Secretary, the DNC, and Petitioners repeatedly suggest that that the dating requirement in question results in rejection of ballots simply because they lack a handwritten date on the "outer return envelope," this characterization imprecise and obfuscates the statutory scheme.

[14] *See* 25 P.S. § 3553 ("If any person shall sign an application for absentee ballot, mail-in ballot or declaration of elector on the forms prescribed knowing any matter declared therein to be false, or shall vote any ballot other than one properly issued to the person, or vote or attempt to vote more than once in any election for which an absentee ballot or mail-in ballot shall have been issued to the person, or shall violate any other provisions of Article XIII1 or Article XIII-D2 of this act, the person shall be guilty of a misdemeanor of the third degree, and, upon conviction, shall be sentenced to pay a fine not exceeding two thousand five hundred dollars ($2,500), or be imprisoned for a term not exceeding (2) years, or both, at the discretion of the court.").

With the above statutory construct in mind, it becomes readily apparent that the dating requirement is neither meaningless nor superfluous.

a. Pennsylvania courts, including this one, have recognized the salutary purpose of the dating requirement.

Most fundamentally, Pennsylvania Courts have already recognized that the dating requirement is not superfluous. Indeed, this Court was the first in the Commonwealth to recognize the "***obvious and salutary purpose*** behind the requirement that a voter date the declaration." *In Re 2,349 Ballots in 2020 General Election* (*Ziccarelli*), 2020 WL 6820816, at *6 (Pa. Cmwlth. 2020). Specifically, in holding that failure to submit a dated voter declaration rendered the accompanying mail-in ballot invalid, the panel explained that the dating requirement not only "provides a measure of security, establishing the date on which the elector actually executed the ballot in full," but "[t]he presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot, as reflected in the body of the declaration itself." *Id.*

Upon review, a majority of the Supreme Court agreed with this Court's substantive analysis (albeit in fragmented fashion). In this regard, expressly relying on the above-quoted language from *Ziccarelli*, Justice Dougherty (joined by then-Chief Justice Saylor and Justice Mundy joined), concluded that "there is an ***unquestionable purpose*** behind requiring electors to date and sign the declaration."[15] For his part, despite voicing his preference for a prospective application of the Court's ruling, Justice Wecht ***rejected*** the argument that "a voter's failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a 'minor irregularity.'" *Id.* at 1079 (Wecht, J., concurring and dissenting).[16] The overlapping rationale expressed in these two responsive opinions, the Supreme Court unanimously reaffirmed, constitute the majority holding. *See Ball*, 289 A.3d at 22 ("Four Justices agreed that failure to comply with

[15] *In re 2020 Canvass*, 241 A.3d at 1090-91 (Dougherty, J., concurring and dissenting) ("[T]he date on the ballot envelope provides proof of when the 'elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot[.]'" (quoting *In Re 2,349 Ballots*, 2020 WL 6820816, at *6)).

[16] *See also Ritter v. Lehigh Cnty. Board of Elections*, 2022 WL 16577, at *7 (Pa. Cmwlth. 2022); *In re Election in Region 4 for Downingtown School Board Precinct Uwchlan 1*, 2022 WL 96156, at *1 (Pa.Cmwlth., 2022).

the date requirement would render a ballot invalid in any election after 2020").[17]

Notably, relying on the *In Re Canvass*, the federal district court in *Migliori* also "conclude[d] that there are important interests sufficient to sustain the regulation in light of the minor requirement imposed." *Migliori I*, 2022 WL 802159 at *1. The trial court's decision in *Milgiori I* is particularly notable, given that it is the only instance in which a federal district court that was squarely presented with the dating requirement's purpose in the overall regulatory scheme—rather than its relation to determining the "qualifications" of a voter.

Thus, this Court need look no further than *Ball*, to conclude that Petitioners' characterization of the dating requirement as "meaningless," "without purpose," and a "minor technical irregularity" cannot succeed. Recasting the same legal arguments under the guise of a constitutional challenge does not alter the calculus.

b. A review of the attestations required by the voter declarations confirms that the dating

[17] *See also id.* at 29 (Donohue, J., concurring) (acknowledging that, despite her the views expressed in the *In re 2020 Canvass* OAJC, "the law is settled to the contrary").

requirement is a necessary component of the Election Code's statutory scheme.

To extent there is any doubt that the dating requirement is not "useless," a review of the three discrete representations made on a voter declaration shows why a majority of the Pennsylvania Supreme Court has remained unmoved by the very same arguments presented here. Instead, despite having fully considered arguments alleging a lack of "weighty interest," the Court has twice agreeing that failure to supply a handwritten date on a voter declaration is not a "minor irregularity." *In re 2020 Canvass*, 241 A.3d. at 1079 (Wecht, J., concurring and dissenting).

Turning, initially, to the first attestation on the declaration—*i.e.*, that the elector is qualified to vote from the stated address—under the Election Code, a person is qualified to vote "in the election district where he or she ... offer[s] to vote" if "[h]e or she shall have resided" there at least thirty days immediately preceding the election. 25 P.S. § 2811. In turn, under the Election Code, residence does not depend on mere registration status; rather, it "means the place where the elector makes his permanent or true home, his principal place of business, and his family residence, if he have one.'" *In re Stabile*, 36 A.2d 451, 453

(Pa. 1944) (quoting *Case of Fry*, 71 Pa. 302, 307 (1872)); *see also In re Stabile*, 36 A.2d at 453 (further cautioning that "[t]he fact of any person's residence, for any legal purpose, whether for voting, or for holding office, or for taxation, has never been determined merely by that person's 'say so'" and, instead "[i]n determining that question the state brushes aside all colorable pretences and finds the reality behind the guise" (emphasis in original)). It is self-evident, therefore, that whether a person resides at a specific address—and, therefore, is qualified to vote from there—may change in a matter of days. And the truthfulness of an elector's representation in this regard may change based on the date on which it is made.

To illustrate, consider a hypothetical voter who received a mail-in ballot on September 21, 2024 (the date on which all county boards of elections ***must*** commence delivery of ballots for the 2024 General Election), but on October 3, 2024, discovers that he must unexpectedly relocate to Ohio; on October 22, 2024 (two weeks before the election), he completes his move. If the voter signed the voter declaration on October 1, 2024, he truthfully attested to being a qualified voter and, indeed, would have had no reason to know that his residence would change.

However, if the voter signed the voter declaration on October 20, 2024, he plainly made a false representation and is guilty of fraud. Absent a dated declaration, under such circumstances, whether the elector had been truthful would be difficult, if not impossible to establish.[18]

As for the second representation made on the voter declaration (*i.e.*, that the elector has not already voted), it should not require a hypothetical to illustrate that, whether an elector's representation has not voted in the election may be true or false depending on the date on which the attestation is made.

As for the general representation that the elector is qualified to vote the enclosed ballot, in addition to removal of residence, other factors also bearing on an individual's qualification to vote can change with time. Again, consider a hypothetical elector who has been charged with a felony, but is not convicted until October 25, 2024. If that voter's

[18] In this regard, it also bears noting that scenarios similar to the one described above, even if seemingly unlikely, are hardly beyond the realm of possibility. In fact, just last week, this Court decided an appeal involving a who voter removed his residence within the 30-day period preceding an election. Although the matter involved a provisional ballot—rather than a mail-in ballot—the decision illustrates that the hypotheticals outlined above may very well describe actual voters. *See In re: Canvass of Provisional Ballots in the 2024 Primary Election Appeal of: Mike Cabell*, No. 628 C.D. 2024, 2024 WL 3252970, at *1 (Pa. Cmwlth. July 1, 2024)

absentee ballot voter declaration is signed at any point before October 25, 2024, the elector has been entirely truthful in representing himself as a qualified voter because "untried pretrial detainees and convicted misdemeanants must be afforded the right to register and vote by officials responsible for administration of the election laws in the Commonwealth of Pennsylvania." *Voting by Untried Prisoners and Misdemeanants*, 67 Pa. D. & C.2d 449 (Op. Pa. Atty. Gen. 1974). If, however, he signs the declaration after that date, the attestation is false, since a convicted felon is not qualified to vote under the Election Code. *See* 25 P.S. § 2602(w) (excluding incarcerated felons from the statutory definition of "qualified absentee elector"); *Mixon v. Commonwealth*, 759 A.2d 442, 450 (Pa. Cmwlth. 2000) ("Under the laws enacted within this Commonwealth, we again hold, as we did in *Martin v. Haggerty* and our State Supreme Court did in *Ray v. Commonwealth*, that incarcerated felons are not qualified absentee electors."), *aff'd*, 783 A.2d 763 (Pa. 2001).

In short, therefore, the accuracy of each of the three matters to which a voter must attest can—and often do—change with time because what is true today may not be true tomorrow.

Equally important, not only is the dating requirement ***capable*** of serving a legitimate purpose aimed at combating voter fraud, but as *Ball* acknowledged, it ***has*** served such a function. *See Ball*, 289 A.3d at 15 ("[O]fficials discovered that a ballot was fraudulent because the outer envelope had been dated twelve days after the putative elector had died."); *see generally Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022. In prior proceedings, the Secretary has maintained that that the circumstances in *Mihaliak* do not demonstrate a valid purpose for the dating requirement because the ballot at issue had been set aside before the officials discovered the fraud. But this argument is predicated on the mistaken assumption that the ***only*** cognizable interest under the Free and Equal Elections Clause is to prevent tabulation of ballots belonging to voters who are not qualified. To the contrary, the Commonwealth undoubtedly has an interest in deterring fraud and promoting confidence in the integrity of elections by detecting and penalizing fraudulent conduct.

Here, absent the date, it would have been unlikely—if not impossible—to determine whether the ballot had been sent by the decedent prior to her death, or, as it turned out, an attempt to

perpetrate fraud by a third-party. The Secretary and Petitioners cannot credibly maintain that the Commonwealth has no interest in enforcing laws that promote the integrity of the process, deter fraud, and punish wrongdoing.

Similarly, as evidenced by the Philadelphia Court of Common Pleas' decision in *Elkin v. Philadelphia City Commissioners, et al.*, Oct. Term No. 2504 (Phila. Ct. Comm. Pls. Nov. 7 2022), double-voting ***does*** occur and reasonable fraud-prevention are necessary to ensure the integrity of elections.

Furthermore, to the extent Petitioners and the Secretary suggest that this clear example of fraud-detection may be overlooked because it is "isolated" or an "anomaly" any such argument is without merit. To begin, the *Mihaliak* matter is the only case we know that is of record. Others may exist. *See, e.g.*, Robert Moran, *2 Bucks County women face voter-fraud charges in separate incidents*, Phila. Inquirer (Apr. 30 2021), *available at* https://www.inquirer.com/news/bucks-county-vote-fraud-dead-20210430.html (last visited April 30, 2021) (noting two separate

incidents of women charged with fraud for voting for their respective deceased mothers).[19]

Viewed in this light, the attempt to recharacterize the statutorily required dated voter declaration as useless, meaningless, or insignificant does not withstand scrutiny.

c. The various arguments concerning purported lack of purpose fail.

In light of the foregoing, this Court should have little difficulty in rejecting each of the arguments concerning the dating requirement's purported lack of purpose. For instance, the Secretary maintains that the lack of "legal or factual purpose, . . . has been conclusively and repeatedly demonstrated, most compellingly in two cases with extensive evidence about the date's function." Br. 22. But neither *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Cmwlth. Aug. 19, 2022), nor *NAACP I* have any bearing on the present analysis.

To begin, in all respects material here, *Berks* was expressly disapproved and overridden by a unanimous court in *Ball*.[20]

[19] Parenthetically, the circumstances of how *Mihliak* first came to this Court's attention and the fact that other instances may well exist, further underscores the necessity of all 67 counties.

Specifically, in *Berks*, this Court concluded that *In re Canvass* had not, in fact, resulted in binding precedent and, therefore, proceeded to reconsider the dating requirement anew. Interpreting those provisions, the *Berks* Court reasoned, required analysis of, *inter alia*, the underlying "purpose" of requiring dated declarations. Ultimately, finding that the requirements served no purpose and did not advance any weighty interests, the *Berks* Court held that the dating requirement was directory, rather than mandatory.

But after carefully reviewing the various Commonwealth Court decisions on the subject, including *Berks*, the panel reaffirmed that "an undeniable majority already has determined that the Election Code's command is unambiguous and mandatory, and that undated ballots would not be counted in the wake of *In re 2020 Canvass*." *Ball*, 289 A.3d at 21. Given that *Berks*'s holding relative to dating requirement has been disapproved, its attendant rationale—including the assessment of the provision's purpose—has also been rendered dead letter.

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[20] Specifically, *Berks*'s discussion of threshold issues of timeliness, exhaustion of administrative remedies, unclean hands, laches, and other justiciability issues, as well as its conclusion regarding the Secretary's right to mandamus, were not affected by *Ball*.

Moreover, even in the best of circumstances, *Berks* would be entitled to little weight, as it is an unpublished, single-judge opinion, which—aside from plainly conflicting with subsequent Supreme Court precedent—also conflicts with at least two unpublished three-judge panel opinions issued in the same year.[21] Finally, these jurisprudential principles aside, *Berks*'s assessment of statutory purpose was premised largely (if not entirely) on a narrow set of facts: the actions and experience of four counties (none of whom are parties in this case) in an election that occurred over two years ago. In fact, the thrust of *Berks* is that, the "purpose" of the dating requirement may be determined by the specific facts of the case.

Citing yet another decision that was disavowed by a reviewing court, the Secretary relies on *NAACP I*. Again, however, every passage cited by the Secretary is either a legal conclusion that was reversed on appeal, or rationale offered in support. Moreover, insofar as the Secretary and Petitioner rely on various discrete factual findings, such

[21] *See Ritter*, 2022 WL 16577, at *7; *see also In re Election in Region 4 for Downingtown School Board Precinct Uwchlan 1*, 2022 WL 96156, at *1.

findings are not of record in this case and, thus, are not a proper basis for granting summary relief.

For its party, the DNC seemingly recognizing that transposing *NAACP I*'s (reversed) findings is not as easy as Petitioners and the Secretary would make it seem. It argues, however, that *NAACP I*'s factual conclusions are binding here under the doctrine of collateral estoppel. This argument, however, borders on the absurd, as three of the four elements are plainly not met.

First, the "issue decided" in *NAACP I* was that a dated voter declaration was immaterial to ascertain a voter's qualification to vote and, thus, violated the federal statute in question. *See J.S. v. Bethlehem Area School Dist.*, 794 A.2d 936, 939 (Pa. Cmwlth. 2002) (explaining collateral estoppel is applicable where "an issue decided in a prior action is identical to one presented in a later action"). Whether the dating requirement served any other purpose was not before the court in *NAACP I*, as it has no bearing on the Materiality Provision analysis. Conversely, the Free and Equal Elections Clause, prohibits gross abuse of legislative power actually infringing on the right of suffrage. The two issues are not identical, as the

Second, because the trial court's decision in *NAACP I* was reversed by the Third Circuit Court of Appeals, it ***did not*** result in a "final judgment on the merits" and, thus, collateral estoppel is inapplicable. *See Robinson v. Fye*, 192 A.3d 1225, 1232 (Pa. Cmwlth. 2018) ("A judgment is deemed final for purposes of . . . collateral estoppel unless or until it is reversed on appeal." (cleaned up)).

Third, even if Petitioners are correct that the "purpose" of the statute is a proper subject of inquiry under the Free and Equal Elections Clause, the parties in *NAACP I* did not litigate that issue; instead, they litigated whether it serves a purpose relative to a voter's qualification; *a fortiari*, they did not have "full and fair opportunity to litigate" those.

The Secretary also argues that "[o]ther courts that have reviewed Pennsylvania's date requirement also have readily concluded that the declaration date serves no function." Br. at 24. Not so. Reviewing these in chronological order, the conclusion by the three-justice OAJC in *In re 2020 Canvass*, that a dated voter declaration is "unnecessary and, indeed, superfluous" is ***not*** a "***conclu[sion]***" of the Supreme Court; it was the conclusion of a minority of the participating justices, which is

entitled to as much weight as any dissent. *See Ball*, 289 A.3d at 29 (Donohue, J., concurring) (expressing her continued belief, "[a]s the author of the [OAJC], . . . that the failure to include a date does not require that absentee or mail-in ballots without dates must be set aside and not counted[,]" but "acknowledge[ing] . . . that the law is settled to the contrary").

The reliance on *Migliori II* is equally misplaced. To begin, that decision was vacated as moot by the United States Supreme Court pursuant to *Munsingwear* and,[22] thus, as a jurisprudential matter, has been "wiped from the books." Lisa A. Tucker & Michael Risch, *Canceling Appellate Precedent*, 76 FLA. L. REV. 175, 197 (2024) (acknowledging that "[i]n vacating the Third Circuit's decision, the Supreme Court wiped [*Migliori*] from the books"); *see also U.S. v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988) (noting that that the effect of vacatur under *Munsingwear* is "to have [the decision] wiped from the books"); *accord Am. Tel. & Tel. Co. v. F.C.C.*, 602 F.2d 401, 411 (D.C.

[22] *See Ritter*, 143 S.Ct. at 298 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

Cir. 1979) (explaining that "[i]n the core *Munsingwear* situation," vacatur "wipe[s] the slate clean").

More fundamentally still, contrary to the Secretary's representation, *Migliori II* did ***not*** conclude that the handwritten declaration date serves "no function." Instead, it held (which holding was later reversed and vacated) that the dating requirement was not relevant to "determining qualification 'to vote in such election,'"—*i.e.*, whether "a voter's age, residence, citizenship, or felony status qualifies them to vote" in the specific election for which they failed to comply with the dating requirement." *Migliori II*, 36 F.4th at 163. In fact, the Court acknowledged the possibility that "the date requirement serves a significant fraud-deterrent function and prevents the tabulation of potentially fraudulent back-dated votes[,]" but found "[f]raud deterrence and prevention" to be "at best tangential[]" to the specific inquiry required under the Materiality Provision. *Id.*

Finally, the Secretary, the DNC, and Petitioners each rely on the following short passage from *NAACP II*: "[t]he date requirement, it turns out, serves little apparent purpose." *NAACP II*, 97 F.4th at 125. This prefatory statement, found in the second sentence of introductory

paragraph, is hardly a "finding." And in any event, read in context, it is clear that the "little apparent purpose" verbiage was in reference to the legal issue it was addressing—*i.e.*, does it have a purpose related to assessing a voter's qualification to vote in that election. In fact, given that the overall purpose of the dating requirement was not at issue, the Court would have had no reason to consider that question.

The Secretary also maintains that the lack of purpose in the dating requirement is further evidenced by the fact that, prior to *Ball*, counties counted misdated ballots. This argument is incoherent. A law is not superfluous and useless merely because, public officials have misinterpreted and failed to enforce a law.

Petitioners and the Secretary also expend substantial effort describing how, in practice, whether the voter declaration is dated is not helpful in determining whether the elector who cast the ballot is "qualified," or whether the ballot was timely received. Even assuming *arguendo* that the Secretary is correct in this regard, at best, these arguments ***may*** show is that the dating requirement is not helpful in assessing a voter's qualification to cast a ballot for that specific election. And if this were the General Assembly only legitimate interest in the

sphere of elections, the constitutional challenge to the dating requirement might have some arguable merit. But of course, the power and, indeed, duty to regulate the franchise goes far beyond that and includes, among other things: deterring, preventing, and detecting fraud;[23] promoting public confidence and trust in our elections;[24] and the orderly administration of elections.

As the above hypotheticals illustrate, the date on which an attestation is made is central (and, at times, dispositive) in establishing whether an individual who is not qualified to vote has knowingly made a false representation, such that he is guilty of a criminal offense and must be disqualified from voting for four years, or merely acted carelessly in failing to inform the board of elections of the change in circumstances. *See generally Com. v. Bobbino*, 18 A.2d 458, 460 (Pa.

[23] *See, e.g.*, *In Re Masino*, 293 A.3d 752, 760 (Pa. Cmwlth. 2023) (recognizing "the Commonwealth's compelling interest in preserving the integrity of the election process").

[24] *See, e.g.*, *Com. v. Beck*, 810 A.2d 736, 746 (Pa. Cmwlth. 2002), as amended (Nov. 21, 2002) (recognizing the importance of "confidence in the election") *In re Petitions to Open Ballot Box Pursuant to 25 P.S. §3261(A)*, 295 A.3d 325, 328 (Pa. Cmwlth. 2023) (acknowledging that "many face a crisis of confidence in our electoral system" and explaining that its decision was the "most consistent with promoting integrity of the Commonwealth's elections"); *see also Pa. Democratic Party*, 238 A.3d at 337 (Wecht, J., concurring) (noting that "a broad and robust interpretation of the Free and Equal Elections Clause could restore the public's confidence" (internal quotation marks and citations omitted)).

Super. 1941) (mere carelessness in ascertaining one's own qualification to vote is insufficient to demonstrate that an individual who was not qualified to vote acted knowingly in casting a ballot). Signed and dated declarations ensure integrity through the election process.

Even on its own terms, Petitioners argument fails. To begin they overlook the fraud interest that is served by the dated declaration requirement solely because undated mail-in declarations have not previously been used to preclude fraudulent ballots from being counted. But it is axiomatic that the General Assembly is not required to wait until fraud occurs before taking some action to prevent it. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 686 (2021) ("[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.").

Moreover, Act 77 is in its relative nascent stages. Setting aside the fact that the date has been shown to have a role to play, as it was central to at least one prosecution, instances may arise that require reliance on the hand-written date to determine even such issues as timeliness.

E. To the extent the action survives, summary relief declaring the dating requirement unconstitutional is

improper because Petitioners' claims turn on factual allegations that are both material and disputed.

Finally, even if this Court finds the various arguments advanced in support of declaring the dating requirement unconstitutional, summary relief is inappropriate because Petitioners arguments depend on a host of material facts that are in genuine dispute. *See MFW Wine Co.* 231 A.3d at 56 (noting that summary relief is inappropriate where material facts are in dispute). For example, to the extent Petitioners suggested that a "constitutionally intolerable ratio" of mail-in ballots are rejected because of dating issues, the numbers they offer are utterly unverified and require further development. Similarly, given that the difficulties posed by an election regulation are a central component of the Free and Equal Elections Clause, absent testimony in this regard, relief is inappropriate. To provide yet another example, the parties urging invalidation of the dating requirement insist that the statute serves no "purpose," but in support of that assertion, rely on facts that were adduced in different proceedings.

VII. CONCLUSION

Commissioner Chew asks this Court to deny Petitioners' and Respondent Schmidt's Application for Summary Relief and dismiss Petitioners' PFR.

Respectfully submitted,

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/s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Shohin H. Vance (No. 323551)
Francis G. Notarianni (No. 327461)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
svance@kleinbard.com
fnotarianni@kleinbard.com

Attorneys for Westmoreland County Commissioner Doug Chew, in his official capacity as a member of the Westmoreland County Board of Elections

WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 2135(a)(1). Based on the word count feature of the word processing system used to prepare this brief, it contains 6,732 words, exclusive of the cover page, tables, and the signature block.

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