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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry, Appellees, v. Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania, Appellants.	:	**CASES CONSOLIDATED** Trial Ct. No. 2024 No. 02481
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024
Brian T. Baxter and Susan T. Kinniry, Appellees, v. Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania, Appellants.	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024

BRIEF OF APPELLEES

On Appeal from the Orders of the Court of Common Pleas of Philadelphia County, entered on September 26, 2024 and September 27, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The issues here are well known to this Court. Six weeks ago, an *en banc* panel held that disqualifying mail ballots submitted on time by eligible voters for non-compliance with the Election Code's obsolete envelope-dating provisions (25 P.S. §§ 3146.6(a), 3150.16(a)), violates the Free and Equal Election Clause of the Pennsylvania Constitution, Pa. Const. art I, § 5. *Black Political Empowerment Project v. Schmidt* ("*B-PEP*"), No. 283 MD 2024, 2024 WL 4002321 (Pa. Cmwlth. Aug. 30, 2024), *vacated*, No. 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 4, 2024). The Pennsylvania Supreme Court vacated that ruling on procedural grounds, without addressing the underlying constitutional question. On this direct appeal under § 3157 of the Election Code, none of the procedural issues that undid the just result in *B-PEP* are present, and the Constitution still compels that same result on the merits.

Appellees are two eligible Philadelphia voters who submitted mail ballots before the receipt deadline in the September 17, 2024 Special Election. Their votes were nevertheless set aside and not counted because they—along with 67 other eligible voters—omitted a handwritten date, or wrote some "incorrect" date, on the outer return envelope. The court below held that rejecting their ballots violated their fundamental right to vote. This Court should affirm based on the same reasoning as in *B-PEP*: Enforcing the meaningless envelope-dating provision to disenfranchise voters violates the Free and Equal Elections Clause.

The voter-written date indisputably serves no purpose other than to disenfranchise voters. It plays no role in establishing that a ballot was returned to the board of elections before the statutory receipt deadline, or that the voter was eligible, and it is not used to prevent fraud. No one disputes any of that, nor could they. Those facts were established based on a complete record including discovery taken from all 67 county boards of elections in a federal case, as confirmed by this Court in *B-PEP*. For the purposes of this case, Appellant Philadelphia Board of Elections ("the Board") stipulated in the proceedings below that the date serves no purpose and is utterly useless. And when given the opportunity at the hearing below, Intervenor-Appellants Republican National Committee and Republican Party of Pennsylvania (collectively, "Intervenor-Appellants") could identify no disputed facts in Appellees' Petition or supporting declarations. Indeed, having had no role in administering the Special Election, or any other election in Philadelphia, the political party intervenors could not possibly raise any legitimate dispute with the critical facts admitted by the Board as to Appellees' mail ballot submissions or how the Board uses—or doesn't use—the vestigial voter-written envelope dates.

The right to vote and have that vote count is enshrined and protected by the Pennsylvania Constitution, which provides that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. Our Constitution, at a minimum, demands that "all aspects of the electoral

process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth…." *League of Women Voters v. Commonwealth* ("*LWV*"), 178 A.3d 737, 804 (Pa. 2018).

The refusal to count otherwise valid mail ballots[1] submitted on time by eligible voters, including Appellees, because of an inconsequential envelope-dating error violates that fundamental right. *See B-PEP*, 2024 WL 4002321 at *32-33; *see also Ball v. Chapman*, 289 A.3d 1, 27 n.156 (Pa. 2023) (plurality opinion) (acknowledging that the "failure to comply with the date requirement ***would not compel the discarding of votes in light of the Free and Equal Elections Clause***, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth[]" (emphasis added)).

Finally, neither the procedural vacatur in *B-PEP* nor the Supreme Court's recent order declining to exercise its King's Bench power (*New PA Project Educ. Fund, et al. v. Schmidt, et al.*, No. 112 MM 2024 (Pa. Oct. 5, 2024)) should cause this Court any hesitation. Appellees were disenfranchised in the September Special Election, and the Constitution's most fundamental protections do not yield simply because there is another election looming. If affirming here and ensuring that

[1] The rules governing mail and absentee ballot processing are identical. For ease of reference, petitioners will refer to both absentee and mail ballots as "mail ballots."

Appellees' ballots are counted in turn helps prevent mass disenfranchisement in future elections, no applicable rule of law stands in the way. Indeed, ceasing the unconstitutional practice of enforcing the envelope-dating provision to disenfranchise would ***reduce*** burdens on the Board and other election officials, relieving them of the need to scrutinize irrelevant voter-written dates on mail ballot envelopes, and would eliminate the need for impacted voters to scramble at the last minute to try and salvage their fundamental right to cast a ballot and have it counted.

STATEMENT OF JURISDICTION

Appellees initiated this case in the trial court under 25 P.S. § 3157. This Court has jurisdiction over this appeal under 42 Pa.C.S. § 762(a)(4)(i)(C). *Dayhoff v. Weaver*, 808 A.2d 1002, 1005-06 (Pa. Cmwlth. 2002).

COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the court below correctly hold that the Philadelphia Board of Elections' decision not to count mail ballots received, on time, with missing or incorrect voter-written dates on the return envelope declaration violated the Free and Equal Elections Clause, art. I, § 5, of the Pennsylvania Constitution?

Suggested Answer: *Yes*.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's standard of review in election contest cases decided under 25 P.S. § 3157 is "limited." *Dayhoff*, 808 A.2d at 1005 n.4. The Court must examine

the record below "to determine whether the trial court committed errors of law and whether the court's findings were supported by adequate evidence." *Id.*; *see also Lewis v. Phila. Cty. Bd. of Elections*, 195 A.3d 347 (Pa. Cmwlth. 2018). The standard of review for questions of law is *de novo*. *E.g.*, *In re Benkoski*, 943 A.2d 212, 215 n.2 (Pa. 2007).

STATEMENT OF THE CASE

On September 17, 2024, the Board administered a Special Election for open seats in State House Districts 195 and 201. Appellees, each of whom is an eligible registered voter, submitted mail ballots before the 8:00 p.m. Election Day deadline, but did not include a handwritten date on the outer return envelope. At a public meeting on September 21, 2024, the Board voted 2-1 to set aside and not count Appellees' ballots, along with sixty-seven similarly situated mail ballots, because the voter either omitted the date or wrote a date that the Board deemed "incorrect" on the declaration envelope. Although the voter-written date is a vestigial relic from past versions of the Election Code, unnecessary to establish either voter eligibility or date of ballot receipt, the Board disenfranchised approximately 1.4% of eligible voters who submitted mail ballots in the Special Election because of this inconsequential error.

Appellees timely challenged that decision in a Petition for Review to the Court of Common Pleas pursuant to 25 P.S. § 3157. The verified Petition and attached

declarations of Appellees Brian T. Baxter and Susan T. Kinniry detailed their qualifications and attempts to vote by mail in the September 2024 Special Election. *See* R0001-R0037[2] (9/23/24 Pet. For Review ["PFR"]), The Petition also detailed the Pennsylvania mail ballot process, *see id* ¶¶ 26-34, and alleged, based on admissions and findings in multiple prior lawsuits in both state and federal court, that the date serves no purpose other than to disenfranchise eligible voters and disqualify ballots received on time, *id*. ¶¶ 35-40.

The court below scheduled a hearing for September 25, 2024, as it was required to do under 25 P.S. § 3157(a). At that hearing, the Board agreed that all facts set forth in the Petition and supporting declarations are undisputed. *See* R0046 (9/25/24 Tr.) at 5:6-6:7; *see also* R0038 (9/26/24 Order) at 1 ("petitioners and respondent stipulated to the operative facts underlying their dispute"). Counsel for Intervenor-Appellants were also present and did not raise any dispute with the facts in the Petition. *See* R0049 at 20:2-21.

The material facts are thus undisputed.

I. Origins of the Envelope-Date Provision

The Election Code has long provided an absentee ballot option for certain Pennsylvania voters. *See* 25 P.S. §§ 3146.1–3146.9; R0008, ¶ 26. In 1963, the

[2] References herein to page numbers R0001-R0188 refer to the Appendix attach to this Brief for the Court's convenience. Appellees anticipate that the separate record on appeal will not be compiled before briefing is closed and therefore attach true and correct copies of any document from the record below referenced in Appellees' Brief.

General Assembly added to the absentee ballot provisions a requirement that the "elector shall...fill out, date and sign [a] declaration printed on" the outer envelope used to return absentee ballots. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1306. At the same time, the Code's canvassing provision was amended to instruct county boards to set aside ballots returned in envelopes bearing a date after the election, *id.*, sec. 24 § 1308(c). Thus, for a brief time in the 1960s, the Election Code directed use of the handwritten envelope date as part of the determination whether absentee ballots were timely.

But in 1968, the Legislature updated the Code to make ***date of receipt*** the sole factor in determining timeliness of absentee ballots, eliminating the requirement to set aside ballots based on the envelope date. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, §§ 1308(a) & (c). Thus, while the instruction to "fill out, date and sign" the envelope declaration remained after 1969, the only date used to determine an whether an absentee ballot was submitted on time was date of ***receipt***.

In 2019, the General Assembly enacted Act 77, which provides all eligible voters the option of no-excuse mail voting. R0008, ¶ 26. The General Assembly largely repurposed the Code's absentee-ballot provisions in the new mail-ballot provisions, including carrying over the instruction from § 3146.6(a) to "fill out, date and sign" a declaration printed on the return envelope. As the Legislature's Republican Party leadership has acknowledged, the General Assembly adopted the

absentee-ballot language wholesale "to minimize the complexities of legislative drafting," R0122 (6/24/24 Br. of *Amici Curiae* Bryan Cutler, et al.), ***not*** because the legislature made any determination that the voter-written date served some purpose in administering the mail ballot process. Thus, the legislative history of Act 77 contains no indication that the General Assembly gave any thought to whether the vestigial "shall…date" language should be enforced to disenfranchise mail-ballot voters who do not strictly comply with it.

II. Voting by Mail in Pennsylvania

A voter seeking to vote by mail must complete an application that includes their name, address, and proof of identification and send it to their county board of elections. 25 P.S. §§ 3146.2, 3150.12; R0008-09, ¶ 27. This requisite information allows county boards to verify the voter's qualifications to vote in Pennsylvania, namely, that they are at least 18 years old, have been a U.S. citizen for at least one month, have resided in the election district for at least 30 days, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301; R0008-09, ¶ 27.

The county board then assesses each applicant's qualifications by verifying their proof of identification and comparing the information on the application with the voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4); R0009, ¶ 28. The county board's eligibility determinations are conclusive unless challenged prior to Election Day. *Id.* §§ 3146.2c, 3150.12b(3); R0009, ¶ 28. After verifying the

voter's identity and eligibility, the county board sends a mail-ballot package that contains a ballot, a secrecy envelope marked with the words "Official Election Ballot," and the pre-addressed outer return envelope containing a pre-printed voter declaration form. *Id*. §§ 3146.6(a), 3150.16(a); *see also* R0009, ¶ 29.

At "any time" after receiving their mail-ballot package, the voter marks their ballot, places it in the secrecy envelope and the return envelope, completes the declaration, and delivers the ballot, by mail or in person, to their county board. *Id.* §§ 3146.6(a), 3150.16(a); R0009, ¶ 30. The Election Code provides that the voter "shall…fill out, date and sign the declaration" printed on the outer envelope used to return their mail ballots. See 25 P.S. §§ 3146.6(a), 3150.16(a); *see also* R0009, ¶ 31.

The county board must receive an otherwise valid mail ballot by 8:00 p.m. on Election Day for it to be considered timely. 25 P.S. §§ 3146.6(c), 3150.16(c); R0009-10, ¶ 33. Upon receipt of a mail ballot, county boards must stamp the return envelope with the date of receipt to confirm its timeliness and log it in the Department of State's Statewide Uniform Registry of Electors ("SURE") system, the statewide database that counties use to, among other purposes, generate poll books.[3] *See* R0009-10, ¶ 33 Timely mail ballots are then verified pursuant to 25 P.S. § 3146.8(g),

[3] Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2-3 (Apr. 3, 2023), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directivesand-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf.

and any verified ballot submission that is not challenged is counted and included with the election results. *Id.*, § 3146.8(g)(4); *see also* R0010, ¶ 34.

III. The Envelope-Dating Provision Serves No Purpose

As set forth in Appellees' Petition for Review (and expressly stipulated by the Board, *see* R0046, at 5:6-6:7), "[t]he date written on the envelope serves no purpose. In particular, it is not used to establish whether the mail ballot was submitted on time." R0011, ¶ 39.

Not only is this fact uncontested by the Board in this litigation; it cannot possibly be disputed in light of prior lawsuits in both state and federal court conclusively demonstrating that the date is not used by election officials for any purpose, and is specifically unnecessary to establish voter eligibility or the timing of ballot receipt. *See, e.g.*, *Pa. State Conf. of NAACP v. Schmidt ("NAACP I")*, 703 F. Supp. 3d 632, 679 (W.D. Pa. 2023) ("Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board."), *rev'd on other grounds*, 97 F.4th 120 (3d Cir. 2024); *see also Pa. State Conf. of NAACP v. Schmidt ("NAACP II")*, 97 F.4th 120, 129 (3d Cir. 2024) ("Nor is [the handwritten date] used to determine the ballot's timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties' timestamping and scanning procedures serve to verify that. Indeed, not

one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 elections."); *B-PEP*, 2024 WL 4002321, at *32 ("As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud.").

In *NAACP I*, all 67 county boards of elections, including the Philadelphia Board, provided evidence and admissions that confirmed the outdated envelope-dating provision serves absolutely no purpose. Based on the undisputed facts in that comprehensive record, the *NAACP I* court granted the plaintiffs' motion for summary judgment, concluding that it was beyond dispute that the envelope-dating provision was "wholly irrelevant" in determining when the voter filled out the ballot or whether the ballot was received by 8:00 p.m. on Election Day. *NAACP I*, 703 F. Supp. 3d at 678; *see also id.* at 679 ("Irrespective of any date written on the outer Return Envelope's voter declaration, if a county board received and date-stamped a...mail ballot before 8:00 p.m. on Election Day, the ballot was deemed timely received...[I]f the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope[]"), *rev'd on other grounds*, 97 F.4th 120. The undisputed record in *NAACP I* further "show[ed], and the parties either agree...or admit…" that county boards did not use the date "***for any purpose*** related to determining a voter's age,

citizenship, county or duration of residence, felony status, or timeliness of receipt." *Id.* at 668, 676 (emphasis added).

These findings were confirmed on appeal: While the Third Circuit reversed based on its interpretation of the scope of the federal statute, it agreed based on undisputed facts and a comprehensive record that "[t]he date requirement … serves little apparent purpose." *NAACP II*, 97 F.4th at 125; *see also id.* at 127 ("[I]t may surprise, the date on the declaration plays no role in determining a ballot's timeliness[]"); *id.* at 139-40 (Shwartz, J., dissenting) (In the November 2022 election, "10,000 timely-received ballots were not counted because they did not comply" with the date provision "even though the date on the envelope is not used to (1) evaluate a voter's statutory qualifications to vote, (2) determine the ballot's timeliness, or (3) confirm that the voter did not die before Election Day or to otherwise detect fraud.").

IV. Previous Litigation over the Envelope-Dating Provision

In each election since 2020, thousands of eligible Pennsylvania voters who submitted their mail ballots on time have faced disenfranchisement based on enforcement of the envelope-dating requirement.[4] As a result, the provision has been the subject of several litigations.

[4] In the 2022 general election, enforcement of the envelope-dating provision disenfranchised over 10,000 voters. *E.g.*, *NAACP II,* 97 F.4th at 127. Thousands more were disenfranchised for this reason in the 2023 municipal elections, and again in the 2024 presidential primary. *See* R0032-37

Specifically, between 2020 and 2022, several courts addressed the statutory construction of the Election Code concerning the envelope-dating provision. *See In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020), *cert. denied,* 141 S. Ct. 1451 (2021) ("*In re 2020*") (concluding date-disqualified mail ballots would be counted for the 2020 election only but not in future elections); *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa. Cmwlth. Jan. 3, 2022), *appeal denied*, 271 A.3d 1285 (Pa. 2022) (ruling that the statute required undated envelopes not be counted). Additional courts considered whether the envelope-dating provision violated the Materiality Provision of the federal Civil Rights Act, also reaching different conclusions. *Compare Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir.) (concluding that enforcement of envelope-dating provision violated federal law), *vacated as moot*, 143 S. Ct. 297 (2022), *and NAACP I,* 703 F. Supp. 3d 632 (same), *and Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *12-29 (Pa. Cmwlth. Aug. 19, 2022) (same), *and McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9-15 (Pa. Cmwlth. June 2, 2022) (same), *with Ball*, 289 A.3d at 33-34 (deadlocking 3-to-3 as to application of the federal Materiality Provision),

(PFR, Ex. 3 (5/27/24 Decl. of A. Shapell)), at ¶ 12. The 69 ballots set aside on this basis in the Special Election represented approximately 1.4% of mail ballots submitted in that election. In a high turnout presidential election, 1.4% of mail ballots could represent tens of thousands of votes, as approximately 2.7 million Pennsylvanians voted by mail in 2020.

and NAACP II, 97 F.4th 120 (concluding the Materiality Provision does not apply to mail ballot forms).

However, this Court and the court below are the only courts that have decided whether applying the envelope-dating provision to disenfranchise voters violates their fundamental rights under the Free and Equal Elections Clause, Pa. Const. art. I, § 5. And both courts have found that it does. *See B-PEP*, 2024 WL 4002321, at *35 ("Simply put, the refusal to count undated or incorrectly dated but timely received mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in and guaranteed by the free and equal elections clause of the Pennsylvania Constitution."); R0039 (9/26/24 Order) at 2 ("[T]he refusal to count a ballot due to a voter's failure to 'date...the declaration printed on [the outer] envelope' used to return his/her mail-in ballot...violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania.").

Moreover, while the *Ball* case involved statutory interpretation and the federal Materiality Provision, three of the six Pennsylvania Supreme Court justices presiding in *Ball* expressly acknowledged that:

> ***[F]ailure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause***, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth.

Ball, 289 A.3d at 27 n.156 (emphasis added) (citing Pa. Const. art. I, § 5; *Pa. Democratic Party v. Boockvar* ("*PDP*"), 238 A.3d 345, 361 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021)).

V. The September 2024 Special Election

On July 1, 2024, the Department of State issued a Mail Ballot Directive prescribing the text, content, shape, size, or form of the mail ballot declaration envelope, and mandating that the disputed date field include the current year pre-filled.[5] Nevertheless, voters in Philadelphia County continued to make envelope dating mistakes during the September 2024 Special Election. Even in a low-turnout election with unopposed candidates, strict enforcement of the envelope-dating provision resulted in the rejection of dozens of mail ballots submitted by eligible Pennsylvania voters before the statutory receipt deadline. With fewer than 5,000 mail ballots submitted in the Special Election, the 69 ballots disqualified for envelope-dating errors represented approximately 1.4% of mail ballots cast in the Special Election.

Appellees are two of the voters disenfranchised on this basis. Appellee Brian T. Baxter, is an 81-year-old qualified registered voter who lives in Philadelphia and

[5] *See* Pa. Dep't of State, *Directive Concerning the Form of Absentee and Mail-in Ballot Materials*, v.2.0 (July 1, 2024) ("DOS Mail Ballot Directive"), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-Directive-Absentee-Mail-in-Ballot-Materials-v2.0.pdf.

votes in every election. *See* R0023-R0024 (PFR, Ex. 1 (9/22/24 Decl. of Brian T. Baxter ["Baxter Decl."])), at ¶¶ 2-3, 6. Mr. Baxter has been voting by mail for two years. *Id.* at ¶ 8. About one month before the Special Election, Mr. Baxter received a mail-ballot packet from the Board. *Id.* at ¶ 9. He marked it, inserted it into the secrecy envelope, and then inserted that into the outer return envelope. *Id.* at ¶ 10. He submitted the completed mail-ballot packet ahead of the September 17, 2024 Special Election for State Representative in the 195th State House district. *Id.* at ¶¶ 9-10. He thought he had filled out everything on the declaration envelope correctly when he submitted it. *Id.* at ¶ 10. However, Mr. Baxter later learned that he had neglected to include a date on the outer declaration envelope when completing his mail-in ballot packet.[6] As a consequence, the Board set aside and did not count his mail ballot in the September 2024 Special Election.

Appellee Susan T. Kinniry is a 38-year-old qualified registered voter in Philadelphia who submitted a mail ballot in the September 17, 2024 Special Election for State Representative in the 195th state house district. *See* R0027-R0028 (PFR, Ex. 1 (9/22/24 Decl. of Susan T. Kinniry ["Kinniry Decl."])), at ¶¶ 2-3, 6, 9. Ms. Kinniry, an attorney for the Social Security Administration, tries to vote in every election and especially in off-cycle, low turnout elections to show that voters are

[6] *See* Philadelphia Board of Elections, *List of Flawed Ballots, 2024 Special Election* (Sept. 15, 2024), https://vote.phila.gov/media/2024_Special_Election_Deficiency_List.pdf.

paying attention to what local officials are doing. *Id.* at ¶¶ 5-6, 15. Ms. Kinniry, who is a regular mail voter, received a mail-in ballot from the Board a few weeks before the September 2024 Special Election. *Id.* at ¶¶ 6, 8-9. She marked her ballot and inserted it into the secrecy envelope and thought she properly filled out the declaration after she inserted everything else into the return envelope. *Id.* at ¶ 10. Ms. Kinniry later learned she had not dated her ballot return envelope and that her vote would not be counted. *Id.* at ¶ 12. As a consequence, the Board set aside and did not count her mail ballot in the Special Election.

Meanwhile, Pennsylvania courts were adjudicating other cases involving the envelope-dating provision. On August 30, 2024, after Philadelphia voters had already begun returning mail ballots in the Special Election, this Court ruled in *B-PEP* that it is unconstitutional to enforce the envelope-dating provision to disqualify mail ballots. *See B-PEP*, 2024 WL 4002321, at *35. But the Pennsylvania Supreme Court vacated that decision on procedural grounds before the Board began canvassing ballots in the Special Election on September 17, 2024. *See B-PEP*, 2024 WL 4181592.

The Board convened at a public meeting on Saturday, September 21, 2024, to adjudicate contested mail ballots and make "sufficiency determinations" about mail

ballot packets with "flaws."[7] One member of the Board, Commissioner Deeley, provided comments noting the oath each commissioner took to uphold the Pennsylvania Constitution and quoting from this Court's August 30, 2024 *B-PEP*:

> The fundamental right to vote guaranteed by our Constitution is at issue…the date on the outer mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud…. The refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the Free and Equal Elections Clause.

R0013, ¶ 47. Commissioner Deeley noted that the Commonwealth Court's order was vacated "on technical grounds" by the Pennsylvania Supreme Court, which "did not rule on the merits of the constitutional arguments." *Id.* ¶ 48. Commissioner Deeley concluded "not counting these ballots because of meaningless and inconsequential errors that do not affect determinations of the timeliness of a ballot, a voter's eligibility to vote, or the prevention of fraud, would be a violation of the Pennsylvania Constitution." *Id.* Commissioner Bluestein responded, stating: "While I agree in principle with Vice-Chair Deeley that these ballots should count, the Pennsylvania Supreme Court vacated the Commonwealth Court ruling and we have an obligation to follow the law as it currently stands. Unfortunately, that means that we are not able to count these ballots in my opinion." *Id.*, ¶ 50.

[7] *See* Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting* (Sept. 21, 2024), https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf.

The Board ultimately voted 2-1 to not count the 23 mail ballots that arrived in undated declaration envelopes, or the 46 that arrived in envelopes that it concluded were "incorrectly dated." *Id.*, ¶¶ 51-52. On September 23, 2024, Appellees initiated this challenge to the Board's decision with a Petition for Review in the Philadelphia Court of Common Pleas pursuant to 25 P.S. § 3157. As expressly required under § 3157(a), the court below held a hearing on Appellees' Petition on September 25, 2024. Intervenor-Appellants filed a motion to intervene and a motion to dismiss the same day and appeared through counsel at the hearing.

Based on the undisputed facts set forth in the Petition and supporting declarations, the Court of Common Pleas granted Appellees' Petition, ruling that the Board's decision to disqualify their mail ballots because of two envelope-dating errors violated their right to vote under the Free and Equal Elections Clause. On September 27, 2024, the court below signed an order granting Intervenor-Appellants' motion to intervene, denying their motion to dismiss, and providing for final disposition of the § 3157 appeal. The Board appealed to this Court on October 1, 2024, and Intervenor-Appellants filed an appeal on October 3, 2024.

SUMMARY OF ARGUMENT

Enforcement of the obsolete envelope-dating provision to reject otherwise valid mail ballots violates Pennsylvanians' expansive constitutional right to vote. The Free and Equal Elections Clause of the Pennsylvania Constitution firmly

establishes the right to vote as a fundamental right that may not be diminished by the government. *See* Pa. Const. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."). The Clause, whose robust protections predate the U.S. Constitution, means not only that voters must have an equal opportunity to participate in elections, but also that "each voter under the law has the right to cast [their] ballot and have it honestly counted." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); *see also LWV*, 178 A.3d at 809 (noting that the Clause "strike[s]...at all regulations...which shall impair the right of suffrage…") (internal citation omitted). Under this Clause, unnecessary and unjustified disenfranchisement based on an indisputably meaningless and vestigial envelope-dating provision cannot continue.

The Free and Equal Elections Clause "governs ***all aspects*** of the electoral process," *LWV*, 178 A.3d at 814 (emphasis added), which includes facially neutral rules for submitting mail ballots. The Clause forbids the imposition of rules applicable to the right to vote when such regulation denies the franchise or subverts the right to vote. *Winston*, 91 A. at 523. Controlling precedent requires that restrictions on fundamental rights—including the right to vote—satisfy strict scrutiny. *See, e.g.*, *Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth.) ("It is well settled that laws which affect a fundamental right, such as the right to vote...are subject to strict scrutiny."), *aff'd*, 713 A.2d 1106 (Pa. 1998); *James v. SEPTA*, 477

A.2d 1302, 1306 (Pa. 1984). Appellants cannot meet the heavy burden under this standard to prove that the envelope-dating provision is "narrowly drawn to advance a state interest of compelling importance." *PDP*, 238 A.3d at 385. In fact, this vestige of Election Code past was not drawn into Act 77 with ***any*** state interest in mind. And the Board here stipulated to the fact that "[t]he date written on the envelope serves no purpose. It is not used to establish whether the mail ballot was submitted on time." R0011-16, ¶¶ 39, 61. Thus, the level of scrutiny applied is ultimately beside the point: Under ***any*** level of constitutional scrutiny, disenfranchisement based on this irrelevant mistake is unjustified. Enforcement of the envelope-dating provision to disqualify voters' otherwise valid mail ballots is therefore unconstitutional.

The merits arguments raised by Intervenor-Appellants below are wrong. ***First***, there is no basis in Pennsylvania jurisprudence for the radical position that the Free and Equal Elections Clause is powerless against so-called "ballot-casting rules." This concept appears nowhere in the Election Code, nor does the phrase "ballot-casting rule" appear in any Pennsylvania judicial opinion prior to the one-judge dissent in *B-PEP*. This proposed new constitutional carveout is irreconcilable with the Pennsylvania Supreme Court's unequivocal mandate that the Free and Equal Elections Clause be "given the broadest interpretation, one which governs ***all aspects*** of the electoral process[.]" *LWV*, 178 A.3d at 814 (emphasis added).

Second, the Pennsylvania Supreme Court has never before ruled on—much less rejected—arguments regarding the constitutionality of the envelope-dating provision under the Free and Equal Elections Clause. This Court is the only appellate court to address this issue on the merits, and it held that enforcement of the envelope-dating provision was unconstitutional. *B-PEP*, 2024 WL 4002321, at *32, *vacated on other grounds*, 2024 WL 4181592. In so doing, the Court rejected the same Intervenors' misreading of prior Pennsylvania Supreme Court cases. And while the *B-PEP* decision was vacated on procedural grounds, it is entirely consistent with the *Ball* Court's acknowledgement that "failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause." 289 A.3d at 27 n.156 (plurality opinion).

Third, Intervenor-Appellants' reliance on other states' jurisprudence and inapposite federal cases in search of a different standard other than the capacious protection of the right to vote guaranteed by the Pennsylvania Constitution is both misguided and inaccurate.

Intervenor-Appellants' various procedural arguments fare no better. ***First***, temporal proximity to the next election presents no legal or procedural impediment to vindicating Appellees' fundamental constitutional rights. The court below quickly decided Appellees' challenge to the Board's disqualification of their ballots, as it was expressly required to do under § 3157. The General Assembly left no room in

this provision for delaying decision or ignoring the voters' challenge merely because another election is on the horizon, and Intervenor-Appellants can point to no Pennsylvania case where the timing of a coming election prevented voters from vindicating their rights in a § 3157 appeal.

Second, the Intervenor-Appellants' arguments about counties not participating in this action do not provide a reason to trample Appellees' fundamental right to vote. This case concerns an appeal from a decision arising from the Philadelphia County Board concerning the September 2024 Special Election that took place exclusively in Philadelphia County; there is no legal basis or procedural mechanism to implead additional counties not involved in the Special Election to participate in this § 3157 direct appeal. And a decision from this Court, or the Pennsylvania Supreme Court, affirming the lower court's application of constitutional principles would not trigger Equal Protection concerns. It should go without saying that the Pennsylvania Constitution applies statewide; thus, the determination of an appellate court with statewide jurisdiction as to its requirements would establish a rule to be applied statewide going forward.

Third, granting Appellees' requested relief does not require invalidation of Act 77. Appellees seek to halt the unconstitutional ***enforcement*** of the envelope dating provision in a way that disenfranchises voters for non-compliance; they do not seek to excise "shall...date," or any other language, from Act 77.

Finally, the federal Elections Clause does not apply here because this case does not involve a federal election. In any event, the requested relief would not implicate the Elections Clause because the court below did not act so far outside its normal ambit as to "transgress the ordinary bounds of judicial review." *Moore v. Harper*, 600 U.S. 1, 36 (2023). Enforcement of the Free and Equal Elections Clause is part of the Pennsylvania courts' ancient and inalienable role in safeguarding the fundamental rights independently guaranteed by the Pennsylvania Constitution through judicial review. *See LWV*, 178 A.3d at 812.

The Board's application of the Election Code's envelope-dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject Appellees' mail ballots based solely on the inadvertent failure to add a meaningless 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. This Court should affirm.

ARGUMENT

Appellants concede what multiple courts have found in recent years: the voter-written date is meaningless, unnecessary to establish voter eligibility or compliance with the ballot receipt deadline. *See* R0011, ¶ 39; *see also*, *e.g.*, *NAACP I*, 703 F. Supp. 3d at 668 ("County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return Envelope for any purpose

related to determining a voter's age..., citizenship..., county or duration of residence..., felony status..., or timeliness of receipt…." (internal record citations omitted)); *see also NAACP II*, 97 F.4th at 125, 127, 129 (3d Cir. 2024) (agreeing the handwritten date plays no role in determining a ballot's timeliness or voter qualifications or in detecting fraud); *B-PEP*, 2024 WL 4002321, at *32 ("As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud."). In light of this complete lack of purpose, disenfranchising voters for non-compliance with an outdated and meaningless requirement violates the Free and Equal Election Clause. The court below was correct in so holding and should be affirmed.

I. Disenfranchising Voters for Noncompliance with the Vestigial Envelope-Dating Provision Violates the Free and Equal Elections Clause.

A. *The Right to Vote in Pennsylvania is Paramount.*

In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. The Clause means not only that voters must have an equal opportunity to cast a ballot, but also that: "each voter under the law has the right to cast [their] ballot and have it honestly counted," *Winston*, 91 A. at 523; that "the regulation of the right to exercise the franchise does not deny the

franchise itself, or make it so difficult as to amount to a denial," *id.*; that "no constitutional right of the qualified elector is subverted....," *LWV*, 178 A.3d at 810; and that elections must "be kept open and unrestricted to the voters of our Commonwealth," *id.* at 804.

A rule that requires the disqualification of a person's vote as a consequence for noncompliance is, on its face, a restriction on voting. Yet Intervenor-Appellants continued to argue in their motion to dismiss (as they did in *B-PEP*) that the Free and Equal Elections Clause is toothless in the face of a pointless rule driving mass disenfranchisement in every election, including the one at issue here. Such a radical diminishment of the Clause's ambit cannot be squared with longstanding precedent.

The Free and Equal Elections Clause is uniquely broad in scope and powerful in its protective force. As the Supreme Court detailed in *LWV*, the right to vote in this Commonwealth emanates from a proud tradition that predates the country's founding and guarantees broader protections than the federal Constitution:

> Pennsylvania's Constitution, when adopted in 1776, was widely viewed as "the most radically democratic of all the early state constitutions." Ken Gormley, "Overview of Pennsylvania Constitutional Law," as appearing in Ken Gormley, ed., *The Pennsylvania Constitution A Treatise on Rights and Liberties*, 3 (2004). Indeed, our Constitution, which was adopted over a full decade before the United States Constitution, served as the foundation—the template—for the federal charter. *Id.* Our autonomous state Constitution, rather than a "reaction" to federal constitutional jurisprudence, stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth.

LWV, 178 A.3d at 802. Our framers envisioned the right to vote as "that most central of democratic rights[.]" *Id.* at 741; *see also PDP*, 238 A.3d at 386-87 (Wecht, J. concurring) ("No right is more precious….Other rights, even the most basic, are illusory if the right to vote is undermined.").

Accordingly, the "plain and expansive sweep of the words 'free and equal'" is "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth...." LWV, 178 A.3d at 804. It "strike[s]…at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise." Id. at 809 (citation omitted).

B. *Strict Scrutiny Applies to the Envelope-Dating Restriction on the Fundamental Right to Vote.*

The Pennsylvania Supreme Court has repeatedly held that the right to vote guaranteed by the Free and Equal Elections Clause is fundamental. *See, e.g.*, *PDP*, 238 A.3d at 361 (employing a construction of the Election Code that "favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate[]"); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (observing that "the right to vote is fundamental and 'pervasive of other basic civil and political rights'") (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)). And strict scrutiny applies to any restriction on this fundamental right. *See, e.g.*, *Petition of Berg*, 712 A.2d at 342 ("It is well settled that laws which affect a fundamental right, such as

the right to vote…, are subject to strict scrutiny").[8] Thus, enforcement of the envelope-dating provision to disenfranchise voters triggers strict scrutiny because it "impose[s] a significant burden on one's constitutional right to vote, in that [it] restrict[s] the right to have one's vote counted to only those voters who ***correctly*** handwrite the date on their mail ballots and effectively den[ies] the right to all other qualified electors who seek to exercise the franchise by mail in a timely manner but make minor mistakes regarding the handwritten date on their mail ballots' declarations." *B-PEP*, 2024 WL 4002321, at *32 (emphasis in original).

While refusing to count a voter's ballot surely imposes a severe burden on that voter's fundamental right to vote, severity is not required to apply strict scrutiny. *See In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) ("[W]here the fundamental right to vote is at issue, a strong state interest must be demonstrated[]"), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016). Laws that "affect," "burden," "infringe upon," or "subvert" the fundamental right to vote may trigger such review, even absent a "severe" burden. *See, e.g.*, *Berg*, 712 A.2d at 342 ("It is well settled that laws which ***affect*** a fundamental right, such as the right to vote...are subject to strict scrutiny." (emphasis added)); *James*, 477 A.2d at 1306 (where a "fundamental right has been ***burdened***, another standard of review is applied: that of strict

[8] While *Berg* declined to apply strict scrutiny, it expressly did so upon finding that the case did not involve denial of fundamental right to vote, and not because strict scrutiny does not apply when the right to vote is at issue. 712 A.2d at 342-44.

scrutiny" (emphasis added)); *Applewhite v. Commonwealth* ("*Applewhite II*"), No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Cmwlth. Ct. Jan. 17, 2014) (noting that laws that "***infringe[] upon*** qualified electors' right to vote" are analyzed "under strict scrutiny[]" (emphasis added)); *see also LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523) (explaining that elections are "free and equal" when "the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; *and when no constitutional right of the qualified elector is* ***subverted or*** *denied him*[]" (emphases added)). Regardless what terminology one uses to describe the harsh result, losing the right to have one's vote counted due to a meaningless mistake is an "extremely serious matter" that triggers strict scrutiny under Pennsylvania law. *Perles v. Cnty. Return Bd. of Northumberland Cnty*., 202 A.2d 538, 540 (Pa. 1964) ("The disfranchisement of even one person validly exercising his right to vote is an extremely serious matter.").

C. *The Enforcement of the Vestigial Envelope-Dating Provision Fails Strict Scrutiny.*

Under strict scrutiny, the party defending the challenged action must prove that it serves a compelling government interest. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also, e.g.*, *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) (providing that the power to disqualify ballots based on minor irregularities "must be exercised ***very sparingly*** and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election ***except for compelling***

reasons" (emphasis added)); *In re Nader*, 858 A.2d at 1180 ("where a precious freedom such as voting is involved, a compelling state interest must be demonstrated"). Indeed, neither the Board nor Intervenor-Appellants have ***ever*** disputed that the dating provision would fail strict scrutiny. Critically, the General Assembly did not have any state interest in mind when including the phrase "shall…date" in Act 77; it was a vestige of past Election Code provisions that no longer have any purpose.[9]

Neither the Board nor Intervenor-Appellants can demonstrate a compelling interest that justifies its complete disenfranchisement of voters for non-compliance with a handwritten date requirement that serves absolutely no purpose in determining timeliness of receipt or voter qualifications. The Board acknowledged at the September 21, 2024 hearing that the date requirement serves no purpose when it stipulated to that fact in the proceedings below. *See* R0011, ¶ 39. And when given the opportunity to identify facts in dispute at the same hearing, Intervenor-Appellants could not do so and ultimately did not object at the hearing to the stipulation of facts pled in the Petition for Review. *See* R0049 at 20:2-21.[10]

[9] As noted, *supra* 6-8, the General Assembly's inclusion of "shall…date" in Act 77 was not supported by any genuine legislative purpose or even consideration of whether the voter-written dates on return envelopes would serve a purpose in administering elections. The General Assembly merely copied this language over from another, outdated provision in the Election Code as a matter of drafting convenience.

[10] This is consistent with the Intervenor-Appellants' agreement in *B-PEP* that the factual record developed in *NAACP I* was not in dispute and could be considered by this Court. *See B-PEP*, 2024 WL 4002321 at *3.

Moreover, this Court—the only appellate court to have tested the envelope-dating provisions in 25 P.S. §§ 3146.6(a), 3150.16(a) against the guarantee of the right to vote under Article I, § 5—concluded that the envelope-dating provisions "are virtually meaningless and, thus, serve no compelling government interest[]" and that the "refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the free and equal elections clause." *B-PEP*, 2024 WL 4002321, at *1, 32. This Court's reasoning in *B-PEP* is squarely applicable to this case, and the Board has not advanced any additional purportedly compelling interests, so the conclusion that enforcement of the envelope-dating provisions fails strict scrutiny should persist.

D. *Enforcement of the Obsolete Envelope-Dating Provision to Disenfranchise Could Not Survive Even Lower Levels of Scrutiny.*

Ignoring the admissions of the Board—as well as every other county board of elections in Pennsylvania and the resulting findings of state and federal courts in *NAACP*, *Migliori*, *B-PEP*, and *Chapman*—Intervenor-Appellants filed a motion to dismiss below that simply repackaged three theoretical purposes served by the envelope-dating provision.[11] *See* R0052-91 (9/25/24 Intervenors' Mem. In Supp. of Mot. to Dismiss ("MTD Br.")). None survive any level of scrutiny.

[11] Intervenor-Appellants also attempted to argue in their motion to dismiss that further factual development is needed before deciding this case. R0083. However, beyond regurgitating the

First, there has been no instance of the envelope-dating provision ever serving as a "useful backstop" for determining whether a ballot arrived by the statutory receipt deadline. No party in any case has disputed the Third Circuit's conclusion that the handwritten date is not "used to determine the ballot's timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties' timestamping and scanning procedures serve to verify that." *NAACP II*, 97 F.4th at 129. Intervenor-Appellants' pure conjecture—that the handwritten date ***might*** be used to determine timeliness, ***if*** there were ***both*** a failure to timestamp ***and*** a failure of the SURE scanning procedure—is far too speculative to qualify as an "important regulatory interest[.]" *See B-PEP*, 2024 WL 4002321, at *33-35 & n.62; *see also* 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5) (requiring boards to "maintain a record of...the date on which the elector's completed [absentee or mail-in] ballot is received by the county board").[12]

previously-rejected hypothetical purposes behind the envelope-dating provision, Intervenor-Appellants did not identify any facts in dispute. And when provided the opportunity at the hearing below, Intervenor-Appellants could identify no such facts in dispute and ultimately did not object at the hearing to the stipulation of facts as pled in the Petition for Review. In any event, given that these political party intervenors had no role in administering the Special Election, it is impossible to conceive how they would have any basis to dispute the Board's admissions—both here and in the *NAACP* case—that it does not use the voter-written date for any purpose other than to set aside noncompliant mail ballot submissions.

[12] *Cf. In re 2020 Canvass,* 241 A.3d at 1077 & n.40 ("The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.").

Second, there is no authority, from Pennsylvania or anywhere else, for the assertion that the voter-written date serves some supposed interest in "solemnity."[13] This supposed government interest could not even theoretically justify disenfranchising voters. *See In re 2020*, 241 A.3d at 1089 n.54 (Wecht, J.) ("It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require."). And whatever purported interest might exist in "solemnity" is accounted for by the other requirements for successfully submitting a mail ballot—including that the voter submit an application, have their identification verified, and that they sign a declaration stating, "I am qualified to vote the enclosed ballot and I have not already voted in this election."[14] DOS Mail Ballot Directive, Appx. A; *see* 25 P.S. §§ 3146.4, 3146.6, 3150.14, 3150.16. It is insulting to voters and inconsistent with the principles embodied by the Free and Equal Elections Clause to suggest that, after

[13] The cases cited below by Intervenor-Appellants for this fabricated "solemnity" concern (R0078-79) were strikingly off-topic, as none involved requirements to date or sign documents. Meanwhile, the ***only*** case they have ever cited that mentions "solemnity," *Vote.org v. Callanen*, is a federal Materiality Provision case that ruled on the materiality of a wet ***signature*** requirement but did not mention a handwritten date requirement except to note that the ***immateriality*** of the envelope date in Pennsylvania is "fairly obvious." 89 F.4th 459, 480, 493 (5th Cir. 2023).

[14] Indeed, a missing or incorrect date commonly does ***not*** deprive a document of its legal effect. For example, with respect to declarations signed under penalty of perjury in accordance with federal law (28 U.S.C. § 1746), "the absence of a date…does not render [the declaration] invalid if extrinsic evidence could demonstrate the period when the document was signed." *Peters v. Lincoln Elec. Co*., 285 F.3d 456, 475-76 (6th Cir. 2002) (citation omitted). Here, the "period when the [envelope] was signed" is known and undisputed, because mail ballots were sent to voters on a date certain and are not accepted by county boards after 8:00 p.m. on Election Day.

taking all these steps, making a minor mistake in filling in a handwritten date on a form on the envelope somehow negates the "solemnity" of voters' participation or suggests they did not adequately contemplate their actions.

Third, the notion that the envelope-dating provision helps detect voter fraud has been thoroughly debunked since 2020. When pressed, proponents of the envelope-date requirement have pointed to a single instance in the 2022 primary, where a ballot was submitted with a date twelve days after the voter had died, and the fraudulent actor was convicted. But as the undisputed record in *NAACP* shows, the Lancaster County Board of Elections had learned of the death of the voter and had ***already removed*** her from the rolls long before it received the ballot, and accordingly would not have counted the ballot regardless of the handwritten date on it. *See NAACP I*, 703 F. Supp. 3d at 679 n.39 ("[T]he county board's own Rule 30(b)(6) designee testified that the fraudulent ballot was first detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope."). This is consistent with the Pennsylvania Supreme Court's determination that the envelope-dating provision is not independently used to determine whether a ballot was "fraudulently back-dated." *In re 2020*, 241 A.3d at 1077 (finding no danger of fraudulent backdating because ballots received after 8:00 p.m. on Election Day are not counted).

In sum, the lack of any *bona fide* government interest served by the envelope-dating provision—as again acknowledged by the Board here—means enforcement of the envelope-dating provision to disenfranchise cannot satisfy intermediate, or even rational basis, scrutiny. *Cf. Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1252 n.6 (Pa. 2016) (Wecht, J., concurring) ("Where stops the reason, there stops the rule.").

II. There Is No Substantive Reason to Reverse the Lower Court.

A. *Intervenor-Appellants' Proposed Limitations on the Right to Vote Are Irreconcilable with the Free and Equal Elections Clause.*

Ignoring the text of the Free and Equal Elections Clause, its history, and binding precedent applying its robust protections, Intervenor-Appellants continue to posit massive new carveouts from the Clause's protections. Their arguments represent an extreme departure from first principles.

First, Intervenor-Appellants suggested below a novel exemption from the Clause's protection for the invented category of "ballot-casting" rules. *E.g.*, R0059-60. Such an exception does not exist and was rejected by this Court in *B-PEP*. *See* 2024 WL 4002321, at *32 (concluding that the envelope-dating provisions are not exempt from strict scrutiny). And it would have no application here in any event, as the court below decided a ballot-***counting*** or ballot-***canvassing*** rule—*i.e.*, whether the Board is required to canvass Appellees' ballots—not a rule involving ballot-

casting, as Appellees assert no claim that inclusion of a line for voters to handwrite the date is itself unconstitutional.

Moreover, the idea of some separate category of "ballot-casting" rules is not grounded in the Election Code or found anywhere in 250 years of precedent.[15] Adopting this exemption now would require the Court to overturn longstanding jurisprudence applying the Free and Equal Elections Clause to "all aspects of the electoral process," and applying it in a "broad and robust" manner. *LWV*, 178 A.3d at 804, 814. It would also render the Clause impotent even against Jim Crow-era requirements like literacy tests, or a requirement to write the voter's paternal grandfather's name on the return envelope. Intervenor-Appellants' theories would immunize such blatant infringements on the right to vote from any constitutional scrutiny so long as they involve "ballot-casting."

Intervenor-Appellants' radical carveout is thus irreconcilable with the *LWV*. Meanwhile, their assertion that Pennsylvania courts have never applied the Clause to a "ballot-casting rule" blatantly ignores a robust history of cases where

[15] The Election Code undercuts the concept of a "ballot-casting" stage that includes dating the return envelope. Based on a plain reading of the Code's mail ballot procedures, completion of the envelope declaration is not itself "ballot casting." The Code provides separate sets of rules that apply to the ballot on one hand and the return envelope declaration on the other. *Compare* 25 P.S. § 3146.3(b) (concerning the form of ballots), *with id*. § 3164.14 (concerning the form of return envelope with voter declaration). Lumping the envelope dating requirement together with "ballot-casting" is a novel concept coined earlier this year by two federal judges in *NAACP II* who were analyzing a federal statute not at issue in this case, and it finds no support in the Election Code or any Pennsylvania case.

Pennsylvania courts have protected the right to vote against unwarranted restrictions. For example, the Supreme Court applied the Clause to the mail-ballot-receipt deadline—clearly a "ballot-casting" rule—during the November 2020 election. *PDP,* 238 A.3d at 371–72. This Court, following remand instructions from the Supreme Court, also previously applied the Clause to invalidate a statute requiring people casting ballots in person to show photo identification. *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 WL 4497211, at *6 (Pa. Cmwlth. Oct. 2, 2012). This Court also ruled, and the Supreme Court affirmed, that a registration ban on people released from prison within the previous five years violates the Clause. *Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Cmwlth. 2000) (*en banc*), *aff'd*, 783 A.2d 763 (Pa. 2001). These decisions build on older cases applying the Clause to invalidate statutes that barred certain categories of people ***from casting ballots***. *See*, *e.g.*, *McCafferty v. Guyer*, 59 Pa. 109, 112 (1868) (there is no "power of the legislature to disfranchise one to whom the Constitution has given the rights of an elector"); *Page v. Allen*, 58 Pa. 338, 353 (1868) (enjoining enforcement of statute that added ten days to constitutional residency requirement for voting).

Indeed, the Supreme Court only recently reaffirmed, in a case involving a different type of requirement on ballot-casting-related paperwork, the principle that the Clause applies whenever an election regulation "denies the franchise ***or*** makes it so difficult as to amount to a denial." *In re Canvass of Provisional Ballots in 2024*

Primary Election ("*In re Canvass of Provisional Ballots*"), No. 55 MAP 2024, 2024 WL 4181584, at *7 (Pa. Sept. 13, 2024) (requirement to ***sign*** provisional ballot paperwork completed at the polls did not violate Free and Equal Elections Clause) (emphasis added). All of this is consistent with the *LWV* Court's emphasis that "the words 'free and equal' as used in Article I, Section 5 have a broad and wide sweep…." *LWV*, 178 A.3d at 809.

Second, Intervenor-Appellants deploy partial caselaw quotes to claim that voting rules are only subject to any constitutional scrutiny when they "make it so difficult [to vote] as to amount to a denial" of the franchise. But as cases like *Berg* and *Applewhite II* make clear, voting rules or practices that "affect" or "infringe upon" the right to vote must all be consistent with the Free and Equal Elections Clause's basic requirements. *See infra*, 28-29. Intervenor-Appellants' argument continues to repeat a partial quote from *Winston* (R0065-69), but misleadingly omits critical language that the Clause extends to restrictions that "effectively" deny the right to vote ***or*** "deny the franchise itself" ***or*** "subvert[]" that right. *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523). Here, enforcement of the date provision actually ***and*** effectively denies voters the right to have their ballots included—or at least subverts the right. *See B-PEP*, 2024 WL 4002321 at *36.[16]

[16] Despite having had the selective nature of these quotations pointed out in several cases, Intervenor-Appellants continue their misleading, partial-quotation tactic in their motion to dismiss

Third, Intervenor-Appellants wrongly suggested below (R0069) that the Clause protects "only" the "opportunity to cast a vote in the election, not that every voter will successfully avail himself or herself of that opportunity." But the Clause applies broadly, to "***all*** aspects of the electoral process." *LWV*, 178 A.3d at 804 (emphasis added). The fundamental right to vote under the Pennsylvania Constitution extends beyond just the right to register or fill out a ballot; it encompasses "the right to cast [a] ballot ***and have it honestly counted***." *Winston*, 91 A. at 523 (emphasis added). The date requirement obviously impairs the right to have a ballot "counted."[17]

This Court previously (and correctly) rejected Intervenor-Appellants' invitation to neuter the Free and Equal Elections Clause and thereby abandon this Commonwealth's traditions and a century of jurisprudence. *See B-PEP*, 2024 WL

below. For example, Intervenor-Appellants argued below that the Pennsylvania Supreme Court recently "reaffirmed" that the Free and Equal Elections Clause only applies to regulations that "make it so difficult [to vote] as to amount to a denial" of the franchise. R0065 (citing *In re Canvass of Provisional Ballots*, WL 4181584). But as it did in *LWV* and *Winston*, the Court in *In re Canvass of Provisional Ballots* said that the Clause applies where a regulation "***denies the franchise or*** makes it so difficult as to amount to a denial." *In re Canvass of Provisional Ballots*, 2024 WL 4181584 at *7 (emphasis added).

[17] While Intervenor-Appellants dismiss as "nonsense" the idea that enforcing the dating requirement to reject votes denies the right to vote, R0066, it is an idea that has been endorsed by an *en banc* panel of this Court in *B-PEP*, as well as three of the six Justices who presided in *Ball*, who expressly found that rejecting a ballot based on non-compliance with the envelope-dating rule "denies the right of an individual to vote…." *Ball*, 289 A.3d at 25 (plurality opinion) (quoting 52 U.S.C. § 10101(a)(2)(B)). This Court also agreed in *Chapman*, 2022 WL 4100998, *27. Additionally, four out of the six federal circuit judges considering the question under federal law in the *Migliori* and *NAACP* cases concluded likewise. That is a lot of judicial firepower supporting what Intervenor-Appellants dismiss as "nonsense."

4002321, at *32. It should do so again. An obsolete voting rule that serves no purpose other than to disenfranchise thousands at every election cannot be immune from all scrutiny under the Free and Equal Elections Clause.

B. *No Pennsylvania Court Has Rejected a Constitutional Challenge to the Enforcement of the Envelope-Dating Provision*.

In their motion to dismiss below, the Intervenor-Appellants also misrepresented the holdings of past opinions to argue that the Pennsylvania Supreme Court rejected the constitutional arguments raised by Appellees here. R0060. The constitutionality of enforcing the envelope-dating provision to disqualify otherwise valid mail ballots under the Free and Fair Elections Clause has never been resolved by the Pennsylvania Supreme Court. It did not consider a Free and Equal Elections Clause challenge in *Ball* or *PDP*.

Ball involved no Free and Equal Elections Clause challenge; instead, the Court reaffirmed the statutory interpretation from *In re 2020*. Indeed, directly contrary to Intervenor-Appellants' argument, the *Ball* plurality acknowledged that "failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause...." 289 A.3d at 27 n.156. This

was the only mention of the Free and Equal Elections Clause in the *Ball* Court's analysis.[18]

Nor does *PDP* foreclose Appellees' constitutional claim. The petitioners in *PDP* raised no constitutional challenge to enforcement of the envelope-dating provision. Petitioners there claimed only that the Free and Equal Elections Clause affirmatively requires that voters be given "***notice and [an] opportunity to cure***" minor errors before mail ballots were rejected. 238 A.3d at 373 (emphasis added). They did not seek a ruling on the antecedent question, namely, whether it is unconstitutional to enforce the envelope-dating provision to reject otherwise valid ballots received on time. The Court decided only that "the Boards are not required to implement a 'notice and opportunity to cure' procedure" because the petitioners had "cited no constitutional or statutory basis" for imposing such a requirement on all counties. *Id.* at 374. This case raises an entirely different issue.

Moreover, the Pennsylvania Supreme Court's decision not to exercise extraordinary jurisdiction in *B-PEP* was grounded in procedural considerations, not the substance of the parties' arguments. *See B-PEP*, 2024 WL 4181592, at *1 (per

[18] Intervenor-Appellants relied below on a fleeting reference in the portion of the *Ball* opinion describing the parties' respective positions, which noted an assertion in the Secretary's brief that the RNC's interpretation of the statute "could implicate the Free and Equal Elections Clause." R0060 (citing *Ball*, 289 A.3d at 16). The Court was not describing any claim or defense under the Free and Equal Elections Clause, nor did it conduct any constitutional analysis. Indeed, as Intervenor-Appellants acknowledged elsewhere, statements regarding the date requirement where "courts did not give 'full and careful consideration' to this point" constitute "passing dictum, as they were irrelevant to the [court's] holding." R0084.

curiam) (explaining that the Commonwealth Court lacked original jurisdiction over the case). Rather than suggesting disapproval of this constitutional claim, Justice Wecht—joined by Chief Justice Todd and Justice Donohue—urged that "the matter be submitted on the briefs" so that the Court could issue "[a] prompt and definitive ruling on the constitutional question...of paramount public importance." *Id.* (Wecht, J., dissenting). This expression of the importance of adjudicating the constitutional claim raised in this appeal by several members of the Commonwealth's highest court resolves any doubt that it is an issue of first impression.

This Court in *B-PEP* and the court below are the only courts to have adjudicated the constitutionality of enforcing the envelope-dating provision. In both cases, the courts determined that such enforcement is unconstitutional, effectively rejecting the Intervenor-Appellants' arguments that this conclusion is foreclosed by controlling Supreme Court precedent. *See B-PEP*, 2024 WL 4002321, at *27-28; *see also* R0039 (9/26/24 Order), at 2 ("[T]he refusal to count a ballot due to a voter's failure to 'date... the declaration printed on [the outer] envelope' used to return his/her mail-in ballot... violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania."). Affirming the court's decision below and recognizing—once again—the constitutional limits on the enforcement of the Election Code's envelope-dating provision does not require this Court to overturn any controlling precedent.

C. *Appellants' Reliance on Law Extrinsic to the Pennsylvania Constitution Is Misplaced.*

In searching for authority to support their merits arguments in their motion to dismiss below, Intervenor-Appellants ultimately left Pennsylvania behind. They urged the Court of Common Pleas to adopt their proposed new limits on the Free and Equal Elections Clause based on inapposite federal cases, or cases from other states. R0073-78. Like this Court in *B-PEP*, the court below correctly did not follow Intervenor-Appellants on this unnecessary detour.

The federal cases Intervenor-Appellants cite (R0074-R0077) are entirely irrelevant to this Court's analysis under the Pennsylvania Constitution. The Pennsylvania Supreme Court has expressly held that the Free and Equal Elections Clause, with its special purpose and unique history, requires "a separate analysis" from any federal constitutional claims. *See LWV*, 178 A.3d at 812. And in any event, even federal case law would not support the constitutionality of completely meaningless restrictions on voting. As the U.S. Supreme Court held in *Crawford v. Marion County Election Board* (a case on which Intervenor-Appellants heavily rely): "***However slight*** that burden may appear…***it must be justified*** by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. 181, 191 (2008) (emphasis added) (citation omitted).[19]

[19] The other federal cases cited by Intervenor-Appellants do not bolster their argument that "minor" voting regulations escape any level of review. In *McDonald v. Board of Election Commissioners*,

And Intervenor-Appellants' reliance on constitutional decisions from other states under other states' constitutions, (R0073-74), are irrelevant to the protections afforded by Pennsylvania's Constitution. They cite no case that has rejected a claim that a similarly pointless and arbitrary restriction on mail-in ballots violates the other states' respective Free and Equal Elections Clause. Instead, they announce that they "are aware of *zero* cases applying any other State's 'free and equal election' clause to invalidate a neutral ballot-casting rule." R0074 (emphasis in original).

Not only do such cases exist; they have repeatedly been highlighted in briefing in prior litigation, and it is only through willful blindness that Intervenor-Appellants can continue to claim that they are "aware of" none. For instance, the Kentucky Supreme Court held that, although a statute required each write-in voter to write the "name of his choice" on the ballot, the Kentucky Constitution required counting votes from 148 voters who wrote the candidate's initials instead. *McIntosh v. Helton*,

for example, the Court reviewed the bases for a state's decision to deny the ability to vote by absentee ballot to "judicially incapacitated" individuals awaiting trial and concluded the policy was "reasonable." 394 U.S. 802, 809 (1969). The Court did not stop at the determination that this restriction did not "absolutely prohibit[]" voters "from exercising the franchise." *Id.* Similarly, in *Timmons v. Twin Cities Area New Party*, the Court applied a "less exacting review" (not no review) of the reasons underlying a restriction on voting that it deemed to be less "severe," but still required the state in that case to demonstrate an "important regulatory interest" to support the "lesser burdens…." 520 U.S. 351, 358 (1997).

828 S.W.2d 364, 365–67 (Ky. 1992). Similar examples can be found in rulings from Missouri and Delaware.[20]

Though they may have pale imitations of our Clause, other states do not share "[o]ur Commonwealth's centuries-old and unique history [that] has influenced the evolution of the text of the Free and Equal Elections Clause, as well as [this] Court's interpretation of that provision." *LWV*, 178 A.3d at 804. What matters here is the right to vote as guaranteed by this Commonwealth's singular charter and the Supreme Court's cases safeguarding that right from any and all unjustified burdens.

VI. There Is No Procedural Reason to Reverse the Lower Court.

A. *The Timing of the Next Election Does Not Compel Reversal.*

Intervenor-Appellants attempted in their motion to dismiss to invoke the so-called "*Purcell* principal," arguing that proximity to the 2024 election should prevent the courts from ruling on Appellees' constitutional claims. the federal law. *See* R0085 (citing *Purcell v. Gonzalez*, 549 U. S. 1 (2006)). But *Purcell* simply does not apply in this appeal, and it is certainly no barrier to affirming.

Purcell is a federal-law equitable doctrine, grounded in federalism and specific to federal courts, which may limit the power of federal courts to grant certain

[20] *See*, *e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) (invalidating a voter ID law under a state constitutional provision guaranteeing "[t]hat all elections shall be free and open"); *Young v. Red Clay Consol. Sch.*, 159 A.3d 713, 799 (Del. Ch. 2017) (holding that family-focused events at polling places violated the Free and Equal Elections Clause because the events created congested parking lots and impeded elderly voters from reaching the polls).

relief that would be disruptive in the period close to an election. *See*, *e.g.*, *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in stay denial) ("***federal courts*** ordinarily should not alter state election laws in the period close to an election" (emphasis added)) (citation omitted); *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in stay grant) ("It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.") (footnote omitted); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring) (*Purcell* is a limitation on "***federal intrusion[s]*** on state lawmaking processes" not on the "authority of state courts to apply their own constitutions to election regulations" (emphasis added)); *id.* at 30 (Kavanaugh, J., concurring) (the "*Purcell* principle" counsels that "***federal courts*** ordinarily should not alter state election laws in the period close to an election" (emphasis added)).

This doctrine has no application in state court and has never been adopted in Pennsylvania. Thus, while the U.S. Supreme Court has occasionally "stayed lower ***federal court*** injunctions" that are issued close in time to an election, *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J.) (emphasis added), state court actions have not been subject to the same limitation. *E.g.*, *Moore*, 142 S. Ct. at 1089 (declining to stay North Carolina Supreme Court decision ordering redraw of congressional lines

because "it [was] too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections").

Accordingly, Pennsylvania courts have never raised *Purcell* in past cases resolving disputes about the conduct of elections while elections or canvassing are underway. *See*, *e.g.*, *Ball*, 289 A.3d 1 (resolving RNC filed King's Bench filed October 19, 2022, enjoining counting of ballots in November 8, 2022 election); *In re 2020*, 241 A.3d 1058 (2020) (resolving issues arising during post-election canvass); *Applewhite*, 2012 WL 4497211 (entering preliminary injunction blocking enforcement of voter ID law in October 2012, after Pennsylvania Supreme Court remanded on September 18 with instructions to act before the 2012 election, 54 A.3d 1, 5 (Pa. 2012)). Application of a *Purcell*-type principle would be especially out of place in the context of a § 3157 challenge. The point of this statutory provision is to create a vehicle for election challenges to be decided quickly immediately after Election Day—specifically requiring that challengers initiate the action within 2 days of the challenged decision of a board of elections, and that courts hold a hearing within 3 days. *See* 25 P.S. § 3157(a). Such actions can ***only*** arise while the county boards are in the throes of an election. Intervenor-Appellees' argument that courts cannot adjudicate voters' rights close in time to an election would all but read § 3157 out of the Election Code.

That the Pennsylvania Supreme Court recently referenced *Purcell* by analogy when denying competing King's Bench petitions does not indicate a sea change, suddenly making *Purcell* applicable to state court actions. While such equitable concepts may be theoretically relevant in considering whether to grant extraordinary jurisdiction as a matter of discretion, the Supreme Court made clear that they are no barrier to merits resolution of an appeal that raises important election issues "in the ordinary course." Order at 3–4 n.2, *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024 (Pa. Oct. 5, 2024). In providing examples of justiciable appeals that arise "in the ordinary course," the Court cited a pending case arising out of a § 3157 challenge in the Court of Common Pleas. This is also such an appeal.

Even if *Purcell* were theoretically relevant to a statutory appeal in state court, Intervenor-Appellants are especially ill-suited to invoke it. That is not just because they (hypocritically) sought relief from Pennsylvania courts on the eve of the 2020 and 2022 elections. It is because they are partisan actors, not government officials. The *Purcell* principle is premised on the "***State's*** extraordinarily strong interest in avoiding...changes to its election laws and procedures." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphasis added). It is not a tool for private litigants to wield where, as here, "no state official has expressed opposition." *Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206, 206 (2022) (Mem.); *see also Abbott*

v. Perez, 585 U.S. 579, 602 n.17 (2018)). Here, the only government actor present is the Board, which ***affirmatively asks this Court to decide the issue***.

Moreover, even if *Purcell* were conceptually applicable and properly raised, the principles that drive it would be satisfied. For example, the merits here are "clearcut" in Appellees' favor, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), as evidenced by the fact that this Court has already decided the exact question presented in the *B-PEP en banc* proceeding. And the "feasib[ility]" of counting mail ballots notwithstanding the immaterial envelope-date issue "without significant cost, confusion, or hardship," *id.*, is beyond cavil: The ballots are being segregated now and need only be opened and counted. Indeed, and as the Board made clear in *B-PEP*, affirming will ***reduce*** the burden on election administrators (who will not need to scrutinize mail ballot envelopes for a meaningless error) and on voters and campaigns (who will not need to expend effort identifying and curing thousands of instances of needless disenfranchisement). *See* R0139-41 (9/4/24 Br. of Resp'ts Allegheny and Philadelphia Cnty. Bds. of Elections).

Further, to whatever extent consideration of the 2024 election is relevant, recent history leaves no doubt that there is still plenty of time for courts to rule and for election administrators to adapt in counting votes ***after*** Election Day. Just two years ago, the Pennsylvania Supreme Court issued a decision on November 1, 2022 (one week before Election Day, in response to a King's Bench petition filed by

Intervenor-Appellants on October 19, 2022), directing County Boards not to count certain ballots. *Ball,* 289 A.3d 1. The Secretary of the Commonwealth issued guidance reflecting this decision two days later,[21] and the Supreme Court issued yet another order with further instructions to election officials on November 5, 2022 (just 3 days before Election Day), requiring them for the first time to evaluate envelope dates for correctness, *id.* at 23. And four years ago, Intervenor-Appellants filed a petition for *certiorari* with the U.S. Supreme Court on October 23, 2020, seeking to reverse the Pennsylvania Supreme Court's decision in *PDP*. *See Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021). Within days, the Secretary updated her guidance.[22] In neither case did Intervenor-Appellants claim, as they do here (R0085), that "chaos would be inevitable" if they were granted the relief that they sought. And the lower court's ruling here—***eliminating*** the obligation for the Board to flyspeck every meaningless envelope date for correctness—involves much less potential "chaos" than the relief Intervenor-Appellants obtained to ***add*** burdens on the eve of the 2022 election.

[21] *See* Pa. Dep't of State, *Gudiance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court's Order in Ball v. Chapman, issued November 1, 2022* (Nov, 3, 2022), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/2022-11-03-Guidance-UndatedBallot.pdf.

[22] *See* Pa. Dep't of State, *Guidance for Mail-in and Absentee Ballots Received from the United States Postal Service after 8:00 p.m. on Tuesday, November 3, 2020* (Oct. 28, 2022), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/2020-10-28-Segregation-Guidance.pdf.

B. *No Other County Board Is Necessary to Adjudicate Appellees' Section 3157 Challenge.*

Intervenor-Appellants also argued below that the 66 county boards other than the Philadelphia Board of Elections have been improperly excluded from this litigation. R0084-85. This argument reflects a fundamental misunderstanding of election challenges under 25 P.S. § 3157. Appellees voted in a Special Election administered by a single Board in the context of a single-county election to decide two state House seats. Appellees' home county board of elections voted to disqualify their mail ballots, and they filed a direct appeal under the procedure required by the Election Code for challenging such decisions. Intervenor-Appellants have not cited, and cannot cite, any case where a § 3157 appeal was required to include participation of all 67 counties or the Secretary of the Commonwealth.[23]

The limited nature of the single-county Special Election at issue here also belies Intervenor-Appellants' inapposite invocation of *Bush v. Gore*, 531 U.S. 98, 106-07 (2000). The court below discharged its duty under § 3157 to adjudicate Appellee voters' challenge to an unconstitutional decision to disqualify their votes in the September Special Election. And the rule of decision it announced involved

[23] It is standard practice, and consistent with the statutory language, that § 3157 appeals are filed only against the election board whose decision is challenged, and the appeal is filed in that board's home county Court of Common Pleas. The other 66 counties are no more necessary to adjudicating this appeal than they were in adjudicating—by way of example—Republican candidate Ritter's § 3157 appeal from the decision of the Lehigh County Board of Elections to count mail ballots received in undated envelopes in *Ritter v. Lehigh County Board of Elections*, 272 A.3d 989 (Pa. Cmwlth. Ct.), *appeal denied*, 271 A.3d 1285 (Pa. 2022).

no amorphous "absence of specific standards," 531 U.S. at 105-106. It could not be more straightforward: The Board is directed open and count voters' mail ballots notwithstanding the meaningless envelope-date error. This case is nothing like *Bush v. Gore* in either its procedural posture or its substance.

And to the extent Intervenor-Appellants concern is not the lower court's constitutional ruling itself, but instead the possibility that a precedential ruling by this Court or the Pennsylvania Supreme Court affirming the lower court will result in other counties properly following that precedent, that is not a *Bush v. Gore* problem, or any type of problem at all. The Free and Equal Elections Clause applies with equal force statewide, and a decision from an appellate court with statewide jurisdiction as to what the Clause requires would resolve any concerns about supposedly "varying standards" from county to county. *Id.* at 107. Should this Court affirm on the merits in a reported decision, that holding would have precedential force going forward for any and all other county boards that do not use the vestigial voter-written date requirement for any reason other than to disenfranchise, as no county board has discretion to deviate from what the Constitution requires.

Finally, Appellees have done nothing to prevent other counties from participating in this litigation; if they thought they had important interests that were implicated, they could have sought to intervene. None did. That is consistent with the lack of amicus or intervenor participation by non-party counties in the *B-PEP*

litigation that was previously before this Court, and with the fact that the vast majority of Pennsylvania's counties stipulated in the *NAACP* cases to abide by the relief sought here (*i.e.*, counting voters' ballots notwithstanding an irrelevant error with the handwritten date) when they were parties in ongoing federal court litigation.[24] And even if they did not intervene, other counties are free to participate in this proceeding as *amici*. Instead, a chorus of commissioners from other counties has submitted *amicus* briefs favoring the result reached by this Court in *B-PEP*.

C. *The Relief Appellees Seek Does Not Require Invalidation of Any Part of Act 77, Much Less Its Entirety.*

The relief sought by Appellees does not implicate Act 77's nonseverability provision and would not require striking "no-excuse" mail voting in Pennsylvania. Appellees simply sought an order reversing the Board's decision not to count Appellees' mail ballots, declaring that the Pennsylvania Constitution requires the counting of Appellees' ballots, and directing the Board to count the mail ballots cast by Appellees and 67 other similarly situated voters in the September 2024 Special Election. Such rulings do not invalidate any provision of Act 77 or its application triggering the Act's nonseverability provisions.

Appellees do not ask this Court to re-write, amend, or strike any provision of Act 77. In other words, the Court need not invalidate or excise "shall...date" from

[24] *See Pennsylvania State Conference of the NAACP v. Schmidt,* No. 22 Civ. 339 (W.D. Pa.), Dkt. Nos. 156, 189, 243, 423 (stipulations).

section 3146.6 to grant the relief sought. By the same token, Appellees do not seek an order barring voters from being directed to date mail ballot declaration forms, or barring continued inclusion of a date field next to the signature line. Including a date line on mail ballot return envelopes and asking voters to fill it out is not the problem; disenfranchising voters when they make a meaningless error in filling it out is. *See In re Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058, 1079 (Pa. 2020) (citing *PDP*, 238 A.3d at 378).

Appellees simply seek a ruling that enforcement of the obsolete envelope-dating provision cannot, consistent with the Free and Equal Elections Clause, result in rejecting otherwise valid mail ballots that arrive before the statutory receipt deadline. That does not invalidate any provision or application of Act 77, let alone all of it, particularly given that the provision addressing the sufficiency of the voter declaration on the return envelope—section 3146.8(g)—predates Act 77. *Cf. Bonner v. Chapman*, 298 A.3d 153, 168-69 (Pa. Cmwlth. 2023) (en banc) (finding that Act 77's nonseverability clause was not implicated by prior successful challenges to the envelope-dating requirement).

Moreover, even a holding that the envelope-dating provision or its application is invalid would not require the Court to invalidate all of Act 77. Pennsylvania courts regularly deem it appropriate to sever provisions in statutes containing similar nonseverability clauses, because it is not for the legislature to "dictate the effect of

a judicial finding that a provision in an act is invalid," *PDP*, 238 A.3d at 397 n.4 (Donohue, J., concurring and dissenting) (citations and quotations marks omitted). It is the province of the courts to determine constitutionality, and to fashion legal and equitable relief. *See Stilp v. Commonwealth*, 905 A.2d 918, 970-981 (Pa. 2006) (declining to enforce identical nonseverability provision and noting significant "separation of powers concerns"). That established rule applies with full force here. Indeed, the *Stilp* Court declined on those powerful separation-of-powers grounds to enforce a "boilerplate" nonseverability provision that is ***literally identical*** to the one in Act 77, instead giving effect to the terms of the binding rules of statutory construction, 1 Pa.C.S. § 1925 ("The provisions of every statute shall be severable"). *Stilp*, 905 A.2d at 979-81; *see also Pa. Fed'n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 753-754 (Pa. 1984) (declining to enforce more specific nonseverability clause on these grounds).

In *Stilp*, the Court confronted a "boilerplate" nonseverability provision identical to the one in Act 77. 905 A.2d at 973. The Court ultimately severed the provision of the legislation at issue that "plainly and palpably violate[d]…the Pennsylvania Constitution" from "the otherwise-constitutionally valid remainder of [the legislation]." *Id.* at 980-81 (footnote omitted). As the Court observed in *Stilp*, it "has never deemed nonseverability clauses to be controlling in all circumstances." *Id.* at 980. Indeed, the Court had previously severed a statutory provision that

contained a nonseverability clause in *Pennsylvania Federation of Teachers*, 484 A.2d at 754, which was significantly more specific than the one in *Stilp* and in Act 77.

Likewise, the application of Act 77's nonseverability provision is neither required nor sensible here. The undisputed facts are that the envelope-dating provision is a vestige of now-meaningless absentee ballot provisions, its inclusion in Act 77 had no legislative purpose, it benefits nobody, and it results in a constitutionally intolerable ratio of rejected ballots (here, 1.4% of all mail ballots). It could easily be severed from the rest of Act 77. Accordingly, even an order striking the date provision from the text of Act 77—relief that, to be clear, Appellees ***do not seek***—would not require the rest of Act 77 to be disturbed. Nor is there any evidence to suggest that the envelope-dating provision was a crucial compromise that led to Act 77's passage. To the contrary, invalidating the entire Act would effectively override both the mandate of 1 Pa. C.S. § 1925 and the General Assembly's intent to open no-excuse mail voting to all eligible Pennsylvania voters, simply because a single pointless provision in a single section of the Act has been enforced in an unconstitutional manner.

Millions of Pennsylvania voters have come to rely on the mail-in voting option created by Act 77, and millions of dollars in public funds have been spent to facilitate this option in the years since its passage. Moreover, invalidation of all the other

provisions of Act 77 would include those that have nothing to do with voting by mail, such as provisions eliminating straight party ticket voting or providing $90 million of financing for the purchase of new voting equipment (which has already been spent). Invalidating the entire Act would needlessly nullify "years of careful [legislative] consideration and debate…on the reform and modernization of elections in Pennsylvania." *McLinko v. Commonwealth*, 279 A.3d 539, 543 (Pa. 2022). Such an outcome would be unreasonable if not absurd, and it should be presumed that "the General Assembly does not intend a result that is absurd[]…or unreasonable." 1 Pa.C.S. § 1922(1).

The relief ordered by the court below vindicates Act 77's larger aims to expand mail ballot voting to all and harmonizes that aim with the requirements of the Free and Equal Elections Clause. This Court should affirm.

D. *The Relief Granted Below Does Not Implicate the Federal Elections Clause.*

Intervenor-Appellants argued below that the U.S. Constitution prohibits Pennsylvania courts from exercising their basic judicial functions, including reviewing state action or the application of state law for compliance with the provisions of the state constitution. R0080-81. As an initial matter, any invocation of the U.S. Constitution's Elections Clause is a non-sequitur here, because this case concerns a special state legislative election and does not involve any federal election. The Elections Clause expressly applies only to regulations governing the "Times,

Places and Manner of holding Elections ***for Senators and Representatives***…." U.S. Const. art. 1, § 4 (emphasis added). The Special Election at issue here did not include any race for federal Senators or Representatives, and therefore does not even touch upon the area regulated by the Elections Clause. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16 (2013) ("[T]he Elections Clause empowers Congress to regulate how ***federal elections*** are held." (emphasis added)).

And even if it were otherwise, Intervenor-Appellants' argument is directly foreclosed by the U.S. Supreme Court's decision in *Moore v. Harper*, 600 U.S. 1 (2023). There, the Court reaching ***exactly the opposite conclusion*** from the one Intervenor-Appellants advance. Specifically, the Court firmly "rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections," such that state election legislation is immune from ordinary judicial review. *Id.* at 26. The Pennsylvania Supreme Court rejected the same Elections Clause argument in *LWV*, 178 A.3d at 811.

Moore expressly held that "state legislatures remain bound by state constitutional restraints" when they make the rules that apply in federal elections, 600 U.S. at 32, reaffirming that "[s]tate courts retain the authority to apply state constitutional restraints" via the power of judicial review accorded to them by their state constitutions. *Id.* at 37; *see also id.* at 38 (Kavanaugh, J., concurring) ("[S]tate

laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution.").

This is not the highly exceptional case where a state court has acted so far outside its normal ambit as to "transgress the ordinary bounds of judicial review" in a manner that implicates the federal Elections Clause. *Moore*, 600 U.S. at 36 (citation omitted). Here, the court below adjudicated a statutory election challenge, as it was required to do under 25 P.S. § 3157, and applied the Pennsylvania Constitution consistent with decades of prior cases reviewing state election rules and practices for compliance with the Free and Equal Elections Clause (as well as this Court's procedurally vacated decision in *B-PEP*). *Supra*, Section I; *see also, e.g.*, *PDP*, 238 A.3d at 371–72; *Applewhite II*, 2014 WL 184988, at *62-64.

Indeed, this is an ***easier*** case than *Moore*, which involved the North Carolina Supreme Court's rejection of a federal congressional districting plan on the grounds that partisan gerrymandering was inconsistent with principles of state constitutional law, including North Carolina's version of a Free and Equal Elections Clause. 600 U.S. at 7-14. Even in that context—where the state court essentially fashioned a new right of action against partisan gerrymandering based on broad principles of state constitutional law—the U.S. Supreme Court had no trouble confirming that state courts may exercise judicial review to ensure that the enactments of the state legislature comport with the state constitution.

Here, unlike in *Moore*, no legislative body is even a party in this case, and the political party Intervenor-Appellants have no standing to assert whatever rights might be granted to the General Assembly by the U.S. Constitution. And even if the issue were properly presented, this case fits easily within the capacious "ordinary bounds of judicial review" standard. Enforcement of the Free and Equal Clause is part of the Pennsylvania courts' ancient and inalienable role in safeguarding the fundamental rights independently guaranteed by the Pennsylvania Constitution through judicial review. *See LWV*, 178 A.3d at 812. Appellees seek no more and no less in this case.

CONCLUSION

Appellees respectfully request that the Court affirm the decision below, order the Board to count their mail ballots, and hold that the Pennsylvania Constitution does not permit rejection of a mail ballot because of a voter's mistake in handwriting the date on the mail ballot return envelope.

Dated: October 14, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I certify that the foregoing brief complies with the 14,000-word limit established by Pa.R.A.P. 2135. According to the word count of the word-processing system used to prepare this brief, the brief contains 13,462 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

Dated: October 14, 2024

/s/ Stephen A. Loney
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CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

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