

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 1305 CD 2024 and 1309 CD 2024

BRIAN T. BAXTER and SUSAN T. KINNIRY,

Petitioners/ Appellees,

v.

PHILADELPHIA COUNTY BOARD OF ELECTIONS,

Respondents/ Appellants,

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF
PENNSYLVANIA,

Intervenors/ Appellants.

***AMICI CURIAE* BRIEF OF COUNTY OFFICIALS IN SUPPORT OF
APPELLEES**

On Appeal from the September 26, 2024 Order of the Court of Common Pleas of
Philadelphia, Docket No. 02481

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I. STATEMENT OF INTEREST

Amici are county commissioners, councilmembers, and election officials who have been elected to represent voters across Pennsylvania. They ask this Court to affirm the decision of the Philadelphia Court of Common Pleas that rejecting mail-in ballots for meaningless dating issues is a violation of the constitutional rights of *amici*'s constituents.¹

For *amici*, this case brings together two critical responsibilities of county government: the administration of elections and serving the needs of older residents. County boards of elections are tasked with overseeing federal, state, and local elections, and county Area Agencies on Aging (“AAAs”) address a wide array of issues that impact older residents differently than other constituents.² As officials deeply invested in the democratic process, *amici* have an interest in ensuring that all eligible electors in their districts can exercise the right to vote, including older voters, who are among the groups that disproportionately rely on mail-in voting. This commitment extends to safeguarding the integrity of the electoral process and the

¹ A list of all *amici* joining this brief in their respective capacities as independently elected officials is included at Appendix A. No party or counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

² Most of *amici* represent counties where the county commissioners constitute the board of elections as well as the executive branch of a government that includes and/or funds an AAA. Those *amici* who represent home rule counties also support and oversee the administration of elections and the AAA, albeit often in more of a legislative capacity.

rights of electors by ensuring that all timely-submitted ballots from qualified voters are counted.

Nearly all of the undersigned *amici* filed briefing in the appeal of *Black Pol. Empowerment Project, et al., v. Schmidt, et al.*, No. 283 M.D. 2024, 2024 WL 4002321 (Pa. Commw. Ct. Aug. 30, 2024) (*vacated on other grounds*) (“*BPEP*”) to advocate against enforcement of the dating requirements. All *amici* agree with this Court’s conclusion in *BPEP*, which was not considered by the Pennsylvania Supreme Court on the merits but was found persuasive by the trial court here: rejecting ballots with undated or misdated outer envelopes needlessly burdens the fundamental rights of all electors who choose to exercise their right to vote via absentee or mail-in ballot,³ and especially burdens the rights of older electors. The dating requirements no longer advance any important interests in the administration of elections, and thus *amici* agree with the Court of Common Pleas’ opinion that enforcing these provisions is a violation of the Pennsylvania Constitution.

II. SUMMARY OF ARGUMENT

In a thorough and detailed opinion in *BPEP*, an *en banc* panel of this Court correctly determined that enforcement of the provisions of the Pennsylvania Election Code requiring electors to date the outer envelope of absentee and mail-in ballots,

³ Because the dating provisions apply to both absentee and mail-in ballots, this brief will use “mail-in ballots” to refer to both unless otherwise specified.

25 P.S. §§ 3146.6(a) and 3150.16(a) (hereinafter, the “dating provisions”), violates the free and equal elections clause of the Pennsylvania Constitution. Pa. Const. art. I, § 5. *Amici* agreed with this conclusion then and agree with it now, especially after enforcement of the dating provisions disenfranchised nearly 70 highly motivated electors in a low turnout Philadelphia special election. The Philadelphia Court of Common Pleas (“trial court”) correctly determined that the free and equal elections clause required the counting of these ballots and ordered the Philadelphia Board of Elections to do so. Order at 2.

The trial court understood the enforcement of the dating provisions in the same way that this Court did in *BPEP*: it results in disenfranchisement based on a meaningless error, depriving Pennsylvanians of their fundamental rights to have their votes counted. *Amici* write in part to add that in their experience, this disenfranchisement will likely affect thousands of voters in the upcoming General Election, and that constituents disproportionately affected by enforcement include older electors like Mr. Baxter,⁴ a group that relies more often on their right to vote by mail. Meanwhile, neither the Commonwealth nor any of the counties represented by *amici* has a meaningful interest in enforcing the dating provisions. In practice, the dating provisions have no bearing on whether the ballot was received in a timely

⁴ Mr. Baxter, a petitioner in this case, is an 81-year-old elector who has been voting by mail for two years. Pet. for Review, Ex. 1, Decl. of Brian Baxter ¶¶ 2, 8.

manner and play no role in the determination of voter fraud. Now that technological advancements have made the dating provisions obsolete, their enforcement results only in the disenfranchisement of voters, costly and perpetual litigation over lingering ambiguities in the law, and a pointless burden on *amici*. Because the burden on *amici*'s constituent electors that results from enforcement is not supported by any government interest, *amici* ask the Court to affirm the trial court's order that enforcement of the dating provisions is a violation of the free and equal elections clause.

III. ARGUMENT

A. **The Philadelphia Court Of Common Pleas Correctly Concluded That The Philadelphia Board Of Elections' Rejection Of Mail In Ballots With Dating Issues Violated The Free And Equal Elections Clause Of The Pennsylvania Constitution.**

The trial court correctly concluded that Philadelphia's refusal to count mail-in ballots due to dating errors on the return envelopes violated the free and equal elections clause of the Pennsylvania Constitution. Order at 2 (citing Pa. Const. art. I, § 5). This Court came to the same conclusion in August in a decision that the trial court reviewed and found persuasive before issuing its order. Hearing Tr. at 16:3-6 (citing *Black Pol. Empowerment Project, et al.*, 2024 WL 4002321); see also *Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955) ("The power to throw out a ballot for minor irregularities...must be exercised very sparingly[.]") (quoting *Appeal of*

Gallagher, 41 A.2d 630, 632 (Pa. 1945)). In Pennsylvania, an elector’s simple mistake in filling out the date, unless adequately cured in time, completely invalidates their vote. In the experience of *amici*, most undated or misdated ballots are disqualified rather than cured, such that the votes of otherwise qualified electors—many of whom are older voters—are not counted at all.

1. Disenfranchisement affects many of amici’s constituents.

Amici are deeply committed to ensuring that all eligible voters can cast votes and have their votes counted, because the right to vote is “fundamental and ‘preservative of other basic civil and political rights.’” *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)). Not only is that right enshrined in the Constitution of Pennsylvania, but *amici* each took an oath to “support, obey and defend” it. Pa. Const. art. VI, § 3. Accordingly, even one instance of unfair and pointless disenfranchisement is too many.

Amici expend considerable time and resources to craft policies to ensure that polling places and mail-in ballot options are accessible to all constituents, and as necessary adjust those policies in response to updated guidance from the Commonwealth and the courts. *Amici* also respond to elector questions, educate the media and voters about election security, train poll workers extensively on procedures, and accurately canvass ballots, among the countless duties required to administer an election. Protecting voters and their rights remains a priority of county

election officials, who increasingly face threats of intimidation or violence⁵ and extensive litigation (including many frivolous lawsuits)⁶ in their pursuit of operating free and equal elections. Thus, several *amici* administer elections in counties that employ notice and cure procedures to ensure that voters can fix curable errors when identified before deadlines pass.⁷

Despite *amici*'s efforts to educate the public about the dating provisions and prevent needless disenfranchisement, enforcement still results in many disqualified ballots in their respective counties. The facts of this case demonstrate how these provisions can disenfranchise even the most motivated electors. Approximately 93% of Philadelphia's registered voters did not participate in the September 17, 2024 special election.⁸ Only the most dedicated voters, like Mr. Baxter and Ms. Kinniry,

⁵ Ruby Edlin and Lawrence Norden, *Poll of Election Officials Finds Concerns About Safety, Political Interference*, THE BRENNAN CENTER (May 1, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/poll-election-officials-finds-concerns-about-safety-political>.

⁶ "In addition to threats of physical violence, these election officials also have been subjected to frivolous lawsuits intended to harass or financially ruin them as they perform the public service of counting votes. Such stresses have, undoubtedly, contributed to the remarkable turnover in local election officials that we've seen across the nation since 2020." Ongoing Threats to Election Administration: Hearing Before the Comm. on Rules and Admin. Of the United States Senate (Nov. 1, 2023) (Statement of Al Schmidt, Secretary of the Commonwealth of Pennsylvania).

⁷ Where counties are able to muster the resources to attempt to operate notice and cure procedures, voters are not always able to take advantage of them. This is common sense; voters who chose to vote by mail may be doing so because they are working or not home around the time of the election, *Black Pol. Empowerment*, 2024 WL 4002321 at *34, n. 56, or because of health challenges preventing polling place attendance.

⁸ Philadelphia City Commissioners, *Unofficial 2024 Special Election Results*, last updated Sept. 24, 2024, <https://vote.phila.gov/results/> (last visited Oct. 11, 2024).

take the time to cast a ballot in such low-turnout “off cycle” elections.⁹ The fact that dozens of such voters were disqualified under these circumstances illustrates that any voter—even the most committed to casting their ballots—can be disenfranchised by enforcing the dating provisions.

This universal risk is reflected in the high numbers of Pennsylvania electors whose mail-in ballots are rejected each year. In addition to the Philadelphia voters in this special election, facts established in prior litigation show that enforcement of the dating provisions disenfranchised nearly 10,000 Pennsylvanian voters in the 2022 general election, *Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 668 (W.D. Pa. 2023) (*reversed on other grounds*), and thousands more in the 2024 primary. *Black Pol. Empowerment*, 2024 WL 4002321 at *6.

State and county officials have made efforts to reduce rates of disenfranchisement of voters who make these human errors, but such errors persist. For example, in the 2024 primary the Department of State required counties to pre-print the first two digits of “2024” on the outer envelope in the hopes that it would

⁹ Ms. Kinniry takes special care “to vote in every election and especially in off-cycle, low turnout elections.” Pet. For Review at 6. As it becomes ever more difficult to protect the democratic process, *amici* increasingly rely on the civic participation of voters like Ms. Kinniry and Mr. Baxter.

help voters avoid misdating or omitting the date.¹⁰ While overall rejection rates for mail-in ballots were down in the 2024 primary compared to the 2023 primary, rejection rates because of misdating went *up* following the envelope re-design.¹¹ The stubborn reoccurrence of “meaningless”¹² human error illustrates the wisdom of the trial court’s decision below.

The burden of disenfranchisement based on these paperwork errors is not eliminated simply because electors have the legal right to vote in person. As a practical matter, many voters rely on mail-in voting to be able to vote at all. The fact that the legislature made it easier for electors to vote by mail without excuse in 2019 does not negate the reliance that many of *amici*’s constituents place on mail-in voting. In addition to the lifeline that mail-voting provides for elderly voters, mail-in voting is important for poll workers who are attending to election administration duties on Election Day, workers whose work schedules or travel obligations may keep them away from the polls on Election Day, students who may be away from polling places, and voters who are disabled or ill.

¹⁰ Carter Walker, *Redesigned envelope leads to fewer rejected Pa. mail ballots, but a new type of error sticks out*, WESA (June 5, 2024), <https://www.wesa.fm/politics-government/2024-06-05/pennsylvania-redesigned-mail-ballot-envelope-fewer-rejections>.

¹¹ *Id.*

¹² See *Black Pol. Empowerment*, 2024 WL 4002321 at *35 (describing dating provision mistakes as “meaningless and inconsequential paperwork errors”).

Ultimately, *amici* believe that an elector’s decision to exercise the right to vote using a mail-in ballot should not diminish the likelihood that their timely-submitted ballot is counted. The Pennsylvania Constitution grants qualified electors the right to vote by absentee ballot. Pa. Const. art. VII, § 14. The Election Code not only affirms that right for absentee voters, 25 P.S. § 3146.1, but also, as of 2019, extends the right to vote by mail to all voters. 25 P.S. § 3150.11. Once granted, that right should be protected, not impeded, by this Commonwealth.

2. *Amici’s* older constituents are more reliant on mail-in voting and more impacted by disenfranchisement based on enforcement of an obsolete dating requirement.

Affirming the decision below is important because of the dating provisions’ disproportionate impact on older voters like Mr. Baxter. This is of particular concern to *amici* because Pennsylvania has one of the highest populations of older voters in the United States. Over 2.4 million Pennsylvanians are over the age of 65 as of the 2020 U.S. Census, making up 19.1% of the Commonwealth’s population.¹³ In Cameron County, which one of *amici* represents, 28% of the population is over 65.¹⁴ *Amici’s* older constituents often rely on mail-in voting to cast their ballot, increasing their risk of disenfranchisement because of errors relating to the dating provisions.

¹³ Population Reference Bureau, *Which U.S. States Have the Oldest Populations?*, <https://www.prb.org/resources/which-us-states-are-the-oldest/> (last visited Oct. 11, 2024).

¹⁴ United States Census, *Cameron County, Pennsylvania*, https://data.census.gov/profile/Cameron_County,_Pennsylvania (last visited Oct. 11, 2024).

In the experience of *amici*, elderly voters are significantly more likely than younger adults to have a disability that makes it challenging to vote in person. According to the Census Bureau's 2022 American Community Survey, 45.9% of Americans aged 75 and older, and 24.3% of those aged 65 to 74, report having a disability, while only 12.6% of adults ages 35 to 64, and 8.3% of adults under 35, report the same.¹⁵ Declining physical mobility can make getting in and out of polling places a particular challenge. In one example relevant to polling place attendance, 14.7% of adults aged 65 to 74 and 29.7% of adults aged 75 or older have an ambulatory difficulty, compared with 4.4% of adults aged 18-64.¹⁶

Distance from the designated polling place can be a challenge as well, especially for the constituents of *amici* who generally live too far away to walk to their polling place. The “declining need or ability to drive” of *amici*'s older constituents can make travel to polling places “difficult or impossible.” *Applewhite v. Commonwealth*, 2014 WL 184988, at *54 (Pa. Commw. Ct. Jan. 17, 2014) (McGinley, J.) (single-Judge op.) (in litigation over voter ID requirements, the court found that elderly voters were less likely to have a voter ID due to the challenge of traveling to a PennDOT Driver License Center). A 2022 study by the U.S.

¹⁵ U.S. Census Bureau, *Disability Characteristics*, <https://data.census.gov/table?q=disability> (last visited Oct. 11, 2024).

¹⁶ *Id.*

Department of Transportation estimated that 11.2 million Americans aged 65 and older have travel-limiting disabilities.¹⁷ As age increases, so does the rate of people reporting travel-limiting disabilities. Before age 50, the rate is less than 10%. By age 70, the rate is 18%, and by age 80 it is nearly 32%.¹⁸ While *amici* work hard to ensure that polling places are accessible for people with disabilities, mail-in voting is the preference of many seniors who, for a variety of reasons, have difficulty getting around.¹⁹

Other data supports the trend that many of the *amici* see in election administration: elderly voters can be disproportionately represented in the share of mail-in ballots with dating issues. An expert declaration in another Pennsylvania case involving the dating provisions provided research and data about older voters' likelihood to vote by mail. Hopkins Decl., *Eakin v. Adams County Board of Elections*, No. 1:22-cv-340-SPB (W.D. Pa. 2023), ECF No. 314-11. Dr. Daniel

¹⁷ U.S. Dep't of Transp., Bureau of Transp. Statistics, *Travel Patterns of American Adults with Disabilities* (Jan. 3, 2022), <https://www.bts.gov/travel-patterns-with-disabilities>.

¹⁸ *Id.*

¹⁹ The dissenting opinion in *BPEP* identified “waiting in long lines and traveling distances” as barriers to attending polling places, *Black Pol. Empowerment*, 2024 WL 4002321 at *54 (McCullough, P., dissenting), and both of those can be challenges to elderly electors. These factors have, among other things, increased reliance on mail-in voting by older voters in *amici*'s counties in recent elections.

Hopkins²⁰ opined that “subtle changes in the costs and frictions involved in undertaking certain activities can influence their completion,” *id.* ¶ 11, and that older voters are more likely to vote by mail because in-person voting has higher costs and friction than mail voting. *Id.* ¶¶ 15, 17-18. It is no coincidence that Mr. Baxter, one of the Philadelphia voters who was disenfranchised here, was an octogenarian. In the *BPEP* litigation, Philadelphia presented the following data about its electors who had submitted undated or misdated ballots in the 2022 general election:

- (i) 60.9% of undated ballots and 64.1% of misdated ballots were submitted by voters who were 60 years old or older, (ii) 37.5% of undated ballots and 40.9% of misdated ballots were submitted by voters who were 70 years old or older; (iii) 14.1% of undated ballots and 13.9% of misdated ballots were submitted by voters who were 80 years old or older; and (iv) 57 undated ballots and 15 misdated ballots were submitted by voters who were 90 years old or older.²¹

Similarly, in Montgomery County, where two *amici* serve as county commissioners, over 490 mail-in ballots were rejected during that same election in whole or in part for failure to comply with the dating provisions; at least two-thirds of the disqualified voters were aged 65 or older. Mr. Baxter testified before the trial court that his age is making him “more forgetful,” which may have

²⁰ Daniel Hopkins, Ph.D., is “a tenured Professor of Political Science at the University of Pennsylvania.” Hopkins Decl. ¶ 3.

²¹ See Allegheny and Philadelphia Cnty. Bds. of Elections Statement of Position Re. Sum. Relief. at 2-3, *Black Pol. Empowerment Project v. Schmidt*, No. 283 M.D. 2024, (Pa. Commw. Ct. June 24, 2024).

contributed to his mistake in the step of dating the mail-in ballot envelope even though he exemplifies the dedicated elector who endeavors to vote in every election. Pet. For Review, Ex. 1 Decl. of Brian Baxter ¶¶ 6-11. *Amici* all represent constituents like Mr. Baxter and hearing them share their experiences of disenfranchisement has called *amici* to action.

In *BPEP*, several of *amici*'s constituents submitted declarations to this Court which detailed the needless disenfranchisement that the dating requirements caused in the 2024 primary. These stories are consistent with *amici*'s experience with election administration and implementation of the dating provisions. In Bucks County, an 80-year-old retired schoolteacher and former bookshop owner who votes by mail due to spinal pain and severe arthritis, accidentally wrote her birthdate in the month and year spot. Pet. App. for Prelim. Injunction, Ex. 8 ¶¶ 2-12, *Black Pol. Empowerment Project, et al., v. Schmidt, et al.*, No. 283 M.D. 2024, (Pa. Commw. Ct. May 28, 2024). Her husband, a former professor who has been “diagnosed with neuropathy and typically gets around with a cane or walker,” and who cannot drive, also wrote the wrong date. *Id.*, Ex. 8 at ¶¶ 4-11. Although Bucks County devotes time and resources to notifying voters of errors and enabling them to complete a new ballot, the retired schoolteacher—the only driver in the household—was unable to drive 45 minutes each way to fix the error; when the couple “learned that [their] ballots would not be counted, [they] felt terrible.” *Id.*, Ex. 8 at ¶¶ 12-14. Another 80-

year-old resident of Bucks County, a former administrative assistant in the aerospace industry who has never missed a presidential election since moving to Pennsylvania, was informed by email and letter from the county that she wrote the incorrect date on her ballot and her ballot would not be counted. *Id.*, Ex. 10 ¶¶ 2-12. Recovering from spinal surgery she had several days before the cure deadline, the elector fell and injured herself while preparing to walk to the polling place and did not feel safe completing the journey, so was disenfranchised. *Id.*, Ex. 10 at ¶ 13. A 71-year-old elector in Chester County, a retired computer service technician, electrician, and union representative who has voted as both a Republican and Democrat, was disenfranchised when he forgot to include the date on the outer envelope of his ballot. *Id.*, Ex. 9 ¶¶ 2-13. Frustrated and believing that the situation was unfair, he did not make the trip to the county office to rectify it. *Id.*, Ex. 9 ¶ 15. A 74-year-old retired school librarian and media specialist in Dauphin County, who votes by mail because she cannot drive anymore, learned after the election that her ballot was not counted, without an opportunity to cure the error. *Id.*, Ex. 12 ¶¶ 2-14.²²

It is clear to *amici* that their elderly constituents are disproportionately disenfranchised when ballots are disqualified for handwritten dating errors. The list of *amici curae* attached to this brief includes election administrators, countywide

²² The stories of older voters from Allegheny, Berks, Philadelphia, and York Counties are further summarized in the Commonwealth Court's opinion in *BPEP. Black Pol. Empowerment*, 2024 WL 4002321 at *34, n. 56 & 58.

officials, and in some cases, voters over 65. Each of them has seen that enforcing the dating requirements has had a disproportionate impact on elderly voters and all of them submit this brief in accordance with their sworn duty to protect the constitutional rights of their constituents.

B. The Dating Provisions Serve No Interest Other Than To Burden Counties and Voters Who Gain Nothing From Enforcing Obsolete Requirements.

The handwritten date on the outside of the ballot is meaningless in determining whether the vote was received in a timely manner and serves no purpose. Instead, enforcement of the dating provisions is burdensome on election administrators, drawing *amici* and their staff away from other pressing duties. If the trial court's order is affirmed, county boards will easily update their policies in time to count the ballots and cast off the burdens of enforcing and litigating an obsolete requirement. If the trial court's order is overturned, on the other hand, county boards can expect more costly and disruptive litigation about an outdated provision just as they are working to ensure the certification of Pennsylvania's votes in the upcoming General Election.

1. The handwritten date on the outer envelope of mail-in ballots no longer serves a purpose.

Amici know from experience that county boards of elections do not use the handwritten date for any purpose outside of enforcement of the dating provisions.

Amici understand the technological advancements that have not only made election administration more efficient but also have made the dating provisions obsolete. While it may have been drafted with good intentions, the date requirement is now a vestigial relic that has no bearing on the authenticity or timeliness of the vote cast. Voters' qualifications are determined when they apply for a mail-in ballot, 25 P.S. §§ 3146.2, 3146.6(a), (c), 3146.8(g)(3)-(4), 3150.12, 3150.16(c). Timeliness is not determined by when the elector filled out the mail-in ballot, but by when the county receives the ballot. 25 P.S. §§ 3146.6(c), 3150.16(c). Nor is the handwritten date is used by county boards of elections to identify fraud. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1077 (Pa. 2020) (because timeliness is determined by when the county receives the ballot, there was no danger of fraudulent back-dating); *see also Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 139-40 (3d Cir. 2024) (Shwartz, J., dissenting) (the handwritten date is "not used to...detect fraud.").

Here, the trial court reached the same conclusion as other judges who have examined the dating provisions and found that "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 [or] eligibility to vote, or fraud." *Black Pol. Empowerment*, 2024 WL 4002321 at *32 (referencing "prior litigation" and citing *Pennsylvania State Conference of NAACP Branches*, 97 F. 4th at 125, 127, 137.). Aside from miring

counties and voters in unnecessary litigation, the primary consequence of the dating provisions is to disenfranchise voters. That is neither a legitimate purpose nor a compelling government interest.

2. Enforcement of the dating provisions is burdensome, drawing *amici* away from other pressing election administration duties.

Rather than serving a compelling government interest, enforcement of the meaningless dating provisions consumes a significant amount of time, labor, and resources that *amici* cannot afford to waste. As the dating provisions have become obsolete, election administration has become more difficult and resource intensive. Eliminating the envelope-dating requirement would remove an unnecessary layer of complexity to the process of returning mail-in ballots. For *amici* in counties which have developed procedures to alert voters of errors and provide them with an opportunity to fix them, the administrative steps required to prevent needless disenfranchisement may include setting aside ballots flagged for errors, formally notifying voters of these discrepancies, and processing corrected ballots. In all counties, boards of elections must meet to adjudicate mail-in ballots with errors like dating issues, as the Philadelphia Board did in this case. Pet. for Review at 13. Each of these steps demands administrative effort, legal oversight, and additional

staffing.²³ These are resources that *amici* could otherwise use, *inter alia*, to ensure the timely administration of the election and advance the work of their programmatic support for senior citizens.

Additionally, notwithstanding Intervenors' argument to contrary, *see* Intervenor-Appellants' Opp. to Exp. Briefing at 2, affirming the trial court would *reduce*, not increase, the strain on *amici*'s boards of elections. Boards of elections can easily alter existing procedures to comply with a ruling which affirms the trial court's decision. While Intervenors have suggested that it is too late to alter policies which would impact mail-in ballots that have already been returned by voters, counting these ballots does not and cannot begin before the pre-canvass on Election Day. 25 P.S. § 3146.8(g)(1.1); *see also* 25 P.S. § 2602(q.1) (defining the pre-canvass).²⁴ Affirming the trial court's decision before Election Day would not only leave county boards with ample time to update their policies in time to count the

²³ Pa. Dep't. of State, Administration of Voter Registration in Pennsylvania, 2022 Annual Report to the Pennsylvania General Assembly (June 30, 2023), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/reports/voter-registration/DOS_Voter_Registration_Report_2022_FINAL.pdf (describing County Boards of Elections' initiatives related to voter roll maintenance, voter outreach, and other improvements to election administration).

²⁴ When the outer envelope of mail-in ballots display apparent defects, the election workers accepting the ballots segregate the ballots for consideration by the boards of elections during the pre-canvass. Therefore, if the dating provisions are invalidated before Election Day, election workers would merely need to add the segregated ballots back into the population of ballots without apparent defects on the outer envelope.

ballots, it would spare them another round of tedious and exhausting disputes over the dating requirement during a hotly contested presidential election.

Indeed, at a time when the boards of elections are stressed more than ever, invalidating the dating provision would provide a welcome reprieve from the onslaught of litigation over Act 77.²⁵ At a time of uncertainty, affirming the trial court's order would provide much-needed clarity to the board of elections in *amici*'s counties. Overturning the decision, by contrast, would only ensure that the taxpayers will have to foot the bill for even more litigation over a technical requirement that has outlived any usefulness it once had.

IV. CONCLUSION

While the requirement for a handwritten date may have served a purpose at one time, “neither the Election Code nor the Legislature have kept up with...new technology [which] renders the dating provisions meaningless.” *Black Pol. Empowerment*, 2024 WL 4002321 at *38. Accordingly, the “refusal to count undated

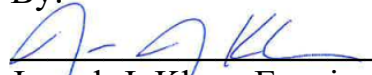
²⁵ Even before this Court's *BPEP* decision, following the 2023 decision in *Ball v. Chapman*, 289 A.3d 1, 21 (Pa. 2023), that the Election Code requires voters to handwrite the date, there has been variance among counties concerning what is a disqualifying dating error, leading to confusing changes in guidance and costly litigation. As this Court pointed out, “the Secretary...concedes that he has changed his guidance regarding the mail ballot declaration **twice in the past year.**” *Black Pol. Empowerment*, 2024 WL 4002321 at *26 (emphasis in original). Most recently, when the Deputy Secretary for Elections issued a new interpretation of the dating requirement just days before the primary election in 2024, Pennsylvania's counties split on whether to follow such last-minute guidance.

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.” *Id.* at 82. Enforcement of an obsolete requirement has proven to disenfranchise voters, disproportionately impacting certain electors who rely on mail-in voting, like the elderly. Rather than serving a compelling or legitimate government interest, such enforcement is burdensome and costly to election administration.

In considering election-related matters, Pennsylvania courts’ “goal must be to enfranchise and not to disenfranchise [the electorate].” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)). *Amici*, who share the same goal, ask this Court to affirm the decision of the trial court and provide the clarity that will help boards of elections run free, fair, and orderly elections.

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Respectfully submitted,
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CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 5,128 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

Dated: October 14, 2024


Joseph Khan

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: October 14, 2024



Joseph Khan

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