IN THE SUPREME COURT OF PENNSYLVANIA

NOS. 76 EM 2024 & 77 EM 2024

BRIAN BAXTER AND SUSAN KINNIRY,

Respondents,

v.

PHILADELPHIA BOARD OF ELECTIONS,

Respondent,

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Petitioners.

VOTER RESPONDENTS' RESPONSE TO PETITIONERS' APPLICATION FOR THE EXERCISE OF EXTRAORDINARY JURISDICTION

Mary M. McKenzie (No. 47434)
Benjamin Geffen (No. 310134)
Claudia De Palma (No. 320136)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
(267) 546-1319
mmckenzie@pubintlaw.org
bgeffen@pubintlaw.org
cdepalma@pubintlaw.org

Stephen Loney (No. 202535)
Witold J. Walczak (No. 62976)
Marian K. Schneider (No. 50337)
Kate I. Steiker-Ginzberg (No. 332236)
Kirsten Hanlon (No. 336365)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
(215) 592-1513
sloney@aclupa.org
vwalczak@aclupa.org
mschneider@aclupa.org
ksteiker-ginzberg@aclupa.org
khanlon@aclupa.org

Additional counsel on next page

John A. Freedman*
Elisabeth S. Theodore*
Daniel Yablon*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
elisabeth.theodore@arnoldporter.com
daniel.yablon@arnoldporter.com

Ari J. Savitzky*
Sophia Lin Lakin*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
asavitzky@aclu.org
slakin@aclu.org

* *Pro hac vice* applications to be filed

Counsel for Voter Respondents

Respondents Brian Baxter and Susan Kinniry ("Voter Respondents"), submit this Response to the application for exercise of extraordinary jurisdiction filed by the Intervenor-Petitioners Republican National Committee and the Republican Party of Pennsylvania ("Republican Intervenors").

INTRODUCTION

In election after election, counties are rejecting the votes of qualified Pennsylvania voters because of an utterly meaningless error in handwriting a date on the mail ballot envelope. The courts below correctly held that this unjustifiable diminution of the fundamental right to vote violates the Pennsylvania Constitution's Free and Equal Elections Clause. *See* PA. CONST. art. I, § 5. No Pennsylvania court has ever held otherwise.

This appeal—properly arising in the ordinary course pursuant to 25 P.S. § 3157 from a Philadelphia-only special election where 69 voters were denied their rights—is the latest case to raise the same question. In the next election, and the ones after that, voters will continue to raise this question, relying on the procedures set forth in state law: Does our Commonwealth's fundamental guarantee of rights truly allow my vote to be rejected for an utterly inconsequential paperwork mistake? Or is the right to vote in this Commonwealth made of sterner stuff?

This Court should provide a definitive answer before more voters are unconstitutionally disenfranchised. It should grant extraordinary jurisdiction as Republican Intervenors request, and then it should affirm expeditiously.

The Court of Common Pleas and the Commonwealth Court correctly found it unconstitutional to deprive Pennsylvanians like Voter Respondents Baxter and Kinniry of their right to vote on this basis in Philadelphia's September 2024 Special Election. This Court should take this opportunity to affirm and make the applicable rule of law clear and uniform across this Commonwealth. Solidifying this eminently just and reasonable rule of state constitutional law would require *zero change* to the process of casting ballots, by mail or otherwise, and would only change the way ballots are canvassed after the election. Affirming the Commonwealth Court and providing clarity in the law would *alleviate* the burden on county elections officials who must now scrutinize thousands of envelopes to determine the presence and correctness of a date *that has no relevance whatsoever*.

And if the Pennsylvania Constitution somehow provides no such protection for voters facing disenfranchisement on such a flimsy basis, this Court should say that, too. Either way, there is no legal or practical bar to the Court's deciding this issue now, just as there was none when the Court granted Republican Intervenors' King's Bench petition in *Ball v. Chapman* on October 21, 2024, and issued a decision changing ballot-counting rules two years ago—on November 1, 2022, mere days

before the 2022 General Election—and certainly none when this Court issued its decision in the *Genser* Section 3157 appeal just last week. There is nothing remarkable about this timing: Section 3157 appeals by their very nature arise close to or during the election, and Pennsylvania courts are bound to resolve them.

By contrast, a "stay" of the Commonwealth Court's decision arising out of Philadelphia's special election cannot be justified by any principle of law or common sense. It would be the worst of all worlds. Because the unpublished decision below involves a small number of votes in an already-decided state legislative election, the practical effect of "staying" *that* order is nil. Staying that decision could not possibly result in the sort of statewide restraining order the Republican Intervenors seek. Nor, to the extent that it is even possible to "stay" *the precedential value of an unpublished decision*, would that accomplish anything except a brief delay of the inevitable.

Specifically, if the Court merely stays the decision below and declines to announce or confirm a rule of law for the counties to follow, then voters whose rights are denied in the 2024 General Election based on this meaningless envelope mistake will have to appeal to their county courts of common pleas under the same Section 3157 process used here, as is their right. The same question presented here will soon be back before the Commonwealth Court, and then before this Court, all while the county boards of elections are in the midst of the canvassing process, and potentially

at a time when the Court's decision could be outcome-determinative. The burdens on election administrators and the courts at that point, and the potential for chaos, will be *far* greater than if this Court would simply grant Republican Intervenors' request for extraordinary jurisdiction and resolve the Free and Equal Elections Clause question once and for all.

On the merits, the correct course is to affirm. The Commonwealth Court twice decided the question presented correctly, and the issues have been fully briefed in this Court twice in the last several months. The Court has all it needs to affirm the Commonwealth Court. The Free and Equal Elections Clause demands, at a minimum, 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 because of an inconsequential envelope-dating error violates that fundamental right, whether one applies strict scrutiny or even some more permissive standard.

As established based on a complete record including discovery taken from all 67 county boards of elections in a federal case and confirmed by the stipulation entered below, the voter-written date is indisputably inconsequential. It serves no

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

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 can dispute any of that. The Philadelphia Board of Elections (the "Board") stipulated to these facts below, and when given the opportunity at the hearing below, Republican Intervenors identified no facts they disputed.

None of Republican Intervenors' arguments presents any substantial basis for granting their requested "stay," let alone for reversal. They rely on the federal "*Purcell* doctrine," which is wholly inapplicable to Section 3157 appeals filed in state court under state law. They argue that counties other than Philadelphia were indispensable parties in this Section 3157 appeal involving a local Philadelphia election, but there is no mechanism for impleading other counties when a voter appeals their local board's decision pursuant to this statute, and no other county has attempted to intervene or even file an amicus brief here. Republican Intervenors argue there should have been more "factual development" below, but point to no salient facts they would have developed, elide their total waiver of this issue in the court of common pleas, and fail to mention that they fully participated in extensive, statewide discovery on this issue in recent federal litigation, the result of which was the Third Circuit's conclusion that the envelope dating rule "serves little apparent

purpose." *Pa. State Conf. of NAACP v. Sec'y Commonwealth of Pa. ("NAACP II")*, 97 F.4th 120, 125 (3d Cir. 2024).

Qualified voters who submit a mail ballot on time, only to have it set aside because of a completely irrelevant envelope-dating error, deserve the protection of their constitutionally guaranteed right to vote. As this Court has emphasized, the Free and Equal Elections Clause reflects the fundamental "desire" of the framers of the Pennsylvania Constitution to allow voting by "all people with an interest in the communities in which they lived—universal suffrage ...." *LWV*, 178 A.3d at 807. Voters will keep seeking that protection in each and every election so long as their votes are denied. If the Commonwealth Court was right in this election appeal, then this Court should say so before other voters are similarly disenfranchised. Republican Intervenors' application for extraordinary jurisdiction should be granted, and the Commonwealth Court's decision protecting the rights of Pennsylvania voters should be affirmed rather than stayed.

BACKGROUND

Voter Respondents Brian T. Baxter and Susan T. Kinniry are qualified registered voters in Philadelphia who submitted mail ballots in the September 17, 2024 Special Election for State Representative in the 195th state house district. *See*

R0023-R0024[2] (9/23/24 Pet. For Review ["PFR"], Ex. 1 (9/22/24 Decl. of Brian T. Baxter ["Baxter Decl."])), at ¶¶ 2-3, 6-9; R0027-R0028 (PFR, Ex. 2 (9/22/24 Decl. of Susan T. Kinniry ["Kinniry Decl."])), at ¶¶ 2-3, 6, 9. Although Mr. Baxter and Ms. Kinniry vote regularly and believed that they had filled out everything on their mail ballot envelopes correctly, they and 67 other voters failed to properly date their outer declaration envelopes.[3] As a consequence, the Board set aside and voted 2-1 not to count their mail ballots in the election. R0014, ¶¶ 51-52.

A. Procedural History

Voter Respondents timely 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. The Petition and supporting declarations detailed the Voters' qualifications and attempts to vote by mail in the September 2024 Special Election and alleged, based on admissions and findings in multiple prior lawsuits in both state and federal court, that the envelope date serves no purpose other than to disenfranchise eligible voters and disqualify ballots received on time. *See* R0001-R0037 (PFR).

[2] References herein to page numbers R0001-R0188 refer to the Appendix submitted by Voter Respondents below to the Commonwealth Court with their merits brief. For the Court's convenience, Voter Respondents submit a true and correct copy of that Appendix with this Response.

[3] *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.

As expressly required under § 3157(a), the Court of Common Pleas held a hearing on the Petition on September 25, 2024. Republican Intervenors filed a motion to intervene and a motion to dismiss the same day. At the hearing, the Board expressly agreed that all facts set forth in the PFR 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 Republican Intervenors were also present and did not raise any dispute with the facts in the Petition. *See* R0049 at 20:2-21.

Based on the undisputed facts presented, the Court of Common Pleas granted Voter Respondents' 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 of Common Pleas signed an order granting Republican Intervenors' motion to intervene, denying their motion to dismiss, and providing for final disposition of the § 3157 appeal. The Board appealed to the Commonwealth Court on October 1, 2024, and Republican Intervenors filed an appeal on October 3, 2024. On October 30, 2024, the Commonwealth Court issued a decision affirming the lower court's ruling. On October 31, Republican Intervenors filed the instant Emergency Application to Stay the Commonwealth Court's ruling.

B. 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 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, whether the absentee ballot arrived at the election office by the statutory deadline was the exclusive method of determining the timeliness of an absentee ballot.

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 it 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.

C. Voting by Mail in Pennsylvania

A voter seeking to vote by mail must complete an application that allows county boards to verify the voter's qualifications to vote in Pennsylvania. 25 Pa.C.S. § 1301; 25 P.S. §§ 3146.2, 3150.12; R0008-09, ¶ 27. 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 return envelope. *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.[4] *See* R0009-10, ¶ 33 Timely mail ballots are then verified pursuant to 25 P.S. § 3146.8(g), and any verified ballot submission that is not challenged is counted and included with the election results. *Id.*, § 3146.8(g)(4); R0010, ¶ 34.

[4] 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/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf.

D. The Envelope-Dating Provision's Lack of Purpose

It is beyond dispute here that the envelope-dating provision serves absolutely no purpose. R0011, ¶ 39; R0046, at 5:6-6:7. Moreover, prior lawsuits in both state and federal court have conclusively demonstrated that the date is unnecessary to establish voter eligibility or the timing of ballot receipt.

In the *NAACP* case, based on evidence and admissions by the Secretary of State and all 67 county boards of elections, including the Philadelphia Board, the trial court concluded 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. *Pa. State Conf. of NAACP v. Schmidt ("NAACP I")*, 703 F. Supp. 3d 632, 679 (W.D. Pa. 2023) ("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..."), *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[5] were confirmed on appeal: While the Third Circuit reversed based on its interpretation of the scope of the federal Civil Rights Act, it unanimously agreed 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.").

E. 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. As a result, the provision has been the subject of repeated litigation.

Several courts have addressed the statutory construction of the Election Code concerning the envelope-dating provision and whether the provision is mandatory. *See Ball v. Chapman,* 289 A.3d 1, 20-23 (Pa. 2022); *In re Canvass of Absentee and*

[5] These findings were not, as Republican Intervenors now suggest, "passing *dictum*." Appl. 22. They were central to the trial court's ruling and undisturbed (indeed, expressly endorsed) on appeal. In any event, aside from trying to dodge these conclusions by labeling them *dicta*, Republican Intervenors do not say how they think they could possibly be incorrect.

Mail-In Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1062 (Pa. 2020) ("*In re 2020*"); *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (Pa. Cmwlth. Jan. 3, 2022), *appeal denied*, 271 A.3d 1285 (Pa. 2022). Additional courts considered whether enforcement of the envelope-dating provision violated the Materiality Provision of the federal Civil Rights Act, 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), *and NAACP II*, 97 F.4th 120 (concluding the Materiality Provision does not apply to mail ballot forms).

The Commonwealth Court and the trial court below are the only courts to address whether applying the envelope-dating provision to disenfranchise voters violates their rights under the Free and Equal Elections Clause, Pa. Const. art. I, § 5. And both courts have found that it does. *See Baxter v. Phila. Bd. of Elections,* No. 1305 C.D. 2024, 2024 WL 4614689, at *18 (Pa. Cmwlth. Oct. 30, 2024); *see also Black Political Empowerment Project, et al. v. Schmidt, et al. ("B-PEP"),* No. 283

M.D. 2024, 2024 WL 4002321, at *35 (Pa. Cmwlth. Aug. 30, 2024), *vacated on other grounds*, 322 A.3d 221 (Pa. 2024); R0039 (9/26/24 Order) at 2.

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)).

ARGUMENT

I. THE UPCOMING 2024 GENERAL ELECTION DID NOT BAR THE DECISION BELOW AND SUPPORTS THIS COURT'S GRANTING JURISDICTION AND AFFIRMING ON THE MERITS NOW.

A. There Is No Broad *Purcell*-Type Rule for Pennsylvania Courts.

Republican Intervenors' primary criticism of the Commonwealth Court's ruling relies on the so-called "*Purcell* doctrine" to argue that no court should decide election cases shortly before or during an election. The import of their arguments is that the Commonwealth Court was required simply to sit on this election appeal, or else decide it against the voters notwithstanding the merits, because another election

is coming up. That suggestion is nonsensical and contrary both to the law and the Pennsylvania courts' history of deciding similar cases.

This appeal arises under 25 P.S. § 3157, which allows Pennsylvania voters who are "aggrieved by any order or decision" of their board of elections to quickly appeal to the court of common pleas where they assert that "an injustice has been done." *Id.* at § 3157(a). The entire point of this statutory mechanism and the judicial process it creates is to furnish a vehicle for election challenges to be quickly decided after an election—challengers initiate an action within two days of a decision of a board of elections, the court schedules a hearing within three days of the filing of the challenge, and appeals can be taken to Commonwealth Court and beyond. *See* 25 P.S. § 3157(a).

Between primaries and general elections, Pennsylvania holds an election of some kind roughly every six months, with special elections (such as the one at issue in this case) held as the need arises between these dates. Pennsylvania courts can thus be adjudicating appeals under Section 3157 throughout the year. When those appeals rise up to the Commonwealth Court or this Court, they may make precedent. *See, e.g.*, *Dayhoff v. Weaver*, 808 A.2d 1002, 1006 (Pa. Cmwlth. Ct. 2002); *see also, e.g.*, *In re Reading Sch. Bd. Election*, 634 A.2d 170, 171 (Pa. 1993). Those precedents may come down close in time to the next election. But that is in the natural order of things—the process established by the General Assembly through

which election law develops, and the process by which the recently decided *Genser* case, as well as this appeal and others, came to this Court. *See Genser v. Butler Cnty. Bd. of Elections*, No. 26 WAP 2024, 2024 WL 4553285, at *3 (Pa. Oct. 23, 2024); *see also, e.g.*, *In re 2020*, 241 A.3d at 1062-63; *Shambach v. Bickhar*t, 845 A.2d 793 (Pa. 2004). Indeed, this Court recently reaffirmed that Section 3157 appeals are the process by which disputes over election law should be presented to it for decision. *See New PA Project Educ. Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1 n.2 (Pa. Oct. 5, 2024) ("*NPPEF*") (noting that the Court would exercise jurisdiction in appeals that "have come before this Court in the ordinary course"); *id.* at *2 (Donohue, J., supporting denial) (noting that the envelope-date issue could arise "in the ordinary course, in a court of common pleas").

Republican Intervenors now suggest a radical new rule that would gut Section 3157 and curtail the process by which the law relating to elections is made in Pennsylvania. From now on, they say, appellate decisions resolving ordinary-course Section 3157 appeals (or perhaps just the ones they disagree with) may not issue close to an election (but how close is left unsaid) because, even if those decisions are unpublished (as the Commonwealth Court's decision was here), the mere *existence* of non-binding persuasive authority regarding a disputed election rule could have some effect on the Republican Intervenors' electoral fortunes. *See* Appl. 11-16. This Court should cast aside that lawless and self-interested proposal.

To be sure, no support for this extreme contention can be had in the federal "*Purcell* Doctrine," as Republican Intervenors wrongly argue (at 10-17). For one, *Purcell* applies to federal judicial *relief* that would bind state actors to change electoral rules close to the election, not to the mere issuance of precedent that might in turn follow as a matter of *stare decisis* or by dint of its persuasive power. *E.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring, joined by Alito, J.) (*Purcell* means that "federal district courts ordinarily should not enjoin state election laws in the period close to an election"); *see, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (per curiam) (federal district court order "unilaterally … [e]xtending the date by which ballots may be cast by voters" stayed because the district court contravened *Purcell* "*by ordering such relief*" (emphasis added)); *see also NPPEF*, No. 112 MM 2024, 2024 WL 4410884, at *1. And at any rate, the entire doctrine relates to limitations that are particular to *federal courts* and has never extended to state court, and certainly never to § 3157 appeals arising in the ordinary course through Pennsylvania's courts.

Grounded in the principles of federalism, *Purcell* is a rule of caution that "a *federal court's* last-minute interference with state election laws is ordinarily inappropriate." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (emphasis added). The opinions discussing *Purcell* consistently hold that it is *federal courts* in particular that are

constrained by that principle. *See*, *e.g.*, *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring) ("*[F]ederal courts* ordinarily should not alter state election laws in the period close to an election.") (emphasis added); *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) ("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." (emphasis added)); *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring) (*Purcell* limits "*federal intrusion[s]* on state lawmaking processes" (emphasis added)); *Republican Nat'l Comm.*, 589 U.S. at 424 (per curiam) ("This Court has repeatedly emphasized that lower *federal courts* should ordinarily not alter the election rules on the eve of an election." (emphasis added)).

Purcell is thus limited to a specific concern with election-eve changes mandated *by federal courts*. Even before *Purcell* had a name, courts recognized that "*[f]ederal court intervention* that would create such a disruption in the state electoral process" implicates "equitable consideration[s]" that "go[] to the heart of our notions of federalism." *E.g.*, *Page v. Bartels*, 248 F.3d 175, 195–96 (3d Cir. 2001) (Becker, C.J.) (emphasis added).

Consistent with deep-rooted federalism principles, the *Purcell* notion has never been thought to apply to state lawmakers and state courts. As Chief Justice Roberts explained, in describing why *Purcell* applied to a Wisconsin federal district

court order but *not* to the election-related orders issued by this Court in 2020, there is a significant difference between "the authority of state courts" applying state law and "federal intrusion[s] on state lawmaking processes," with "[d]ifferent bodies of law and different precedents govern[ing] these two situations." *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (Roberts, C.J., concurring).

Recent redistricting cases illustrate the distinction clearly. In *Merrill*, in which an Alabama federal court ordered redistricting, this Court granted a stay of the lower federal court's injunction based on *Purcell* because "federal courts ordinarily should not enjoin a state's election laws in the period close to an election." 142 S. Ct. at 881. But in *Moore*, where new districting lines were ordered by the North Carolina Supreme Court, the Court denied a stay and let the state-judge lines stand, because as Justice Kavanaugh explained it was "too late for the federal courts"—*i.e.*, the U.S. Supreme Court—to order that the district lines be changed." 142 S. Ct. at 1089 (Kavanaugh, J., concurring).

Indeed, Pennsylvania law affirmatively bars the invention of some generally applicable *Purcell*-type principle. Such a rule would be in nearly insoluble tension with the operation of 25 P.S. § 3157, which provides for the rapid adjudication of election-related legal challenges specifically relating to the computation and canvassing of the returns that occurs in the immediate aftermath *after* the election. State court decisions under the dispute-resolution mechanism set forth in § 3157 thus

necessarily arise *only* in the throes of election season—and yet Pennsylvania courts can and do decide them. *See supra* 17 (citing cases). When a Section 3157 appeal makes it all the way to this Court, it may well be time for another election, as was the case in *Genser*. Attempting to impose *Purcell*, a concept designed for limited-jurisdiction federal courts, on the workaday activities of the courts of this Commonwealth as they interpret and adjudicate disputes regarding the Election Code would be a violation of the General Assembly's express authorization to Pennsylvania courts to hear such appeals, as well as the General Assembly's intent in drafting Section 3157. Imposing a new *Purcell*-like standard on Pennsylvania courts would also be a disaster in practice.

No wonder, then, that this Court did not in fact "adopt the *Purcell* principle" as some blanket rule of law when it denied the *NPPEF* King's Bench petition in a non-precedential two-page order last month. *See* Appl. at 18; *see also id.* at 1, 2, 8, 10, 11, 16, 17 (repeatedly citing the same snippet from *NPPEF* in support of a contrary proposition).

The *NPPEF* order may reflect that *Purcell*-type considerations concerning the exigencies of election season *can* be relevant, particularly in the discretionary decision whether to allow a King's Bench petition seeking prospective relief. But it also made clear that such considerations are no barrier at all to merits resolution of appeals that arise "in the ordinary course"—even ones that raise important election-

related legal issues. *NPPEF*, No. 112 MM 2024, 2024 WL 4410884, at *1 n.2 (Pa. Oct. 5, 2024).[6] The Court then pointed specifically to *Genser*, a then-pending Section 3157 appeal, as an example of such an ordinary-course appeal. *Id.* And the Court thereafter decided *Genser*, just last week, bringing uniformity and clarity to a disputed legal issue regarding the application of the Election Code to the canvassing of provisional ballots. 2024 WL 4553285, at *22. This Court's decision in *Genser* is consistent with design of Section 3157—and is simply impossible to square with Republican Intervenors' dramatic overreading of the *NPPEF* order or their proposed, *Purcell*-inspired override of the normal process for post-election elections appeals under Section 3157.

Republican Intervenors plainly do not like how the General Assembly has structured the process of elections appeals in Pennsylvania, and they plainly wish this case did not arise through that process via a September 2024 special election. They suggest (at 19-21) that there was something improper in Commonwealth Court deciding this case without all 67 counties joined as parties, but appeals under Section 3157 do not proceed that way, as *Genser* and other recent decisions of this Court

[6] Pennsylvania courts have in fact repeatedly resolved disputes about the conduct of elections even while elections or canvassing are underway. *See*, *e.g.*, *Ball v. Chapman,* 289 A.3d 1 (Pa. 2023) (resolving King's Bench petition filed by Republican Intervenors); *In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. Nov. 23, 2020) (resolving issues arising during post-election canvass); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Cmwlth. Oct. 2, 2012) (entering a preliminary injunction against enforcement of a voter ID law after remand from this Court, 54 A.3d 1, 5 (Pa. Sept. 18, 2012)).

illustrate.[7] Indeed, they even go so far as to suggest (*e.g.*, at 3) that perhaps this Court should not merely grant a stay of the decision below but should direct a "modification" of the Commonwealth Court's order that would function as a *de facto* restraining order against counties that are not even parties to this case, requiring them "to enforce the General Assembly's date requirement in the 2024 General Election and all future elections," even though the constitutionality of such enforcement remains an open question. Such an injunction against unnamed, unserved non-parties, in order to prevent them from even considering the Commonwealth Court's non-precedential decision as they canvass votes in the 2024 General Election, would be contrary not only to Section 3157 but to all notions of jurisdiction and prudence. *See, e.g.*, *First Regular Baptist Church of Indiana, Pa. v. Allison*, 154 A. 913, 917 (Pa. 1931).

It is especially odd for Republican Intervenors to invoke *Purcell*-type concepts here. The *Purcell* principle is premised on the "*State's* extraordinarily strong interest in avoiding ... changes to its election laws and procedures." *E.g.*, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphasis added). Relevant

[7] The Commonwealth Court majority thus correctly rejected Republican Intervenors' novel position that every county had to be joined in the Voter Respondents' direct statutory appeal from their own county board's decision: "[W]e also reject any contention that the other 66 county boards of elections needed to be joined as parties for Designated Appellees to obtain the relief they sought from the trial court pertaining to the September 17, 2024 Special Election, which only took place in one county of this Commonwealth, Philadelphia County. The requested relief could not have been sought against any other county board in relation to that Special Election." *Baxter*, 2024 WL 4614689 at *10 n.25.

to that interest, the General Assembly enacted an election appeals process that *requires* that certain judicial decisions related to election law will arise in the ordinary course, through the appeals of aggrieved parties from the decisions of county boards of elections. 25 § P.S. 3157(a). Republican Intervenors, as private partisan entities who do not represent the State or its interests, now ask this Court to do away with the election appeals process set forth in state law. Whether by *Purcell* or any other name, what they seek is not the law in Pennsylvania.

B. *Purcell*-Type Considerations Do Not Support a Stay—But They Do Support Granting Review and Affirming.

None of this is to say that the exigencies of election season are categorically irrelevant when state courts are fashioning equitable relief—they may well be, at least inasmuch as the grant of that relief is also justified by a likelihood of success on the merits. But here, to the extent they are relevant, those exigencies do not support a stay. They support a grant of jurisdiction and an affirmance.

As for the Commonwealth Court, there is simply no argument that its order improperly caused any disruption or chaos or burden with respect to the actual subject matter of this appeal, namely the September 2024 special election in Philadelphia. *See infra,* 47-50. Republican Intervenors concede (at 2) that they have no issue with any injunctive relief issued by the Commonwealth Court. They assert that the Commonwealth Court's "order" is the problem (at 2), but there too, they cannot actually claim the order directly binds any other county in the future,

inasmuch as the Commonwealth Court did not issue a published, precedential opinion.

The argument is, instead, that by vindicating the rights of 69 Philadelphians in the election appeal before it, the Commonwealth Court said something about what the Pennsylvania Constitution means that counties and county courts may agree with when the same issue comes up with respect to the 2024 General Election. But that is just how persuasive authority works. This Court can "stay" the effect of the Commonwealth Court's decision on the votes cast in the September 2024 special election, but it cannot affirmatively command non-party counties and county courts of common pleas to disregard the same constitutional arguments when they inevitably arise again after the coming election.

That is why Republican Intervenors' argument, that the mere existence of the decision below creates some risk of disuniformity with respect to the counting of mail ballots in envelopes with dating errors in the 2024 General Election, Appl. at 13-15, is so misplaced. The decision below plainly orders no prospective relief; because it is unpublished, it is persuasive authority to the same extent in Erie County and Lancaster County as it is in Philadelphia. *See, e.g.*, Pa.R.A.P. 126(b); *see also, e.g.*, *Duke Energy Fayette II, LLC v. Fayette Cnty. Bd. of Assessment Appeals*, 116 A.3d 1176, 1182 (Pa. Cmwlth. Ct. 2015). Thus, whatever risk there might be of varying rules between counties with respect to these mail ballots, a "stay" would not

do anything to address that risk. With or without a stay, counties will need to decide whether the Pennsylvania Constitution requires them to count voters' ballots. With or without a stay, county courts of common pleas will need to hear the appeals from board of elections decisions. If anything, a stay would make things *worse* in the 2024 General Election, creating even more uncertainty about the application of the Free and Equal Elections Clause to the envelope-date issue but still leaving local elections boards and courts to come up with their own answers when voters seek to vindicate their constitutional rights in elections appeals (or when Republican Intervenors or allied actors file their own appeals to block them).

Nor do Republican Intervenors provide any explanation for how granting a "stay" of an unpublished decision about a past, concluded election will prevent future "chaos" or implicate any of the "host of difficult decisions about how best to structure and conduct the election" that election officials must make. Appl. at 11-12 (quoting *Dem. Nat'l Committee*, 141 S. Ct. at 31 (Kavanaugh, J., concurring)). This case does not involve *any* of the rules for where, when, or how Pennsylvanians vote. None. It involves only whether, at the canvassing stage, a voter's mail ballot must be rejected and left uncounted because the voter made a trivial mistake in failing to date a form printed on the outer envelope.

Meanwhile, if Republican Intervenors were in fact right that, absent a stay, county boards would choose to follow the Commonwealth Court's decision and

"likely count" ballots despite envelope date errors (*see* Appl. at 13), that would not be a *Purcell*-type problem at all. *Purcell*-type problems arise where a court orders election-related relief that is not "feasible" "without significant cost, confusion, or hardship," *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). But following the Commonwealth Court's legal rule would be perfectly feasible "without significant cost, confusion, or hardship." *Id.* Again, that rule requires no change at all to any aspect of the process by which voters vote. If anything, voters, campaigns, and community organizations would be *relieved* of the need to expend considerable efforts investigating and mitigating instances of needless disenfranchisement. And as for elections officials, applying the legal reasoning of the Commonwealth Court makes the work of canvassing demonstrably *easier*, as the counties have previously explained. *See, e.g.*, R0139-41 (9/4/24 Br. of Resp'ts Allegheny and Philadelphia Cnty. Bds. of Elections).[8] Following the rule of the Commonwealth Court would just relieve county officials of the onerous task of scrutinizing the envelopes for "correct" dates whose only evident purpose is to disenfranchise unfortunate voters by the thousands in election after election.

[8] In his dissenting opinion, Judge Wolf expressed concern that the Commonwealth Court's decision might lead some voters to forego voting provisionally. *See Baxter*, 2024 WL 4614689, at *26, 27 n.6 (Wolf, J., dissenting). But given the non-precedential status of the Commonwealth Court's decision, any voter would still be advised to vote a provisional ballot so that it can be counted in the event that the mail ballot is not. For those who wish to vindicate the law's preference that "[t]echnicalities should not be used to make the right of the voter insecure," *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954), the only enduring solution will be a decision from this Court.

All of which is why now is the right time for this Court to *grant the Republican Intervenors' request and affirm*. The single best way to address the burdens on voters and election officials stemming from the ongoing legal dispute over the constitutionality of disenfranchising voters for a meaningless paperwork error is for this Court to resolve that dispute.[9] The Court could do so here in the same procedural manner as in *Genser*—via a Section 3157 appeal that has arisen in the ordinary course. Doing so would result in a final, precedential legal rule that would apply uniformly across the Commonwealth. And for the reasons stated already, that rule is easily administered—*much more easily* than the cumbersome and unjust status quo.

Taking this case now, as Republican Intervenors request, will also give the Court a chance to resolve this issue—at least by way of an order with an opinion to follow, as in *Ball*—before the results of the upcoming election are known. As the Secretary of State and Department of State convincingly argued as *amici* below, "[i]t is better to address questions about which ballots will be counted before such a decision becomes outcome determinative." 10/14/24 Amicus Br. in Supp. of Appellees, at 9-10 (citing *Zimmerman v. Schmidt*, 33 MD 2024, 2024 WL 3979110,

[9] Republican Intervenors also offer (at 17-18) a lengthy recitation of some of the prior litigation around the envelope-dating provision, ostensibly to support their suggestion that the state constitutional claim here should have been raised more quickly. But the plaintiffs in the prior federal cases raised only federal claims, which is consistent with limitations on the power of federal courts to enforce state constitutional rights. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Voter Respondents also were not party to those prior suits, as their right to vote was not violated until the September 2024 special election.

at *5 n.13 (Pa. Cmwlth. Aug. 23, 2024), *vacated on other grounds*, 63 MAP 2024, 2024 WL 4284202 (Pa. Sept. 25, 2024)). Doing so now provides an opportunity to set the precedent that will guide all county boards before they begin the canvass and computation of ballots in the upcoming election.

Although this approach would involve expedited review, this Court has resolved similarly critical questions of what ballots would count on similarly short timelines, most notably in *Ball*. The alternative—waiting to address the underlying constitutional issue until the courts are faced with a proliferation of Section 3157 appeals after Election Day, and indeed after counties have started counting votes, in a presidential election year—would be a far more chaotic, harried, and confusing course of action.

There can be no doubt that election administrators in Pennsylvania are well able to adapt where the applicable rule regarding the canvassing of ballots changes close to the election (especially when that change makes their jobs easier). That was the case with respect to *Genser*, where this Court's decision with respect to the canvassing of provisional ballots was the subject of speedily issued guidance from the Secretary of the Commonwealth, and where there has been no argument that counties will be unable to apply the rule laid down in by the Court. County boards also adapted two years ago in *Ball*, where in response to Republican Intervenors' October 19, 2022 request, this Court ordered that ballots with envelope-date errors

not be counted on November 1, just before Election Day, and then followed that with further instructions to election officials just three days before Election Day, requiring for the first time that envelope dates to be reviewed by the county boards for correctness, *Ball,* 289 A.3d 1, 23. Again, the Secretary of the Commonwealth issued guidance reflecting this decision two days later,[10] and counties complied with the Court's order, as Republican Intervenors expressly told this Court they would in their election-eve King's Bench petition, *see Ball v. Chapman*, Petitioners' Br., No. 102 MM 2022, 2022 WL 18540588 at *41(Pa. Oct. 24, 2022).[11]

A precedential merits ruling from this Court would also ensure uniformity going forward and eliminate any possible Equal Protection concerns. Republican Intervenors' suggestion (at 14) that the decision below contravenes *Bush v. Gore* by potentially leading to "varying" county-by-county standards is mistaken and only further underscores the need for a merits determination by this Court. To be sure, the

[10] *See* Pa. Dep't of State, *Guidance 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.

[11] Notably, Republican Intervenors also filed a petition for *certiorari* with the U.S. Supreme Court on October 23, 2020, seeking to reverse this Court's decision in *PDP* to alter various Pennsylvania election rules. *See Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021). Again, within days, the Secretary updated her guidance. *See also* 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.

decision below did not involve any varying standards at all: Because only voters in Philadelphia County were eligible to vote in that election, the decision below necessarily did not involve voters in different counties being subject to any "arbitrary and disparate treatment" in connection with the special election at issue. *Bush v. Gore*, 531 U.S. 98, 104 (2000). Petitioners' overreading of *Bush v. Gore* to somehow require the presence of all 67 boards of election makes no sense in a case involving a single-county special election. *Cf.* Appl. at 14 (contending that "statewide standards" must govern in a "*statewide* election" (emphasis added)). Again, that position would all but nullify Section 3157, which specifically contemplates the county-by-county adjudication of legal issues arising in the canvassing process in the courts of common pleas for each county.

The Free and Equal Elections Clause applies with equal force statewide. A precedential decision from this Court or the Commonwealth Court prohibiting discarding valid ballots based on a failure to comply with the vestigial ballot-dating provision as inconsistent with the Pennsylvania Constitution would, as Republican Intervenors urge, establish a clear "statewide standard[] for determining what is a legal vote." Appl. at 14 (quoting *Bush*, 531 U.S. at 110). Thus, if the Court has any concerns about confusion or inconsistency among the boards of elections in light of the decision below, that is simply another reason to grant extraordinary jurisdiction, as requested by Republican Intervenors, and affirm.

In sum, proximity to the election was no barrier to the Commonwealth Court resolving the Section 3157 appeal before it. That Court did its job. And it has not been a barrier to action in this Court in prior elections when Republican Intervenors sought election-eve relief. *See Ball*, 289 A.3d at 8. Proximity to the upcoming election is indeed an *affirmative* reason for this Court to exercise extraordinary jurisdiction in this appeal and resolve the question presented once and for all, before that question returns again in a messier and more chaotic post-election posture.

II. THIS COURT SHOULD EXERCISE EXTRAORDINARY JURISDICTION AND AFFIRM ON THE MERITS.

Republican Intervenors' application presents an opportunity for the Court to exercise extraordinary jurisdiction and finally put an end to unconstitutional disenfranchisement based on enforcement of the envelope-dating provision. Affirming the Commonwealth Court below is both justified on the merits and makes good sense to provide guidance to state election officials before canvassing of mail ballots is complete in the upcoming election.

The Court has before it all it needs to affirm on the merits: a materially undisputed factual record; two well-reasoned decisions on the law from *en banc* panels of the Commonwealth Court (in this case and *B-PEP*); and multiple decisions from other courts which had the benefit of discovery from all 67 counties and the Department of State and uniformly concluded that the envelope-dating provision plays no role in election administration other than to disenfranchise voters for

noncompliance. And the panel majority's decision was plainly correct on the merits.[12] It correctly concluded, again, that enforcement of the obsolete envelope-dating provision to reject otherwise valid mail ballots violates Pennsylvanians' constitutional right to vote. The violation repeats each and every time such enforcement occurs. Nothing in Republican Intervenors' submissions to this Court or the courts below call these conclusions into question.[13]

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[12] The Commonwealth Court also acted well within its jurisdictional authority in reviewing the trial court's ruling. Because the Court of Common Pleas did not hold "invalid as repugnant to the Constitution...any statute," the lower court's decision did not trigger this Court's exclusive appellate jurisdiction under 42 Pa.C.S. § 722. Rather, the Court of Common Pleas held that "the Board's decision to reject [Voters'] ballot[s] for failure to affix the date deprived them of their Pennsylvania Constitutional right to vote." 1925(a) Order at 1-2 (Oct. 10, 2024). Nor did Voter Respondents' Petition seek an order invalidating any statutory provision. In addition, as Judge Wolf acknowledged in his dissent below, "parties can waive jurisdictional defects and thus perfect appellate jurisdiction *Baxter*, 2024 WL 4614689, at *25 (Wolf, J., dissenting) (citing 42 Pa.C.S. § 704). There was no jurisdictional defect, but even if there had been one, the defect would have been waived by Republican Intervenors' filing of their appeal in the Commonwealth Court instead of filing directly in this Court.

Proposed Amicus RITE compares this case to *Zimmerman v. Schmidt*, __ A.3d __, No. 63 MAP 2024, 2024 WL 4284202, at *1 (Pa. Sept. 25, 2024), but in that case, the Commonwealth Court lacked *original jurisdiction* under 42 Pa.C.S. § 761(a). Unlike Section 722 appellate jurisdiction, that is a non-waivable defect. *E.g., In re Petition for Enf't of Subpoenas issued by Hearing Exam'r in a Proceeding before Bd. of Med*., 214 A.3d 660, 663 n.3 (Pa. 2019). By contrast, 42 Pa.C.S. § 704(a) provides that when an appellant invokes the Commonwealth Court's *appellate* jurisdiction, "[t]he failure of an appellee to file an objection to the jurisdiction of [the] appellate court ... shall, unless the appellate court otherwise orders, operate to perfect the appellate jurisdiction of such appellate court, notwithstanding any provision of [Title 42]."

[13] The Commonwealth Court's order relates to a special election to the state legislature, such that the federal Elections Clause and Electors Clause categorically do not apply to its decision. Republican Intervenors accordingly do not contend that the Commonwealth Court's order implicates those provisions or any aspect of *Moore v. Harper,* 600 U.S. 1 (2023). Any argument that the interpretation of the Free and Equal Clause in this case implicates any federal question under *Moore v. Harper* is waived.

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

The Free and Equal Elections Clause firmly establishes the right to vote as a fundamental one, which 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."); *see also, e.g.*, *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) ("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)). The Clause is uniquely broad in scope and powerful in its protective force. As this 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. *LWV*, 178 A.3d at 802 (citations omitted). 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, this venerable Clause "governs *all aspects* of the electoral process." *LWV*, 178 A.3d at 814 (emphasis added). It 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 v. Moore*, 91 A. 520, 523 (Pa. 1914); 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. It thus "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).

Under Pennsylvania law, restrictions on this most fundamental right must 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);[14] *James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984). And 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).[15] Laws that "subvert[]," "affect," "burden," or "infringe[] upon" the

[14] 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.

[15] *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

fundamental right to vote may trigger such review, even absent a "severe" burden. *See, LWV*, 178 A.3d at 810; *Berg*, 712 A.2d at 342; *James*, 477 A.2d at 1306.

Regardless what terminology is used 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."). Accordingly, the parties defending enforcement of the envelope-dating provision must prove that it serves a compelling government interest. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002).

Under these authorities, the Commonwealth Court reached the correct conclusion on the merits. Republican Intervenors do not even try to show that disenfranchising voters for failure to strictly comply with the obsolete envelope-dating provision is a scheme that is "narrowly drawn to advance a state interest of compelling importance." *PDP*, 238 A.3d at 385. They have never disputed that the dating provision would fail strict scrutiny. Nor could they. It is stipulated in this case, and was not disputed by Republican Intervenors in the Court of Common Pleas,[16]

except for compelling reasons" (emphasis added)); *accord In re Nader*, 858 A.2d at 1180 ("where a precious freedom such as voting is involved, a compelling state interest must be demonstrated").

[16] When given the opportunity to identify facts in dispute at the same hearing, Republican Intervenors could not do so and ultimately did not object to the stipulation of facts pled in the PFR. *See* R0049 at 20:2-21.

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. Moreover, the General Assembly indisputably had *no* 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.[17]

The envelope-dating provision is so uniquely pointless that the level of scrutiny applied is ultimately irrelevant: Under *any* level of constitutional scrutiny, disenfranchisement based on this meaningless mistake is unjustified and therefore unconstitutional.

Ignoring the Court of Common Pleas record—as well as the admissions of every county board of elections in Pennsylvania and the resulting findings of state and federal courts in *NAACP*, *Migliori*, *B-PEP*, and *Chapman*—Republican Intervenors continue to repackage three theoretical purposes that they (and they alone) say are served by the envelope-dating provision. *See* Appl. 31-34. While Republican Intervenors state that further factual development is necessary here, they have yet to identify any facts in the PFR they would deny or dispute.[18] Moreover,

[17] As noted, *supra* pp. 8-10, 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.

[18] Republican Intervenors now argue they were denied the opportunity to conduct expert and fact discovery, and that they want to depose Voters Respondents about "why they did not comply with

these same Intervenors cannot dispute that they participated fully in expert and fact discovery in *NAACP* to discern everything they could from *every* county about how election officials use the voter-written dates. Neither they nor any other party to *NAACP* discovered any use for these dates.[19] Ultimately, 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.

Republican Intervenors are thus left to regurgitate the previously-rejected hypothetical purposes behind the envelope-dating provision. None of those survives any level of scrutiny.

First, the envelope-dating provision has never served 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

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the date requirement." Appl. at 21-22. Aside from failing to raising this in the trial court, Republican Intervenors do not explain how Voters' reasons for missing the envelope date matter. In any event, their reasons are a matter of stipulated record, as they set forth in their undisputed declarations that the mistakes were inadvertent. *See* Baxter Decl., ¶10; Kinniry Decl., ¶10.

[19] Republican Intervenors now argue for the first time that the factual conclusions in *NAACP I* somehow have less force here because they were reached in the context of a case about the federal Materiality Provision. This is nonsense. Discovery in that case focused on many of the same questions about the uses of and state interests advanced by the envelope-dating provision. Republican Intervenors now say they wish to explore these issues again in this case. Republican Intervenors had exactly the same incentive to ask the same questions of county boards in *NAACP* to argue that handwritten envelope dates are "material" under federal law as they would to argue that they are constitutional under the Free and Equal Elections Clause.

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. Republican Intervenors' 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 a "compelling government interest." *See Baxter*, 2024 WL 4614689 at *17; *see also* 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5) (requiring boards to "maintain a record of...[t]he date on which the elector's completed absentee [or mail-in] ballot is received by the county board").[20]

Second, there is no authority, from Pennsylvania or anywhere else, for the assertion that the voter-written date serves some supposed interest in "solemnity."[21] This supposed government interest could not even theoretically justify disenfranchising voters. *See, e.g.*, *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

[20] *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.").

[21] The cases that Republican Intervenors cite for this fabricated "solemnity" concern (Appl. 32-33) are strikingly off-topic, as none involved any 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).

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."[22] Pa. Dep't of State, *Directive Concerning the Form of Absentee and Mail-in Ballot Materials*, v.2.0 (July 1, 2024), at Appx. A[23]; *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 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 repeatedly and thoroughly debunked since 2020. Republican Intervenors keep pointing 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* showed, the Lancaster County

[22] 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). 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.

[23] Available at 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.

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 this 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.").

B. There Is No "Ballot-Casting" Exemption from the Free and Equal Elections Clause's Protections.

Ignoring the text of the Free and Equal Elections Clause, its history, and caselaw applying its robust protections, Republican Intervenors continue to allude

to an imagined carveout for so-called "neutral ballot-casting rules." Their arguments represent an extreme departure from first principles.

Republican Intervenors' arguments (*e.g.*, Appl. at 5, 25) assume a category of "ballot-casting" rules that does not exist. The idea of a legally distinct class of "ballot-casting" rules is not grounded in the Election Code[24] or found anywhere in 250 years of precedent. And it would have no application here in any event, as this case involves a ballot-*counting* or ballot-*canvassing* rule—*i.e.*, whether the board of elections is required to canvass voters' ballots—not a rule involving ballot-casting. Voter Respondents never argued that the mere inclusion of a line for voters to handwrite the date on the return envelope form is itself unconstitutional.

Creating a broad category of voting rules that would be effectively exempt from the Free and Equal Elections Clause would require the Court to overturn longstanding jurisprudence applying the Clause's protections to "all aspects of the electoral process" in a "broad and robust" manner. *LWV*, 178 A.3d at 804, 814. Doing so with so-called "ballot-casting" rules would also render the Clause impotent

[24] 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.

even against Jim Crow-era requirements like literacy tests, or a requirement to write the voter's paternal grandfather's name on the mail ballot return envelope.

Meanwhile, Republican Intervenors' assertion that Pennsylvania courts have never applied the Clause to a "ballot-casting rule" blatantly ignores the Pennsylvania courts' history of protecting the right to vote against unwarranted restrictions. For example, this 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.[25] In addition, the Commonwealth Court, following remand instructions from this Court, 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). And this Court

[25] Republican Intervenors continue twisting *PDP* to argue that this Court already rejected the constitutional arguments at issue here. *See* Appl. at 24-25 (citing *PDP*, 238 A.3d 345). This Court has never decided the constitutionality of enforcing the envelope-dating provision to disqualify mail ballots under the Free and Equal Elections Clause. *PDP* contained no constitutional challenge to enforcement of the envelope-dating provision. As this Court clarified last week in *Genser*—correcting similar mischaracterizations of *PDP* by the same Republican Intervenors—the petitioners in *PDP* 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. *Genser*, 2024 WL 4553285, at *13 (quoting *PDP*, 238 A.3d at 373-374 (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. *PDP*, 238 A.3d at 374. The Commonwealth Court—in this case and in *B-PEP*—is the only Pennsylvania appellate court to have adjudicated the constitutionality of enforcing the envelope-dating provision. Each time, the courts rejected Republican Intervenors' twisted reading of *PDP* and ruled such enforcement unconstitutional. *See Baxter*, 2024 WL 4614689, at *12 n.29; *B-PEP*, 2024 WL 4002321, at *27-28.

affirmed a Commonwealth Court ruling 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).

This Court also 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."[26] *In re Canvass of Provisional Ballots in 2024 Primary Election* ("*In re Canvass of Provisional Ballots*"), No. 55 MAP 2024, 2024 WL

[26] Despite this Court reaffirming its prior, broader, approach in *In re Canvass of Provisional Ballots*, Republican Intervenors continue to 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. Appl. at 26, 30 (quoting *LWV*, 178 A.3d at 810). But as cases like *Berg* and *Applewhite* 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 supra* p.34. Intervenor-Appellants' argument continues to repeat a partial quote from *Winston* (Appl. at 26), 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). Enforcement of the date provision actually *and* effectively denies voters the right to have their ballots included—or at least subverts the right.

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).[27] 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.

The Commonwealth Court correctly rejected Republican Intervenors' invitation to neuter the Free and Equal Elections Clause and thereby abandon this Commonwealth's traditions and a century of jurisprudence. This Court should take their invitation to exercise extraordinary jurisdiction, but then affirm the lower court's reasoned decision on the merits.

III. REPUBLICAN INTERVENORS HAVE NO GROUNDS FOR A STAY.

To obtain a stay, Republican Intervenors must show not only that they are "likely to prevail on the merits of their appeal," but also that they will suffer "irreparable injury" without a stay, and that the balance of harms and the public

[27] Republican Intervenors also stretch the Court's recent *In re Canvass of Provisional Ballots* holding to suggest it compels a different result here. It does not. The plurality in that case dispensed with a constitutional argument by simply noting that the proponent of the constitutional argument did "not indicate how" the statute at issue "denies the franchise or makes it so difficult as to amount to a denial." 322 A.3d at 909. Even then, the plurality identified important regulatory interests underlying the signature requirement at issue. *Id.* at 907. Here, by contrast, Voter Respondents have plainly identified how enforcement of the envelope-dating provision has in fact denied their right to vote in the Special Election, and the utter lack of government interest supporting such enforcement (in contrast to a signature requirement) alone distinguishes this case from *In re Canvass of Provisional Ballots.*

interest support a stay. *Reading Anthracite Co. v. Rich*, 577 A.2d 881, 884 (Pa. 1990).[28] They make no such showing.

First, Republican Intervenors are not likely to prevail on the merits of their appeal, for the reasons discussed at length above. *See supra*, § II. Nor are Republican Intervenors likely to succeed on any esoteric jurisdictional or *Purcell*-based theory in this Section 3157 appeal. *See supra*, § I.

Second, denying a stay will not cause Petitioners "irreparable injury," or indeed any injury at all. As explained already, *supra* pp.1, 6-8, the Commonwealth Court judgment that Republican Intervenors want stayed simply requires the Philadelphia County Board of Elections to count 69 absentee and mail-in ballots submitted in a September 17, 2024 special election among unopposed Democratic Party candidates that has already happened. It is undisputed that counting those votes will not change the outcome of the special election. Staying the counting of these 69 ballots submitted in undated and incorrectly dated envelopes and the amendment of the certified vote totals would accordingly not prevent any injury to Republican Intervenors. In contrast, a stay would "substantially harm other interested parties in

[28] Republican Intervenors' focus on the "substantial case" standard (Appl. at 19) is misguided. A court may in its discretion consider whether the applicant has made "'a substantial case on the merits,' but only when the other three factors 'strongly favor interim relief.'" *ModivCare Sols., LLC v. Dep't of Hum. Servs*., No. 789 C.D. 2023, 2023 WL 8367792, at *3 (Pa. Cmwlth. Ct. Nov. 17, 2023) (citations omitted). As set forth herein, Republican Intervenors cannot establish that any of the equitable stay factors weigh in their favor at all, let alone strongly, and thus cannot benefit from the lower "substantial case" standard on the merits.

the proceedings," namely Voter Respondents, by continuing the constitutional violation of depriving their right to have their votes counted.

Republican Intervenors argue (at 34) that, absent a stay, "their request for review in this Court will become moot and they will forever lose their ability to obtain such review, including of any county board decisions to extend the majority's order to the ongoing 2024 General Election." This argument makes no sense. As noted, *supra* pp. 3, 24, an unpublished Commonwealth Court decision is non-precedential, and it is thus unclear how a "stay" of that decision changes anything. Indeed, their theory that they will not be able to obtain review once the "current election has come and gone" is especially odd given that the election from which the judgment below arises has itself "come and gone." Their argument also ignores the availability of Section 3157 appeals that could be pursued by an aggrieved person should any county be persuaded by the Commonwealth Court's decision to count ballots received in undated or misdated envelopes.

Indeed, although Republican Intervenors have requested a stay of the judgment, what they really want is vacatur or reversal of the Commonwealth Court's *opinion* and a *de facto* restraining order restricting non-party counties from considering the open constitutional question in this case when they canvass the votes in the upcoming election. But the concern that counties will apply the Commonwealth Court's *reasoning* in the 2024 General Election is not an argument about irreparable

harm stemming from the *judgment* in this case, which does not require any county to do anything with respect to the 2024 General Election. If a county board of elections counts ballots that Republican Intervenors believe should not be counted in the 2024 General Election, they and other interested parties may seek appropriate relief at that time. They might also seek an order in the appropriate venue at the appropriate time to require continued segregation of the affected ballots.[29]

What Republican Intervenors may not do is obtain a *de facto* restraining order against every county in the state, via a "stay" in an appeal from a single-county arising from arising from September special election, on the theory that parties not before the court will apply the reasoning of an unpublished Commonwealth Court opinion in a way that they do not like. That is not a harm caused by the judgment in this case. Indeed, a stay—which is not a decision on the merits—would do nothing to remedy this claimed irreparable injury, because other courts and counties could still follow the Commonwealth Court's reasoning in deciding whether to count ballots with envelope errors in the upcoming election, finding it persuasive whether or not it is "stayed."

[29] For the past several elections, and consistent with the Department of States' guidance to all county boards, the county boards of elections have continued segregating ballots received in undated and misdated envelopes pending the outcome of ongoing litigation. *See* Pa. Dep't of State, *Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures*, 13, n. 13 (Sept. 10, 2024), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-guidance-civilian-absentee-mail-in-ballot-procedures-v3.1.pdf. This continuing practice further undermines Republican Intervenors' assertions that they will be irreparably harmed if the decision below is not stayed before Election Day.

Nor do Republican Intervenors substantiate their implicit assumption that they will in fact achieve some electoral benefit from disenfranchising mail ballot voters in the first place. This theory of irreparable harm is dependent on a long chain of hypothetical future consequences—that counties will apply the reasoning in the unpublished Commonwealth Court's opinion to count ballots, that they will not segregate the ballots, that they will prevent Republican observers from sitting close enough to see which ballots have noncompliant envelopes, that Republicans will therefore be unable to bring a challenge at the appropriate time, and that more of the impacted ballots will be cast by people voting for Democratic candidates. This string of hypotheticals does not constitute irreparable harm.

Third, the "public interest" does not support the grant of a stay. Republican Intervenors claim that denying their application would "seriously and irreparably harm the State, the General Assembly, and [Pennsylvania's] voters." Appl. 36 (internal quotation marks and citation omitted). Neither the State nor the General Assembly has alleged any such harm, and the Republican Intervenors do not speak for either. Indeed, the State submitted an amicus brief below in favor of Voter Respondents' position on the merits. As for Pennsylvania's voters, insofar as the Republican Intervenors may act as an advocate for voters from their political party, they again have not explained how denying a stay would specifically harm those

voters. Voters of all parties and persuasions make mistakes in complying with the Pennsylvania Election Code's technical rules for mail voting.

As noted, and contrary to Republican Intervenors' suggestion (at 36), a stay would substantially harm other interested parties, namely Voter Respondents here, by continuing to deprive them of their right to have their votes counted on the basis of a meaningless technical violation. And while the decision below relates only to a special election, if one posits Republican Intervenors' imagined world in which, absent a stay, all counties follow the Commonwealth Court's unpublished decision, then the public interest in granting such a stay swings even more lopsidedly against them. Tens of thousands of undisputedly qualified voters may be needlessly disenfranchised in the 2024 General Election based on the obsolete envelope-dating provision. The public interest in counting every qualified voter's ballot is paramount. *E.g., Appeal of James*, 105 A.2d at 66 ("Technicalities should not be used to make the right of the voter insecure."); *accord Shambach*, 577 Pa. at 845. Here, it weighs heavily against the proposed stay—but it supports granting extraordinary jurisdiction and affirming the Commonwealth Court.

CONCLUSION

The Court should deny the request for a stay or a modification of the Commonwealth Court's Order. The Court should grant the request to exercise extraordinary jurisdiction and affirm.

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Respectfully submitted,

/s/ Stephen A. Loney
Stephen A. Loney (No. 202535)
Witold J. Walczak (No. 62976)
Marian K. Schneider (No. 50337)
Kate Steiker-Ginzberg (No. 332236)
Kirsten Hanlon (No. 336365)
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513
sloney@aclupa.org
mschneider@aclupa.org
vwalczak@aclupa.org
ksteiker-ginzberg@aclupa.org
khanlon@aclupa.org

Ari J. Savitzky*
Sophia Lin Lakin*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500
asavitzky@aclu.org
slakin@aclu.org

Mary M. Mckenzie (No. 47434)
Benjamin Geffen (No. 310134)
Claudia De Palma (No. 320136)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
(267) 546-1319
mmckenzie@pubintlaw.org
bgeffen@pubintlaw.org
cdepalma@pubintlaw.org

John A. Freedman*
Elisabeth S. Theodore*
Daniel Yablon*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
elisabeth.theodore@arnoldporter.com
daniel.yablon@arnoldporter.com

**Pro hac vice* to be filed

Counsel for Voter-Respondents

CERTIFICATE 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.

/s/ *Stephen Loney*