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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 1305 C.D. 2024, 1309 C.D. 2024

BRIAN BAXTER and SUSAN KINNIRY,
Appellees,

v.

PHILADELPHIA BOARD OF ELECTIONS,
Appellant,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,
Intervenor-Appellants.

INTERVENOR-APPELLANTS' INITIAL BRIEF

On Appeal from the September 26, 2024 Order and September 27, 2024 Final Disposition Order of the Court of Common Pleas Of Philadelphia County, September Term 2024, No. 02481

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INTRODUCTION

The Pennsylvania Supreme Court has repeatedly upheld the General Assembly's date requirement for mail ballots against a barrage of legal challenges, including the very same Free and Equal Elections Clause arguments the trial court credited in this case.[1] Just over a week ago, the Pennsylvania Supreme Court declined yet another invitation to consider a Free and Equal Elections challenge to the date requirement. *See New Pa. Project Education Fund v. Schmidt*, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (per curiam) ("*New Pa.*"). In so doing, that court could not have been clearer: It will not "countenance" *any* changes to the date requirement "during the pendency of [the] ongoing election." *Id.*

The date requirement thus remains mandatory and uniform across the Commonwealth—and the Philadelphia Board of Elections ("the Board"), like the other 66 county boards, remains bound to enforce it for the ongoing 2024 General Election. Appellees nonetheless ask this Court to disregard the Pennsylvania Supreme Court's order. Without even *mentioning* that order's controlling language, Appellees now ask this Court (in a case that has nothing to do with the 2024 General Election) to invalidate the date requirement for the 2024 General Election. At the threshold, the Court should decline this invitation and reiterate that the Pennsylvania

[1] This Brief uses "mail ballots" to refer to both absentee ballots and mail-in ballots. *See* 25 Pa. Stat. §§ 3146.6, 3150.16.

Supreme Court has brought to an end Appellees' continued campaign to render the date requirement unenforceable during the ongoing election in which millions of Pennsylvania voters are already receiving and casting their ballots for President, Congress, and scores of state and local offices.

In fact, the Court should reject Appellees' challenge for past and future elections alike because it fails on the merits. The Pennsylvania Supreme Court has already upheld the General Assembly's *entire* declaration mandate for mail ballots—of which the date requirement is part—against a Free and Equal Elections challenge. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020); *see also* 25 Pa. Stat. §§ 3146.6(a) (requiring voters who vote by absentee ballot to "fill out, date and sign the declaration printed on [the outer] envelope"), 3150.16(a) (same for mail-in ballots). Just two years ago, it again upheld the date requirement as mandatory while noting—and declining to adopt—Free and Equal Elections arguments against it. *See Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2023). Accordingly, it ordered all 67 county boards of elections not to count mail ballots that do not comply with the requirement. *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).

A month ago, the Pennsylvania Supreme Court vacated a decision of a divided panel of this Court that invalidated the date requirement on Free and Equal Elections grounds. *See Black Political Empowerment Project v. Schmidt*, __A.3d__, 2024 WL

4181592, at *1 (Pa. Sept. 13, 2024) (per curiam) ("*BPEP* Order"), *vacating Black Political Empowerment Project v. Schmidt*, 2024 WL 4002321, at *1 (Pa. Commw. Ct. Aug. 30, 2024) ("*BPEP*"). Along with *New Pennsylvania Project Education Fund*, that makes two orders in just over three weeks declining to exercise extraordinary jurisdiction to entertain Free and Equal Elections challenges to the date requirement. *See New Pa.*, 2024 WL 4410884, at *1. And those orders, in turn, followed the Third Circuit's holding earlier this year that the mandatory date requirement does not violate the Materiality Provision of the Civil Rights Act of 1964 because it does not violate "the right to vote." *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth. of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024).

The Pennsylvania Supreme Court's holdings are not only binding on this Court; they are also correct. As that court has held for over a century—and recently reaffirmed *after* this Court's divided panel decision in *BPEP*—a mandatory ballot-casting rule can violate the Free and Equal Elections Clause only if it "den[ies] the franchise itself, or make[s] it so difficult [to vote] as to amount to a denial." *In re: Canvass of Provisional Ballots in 2024 Primary Election*, __A.3d__, 2024 WL 4181584, at *7 (Pa. Sept. 13, 2024) (cleaned up); *see also Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). And that standard presents an extraordinarily high bar for challengers to clear: The Pennsylvania Supreme Court has *never* invalidated a ballot-casting rule under it. *See* A. MCCALL, ELECTIONS, *IN* K. GORMLEY ET. AL.,

THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 215-232 (identifying the types of cases the Clause has been applied in).

The date requirement, too, falls far on the constitutional side of that line. No reasonable person could conclude that the obligation to date a ballot "make[s] it so difficult [to vote] as to amount to a denial" of the franchise. *In re: Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7; *see also BPEP*, 2024 WL 4002321, at *54 (McCullough, J., dissenting). The date requirement does not even apply to in-person voting, the voting method of choice for the majority of Pennsylvania voters. Even when it comes to mail voting, the date requirement is constitutional because signing and dating a document is a commonplace requirement of everyday life that is *less* burdensome than numerous voting rules that have been upheld against right-to-vote challenges. Moreover, on anyone's account, well over 99% of individuals voting by mail have complied with the date requirement in every election. *See BPEP*, 2024 WL 4002321, at *54-55 (McCullough, J., dissenting). That number is only expected to increase thanks to Secretary Schmidt's July 1, 2024 Directive that makes complying with the date requirement easier than ever. *See id.* at *9.

If more were somehow needed, Appellees' suit never should have gotten off the ground because it suffers several serious procedural defects. *First*, even as the Pennsylvania Supreme Court just vacated the divided panel decision in *BPEP*

because the petitioners there failed to join all of Pennsylvania's county boards of elections, *see BPEP* Order, 2024 WL 4181592, at *1 , Appellees made the same error here. The other 66 county boards have interests in this case and the date requirement, and they must be joined. *Second*, Appellees were granted relief based on contested facts. Intervenor-Appellants *have* evidence that the date requirement serves important functions. For example, the date requirement recently supplied evidence in a voter-fraud prosecution that secured a conviction. *See Commonwealth v. Mihaliak*, MJ-02202-CR-0000126-2022 (Lancaster Cnty. 2022) (charging document in *Mihaliak*), App. Ex. A, A-4. Intervenor-Appellants, to say nothing of other county boards, have the right to engage in factual development and conduct discovery—rights that the Court of Common Pleas below wholly ignored. *Third*, the trial court reversibly erred when it retroactively changed election rules for an already completed election.

For any and all of these reasons, and as explained more fully below, the Court should reverse.

BACKGROUND

In 2019, a bipartisan majority of the General Assembly adopted universal mail voting for the first time in history. Act of Oct. 31, 2019, P.L. 552, No. 77 § 8 ("Act 77"); *see* 25 Pa. Stat. § 3150.11(a). As part of that compromise in the historic Act 77, the General Assembly maintained the longstanding requirement that mail voters

"fill out, date and sign the declaration" on the ballot return envelope. Act 77 §§ 6, 8; *see also* 25 Pa. Stat. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3).

Appellees are two voters who do not dispute that they failed to comply with the date requirement during the September 17, 2024 Special Election for State House Districts 195 and 201 (the "Special Election"). *See* Pet. ¶¶ 16, 21, App. Ex. B. Consequently, the Board complied with state law and declined to count their ballots. *Id.* ¶¶ 17, 21. Appellees then filed a petition for review in the Philadelphia Court of Common Pleas asking that court to invalidate the date requirement under the Free and Equal Elections Clause. *Id.* ¶ 63. They made this request even though voting in the Special Election was completed and the 2024 General Election was *already underway*. *See* 25 Pa. Stat. § 3146.2a (mail ballots for 2024 general election may be sent out starting on September 16).

After a brief hearing, the trial court granted the petition and held that refusal to count a ballot "due to a voter's failure to date the declaration printed on the outer envelope used to return his/her mail-in ballot . . . violates [the Free and Equal Elections Clause]." Sept. 26 Order at 2, App. Ex. C (cleaned up). The trial court therefore ordered the Board to verify Appellees' "and the sixty-seven other registered voters date-disqualified mail-in ballots from the Special Election," to count all such ballots "if otherwise valid," and to include the counted ballots "in the results of the Special Election." *Id.* (cleaned up). The trial court issued a follow-on

order the next day that, among other things, granted Intervenor-Appellants Republican National Committee and Republican Party of Pennsylvania (the "Republican Committees") leave to intervene. *See* Sept. 27 Order at 1-2, App. Ex. D.

The trial court has confirmed that Appellees' petition "related to a special election that had already occurred and did not involve voting in the November 2024 election[.]" Oct. 10 Order at 2 n.1 ("Oct. 10 Order"), App. Ex. E. Appellees nonetheless have requested that this Court expedite its decision in this matter "in advance of the November 5 general election" because, in their view, a ruling from this Court "is necessary to guide Philadelphia and other county boards of elections as to the treatment of undated or misdated mail-in and absentee ballots, and to ensure that such ballots are not rejected on unconstitutional grounds." Appellees' Application For Expedited Briefing Schedule ¶ 4 (Oct. 7, 2024) ("Appellees' Appl.").

Both the Board and the Republican Committees timely appealed the trial court's orders.

STANDARD OF REVIEW

A Court of Common Pleas can reverse the decision of a county board of elections "only for an abuse of discretion or error of law." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020)

(citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); *see also* 25 Pa. Stat. § 3157(b) (confining Court of Common Pleas' review of decision of board of elections to matters involving "fraud or error").

This Court reviews legal determinations of the Court of Common Pleas *de novo*. *See In re Canvassing Observation*, 2020 WL 6551316, at *1 n.3 (Pa. Commw. Ct. Nov. 5, 2020), *vacated on other grounds*, 241 A.3d 339 (Pa. 2020) (citing *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015)).

SUMMARY OF ARGUMENT

This Court should reiterate that the date requirement remains in force for the ongoing 2024 General Election, foreclose any further challenges to the date requirement pertaining to that election, and reverse the trial court's order on the merits or procedural grounds.

I. The Pennsylvania Supreme Court has decreed that it will not countenance changes to the mandatory date requirement for the ongoing 2024 General Election. The trial court's order, moreover, does not even pertain to the 2024 General Election. The Court therefore should decline Appellees' invitation to change the rules for the 2024 General Election, and reiterate that it will not enter any order affecting the enforceability of the date requirement for the 2024 General Election in this or any other case.

II. To the extent the Court addresses the merits, it should reject Appellees' Free and Equal Elections challenge. The Pennsylvania Supreme Court has repeatedly upheld mandatory application of the date requirement to decline to count noncompliant mail ballots—including against Free and Equal Elections challenges—and the Third Circuit has rejected a right-to-vote challenge to the requirement. Indeed, the date requirement comports with, rather than contravenes, the Free and Equal Elections Clause because it does not bar access to or deny the franchise.

The Court should not follow the prior divided panel decision in *BPEP*. Since that decision issued, the Pennsylvania Supreme Court reaffirmed that election rules do not violate the Free and Equal Elections Clause unless they "deny the franchise itself, or make it so difficult as to amount to a denial." *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at * 7 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). Unless a rule flunks *that demanding test*, it receives *no scrutiny* under the Free and Equal Elections Clause. *Id.* The vacated *BPEP* panel decision applied strict scrutiny to justify enjoining enforcement of the date requirement and, thus, is irreconcilable with the Pennsylvania Supreme Court's intervening reaffirmation of the governing law.

III. Finally, the Court may reverse without even reaching the merits. *First*, Appellees' suit suffers from the same procedural flaw that caused the Pennsylvania

Supreme Court to vacate the divided *BPEP* decision: Appellees failed to join all 67 county boards to this suit. *Second*, the trial court decided Appellees' petition without allowing the Republican Committees and the 66 non-joined county boards to present the factual record further underscoring the date requirement's constitutionality. *And third*, the trial court erred when it entered an order that changed the rules of the Special Election after it was completed. Each of these procedural failures alone warrants reversal.

ARGUMENT

The Court should reiterate that it will not enter any order affecting the date requirement's enforceability for the ongoing 2024 General Election, in this or any other case. It should also reverse the trial court's order on the merits or any of the host of procedural defects in Appellees' suit and the proceedings below.

I. THE COURT SHOULD REITERATE THAT IT WILL NOT ORDER ANY CHANGES TO THE ENFORCEABILITY OF THE DATE REQUIREMENT FOR THE ONGOING 2024 GENERAL ELECTION.

At the threshold, the Court should make clear that it will not order any changes to the date requirement's enforceability for the 2024 General Election.

The law of the Commonwealth is well established: The General Assembly's date requirement for mail ballots is mandatory and enforceable as a matter of state and federal law. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020); *Ball*, 289 A.3d at 14-16 & n.77; *BPEP* Order, 2024 WL 4181592, at *1; *Pa.*

State Conf. of NAACP, 97 F.4th at 125. Moreover, just days ago, the Pennsylvania Supreme Court could not have been clearer when it confronted another last-minute challenge to the date requirement from Appellees' counsel: It will not "countenance" changes to the date requirement "during the pendency of [the] ongoing election." *New Pa.*, 2024 WL 4410884, at *1.

As the Pennsylvania Supreme Court explained, this decision is rooted in "the *Purcell* principle" and "common sense." *Id.* (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). The *Purcell* principle recognizes that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As [the] election draws closer, that risk will increase." *Id.* at 3 n.1 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam)). Thus, it is a "basic tenet of election law" that "[w]hen an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (mem.) (Kavanaugh, J., concurring). "[R]unning a statewide election is a complicated endeavor," and involves "a host of difficult decisions about how best to structure and conduct the election." *Id.* And those decisions must then be communicated to the "state and local officials" tasked with implementing them, who in turn "must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting." *Id.*

The *Purcell* principle forecloses invalidating the date requirement during the ongoing 2024 General Election. *See New Pa.*, 2024 WL 4410884, at *1. Jeopardizing the enforceability of the date requirement would unleash "voter confusion" and "chaos." *Kuznik v. Westmoreland Cnty. Bd. Of Comm'rs*, 902 A.2d 476, 504-07 (Pa. 2006). There would be rushed appeals right before Election Day to the Pennsylvania Supreme Court, which would be forced to reverse this Court again. At the same time, a judicial order barring enforcement of something as mundane and commonsensical as the date requirement would undermine public confidence in the integrity of Pennsylvania's elections and Pennsylvania's courts. *See, e.g.*, *Democratic Nat'l Comm.*, 141 S. Ct. at 30 (Gorsuch, J., concurring) ("Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.").

But it will be worse than that—much worse—if the Court attempts to alter the enforceability of the date requirement for the 2024 General Election in this case. This case does not even *present the question* of the date requirement's application in the 2024 General Election. The trial court itself has confirmed that Appellees' petition and its order "related to a special election that had already occurred and did not involve voting in the November 2024 election[.]" Oct. 10 Order at 2 n.1, App. Ex. E. Because the order does not *prospectively* bind anyone, the Board—like the 66 other county boards—must enforce the mandatory date requirement for the

ongoing 2024 General Election. *See Pa. Democratic Party*, 238 A.3d at 374; *Ball*, 289 A.3d at 14-16 & n.77; *BPEP* Order, 2024 WL 4181592, at *1; *New Pa.*, 2024 WL 4410884, at *1; *Pa. State Conf. of NAACP*, 97 F.4th at 125.

Moreover, any contrary order from this Court in this case would apply only to the Board, and no other county boards *could* choose to comply with it over the orders from the Pennsylvania Supreme Court by which *they* are bound. *See id*. Commissioner Bluestein understood as much when the Board addressed the validity of Appellees' ballots. *See* Pet. ¶ 50, App. Ex. B. Thus, any order of the Court in this case that the date requirement is unenforceable would result in different boards applying different standards for determining the validity of mail ballots—a textbook violation of the Equal Protection Clause of the U.S. Supreme Court and the Pennsylvania Constitution. To reiterate, it would result in a *violation*, rather than a *vindication*, of the Free and Equal Elections Clause.

Under the Equal Protection Clause of the U.S. Constitution, a "State may not, by . . . arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Accordingly, at least where a "statewide" rule governs, such as in a statewide election, there must be "adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them." *Id.* at 110. Courts cannot order different "counties [to] use[] varying standards to determine what [i]s a legal vote." *Id.* at 107.

Yet that is precisely what will happen if this Court instructs or permits the Board not to enforce the date requirement. Such an action would result in "varying standards to determine what [i]s a legal vote" from "county to county" and be improper. *See id.* at 106-07.

Such an order would also violate the Pennsylvania Constitution, which decrees that "[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State," Pa. Const. art. VII, § 6, and the Election Code, which requires that elections be "uniformly conducted" throughout the Commonwealth. 25 Pa. Stat. § 2642(g). And it *would even violate the Free and Equal Elections Clause*. After all, the Clause's mandate of "free and equal" elections, Pa. Const. art. I, § 5, prohibits discrimination against voters "based on considerations of the region of the state in which [voters] live[]," *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808 (Pa. 2018) ("*LWV*"), and requires election rules to "treat[] all voters alike" and "in the same way under similar circumstances," *Winston*, 91 A. at 523. Any order from this Court invalidating the date requirement in Philadelphia—particularly *during an ongoing election*—would violate all of these state-law commands.

Regrettably, Appellees' counsel have not gotten the message. After this Court already ordered expedited briefing in this appeal, Appellees expressed dissatisfaction with the Court's timing and requested even *further* expedition of the schedule. Their sole rationale for that request was that the Court should rush to a

decision "in advance of the November 5 general election" because, in their view, a ruling from this Court "is necessary to guide Philadelphia and other county boards of elections as to the treatment of undated or misdated mail-in and absentee ballots." Appellees' Appl. ¶ 4.

Even though Appellees' counsel also represented the unsuccessful petitioners in *BPEP* and *New Pennsylvania Project Education Fund*, their application to this Court *failed to disclose* the Pennsylvania Supreme Court's adoption of the *Purcell* principle and the express statement that it will not "countenance" changes to the date requirement "during the pendency of an ongoing election." *Compare New Pa.*, 2024 WL 4410884, at *1, *with* Appellees' Appl. ¶ 4. The application also provided no explanation as to how an order in this case—which would run only against the Board—could possibly give "guidance" to "other county boards" at all, let alone for the "November 5 general election." Appellees' Appl. ¶ 4. Of course, it could not, because all 66 such boards remain bound by the Pennsylvania Supreme Court's orders, including the *New Pennsylvania Project Education Fund* order to which they are all parties. This Court lacks authority to disregard or override Pennsylvania Supreme Court orders. *See Pa. Democratic Party*, 238 A.3d at 374; *Ball*, 289 A.3d at 14-16 & n.77; *BPEP* Order, 2024 WL 4181592, at *1; *New Pa.*, 2024 WL 4410884, at *1.

Appellees instead hung their hat on the Pennsylvania Supreme Court's statement that it will carry out its "appellate role with respect to lower court decisions" that arise "in the ordinary course." Appellees' Appl. ¶ 3 (quoting *New Pa.*, 2024 WL 4410884, at *1). That is surely right. But far from leaving the door open to judicial changes to the date requirement's enforceability as Appellees suggest, this truism slams that door shut. If lower courts continue to invalidate rules in the Election Code, especially with an eye to applying those changes during the 2024 General Election, the Pennsylvania Supreme Court will exercise its "appellate role with respect to lower court decisions" and reverse. *New Pa.*, 2024 WL 4410884, at *1 n.2; *see also In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at 11 (Pa. Sept. 13, 2024) (Wecht, J., concurring) (criticizing the "proliferation" of lawsuits "advocating for the acceptance of ballots that do not comply with the plain terms of the Election Code"). That will surely happen here if this Court tries to render the date requirement unenforceable for the 2024 General Election. *See New Pa.*, 2024 WL 4410884, at *1.

In fact, accepting Appellees' counsel's request to change the enforceability of the date requirement now not only would violate the Pennsylvania Supreme Court's binding instructions and the *Purcell* principle; it would also be fundamentally unfair to the Commonwealth and its millions of voters. Moreover, it would work no unfairness to Appellees or their counsel. Appellees' counsel have brought multiple

suits challenging the enforceability of the date requirement over the past two years—but waited until the eve and pendency of the 2024 General Election to raise their Free and Equal Elections challenge. *See New Pa.*, 2024 WL 4410884, at *1 (Brobson, J., concurring) (explaining how Appellees' counsel "inexplicably" waited to bring Free and Equal Elections Clause challenges).

In particular, they first filed suit in November 2022, when they challenged the date requirement under the Materiality Provision in federal court. They lost that challenge. *See Pa. State Conf. of NAACP*, 97 F.4th 120. Only thereafter, they amended the federal complaint to add right-to-vote claims under the U.S. Constitution, but not analogous claims under the Free and Equal Elections Clause. *See* Second Am. Compl., ECF No. 413, *Pa. State Conf. of NAACP v. Schmidt*, No. 22-CV-339 (W.D. Pa. filed June 14, 2024).

It was not until May 28, 2024—more than 18 months after filing their first suit—that Appellees' counsel brought some of the federal plaintiffs and other petitioners to state court to raise the Free and Equal Elections challenge for the first time in *BPEP*. The Pennsylvania Supreme Court vacated the divided panel decision upholding that challenge. *See BPEP Order*, 2024 WL 4181592, at *1. Appellees' counsel nonetheless reordered the *BPEP* caption and added one new petitioner in order to ask the Pennsylvania Supreme Court to exercise extraordinary jurisdiction

over their Free and Equal Elections challenge. The Pennsylvania Supreme Court declined to do so. *See New Pa.*, 2024 WL 4410884, at *1.

And even though the Pennsylvania Supreme Court took the occasion to adopt the *Purcell* principle and declare that it will not "countenance" changes to the date requirement "during the pendency of an ongoing election," *id.*, Appellees want this Court to do precisely that, *see* Appellees' Appl. ¶ 4. Appellees' counsel will apparently stop at nothing in their assault on the General Assembly's duly enacted and lawful date requirement. The Court should put an end to this piecemeal-litigation effort to invalidate the date requirement and declare that it will not order any changes to the date requirement during the ongoing 2024 General Election.

II. THE DATE REQUIREMENT DOES NOT VIOLATE THE FREE AND EQUAL ELECTIONS CLAUSE.

If it reaches the merits, the Court should reverse because the date requirement does not violate the Free and Equal Elections Clause.

Appellees ask the Court to do something the Pennsylvania Supreme Court has *never* sanctioned: wield the Clause to strike down a neutral ballot-casting rule that governs how voters complete and cast their ballots. *See* A. MCCALL, ELECTIONS, *IN* K. GORMLEY ET. AL., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 215-232 (identifying the types of cases the Clause has been applied in). But in order to function properly, elections must have rules, including ballot-casting rules. The Judiciary may not disregard those rules, rewrite them, or declare them

unconstitutional simply because a voter failed to follow them and, accordingly, had his or her ballot rejected. *See, e.g.*, *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined") (cleaned up); *Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) ("we have resolved the question of the General Assembly's intent . . . based on the plain language of the statute; accordingly, it would be improper to stray into the arena of public policy in resolving this case"); *accord Pa. State Conf. of NAACP*, 97 F.4th at 133-34; *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissental) ("When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.' Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot. 'Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.'" (quoting *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 669 (2021)).

Thus, a voter does not suffer constitutional harm when his ballot is rejected because he failed to follow the rules the General Assembly enacted for completing or casting it. As the Pennsylvania Supreme Court recently reaffirmed (and originally held over a century ago), "[t]he power to regulate elections is legislative." *Pa.*

Democratic Party, 238 A.3d at 373 (*quoting Winston*, 91 A. at 522). Thus, "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate"—including the adoption of ballot-casting rules and the decision whether ballots should be "rejected due to minor errors made in contravention of those requirements"— "to the Legislature." *Id.* at 374.

A party seeking to strike down a statute as unconstitutional must meet an extremely high burden. The "starting point" is the presumption that "all legislative enactments" are constitutional and "[a]ny doubts are to be resolved in favor of a finding of constitutionality." *Mixon v. Commonwealth*, 759 A.2d 442, 447 (Pa. Commw. Ct. 2000); *LWV*, 178 A.3d at 801. This presumption of constitutionality is strong. *Mixon*, 759 A.2d at 447. To overcome it, Appellees must prove the date requirement "clearly, palpably, and plainly violates the Constitution." *LWV*, 178 A.3d at 801 (cleaned up). Indeed, a "statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid." *Pa. Env't Def. Found.*, 161 A.3d at 938 n.31.

Appellees' Free and Equal Elections challenge to the date requirement fails for several reasons. *First*, the Pennsylvania Supreme Court has already rejected it. *Pa. Democratic Party*, 238 A.3d at 372-80; *Ball*, 289 A.3d at 14-16 & n.77.

Second, even if the Court deems that to be an open question, Appellees' claims fail on the Clause's plain text and history and the controlling precedent construing

it. *See, e.g.*, *LWV*, 178 A.3d at 807-10; *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7. Indeed, the Pennsylvania Supreme Court's recent intervening decision reiterating the controlling standard and upholding a signature requirement further confirmed that the divided *BPEP* panel erred when it applied strict scrutiny and invalidated the date requirement. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7.

Third, case-law from other states with "free and equal elections" clauses and precedents construing the right to vote under the U.S. Constitution foreclose Appellees' claims. *See infra.* Part II.C.

Fourth, Appellees' requested relief is improper. Employing the Free and Equal Elections Clause to invalidate the date requirement would "impermissibly distort[]" state law and, thus, violate the Elections and Electors Clauses of the U.S. Constitution. *Moore v. Harper*, 600 U.S. 1, 38 (2023) (Kavanaugh, J., concurring) (cleaned up); *see id.* at 34-36 (holding that federal courts must review state-court interpretations of federal election laws passed by state legislatures). And if this Court fails to reverse, the entirety of Act 77—including its creation of no-excuse mail-in voting for all Pennsylvania voters—has been invalidated under the non-severability provision the General Assembly enacted to protect its political compromises in the Act. *See McLinko v. Dep't of State*, 279 A.3d 539, 609-10 (Pa. 2022) (Brobson, J., dissenting).

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

The trial court's order fails because the Pennsylvania Supreme Court already has upheld the date requirement against Free and Equal Elections challenges.

Start with *Pennsylvania Democratic Party*, where the petitioners brought a Free and Equal Elections challenge to the declaration mandate of which the date requirement is part. *See* 238 A.3d at 372. The petitioners argued that mail ballots should be counted notwithstanding "minor errors" or "irregularities" in completion of the declaration. *Id.* at 372-73. They therefore asked the Pennsylvania Supreme Court to hold that the Clause requires county boards to provide voters notice and an opportunity to cure such "minor errors" before rejecting the ballot. *See id.* at 372-74.

The Secretary of the Commonwealth opposed this request and the petitioners' construction of the Clause. *See id.* at 373. The Secretary agreed that "so long as a voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative of his or her choice," which is all that the Clause guarantees. *Id.* (cleaned up). In other words, the Secretary concluded that the General Assembly does not violate the Clause when it mandates that ballots not be counted where a voter fails to "follow[] the requisite voting procedures" it has enacted. *Id.*

The Pennsylvania Supreme Court agreed and rejected the challenge. It reasoned that the Clause does not mandate a cure procedure "for [mail-in] ballots that voters have filled out incompletely or incorrectly." *Id.* at 374. After all, the Clause "leaves the task of effectuating th[e] mandate" that elections be free and equal "to the Legislature." *Id.* It therefore resides in the General Assembly to decide both "the procedures for casting and counting a vote by mail" and whether even "minor errors made in contravention of those requirements" warrant rejection of the ballot. *Id.*

That court therefore held that the declaration mandate complies with the Clause. *See id.* Obviously, because the *entire* declaration mandate is constitutional, so, too, is its date requirement *component*. *See id.*

Appellees' position that the date requirement serves no purpose and that mandatory application of it violates the Clause was also presented to the Pennsylvania Supreme Court in *Ball*. *See* Brief of Respondent, *Ball v. Chapman*, No. 102 MM 2022, 2022 WL 18540590, at *37 (Pa. Oct. 25, 2022) ("Imposing draconian consequences for insignificant errors could, as is the case here . . . implicate the Constitution's Free and Equal Elections Clause[.]"); Brief of Intervenor-Respondents DCCC, Democratic National Committee, Pennsylvania Democratic Party, *Ball v. Chapman*, No. 102 MM 2022, 2022 WL 18540587, at *1-2, (discussing the date requirement's alleged lack of a function) *8-10 (same), *29-

32 (making argument under Free and Equal Elections Clause). The court even noted those arguments in its opinion. *See* 289 A.3d at 14-16 (discussing Free and Equal Elections Clause arguments); 16 n.77 (discussing requirement's alleged lack of "functionality"). It nonetheless upheld the requirement as "unambiguous and mandatory" such that noncompliance renders the ballot legally "invalid," *id.* at 20-23, thus rejecting those arguments.

In its vacated decision, the *BPEP* panel majority attempteed to distinguish *Pennsylvania Democratic Party* because "notice and opportunity to cure procedures are *not* at issue" in the newfound challenges to mandatory application of the date requirement. *BPEP*, 2024 WL 4002321, at *28. But that argument by emphasis offers a distinction without a difference: Because the Pennsylvania Supreme Court declined to impose a notice-and-cure requirement, the express import of *Pennsylvania Democratic Party* is that the declaration mandate and its date requirement component are constitutional even though "minor errors" in compliance require rejection of ballots. 238 A.3d at 374. This, therefore, is a simple *a fortiori* case.

This Court should adhere to *Pennsylvania Democratic Party* and *Ball* and reverse.

B. The Date Requirement Does Not Violate The Constitution.

Even if the Court deems the constitutionality of the date requirement an open question, it still should reverse because the requirement comports with the Free and Equal Elections Clause.

1. The Pennsylvania Supreme Court Has Never Invalidated A Mandatory Ballot-Casting Rule Under The Clause.

Originally adopted in 1790, the Free and Equal Elections Clause provides that "[e]lections shall be free and equal." Pa. Const. art. I, § 5. Its purpose is to "ensure that each voter will have an equally effective power to select the representative of his or her choice, free from any discrimination on the basis of his or her particular beliefs or views." *LWV*, 178 A.3d at 809. In other words, the Clause guarantees that every Pennsylvania voter has "the same free and equal *opportunity* to select his or her representatives." *Id.* at 814 (emphasis added); *see also Pa. Democratic Party*, 238 A.3d at 373 ("So long as a voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative of his or her choice.") (cleaned up).

Precedent and history demonstrate that the Clause performs three functions. *First*, the Clause prohibits arbitrary voter-qualification rules that disqualify classes of citizens from voting. *LWV*, 178 A.3d at 807. During Pennsylvania's colonial period, large numbers of Pennsylvanians were prohibited from voting because of religious or property-based qualifications. *Id.* at 804-05. Pennsylvania's Framers

prohibited such arbitrary and discriminatory qualifications when they adopted the Clause. *See id.* at 807; *see* McCall, ELECTIONS at 217.

Second, the Clause prohibits intentional discrimination against voters based on social or economic status, geography of residence, or religious or political beliefs. *LWV*, 178 A.3d at 807. That is why the Pennsylvania Supreme Court held that the Clause prohibits partisan gerrymandering. *Id.* at 808-09. That court explained this holding flows from the Clause's aim to prohibit "dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered." *Id.*

Third, the Clause prohibits "regulation[s]" that "make it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.* at 810 (quoting *Winston*, 91 A. at 523). Unless a regulation imposes such extreme burdens, "no constitutional right of [a] qualified elector is subverted or denied" and the regulation is not subject to judicial scrutiny under the Clause. *Id.* Notably, the Pennsylvania Supreme Court reaffirmed *this* is the test just a few weeks ago in an opinion issued after the divided panel decision in *BPEP*. *In re Canvass of Provisional Ballots in 2024 Election*, 2024 WL 4181584, at *7.

In accordance with the Clause's plain text and purpose, the Pennsylvania Supreme Court has never used it to strike down a neutral ballot-casting rule

governing how voters complete and cast ballots. *See* McCall, ELECTIONS at 215-232 (discussing different ways Clause has been used). In fact, it has routinely *upheld* ballot-casting rules against such challenges, including the declaration mandate and the secrecy-envelope rule, *see Pa. Democratic Party*, 238 A.3d at 372-80, and the provisional-ballot signature requirement, *In re Canvass of Provisional Ballots in 2024 Election*, 2024 WL 4181584, at *7.

Appellees may argue that the Pennsylvania Supreme Court wielded the Free and Equal Elections Clause to invalidate the mail-ballot received-by deadline in 2020. *See Pa. Democratic Party*, 238 A.3d at 371-72. But that is wrong: The Pennsylvania Supreme Court granted only *temporary* relief from the received-by deadline during the COVID-19 pandemic for the 2020 general election only. *See id.* It did not *invalidate* the deadline for all time; that deadline remains the law in Pennsylvania today. *See id.* Thus, that temporary remedial action in the midst of a once-in-a-century public health crisis provides no support for Appellees' request to invalidate the date requirement for all Pennsylvania voters for all elections forever.

The Pennsylvania Supreme Court's recent decision in *In re Canvass of Provisional Ballots in 2024 Primary Election* further proves that the date requirement is constitutional and that the *BPEP* panel majority erred in concluding otherwise. There, the Pennsylvania Supreme Court held that a county board was obligated to reject unsigned provisional ballots because the General Assembly had

unambiguously commanded that result. *Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *5. It reached that holding despite the argument that the signature requirement was "unnecessary and superfluous." *See id.* at *3.

Moreover, it rejected a challenge under the Free and Equal Elections Clause, reaffirming that "voting regulations" are unconstitutional only if they "deny the franchise itself, or make it so difficult as to amount to a denial." *Id.* at *7 (cleaned up). As the Pennsylvania Supreme Court reasoned, the act of "sign[ing] the ballot's outer envelope" obviously did not "den[y] the franchise or make[] it so difficult as to amount to a denial." *Id.* Notably, it arrived at this holding without *any* judicial scrutiny or second-guessing of the General Assembly's policy choice in requiring those signatures. *Id.*

The Pennsylvania Supreme Court's consistent holdings make perfect sense: The Clause delegates to the "Legislature" the "task of effectuating" its mandate, subject only to a guarantee that every voter shall have an equal *opportunity* to cast a vote (not that every voter will successfully utilize that opportunity). *Pa. Democratic Party*, 238 A.3d at 374; *LWV*, 178 A.3d at 810. It therefore does not—and has never been interpreted to—restrict the Legislature's authority to adopt neutral ballot-casting rules.

Moreover, "[i]t is not possible, nor does the Constitution require, that this freedom and equality of election shall be a perfect one," and "some may even lose their suffrages by the imperfection of the system; but this is no ground to pronounce a law unconstitutional." *Patterson v. Barlow*, 60 Pa. 54, 75-76 (1869). "[N]othing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch." *Winston*, 91 A. at 523.

2. The Date Requirement Does Not Violate The Clause.

The Pennsylvania Supreme Court applied this governing precedent to reject challenges to two sets of ballot-casting rules in *Pennsylvania Democratic Party*: the declaration mandate and the secrecy-envelope rule. *See* 238 A.3d at 372-80. It also applied this precedent to reject a challenge to the allegedly "unnecessary and superfluous" signature requirement for provisional ballots. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *3.

As part of the declaration mandate and as a companion to the signature requirement for mail ballots, and like the secrecy-envelope rule, the date requirement is a neutral, non-discriminatory ballot-casting rule that does not violate the Clause. *See Pa. Democratic Party* at 372-73; *Mixon*, 759 A.2d at 449-50. Appellees below did not—and could not—claim that the date requirement unconstitutionally narrows who is eligible to vote or constitutes intentional discrimination by the bipartisan majority of the General Assembly that enacted Act 77. *See LWV*, 178 A.3d at 807.

So they must invoke the Clause's third protection and believe that the date requirement "make[s] it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.* at 810 (cleaned up).

That is nonsense. In the first place, Pennsylvania law permits *all* voters to vote in person without complying with the date requirement. *See, e.g.*, 25 Pa. Stat. § 2811. So far from making voting "so difficult as to amount to a denial" of "the franchise," *LWV*, 178 A.3d at 810 (cleaned up), the date requirement is *inapplicable* to an entire universally available method of voting—the method that the majority of Pennsylvania voters use to vote. *See* 2022 General Election Official Returns (Statewide), November 8, 2022 (22.8% of ballots counted in the 2022 U.S. Senate election—1,225,447 out of 5,368,021—were mail ballots), https://tinyurl.com/3kfzwpzh. It is hard to see how a rule regulating no-excuse mail voting, which was "unknown in the Commonwealth for well over two centuries and is wholly a creature of recent, bipartisan legislat[ion]," can violate any right to vote. *BPEP*, 2024 WL 4002321, at *39 (McCullough, J., dissenting).

In the second place, even if the Court could ignore the preferred voting method of most Pennsylvania voters and focus only on mail voting, there is nothing "difficult" about signing and dating a document, let alone "so difficult" as to deny the right to vote. *LWV*, 178 A.3d at 810 (cleaned up); *see also In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7. Appellees'

own position contemplates as much, since they do not challenge the signature component of the declaration mandate—and they offer no explanation as to how *dating* the declaration can be more difficult than *filling out and signing* it. Moreover, signing and dating documents is a mandatory and common feature of life. The forms provided in Pennsylvania statutes which provide spaces for both a signature and a date are too numerous to list here.[2] Consequently, "[n]o reasonable person would find the obligation to sign and date a [mail-ballot] declaration to be difficult or hard or challenging." *BPEP*, 2024 WL 4002321, at *54 (McCullough, J., dissenting); *see also In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7 (upholding provisional-ballot signature requirement).

Furthermore, both signing a piece of paper and writing a date on it are nothing more than the "usual burdens of voting," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.); *id.* at 204-09 (Scalia, J., concurring), not a "difficult[y]" so severe "as to amount to a denial" of "the franchise," *LWV*, 178 A.3d at 810 (cleaned up). Indeed, *every* State requires voters to write pieces of information on voting papers—both for in-person and mail voting. *See, e.g.*, 25 Pa. Stat. §§ 3146.6(a), 3150.16(a) (signature requirement); *id.* § 3050 (requirement to

[2] To name a few, *see* 57 Pa. C.S. § 316 (short form certificates of notarial acts); 23 Pa. C.S. § 5331 (parenting plan); 73 Pa. Stat. § 201-7(j.1)(3)(ii) (emergency work authorization form); 42 Pa. C.S. § 8316.2(b) (childhood sexual abuse settlement form); 73 Pa. Stat. § 2186(c) (cancellation form for certain contracts); 42 Pa. C.S. § 6206 (unsworn declaration).

maintain in-person voting poll books); *Electronic Poll Books*, National Conference of State Legislatures (Oct. 25, 2019), ncsl.org/elections-and-campaigns/electronic-poll-books; *How States Verify Voted Absentee/Mail Ballots*, National Conference of State Legislatures (Jan. 22, 2024), ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots.

In fact, dating a ballot declaration is far less difficult than other tasks that have been upheld as non-burdensome and constitutional under the Clause and other constitutional provisions. As noted, the Pennsylvania Supreme has already upheld the entire declaration mandate and the secrecy-envelope rule against Free and Equal Elections challenges. *See Pa. Democratic Party*, 238 A.3d at 372-80. The date requirement—like the signature requirement that Appellees do not challenge—is necessarily *easier* to comply with than the full range of rules (including the "fill out," "date," and "sign" requirements) that form the declaration mandate.

Moreover, the U.S. Supreme Court has upheld as constitutionally non-burdensome "the inconvenience of making a trip to the [Department of Motor Vehicles], gathering the required documents, and posing for a photograph" as required to obtain a photo identification for in-person voting. *Crawford*, 533 U.S. at 198 (Stevens, J.). It has also reasoned that "[h]aving to identify one's own polling place and then travel there to vote does not exceed the usual burdens of voting." *Brnovich*, 594 U.S. at 678 (cleaned up). Yet both of these tasks are far more difficult

than dating a ballot envelope (especially one prepared in accordance with the Secretary's July 1 Directive, *see infra* at 35-36)—so, *a fortiori*, the date requirement does not "make it so difficult [to vote] as to amount to a denial" of "the franchise." *LWV*, 178 A.3d at 810 (cleaned up).

The *BPEP* majority did not dispute any of these points. Instead, in concluding the date requirement "make[s] it so difficult [to vote] as to amount to a denial of the franchise," *LWV*, 178 A.3d at 810 (cleaned up), that majority relied on *only one* factor: the number of rejected ballots. *BPEP*, 2024 WL 4002321, at *32 (showing burden by pointing to those who could not "*correctly* handwrite the date") (emphasis added). But the Pennsylvania Supreme Court has never equated burdens on the right to vote with the number of rejected ballots. *See, e.g.*, *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7 (no discussion of rejection rates). To the contrary, this aspect of the Pennsylvania Supreme Court's Free and Equal Elections jurisprudence turns on the objective *burden* imposed by the challenged rule—*i.e.*, whether the challenged rule "make[s] it so difficult [to vote] as to amount to a denial" of "the franchise"—not the number of voters who fail to comply with it. *LWV*, 178 A.3d at 810 (cleaned up). And the majority did not "conduct[] any analysis of the *actual difficulty* [of complying with the date requirement] relative to every other generic and neutral ballot-casting requirement

of the Election Code." *BPEP*, 2024 WL 4002321, at *45 (McCullough, J., dissenting).

Taking a somewhat different approach, Justice Wecht has suggested that an election-administration rule is constitutional unless it "will result in a constitutionally intolerable ratio of rejected ballots" *Pa. Democratic Party*, 238 A.3d at 389 (Wecht, J., concurring). But past rejection rates under the date requirement *prove* the requirement's constitutionality. *See BPEP*, 2024 WL 4002321, at *45 (McCullough, J., dissenting).

In particular, Appellees claim that about "10,000" mail ballots were not counted in the 2022 general election due to noncompliance with the date requirement. *See* Pet. ¶ 38, App. Ex. B. But that represents only 0.8% of the 1,258,336 mail ballots returned statewide in the 2022 general election. *See* U.S. Election Administration Commission, *Election Administration and Voting Survey 2022 Comprehensive Report: A Report from the U.S. Election Assistance Commission to the 118th Congress* at 45, 47, https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf. A requirement that over 99% of mail voters complied with cannot be "so difficult as to amount to a denial" of the "franchise." *LWV*, 178 A.3d at 810 (cleaned up); *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7.

Moreover, this 0.8% noncompliance rate is *lower* than the historic noncompliance rate under the secrecy-envelope requirement. *See* MIT Election & Science Lab, *How Many Naked Ballots Were Cast in Pennsylvania's 2020 General Election?*, Figure 1, https://electionlab.mit.edu/articles/how-many-naked-ballots-were-cast-pennsylvanias-2020-general-election (statewide rejection rate for noncompliance with secrecy-envelope requirement around 1%). Thus, because the secrecy-envelope requirement does not violate the Free and Equal Elections Clause, *see Pa. Democratic Party*, 238 A.3d at 376-80, the date requirement cannot either.

Notably, the rejection rate under the date requirement actually *decreased* in the 2024 primary elections to 0.56%. *See Black Political Empowerment Project*, 2024 WL 4002321, at *55 (McCullough, J., dissenting). The vast majority of Pennsylvania mail voters therefore again complied with the date requirement, so it cannot violate the Free and Equal Elections Clause. *LWV*, 178 A.3d at 810.

Finally, as even the *BPEP* majority recognized, there is every reason to think the rejection rate will only continue to decline. In fact, it has never been easier to comply with the date requirement: The Secretary recently redesigned the mail-ballot declaration in a manner that "eliminates" the most common forms of dating errors in past elections. *Black Political Empowerment Project*, 2024 WL 4002321, at *9. Thanks to the Secretary's actions, county boards must (1) preprint the entire year in the date field, thus "eliminat[ing]" the error of "a voter writing an incomplete or

inaccurate year," *id.* at *9; (2) print "Today's date here (REQUIRED)" above the date field, thus further specifying which date is "correct," and (3) print four boxes in the date field and to specify that the date should be written in MM/DD format, thus eliminating any confusion regarding whether voters should use the American or International dating conventions. *See* Directive Concerning the Form of Absentee and Mail-in Ballot Materials, Pa. Dep't of State 12 (2024), 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.

If one looks at the newly-designed declaration, which reflects the Secretary's redesign directive, it is obvious that the date requirement is easy to comply with. *Id.*

3. Pennsylvania Law Forecloses Application Of Strict Scrutiny Or Any Other Judicial Balancing Test.

The *BPEP* majority took a starkly different approach and applied *strict scrutiny* to the date requirement. *BPEP*, 2024 WL 4002321, at *32. But that contravened well-established Pennsylvania law—for several reasons.

First, the Pennsylvania Supreme Court has *never* applied the Free and Equal Elections Clause in this manner. In fact, consistent with its historical aims, the Clause has been applied "infrequently," *LWV*, 178 A.3d at 809, and *never* to invalidate a neutral ballot-casting rule. Moreover, when the Pennsylvania Supreme Court considered Free and Equal Elections challenges to the declaration mandate and the secrecy-envelope rule, it did not apply *any* kind of judicial scrutiny or balancing, let alone strict scrutiny. *See Pa. Democratic Party*, 238 A.3d at 372-80; *see also id.* at 374 ("task of effectuating" Free and Equal Elections mandate belongs to "the Legislature"). The Pennsylvania Supreme Court recently took the exact same approach to the provisional-ballot signature requirement. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7.

Second, Appellees have argued "strict scrutiny" applies to "any restriction" on voting. Pet. ¶ 59, App. Ex. B. That would come as a surprise to the Pennsylvania Supreme Court, which in *Pennsylvania Democratic Party* recognized that the right to vote is fundamental but did *not* apply any scrutiny or balancing, let alone strict scrutiny, to the voting rules challenged there. *See* 238 A.3d at 372-80, 385. And in

the other case Appellees cited below for this proposition, this Court *declined* to apply strict scrutiny over an argument that the challenged law implicated the fundamental right to vote. *See Petition of Berg*, 712 A.2d 340, 342-44 (Pa. Commw. Ct. 1998) (cited at Pet. ¶ 59, App. Ex. B).

Third, expanding the Free and Equal Elections Clause to subject all neutral ballot-casting rules to an open-ended balancing test would be inconsistent with Pennsylvania's separation of powers. "While the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature." *Pa. Democratic Party*, 238 A.3d at 374; *see* Pa. Const. art. VII, § 14(a). And the Judiciary "may not usurp the province of the legislature by rewriting [statutes] . . . as that is not [the court's] proper role under our constitutionally established tripartite form of governance." *In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018).

Instead of rushing to reinstate the *BPEP* decision against the date requirement, this Court should adhere to *In re Canvass of Provisional Ballots in 2024 Primary Election*, which the Pennsylvania Supreme Court issued after *BPEP*. The Pennsylvania Supreme Court's approach to the Free and Equal Elections Clause challenge in that case *looks nothing like* what the panel majority did in *BPEP*. *See In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7. Instead, the Pennsylvania Supreme Court did exactly what it did in

Pennsylvania Democratic Party: It upheld the challenged provision without applying *any* sort of judicial balancing test or second-guessing the General Assembly's potential policy justifications for the challenged rule. *Compare id.*, *with Pa. Democratic Party*, 238 A.3d at 372-80.

As Justice Wecht explained, even "technicalities" in "the Election Code must be strictly enforced." *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *15 (Wecht, J., concurring). In fact, Justice Wecht cited the date requirement as an example of a "technicality" that must be "strictly enforced," even though he suggested it may be "superfluous." *Id.* at *13, 15 & n.58 (Wecht, J., concurring). When it comes to ballot-casting rules, Justice Wecht explained that "[t]he question for a court is not what is 'necessary'" but instead "what the statute means." *Id.* at *13 (Wecht, J., concurring). Thus, "if the language is plain, the answer is clear." *Id.* "The legislature, with the Governor's approval, decides what is or is not necessary"; the courts do not. *Id.*

Adopting strict scrutiny or any other judicial balancing test for mandatory election rules would effectively force the Judiciary to routinely "second-guess the policy choices of the General Assembly." *Ins. Fed'n of Pa., Inc.*, 970 A.2d at 1122 n.15. Even though "ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government," *Winston*, 91 A. at 522,

Appellees would subject all of Pennsylvania's election laws to searching judicial scrutiny. This Court should reject that dangerous and legally unfounded approach.

4. The Date Requirement Satisfies Any Applicable Interest Balancing.

There is no basis to apply a judicial balancing test to the date requirement. But even if such an approach were legitimate, the Court still should reverse because the date requirement would satisfy it, and the court below erred in concluding otherwise.

As a majority of the Pennsylvania Supreme Court has recognized, the date requirement serves several weighty interests and an "unquestionable purpose." *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see id.* at 1087 (Wecht, J., concurring in part and dissenting in part) ("colorable arguments . . . suggest [the date requirement's] importance"); *accord In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *4 (acknowledging Justices previously found date requirement to serve important purposes). To start, it "provides proof of when the 'elector actually executed the ballot in full.'" *Id.* at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). It thus facilitates the "orderly administration" of elections, undoubtedly a legitimate interest, *Crawford*, 553 U.S. at 196 (Stevens, J.). To be sure, election officials are required to timestamp a ballot and scan the barcode into the Statewide Uniform Registry of Electors ("SURE")

upon receipt. *See Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 665 (W.D. Pa. 2023), *rev'd* 97 F.4th 120 (3d Cir. 2024). And there is every reason to think that ordinarily happens. *See id.* But the handwritten date serves as a useful backstop, and would become quite important if officials failed to perform those tasks or if SURE malfunctioned—possibilities Third Circuit Judge Matey has highlighted. *See Migliori v. Cohen*, 36 F.4th 153, 165 (3d Cir. 2022) (Matey, J., concurring in judgment), *vacated sub nom.*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022).

Further, the requirement serves the State's interest in solemnity—*i.e.*, in ensuring that voters "contemplate their choices," including the choice to vote by mail rather than in person, and "reach considered decisions about their government and laws." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 15 (2018) (cleaned up). Signature-and-date requirements serve a "cautionary function" by "impressing the parties with the significance of their acts and their resultant obligations." *Davis v. G N Mortg. Corp.*, 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003). Such formalities "guard[] against ill-considered action," *Thomas A. Armbruster, Inc. v. Barron*, 491 A.2d 882, 884 (Pa. Super. Ct. 1985), and the absence of formalities "prevent[s] . . . parties from exercising the caution demanded by a situation in which each ha[s] significant rights at stake," *Thatcher's Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc.*, 636 A.2d 156, 161 (Pa. 1994). That is why the "requirement to sign and date documents is deeply rooted in legal traditions that prioritize clear and consensual

agreements." *BPEP*, 2024 WL 4002321, at *53 (McCullough, J., dissenting); *accord Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (an "original signature . . . carries solemn weight.") (cleaned up).

Moreover, the requirement advances the State's interests in "deterring and detecting voter fraud" and "protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 191 (Stevens, J.); *see also In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1091 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). The requirement's advancement of the interest in preventing fraud is actual, not hypothetical: In 2022, the date requirement was used to detect voter fraud committed by a deceased individual's daughter. *See Commonwealth v. Mihaliak*, MJ-02202-CR-0000126-2022 (Lancaster Cnty. 2022) (charging document in *Mihaliak*), App. Ex. A, A-4. In fact, because county boards may not conduct signature matching, *see In re: Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 595 (Pa. 2020), the *only* evidence of third-party fraud on the face of the fraudulent ballot was the handwritten date of April 26, 2022, which was twelve days after the decedent had passed away. *See* App. Ex. A (charging document in *Mihaliak*). That evidence was used to secure a guilty plea from the fraudster, who was criminally sentenced. *See BPEP*, 2024 WL 4002321, at *15 n.33.

States do not need to point to evidence of election fraud within their borders in order to adopt rules designed to deter and detect it. *Brnovich*, 594 U.S. at 686.

Yet here, where the requirement has actually been used to detect and prosecute fraud, the State's interest in "deterring and detecting voter fraud" is unquestionably advanced. *Crawford*, 553 U.S. at 191 (Stevens, J.). And the requirement's anti-fraud function advances the related vital state interest of preserving and promoting voter "[c]onfidence in the integrity of our electoral process[]" that is so "essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4.

This Court should not second-guess the General Assembly's policy choice to enact and maintain the date requirement. As Justice Wecht has explained, "[t]he question for a court is not what is 'necessary'" because "[t]he legislature, with the Governor's approval, decides what is or is not necessary." *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *13 (Wecht, J., concurring). The Court should reverse.

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

If more were somehow needed, other States' "free and equal elections" jurisprudence and federal right-to-vote case-law also refute Appellees' arguments.

1. "Free And Equal Elections" Clauses In Other States Do Not Invalidate Ballot-Casting Rules.

As the Pennsylvania Supreme Court has noted, twelve other States have "free and equal elections" provisions similar to the Clause. *LWV*, 178 A.3d at 813 n.71. Yet neither Appellees nor the *BPEP* majority cited any cases from any of those States

in which a neutral ballot-casting rule like the date requirement was invalidated under such a provision.

That is because courts in those States have consistently held that, under analogous "free and equal" elections clauses, a ballot-casting rule is lawful "so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible." *Simmons v. Byrd*, 136 N.E. 14, 18 (Ind. 1922); *see Mills v. Shelby Cnty. Election Comm'n*, 218 S.W.3d 33, 40-41 (Tenn. Ct. App. 2006) (provision "refers to the rights of suffrage and not to the logistics of how the votes are cast."). Other state courts interpret their "free and equal" election provisions merely to prohibit the use of coercion to bar access to voting or to require that lawfully-cast votes be given equal weight. *See, e.g.*, *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009); *Ross v. Kozubowski*, 538 N.E.2d 623, 627 (Ill. App. Ct. 1989) ("free and equal election" provision does not guarantee an election "devoid of all error" and requires "only" that "each voter have the opportunity to cast his or her [own] vote without restraint and that his or her vote have the same influence as the vote of every other voter") (cleaned up); *Graham v. Sec'y of State*, 684 S.W.3d 663, 684 (Ky. 2023) (violation only where "restraint or coercion, physical or otherwise, is exercised against a voter's ability to cast a vote"); *Gentges v. State Election Bd.*, 419 P.3d 224, 228 (Okla. 2018) (provision violated when there is "conscious legislative intent for electors to be deprived of their right to vote");

Libertarian Party of Or. v. Roberts, 750 P.2d 1147, 1152 (Or. 1988) (clause requires equal counting of votes); *Chamberlin v. Wood*, 88 N.W. 109, 110-12 (S.D. 1901) (clause prohibits coercion and requires equal counting of votes).

After a diligent search, Intervenor-Appellants are aware of *zero* cases applying any other State's "free and equal election" clause to invalidate a neutral ballot-casting rule. To the contrary, the Delaware Chancery Court recently rejected a challenge to a mail-ballot receipt deadline under that State's Free and Equal Elections Clause. *See League of Women Voters of Del., Inc. v. Dep't of Elections.*, 250 A.3d 922, 935-37 (Del. Ch. 2020). That court acknowledged that "some people will be disenfranchised because they spoil mail-in ballots in a variety of ways," but explained that such failures are inevitable and do not implicate the Delaware Free and Equal Elections Clause. *Id.* at 935-36. The choice of which rules to set for mail ballots, the court explained, is a "matter of policy, not the Delaware Constitution." *Id.* at 936.

2. Federal Precedent Also Refutes Appellees' Challenge.

Federal right-to-vote case-law also refutes Appellees' request to recognize a constitutional right to require counting ballots that do not comply with neutral ballot-casting rules like the date requirement.

To start, the U.S. Supreme Court has recognized that there is no constitutional right to vote by mail and that a State's regulation of one method of voting cannot

violate the right to vote when another voting method remains available. *See, e.g.*, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-808 (1969); *Crawford*, 553 U.S. at 201 (Stevens, J.); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020). In other words, the federal constitutional right to vote is violated only when an individual is "absolutely prohibited from exercising the franchise" through any method. *McDonald*, 394 U.S. at 809.

The date requirement for mail ballots comports with the U.S. Constitution. Indeed, Pennsylvania "permits [all voters] to vote in person" without complying with the requirement; "that is the exact opposite of 'absolutely prohibiting' them from doing so." *Tex. Democratic Party*, 961 F.3d at 404 (cleaned up). The right to vote under the federal Constitution is therefore unaffected by the requirement. *See McDonald*, 394 U.S. at 807, 809.

Moreover, even if the Court believes it can apply some sort of judicial balancing approach here, federal law underscores that the date requirement is constitutional even under such an approach. Courts assess alleged violations of the federal constitutional right to vote under the so-called *Anderson-Burdick* test. Under that framework, regulations imposing "severe burdens on [voters'] rights must be narrowly tailored and advance a compelling state interest," while those imposing "[l]esser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory

restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up). Moreover, the "usual burdens of voting" cannot violate any right to vote under federal law. *Crawford*, 553 U.S. at 198 (Stevens, J.); *accord Brnovich*, 594 U.S. at 669.

The date requirement easily withstands scrutiny under that standard. Writing a date on a piece of paper is nothing more than a "usual burden[] of voting" and thus receives no scrutiny under the *Anderson-Burdick* framework. *Crawford*, 553 U.S. at 198 (Stevens, J.); *id.* at 204-09 (Scalia, J., concurring).

The Third Circuit's holding that the date requirement does not violate the federal statutory "right to vote" underscores that rules imposing the usual burdens of voting cannot violate any right to vote. *Pa. State Conf. of NAACP*, 97 F.4th at 133. As the Third Circuit explained, "a voter who fails to abide by state rules prescribing how to make a vote effective is not denied the right to vote when his ballot is not counted." *Id.* (cleaned up). The Third Circuit reached this conclusion that neutral, nondiscriminatory ballot-casting rules do not violate the "right to vote" without conducting any balancing of the burdens imposed, and state interests served, by those rules. *See id.*

To be sure, the Third Circuit was discussing the statutory "right to vote" in the Materiality Provision. But the appellees there (and the dissenting judge) argued that the "right to vote" in the Materiality Provision is *broader* than the right to vote in

the U.S. Constitution. *See id.* at 139-40 (Shwartz, J., dissenting); No. 23-3166 (3d Cir.) ECF 144 at 13-14, 17 n.1.

If anything, the "right to vote" in the federal civil-rights laws is coterminous with the federal constitutional right—and there is no authority suggesting the federal constitutional right to vote is broader than the federal statutory right to vote. *See Brnovich*, 594 U.S. at 669-70 (consulting "standard practice" at the time "when § 2 [of the Voting Rights Act] was amended" to determine what "furnish[es] an equal 'opportunity' to vote in the sense meant by § 2"); *Baker v. Carr*, 369 U.S. 186, 247 (1962) (Douglas, J., concurring) (the "right to vote" was "protected by the judiciary long before that right received [] explicit protection" in civil-rights statutes). *A fortiori*, the Third Circuit's conclusion that the date requirement does not violate the statutory right to vote means that it cannot violate the constitutional right to vote either.

In all events, the date requirement easily passes muster even if it is subjected to interest balancing under the *Anderson-Burdick* framework. Any burden the requirement imposes is trivial compared to burdens the U.S. Supreme Court has held are minor under the *Anderson-Burdick* framework. *Compare, e.g.*, *Crawford*, 553 U.S. at 198 (obtaining photo ID in-person at the DMV) (Stevens, J.); *Brnovich*, 594 U.S. at 678 (identifying and traveling to correct polling place).

Because the requirement imposes, at most, a minor burden on voting, it is subject to "rational basis review." *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020). Under that "quite deferential" standard, *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 153 (3d Cir. 2022), the "State's important regulatory interests will usually be enough to justify" election regulations, *Timmons*, 520 U.S. at 351-52. As explained, the date requirement passes rational-basis scrutiny with flying colors. *See supra* Part II.B.4.

D. Invalidating The Requirement Would Violate The U.S. Constitution.

Invalidating the date requirement would also violate the Elections and Electors Clauses of the U.S. Constitution. The Elections Clause directs: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Electors Clause grants the General Assembly plenary authority to prescribe the "Manner" by which the Commonwealth "appoint[s] [Presidential] . . . Electors." U.S. Const. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

These provisions "expressly vest[] power to carry out [their] provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Moore*, 600 U.S. at 34. Thus, "state courts do not have free rein" in interpreting or applying state constitutions to election laws passed by the state legislatures. *Id.*; *accord id.* at

38 (Kavanaugh, J., concurring). State courts cannot "impermissibly distort[]" state law "beyond what a fair reading require[s]." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) (endorsing this standard); *id.* at 34-36 (holding that federal courts must review state courts' treatment of election laws passed by state legislatures regulating federal elections).

The Pennsylvania Supreme Court has already held that the date requirement is mandatory, *Ball*, 289 A.3d at 20-23; has declined two invitations to wield the Free and Equal Elections Clause to invalidate it, *see supra* Part II.A; and has declined two more invitations to revisit that decision in recent weeks, *see supra* Part I. And as established, there is no support in the Clause's text or history, Pennsylvania case-law, precedents interpreting analogous state constitutional provisions, or federal constitutional law for invalidating it. *See supra* Parts II.A-C. Doing so anyway would "transgress the ordinary bounds of judicial review such that [this Court would be] arrogat[ing] to [itself] the power vested in [the] state legislature[] to regulate federal elections," violate the U.S. Constitution, and lead to potential review by the U.S. Supreme Court. *Moore*, 600 U.S. at 36.

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

Finally, if this Court *were* to affirm, it would necessarily mean striking universal mail voting in Pennsylvania. *BPEP*, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

As "a general matter, nonseverability provisions are constitutionally proper." *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). That is especially true where they arise from "the concerns and compromises which animate the legislative process." *Id.*

Act 77's non-severability provision states: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Act 77 § 11. The date requirement is part of the universal mail voting established in section 8, so invalidating "its application to any person or circumstance" voids the entire Act. *Id.*; *see McLinko*, 279 A.3d at 609-610 (Brobson, J., dissenting); *McLinko v. Dep't of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., concurring in part and dissenting in part); *BPEP*, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

This provision is enforceable because it was a crucial element in the political compromise that led to Act 77's passage. *See Stilp*, 905 A.2d at 978. Both the Democratic sponsor and the Republican Senate Majority Leader described Act 77 as a politically difficult compromise. *See* 2019 Pa. Legislative Journal–Senate 1000 (Oct. 29, 2019); *id.* at 1002. The non-severability provision helped reassure legislators that their parts of the bargain would not be discarded by courts while their

concessions remained in place. Consider the following colloquy on the House floor involving State Government Committee Chair Garth Everett:

> Mrs. DAVIDSON. . . . Then I also understand it also reads that the provisions of the bill will be nonseverable. So is that to mean that if somebody wants to challenge whether or not they were discriminated against because they did not have a ballot in braille, would they be able to – would that be a suit that they could bring to the Supreme Court under the severability clause?
>
> Mr. EVERETT. Thank you, Mr. Speaker.
>
> There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because **the intent of this is that this bill works together, that it not be divided up into parts.** . . .
>
> Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.
>
> Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.
>
> Mrs. DAVIDSON. All right. Thank you.

2019 Pa. Legislative Journal—*House* 1740–41 (Oct. 29, 2019) (emphasis added).

The trial court's order stated that enforcement of the date requirement against Appellees violated the Free and Equal Protections Clause. Sept. 26 Order at 1-2, App. Ex. B. That court therefore "held invalid" the requirement's "application to" some "person" and "circumstance." Act 77 § 11. Thus, if affirmed, the trial court's decision has voided the entirety of Act 77 and universal mail voting on the eve of

the 2024 general election. *See Pa. Democratic Party*, 238 A.3d at 391 (Wecht, J., concurring) ("A mandate without consequences is no mandate at all.").

III. SEVERAL PROCEDURAL DEFECTS REQUIRE REVERSAL.

The Court need not even reach the merits because several procedural defects in Appellees' suit and the proceedings below require reversal.

First, Appellees' suit should be dismissed because they failed to join indispensable parties: the other 66 county boards of elections. *See BPEP Order*, 2024 WL 4181592, at *1; *accord Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988). Indeed, it was precisely the same failure to join all county boards that caused the Pennsylvania Supreme Court to vacate the divided panel decision in *BPEP*. Thus, the Pennsylvania Supreme Court has recognized that all county boards have interests in the date requirement and must be joined to cases challenging it. *See BPEP Order*, 2024 WL 4181592, at *1. It is therefore bewildering that Appellees, represented by the same counsel who failed to join the other county boards just weeks ago, repeated the same reversible error here.

Nor is this an empty formality. The other county boards may wish to participate in the development of a factual record about the date requirement. Some county boards have vigorously defended the date requirement in parallel federal litigation. *See, e.g.*, *Pa. State Conf. of NAACP*, 703 F. Supp. 3d at 643-44 (noting

defenses by Lancaster and Berks County Boards). They should be given the chance to do so here.

Second, factual development would be necessary before granting relief in this case. Appellees' petition asserts that the General Assembly's date requirement is "meaningless." Pet. ¶ 4, App. Ex. B. Intervenor-Appellants strongly disagree. *See supra* Part II.B.4. This is a factual dispute that cannot be resolved without record development, including discovery and potentially expert witnesses. Intervenor-Appellants would also like to depose Appellees to understand why they did not comply with the date requirement.

Appellees asserted below that other courts have found that the date requirement serves no function. *See* Pet. ¶ 4, App. Ex. B. This is false. The federal-court cases Appellees cited dealt not with right-to-vote arguments, but with challenges under a federal statute (the Materiality Provision). *See Pa. State Conf. of NAACP*, 703 F. Supp. 3d at 668; *Pa. State Conf. of NAACP*, 97 F.4th 120 (rejecting challenges to date requirement). Statements respecting the date requirement are thus passing dictum, as they were irrelevant to the federal courts' holdings. *See, e.g.*, *In re Nat'l Football League Players Concussion Inj. Litig.*, 775 F.3d 570, 583 n.18 (3d Cir. 2014). Indeed, it is apparent those courts did not give "full and careful consideration" to this point. *Id.* After all, they did not address the State's interest in documenting the date the voter completed the ballot as part of trustworthy election

administration or as a back-up for scanning errors or SURE system malfunctions. *See Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment). They also did not address the State's interest in solemnity. *See Pa. State Conf. of NAACP*, 97 F.4th at 125, 127, 129. The Third Circuit likewise did not address the State's interest in deterring and detecting fraud or even mention the *Mihaliak* case, *see id*., while the district court offered a footnote saying evidence of fraud was "irrelevant" under the Materiality Provision, 703 F. Supp. 3d at 679 n.39. And the vacated *BPEP* decision Appellees cited below erroneously relied on those inapt federal cases, *see BPEP*, 2024 WL 4002321, at *32, all without allowing 66 boards of elections not joined to that case to participate and contribute to a record regarding the date requirement's functions.

Third, the trial court erred in retroactively changing election rules for the Special Election. As the Pennsylvania Supreme Court and U.S. Supreme Court have instructed, judicial changes to election rules are not allowed even shortly *before* Election Day because they undermine "[c]onfidence in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4; *see supra* Part I. That rule applies "with much more force on the back end of elections." *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020); *see League of United Latin Am. Citizens Ariz. v. Reagan*, 2018 WL 5983009, at *4 (D. Ariz. Nov. 14, 2018) (applying *Purcell* after an election). Orders before Election Day are made behind the veil of ignorance; neither

the court nor the public knows what effect, if any, they will have on the outcome. By contrast, orders "after election day" create suspicions that courts are interfering with the election results. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (mem.) (Thomas, J., dissenting); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary . . . and interference with an election after voting has begun is unprecedented.").

The lower court here should not have purported to retroactively invalidate the date requirement for the Special Election. Challenges to the General Assembly's election rules must be brought *well in advance* of elections. *See New Pa.*, 2024 WL 4410884, at *1; *accord Reagan*, 2018 WL 5983009, at *4 ("[P]roblems can arise from rushed election-related decisions."). And the General Assembly's commands can only be constitutionally invalidated with great care after courts oversee a deliberate and orderly process that honors regular procedures. *See Mixon*, 759 A.2d at 447. The trial court's order violated those rules. It purported to invalidate the General Assembly's law with no factual development, no regular briefing, and not even the courtesy of reasoning in an opinion. The trial court showed little regard for the General Assembly—completely at odds with the *strong* presumption of constitutionality that legislative acts enjoy. *Id.* This Court should not repeat that error.

CONCLUSION

The Court should reverse.

Dated: October 14, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum contains 13,176 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

I hereby certify 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.

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