

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

Petitioners,

v.

AL SCHMIDT, in his official capacity as  
Secretary of the Commonwealth,  
PHILADELPHIA COUNTY BOARD  
OF ELECTIONS, AND ALLEGHENY  
COUNTY BOARD OF ELECTIONS,

Respondents,

REPUBLICAN NATIONAL  
COMMITTEE AND REPUBLICAN  
PARTY OF PENNSYLVANIA,  
Intervenors.

Case No. 283 MD 2024  
Original Jurisdiction

**MEMORANDUM IN SUPPORT OF REPUBLICAN INTERVENORS'**  
**APPLICATION FOR SUMMARY RELIEF**

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
BACKGROUND .....	6
STANDARD OF REVIEW .....	9
ARGUMENT .....	9
I. THE COURT SHOULD DISMISS THE PETITION DUE TO ITS MYRIAD PROCEDURAL DEFECTS.....	11
A. Petitioners Lack Standing To Sue The Secretary.....	11
B. This Court Lacks Subject Matter Jurisdiction Because The Secretary Is Not A Proper Or Indispensable Party .....	15
C. The Court Lacks Subject Matter Jurisdiction Over Any Claims Against The Boards .....	19
D. In The Alternative, Petitioners Failed To Join Indispensable Parties .....	21
II. THE COURT SHOULD ENTER JUDGMENT AGAINST PETITIONERS BECAUSE THEIR CLAIMS FAIL ON THE MERITS.....	24
A. The Pennsylvania Supreme Court Has Rejected Free and Equal Elections Challenges To The Date Requirement .....	28
B. The Date Requirement Does Not Violate The Constitution .....	31
1. The Clause Does Not Invalidate Mandatory Ballot-Casting Rules .....	31
2. The Date Requirement Does Not Violate The Free And Equal Elections Clause .....	34
3. Pennsylvania Law Forecloses Petitioners’ Request For Strict Scrutiny. ....	40
C. Other States’ “Free And Equal Elections” Precedent And Federal Right-To-Vote Precedent Foreclose Petitioners’ Claims.....	43
1. “Free And Equal Elections” Clauses In Other States Do Not Invalidate Ballot-Casting Rules .....	43

2. Federal Right-To-Vote Precedent Also Refutes  
Petitioners’ Challenge .....45

D. Invalidating The Date Requirement Would Violate The U.S.  
Constitution .....54

E. Declaring The Date Requirement Unconstitutional Would  
Strike Act 77 And Universal Mail Voting In Pennsylvania .....55

CONCLUSION .....58

CERTIFICATION OF WORD COUNT .....60

CERTIFICATE OF COMPLIANCE .....61

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## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	48
<i>Ball v. Chapman</i> , 284 A.3d 1189 (Pa. 2022).....	2, 14
<i>Ball v. Chapman</i> , 289 A.3d 1 (Pa. 2023).....	<i>passim</i>
<i>Ball v. Chapman</i> , No. 102 MM 2022, 2022 WL 18540580 (Pa. Oct. 25, 2022) .....	6
<i>Ball v. Chapman</i> , No. 102 MM 2022, 2022 WL 18540587 (Pa. Oct. 25, 2022) .....	6, 30
<i>Blount v. Philadelphia Parking Authority</i> , 965 A.2d 226 (Pa. 2009).....	20
<i>Brnovich v. DNC</i> , 594 U.S. 647 (2021).....	<i>passim</i>
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	23, 24, 55
<i>Chadwick v. Caulfield</i> , 834 A.2d 562 (Pa. Super. Ct. 2003).....	15
<i>Chamberlin v. Wood</i> , 88 N.W. 109 (Ga. 1901) .....	44
<i>Chapman v. Berks Cnty. Bd. of Elections</i> , No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022) .....	12, 14, 24

<i>Chavez v. Brewer</i> , 214 P.3d 397 (Ariz. Ct. App. 2009).....	44
<i>Commonwealth v. Mihaliak</i> , CP-36-CR-0003315-2022 (Lancaster Cnty. 2022).....	52
<i>Crawford v. Marion Cnty. Election Bd.</i> , 553 U.S. 181 (2008).....	<i>passim</i>
<i>Damico v. Royal Ins. Co.</i> , 556 A.2d 886 (Pa. Super. Ct. 1989).....	21
<i>Davis v. G N Mortg. Corp.</i> , 244 F. Supp. 2d 950 (N.D. Ill. 2003).....	51
<i>Finan v. Pike County Conservation District</i> , 209 A.3d 1108 (Pa. Commw. Ct. 2019).....	20
<i>Firearm Owners Against Crime v. Papenfuse</i> , 261 A.3d 467 (Pa. 2021).....	<i>passim</i>
<i>Foreman v. Chester-Upland Sch. Dist.</i> , 941 A.2d 108 (Pa. Commw. Ct. 2008).....	17
<i>Gentges v. State Election Bd.</i> , 419 P.3d 224 (Okla. 2018).....	44
<i>Graham v. Sec’y of State</i> , 684 S.W.3d 663 (Ky. 2023).....	44
<i>In re Canvass of Absentee &amp; Mail-In Ballots</i> , 241 A.3d 1058 (Pa. 2020).....	12, 14, 50, 51
<i>In re: Fortieth Statewide Investigating Grand Jury</i> , 197 A.3d 712 (Pa. 2018).....	42
<i>In re J.M.Y.</i> , 218 A.3d 404 (Pa. 2019).....	15

<i>In re Luzerne Cnty. Return Bd.</i> , 290 A.2d 108 (Pa. 1972).....	42
<i>In re Nat’l Football League Players Concussion Inj. Litig.</i> , 775 F.3d 570 (3d Cir. 2014) .....	53
<i>In Re: Nov. 3, 2020 Gen. Election</i> , 240 A.3d 591 (Pa. 2020).....	52
<i>Ins. Fed’n of Pa., Inc. v. Commonwealth, Ins. Dep’t</i> , 970 A.2d 1108 (Pa. 2009).....	25, 42
<i>League of Women Voters of Del. v. Dep’t of Elections.</i> , 250 A.3d 922 (Del. Ch. 2020) .....	45
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	<i>passim</i>
<i>Libertarian Party of Or. v. Roberts</i> , 750 P.2d 1147 (Or. 1988) .....	44
<i>Marcellus Shale Coal. v. Dep’t of Env’t Prot.</i> , 216 A.3d 448 (Pa. Commw. Ct. 2019).....	9
<i>Mays v. LaRose</i> , 951 F.3d 775 (6th Cir. 2020) .....	49
<i>Mazo v. N.J. Sec’y of State</i> , 54 F.4th 124 (3d Cir. 2022) .....	49
<i>McClinko v. Dep’t of State</i> , 270 A.3d 1243 (Pa. Commw. Ct. 2022).....	56
<i>McDonald v. Bd. of Election Comm’rs</i> , 394 U.S. 802 (1969).....	45, 46
<i>McLinko v. Dep’t of State</i> , 279 A.3d 539 (Pa. 2022).....	27, 56

<i>McPherson v. Blacker</i> , 146 U.S. 1 (1892).....	54
<i>Migliori v. Cohen</i> , 36 F.4th 153 (2022) .....	50, 53
<i>Mills v. Shelby Cnty. Election Comm’n</i> , 218 S.W.3d 33 (Tenn. Ct. App. 2006).....	44
<i>Minn. Voters All. v. Mansky</i> , 585 U.S. 1 (2018).....	4, 35, 51
<i>Mixon v. Commonwealth</i> , 759 A.2d 442 (Pa. Commw. Ct. 2000) .....	26, 34
<i>Moore v. Harper</i> , 600 U.S. 1 (2023).....	27, 54, 55
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020).....	<i>passim</i>
<i>Pa. Env’t Def. Found. v. Commonwealth</i> , 161 A.3d 911 (Pa. 2017).....	25, 26
<i>Pa. Sch. Bds. Ass’n, Inc. v. Commonwealth. Ass’n of Sch. Admin’rs</i> , 696 A.2d 859 (Pa. Commw. Ct. 1997).....	16
<i>Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.</i> , 97 F.4th 120 (3d Cir. 2024) .....	<i>passim</i>
<i>Pa. State Conf. of NAACP v. Schmidt</i> , 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023).....	50
<i>Pa. State Conf. of NAACP v. Schmidt</i> , No. 22-CV-339 (W.D. Pa. filed June 14, 2024).....	6
<i>Pa. State Conf. of NAACP v. Sec’y</i> , No. 23-3166 (3d Cir. Jan. 3, 2024).....	6

<i>Patterson v. Barlow</i> , 60 Pa. 54 (1869).....	34
<i>Petition of Berg</i> , 712 A.2d 340 (Pa. Commw. Ct. 1998).....	41
<i>Petition of Cioppa</i> , 626 A.2d 146 (Pa. 1993).....	42
<i>Polydyne, Inc. v. City of Philadelphia</i> , 795 A.2d 495 (Pa. Commw. Ct. 2002).....	<i>passim</i>
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006).....	53
<i>Ritter v. Migliori</i> , 142 S. Ct. 1824 (2022).....	25
<i>Ritter v. Migliori</i> , 143 S. Ct. 297 (2022).....	50
<i>Ross v. Kozubowski</i> , 538 N.E.2d 623 (Ill. App. Ct. 1989).....	44
<i>Seitel Data, Ltd. v. Ctr. Twp.</i> , 92 A.3d 851 (Pa. Commw. Ct. 2014).....	15
<i>Shambach v. Bickhart</i> , 845 A.2d 793 (Pa. 2004).....	42
<i>Simmons v. Byrd</i> , 136 N.E. 14 (Ind. 1922).....	44
<i>Stilp v. Commonwealth</i> , 905 A.2d 918 (Pa. 2006).....	56, 57, 58
<i>Tex. Democratic Party v. Abbott</i> , 961 F.3d 389 (5th Cir. 2020).....	45, 46



<i>Thatcher’s Drug Store v. Consol. Supermarkets</i> , 636 A.2d 156 (Pa. 1994).....	51
<i>Thomas A. Armbruster, Inc. v. Barron</i> , 491 A.2d 882 (Pa. Super. Ct. 1985).....	51
<i>Timmons v. Twin Cities Area New Party</i> , 520 U.S. 351 (1997).....	47, 49
<i>Vote.Org v. Callanen</i> , 89 F.4th 459 (5th Cir. 2023).....	51
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914).....	34, 42
<i>Wm. Penn Parking Garage, Inc. v. City of Pittsburgh</i> , 346 A.2d 269 (Pa. 1975).....	11
<i>Zicarelli v. Allegheny Cnty. Bd. of Elections</i> , 2:20-cv-1831-NR, 2021 WL 101683 (W.D. Pa. Jan. 12, 2021).....	13, 14

**CONSTITUTIONAL AND STATUTORY AUTHORITIES**

U.S. Const. Article I, § 4, cl. 1.....	54
U.S. Const. Article II, § 1, cl. 2 .....	54
Pa. Const. Article 1, § 5 .....	2, 32
Pa. Const. Article VII, § 14.....	41
25 P.S. § 2621 .....	8, 12
25 P.S. § 2642 .....	8, 12
25 P.S. § 2811 .....	35
25 P.S. § 3050 .....	36
25 P.S. § 3145.6 .....	55

25 P.S. § 3146.6 .....	1, 2, 36
25 P.S. § 3150.16 .....	1, 2, 36, 55
73 P.S. § 201-7 .....	36
73 P.S. § 2186 .....	36
23 Pa. C.S. § 5331 .....	36
42 Pa. C.S. § 102 .....	16, 19
42 Pa. C.S. § 761 .....	10, 15, 16, 18
42 Pa. C.S. § 761.10 .....	19
42 Pa. C.S. § 6206 .....	36
42 Pa. C.S. § 8316.2 .....	36
57 Pa. C.S. § 316 .....	36
<b>OTHER AUTHORITIES</b>	
2019 Pa. Legislative Journal— <i>House</i> (Oct. 29, 2019) .....	58
2019 Pa. Legislative Journal— <i>Senate</i> (Oct. 29, 2019) .....	57
2022 General Election Official Returns (Statewide), November 8, 2022 .....	35
<i>In re: Election Oversight Pennsylvania Department of State’s Election Guidance</i> (Jan. 21, 2021) .....	13
A. McCall, ELECTIONS, <i>IN</i> K. GORMLEY ET. AL., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES .....	24, 31, 33
MIT Election & Science Lab, <i>How Many Naked Ballots Were Cast in Pennsylvania’s 2020 General Election?</i> .....	39
Pa. R.A.P. 1532 .....	9

Pa. R.C.P. 1032 .....*passim*

*Report: A Report from the U.S. Election Assistance Commission to the  
118<sup>th</sup> Congress*.....39

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## INTRODUCTION

“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 v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). Accordingly, the question which ballot-casting rules should govern how Pennsylvania voters complete and cast their ballots—and whether ballots should be “rejected due to minor errors made in contravention of those requirements”—“is one best suited for the Legislature.” *Id.* The General Assembly has exercised this broad legislative discretion to enact an array of mandatory ballot-casting rules, including rules that make voting by mail available to all Pennsylvania voters.

For example, decades ago, the General Assembly adopted the mandate that voters who vote by mail “fill out, date and sign the declaration printed on [the outer] envelope” completely and accurately. 25 P.S. §§ 3146.6(a), 3150.16(a).<sup>1</sup> That declaration mandate requires election officials to decline to count any mail ballot that fails to comply with it. *See id.* §§ 3146.6(a), 3150.16(a). The General Assembly has also adopted a mandatory secrecy-envelope rule to preserve the secrecy of mail ballots. *See id.* §§ 3146.6(a), 3150.16(a).

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<sup>1</sup> This Memorandum uses “mail ballots” to refer to both absentee ballots, *see* 25 P.S. § 3146.6, and mail-in ballots, *see id.* § 3150.16.

For its part, the Pennsylvania Supreme Court has adhered to the rule of legislative primacy to set ballot-casting rules. It has *never* invalidated a ballot-casting rule enacted by the General Assembly under the Free and Equal Elections Clause (Pa. Const. art. 1, § 5). In fact, it has expressly upheld against Free and Equal Elections challenges the declaration mandate—of which the date requirement is part—and the secrecy-envelope rule. *See Pa. Democratic Party*, 238 A.3d at 372-80. In so doing, it has never applied, or suggested that courts should apply, any kind of judicial scrutiny or balancing test to determine the constitutionality of ballot-casting rules. *See id.*

In recent years, however, several groups of plaintiffs—including some of Petitioners here, in multiple lawsuits—have launched a barrage of lawsuits attacking the date requirement separate and apart from the declaration mandate of which it is part. 25 P.S. §§ 3146.6(a), 3150.16(a). Those suits have now failed in state and federal court. In 2022, the Pennsylvania Supreme Court held that the date requirement is mandatory under state law and ordered all 67 county boards of elections not to count any mail ballots that fail to comply with it. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022). Earlier this year, the Third Circuit held 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 (3d Cir. 2024).

Neither Petitioners nor any other plaintiffs have ever explained how their challenges to the date requirement can survive the Pennsylvania Supreme Court’s unbroken line of controlling precedent upholding the General Assembly’s ballot-casting rules. Indeed, Petitioners do not explain how the date requirement can violate the Free and Equal Elections Clause when the Pennsylvania Supreme Court has already rejected a challenge under the Clause to the broader declaration mandate of which the date requirement is part. *See Pa. Democratic Party*, 238 A.3d at 372-74. They also do not explain how the date requirement can be unconstitutional when other ballot-casting rules like the secrecy-envelope rule are not. *See id.* at 376-80. And they do not explain how their Free and Equal Elections challenge can survive *Ball*, where the very same arguments Petitioners raise here were before the Pennsylvania Supreme Court when it upheld the date requirement as mandatory. *See* 289 A.3d at 14-16 & n.77.

Instead, Petitioners merely double-down on their challenge to the date requirement in this Court, and even go so far as to suggest that the Free and Equal Elections Clause subjects it to *strict scrutiny*. *See* App. for Prelim. Inj. ¶¶ 12-15. That would come as a surprise to the Pennsylvania Supreme Court, which did not apply *any* level of scrutiny, let alone strict scrutiny, to uphold the entire declaration

mandate against a Free and Equal Elections challenge in the very case Petitioners cite as support for applying strict scrutiny to a piece of that mandate here. *See id.* ¶ 12; *Pa. Democratic Party*, 238 A.3d at 372-80. And it should surprise this Court too, because it would subject *all* of the General Assembly’s ballot-casting rules to strict scrutiny, in contravention of controlling Pennsylvania Supreme Court case-law and the Pennsylvania Constitution’s delegation of the “task of effectuating” the Free and Equal Elections “mandate to the Legislature,” not the Judiciary. *Id.* at 374. Simply put, the Petition amounts to nothing more than an attempt to overrule *Pennsylvania Democratic Party, Ball*, and *Pennsylvania State Conference of the NAACP* by inviting this Court to invalidate the date requirement.

Yet this Court need not even entertain that invitation because, straight out of the gate, the Petition fails for a variety of procedural defects, each of which warrants dismissal. Among other failings, Petitioners lack standing to sue the Secretary—the *only* party against whom they sought relief in the Petition, *see* Pet. ¶ 92—because the Secretary’s Guidance regarding the date requirement is not binding on county boards of elections. *See Republican Nat’l Comm. v. Schmidt*, No. 447 M.D. 2022 slip op. at 20 (Pa. Commw. Ct. Mar. 23, 2023) (Ceisler, J.) (attached as Exhibit A). And since the Secretary is not a proper or indispensable party to this suit, the Court also lacks subject matter jurisdiction, as Judge Ceisler concluded in an indistinguishable case just 15 months ago. *See id.* at 13-14, 18-28.

Moreover, Petitioners named only two county boards of elections as Respondents, even though their Petition bizarrely seeks no relief against them. Petitioners' cherry-picking of these Respondents is no accident: like the Secretary, they have opposed the date requirement and asked courts to invalidate it in prior cases. In any event, the Court lacks jurisdiction over the two county board Respondents because Petitioners seek no relief against them and because—as Judge Ceisler also held—county boards are local agencies, not agencies of the Commonwealth. *See id.* at 22-27. And even if the Court had subject matter jurisdiction and Petitioners had sought relief against those Respondents, dismissal would still be warranted because Petitioners failed to join the other 65 county boards of elections, which are indispensable parties to this suit. *See* Pa. R.C.P. 1032(b).

The Court thus need not even address the merits of the Petition—let alone grapple with the fact that Petitioners' requested relief would violate the U.S. Constitution and result in invalidation of universal mail voting in Pennsylvania under Act 77's non-severability provision. But in the event the Court reaches the merits, it should hold that the date requirement is constitutional. The Free and Equal Elections Clause's text and history, and the authoritative precedent construing the Clause, demand that result.

For all of these reasons, and as explained more fully below, the Court should grant summary relief, dismiss the Petition, and enter judgment against Petitioners.



## BACKGROUND

Four original Petitioners in this action—Black Political Empowerment Project, Make The Road Pennsylvania, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania—have already brought and lost challenges to the date requirement in state and federal court. Those Petitioners participated as *amici* challenging the requirement in *Ball*. See *Amici Curiae Brief In Support Of Respondents, Ball v. Chapman*, No. 102 MM 2022, 2022 WL 18540580 (Pa. Oct. 25, 2022). They are also federal-court plaintiffs whose Materiality Provision claim the Third Circuit recently rejected and who continue to pursue federal constitutional challenges to the date requirement. 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).

Intervenors the Democratic National Committee and Pennsylvania Democratic Party (collectively, “the Democratic Intervenors”) intervened to challenge the date requirement both in *Ball*, see Br. of Intervenor-Respondents, *Ball v. Chapman*, No. 102 MM 2022, 2022 WL 18540587 (Pa. Oct. 25, 2022) (“Democratic Intervenors *Ball* Br.”), and in the Third Circuit appeal, see Order, ECF No. 129, *Pa. State Conf. of NAACP v. Sec’y*, No. 23-3166 (3d Cir. Jan. 3, 2024).

Petitioners (now joined by the Democratic Intervenors) nonetheless filed the Petition in this Court on May 28, 2024, raising yet another challenge to the date requirement. Petitioners allege that the date requirement violates the Free and Equal

Elections Clause and is “meaningless.” *See, e.g.*, Pet. ¶¶ 81-91. Their Petition names three Respondents: Secretary of the Commonwealth Al Schmidt, the Philadelphia County Board of Elections, and the Allegheny County Board of Elections. *See, e.g., id.* ¶ 1. It does not name any of the Commonwealth’s other 65 county boards of elections. *See id.* This Memorandum collectively refers to the Philadelphia County Board of Elections and the Allegheny County Board of Elections as “the Boards.”

In prior cases—including *Ball* and *Pennsylvania State Conference of the NAACP*—all three Respondents declined to defend the date requirement and asked courts to invalidate it. *See* Resp’t Allegheny Cnty. Bd. of Elections Br. and Resp’t Phila. Cnty. Bd. of Elections Br., *Ball v. Chapman*, No. 102 MM 2022 (Pa. filed Oct. 16, 2022); Defs. Appellee Resp. Br., *NAACP v. Sec’y Commonwealth of Pa.*, No. 23 3166 (3d Cir. filed Dec. 7, 2023). Petitioners and the Democratic Intervenors thus have sued three Respondents who agree with them that the General Assembly’s date requirement upheld by the Pennsylvania Supreme Court and the Third Circuit is invalid.

Petitioners request that the Court declare the date requirement “unconstitutional” and “enjoin further enforcement” of it. Pet. ¶¶ 92(a), (c). The Petition, however, seeks that relief only “against the Secretary of State.” *Id.* ¶ 92. It does not seek *any* relief against the two Boards. *See id.*

The Secretary, however, has no authority to enforce the date requirement or

to bind county boards of elections not to enforce it. *See id.* ¶ 41; *see also* 25 P.S. § 2621. The authority whether to enforce the date requirement resides exclusively in the county boards of elections, *see* Pet. ¶ 44; 25 P.S. § 2642, all of which are currently bound to enforce it under *Ball*, *see Ball* November 1, 2022 Order (attached as Exhibit B). Any relief ordered against the Secretary, therefore, will not result in enjoining “further enforcement” of the date requirement. *See* Pet. ¶ 92(c).

Indeed, Petitioners seek relief based solely on the Secretary’s non-binding “Guidance” advising county boards of elections on their legal obligation to enforce the date requirement under the plain terms of the Election Code, *Ball*, and *Pennsylvania State Conference of the NAACP*. *See, e.g.*, Pet. ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36, 42-43, 79. But as Judge Ceisler and other courts have held, a guidance from the Secretary advising county boards of elections on their legal obligations related to ballot-casting rules is not legally binding. *See, e.g., Republican Nat’l Comm.*, Exhibit A at 29. Accordingly, rescinding or invalidating the Secretary’s Guidance will not change any county board’s legal obligation to enforce the date requirement or result in any board counting any noncompliant ballot.

The Court granted the Republican Intervenors’ Application for Intervention on June 10, 2024. Republican Intervenors now move the Court for summary relief in the form of a judgment dismissing the Petition.

## STANDARD OF REVIEW

“At any time after the filing of a petition for review in an appellate or original jurisdiction matter,” this Court “may on application enter judgment if the right of the applicant thereto is clear.” Pa. R.A.P. 1532(b). “Summary relief is similar to summary judgment under the Pennsylvania Rules of Civil Procedure.” *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 216 A.3d 448, 458 (Pa. Commw. Ct. 2019). Summary relief therefore is appropriate “where there are no disputed issues of material fact and it is clear that the applicant is entitled to the requested relief under the law.” *Id.*

## ARGUMENT

The Petition fails at the threshold—and should be dismissed—for each of four procedural defects.

*First*, Petitioners lack standing to sue the Secretary. The Secretary’s sole action challenged by Petitioners is his issuance of a non-binding Guidance regarding the date requirement. But because the Guidance is not legally binding on county boards of elections, *see Republican Nat’l Comm.*, Ex. A at 20, it has no causal connection to Petitioners’ alleged harm of county boards declining to count noncompliant ballots. Thus, moreover, any order invalidating the Guidance will not redress that harm.

*Second* and relatedly, the Secretary is the only Commonwealth official named

as a Respondent but is not a proper or indispensable party to this suit. The Court therefore lacks subject matter jurisdiction. *See id.* at 13-14, 18-22; 42 Pa. C.S. § 761(a)(1).

*Third*, this Court lacks jurisdiction over the two Boards because Petitioners seek no relief against them and because they are local agencies, not Commonwealth agencies. *See Republican Nat'l Comm.*, Exhibit A at 22-27.

*Fourth*, even if the Court had jurisdiction and Petitioners had sought relief against the two Boards, dismissal would still be warranted because Petitioners have failed to join 65 county boards of elections, who are indispensable parties to this action. *See Pa. R.C.P. 1032(b); Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002), as amended (Apr. 30, 2002).

The Court thus need not even address the merits of the Petition. But in the event the Court reaches the merits, it should hold that the date requirement is constitutional. After all, the Pennsylvania Supreme Court already has upheld the date requirement against the very Free and Equal Elections challenges Petitioners now raise. And even if the Court deems that an open question, the plain text and history of the Free and Equal Elections Clause, and the authoritative precedent construing it, conclusively establish that the date requirement is a constitutional exercise of the General Assembly's authority to "effectuat[e]" the Pennsylvania Constitution's mandate "that elections be 'free and equal.'" *Pa. Democratic Party*,

238 A.3d at 374. The Court should grant summary relief, dismiss the Petition, and enter judgment against Petitioners.

**I. THE COURT SHOULD DISMISS THE PETITION DUE TO ITS MYRIAD PROCEDURAL DEFECTS.**

The Court should grant summary relief and dismiss the Petition for lack of standing, lack of subject matter jurisdiction, and failure to join indispensable parties.

**A. Petitioners Lack Standing To Sue The Secretary.**

“[U]nder a traditional standing analysis, the individual initiating the legal action must show that he is aggrieved by the matter he seeks to challenge.” *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 473 (Pa. 2021). Thus, a petitioner in this Court must establish both “a causal connection between the asserted violation and the harm complained of” and that a judicial order would “redress” the petitioner’s harm. *Id.* at 473-74; *see also id.* at 492 (Wecht, J., concurring); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975) (petitioner “must show causation of the harm to his interest by the matter of which he complains”).

Petitioners have failed to satisfy this basic requirement. Petitioners’ alleged harm is that county boards of elections do not count mail ballots that fail to comply with the date requirement. *See, e.g.*, Pet. ¶¶ 1-5, 79. The only action of the Secretary they challenge is the Secretary’s Guidance regarding the date requirement. *See, e.g.*, *id.* ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36, 42-43, 79.

There is, however, no “causal connection” between the Secretary’s Guidance and county boards declining to count noncompliant mail ballots. *Firearm Owners Against Crime*, 261 A.3d at 473. The Secretary lacks authority to count ballots, to enforce the date requirement, or to bind county boards to enforce or not to enforce it. *See* Pet. ¶ 41; *see also* 25 P.S. § 2621 (setting out Secretary’s limited powers). Instead, the authority whether to count a ballot and to enforce the date requirement resides exclusively in the county boards. *See* Pet. ¶ 44; 25 P.S. § 2642 (setting out county boards’ expansive powers).

Thus, as Judge Ceisler explained just 15 months ago, the “Secretary does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely upon the County Boards.” *Republican Nat’l Comm.*, Exhibit A at 20 (“not[ing]” that the Secretary’s “duties and responsibilities” under the Election Code “are limited”). Moreover, “the Secretary has no authority to definitively interpret the provisions of the Election Code.” *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d 1058, 1078 n.6 (Pa. 2020). In fact, as this Court has previously acknowledged, the Secretary has *admitted* to lacking authority to direct county boards in their administration of elections, to direct county boards to follow any guidance from the Secretary, or even to direct county boards to comply with a court order. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*10 (Pa. Commw. Ct. Aug. 19, 2022) (the

Secretary acknowledging he “does not have the authority to direct the Boards to comply with [a court order]”); Pa. House of Representatives, State Gov’t Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State’s Election Guidance*, (Jan. 21, 2021), at 23-25 (previous Secretary acknowledging that a Secretary’s guidance is not directory), *available at* <https://tinyurl.com/4wxjvd4c>.

Accordingly, as Judge Ceisler and other courts have held, any guidance of the Secretary regarding the county boards’ administration of elections does not affect the boards’ legal obligations and is not legally binding or enforceable against the boards. *See Republican Nat’l Comm.*, Exhibit A at 13-14, 18-22; *see also Ziccarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at \*5 n.6 (W.D. Pa. Jan. 12, 2021) (“[U]nder Pennsylvania law, the Secretary’s pre-election guidance is just that—guidance. County boards of elections ultimately determine what ballots to count or not count in the first instance.”).

This is also evident from the Pennsylvania Supreme Court’s remedial order in *Ball*. The petitioners in *Ball* named the Secretary as a respondent and challenged the Secretary’s then-existing guidance advising county boards to canvass “[a]ny ballot return-envelope that is undated or dated with an incorrect date but that has been timely received by the county.” 289 A.3d at 8. The *Ball* Court held that undated and incorrectly dated ballots are invalid under Pennsylvania law and ordered that such ballots may not be counted. Its remedial order, however, was directed only to the



county boards of elections, *not* to the Secretary. *See* 284 A.3d 1189, 1192, November 1, 2022 Order (attached as Exhibit B (“The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting . . .”). In fact, the *Ball* order did not require the Secretary to do *anything*—including rescind or modify the guidance the petitioners had challenged. *See id.*

In declining to order the Secretary to do anything, the Pennsylvania Supreme Court implicitly recognized that the Secretary’s guidance is not binding—and, thus, has no effect on whether county boards count any ballot. It therefore recognized that there is no “causal connection” between a guidance of the Secretary and whether county boards would decline to count noncompliant mail ballots as required by its order. *Firearm Owners Against Crime*, 261 A.3d at 473.

So too here. Pennsylvania’s 67 boards of elections are bound under *Ball* not to count mail ballots that fail to comply with the date requirement, *see Ball*, 289 A.3d at 8, 21-22, *regardless* of the Secretary’s Guidance or whether the Secretary issues any guidance at all, *see In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1078 n.6; *Republican Nat’l Comm.*, Exhibit A at 13-14, 18-22; *Chapman*, 2022 WL 4100998, at \*10; *Zicarelli*, 2021 WL 101683, at \*5 n.6.

Accordingly, there is no “causal connection” between the Secretary’s Guidance and the “harm [Petitioners] complained of”—county boards not counting noncompliant mail ballots. *Firearm Owners Against Crime*, 261 A.3d at 473.

Moreover, a court order directing the Secretary to rescind or modify the Guidance or not to enforce the date requirement would not “redress” Petitioners’ alleged harm. *Id.* at 474; *id.* at 492 (Wecht, J., concurring); *see generally Chadwick v. Caulfield*, 834 A.2d 562, 570 (Pa. Super. Ct. 2003) (listing redressability as a requirement of standing).

Petitioners therefore lack standing to sue the Secretary—the *only* party against whom they have sought relief. *See* Pet. ¶ 92. The Court should grant summary relief, dismiss the Petition, and enter judgment against Petitioners.

**B. This Court Lacks Subject Matter Jurisdiction Because The Secretary Is Not A Proper Or Indispensable Party.**

“Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth.” *Seitel Data, Ltd. v. Ctr. Twp.*, 92 A.3d 851, 859 (Pa. Commw. Ct. 2014) (quoting *Commonwealth v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009)). This Court has original jurisdiction only “where such jurisdiction is conferred by any statute.” *Id.* Because “[i]t is axiomatic that subject matter jurisdiction is the indispensable foundation of a court’s power to adjudicate the issues in a particular case,” this Court must address its jurisdiction before reviewing the merits. *In re J.M.Y.*, 218 A.3d 404, 415 (Pa. 2019).

Petitioners allege that “[t]his Court has original jurisdiction over this Petition for Review pursuant to 42 Pa. C.S. § 761(a)(1).” Pet. ¶ 7. Section 761(a)(1) grants the Court original jurisdiction over civil actions “[a]gainst the Commonwealth

government, including any officer thereof, acting in his official capacity.” 42 Pa. C.S. § 761(a)(1).

Section 102 of the Judicial Code defines the “Commonwealth government” as:

the government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.

*Id.* § 102.

Although the Secretary is an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Republican Nat’l Comm.*, Exhibit A at 17; *see also Pa. Sch. Bds. Ass’n, Inc. v. Commonwealth. Ass’n of Sch. Admin’rs*, 696 A.2d 859, 867 (Pa. Commw. Ct. 1997) (“[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper.”)). Rather, for the Court to exercise jurisdiction under 42 Pa. C.S. §761(a)(1) “against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Republican Nat’l Comm.*, Exhibit A at 17.

“[T]he main inquiry for determining whether a party is indispensable” for these purposes “involves whether justice can be accomplished in the absence of the party.” *Id.* at 17-18. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Id.* at 18; *see also Foreman v. Chester-Upland Sch. Dist.*, 941 A.2d 108, 113 (Pa. Commw. Ct. 2008). On the other hand, “where a petitioner ‘seeks absolutely no [actual] relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Republican Nat’l Comm.*, Exhibit A at 18.

Just 15 months ago, Judge Ceisler held that the Secretary is not indispensable—and that joinder of the Secretary does not invoke the Court’s original jurisdiction—where the Secretary’s only challenged action is issuance of a non-binding guidance relating to county boards’ administration of elections. *See id.* at 18-22. In particular, in *Republican National Committee*, committees of the Republican Party and voters brought suit against the Secretary, the Commonwealth Director of Elections, and all 67 county boards. *See id.* at 1-2. The petitioners challenged certain boards’ adoption of “notice and cure procedures” for defective mail ballots. *See id.* at 2. The only action of the Acting Secretary the petitioners

challenged was his issuance of a guidance regarding *Ball* and county boards' administration of elections. *See id.* at 8-14.

Judge Ceisler held that because the Acting Secretary's guidance was not binding on county boards, he was not an indispensable party. *See id.* at 18-22. Rather, because county boards administer elections free from the Secretary's authority or control, the petitioners could obtain "meaningful relief" without the Secretary through suits against county boards, which must be brought in each board's home county. *See id.* at 20-22. Judge Ceisler therefore dismissed the case for lack of subject matter jurisdiction. *See id.* at 18-28.

Here as well, the Secretary is not an indispensable party. After all, the Secretary cannot be indispensable to granting Petitioners "meaningful relief," *id.* at 18, when Petitioners lack standing even to sue the Secretary, *see supra* Part I.A. Moreover, the Secretary's only action that Petitioners challenge is a non-binding Guidance that has no effect on whether county boards of elections enforce the date requirement and decline to count noncompliant ballots. *See id.* Thus, as in *Republican National Committee*, the Secretary is not an indispensable party here. *See Republican Nat'l Comm.*, Exhibit A at 17. Accordingly, because the Secretary is the only Commonwealth officer named as a Respondent, the Court lacks subject matter jurisdiction and should dismiss the Petition. *See* 42 Pa. C.S. § 761(a)(1); *Republican Nat'l Comm.*, Exhibit A at 18-28.

**C. The Court Lacks Subject Matter Jurisdiction Over Any Claims Against The Boards.**

For two reasons, this Court also lacks subject matter jurisdiction over any claims Petitioners purport to plead against the Boards. *First*, Petitioners have sought relief only against the Secretary, and have not sought *any* relief against the Boards. *See* Pet. ¶ 92. In other words, Petitioners do not seek judicial “redress” against the Boards, so the Court has no jurisdiction over them in this case. *Firearm Owners Against Crime*, 261 A.3d at 474; *see also id.* at 492 (Wecht, J., concurring).

*Second*, even if Petitioners had sought relief against the Boards, the Court lacks subject matter jurisdiction over them under 42 Pa. C.S. § 761.10. Because the Secretary is not an indispensable party, this Court would have subject matter jurisdiction only if the two Boards are “agencies” of the “Commonwealth government.” 42 Pa. C.S. § 761.10. They are not. Instead, the Boards are “local authorit[ies]” that are “not include[d]” within the “Commonwealth government” for jurisdictional purposes. *Id.* § 102.

Judge Ceisler already settled this question in the indistinguishable *Republican National Committee* case. In that case, after determining that the Secretary and the Director of Elections were not indispensable parties, Judge Ceisler addressed whether county boards are “Commonwealth agencies” whose joinder brought the case within the Court’s original jurisdiction. *Republican Nat’l Comm.*, Exhibit A at 22.

Relying on the analytical framework established in *Blount v. Philadelphia Parking Authority*, 965 A.2d 226 (Pa. 2009), and *Finan v. Pike County Conservation District*, 209 A.3d 1108 (Pa. Commw. Ct. 2019), Judge Ceisler noted that “for purposes of jurisdiction, Commonwealth agency status is narrowly construed.” *Id.* at 23 (quoting *Finan*, 209 A.3d at 1111). Judge Ceisler pointed out that the Election Code’s provisions creating and empowering county boards “reflect that the County Boards are local agencies.” *Id.* at 26. In particular, each county board “has jurisdiction to administer and conduct elections and primaries within each respective county, not statewide”; the county boards “are not controlled by the Commonwealth”; and the county boards “are funded by the county commissioners or other appropriating authorities of the county[,] . . . not by [a] . . . Commonwealth entity.” *Id.* at 27. Judge Ceisler therefore concluded that the 67 county boards of elections are not Commonwealth agencies for jurisdictional purposes and dismissed the petition for lack of subject matter jurisdiction. *See id.* at 24-27.

The two Boards Petitioners named as Respondents are local agencies, not Commonwealth entities, for jurisdictional purposes. *See id.* Thus, because the Secretary is not an indispensable party, the Court lacks subject matter jurisdiction over any claims against the Boards and should dismiss the Petition. *See id.*

**D. In The Alternative, Petitioners Failed To Join Indispensable Parties.**

Even if the Court had jurisdiction and Petitioners had sought relief against the Boards, the Court still should dismiss the Petition. Petitioners failed to join indispensable parties: the other 65 county boards of elections.

“Whenever it appears by suggestion of the parties or otherwise ... that there has been a failure to join an indispensable party, the court shall ... dismiss the action.” Pa. R.C.P. 1032(b); *see also Polydyne*, 795 A.2d at 496. Indeed, “in the absence of an indispensable party, the court lacks jurisdiction over the matters before it that affect the rights of that missing party.” *Damico v. Royal Ins. Co.*, 556 A.2d 886, 887 (Pa. Super. Ct. 1989) (citing *Columbia Gas Transmission v. Diamond Fuel Co.*, 346 A.2d 788 (Pa. 1975)). A party is indispensable when “his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *Polydyne*, 795 A.2d at 496 (citing *Vernon Twp. Water Auth. v. Vernon Twp.*, 734 A.2d 935, 938 n.6 (Pa. Commw. Ct. 1999)).

In at least two ways, any relief Petitioners seek against the Boards implicates the legal rights and obligations of the 65 other county boards of elections such that those boards are indispensable parties here.

*First*, Petitioners suggest that invalidating the Secretary’s Guidance will require all 67 county boards to stop “setting aside mail ballot envelopes with missing or incorrect voter-written dates.” Pet. ¶ 79. That suggestion is incorrect: the



Guidance is not binding, and the Secretary has no authority to direct any county board to disregard its legal obligation to enforce the date requirement under the plain terms of the Election Code and *Ball*. *See supra* Part I.A. County boards simply cannot be relieved from that obligation through a judicial order entered in a case that does not name them or seek “redress” against them. *Firearm Owners Against Crime*, 261 A.3d at 474; *see also id.* at 492 (Wecht, J., concurring).

Thus, to the extent that the relief Petitioners seek would affect the 65 unnamed county boards and purport to require them *to count* noncompliant ballots that *Ball* requires them *not to count*, those boards are indispensable parties in this suit, and the Petition should be dismissed for failure to join them. *See* Pa. R.C.P. 1032(b); *Polydyne*, 795 A.2d at 496. In fact, the Petition itself makes reference to county boards of elections—Montgomery, York, Bucks, Chester, Berks, and Dauphin—that are not named as Respondents. *See* Pet. ¶¶ 4, 76. The Petition also alleges that unnamed county boards have adopted a variety of inconsistent practices to determine whether a mail ballot complies with the date requirement, and that this variation in practices is part of the purported Free and Equal Elections Clause violation Petitioners allege. *See id.* ¶¶ 64-65. Petitioners thus implicitly concede that county boards other than the two Boards it has named are indispensable to any relief they seek against county boards. *See id.* ¶¶ 4, 64-65, 76. Thus, because Petitioners did not join any of those other boards as Respondents, the Court cannot order any

remedy against them and lacks jurisdiction over this action. *See, e.g., Polydyne*, 795 A.2d at 496.

*Second*, even if Petitioners had requested an injunction prohibiting the two Boards named as Respondents from enforcing the date requirement, *but see* Pet. ¶ 92, the other 65 county boards of elections would still be indispensable parties whose non-joinder requires dismissal of the Petition. If an injunction were granted against the two Boards, it would establish “varying standards to determine what [is] a legal vote” from “county to county” across the Commonwealth and, thus, potentially ensnare all 67 county boards of elections in an Equal Protection violation. *Bush v. Gore*, 531 U.S. 98, 106-07 (2000).

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.” *Id.* at 104-05. 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 109-10. Courts cannot order different “counties [to] use[] varying standards to determine what [constitutes] a legal vote.” *Id.* at 107.

Yet that is precisely what Petitioners would be asking this Court to do if they had sought a declaration or injunction prohibiting the two Boards from enforcing the date requirement. After all, any such order *requiring* the Boards *to count*

noncompliant ballots would not affect the other 65 county boards' obligation *not to count* those ballots under the Election Code and *Ball*. Such an order resulting in “varying standards to determine what [is] a legal vote” from “county to county” is improper. *See id.* at 106-07. Accordingly, the 65 county boards not named in this action have rights which are “connected with the claims of the litigants,” and which would be impaired by an injunction against the Boards. *Polydyne*, 795 A.2d at 496.

The consequence of failing to join those indispensable parties is clear: the Court lacks jurisdiction, and this action must be dismissed. Pa. R.C.P. 1032(b). The Court should grant summary relief and dismiss the Petition.

## **II. THE COURT SHOULD ENTER JUDGMENT AGAINST PETITIONERS BECAUSE THEIR CLAIMS FAIL ON THE MERITS.**

The Court need not consider the merits because the Petition fails for each of the many procedural defects described in Part I. But to the extent the Court considers the merits, it should grant summary relief and enter judgment against Petitioners because their Free and Equal Elections claims fail as a matter of law.

Petitioners invite the Court to do something unprecedented in the Commonwealth's history: to wield the Free and Equal Elections 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 Free and Equal Elections 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., Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009); *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017); *accord Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissent) (“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. DNC*, 594 U.S. 647, 669 (2021))); *Pa. State Conf. of NAACP*, 97 F.4th at 133-34 (agreeing with Justice Alito on this point).

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 held over a century ago (and recently reaffirmed in *Pennsylvania Democratic Party*), “[t]he power to regulate elections is legislative.” *Pa. Democratic Party*, 238 A.3d at 373 (quoting *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914)). 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); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801 (Pa. 2018).

This presumption of constitutionality is strong. *Mixon*, 759 A.2d at 447. To overcome it, Petitioners must prove the date requirement “clearly, palpably, and plainly violates the Constitution.” *League of Women Voters*, 178 A.3d at 801. 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.

Petitioners’ Free and Equal Elections challenge to the General Assembly’s duly enacted and longstanding date requirement fails for several reasons. *First*, the Pennsylvania Supreme Court has already rejected the very Free and Equal Elections challenges Petitioners mount here. *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, Petitioners’ claims fail on the Clause’s plain text and history and the controlling precedent construing the Clause. *See, e.g., League of Women Voters*, 178 A.3d at 807-10.

*Third*, case-law from other states with “free and equal elections” clauses and case-law construing the right to vote under the U.S. Constitution foreclose Petitioners’ claims.

*Fourth*, Petitioners’ 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) (quoting *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring)); *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 invalidates the date requirement, the entirety of Act 77—including its creation of no-excuse mail voting for all Pennsylvania voters—would be 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, 609-610 (Pa. 2022) (Brobson, J., dissenting).

For each of these reasons as well, the Court should grant summary relief and enter judgment against Petitioners.

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

Petitioners' claims are foreclosed because the Pennsylvania Supreme Court has already rejected these Free and Equal Elections challenges to the date requirement.

The petitioners in *Pennsylvania Democratic Party*—who included Intervenor Pennsylvania Democratic Party—already brought a Free and Equal Elections challenge to the Election Code's declaration mandate of which the date requirement is part. In particular, those petitioners asserted that “the multi-stepped process for voting by mail-in or absentee ballot inevitably leads to ... minor errors, such as not completing the voter declaration,” which requires voters to “fill out, date, and sign the declaration printed on the outer envelope.” *Pa. Democratic Party*, 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 373. 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 373-74.

The Secretary opposed this request and the petitioners' construction of the Free and Equal Elections 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.* (quotation marks omitted). 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 petitioners’ claim. It reasoned that the Free and Equal Elections Clause does not mandate a cure procedure “for mail-in and absentee 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 Legislature to decide both “the procedures for casting and counting a vote by mail” and whether even “minor errors in contravention of those requirements” warrant rejection of the ballot. *Id.*

The Pennsylvania Supreme Court therefore held that the declaration mandate complies with the Free and Equal Elections Clause even though it requires county boards to reject ballots due to “minor errors” in completion of the declaration. *See id.* The court thus rejected Petitioners’ current argument: that the Clause precludes mandatory application of the declaration mandate and its date requirement to reject noncompliant mail ballots. *See id.*

Petitioners’ arguments, *see* Pet. ¶¶ 81-91, that the date requirement serves no purpose and that mandatory application of the date requirement violates the Clause



were also presented to the Pennsylvania Supreme Court in *Ball*, including by the Democratic Intervenors here. Brief of Respondent in *Ball*, 2022 WL 18540590, at \*37 (“Imposing draconian consequences for insignificant errors could, as is the case here [] implicate the Constitution’s Free and Equal Elections Clause[.]”); Democratic Intervenors’ *Ball* Br., 2022 WL 18540587, at \*1-2 & \*8-10 (discussion alleged lack of purpose), \*29-32 (making argument under Free and Equal Elections Clause). The court even noted those arguments in its opinion. *See* 289 A.3d at 14-15 (discussing Free and Equal Elections Clause arguments raised by the parties); 16 n.77 (discussing alleged lack of “functionality” of the date requirement). It nonetheless upheld the date requirement as “unambiguous and mandatory” such that a voter’s failure to comply with it renders the ballot legally “invalid,” *id.* at 20-23, thus rejecting those arguments. Petitioners’ rehash of these same challenges to the date requirement, *see* Pet. ¶¶ 81-91, is foreclosed by precedent.

Petitioners actually refer to *Ball* in an unavailing attempt to argue that it left the door open to their Free and Equal Elections challenge. Pet. ¶ 3. However, in the footnote Petitioners cite, Justice Wecht referred to the Clause in discussing possible ambiguities in the federal Materiality Provision. *See* 289 A.3d at 27 n.156. Justice Wecht’s opinion was not adopted by a majority of the court, was not an application of the Clause to Act 77, and was premised on a potential ambiguity in the federal statute. When actually speaking for the court, Justice Wecht held that the date

requirement is unambiguous, *Ball*, 289 A.3d at 20-23, and the Third Circuit’s recent decision in *Pennsylvania State Conference of the NAACP*, 97 F.4th 120, rejecting the assertion of ambiguities in the Materiality Provision, renders Justice Wecht’s reasoning moot. The Court should grant summary relief and dismiss.

**B. The Date Requirement Does Not Violate The Constitution.**

The Pennsylvania Supreme Court’s rejection of Free and Equal Elections challenges to the date requirement alone warrants summary relief. *See supra* Part II.A. But even if the Court deems that question open, it still should grant this relief because controlling law makes clear that the date requirement comports with the Clause.

**1. The Clause Does Not Invalidate Mandatory Ballot-Casting Rules.**

The Pennsylvania Supreme Court has never used the Free and Equal Elections Clause to strike down a neutral ballot-casting rule governing how voters complete and cast their ballots. *See McCall, supra*, at 215-232 (discussing different ways Clause has been used); *see also League of Women Voters*, 178 A.3d at 802, 806, 818 (repeatedly using same treatise to interpret the Clause). In fact, it has routinely *upheld* ballot-casting rules—such as the declaration mandate and the secrecy-envelope rule—against challenges under the Clause. *See Pa. Democratic Party*, 238 A.3d at 372-80.

These holdings make perfect sense: the Clause delegates to the “Legislature”

the “task of effectuating” its mandate, including the adoption of ballot-casting rules and the decision whether ballots should be invalidated “due to minor errors made in contravention of those requirements.” *Id.* at 374. Originally adopted in 1790, the 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.” *League of Women Voters*, 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; *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”) (internal quotation marks omitted).

Precedent and history demonstrate that the Clause performs three functions—none of which implicate, let alone invalidate, ballot-casting rules like the date requirement. *First*, the Clause prohibits arbitrary voter-qualification rules that disqualify classes of citizens from voting. *League of Women Voters*, 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 (Clause achieves

“universal suffrage” by “prohibiting exclusion from the election process of those without property or financial means”); *see* McCall, *supra*, at 217.

*Second*, the Clause prohibits intentional discrimination against voters based on social or economic status, geography of residence, or religious or political beliefs. *League of Women Voters*, 178 A.3d at 807. That is why the Pennsylvania Supreme Court held that the Clause prohibits political gerrymandering. *Id.* at 808-09. The 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 Free and Equal Elections Clause. *Id.*

After all, the Clause guarantees only that every voter shall have an equal *opportunity* to cast a vote in the election, not that every voter will successfully avail himself or herself of that opportunity. *Pa. Democratic Party*, 238 A.3d at 374; *League of Women Voters*, 178 A.3d at 810. It therefore does not—and has never been interpreted to—restrict the authority of the Legislature to adopt neutral ballot-

casting rules. To the contrary, “[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). Indeed, “nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government.” *Winston*, 91 A. at 523.

## **2. The Date Requirement Does Not Violate The Free And Equal Elections 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 Pa. Democratic Party*, 238 A.3d at 372-80. As part of the declaration mandate, and like the secrecy-envelope rule, the date requirement is a neutral, non-discriminatory ballot-casting rule that does not violate the Free and Equal Elections Clause. *See id.* at 372-73; *Mixon*, 759 A.2d at 449-50.

Petitioners do not—and cannot—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 League of Women Voters*, 178 A.3d at 807. Petitioners thus must be invoking the Clause’s third protection, *see id.*, and claiming that the date requirement

“make[s] it so difficult [to vote] as to amount to a denial” of “the franchise.” *Id.* at 810.

That claim 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 P.S. § 2811. So far from making voting “so difficult as to amount to a denial” of “the franchise,” *League of Women Voters*, 178 A.3d at 810, the date requirement is *inapplicable* to an entire universally available method of voting—the method that the majority of Pennsylvania voters use to vote, even on Petitioners’ own figures. *See* Pet. ¶¶ 55 & n.6, 70 (suggesting that 37% of Pennsylvania voters voted by mail in the 2024 primary elections); 2022 General Election Official Returns (Statewide), November 8, 2022 (22.8% of ballots counted in the 2022 U.S. Senate election—1,225,446 out of 5,368,021)—were mail ballots), [https://www.electionreturns.pa.gov/\\_ENR/General/SummaryResults?ElectionID=94&ElectionType=G&Is.Active=0](https://www.electionreturns.pa.gov/_ENR/General/SummaryResults?ElectionID=94&ElectionType=G&Is.Active=0).

In the second place, even if Petitioners were correct that the Free and Equal Elections Clause requires ignoring the preferred voting method of the majority of Pennsylvania voters and focusing 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. *League of Women Voters*, 178 A.3d at 810. Petitioners’ own position contemplates as much, since they do not challenge the “fill out” and “sign” aspects

of Pennsylvania’s 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.<sup>2</sup>

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) (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring), not a “difficult[y]” so severe “as to amount to a denial” of “the franchise,” *League of Women Voters*, 178 A.3d at 810. Every State requires voters to write pieces of information on voting papers—both for in-person and mail voting. *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a) (signature requirement); 25 P.S. § 3050 (requirement to 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](https://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/how-states-verify-voted-absentee-mail-ballots](https://ncsl.org/elections-and-campaigns/how-states-verify-voted-absentee-mail-ballots).

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

campaigns/table-14-how-states-verify-voted-absentee-mail-ballots. Anyone who has voted knows this.

In fact, dating a ballot declaration is far less difficult than performing other tasks that have been upheld as non-burdensome and constitutional under the Free and Equal Elections Clause and other constitutional provisions. As noted, the Pennsylvania Supreme Court has already upheld against a Free and Equal Elections challenge the declaration mandate of which the date requirement is part and the secrecy-envelope rule. *See Pa. Democratic Party*, 238 A.3d at 372-80. Petitioners never even attempt to explain how those rules can be valid under the Clause but the date requirement is not. Nor could they, since the date requirement—like the signature requirement Petitioners do not challenge—is necessarily *easier* to comply with than the range of rules (including the “fill out,” “date,” and “sign” requirements) that form the declaration mandate.

Moreover, the United States Supreme Court has upheld as constitutionally non-burdensome “the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering . . . required documents, and posing for a photograph” as required to obtain a photo identification for in-person voting. *Crawford*, 533 U.S. at 198 (opinion of 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. Yet both of these tasks are far more difficult



than signing and dating a ballot envelope—so, *a fortiori*, the date requirement does not “make it so difficult [to vote] as to amount to a denial” of “the franchise.” *League of Women Voters*, 178 A.3d at 810.

This is the end of the analysis, and Petitioners’ challenge fails. Indeed, 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. *Id.* But even if the number of noncompliant ballots were relevant, *see, e.g., Pa. Democratic Party*, 238 A.3d at 389 (Wecht, J., concurring) (reasoning that the requirement that voters “fill out, date and sign the declaration printed on’ the ballot return envelope” is constitutional unless it “will result in a constitutionally intolerable ratio of rejected ballots”), Petitioners’ own figures demonstrate that the date requirement is not so “difficult” to comply with as to be unconstitutional, *League of Women Voters*, 178 A.3d at 810.

In particular, according to the figures Petitioners rely on, “10,657” mail ballots were not counted in the 2022 general election due to noncompliance with the date requirement. *See* Pet. Ex. 1 ¶¶ 8-9 (relying on data analysis by a lawyer advocating for invalidation of date requirement in parallel federal challenge). But that represents only 0.85% 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 118<sup>th</sup> Congress* at 45, 47, [https://www.eac.gov/sites/default/files/2023-06/2022\\_EAVS\\_Report\\_508c.pdf](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.” *League of Women Voters*, 178 A.3d at 810.

Moreover, this 0.85% 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?* (statewide rejection rate for noncompliance with secrecy-envelope requirement around 1%), <https://electionlab.mit.edu/articles/how-many-naked-ballots-were-cast-pennsylvanias-2020-general-election>. 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 figures Petitioners rely on also show that the rate of noncompliance with the date requirement *decreased* in the 2024 primary elections. According to those figures, only 0.21% (4,000 out of 1,900,000) of all ballots submitted and only 0.56% of all mail ballots submitted (4,000 out of 714,315) in those elections were rejected due to an incorrect or missing date. See Pet. ¶¶ 70, 73 and Exhibit A. The vast majority of Pennsylvania mail voters therefore again

complied with the date requirement, so it cannot violate the Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 810.

### **3. Pennsylvania Law Forecloses Petitioners' Request For Strict Scrutiny.**

Well-established Pennsylvania law, therefore, forecloses Petitioners' Free and Equal Elections challenges to the date requirement. Petitioners thus pivot to inviting this Court to transform the Clause into a license for judges to routinely second-guess any election rule adopted by the General Assembly. *See* Pet. ¶¶ 82-85. In their preferred world, Pennsylvania courts would subject all state election rules to a demanding balancing test that considers burdens on voters and the wisdom of the General Assembly's policy judgment that those rules are justified. In fact, Petitioners go so far as to advocate that the Court subject the date requirement to *strict scrutiny*. *See* App. for Prelim. Inj. ¶¶ 12-15.

The Court should decline Petitioners' invitation to author this dramatic rewrite of Pennsylvania law for several reasons. *First*, the Pennsylvania Supreme Court has *never* applied the Free and Equal Elections Clause in this manner. Thus, Petitioners can identify no support in Pennsylvania law for doing so. To the contrary, consistent with its historical aims, the Clause has been applied "infrequently," *League of Women Voters*, 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”).

*Second*, Petitioners cite *Pennsylvania Democratic Party* for the proposition that the right to vote is “fundamental” and, thus, that any “laws which affect [that] fundamental right” are subject to “strict scrutiny.” App. for Prelim. Inj. ¶¶ 12-13. 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 Petitioners cite, 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 App. for Prelim. Inj. ¶ 13).

*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 [shall] 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).

Adopting Petitioners’ proposed framework 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 (emphasis in original). 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, Petitioners would subject all of Pennsylvania’s election laws to searching judicial scrutiny. This Court should reject that dangerous and legally unfounded approach.

*Fourth*, Petitioners’ claimed support for their approach in Pennsylvania case-law is illusory. *See* Pet. ¶¶ 83, 88. The cases Petitioners cite are statutory construction cases, not constitutional cases, and stand only for the proposition that certain ambiguities in the Election Code have been construed in favor of voters. *See, e.g., Pa. Democratic Party*, 238 A.3d at 361 (explaining that both parties “offer[ed] a reasonable interpretation” of challenged provision); *Shambach v. Bickhart*, 845 A.2d 793, 796-99 (Pa. 2004) (identifying statutory ambiguity and “liberally constru[ing]” statute); *Petition of Cioppa*, 626 A.2d 146, 148-49 (Pa. 1993) (identifying rule of statutory construction but holding provision was unambiguous); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (holding as to “proper interpretation” of statute). They are therefore inapposite here: the Pennsylvania

Supreme Court has authoritatively construed the date requirement against Petitioners' position, *see Ball*, 289 A.3d at 20-23, as Petitioners acknowledge, *see, e.g.,* Pet. ¶¶ 86-91.

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

The Pennsylvania Supreme Court's rejection of Free and Equal Elections challenges to the date requirement, *see supra* Part II.A, and its precedent construing the Clause, *see supra* Part II.B, are each alone sufficient to warrant summary relief of judgment against Petitioners. If more were somehow needed, other States' "free and equal elections" jurisprudence and federal right-to-vote case-law refute Petitioners' challenge to the date requirement.

**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. *League of Women Voters*, 178 A.3d at 813 n.71. Yet Petitioners cite *zero* cases from any of those States in which a neutral ballot-casting rule like the date requirement was invalidated or enjoined 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, 17-18 (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”); *Graham v. Sec’y of State*, 684 S.W.3d 663, 684-85 (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 (Ga. 1901) (clause prohibits coercion and requires equal counting of votes).

After a diligent search, Republican Intervenors are aware of *zero* cases applying any other State’s “free and equal election” clause to invalidate an ordinary

ballot-casting rule like the date requirement. 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. 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 Right-To-Vote Precedent Also Refutes Petitioners' Challenge.**

Federal law also refutes Petitioners' request to recognize a constitutional right to require counting ballots that do not comply with neutral ballot-casting rules like the date requirement. That is true even if the Court adopts a judicial balancing approach at odds with the Pennsylvania Supreme Court's governing Free and Equal Elections Clause precedent.

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 (opinion of 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 clearly comports with the U.S. Constitution because Pennsylvania allows all voters to vote in person without complying with the date requirement. Pennsylvania thus stands in the same position as Indiana in *Crawford*, where the Court refused to consider alleged constitutional burdens on elderly voters’ ability to vote in person because “the elderly in Indiana are able to vote absentee.” 553 U.S. at 201 (opinion of Stevens, J.). Because Pennsylvania permits all eligible voters to vote in person, Petitioners here, like Indiana’s elderly voters in *Crawford*, are not “absolutely prohibited” from voting. *McDonald*, 394 U.S. at 809. Indeed, “[Pennsylvania] permits [all voters] to vote in person; that is the exact opposite of ‘absolutely prohibit[ing]’ them from doing so.” *Tex. Democratic Party*, 961 F.3d at 404. Petitioners’ right to vote under the federal Constitution is therefore unaffected by the date requirement. *See McDonald*, 394 U.S. at 807.

Moreover, even if Petitioners were correct that this Court could apply a 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 [the] 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). Moreover, the “usual burdens of voting” cannot violate any right to vote under federal law. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *accord Brnovich*, 594 U.S. at 669 (2021).

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 (opinion of 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 the constitutional 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.* Indeed, “[i]f state law provides that ballots completed in different color inks, or secrecy envelopes containing improper markings, or envelopes missing a date, must be discounted, that is a legislative choice that federal

courts might review if there is unequal application, but they have no power to review under” a theory that the right to vote has been denied. *Id.* 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 (including Intervenor the Democratic National Committee) 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); *Id.*, 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 does not 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 imposed by the date requirement is trivial compared to burdens the U.S. Supreme Court has held are minor under the *Anderson-Burdick* framework. Writing a date on a document is far less onerous than “the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering . . . required documents, and posing for a photograph” upheld as minimal and constitutional in *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.). It is also substantially less burdensome than “[h]aving to identify one’s own polling place and then travel there to vote,” which “does not exceed the usual burdens of voting.” *Brnovich*, 594 U.S. at 678 (internal quotation marks omitted).

Because the date 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), which is obviously “quite deferential,” *Mazo v. N.J. Sec’y of State*, 54 F.4th 124, 153 (3d Cir. 2022). Under that standard, the “State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory” election regulations. *Timmons*, 520 U.S. at 351-52.

The date requirement easily passes muster under that standard because it is supported by several legitimate state interests. As the Pennsylvania Supreme Court

has already held, 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 (opinion of Justice Wecht) (noting that “colorable arguments ... suggest [the date requirement’s] importance”).

To start, the date requirement “provides proof of when [an] ‘elector actually executed [a] ballot in full.’” *Id.* at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). Such information facilitates the “orderly administration” of elections and is undoubtedly a legitimate state interest. *Crawford*, 553 U.S. at 196 (opinion of Stevens, J.). To be sure, Pennsylvania election officials are required to timestamp a ballot upon receiving it, and they rely on that date when entering information into Pennsylvania’s Statewide Uniform Registry of Electors (“SURE”) system. *See Pa. State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at \*21 (W.D. Pa. Nov. 21, 2023), *rev’d*, *Pa. State Conf. of NAACP*, 97 F.4th 120. And there is every reason to think that *ordinarily* happens. *See id.* But the handwritten date serves as a useful backstop, and it would become quite important if a county failed to timestamp a ballot upon receiving it or if Pennsylvania’s SURE system malfunctioned—a possibility Judge Matey has highlighted. *See Migliori v. Cohen*, 36 F.4th 153, 165 (2022) (Matey, J., concurring in judgment), *vacated Ritter v.*

*Migliori*, 143 S. Ct. 297 (2022), and majority holding disavowed, *Pa. State Conf. of NAACP*, 97 F.4th at 128.

Further, the date requirement serves the State’s interest in solemnity—*i.e.*, in ensuring that voters “contemplate their choices” and “reach considered decisions about their government and laws.” *Minn. Voters All. v. Mansky*, 585 U.S. 1, 15 (2018). 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, 883-84 (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 v. Consol. Supermarkets*, 636 A.2d 156, 161 (Pa. 1994). Indeed, the Fifth Circuit recently upheld an original-signature requirement, in part, on the basis that an “original signature to a voter registration form carries ‘solemn weight.’” *Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023).

Moreover, the date requirement advances the State’s interests in “detering and detecting voter fraud” and “protecting the integrity and reliability of the electoral process.” *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.); *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1091 (opinion of Justice Dougherty, Chief

Justice Saylor, and Justice Mundy). Here, the date 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*, CP-36-CR-0003315-2022 (Lancaster Cnty. 2022). In fact, because current Pennsylvania Supreme Court precedent precludes county boards of elections from comparing the signature on the ballot envelope with one in the official record, *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* Exhibit C (charging document in *Mahaliak*). That evidence was used to secure a guilty plea from the fraudster, who was sentenced to probation and barred from voting for four years. *See Mihaliak*, CP-36-CR-0003315-2022.

The U.S. Supreme Court has made clear that 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 date requirement has actually been used to detect and prosecute fraud, the State's interest in "detering and detecting voter fraud" is unquestionably advanced. *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.). And the date requirement's fraud deterrence and detection 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 v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.”).

Petitioners point to the Third Circuit’s statement that the “date requirement . . . serves little apparent purpose,” *Pa. State Conf. of NAACP*, 97 F.4th at 125; Pet. ¶ 67, but that statement is of no moment here. It is merely passing dictum, as it was irrelevant to the Third Circuit’s holding. *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 the Third Circuit did not give “full and careful consideration” to this point. *Id.* After all, it 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). It also did not address the State’s interest in solemnity. *See Pa. State Conf. of NAACP*, 97 F.4th at 125. And it did not address the State’s interest in deterring and detecting fraud or even mention the *Mihaliak* case. *See id.* That the date requirement may not be used for the “purpose” of “confirm[ing] timely receipt of the ballot or . . . determin[ing] when the voter completed it” in the mine-run of cases, *id.*, in no way undermines that the date



requirement advances important state interests that this Court must defer to and uphold under any (unwarranted) balancing analysis.

In sum, federal law refutes, rather than supports, Plaintiffs' request to extend Pennsylvania's Free and Equal Elections Clause to invalidate ordinary ballot-casting rules like the date requirement.

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

Invalidating the date requirement under the Pennsylvania Constitution 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 set the rules for Presidential elections and to prescribe the "Manner" by which the Commonwealth "appoints [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

These two constitutional provisions "expressly vest[] power to carry out [their] provisions in 'the Legislature' of each State, a deliberate choice [courts] 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 39 (Kavanaugh, J., concurring). State courts cannot

“impermissibly distort[.]” state law “beyond what a fair reading required.” *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 General Assembly’s date requirement is mandatory. *Ball*, 289 A.3d at 20-23. It has also declined two invitations to wield the Free and Equal Elections Clause to invalidate the date requirement or declare it non-mandatory. *See supra* Part II.A. 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 the date requirement. *See supra* Parts II.A-C. Doing so anyway would “transgress the ordinary bounds of judicial review such that [the court would be] arrogat[ing] to [itself] the power vested in [the] state legislature[.] to regulate federal elections.” *Moore*, 600 U.S. at 36. That action therefore would violate the U.S. Constitution and only lead to potential review by the U.S. Supreme Court.

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

Finally, if this Court *were* to accept Petitioners’ argument that the date requirements of 25 P.S. §§ 3145.6(a) and 3150.16(a) are unconstitutional, it would

necessarily mean striking universal mail voting in Pennsylvania.

Act 77 states that: “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 creation of universal mail voting established in section 8, which means that invalidation of the date requirement would have the effect of invalidating the entirety of the Act.

This point was specifically addressed by Justice Brobson, who noted that the question remains open. *See McLinko*, 279 A.3d at 609-610 (Brobson, J., dissenting). Judge Wojcik also addressed this issue in his partial dissent in *McClinko v. Dep’t of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., dissenting in part) (“Section 11 of Act 77 contains a ‘poison pill’ that would invalidate all of Act 77’s provisions if this Court determines that any of its provisions are invalid... [t]hus, if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77’s provisions are void.”).

Such a result would be a necessary outcome, given that “[a]s a general matter, nonseverability provisions are constitutionally proper.” *Id.* at 1278 (quoting *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006)). That is especially true where non-severability provisions legitimately arise from “the concerns and compromises which animate the legislative process.” *Stilp*, 905 A.2d at 978. Here, there is

considerable evidence that the non-severability provision in Act 77 was an important reason the bill was passed. Both the Democratic sponsor of Act 77 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. Thank you.

My second question has to do with the severability clause. It is my understanding that the bill says that the Supreme Court will have exclusive jurisdiction over challenges to elimination of straight-party voting, absentee voting, and mail-in voting. 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, and there is also a provision that the desire is, and of course, that could be probably gotten around legally, but that suits be brought within 180 days so that we can settle everything before this would take effect. So those are the provisions that have to do with nonseverability.

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).

It is thus clear that Act 77’s non-severability provision arises from “the concerns and compromises which animate the legislative process.” *Stilp*, 905 A.2d at 978. Thus, if the Court grants the relief requested by Petitioners and holds that application of the date requirement is unconstitutional, then by its own terms, Act 77 in its entirety—and the system of “no excuse” mail-in voting currently available to all Pennsylvania voters—must be stricken as well.

### **CONCLUSION**

The Court should grant summary relief, dismiss the Petition, and enter judgment against Petitioners.

Dated: June 24, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher  
PA I.D. #37950  
THE GALLAGHER FIRM, LLC  
436 Seventh Avenue, 31st Floor  
Pittsburgh, PA 15219  
Phone: (412) 308-5512  
kag@gallagherlawllc.com

John M. Gore (*pro hac vice*)  
E. Stewart Crosland  
Louis J. Capozzi III  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001  
Phone: (202) 879-3939  
jmgore@jonesday.com  
scrosland@jonesday.com  
lcapozzi@jonesday.com

Thomas W. King, III  
Thomas E. Breth  
DILLON, McCANDLESS, KING,  
COULTER & GRAHAM, LLP  
128 W. Cunningham St.  
Butler, PA 16001  
Phone: (724) 283.2200  
tking@dmkcg.com  
tbreth@dmkcg.com

*Counsel for Republican Intervenors*

# **EXHIBIT A**

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

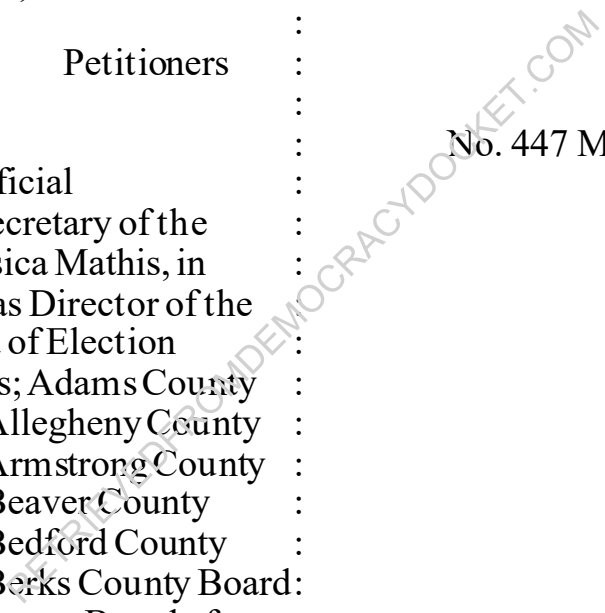
Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional Committee; Republican :  
Party of Pennsylvania; David Ball; :  
James D. Bee; Debra A. Biro; Jesse D. :  
Daniel; Gwendolyn Mae Deluca; Ross :  
M. Farber; Connor R. Gallagher; Lynn :  
Marie Kalcevic; Linda S. Kozlovich; :  
William P. Kozlovich; Vallerie :  
Siciliano-Biancaniello; S. Michael :  
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022





Elections; Cumberland County Board :  
of Elections; Dauphin County Board of :  
Elections; Delaware County Board of :  
Elections; Elk County Board of :  
Elections; Erie County Board of :  
Elections; Fayette County Board of :  
Elections; Forest County Board of :  
Elections; Franklin County Board of :  
Elections; Fulton County Board of :  
Elections; Greene County Board of :  
Elections; Huntingdon County Board :  
of Elections; Indiana County Board of :  
Elections; Jefferson County Board of :  
Elections; Juniata County Board of :  
Elections; Lackawanna County Board :  
of Elections; Lancaster County Board :  
of Elections; Lawrence County Board :  
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of Elections; Lehigh County Board of :  
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of Elections; Northumberland County :  
Board of Elections; Perry County :  
Board of Elections; Philadelphia County:  
Board of Elections; Pike County Board :  
of Elections; Potter County Board of :  
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Elections; Sullivan County Board of :  
Elections; Susquehanna County Board :  
of Elections; Tioga County Board of :  
Elections; Union County Board of :  
Elections; Venango County Board of :  
Elections; Warren County Board of :  
Elections; Wayne County Board of :

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Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE CEISLER

FILED: March 23, 2023

In this original jurisdiction action, the Republican National Committee (RNC), and the Republican Party of Pennsylvania (RPP) (collectively, Republican Committee Petitioners),<sup>1</sup> and David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib (collectively, Voter Petitioners)<sup>2</sup> (all collectively referred to as Petitioners), filed a petition for review directed to this Court’s original jurisdiction seeking declaratory and injunctive relief (petition for review or petition) on September 1, 2022, and later a First Amended Petition for Review Directed to

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<sup>1</sup> The National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC) voluntarily terminated their claims against all Respondents via praecipe on January 30, 2023. As such, the term “Petitioners” used throughout this opinion does not include either the NRSC or the NRCC, except where indicated.

<sup>2</sup> Voter Petitioners are 12 registered voters who reside in Washington County, Cambria County, Northampton County, Indiana County, Beaver County, Westmoreland County, Allegheny County, Fayette County, Delaware County, and Butler County, who regularly vote in both primary and general elections. (First Amended Petition for Review (Amended Pet.) ¶¶ 33-44.) They repeat that they intend to vote for candidates in all races, including for federal and statewide offices, that will be on the ballot in the 2022 General Election, notwithstanding that election has since passed. (Amended Pet. ¶ 45.)

Court’s Original Jurisdiction Seeking Declaratory and Injunctive Relief (Amended Petition), on February 17, 2023,<sup>3</sup> against Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth (Acting Secretary),<sup>4</sup> and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries (collectively, Commonwealth Respondents); and the Commonwealth’s 67 County Boards of Elections (County Boards).<sup>5</sup> In the Amended Petition, Petitioners again challenge the various County Boards’ actions in developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code’s (Election Code)<sup>6</sup> signature and ballot secrecy requirements. Specifically, Petitioners allege that the County Boards’ “practice of conducting these pre-canvass activities” before Election Day “under the guise of [notice and opportunity to cure] procedures” is in direct contravention of multiple provisions of the Election Code; the Pennsylvania Supreme Court’s holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); article I, section 5 and article VII, section 6 of the Pennsylvania

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<sup>3</sup> On this date, the Court, *inter alia*, granted Petitioners’ unopposed Application for Leave to File Amended Petition for Review, and struck as moot the preliminary objections filed to the original petition for review.

<sup>4</sup> By Order dated February 16, 2023, this Court substituted Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, as a party respondent for Leigh M. Chapman, in her official capacity as former Acting Secretary of the Commonwealth pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c).

<sup>5</sup> Notwithstanding its apparent omission from the caption, as noted in this Court’s September 29, 2022 Memorandum Opinion in this case, the Court considers the Washington County Board of Elections to be a Respondent in this case. *See Republican Nat’l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 3 n.2, *aff’d by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022).

<sup>6</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Constitution, Pa. Const. art. I, § 5 (free and equal elections clause)<sup>7</sup> & art. VII, § 6 (relating to uniformity with respect to laws regulating elections);<sup>8</sup> and Article I, Section 4, Clause 1 of the United States Constitution, U.S. Const. art. I, § 4, cl. 1 (Elections Clause).<sup>9</sup> (First Amended Petition for Review (Amended Pet.) ¶¶ 2-14, 17-19.) They seek declarations in these regards under the Declaratory Judgments Act (DJA),<sup>10</sup> as well as statewide, permanent injunctive relief enjoining the 67 County Boards from implementing such procedures and prohibiting the Acting Secretary from issuing any guidance as to such procedures in violation of the Election Code.

Presently before the Court are the Preliminary Objections (POs) of: (1) Commonwealth Respondents; (2) Bucks County Board of Elections; (3) Bedford, Carbon, Centre, Columbia, Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York County Boards of Elections; (4) Chester County Board of Elections; (5) Delaware County Board of Elections; (6) Montgomery County Board of Elections; (7) Philadelphia County Board of Elections; (8) the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP); and (9) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and

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<sup>7</sup> The free and equal elections clause provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

<sup>8</sup> It provides: “All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State,” with certain exceptions not applicable to this case. Pa. Const. art. VII, § 6.

<sup>9</sup> The Elections Clause provides: “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, except as to the Places of ch[oo]sing Senators.” U.S. Const. art. I, § 4, cl. 1.

<sup>10</sup> 42 Pa.C.S. §§ 7531-7541.

DCCC)<sup>11</sup> (all collectively referred to as Respondents, unless otherwise indicated). Respondents ask the Court to dismiss Petitioners' Amended Petition based on (1) lack of subject matter jurisdiction; (2) lack of standing (3) laches; and (4) legal insufficiency and/or failure to state a claim as to all counts.

For the reasons that follow, the Court sustains the POs asserting lack of subject matter jurisdiction and dismisses as moot the remaining POs.

### **Background & Procedural History**

By way of brief background, Petitioners initially alleged in the petition for review that several County Boards took it upon themselves to develop and implement notice and opportunity to cure procedures with respect to absentee and mail-in ballots that failed to comply with the Election Code's signature and ballot secrecy requirements, for the November 8, 2022 General Election and beyond, in direct contravention of the Election Code and the Supreme Court's holding in *Pennsylvania Democratic Party*; and that the County Boards' cure procedures usurped the General Assembly's exclusive legislative authority to adopt cure procedures and constituted a violation of the authority granted to the General Assembly to regulate the manner of federal elections under the Elections Clause. They requested declarations in those regards, as well as a declaration that the County Boards may not adopt **cure** procedures other than as the General Assembly expressly provided in the Election Code<sup>12</sup> and, further, statewide injunctive relief prohibiting

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<sup>11</sup> The Court permitted the intervention of the DNC and the PDP, and the DSCC and the DCCC on September 22, 2022.

<sup>12</sup> See Section 1308(h) of the Election Code, added by the Act of March 6, 1951, P.L. 3, which provides:

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

the 67 County Boards from developing or implementing **cure** procedures and directing the Acting Secretary to take no action inconsistent with such injunction order.<sup>13</sup>

Petitioners then filed the Amended Petition upon leave of this Court on February 17, 2023. Also on that date, this Court set an expedited briefing schedule, and further directed the parties to file and serve separate briefs addressing the Supreme Court's recent decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), and the effect of that decision, if any, on the instant matter. The Court also indicated, among other things, that following the filing of the above briefs, the Court would determine whether this matter would be argued or decided on the papers.

The Parties have complied with this Court's February 17, 2023 Order and filed pleadings and/or POs and comprehensive supporting briefs, as well as briefs addressing *Ball*.<sup>14</sup> As noted above, Respondents filed nine sets of POs, and eight

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(1) Deleted by [the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), effective immediately] . . . .

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

25 P.S. § 3146.8(h).

<sup>13</sup> In a single-Judge Memorandum Opinion and Order issued on September 29, 2022, this Court denied Petitioners' separate request for preliminary injunctive relief because Petitioners failed to meet their heavy burden of proving entitlement to such sweeping relief. On appeal, the Supreme Court affirmed this Court's decision on the basis that the Justices were evenly divided on the question before them. *See RNC I, aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022).

<sup>14</sup> The following Parties filed briefs addressing the Supreme Court's decision in *Ball*: Berks County; DNC and PDP; Montgomery County; Bedford, Carbon, Centre, Columbia,

Answers, some with New Matter,<sup>15</sup> to the Amended Petition. Petitioners filed responses generally opposing the POs, and an omnibus brief addressing all of the POs. In light of the Parties' comprehensive filings, and the proximity of the May 16, 2023 Municipal Primary Election and the County Boards' distribution of absentee and mail-in ballots to voters, the Court determined that argument was not necessary and, by Order dated March 16, 2023, directed that the POs and responses opposing them would be decided on the papers already filed, without oral argument, unless otherwise ordered.

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Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York Counties (collectively, Bedford County, et al.); Lehigh County; Chester County; Commonwealth Respondents; Philadelphia County; Bucks County; Petitioners; Delaware County; Allegheny County; Luzerne County; Potter County; and DSCC and DCCC.

Lehigh, Bucks, and Delaware Counties join in Montgomery County's brief. Chester County joins in Commonwealth Respondents' and Philadelphia County's briefs. Allegheny County joins in all Respondents' briefs to the extent they address, among other things, lack of standing.

Berks and Potter Counties take no position on *Ball*'s applicability to this case, and Bedford County, et al., Luzerne County, and DNC and PDP opine that *Ball* is not relevant to this case. DNC and PDP additionally opine that *Ball* reaffirms the broad authority of County Boards in administering elections. Aside from Petitioners, the other Respondents observe that *Ball* is applicable here with respect to, *inter alia*, standing and the broad authority of County Boards.

<sup>15</sup> Adams, Allegheny (with New Matter), Berks, Lehigh, Luzerne, Northampton (with New Matter), and Potter Counties filed Answers to the Amended Petition, generally denying the averments of the Amended Petition. In addition to filing an Answer, Luzerne County filed a Statement in Lieu of Brief in Support of Answer. Blair County filed a no answer letter, indicating therein that it will not be filing an answer in this case.

In its New Matter, Allegheny County contends that Petitioners claims are barred by laches and res judicata, that this Court lacks subject matter jurisdiction, and that Petitioners failed to state a claim upon which relief can be granted and lack standing. (Allegheny Ans. & New Matter ¶¶ 1-5.) Northampton County asserts in its New Matter that Petitioners' claims are barred by laches and the applicable statute of limitations, and that Petitioners have failed to state a claim upon which relief may be granted and failed to exhaust other remedies available to them. (Northampton Ans. & New Matter ¶¶ 163-66.)

## Amended Petition

In their Amended Petition, Petitioners repeat the same background information regarding Voter Petitioners and Republican Committee Petitioners, respectively, and the factual circumstances of the case described in this Court's September 29, 2022 Memorandum Opinion, which the Court will not repeat here in its entirety for the sake of brevity. (*See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 11-17, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022); *compare* original petition for review ¶¶ 2-12, 13-39, 40-64, 65-80, 82-85, 86-92 (count I), 93-96 (count II), 97-103 (count III), *with* Amended Pet. ¶¶ 2-23, 27, 28-52, 53-77, 93-104, 111-14, 117-20, 127-33 (Count I), 152-55 (Count III), 156-62 (Count IV).)

The Court observes, however, that in the Amended Petition, Petitioners add to their argument from their original petition that the County Boards are prohibited from developing and implementing **notice and cure** procedures<sup>16</sup> not expressly created by the General Assembly, now asserting and seeking a declaration under the DJA that the Boards' implementation of such procedures directly violates the Election Code's various pre-canvassing and provisional ballot provisions; that the furnishing of voters' personally identifying information to political party representatives, candidates, and/or special interest groups violates voters' constitutional right to informational privacy under article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, § 1,<sup>17</sup> and *Pennsylvania State Education*

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<sup>16</sup> In their Amended Petition, Petitioners now highlight "**notice and cure** procedures," as opposed to just "**cure** procedures" mentioned in the original petition for review.

<sup>17</sup> It provides: "All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own



*Association v. Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016); and that the Acting Secretary has issued guidance directing the County Boards to engage in pre-canvass activities under the guise of making “administrative determinations” and statements encouraging the Boards to contact voters whose defective ballots have been cancelled due to errors on the ballots’ outer envelopes so they may have the opportunity to have their votes count. (See Amended Pet. ¶¶ 29, 79-92, & 134-35 (Count I).)

As to the pre-canvass and provisional ballot provisions specifically, Petitioners newly argue that notice and cure procedures are “inconsistent with law” under Section 302(f) of the Election Code, 25 P.S. § 2642(f),<sup>18</sup> and directly violate the Election Code, because “[t]he Election Code tightly constrains what Boards may do with absentee and mail-in ballots once they receive them.” (Amended. Pet. ¶¶ 76, 78.) In this regard, they first assert that absentee and mail-in ballots must be kept in sealed or locked containers until Election Day under Section 1308(a) of the Election Code, 25 P.S. § 3146.8(a),<sup>19</sup> and that County Boards are thus prohibited

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happiness.” Pa. Const. art. I, § 1. Petitioners do not develop this argument in the Amended Petition.

<sup>18</sup> Section 302(f) provides that County Boards have authority “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f).

<sup>19</sup> Section 1308(a) provides:

(a) The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a).

from doing anything else with the ballots until Election Day. (*Id.* ¶¶ 79-80.) Second, they claim that notice and cure procedures are effectively an “inspection . . . of” absentee and mail-in ballots under the definition of “pre-canvass” in Section 102(q.1) of the Election Code, 25 P.S. § 2602(q.1);<sup>20</sup> however, they highlight that County Boards cannot begin the pre-canvass of those ballots until 7:00 a.m. on Election Day under Section 1308(g)(1.1) of the Election Code, 25 P.S. § 3146.8(g)(1.1).<sup>21</sup> (*Id.* ¶¶ 81-82.) Third, they argue that the County Boards’ email

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<sup>20</sup> Section 102(q.1) provides:

(q.1) The word “pre-canvass” shall mean **the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots**, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.1) (emphasis added).

<sup>21</sup> Section 1308(g)(1.1) provides:

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

25 P.S. § 3146.8(g)(1.1).

and/or internet notification to voters via the SURE System and others regarding signature, date, or secrecy envelope defects in absentee or mail-in ballots following their “inspection” is “inconsistent with law” because Section 1308(g)(1.1)’s prohibition on nondisclosure of the results of the pre-canvass until the polls close on Election Day necessarily includes a prohibition on the disclosure of a Board’s determination that a ballot will not count due to such a defect. (*Id.* ¶¶ 83-85.) Last, Petitioners acknowledge that those voters who requested absentee and mail-in ballots but did not cast them may vote provisionally. (*Id.* ¶ 90 n.2 (citing Sections 1306(b)(2)-(3) and 1306-D(b)(2)-(3) of the Election Code, 25 P.S. §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3)).)<sup>22</sup> They argue, however, that the County Boards cannot encourage voters who improperly cast their absentee or mail-in ballot to cast a second vote via provisional ballot, claiming this “cure” essentially requires voters to make knowingly false statements subject to the penalty of perjury on their provisional ballots. (Amended Pet. ¶¶ 87-92 (citing Sections 1306(b)(1), 1306-D(b)(1), and 1210(a.4)(2) of the Election Code, 25 P.S. §§ 3146.6(b)(1) (providing that an elector who receives and votes an absentee ballot “shall not be eligible to vote at a polling place on election day”), 3150.16(b)(1) (same with respect to mail-in ballots), 3050(a.4)(2) (requiring an elector to sign affidavit prior to voting a provisional ballot)).)

Petitioners also add a new Count II to the Amended Petition, in which they request a declaration that the disparate approaches taken by the County Boards with respect to notice and cure procedures violate the free and equal elections clause (Pa. Const. art. I, § 5), the clause requiring uniformity in the laws regulating the holding

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<sup>22</sup> Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3. Section 1306-D was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

of elections in the Commonwealth (Pa. Const. art. VII, § 6), and Section 302(g) of the Election Code, 25 P.S. § 2642(g).<sup>23</sup> (See Amended Pet. ¶¶ 136-51 (Count II).)

Petitioners seek declarations from this Court under the DJA that the County Boards' development and implementation of notice and cure procedures violates Pennsylvania law and is prohibited, (Amended Pet. ¶¶ 127-35 & Wherefore Clause, pp. 34-35 (Count I) & ¶¶ 136-51 & Wherefore Clause, p. 38 (Count II)); and that the adoption of such procedures not expressly authorized by the General Assembly for federal elections violates the Elections Clause of the United States Constitution (Amended Pet. ¶¶ 152-55 & Wherefore Clause, p. 39 (Count III)). They further seek a statewide, permanent injunction prohibiting the County Boards from developing or implementing notice and cure procedures. (Amended Pet. ¶¶ 156-62 & Wherefore Clause, p. 41 (Count IV).) In addition to the relief sought in Counts I, II, and IV, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Notably, Petitioners further allege that this Court has original jurisdiction over the Amended Petition under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), "because this matter is asserted against Commonwealth officials in their official capacities." (Amended Pet. ¶ 28.)

As mentioned above, Commonwealth Respondents and some County Boards have filed the following POs, asserting that the Amended Petition should be

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<sup>23</sup> Section 302(g) provides that County Boards have authority "[t]o instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

dismissed based on this Court's lack of subject matter jurisdiction, Petitioners' lack of standing, the doctrine of laches, and the legal insufficiency of the Amended Petition and/or Petitioners' failure to state a claim as to some or all counts of the Amended Petition.<sup>24</sup>

### **Standard of Review**

In ruling on preliminary objections, the Court accepts as true all well-pleaded material allegations in the petition for review and any reasonable inferences that may be drawn from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). This Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* The Court may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and the Court must resolve any doubt in favor of the petitioner. *Id.* “[The Court] review[s] preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted.” *Armstrong Cnty. Mem’l Hosp. v. Dep’t of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

Because it is jurisdictional, the Court will first address the POs asserting the Court lacks subject matter jurisdiction, followed by the other POs, if necessary.

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<sup>24</sup> Specifically, Delaware County, Commonwealth Respondents, Chester County, and Philadelphia County demur to the Amended Petition based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim as to all or various counts of the Amended Petition.

Bucks County and DSCC and DCCC demur to the Amended Petition based on lack of standing and failure to state a claim. Bucks County additionally asserts, along with Montgomery County, that laches bars the relief sought in the Amended Petition.

Bedford County, et al. and DNC and PDP demur to the Amended Petition solely based on failure to state a claim.

### **Subject Matter Jurisdiction**

Commonwealth Respondents (PO 1) and some County Boards<sup>25</sup> first argue that this Court lacks subject matter jurisdiction<sup>26</sup> under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), because neither of the Commonwealth Respondents is an indispensable party to this matter; the County Boards are neither Commonwealth agencies nor part of the Commonwealth government, and, as such, the County Boards must be sued in their respective local court of common pleas; and the Acting Secretary has only limited powers over the County Boards relating to elections. (Cmwlth. Resp'ts' POs ¶¶ 33-55 (citing *In re Voter Referendum Pet. Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009)), Cmwlth. Resp'ts' Br. at 14-23; Delaware POs ¶¶ 10-37, Delaware Br. at 3-7 (citing *Finan v. Pike Cnty. Conserv. Dist.*, 209 A.3d 1108, 111 (Pa. Cmwlth. 2019), and *Blount v. Phila. Parking Auth.*, 965 A2d 226, 231-32 (Pa. 2009)); Chester POs ¶¶ 37-54, Chester Br. at 12-14; Phila. POs ¶¶ 47-72 (citing *Blount*), Phila. Br. at 15-20.) Commonwealth Respondents further assert that Petitioners do not challenge any Department of State (Department) requirement or statewide practice, and they have not alleged what, if any, type of action the Acting Secretary might take here if Petitioners' requested relief is granted. (Cmwlth. Resp'ts' POs ¶¶ 39-40, 43-46 (citing ¶ 116 of the Amended Petition); Chester POs ¶ 53; Chester Br. at 16 (noting the Amended Petition fails to seek any meaningful relief from either Commonwealth Respondent).) Chester County additionally highlights an inconsistency in paragraphs 68 and 103 of Petitioners' Amended Petition, noting that paragraph 103 asserts injunctive relief is necessary to stop Commonwealth Respondents from "encouraging" implementation of notice

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<sup>25</sup> These include: Delaware County (PO 1), Chester County (PO 2), and Philadelphia County (PO 1).

<sup>26</sup> See Pa.R.Civ.P. 1028(a)(1).

and cure procedures, but that paragraph 68 cites guidance showing Commonwealth Respondents oppose implementation of notice and cure procedures. (Chester POs ¶¶ 48-51; Chester Br. at 15-16.)

Petitioners respond that this Court has subject matter jurisdiction because the Acting Secretary is an indispensable party, and the County Boards are part of the Commonwealth government. (Pet’rs’ Omnibus Br. at 16-17.) As support for their assertion the Acting Secretary is an indispensable party, Petitioners point to the Acting Secretary’s November 3, 2022 guidance, issued in response to the Supreme Court’s November 1, 2022 order in *Ball*,<sup>27</sup> regarding the mechanics of absentee and mail-in voting and the County Boards’ inspection of ballots and whether a right to cure exists, as well as the former Acting Secretary’s recent litigation against three County Boards in *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022), regarding whether Boards may exercise discretion to count absentee and mail-in ballots without dates or with incorrect dates. (Pet’rs’ Omnibus Br. at 17.) Petitioners claim that the Acting Secretary’s guidance “is precisely the type of inspection included within the definition of ‘pre-canvass’ under the Election Code, which cannot begin until 7:00 a.m. on Election Day”; thus, according to Petitioners, the Acting Secretary is instructing the County Boards to directly violate the Election Code. (*Id.* at 17-18.)<sup>28</sup> Petitioners therefore claim that

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<sup>27</sup> According to Petitioners, the Acting Secretary issued guidance on this date, directing County Boards to examine all absentee and mail-in ballots to determine if the return envelopes are signed and dated. (Pet’rs’ Omnibus Br. ¶ 17 (citing 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, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf> (last visited Mar. 22, 2023).)

<sup>28</sup> Further, and notwithstanding that the 2022 General Election has already occurred, Petitioners again point to the Acting Secretary’s guidance issued days before that election, in which former Acting Secretary Chapman “encouraged” County Boards to contact voters whose ballots

this case challenges actions taken by the Acting Secretary, thus making him an indispensable party. (*Id.* at 18.) Petitioners do not address in their Amended Petition or subsequent briefs whether Director Mathis is an indispensable party.

As for the County Boards, Petitioners assert they are not “local authorities” excluded from the definition of “Commonwealth government,” as they are not created by political subdivisions. (Pet’rs’ Omnibus Br. at 19.) Rather, the County Boards are formed by statute, i.e., Section 301(a) of the Election Code, 25 P.S. § 2641(a) (relating to county boards of elections and membership), and, thus, they constitute a component part of the “Commonwealth government” as that term is defined under 42 Pa.C.S. § 761. (*Id.* at 18-19 (pointing to definition of “Commonwealth government” and specifically “boards” in the definition in 42 Pa.C.S. § 102, and citing *In re Nom. Pets. of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021),<sup>29</sup> and *Cnty. of Fulton v. Sec. of the Cmwlth.*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021) (stating that both the Secretary and County Boards “are government agencies created by the General Assembly”)).<sup>30</sup>

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were cancelled due to defects so that those voters could have the opportunity to have their vote count. (Pet’rs’ Omnibus Br. at 18 (citing an inactive link to the Department’s website).)

<sup>29</sup> Petitioners’ reliance on *In re Nomination Petitions of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021), for the proposition that the 67 County Boards are part of the Commonwealth government for jurisdictional purposes is misplaced, as the case was properly brought in this Court’s **appellate** jurisdiction and involved review of a trial court’s order denying the objectors’ petitions to set aside the nomination petitions of a candidate for office who failed to properly file her statement of financial interests (SOFI) with the “governing authority” of a specific county. This Court held that the candidate’s filing of her SOFI with the county elections office satisfied the requirements of the applicable statute and regulations because the county’s commissioners were the “governing authority” of that county and the county’s board of elections under the Election Code. *In re Griffis*, 259 A.3d at 548.

<sup>30</sup> Petitioners’ reliance on *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021), is also misplaced, as it dealt with responsibilities of the Secretary and the County Boards in relation to election equipment. In that case, this Court noted that it was not clear whether the Secretary or the County Boards had the responsibility of preventing tampering with election equipment, but that “[b]oth are government agencies created by the



In considering this PO, the Court “begin[s] with the undisputed basic principle that this Court, as any other court, must have subject matter jurisdiction over a controversy because, without it, any judgment rendered would be void.” *Stedman v. Lancaster Cnty. Bd. of Comm’rs*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019) (quoting *Patterson v. Shelton*, 175 A.3d 442, 449 (Pa. Cmwlth. 2017)). “Thus, ‘whenever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances.’” *Id.* (quoting *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cwmlth. 1992)). Our Supreme Court previously set forth the well settled scope and standard of review regarding questions of subject matter jurisdiction as follows:

Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth. The test for whether a court has subject matter jurisdiction inquires into the competency of the court to determine controversies of the general class to which the case presented for consideration belongs. Thus, as a pure question of law, the standard of review in determining whether a court has subject matter jurisdiction is *de novo* and the scope of review is plenary. Whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*.

*Office of Att’y Gen. ex rel. Corbett v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009).

Relevant here, Section 761(a)(1) of the Judicial Code states that “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . (1) Against the Commonwealth government, including any officer

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General Assembly with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania” and that “[b]oth agencies are presumed to act lawfully and reasonably in the exercise of their statutory duties.” *County of Fulton*, 276 A.3d at 861. The case is otherwise irrelevant for purposes of the instant matter, except as indicated below.

thereof, acting in his official capacity . . . .” 42 Pa.C.S. § 761(a)(1). Section 102 of the Judicial Code defines the term “Commonwealth government” as follows:

**“Commonwealth government.”** The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, **but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.**

42 Pa.C.S. § 102 (emphasis added). Although the Acting Secretary and Director Mathis are each an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Stedman*, 221 A.2d at 756 (quoting *Pa. Sch. Bds. Ass’n, Inc. v. Cmwlth. Ass’n of Sch. Admins.*, 696 A.2d 859, 867 (Pa. Cmwlth. 1997), and stating that “[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper”).

Rather, “for this Court to have original jurisdiction over a suit against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Stedman*, 221 A.3d at 757 (citations omitted). “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Stedman*, 221 A.3d at 757 (quoting *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlth. 2018)).<sup>31</sup> ““Thus, the main inquiry for determining whether a party is indispensable

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<sup>31</sup> Section 7540(a) of the DJA further explains the concept of an indispensable party by providing that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

involves whether justice can be accomplished in the absence of the party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 279). In conducting this inquiry,<sup>32</sup> “the nature of the particular claim and the type of relief sought should be considered.” *Rachel Carson Trails*, 201 A.3d at 279. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Ballroom, LLC v. Cmwlt.*, 984 A.2d 582, 588 (Pa. Cmwlt. 2009). Importantly, “where a petitioner ‘seeks absolutely no relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 280).

With these principles in mind, the Court will evaluate the alleged indispensability of the Acting Secretary and Director Mathis.

In this case, Petitioners named the Acting Secretary and Director Mathis, in their official capacities, as Respondents, apparently due to their responsibilities under the Election Code. Petitioners identify the Acting Secretary’s responsibilities as including receiving the returns of primaries and elections from the County Boards, the canvassing and computing of the votes cast for candidates, proclaiming the results of such primaries and elections, and issuing certificates of election to the successful candidates at such elections. (Amended. Pet. ¶ 50 (citing Sections 201(f) and 1409 of the Election Code, 25 P.S. §§ 2621(f), 3159).) However, the only

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<sup>32</sup> This analysis requires an examination of the following four factors: (1) “[d]o absent parties have a right or interest related to the claim?”; (2) “[i]f so, what is the nature of that right or interest?”; (3) “[i]s that right or interest essential to the merits of the issue?”; and (4) “[c]an justice be afforded without violating the due process rights of absent parties?” *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlt. 2018).

material allegations made against former Acting Secretary Chapman in the Amended Petition relate to the following:

- her position in the *Pennsylvania Democratic Party* litigation from 2020, (Amended Pet. ¶ 58);
- her recent guidance that voters will not have the opportunity to correct their ballots before the election if there is a problem, (Amended Pet. ¶ 68 (quoting the Acting Secretary’s guidance that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election[,]” and citing <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)));
- confusingly, her purported failure to take action to stop the County Boards’ unauthorized notice and cure procedures following her involvement as a party in an unrelated federal case, (Amended Pet. ¶¶ 103-04);
- the notion that in Counties that have not implemented cure procedures, the SURE system, maintained by the Acting Secretary, provides notice via email to voters that their ballots may not be counted, (Amended Pet. ¶ 116);
- the Acting Secretary’s November 3, 2022 guidance, issued in response to *Ball*, directing County Boards to examine all mail-in ballots received to determine if the return envelopes are signed and dated, which according to Petitioners directs the Boards to violate the Election Code, (Amended Pet. ¶¶ 121-24); and
- former Acting Secretary Chapman’s guidance issued prior to *Ball* in apparent response to the *Berks County* case, but before the November 2022 General Election, encouraging Boards to contact voters whose ballots have been cancelled due to defects on the outer envelopes so they can have their votes

count, which constitutes an endorsement of notice and cure, according to Petitioners, (Amended Pet. ¶¶ 125-26).

Based on these averments, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (*See* Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Here, Petitioners have not made any claims implicating the duties and responsibilities of the Acting Secretary under the Election Code identified in the Amended Petition, which duties and responsibilities the Court notes are limited,<sup>33</sup> but rather, Petitioners merely take issue with the various guidance the Acting Secretary has issued over the past three years in response to the developing case law in this area, which does not implicate what is truly at the heart of this case: ***some of the County Boards' development and implementation of notice and opportunity to cure procedures.*** Although the Acting Secretary may have a generalized interest in issues surrounding the administration of elections in the Commonwealth and the enfranchisement of voters, generally, the Acting Secretary's interests in this regard are not essential to a determination of whether some County Boards are unlawfully implementing notice and cure procedures with respect to absentee and mail-in ballots that are defective under the Election Code. Further, the Acting Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards, as will be discussed *infra*. Compare 25 P.S. § 2642 (outlining County Boards' extensive powers and duties over administration and conduct of elections), with 25 P.S. §§

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<sup>33</sup> See 25 P.S. §§ 2621, 3159.

2621 (outlining limited powers and duties of Secretary), 3159 (providing for Secretary’s duties to tabulate, compute, and canvass returns). That the Acting Secretary *may, in the future*, issue guidance or statements on this issue is too “tangential” and “minimal” of an involvement, and speculative even,<sup>34</sup> to make him an indispensable party to this matter. Because Petitioners could conceivably obtain meaningful relief with respect to the County Boards’ purportedly unlawful actions without the Acting Secretary’s involvement in this case, the Acting Secretary is not an indispensable party.

As for Director Mathis, Petitioners observe she is responsible for overseeing the Election Services and Voter Registration divisions of the Department, as well as the Bureau of Election Services and Notaries, which is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. (Amended Pet. ¶ 51 (citing <https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx> (last visited Mar. 22, 2023)).) Other than this statement of her duties, Petitioners do not make any claims or request any relief as to Director Mathis in the Amended Petition. Because no relief is sought against Director Mathis, she is not indispensable to this matter. *See Stedman*, 221 A.3d at 758.

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<sup>34</sup> Petitioners have also not identified any authority whatsoever that would **require** an order from this Court **at this juncture** prohibiting the Acting Secretary from issuing any guidance or statements on this issue later. The Court cannot predict whether the Acting Secretary will again issue guidance or any statements regarding notice and cure procedures, and notes that the former Acting Secretary has most recently issued guidance in response to the Supreme Court’s recent decision in *Ball* essentially **opposing** the implementation of any notice and cure procedures, which does not help Petitioners’ case. (*See* <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)).) Presumably, if the Acting Secretary was to issue any guidance or statements on this issue in the future, the Court opines that he would do so in accordance with whatever is the controlling case law on the issue at that time.

Having concluded that neither the Acting Secretary nor Director Mathis are indispensable parties to this action, the POs in this regard are sustained, and the Acting Secretary and Director Mathis are dismissed from this action.

The Court must now consider whether it has original jurisdiction over the remaining Respondents, i.e., the 67 County Boards, or whether original jurisdiction lies in the respective courts of common pleas. As the Parties suggest, these questions hinge on whether the County Boards are Commonwealth agencies, as Petitioners contend, or local agencies that are excluded from the definition of “Commonwealth government,” as Respondents contend. This Court agrees with Respondents.

As set forth above, this Court has original jurisdiction over all civil actions brought against the “Commonwealth government.” 42 Pa.C.S. § 761(a)(1). However, that term does not include any political subdivision, municipal, or other local authority, or any officer or agency of any such political subdivision or local authority. 42 Pa.C.S. § 102. The Court must therefore determine whether the County Boards fall into one of these categories.

In *Finan*, this Court considered, in the context of an appeal from a trial court order sustaining a preliminary objection challenging its jurisdiction, whether the Pike County Conversation District created pursuant to the Conservation District Law<sup>35</sup> qualified as a local agency or a Commonwealth agency for jurisdictional purposes. 209 A.3d at 1110. In doing so, this Court recognized that

[t]he type of agency dictates the proper court of original jurisdiction; for actions against local agencies, the proper court is the county court of common pleas, whereas actions against Commonwealth agencies are properly filed in the Commonwealth Court. *Blount*[, 965 A.2d 226.] Our analysis for determining the type of agency depends on the purpose for which we review agency status. [*James J. Gory Mech. Contr 'g, Inc.*

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<sup>35</sup> Act of May 15, 1945, P.L. 547, as amended, 3 P.S. §§ 849-864.

*v. Phila. Hous. Auth.*, 855 A.2d 669 (Pa. 2004); *T & R Painting Co., Inc. v. Phila. Hous. Auth.*, 353 A.3d 800 (Pa. 1976); *Quinn v. Se. Pa. Transp. Auth. (SEPTA)*, 659 A.2d 613 (Pa. Cmwlth. 1995).]

Generally, for purposes of jurisdiction, Commonwealth agency status is narrowly construed. *Gory*; see *Dep't of Aging v. Lindberg*, . . . 469 A.2d 1012 (Pa. 1983) (construing this Court's jurisdiction under 42 Pa.C.S. § 761(a)(1) narrowly). When the enabling statute does not specify the court of original jurisdiction, in analyzing the type of agency for jurisdictional purposes, "the pivotal factors are whether the entity [1] operates on a statewide basis and [2] is predominantly controlled by the state." *Gory*, 855 A.2d at 677 (emphasis added). We discern legislative intent to confer jurisdiction on this Court where the entity acts throughout the state and under state control. *Id.* By contrast, where "the entity operates within a single county . . . and is governed in large part by that county . . . the entity must be characterized as a local agency and sued in the courts of common pleas." *Id.* at 678.

*Finan*, 209 A.3d at 1111-12 (footnote omitted). This Court further observed that *Blount*, cited above, is "[t]he seminal case in determining agency status for jurisdiction purposes[.]" *Id.* at 1114.

In *Blount*, the Supreme Court analyzed whether the Philadelphia Parking Authority (PPA) qualified as a Commonwealth agency such that this Court was the court of original jurisdiction. In so doing, the Supreme Court considered multiple factors, including the PPA's functions, reach of operations, and the degree of state control over finance and governance, and ultimately concluded that the PPA was a Commonwealth agency, and that jurisdiction in this Court was proper, because the PPA undertook both state functions and operated outside Philadelphia. See *Finan*, 209 A.3d at 1114 (discussing *Blount*); see also *Blount*, 965 A.2d at 229-34.

Returning to *Finan*, this Court concluded that the Pike County Conservation District did not meet the *Blount* factors for Commonwealth agency status because the District operates solely within the confines of Pike County, which reach of authority indicated local agency status addressing issues within a single county;



implements statewide policies and initiatives and fees, but only in Pike County; is not controlled by the Commonwealth, as its governing body was not selected by the Governor or any other Commonwealth agent; and there is little state control over the District's budget or finances. *Finan*, 209 A.3d at 1114-15. The Court further noted that although the Department of Environmental Protection (DEP) delegated certain functions to the District through a delegation agreement, such delegation did not confer Commonwealth agency status upon the District. *Id.* Accordingly, absent any state control or exercise of statewide authority, the Court concluded there was no basis for deeming the District to be a Commonwealth agency for jurisdictional purposes. *Id.* at 1115 (citing *Blount*; *T & R Painting*). Moreover, the Court rejected the District's proffered third factor for consideration, i.e., that this Court's jurisdiction should extend to county conservation districts because they share implementation and enforcement authority with two statewide agencies (DEP and the State Conservation Commission created under the Conservation District Law) and thus deal with implementation of statewide laws. *Id.* at 1115.

Considering the *Blount* factors, and *Finan*, as they relate to the instant matter, the Court concludes that the 67 County Boards are local agencies for jurisdictional purposes. Notably, the Judicial Code does not define what constitutes a local agency. However, Section 1991 of the Statutory Construction Act of 1972 defines "political subdivision" as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district and county institution district." 1 Pa.C.S. § 1991; see *Blount*, 965 A.2d at 230 (observing, *inter alia*, the definition of "local authority" under the rules of statutory construction for purposes of determining whether the PPA was a Commonwealth or local agency). Section 102(b) and (c) of the Election Code defines "county" as "any county of this Commonwealth" and

“county board” or “board” as “the county board of elections of any county [t]herein provided for.” 25 P.S. § 102(b), (c).

Importantly, Section 301(a) of the Election Code provides that “[t]here shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.” 25 P.S. § 2641(a) (emphasis added). Section 301(b) of the Election Code further provides that “[i]n each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners . . . .” 25 P.S. § 2641(b). Section 302 of the Election Code outlines the powers and duties of the County Boards, providing that “[t]he county boards of elections, **within their respective counties**, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act,” including the 16 powers and duties enumerated in that section. 25 P.S. § 2642 (emphasis added). Included in these powers are those at issue in the instant matter, namely Section 302(f) and (g), which authorize the County Boards:

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

25 P.S. §§ 2642(f), (g).

Section 305(a) of the Election Code further provides that “[t]he county commissioners or other appropriating authorities of the county shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county . . . .” 25 P.S. § 2645(a); *see also* Section 305(a)1.-4. of the Election Code, 25 P.S. § 2645(a)1.-4. (providing additional expenses related to elections for which the Counties are liable). Conversely, under Section 201 of the Election Code, the Secretary’s powers and duties are limited, and include different powers than those granted solely to the County Boards in Sections 301 and 302. *See* 25 P.S. § 2621.

Because these provisions of the Election Code reflect that the County Boards are local agencies, but do not expressly state the same, the Court must analyze the legislative intent behind the statute. “In discerning legislative intent to confer Commonwealth agency status, courts consider whether conferring jurisdiction on a particular court would lead to an absurd or unreasonable result.” *Finan*, 209 A.3d at 1113 (citing 1 Pa.C.S. § 1921). “When the matter involves a local community, and ‘the issues involved were matters strictly within the concern of a particular locality rather than a concern of the Commonwealth generally,’ then it would be absurd to conduct the litigation in Harrisburg as opposed to the locality.” *Finan*, 209 A.3d at 1113 (citing *T & R Painting*, 353 A.2d at 802 (citation omitted)).

Here, the County Boards do not meet the *Blount* factors, which means they are local agencies. First, the General Assembly granted jurisdiction to administer and conduct primaries and elections solely within the confines of the respective Counties of the Commonwealth to the County Boards under Section 301(a) of the Election Code. The County Boards’ authority indicates local agency status because

it has jurisdiction to administer and conduct elections and primaries **within each respective county**, not statewide. Second, the County Boards are not controlled by the Commonwealth, as the County Boards are governed by the county commissioners under Section 301(b) of the Election Code, and, under Section 302(f) and (g), the County Boards are authorized to make rules, regulations, and instructions necessary for the guidance of, among others, elections officers and electors and to instruct elections officers in their duties. The Court therefore rejects Petitioners' argument that the County Boards are Commonwealth agencies because they were created by statute; rather, under *Blount*, it is the degree of Commonwealth control over them that is dispositive. As the Court observed in *County of Fulton*, the Department does not control the County Boards. *See County of Fulton*, 276 A.3d at 861-62 (stating that “[t]he county boards of elections are not bureaus within the Department of State subject to management by the Secretary of the Commonwealth” and that “[t]hey are separate and stand-alone government agencies”).

Further, the County Boards are funded by the county commissioners or other appropriating authorities of the county annually under Section 305 of the Election Code, not by the Department or other Commonwealth entity. Thus, although the subject matter of this litigation implicates elections, both local and statewide,<sup>36</sup> which are governed by the Election Code,<sup>37</sup> all signs point to the County Boards

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<sup>36</sup> In *Finan*, this Court declined “to expand this Court’s original jurisdiction to include cases challenging local implementation of statewide laws in the interest of uniformity. The potential for conflicting constructions of statewide laws by the county courts of common pleas exists whenever a statewide law is applied differently by different local agencies.” *Finan*, 209 A.3d at 1115-16.

<sup>37</sup> This Court has exclusive original jurisdiction in the following election-related matters only:

(1) Contested nominations and elections of the second class under the . . . [Election Code.]

falling under the designation of “political subdivision,” suits against which are excluded from this Court’s original jurisdiction under Section 761(a)(1) of the Judicial Code. *See also In re Voter Referendum Pet.*, 981 A.2d at 171 (recognizing that a county board of elections is a local agency). As a result, jurisdiction for an action challenging a County Board’s development and implementation of notice and cure procedures properly lies in the respective County’s court of common pleas. *See* 42 Pa.C.S. § 931 (providing that “[e]xcept where exclusive original jurisdiction of an action or proceeding is by statute or by general rule . . . vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas”). Accordingly, because this Court lacks subject matter jurisdiction over Petitioners’ claims against the 67 County Boards in the absence of the Acting Secretary and Director Mathis, the POs in this regard are sustained,<sup>38</sup> and the Amended Petition is dismissed.<sup>39</sup>



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ELLEN CEISLER, Judge

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(2) All matters arising in the Office of the Secretary of the Commonwealth relating to Statewide office, except nomination and election contests within the jurisdiction of another tribunal.

42 Pa.C.S. § 764.

<sup>38</sup> Given the Court’s disposition, Respondents’ other POs are dismissed as moot.

<sup>39</sup> Ordinarily, this Court would transfer the matter to the proper court with original jurisdiction over the matter. *See* 42 Pa.C.S. § 5103(a). However, given the impracticality of doing so in this case and given the fact that some County Boards may have changed their procedures since the November 2022 General Election, the Court will not transfer this matter and, instead, will dismiss the Amended Petition. Should Petitioners wish to file suit in the respective courts of common pleas where notice and cure procedures are challenged, they may do so.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional Committee; Republican :  
Party of Pennsylvania; David Ball; :  
James D. Bee; Debra A. Biro; Jesse D. :  
Daniel; Gwendolyn Mae Deluca; Ross :  
M. Farber; Connor R. Gallagher; Lynn :  
Marie Kalcevic; Linda S. Kozlovich; :  
William P. Kozlovich; Vallerie :  
Siciliano-Biancaniello; S. Michael :  
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022

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Elections; Cumberland County Board :  
of Elections; Dauphin County Board of :  
Elections; Delaware County Board of :  
Elections; Elk County Board of :  
Elections; Erie County Board of :  
Elections; Fayette County Board of :  
Elections; Forest County Board of :  
Elections; Franklin County Board of :  
Elections; Fulton County Board of :  
Elections; Greene County Board of :  
Elections; Huntingdon County Board :  
of Elections; Indiana County Board of :  
Elections; Jefferson County Board of :  
Elections; Juniata County Board of :  
Elections; Lackawanna County Board :  
of Elections; Lancaster County Board :  
of Elections; Lawrence County Board :  
of Elections; Lebanon County Board :  
of Elections; Lehigh County Board of :  
Elections; Luzerne County Board of :  
Elections; Lycoming County Board of :  
Elections; McKean County Board of :  
Elections; Mercer County Board of :  
Elections; Mifflin County Board of :  
Elections; Monroe County Board of :  
Elections; Montgomery County Board :  
of Elections; Montour County Board of :  
Elections; Northampton County Board :  
of Elections; Northumberland County :  
Board of Elections; Perry County :  
Board of Elections; Philadelphia County:  
Board of Elections; Pike County Board :  
of Elections; Potter County Board of :  
Elections; Schuylkill County Board of :  
Elections; Snyder County Board of :  
Elections; Somerset County Board of :  
Elections; Sullivan County Board of :  
Elections; Susquehanna County Board :  
of Elections; Tioga County Board of :  
Elections; Union County Board of :  
Elections; Venango County Board of :  
Elections; Warren County Board of :  
Elections; Wayne County Board of :

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Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

## **ORDER**

AND NOW, this 23<sup>rd</sup> day of March, 2023, it is hereby **ORDERED** as follows:

1. The first Preliminary objection (PO) of Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; the first PO of the Delaware County Board of Elections; the second PO of the Chester County Board of Elections; and the first PO of the Philadelphia County Board of Elections, relating to lack of subject matter jurisdiction, are **SUSTAINED**.
2. All remaining POs are **DISMISSED AS MOOT**.
3. Petitioners' First Amended Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief is **DISMISSED**.



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ELLEN CEISLER, Judge



# **EXHIBIT B**

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**[J-85-2022]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

DAVID BALL, JAMES D. BEE, JESSE D. : No. 102 MM 2022  
DANIEL, GWENDOLYN MAE DELUCA, :  
ROSS M. FARBER, LYNN MARIE :  
KALCEVIC, VALLERIE SICILIANO- :  
BIANCANIELLO, S. MICHAEL STREIB, :  
REPUBLICAN NATIONAL COMMITTEE, :  
NATIONAL REPUBLICAN :  
CONGRESSIONAL COMMITTEE, AND :  
REPUBLICAN PARTY OF PENNSYLVANIA, :

Petitioners

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL :  
CAPACITY AS ACTING SECRETARY OF :  
THE COMMONWEALTH, AND ALL 67 :  
COUNTY BOARDS OF ELECTIONS, :

Respondents

**PER CURIAM**

**DECIDED: November 1, 2022**

**AND NOW**, this 1<sup>st</sup> day of November, 2022, upon review of the briefs of the parties and *amici*, the Petitioners' request for injunctive and declaratory relief is granted in part and denied in part. The Pennsylvania county boards of elections are hereby **ORDERED** to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes. See 25 P.S. §3146.6(a) and §3150.16(a).

The Court is evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. §10101(a)(2)(B).

We hereby **DIRECT** that the Pennsylvania county boards of elections segregate and preserve any ballots contained in undated or incorrectly dated outer envelopes.

The Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania have standing. Petitioners David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae Deluca, Ross M. Farber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, and S. Michael Streib are hereby **DISMISSED** from the case for lack of standing.

Opinions to follow.

Chief Justice Todd and Justices Donohue and Wecht would find a violation of federal law.

Justices Dougherty, Mundy and Brobson would find no violation of federal law.

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# EXHIBIT C

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**COMMONWEALTH OF PENNSYLVANIA**  
**COUNTY OF: Lancaster**



**POLICE CRIMINAL COMPLAINT**  
**COMMONWEALTH OF PENNSYLVANIA**  
**VS.**

Magisterial District Number: 02-2-02

DEFENDANT: (NAME and ADDRESS):

MDJ: Hon. **BRUCE A. ROTH, ESQ**  
**150 NORTH QUEEN STREET**  
**SUITE 120**  
 Address: **LANCASTER, PA 17603**  
 Telephone: **717-295-2000**

**CHERYL MIHALIAK**  
 First Name Middle Name Last Name Gen  
**831 3RD ST**  
**LANCASTER PA 17603**

NCIC Extradition Code Type

<input type="checkbox"/> 1-Felony Full	<input type="checkbox"/> 5-Felony Pend.	<input type="checkbox"/> C-Misdemeanor Surrounding States	<input type="checkbox"/> Distance:
<input type="checkbox"/> 2-Felony Ltd.	<input type="checkbox"/> 6-Felony Pend. Extradition Determ.	<input type="checkbox"/> D-Misdemeanor No Extradition	
<input type="checkbox"/> 3-Felony Surrounding States	<input type="checkbox"/> A-Misdemeanor Full	<input type="checkbox"/> E-Misdemeanor Pending	
<input type="checkbox"/> 4-Felony No Ext	<input checked="" type="checkbox"/> B-Misdemeanor Limited	<input type="checkbox"/> F-Misdemeanor Pending Extradition Determ.	

**DEFENDANT IDENTIFICATION INFORMATION**

Docket Number <b>R-126-22</b>	Date Filed <b>06/03/22</b>	OTNA Live Scan Number <b>R 300522-5</b>	Complaint <b>150</b>	Incident Number <b>DA-22-0138</b>	Request Lab Services? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
----------------------------------	-------------------------------	--	-------------------------	--------------------------------------	--

GENDER <input type="checkbox"/> Male <input checked="" type="checkbox"/> Female	DOB <b>6/13/1961</b>	POB	Add'l DOB	Co-Defendant(s) <input type="checkbox"/>
AKA	First Name	Middle Name	Last Name	Gen.

RACE  White  Asian  Black  Native American  Unknown

ETHNICITY  Hispanic  Non-Hispanic  Unknown

HAIR COLOR  GRY (Gray)  RED (Red/Aubn.)  SDY (Sandy)  BLU (Blue)  PLE (Purple)  BRO (Brown)  
 BLK (Black)  ONG (Orange)  WHI (White)  XXX (Unk/Bald)  GRN (Green)  PNK (Pink)  
 BLN (Blonde/Strawberry)

EYE COLOR  BLK (Black)  BLU (Blue)  BRO (Brown)  GRN (Green)  GRY (Gray)  
 HAZ (Hazel)  MAR (Maroon)  PNK (Pink)  MUL (Multicolored)  XXX (Unknown)

DNA <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	DNA Location	WEIGHT (lbs.) <b>160</b>
FBI Number <b>688907JA3</b>	MNU Number	
Defendant Fingerprinted? <input type="checkbox"/> YES <input type="checkbox"/> NO		FT. HEIGHT' In. <b>5 11</b>
Fingerprint Classification:		

**DEFENDANT VEHICLE INFORMATION**

Plate #	State	Hazmat <input type="checkbox"/>	Registration Sticker (MM/YY)	Comm'l Veh. Ind. <input type="checkbox"/>	School Veh. <input type="checkbox"/>	Oth. NCIC Veh. Code	Reg. same as Def. <input type="checkbox"/>
VIN	Year	Make	Model	Style	Color		

Office of the attorney for the Commonwealth  Approved  Disapproved Because: \_\_\_\_\_

(The attorney for the Commonwealth may require that the complaint, arrest warrant affidavit, or both be approved by the attorney for the Commonwealth prior to filing. See Pa.R.Crim.P.507.)  
Andrew J. Gonzalez (Name of the attorney for the Commonwealth) [Signature] (Signature of the attorney for the Commonwealth) 6/3/22 (Date)

I, **MARTIN, LARRY** (Name of the Affiant) **10158** PSP/MPOETC Assigned Affiant ID Number and Badge #  
 of **LANCASTER CO DETECTIVES** (Identify Department or Agency Represented and Political Subdivision) **PA036013A** (Police Agency ORI Number)  
 do hereby state: (check appropriate box)  
 1.  I accuse the above named defendant who lives at the address set forth above  
 I accuse the defendant whose name is unknown to me but who is described as \_\_\_\_\_  
 I accuse the defendant whose name and popular designation or nickname are unknown to me and whom I have therefore designated as John Doe or Jane Doe  
 with violating the penal laws of the Commonwealth of Pennsylvania at [ **301** ] **Lancaster City**  
 (Subdivision Code) (Place-Political Subdivision)  
**150 N QUEEN ST LANCASTER, PA 17603**  
 in **Lancaster** County [ **36** ] on or about **Between 04/26/2022 0001 and 04/26/2022 2359**  
 (County Code) (Offense Date)





# POLICE CRIMINAL COMPLAINT

Docket Number:	Date Filed: <b>06/03/2022</b>	OTN/LiveScan Number	Complaint <b>150</b>	Incident Number <b>DA-22-0138</b>
Defendant Name	First: <b>CHERYL</b>	Middle:	Last: <b>MIHALIAK</b>	

- I ask that a warrant of arrest or a summons be issued and that the defendant be required to answer the charges I have made.
- I verify that the facts set forth in this complaint are true and correct to the best of my knowledge or information and belief. This verification is made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. § 4904) relating to unsworn falsification to authorities.
- This complaint consists of the preceding page(s) numbered 1 through 4.
- 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 of confidential information and documents differently than non-confidential information and documents.

The acts committed by the accused, as listed and hereafter, were against the peace and dignity of the Commonwealth of Pennsylvania and were contrary to the Act(s) of the Assembly, or in violation of the statutes cited.  
**(Before a warrant of arrest can be issued, an affidavit of probable cause must be completed, sworn to before the issuing authority, and attached.)**

June 3, 2022 DA [Signature]  
 (Date) (Signature of Affiant)

AND NOW, on this date \_\_\_\_\_ I certify that the complaint has been properly completed and verified.  
 An affidavit of probable cause must be completed before a warrant can be issued.

02-2-02  
 (Magisterial District Court Number)

[Signature]  
 (Issuing Authority)





# POLICE CRIMINAL COMPLAINT

Docket Number:	Date Filed: <b>06/03/2022</b>	OTN/LiveScan Number	Complaint <b>150</b>	Incident Number <b>DA-22-0138</b>
Defendant Name	First: <b>CHERYL</b>	Middle:	Last: <b>MIHALIAK</b>	

The acts committed by the accused are described below with each Act of Assembly or statute allegedly violated, if appropriate. When there is more than one offense, each offense should be numbered chronologically.

(Set forth a *brief* summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) allegedly violated, without more, is not sufficient. In a summary case, you must cite the specific section(s) and subsection(s) of the statute(s) or ordinance(s) allegedly violated.

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903	Number of Victims Age 60 or Over _____
------------------	--	---	---	--

<input checked="" type="checkbox"/>	<b>1</b>	<b>4101</b>	<b>(a)(3)</b>	of the	<b>PA Crimes Code</b>	<b>1</b>	<b>M1</b>		<b>250</b>
Lead?	Offense #	Section	Subsection		PA Statute (Title)	Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if Applicable)	Accident Number	<input type="checkbox"/> Interstate	<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
------------------------------	-----------------	-------------------------------------	--------------------------------------	------------------------------------

Statute Description (Include the name of the statute or ordinance):

**FORGERY-UTTER FORGED WRIT**

Acts of the accused associated with this Offense:

**PACC 4101(a)3 Forgery**

*WP AB 7/25/22*

IN THAT, on or about April 26, 2022, THE DEFENDANT did unlawfully utter a writing, namely, a commercial instrument or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations, which said actor knew to be forged, with intent to defraud or injure TO WIT: Cheryl Mihaliak completed a mail in voter ballot for her deceased mother and signed her mother's name to the ballot. It was returned to the Lancaster County Board of Elections.

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903	Number of Victims Age 60 or Over _____
------------------	--	---	---	--

<input type="checkbox"/>	<b>2</b>	<b>3517</b>	<b>-</b>	of the	<b>25</b>	<b>1</b>	<b>M2</b>		
Lead?	Offense #	Section	Subsection		PA Statute (Title)	Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if Applicable)	Accident Number	<input type="checkbox"/> Interstate	<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
------------------------------	-----------------	-------------------------------------	--------------------------------------	------------------------------------

Statute Description (Include the name of the statute or ordinance):

Acts of the accused associated with this Offense:

Any person who shall forge or falsely make the official endorsement on any ballot or wilfully destroy or deface any ballot or wilfully delay the delivery of ant ballot. TO WIT: Cheryl Mihaliak completed a mail in voter ballot for her deceased mother and signed her mother's name to the ballot.





# Police Criminal Complaint

Docket Number:	Date Filed: <b>06/03/2022</b>	OTN/LiveScan Number	Complaint <b>150</b>	Incident Number <b>DA-22-0138</b>
Defendant Name	First: <b>CHERYL</b>	Middle:	Last: <b>MIHALIAK</b>	

## AFFIDAVIT OF PROBABLE CAUSE

1) On April 28, 2022, I (Detective Larry R. Martin) was assigned to investigate an alleged voter fraud incident. I received information from Christa Miller Chief Clerk/ Chief Registrar of the Lancaster County Board of Elections and Registration Commission.

2) Christa Miller stated she received a mail in ballot from Teresa J. Mihaliak signed and dated April 26, 2022. The ballot for the democrat primary was received on April 28, 2022, by her office. However, Christa Miller reported that Teresa J. Mihaliak was deceased on April 14, 2022. Christa Miller said this was confirmed by an obituary and records from the Department of Health. She said Teresa J. Mihaliak was removed from the voter rolls on April 25, 2022.

3) Christa Miller stated that Teresa J. Mihaliak's ballot was requested by Cheryl Mihaliak on March 17, 2022, Cheryl Mihaliak requested her own ballot on March 17, 2022. Christa Miller reported both Teresa Mihaliak and Cheryl Mihaliak's ballots were returned on April 28, 2022.

4) On May 5, 2022, at 1641 hours I spoke with Cheryl Mihaliak. During that conversation Cheryl Mihaliak told me that she did vote for her mother and signed her ballot after her mother died. Cheryl Mihaliak said that she knew who her mother was going to vote for and decided to vote for her after she died. Cheryl Mihaliak said she filled out her mother Teresa J. Mihaliak ballot and signed her ballot.

5) Due to the above information, I request that a summons be issued for defendant Cheryl Mihaliak.

I, LARRY MARTIN, BEING DULY SWORN ACCORDING TO THE LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE FOREGOING AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

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 OF CONFIDENTIAL INFORMATION AND DOCUMENTS DIFFERENTLY THAN NO-CONFIDENTIAL INFORMATION AND DOCUMENTS.

  
 \_\_\_\_\_  
 (Signature of Affiant)

Sworn to me and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_ Date \_\_\_\_\_, Magisterial District Judge

My commission expires first Monday of January,



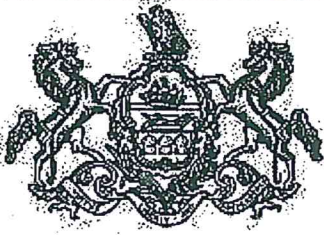


# Magisterial District Judge 02-2-02

## DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

## Criminal Docket



Commonwealth of Pennsylvania  
v.  
Cheryl Mihaliak

Page 1 of 4

### CASE INFORMATION

<u>Judge Assigned:</u>	Magisterial District Judge Bruce A. Roth	<u>Issue Date:</u>	06/03/2022
<u>OTN:</u>	R 300522-5	<u>File Date:</u>	06/03/2022
<u>Arresting Agency:</u>	Lancaster County, District Attorney	<u>Arrest Date:</u>	
<u>Complaint No.:</u>	DA-22-0138	<u>Incident No.:</u>	DA-22-0138
<u>Disposition:</u>	Waived for Court	<u>Disposition Date:</u>	07/25/2022
<u>County:</u>	Lancaster	<u>Township:</u>	Lancaster City
<u>Case Status:</u>	Closed		

### STATUS INFORMATION

<u>Case Status</u>	<u>Status Date</u>	<u>Processing Status</u>
Closed	07/25/2022	Completed
	06/03/2022	Awaiting Preliminary Hearing

### CALENDAR EVENTS

<u>Case Calendar</u>	<u>Schedule</u>		<u>Schedule</u>		
<u>Event Type</u>	<u>Start Date</u>	<u>Start Time</u>	<u>Room</u>	<u>Judge Name</u>	<u>Status</u>
Preliminary Hearing	06/29/2022	2:00 pm		Magisterial District Judge Bruce A. Roth	Continued
<i>Continuance Reason: Defendant Attorney Request</i>					
<i>Requested By: Attorney Michael Todd Winters</i>					
Preliminary Hearing	07/25/2022	2:00 pm		Magisterial District Judge Bruce A. Roth	Scheduled
Formal Arraignment	08/26/2022	9:00 am	Courtroom A		Scheduled

### DEFENDANT INFORMATION

<u>Name:</u>	Mihaliak, Cheryl	<u>Sex:</u>	Female
<u>Date of Birth:</u>	06/13/1961	<u>Race:</u>	
<u>Address(es):</u>			
<u>Other</u>			
831 Third Street Lancaster, PA 17603			

Advised of His Right to Apply for Assignment of Counsel?	Yes
Public Defender Requested by the Defendant?	No
Application Provided for Appointment of Public Defender?	No
Has the Defendant Been Fingerprinted?	No



# Magisterial District Judge 02-2-02

## DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

## Criminal Docket

Commonwealth of Pennsylvania  
v.  
Cheryl Mihaliak

Page 2 of 4

### CASE PARTICIPANTS

Participant Type	Participant Name	OTN/LOTN	Docket Number	Was Sworn In?	Has Testified?
Prosecution	Commonwealth of Pennsylvania				
Arresting Officer	Martin, Larry R.				
Defendant	Mihaliak, Cheryl				
Witness for the Commonwealth	Miller, Christa				

### BAIL

<b>Bail Set:</b>				<b>Nebbia Status: None</b>
<u>Bail Action Type</u>	<u>Bail Action Date</u>	<u>Bail Type</u>	<u>Percentage</u>	<u>Amount</u>
Set	07/25/2022	Unsecured		\$2,500.00

### CHARGES

# Charge	Grade	Description	Offense Dt.	Disposition
1 18 § 4101 §§ A3	M1	Forgery - Utters Forged Writing	04/26/2022	Withdrawn
2 25 § 3517	M2	Forging And Destroying Ballots	04/26/2022	Waived for Court

### DISPOSITION/SENTENCING DETAILS

Case Disposition	Disposition Date	Was Defendant Present?
Waived for Court	07/25/2022	Yes
<u>Offense Seq./Description</u>	<u>Offense Disposition</u>	
1 Forgery - Utters Forged Writing	Withdrawn	
2 Forging And Destroying Ballots	Waived for Court	

### ATTORNEY INFORMATION

<b>Private</b>	<b>Assistant District Attorney</b>
<u>Name:</u> Michael Todd Winters, Esq.	<u>Name:</u> Jennifer Lauren Ponessa, Esq.
<u>Representing:</u> Mihaliak, Cheryl	<u>Representing:</u> Commonwealth of Pennsylvania
<u>Counsel Status:</u> Active	<u>Counsel Status:</u> Active
<u>Supreme Court No.:</u> 077976	<u>Supreme Court No.:</u> 319222
<u>Phone No.:</u> 717-584-1895	<u>Phone No.:</u> 717-299-8100
<u>Address:</u> 53 N Duke St Ste 318 Lancaster, PA 17602	<u>Address:</u> Lancaster County Da's Office 50 N Duke St Lancaster, PA 17602-2805



# Magisterial District Judge 02-2-02

## DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

## Criminal Docket

Commonwealth of Pennsylvania  
v.  
Cheryl Mihaliak

Page 3 of 4

## DOCKET ENTRY INFORMATION

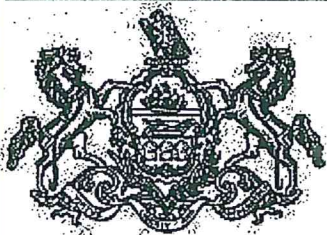
Filed Date	Entry	Filer	Applies To
07/25/2022	Bail Set	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/25/2022	Formal Arraignment Scheduled	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/25/2022	Waiver of Preliminary Hearing	Cheryl Mihaliak	Cheryl Mihaliak, Defendant
07/25/2022	Waived for Court	Magisterial District Judge Bruce A. Roth	Cheryl Mihaliak, Defendant
07/25/2022	Docket Transcript Printed	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/22/2022	Attorney Active	Jennifer Lauren Ponessa, Esq.	Commonwealth of Pennsylvania, Prosecution
06/24/2022	First Class Summons Accepted	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/13/2022	Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
Event: Preliminary Hearing-07/25/2022 2:00PM- 2:05PM Testify On Behalf Of: Commonwealth of Pennsylvania			
06/13/2022	First Class Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
06/13/2022	Preliminary Hearing Scheduled	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/13/2022	Preliminary Hearing Continued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/09/2022	Attorney Active	Michael Todd Winters, Esq.	Cheryl Mihaliak, Defendant
06/06/2022	Certified Summons Accepted	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/06/2022	Certified Fingerprint Order Accepted	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Summons Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
Event: Preliminary Hearing-06/29/2022 2:00PM- 2:15PM Testify On Behalf Of: Commonwealth of Pennsylvania			
06/03/2022	First Class Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
06/03/2022	Certified Summons Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	First Class Fingerprint Order Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Fingerprint Order Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
Report to Agency: Lancaster Police Dept Authority: Roth, Bruce A. Report From: 6/3/2022 12:00:00 AM Report To: 6/29/2022 12:00:00 AM			
06/03/2022	Certified Fingerprint Order Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Preliminary Hearing Scheduled	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Criminal Complaint Filed	Magisterial District Court 02-2-02	

# Magisterial District Judge 02-2-02

## DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

### Criminal Docket



Commonwealth of Pennsylvania

v.

Cheryl Mihaliak

Page 4 of 4

## DOCKET ENTRY INFORMATION

Filed Date	Entry	Filer	Applies To
06/03/2022	First Class Summons Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant

July 25, 2022

Date

Magisterial District Judge Bruce A. Roth



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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

Petitioners,

v.

AL SCHMIDT, in his official capacity as  
Secretary of the Commonwealth,  
PHILADELPHIA COUNTY BOARD  
OF ELECTIONS, AND ALLEGHENY  
COUNTY BOARD OF ELECTIONS,

Respondents,

REPUBLICAN NATIONAL  
COMMITTEE AND REPUBLICAN  
PARTY OF PENNSYLVANIA,  
Intervenors.

Case No. 283 MD 2024  
Original Jurisdiction

**REPUBLICAN INTERVENORS' APPLICATION FOR SUMMARY RELIEF**

Intervenors the Republican National Committee and Republican Party of Pennsylvania (collectively, “the Republican Intervenors”) support and seek to uphold free and fair elections on behalf of all Pennsylvania voters. Accordingly, the Republican Intervenors hereby move, under Pennsylvania Rule of Appellate Procedure 1532(b), for summary relief in the form of a judgment dismissing the

Petition. In support of this Application, the Republican Intervenors hereby incorporate the Application for Intervention, Memorandum in Support of Application for Intervention, and Proposed Preliminary Objections filed on June 7, 2024, as well as the memorandum of law filed in support of this Application. The Republican Intervenors further state the following:

### **BACKGROUND**

1. The Pennsylvania Election Code’s requirement that voters who vote by mail sign and date a declaration on the ballot return envelope, now codified at 25 P.S. §§ 3146.6(a) and 3150.16(a), has been the law of the Commonwealth for decades.

2. In recent years, the date requirement has been the target of an array of lawsuits in state and federal court.

3. In 2022, the Pennsylvania Supreme Court held that the date requirement is mandatory under state law and ordered all 67 county boards of elections not to count any mail ballots that fail to comply with it. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).<sup>1</sup>

4. Earlier this year, the Third Circuit held that the date requirement does not violate the Materiality Provision of the Civil Rights Act of 1964 because it does

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<sup>1</sup> This Application uses the term “mail ballots” to refer to both absentee ballots, *see* 25 P.S. § 3146.6, and mail-in ballots, *see id.* § 3150.16.

not violate “the right to vote.” *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024).

5. These decisions eliminated two key grounds on which plaintiffs—including some of Petitioners here—have sought to invalidate the date requirement, as well as essential premises of Petitioners’ claims in this suit. Four Petitioners in this action—Black Political Empowerment Project, Make The Road Pennsylvania, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania—participated as *amici* in *Ball*. Those four Petitioners are also federal-court plaintiffs whose Materiality Provision claim the Third Circuit recently rejected and who continue to pursue federal constitutional challenges to the date requirement. *See* Second Am. Compl., ECF No. 413, *Pa. State Conf. of NAACP v. Chapman*, No. 22 CV 339 (W.D. Pa. filed June 14, 2024).

6. Petitioners nonetheless filed their Petition in this Court on May 28, 2024. The Petition alleges that the date requirement violates the Free and Equal Election Clause of the Pennsylvania Constitution (Pa. Const. Art, 1, §5) and that the date requirement is “meaningless.” *See, e.g.*, Pet. ¶¶ 81-91. The Petition names three Respondents: Secretary of the Commonwealth Al Schmidt, the Philadelphia County Board of Elections, and the Allegheny County Board of Elections.

7. Petitioners’ cherry-picking of these Respondents is no accident. In prior cases—including *Ball* and *Pennsylvania State Conference of the NAACP*—all

three Respondents declined to defend the date requirement and asked courts to invalidate it. *See* Resp't Allegheny Ctny. Bd. of Elections Br. and Resp't Phila. Cnty. Bd. of Elections Br., *Ball v. Chapman*, No. 102 MM 2022 (Pa. filed Oct. 16, 2022); Defs. Appellee Resp. Br., *NAACP v. Sec'y Commonwealth of Pa.*, No. 23 3166 (3d Cir. filed Dec. 7, 2023). That is why Republican Intervenors have had to lead the successful defense of the date requirement in those cases.

8. Petitioners' new suit is thus an obvious effort to circumvent the prior court decisions upholding the date requirement.

9. In particular, Petitioners now seek a pre-enforcement declaratory judgment that would prohibit the Secretary—the *only* Respondent against whom Petitioners have sought any relief, *see* Pet. ¶ 92—from enforcing the date requirement. Petitioners also seek relief against the Secretary based solely on his non-binding "Guidance" advising county boards of elections regarding their legal obligation to enforce the date requirement under the plain terms of the Election Code, *Ball*, and *Pennsylvania State Conference of the NAACP*.

10. Petitioners' challenge to the date requirement simply makes no sense—and is irreconcilable with controlling Pennsylvania Supreme Court precedent—for at least four reasons.

11. *First*, the arguments that the date requirement violates the Free and Equal Elections Clause and is "meaningless" were before the Pennsylvania Supreme



Court in *Ball*—but that court nonetheless upheld the requirement. *See* 289 A.3d at 14-16 & n.77.

12. *Second*, the Pennsylvania Supreme Court has *never* invalidated a ballot-casting rule governing how voters complete and cast their ballots under the Free and Equal Elections Clause.

13. *Third*, in fact, the Pennsylvania Supreme Court has expressly *upheld* such rules, including the declaration requirement and secrecy-envelope rules that appear in the same statutory provision as the date requirement, *see* 25 P.S. §§ 3146.6(a), 3150.16(a), against Free and Equal Elections Clause challenges, *see Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 372-80 (Pa. 2020).

14. *Fourth*, Petitioners do not challenge Pennsylvania's signature requirement for mail ballots, which appears in *the same statutory phrase* as, and is a companion to, the date requirement. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). Petitioners offer no explanation as to how these other ballot-casting rules can be constitutional under the Free and Equal Elections Clause but the date requirement somehow is not.

15. On June 10, 2024, the Court granted the Republican Intervenors intervention to defend the date requirement in this suit.

## SUMMARY RELIEF

16. The Republican Intervenors now move the Court to enter summary relief dismissing the Petition and upholding the General Assembly's longstanding, commonsensical, and constitutional date requirement.

17. This Court may grant summary relief in the form of a judgment dismissing a petition when the applicant's right to relief is "clear." Pa. R.A.P. 1532(b).

18. The Court should grant summary relief when there are "no disputed issues of material fact and it is clear that the applicant is entitled to the requested relief under the law." *Marcellus Shale Coal, v. Dep't of Env't Prot.*, 216 A.3d 448, 458 (Pa. Cmwlth. 2019) (noting that summary relief is similar to summary judgment under the Pennsylvania Rules of Civil Procedure).

19. The Republican Intervenors' right to summary relief is clear. As explained more fully in the accompanying memorandum of law, the Petition suffers from at least five defects, each of which independently warrants dismissal.

20. *First*, Petitioners lack standing to sue the Secretary because the Secretary's Guidance regarding the date requirement is not legally binding or enforceable against the county boards of elections. Therefore, there is no causal connection between the Guidance and Petitioners' alleged harm of county boards

declining to count ballots that do not comply with the date requirement, and enjoining that Guidance would not redress that alleged harm.

21. *Second*, and relatedly, this Court lacks subject matter jurisdiction because the Secretary—the only entity of the Commonwealth government named as a Respondent—is not a proper or indispensable party to this suit.

22. *Third*, the Court lacks jurisdiction over the Philadelphia County and Allegheny County Boards of Elections because Petitioners seek no relief against them, and they are not agencies of the Commonwealth.

23. *Fourth*, even if the Court has subject matter jurisdiction and Petitioners had sought relief against the Philadelphia County and Allegheny County Boards of Elections, the Petition must be dismissed because Petitioners failed to join the remaining 65 county boards of elections, who are indispensable parties to this suit.

24. *Fifth*, as a matter of law, the Petition fails to state a violation of the Free and Equal Elections Clause. The Pennsylvania Supreme Court has already rejected the arguments that the date requirement violates the Free and Equal Elections Clause and is “meaningless”—precisely the arguments Petitioners advance here. Even if this Court considers the question open, the Clause’s text, history, and precedent—including the Pennsylvania Supreme Court’s upholding of other ballot-casting rules—foreclose the conclusion that the date requirement is unconstitutional. Any holding to the contrary, moreover, would violate the Electors and Elections Clauses

of the U.S. Constitution and thereby invite potential review by the U.S. Supreme Court. And any such holding would require striking down universal mail voting in Pennsylvania under Act 77's non-severability provision.

WHEREFORE, for all of these reasons and those stated in the Application for Intervention, Memorandum in Support of Application for Intervention, Proposed Preliminary Objections, and the memorandum of law filed in support of this Application, the Republican Intervenors respectfully request that this Honorable Court grant their Application for Summary Relief and enter judgment dismissing the Petition.

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Dated: June 24, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

THE GALLAGHER FIRM, LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

Phone: (412) 308-5512

kag@gallagherlawllc.com

John M. Gore (*pro hac vice*)

E. Stewart Crosland

Louis J. Capozzi III

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Phone: (202) 879-3939

jmgore@jonesday.com

scrosland@jonesday.com

lcapozzi@jonesday.com

Thomas W. King, III

Thomas E. Breth

DILLON, McCANDLESS, KING,

COULTER & GRAHAM, LLP

128 W. Cunningham St.

Butler, PA 16001

Phone: (724) 283.2200

tking@dmkcg.com

tbreth@dmkcg.com

*Counsel for Intervenors*

**VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE**

I, Alex Latcham, Senior Deputy Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Application for Summary Relief are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

*Alex Latcham*

---

Alex Latcham  
Senior Deputy Political Director  
Republican National Committee

Date: 06/24/2024

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**VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA**

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Application for Summary Relief are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



---

Angela Alleman  
Executive Director  
Republican Party of Pennsylvania

Date: 6/23/24

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

Petitioners,

v.

AL SCHMIDT, in his official capacity as  
Secretary of the Commonwealth,  
PHILADELPHIA COUNTY BOARD  
OF ELECTIONS, AND ALLEGHENY  
COUNTY BOARD OF ELECTIONS,

Respondents,

REPUBLICAN NATIONAL  
COMMITTEE AND REPUBLICAN  
PARTY OF PENNSYLVANIA,  
Intervenors.

Case No. 283 MD 2024  
Original Jurisdiction

**ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_ 2024, it is hereby

**ORDERED** as follows:

1. The Republican Intervenors' Application for Summary Relief under Pa.

R.A.P. 1531(b) is **GRANTED** for the following reasons:



- a. Petitioners lack standing to sue Secretary Schmidt. The Secretary's Guidance regarding the date requirement is not legally binding on, or enforceable against, the county boards of elections, so there is no causal connection between the Guidance and county boards of elections enforcing the date requirement. Therefore, enjoining that Guidance would not redress Petitioners' alleged harm of county boards declining to count ballots that do not comply with the date requirement.
- b. The Court lacks subject matter jurisdiction because the Secretary—the only entity of the Commonwealth government named as a Respondent—is not a proper or indispensable party to this suit.
- c. The Court lacks subject matter jurisdiction over the Philadelphia County and Allegheny County Boards of Elections because the Petition seeks no relief against them and because they are local agencies, not entities of the Commonwealth government.
- d. Even if the Court had jurisdiction and Petitioners had sought relief against the Philadelphia County and Allegheny County Boards of Elections, Petitioners have failed to join the remaining 65 county boards of elections, who are indispensable parties to this suit.
- e. As a matter of law, the Petition fails to state a violation of the Free and Equal Elections Clause. The Pennsylvania Supreme Court has already rejected the arguments that the date requirement violates the Free and Equal Elections Clause and is meaningless. *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 372-80 (Pa. 2020); *Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2023). Consistent with this rejection, the Pennsylvania Supreme Court has never invalidated a ballot-casting rule governing how voters complete and cast their ballots under the Free and Equal Elections Clause. And the Pennsylvania Supreme Court has rejected similar challenges under the Free and Equal Elections Clause to ballot-casting rules such as the declaration mandate of which the date requirement is part and the secrecy-envelope rule that appears in the very same statutory provision, 25 P.S. §§ 3146.6(a), 3150.16(a), as the date requirement. *Pa. Dem.*

*Party*, 238 A.3d at 372-80. Petitioners—who also do not challenge Pennsylvania’s signature requirement for mail ballots, which like the date requirement is part of the mandate that mail voters “fill out, date, and sign the declaration” on the outer envelope accurately and completely, 25 P.S. §§ 3146.6(a), 3150.16(a)—offer no explanation as to how these other ballot-casting rules can be constitutional under the Free and Equal Elections Clause but the date requirement is not.

2. For each of the reasons set forth above, including that the Petitioners are unable to demonstrate that the date requirement for absentee and mail-in ballots violates the Free and Equal Elections Clause, the Petition is legally infirm.

3. Accordingly, the Petition for Review Addressed to the Court’s Original Jurisdiction is hereby **DISMISSED** with prejudice.

BY THE COURT:

\_\_\_\_\_ J.

**CERTIFICATION OF WORD COUNT**

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum contains 13,802 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

*/s/ Kathleen A. Gallagher*  
\_\_\_\_\_  
*Counsel for Republican Intervenors*

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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.

*/s/ Kathleen A. Gallagher*  
\_\_\_\_\_  
*Counsel for Republican Intervenors*

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