

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry, : **CASES CONSOLIDATED**
Appellees, :

Trial Ct. No. 2024 No. 02481

v. :

Philadelphia Board of Elections, :
Republican National Committee, and :
Republican Party of Pennsylvania, :
Appellants. :

Appeal of: Philadelphia County Board of : No. 1305 C.D. 2024
Elections :

Brian T. Baxter and Susan T. Kinniry, :
Appellees, :

v. :

Philadelphia Board of Elections, :
Republican National Committee, and :
Republican Party of Pennsylvania, :
Appellants. :

Appeal of: Republican National Committee : No. 1309 C.D. 2024
and Republican Party of Pennsylvania :

BRIEF OF APPELLEES

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

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INTRODUCTION

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

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

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

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

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

The refusal to count otherwise valid mail ballots¹ submitted on time by eligible voters, including Appellees, because of an inconsequential envelope-dating error violates that fundamental right. *See B-PEP*, 2024 WL 4002321 at *32-33; *see also Ball v. Chapman*, 289 A.3d 1, 27 n.156 (Pa. 2023) (plurality opinion) (acknowledging that the “failure to comply with the date requirement **would not compel the discarding of votes in light of the Free and Equal Elections Clause**, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth[.]” (emphasis added)).

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

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

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

STATEMENT OF JURISDICTION

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

COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

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

Suggested Answer: Yes.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

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

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

STATEMENT OF THE CASE

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

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

declarations of Appellees Brian T. Baxter and Susan T. Kinniry detailed their qualifications and attempts to vote by mail in the September 2024 Special Election. *See* R0001-R0037² (9/23/24 Pet. For Review [“PFR”]), The Petition also detailed the Pennsylvania mail ballot process, *see id.* ¶¶ 26-34, and alleged, based on admissions and findings in multiple prior lawsuits in both state and federal court, that the date serves no purpose other than to disenfranchise eligible voters and disqualify ballots received on time, *id.* ¶¶ 35-40.

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

The material facts are thus undisputed.

I. Origins of the Envelope-Date Provision

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

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

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

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

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

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

II. Voting by Mail in Pennsylvania

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

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

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

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

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

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

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

III. The Envelope-Dating Provision Serves No Purpose

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

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

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

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

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

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

IV. Previous Litigation over the Envelope-Dating Provision

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

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

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

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

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

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

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

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

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

V. The September 2024 Special Election

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

The Free and Equal Elections Clause “governs ***all aspects*** of the electoral process,” *LWV*, 178 A.3d at §14 (emphasis added), which includes facially neutral rules for submitting mail ballots. The Clause forbids the imposition of rules applicable to the right to vote when such regulation denies the franchise or subverts the right to vote. *Winston*, 91 A. at 523. Controlling precedent requires that restrictions on fundamental rights—including the right to vote—satisfy strict scrutiny. *See, e.g.,* *Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth.) (“It is well settled that laws which affect a fundamental right, such as the right to vote...are subject to strict scrutiny.”), *aff’d*, 713 A.2d 1106 (Pa. 1998); *James v. SEPTA*, 477

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

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

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

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

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

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

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

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

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

The Board’s application of the Election Code’s envelope-dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject Appellees’ mail ballots based solely on the inadvertent failure to add a meaningless handwritten date next to their signature on the mail-ballot return envelope is an unconstitutional interference with the exercise of the right to suffrage in violation of the Free and Equal Elections Clause. This Court should affirm.

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Neither the Board nor Intervenor-Appellants can demonstrate a compelling interest that justifies its complete disenfranchisement of voters for non-compliance with a handwritten date requirement that serves absolutely no purpose in determining timeliness of receipt or voter qualifications. The Board acknowledged at the September 21, 2024 hearing that the date requirement serves no purpose when it stipulated to that fact in the proceedings below. *See* R0011, ¶ 39. And when given the opportunity to identify facts in dispute at the same hearing, Intervenor-Appellants could not do so and ultimately did not object at the hearing to the stipulation of facts pled in the Petition for Review. *See* R0049 at 20:2-21.¹⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Second, Intervenor-Appellants deploy partial caselaw quotes to claim that voting rules are only subject to any constitutional scrutiny when they “make it so difficult [to vote] as to amount to a denial” of the franchise. But as cases like *Berg* and *Applewhite II* make clear, voting rules or practices that “affect” or “infringe upon” the right to vote must all be consistent with the Free and Equal Elections Clause’s basic requirements. *See infra*, 28-29. Intervenor-Appellants’ argument continues to repeat a partial quote from *Winston* (R0065-69), but misleadingly omits critical language that the Clause extends to restrictions that “effectively” deny the right to vote **or** “deny the franchise itself” **or** “subvert[]” that right. *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523). Here, enforcement of the date provision actually **and** effectively denies voters the right to have their ballots included—or at least subverts the right. *See B-PEP*, 2024 WL 4002321 at *36.¹⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: October 14, 2024

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CERTIFICATION OF WORD COUNT

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

Dated: October 14, 2024

/s/ Stephen A. Loney
Stephen A. Loney

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CERTIFICATION OF COMPLIANCE

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

Dated: October 14, 2024

/s/ Stephen A. Loney
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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY,
PENNSYLVANIA**

BRIAN T. BAXTER
2401 Pennsylvania Ave.
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and

SUSAN T. KINNIRY
859 N. Stillman St.
Philadelphia, PA 19130

Petitioners,

v.

PHILADELPHIA BOARD OF ELECTIONS
City Hall, 1400 JFK Blvd., Rm 142
Philadelphia, PA 19107

Respondents.

CIVIL DIVISION

No. _____

ELECTION APPEAL

PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

R0001

Case ID: 240902481
Control No.: 24094566



Petitioners Brian T. Baxter and Susan T. Kinniry, qualified registered electors of Philadelphia County, by and through their undersigned counsel, appeal pursuant to 25 P.S. § 3157 from the decision of the Philadelphia Board of Elections (“Board”) on September 21, 2024, to not count their mail-in ballots in the September 17, 2024 Special Election, and aver as follows:¹

INTRODUCTION

1. Voting is the cornerstone of our democracy and the fundamental right upon which all our civil liberties rest. In Pennsylvania, the right to vote and have that vote count is enshrined and protected by the Free and Equal Elections Clause in the Pennsylvania Constitution, which provides that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

2. This appeal concerns the decision of the Board following the September 17, 2024 Special Election for State House Districts 195 and 201 to not count mail-in ballots because of a missing handwritten date on the outside declaration envelope. The Board set aside and did not count Petitioners’ mail-in ballots because both Petitioners inadvertently forgot to handwrite a date on the declaration envelope. 67 other ballots were also not counted because the voter either omitted the date or wrote a date that was deemed “incorrect” on the declaration envelope.

3. Since 2022, if a voter fails to handwrite the date on the outer declaration envelope of their mail ballot or writes a date that is deemed “incorrect,” their mail ballot is not counted.

See Ball v. Chapman, 289 A.3d 1 (Pa. 2023).

¹ As Petitioners do not seek a recount or recanvass under §§ 1701, 1702, or 1703 of the Election Code, and the race in their election districts is not close enough for the affected voters’ mail-in ballots to potentially impact any outcomes, there is no need for the Court or the Commissioners to suspend certification of the election results in the special election. Rather, Petitioners seek an order declaring the Commissioners’ decision unlawful under the Pennsylvania Constitution and requiring the Commissioners to amend the final vote count to include the mail-in ballots of Petitioners. That said, given the upcoming November general election, time is of the essence to achieve clarity of the law before then.

4. However, in recent prior lawsuits multiple courts have found that the voter-written date is meaningless, unnecessary to establish voter eligibility or timely ballot receipt. *See, e.g., Pa. State Conf. of NAACP v. Schmidt* (“NAACP P”), 703 F. Supp. 3d 632, 668 (W.D. Pa. 2023), *rev’d on other grounds*, 97 F.4th 120 (3d Cir. 2024) (“County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return Envelope for any purpose related to determining a voter’s age..., citizenship..., county or duration of residence..., felony status..., or timeliness of receipt...” (internal record citations omitted)); *Pa. State Conf. of NAACP Branches v. Schmidt* (“NAACP IP”), 97 F.4th 120, 125, 127, 129 (3d Cir. 2024)(agreeing the handwritten date plays no role in determining a ballot’s timeliness or voter qualifications or in detecting fraud); *see also, e.g., Black Political Empowerment Project, et al. v. Schmidt, et al.* (“B-PEP”), No. 283 M.D. 2024, 2024 WL 4002321 at *32 (Pa. Cmwlth. Aug. 30, 2024), *vacated on other grounds*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud.”).

5. Accordingly, the refusal to count timely mail ballots submitted by otherwise eligible voters because of an inconsequential date error violates the fundamental right to vote enshrined in the Free and Equal Elections Clause. *See B-PEP*, 2024 WL 4002321, at *32-33; *see also Ball*, 289 A.3d at 27 n.156 (Pa. 2023) (plurality opinion) (acknowledging that the “failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth”).

6. Enforcement of this envelope-date provision disenfranchised at least 10,000 voters in the 2022 general election and thousands more voters in the 2024 Presidential primary whose ballots were timely received by Election Day. In the September 17, 2024 Special Election—a low turnout election involving only two seats in the Pennsylvania House of Representatives—the Board disenfranchised 23 mail-in voters for failing to include the date on the outer declaration envelope and 46 mail-in voters for writing a date that was deemed to be “incorrect.”

7. Although previous cases addressed whether federal or state statutory law required enforcement of the handwritten date, the only case to assess whether enforcement of the meaningless envelope-date requirement violates the Free and Equal Elections Clause found that it did. *B-PEP*, 2024 WL 4002321, at *32-33. But that decision was recently vacated on procedural grounds. *See B-PEP*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (without reaching the merits, vacating lower court opinion on procedural grounds, holding that the Commonwealth Court lacked subject matter jurisdiction).

8. The Board’s decision to refuse to count Petitioners’ votes violates art.1, §5 of the Pennsylvania Constitution.

9. Petitioners are aggrieved by the Board’s decision and hereby appeal from it pursuant to 25 P.S. § 3157(a).

JURISDICTION

10. The Court has jurisdiction over this statutory appeal pursuant to 25 P.S. § 3157(a).

PARTIES

11. Petitioner Brian T. Baxter is an 81-year-old qualified registered voter who lives in Philadelphia. Mr. Baxter submitted a mail-in ballot ahead of the September 17, 2024 Special

Election for State Representative in the 195th state house district. *See* Declaration of Brian T. Baxter ¶¶ 1-3, 9 (“Baxter Decl.”).²

12. Mr. Baxter has a master’s degree in public policy and has had a long professional career in politics and public sector governance. *Id.*, ¶ 5.

13. Mr. Baxter votes in every election because voting is important to him and he believes it is a citizen’s responsibility to participate in shaping the policies under which we live. *Id.*, ¶¶ 6-7.

14. Mr. Baxter votes by mail because he appreciates the ability to take his time and research the candidates while deciding for whom to vote. He has been voting by mail for two years. *Id.*, ¶ 8.

15. About one month before the September 2024 Special Election, Mr. Baxter received a mail-in ballot from the Board. *Id.*, ¶ 9. He marked it, inserted it into the secrecy envelope and the outer return envelope. He thought he had filled out everything on the declaration envelope correctly when he submitted it. *Id.*, ¶ 10.

16. However, Mr. Baxter neglected to include a date on the outer declaration envelope when completing his mail-in ballot packet.³

17. As a consequence, the Board set aside and did not count his mail ballot in the September 2024 Special Election.

18. Petitioner Susan T. Kinniry is a 38-year-old qualified registered voter in Philadelphia who submitted a mail-in ballot in the September 17, 2024 Special Election for State

² A true and correct copy of Brian T. Baxter’s Declaration is attached hereto as Exhibit 1.

³ See Philadelphia Board of Elections, *List of Flawed Ballots, 2024 Special Election* (Sept. 15, 2024), https://vote.phila.gov/media/2024_Special_Election_Deficiency_List.pdf.

Representative in the 195th state house district. *See* Declaration of Susan T. Kinniry ¶¶ 1-3, 9 (“Kinniry Decl.”).⁴

19. Ms. Kinniry tries to vote in every election and especially in off-cycle, low turnout elections to show that voters are paying attention to what local officials are doing. Kinniry Decl. ¶¶ 6, 15.

20. Ms. Kinniry, who is a regular mail voter, received a mail-in ballot from the Board a few weeks before the September 2024 Special Election. *Id.*, ¶¶ 8-9. She marked her ballot and inserted it into the secrecy envelope and thought she properly filled out the declaration after she inserted everything into the return envelope. *Id.*, ¶ 10.

21. Ms. Kinniry received an email from the Board on August 27, 2024, informing her that she did not date her ballot return envelope and that her vote would not be counted. *Id.*, ¶ 12.

22. As a consequence, the Board set aside and did not count her mail ballot in the Special Election.

23. Respondent the Philadelphia Board of Elections is responsible for overseeing the conduct of all elections in Philadelphia County.⁵ Among other duties, County Boards are responsible for:

- a. Reviewing and processing applications for absentee and mail ballots.⁶ 25 P.S. §§ 3146.2b, 3150.12b.
- b. Confirming an absentee applicant’s qualifications by verifying their proof of identification and comparing the information on the application with information

⁴ A true and correct copy of Susan Kinniry’s Declaration is attached hereto as Exhibit 2.

⁵ The Board is composed of the three Philadelphia City Commissioners (the “Commissioners”), who are a bipartisan group of elected officials who oversee elections and voter registration in Philadelphia. Pursuant to the Philadelphia Home Rule Charter, the Commissioners serve as the county board of elections for Philadelphia County as provided in the Election Code. 25 P.S. § 2641.

⁶ The rules governing mail and absentee ballot processing are identical. For ease of reference, Petitioners will refer to both absentee and mail ballots as “mail ballots.”

contained in the voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4).

- c. Sending a mail-ballot package that contains a ballot, a “secrecy envelope” marked with the words “Official Election Ballot,” and the pre-addressed outer return envelope, on which a voter declaration form is printed (the “Return Envelope”). *Id.* §§ 3146.6(a), 3150.16(a).
- d. Maintaining poll books that track which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).
- e. Upon return of a mail ballot, stamping the Return Envelope with the date of receipt to confirm its timeliness.⁷
- f. Logging returned mail ballots in the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system, the voter registration system. *Id.*
- g. Keeping returned mail ballots in sealed or locked containers until they are canvassed by the County Board. 25 P.S. § 3146.8(a).
- h. Pre-canvassing and canvassing mail ballots, including examining the voter declaration. *Id.* § 3146.8(g).
- i. Conducting a formal hearing to hear challenges as to all challenged absentee ballot applications and challenged absentee ballots. *Id.* § 3146.8(g)(5).

⁷ See Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2–3 (April 3, 2023), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf>.

DECISION OF THE BOARD AT ISSUE

24. Pursuant to 25 P.S. § 3154(f), the Board met in a public meeting on Saturday, September 21, 2024 to review the mail ballots from the Special Election.⁸ Following a 2-1 vote, the Board orally announced its decision to refuse to count 69 ballots—including Petitioners' ballots—with a missing or incorrect date.⁹

25. Petitioners appeal from that decision.

FACTUAL BACKGROUND

A. Voting by Mail in Pennsylvania

26. Pennsylvania has long provided absentee ballot options for voters who cannot attend a polling place on Election Day. *See* 25 P.S. §§ 3146.1–3146.9. In 2019, Pennsylvania enacted new mail-in voting provisions, extending the vote-by-mail option to *all* registered, eligible voters. Act of Oct. 31, 2019, P.L. 552, No. 77, § 8.

27. A voter seeking to vote by mail must complete an application that includes their name, address, and proof of identification and send it to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. Such proof of identification must include a Pennsylvania driver's license number, or non-driver identification number, if the voter has one. If the voter does not have a PennDOT-issued identification, they must provide the last four digits of the voter's social security number. 25 P.S. § 2602(z.5)(3). As part of the application process, voters provide all the information necessary for county boards of elections to verify that they are qualified to vote in Pennsylvania, namely, that they are at least 18 years old, have been a U.S. citizen for at least one

⁸ *See* Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting* (Sept. 21, 2024), https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf.

⁹ *See* Philadelphia Board of Elections, *Livestream Meetings: Return of Board Meeting on 9-21-2024*, <https://vote.phila.gov/resources-data/commissioner-meetings/livestream-meetings/>.

month, have resided in the election district for at least 30 days, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301.

28. After the application is submitted, the county board of elections confirms applicants' qualifications by verifying their proof of identification and comparing the information on the application with information contained in a voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4). The county board's determinations on that score are conclusive as to voter eligibility unless challenged prior to Election Day. *Id.*

29. Once the county board verifies the voter's identity and eligibility, it sends a mail-ballot package that contains a ballot, a "secrecy envelope" marked with the words "Official Election Ballot," and the pre-addressed outer return envelope, on which a voter declaration form is printed (the "Return Envelope"). *Id.* §§ 3146.6(a), 3150.16(a). Poll books kept by the county show which voters have requested mail ballots and which have returned them. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).

30. At "any time" after receiving their mail-ballot package, the voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a).

31. The Election Code provides that the voter "shall...fill out, date and sign the declaration" printed on the outer envelope used to return their mail ballots. *See* 25 P.S. §§ 3146.6(a), 3150.16(a).

32. The voter delivers the ballot, in the requisite envelopes, by mail or in person, or by other designated method, to their county board of elections.

33. A mail ballot is timely so long as the county board of elections receives it by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt of a mail ballot, county boards

of elections stamp the Return Envelope with the date of receipt to confirm its timeliness and log it in the Department of State's Statewide Uniform Registry of Electors ("SURE") system, the statewide database counties use to, among other purposes, generate poll books.¹⁰

34. Timely mail-in ballots are then verified consistent with procedures set forth in 25 P.S. § 3146.8(g)(3). Any ballot that has been so verified by the county board of elections and has not been challenged is counted and included with the election results. *Id.* § 3146.8(d), (g)(4).

B. The Date Provision Serves No Purpose

35. Pennsylvania's adoption of mail voting has been a boon for voter participation in the Commonwealth. For example, in 2020, 2.7 million Pennsylvanians voted by mail ballot.¹¹

36. In the 2024 primary election, more than 4,000 mail-in ballots across Pennsylvania were marked as canceled in the SURE system due to a missing or incorrect handwritten date. *See* Declaration of Ariel Shapell at ¶ 12(b).¹²

37. The enforcement of the dating provision results in the arbitrary and baseless rejection of thousands of timely ballots. *See NAACP I*, 703 F.Supp.3d at 680 (finding the record "replete with evidence that the county boards' application of the [date requirement] in the November 2022 general election created inconsistencies across the Commonwealth in the way 'correctly dated' and 'incorrectly dated' ballots were rejected or counted by different counties").

38. This is not new. In the 2022 election, over 10,000 timely absentee and mail-in ballots were rejected because of the dating provision. *See NAACP I*, 703 F. Supp.3d at 668.

¹⁰ Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2-3 (Apr. 3, 2023), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf>.

¹¹ Pa. Dep't of State, *Report on the 2020 General Election* at 9 (May 14, 2021), <https://www.dos.pa.gov/VotingElections/Documents/2020-General-Election-Report.pdf>.

¹² A true and correct copy of the Declaration of Ariel Shapell is attached hereto as Exhibit 3.

39. The date written on the envelope serves no purpose. In particular, it is not used to establish whether the mail ballot was submitted on time. Indeed, lawsuits in both state and federal court raising statutory challenges have conclusively demonstrated that the date is meaningless, necessary neither to establish voter eligibility nor timely ballot receipt. *See, e.g., NAACP II*, 97 F.4th at 129 (“Nor is [the handwritten date] used to determine the ballot’s timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties’ timestamping and scanning procedures serve to verify that. Indeed, not one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 elections.”); *see also NAACP I*, 703 F. Supp.3d at 679 (“Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board.”); *B-PEP*, 2024 WL 4002321, at *32 (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud.”).¹³

40. A voter whose mail ballot was timely received could have signed the voter declaration form *only* in between the date their county board sent the mail-ballot packages and the Election-Day deadline. Ballots received by county boards *after* 8 p.m. on Election Day are not counted regardless of the handwritten envelope date. *See NAACP I*, 703 F.Supp.3d at 679 (“Irrespective of any date written on the outer Return Envelope’s voter declaration, if a county board received and date-stamped a . . . mail ballot before 8:00 p.m. on Election Day, the

¹³ The courts’ findings in *NAACP I* and *NAACP II* that this voter-written date serves no purpose, plays no role in establishing a ballot’s timeliness or voter eligibility and is not used to prevent fraud are based on a complete record including discovery from all 67 county boards of elections, including Philadelphia.

ballot was deemed timely received...[I]f the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope”), *rev’d on other grounds, NAACP II*, 97 F.4th 120 (3d Cir. 2024).

C. The Board Timely Received Petitioners’ Mail-In Ballots.

41. Petitioners are qualified voters who are registered to vote in Pennsylvania.

42. Petitioners validly applied for, received, and timely submitted their mail-in ballots prior to the Special Election on September 17, 2024.

43. Before the day of the Special Election and upon receipt of the mail-in ballots at issue here, the election staff reviewed the envelopes and determined that Petitioners had made an error that would prevent the Board from counting them under Pennsylvania law. Specifically, both Petitioners forgot to handwrite a date on the mail ballot declaration envelope.

44. On September 9, 2024, the Board posted a list of mail-in ballots on its website that had been received ahead of the 2024 Special Election that were “administratively determined to be potentially flawed.”¹⁴ The public notice stated that “[t]hese ballot submissions have the possibility of **NOT** being counted” and provided information about requesting a replacement ballot or casting a provisional ballot.¹⁵ Petitioners’ names appeared on this list of defective mail-in ballots received prior to Election Day, but they did not correct the error on their mail ballot envelopes before 8 p.m. on the day of the Special Election.

¹⁴ See Philadelphia Board of Elections, *2024 Special Election: Unverifiable Identification, Undeliverable and/or Potentially Flawed Ballots* (Sept. 9, 2024), <https://vote.phila.gov/news/2024/09/09/2024-special-election-unverifiable-identification-undeliverable-and-or-potentially-flawed-ballots/>.

¹⁵ *Id.*

D. The Board Voted to Not Count Petitioners' Mail-in Ballots in the 2024 Special Election

45. The Board convened at a public meeting on Saturday, September 21, 2024 to adjudicate mail-in ballots and make “sufficiency determinations” about mail ballot packets with flaws.¹⁶

46. The Board was informed that 23 mail-in ballots had been segregated due to a “missing date.” Commissioner Sabir moved that “this Board not accept ballots with a missing date.” The motion was seconded by Commissioner Bluestein.¹⁷

47. Commissioner Deeley responded to the motion by reading from the Commonwealth Court’s August 30, 2024 opinion in which the Board was named as a Respondent including that:

The fundamental right to vote guaranteed by our Constitution is at issue. For this reason, a strict scrutiny standard of review applies to the dating provisions’ restriction on that right. Under this standard of review, the government bears the heavy burden of proving that the law in question is narrowly tailored to serve a compelling government interest and where the governmental fails to satisfy its burden, the law or its application is unconstitutional. As has been determined in prior litigation, the date on the outer mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud. Therefore, the dating provisions serve no compelling government interest. The refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the Free and Equal Elections Clause.

48. Commissioner Deeley observed that the Commonwealth’s order was vacated “on technical grounds” by the Pennsylvania Supreme Court, which “did not rule on the merits of the

¹⁶ See Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting* (Sept. 21, 2024), https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf.

¹⁷ See Philadelphia Board of Elections, *Livestream Meetings: Return of Board Meeting on 9-21-2024*, <https://vote.phila.gov/resources-data/commissioner-meetings/livestream-meetings/>. The allegations in paragraphs 47-54, *infra*, recount the proceedings as recorded in this livestream.

constitutional arguments.” Commissioner Deeley concluded, in light of the Commonwealth Court’s ruling, that “not counting these ballots because of meaningless and inconsequential errors that do not affect determinations of the timeliness of a ballot, a voter’s eligibility to vote, or the prevention of fraud, would be a violation of the Pennsylvania Constitution.”

49. Commissioner Deeley further explained that as Commissioner she is legally required to swear an oath to uphold the Pennsylvania Constitution at the beginning of each term. “The Pennsylvania Constitution is one of the documents that we swear to support, obey, and defend. Therefore, I believe...that we should count these ballots.”

50. Commissioner Bluestein responded to the remarks by stating, “While I agree in principle with Vice-Chair Deeley that these ballots *should* count, the Pennsylvania Supreme Court vacated the Commonwealth Court ruling and we have an obligation to follow the law as it currently stands. Unfortunately, that means that we are not able to count these ballots in my opinion.”

51. The Board voted 2-1 to not count mail-in ballots that arrived in undated declaration envelopes.

52. The Board was then informed that 46 ballots had arrived in envelopes that were “incorrectly dated.” The Board moved to not count “incorrectly dated” ballots, and Commissioner Deeley again noted her objection in light of the *B-PEP* ruling, stating “I believe the Free and Equal Election Clause of the Pennsylvania Constitution requires us to count these ballots.”

53. Commissioner Sabir responded that he “agree[d] with the sentiments” expressed by his colleague.

54. The Board voted 2-1 to not count mail-in ballots that arrived in “incorrectly dated” declaration envelopes. Thus, Petitioners’ votes were not counted in the 2024 Special Election.

GROUND FOR APPEAL

55. The Board’s decision to not count Petitioners’ mail ballots violated Petitioners’ fundamental right to vote under the Free and Equal Elections Clause.

56. In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. The Clause means not only that voters must have an equal opportunity to participate in elections, but also that: “each voter under the law has the right to cast [their] ballot and have it honestly counted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

57. Under this guarantee “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Likewise, the Pennsylvania Constitution forbids the imposition of rules applicable to the right to vote when such regulation denies the franchise or subverts the right to vote. *Winston*, 91 A. at 523.

58. The Pennsylvania Supreme Court has repeatedly held that the right to vote guaranteed by the Free and Equal Elections Clause is fundamental. *See, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) (employing a construction of the Election Code that “favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate”); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (observing

that “the right to vote is fundamental and ‘pervasive of other basic civil and political rights’”) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)).

59. Strict scrutiny applies to any restriction on this fundamental right. *See, e.g., Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth. 1998), *aff’d*, 713 A.2d 1106 (Pa. 1998) (“It is well settled that laws which affect a fundamental right, such as the right to vote..., are subject to strict scrutiny”); *Applewhite v. Commonwealth* (“*Applewhite II*”), No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Cmwlth. Jan. 17, 2014) (laws that “infringe[] upon qualified electors’ right to vote” are analyzed “under strict scrutiny.”); *James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984) (“[W]here a...fundamental right has been burdened, another standard of review is applied: that of strict scrutiny.”).

60. Under strict scrutiny, the party defending the challenged action must prove that it serves a compelling government interest. *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also, e.g., In re Nader*, 858 A.2d 1167, 1180 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016) (“[W]here a precious freedom such as voting is involved, a compelling state interest must be demonstrated”).

61. The Board cannot demonstrate a compelling interest that justifies its complete disenfranchisement of voters where the handwritten date requirement on mail ballot envelopes serves absolutely no purpose in determining timeliness of receipt or voter qualifications. The Board acknowledged at the September 21 hearing that the date requirement serves no purpose.

62. The only court to have tested the envelope-date provisions in 25 P.S. §§ 3146.6(a), 3150.16(a) against the guarantee of the right to vote under Article I, § 5 concluded that the envelope-date provisions “serve no compelling government interest” and that the “refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise

eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the free and equal elections clause.” *B-PEP*, 2024 WL 4002321, at *1.

63. The Board’s application of the Election Code’s envelope dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject Petitioners’ timely mail ballots based solely on the inadvertent failure to add a meaningless, superfluous handwritten date next to their signature on the mail ballot Return Envelope is an unconstitutional interference with the exercise of the right to suffrage in violation of the Free and Equal Elections Clause.

WHEREFORE, Petitioners respectfully request that this Honorable Court enter an order reversing the decision of the Philadelphia Board of Elections, declaring that the Pennsylvania Constitution requires the counting of Petitioners’ ballots, directing the Board to count the mail ballots cast by Petitioners in the September 17, 2024 Special Election, and enter such other and further relief as provided by the Pennsylvania Election Code or as this Court deems just and appropriate.

Respectfully submitted,

Dated: September 23, 2024

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**Pro hac vice applications*
to be filed

CERTIFICATE OF COMPLIANCE

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

Dated: September 23, 2024

/s/ Claudia De Palma
Claudia De Palma
Counsel for Petitioners

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VERIFICATION

I, BRIAN T. BAXTER, hereby state:

1. The statements made in the foregoing *Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Brian T. Baxter

Dated: September 23, 2024

VERIFICATION

I, Susan T. Kinniry, hereby state:

1. The statements made in the foregoing *Petition for Review in the Nature of a Statutory Appeal* are true and correct to the best of my own personal knowledge, information, and belief; and
2. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



A handwritten signature in black ink, appearing to read "Susan T. Kinniry", is written over a horizontal line.

Dated: September 23rd, 2024

EXHIBIT

1

RETRIEVED FROM DEMOCRACYDOCKET.COM

DECLARATION OF BRIAN T. BAXTER

I, Brian T. Baxter, hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 81 years old and am otherwise competent to testify.

3. I live in Philadelphia, Pennsylvania.

4. I have lived in Philadelphia for fourteen years. I lived in Harrisburg in the 1980s and later resided in Cherry Hill, New Jersey before moving to Philadelphia. I am happily married to my wife Ilene and a proud father.

5. I am presently retired. For most of my career, I worked for elected officials, both Republicans and Democrats, at the state and local level in Pennsylvania, New Jersey, and New York. I have a master's degree in public policy from Princeton University, and I am very interested in politics and elections. Some of my professional roles include serving as city administrator of Trenton, New Jersey for nine years, working for Elizabeth Holtzman when she was the Comptroller of New York City, and working for Governor Christine Todd Whitman of New Jersey. I gained experience with political campaigns in the City of Philadelphia by supporting Joseph Rock's run for City Controller in 1989. I most recently worked as a lobbyist at S.R. Wojdak & Associates, the largest lobbying firm in the state. I continue to stay involved with political work by volunteering on the 35 Doors Project for Indivisible Pennsylvania.

6. I am a registered voter in Philadelphia. I vote in every election,

including primary and general elections.

7. Voting is very important to me and I believe it is the responsibility of every citizen to vote. Voting is a critical way to participate in shaping the policies under which we live.

8. I started voting by mail about two years ago. I prefer to vote by mail because it provides time to do internet research and gather information about the candidates and issues on the ballots before I submit my vote. I believe that voting around the kitchen table results in smarter voting because I can review the ballot in advance. I do not want to walk into the voting booth without the proper amount of information and vote on a ballot that I am seeing for the first time.

9. I voted by mail in the Philadelphia's Special Election this year for State Representative in the 195th District. About one month before the September 2024 special election, I received a mail-in ballot from the Philadelphia City Commissioners.

10. After I received my ballot, I marked it, inserted it into the secrecy envelope and the outer return envelope. I thought I had filled out everything on the ballot correctly when I submitted it. I was aware that there were lawsuits and efforts in the state legislature to change the envelope dating requirement and I tried to follow all the directions so that my vote would be counted.

11. As far as I know, I have never made a mistake that disqualified my ballot in prior elections when I voted by mail. I am getting older and more

forgetful, which may have contributed to my mistake when completing the mail-in ballot envelope.

12. I believe that my vote should be counted. After reading dozens of articles about this issue, I am not aware of any rationale for why the date is helpful or necessary. The date on the envelope is not important because it is the date that the ballot arrives in the election office that determines whether the vote is valid. I tried to comply with the mail-in ballot rules, but this bureaucratic stumbling block will prevent my vote from counting.

13. I returned my mail-in ballot on time and I believe that denying a citizen's vote because they didn't include the date on the mail-in ballot envelope is taking away that person's vote for no good reason.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 22nd of September, 2024 in Philadelphia, Pennsylvania.

A handwritten signature in black ink that reads "Brian T. Baxter". The signature is written in a cursive style and is positioned above a horizontal line.

Brian T. Baxter

EXHIBIT

2

RETRIEVED FROM DEMOCRACYDOCKET.COM

DECLARATION OF SUSAN T. KINNIRY

I, Susan T. Kinniry, hereby declare as follows:

1. I have personal knowledge of the matters in this declaration and this is what I would testify to if called as a witness in Court.

2. I am 38 years old and am otherwise competent to testify.

3. I am a resident of Philadelphia, Pennsylvania.

4. I grew up in Jenkintown, Pennsylvania. I attended high school and law school in Philadelphia.

5. I have worked as an attorney for the Social Security Administration since 2017. My work initially focused on the disability program and presently involves labor and employee relations issues.

6. I have been a registered voter in Philadelphia since around 2018. I try to vote in every primary and general election.

7. Voting is very important to me because it is one of the most direct ways that citizens can influence what kind of government we have and who represents our interests. I try not to pass up that opportunity to participate in governance.

8. I started voting by mail in Philadelphia in 2019. I prefer to vote by mail because it is more convenient than voting in person, and because I like having time to review the ballot at home before casting my vote.

9. I voted by mail this year in Philadelphia's Special Election for State Representative in the 195th District. I made an annual request for mail-in

ballots and received a mail-in ballot from the Philadelphia City Commissioners a few weeks before the September 2024 special election.

10. After I received my ballot, I marked it, inserted it into the secrecy envelope and the outer return envelope. I signed the declaration on the outer envelope. I thought I had filled out the outer envelope correctly when I submitted it. I was aware that elections offices in Pennsylvania cannot count ballots for immaterial reasons, so I am embarrassed that I forgot to include the date.

11. As far as I know, I have never made any mistakes on prior mail-in ballots. I do not recall ever receiving an email stating that my ballot was invalid before this September 2024 special election.

12. After I returned my ballot, I received an email from the Pennsylvania Department of State on August 27, informing me that I did not date my ballot return envelope and that my vote would not be counted if I didn't take additional steps to fix this mistake. A true and correct copy of the email dated August 27 is attached hereto as Exhibit A.

13. I was annoyed at myself when I learned that my ballot would not be counted because I forgot the date. I also thought that if I made this mistake, despite my experience with technical, legal requirements, many others must make the same mistake.

14. I did not attempt to fix my ballot because shortly after receiving the email stating that I forgot to date my ballot return envelope, I read in the news

about a recent Commonwealth Court decision finding that it was unconstitutional to reject ballots that do not comply with the date requirement. I thought that the Court had reached the right result.

15. I wish that my vote had been counted in this election. I think it is important to participate in off-cycle elections to show that voters are paying attention to what local officials are doing. Often voter turnout is low in these kinds of special elections, so I made an intentional effort to submit my ballot.

16. I believe that voting rules should encourage more participation, not less. The envelope dating requirement seems like an unnecessary stumbling block that will result in fewer ballots being counted. That is not the result that is in everyone's best interest.

I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed this 22nd of September, 2024 in Philadelphia, Pennsylvania.

A handwritten signature in black ink, appearing to read 'Susan T. Kinniry', written over a horizontal line.

Susan T. Kinniry

Declaration Exhibit A

RETRIEVED FROM DEMOCRACYDOCKET.COM

From: <RA-voterregstatcert@state.pa.us>
Date: Tue, Aug 27, 2024, 4:58 PM
Subject: Your Ballot Status Has Changed – Check for Updates
To: <SUSANKINNIRY@gmail.com>

Dear SUSAN T KINNIRY,

After your ballot was received by PHILADELPHIA County, it received a new status.

Your ballot may not be counted because you did not date your ballot return envelope. If you receive this email on or before election day, you can go to your polling place on election day before 8 p.m. and request a provisional ballot.

You can get more information on your ballot's new status by going to <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

If you have questions or need more information after checking your ballot's status, please contact PHILADELPHIA County at (215) 686-VOTE.

Para leer esta información en español, vaya a <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx> .
要閱讀此資訊的中文版, 請造訪 <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>.

Thank you.

****Please do not reply to this email.****

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EXHIBIT

3

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**DECLARATION OF ARIEL SHAPELL
IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW**

1. I, Ariel Shapell, am an attorney at the American Civil Liberties Union of Pennsylvania (“ACLU-PA”) and have a background in data analytics.

2. I received a B.S.B.A. with majors in mathematics and finance from Washington University in St. Louis in 2011 and a J.D. from the University of Pennsylvania Carey Law School in 2021.

3. In 2014 and 2015, I served as the Director of Business Intelligence at Beatport LLC, a digital music and entertainment company, where I was responsible for organizing, analyzing, and reporting the company’s business data. In my role, I performed data analyses and visualizations and developed systems to extract, transform, and load data. I also supervised a team of three data scientists and analysts.

4. From 2015 until 2018, I served as the lead product manager at Postlight LLC, a technology consultancy. At Postlight LLC, I oversaw data analytics and digital product development projects for large entertainment, finance, and cultural institutions.

5. From 2019 through the present, I have worked as a volunteer, intern, and now legal fellow at the ACLU-PA. During my time with the ACLU-PA, I have conducted numerous analyses of large data sets for both litigation and advocacy.

6. During my time with the ACLU-PA, I have conducted numerous analyses of large data sets for both litigation and advocacy.

7. I have been asked by the ACLU-PA, Arnold & Porter Kaye Scholer LLP, and the Public Interest Law Center (collectively, “Petitioners’ Counsel” or “Counsel”) to apply my training and expertise to assess the number of mail-ballots that were coded as canceled or pending because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.”

8. I have been informed and understand that on August 21, 2023, ACLU-PA attorney Kate Steiker-Ginzberg received access from the Pennsylvania Department of State to the “Pennsylvania Statewide Mail-Ballot File,” which contains point-in-time public information about each mail-ballot application and mail-ballot recorded in Pennsylvania’s Statewide Uniform Registry of Electors (“SURE”) system.

9. Attorney Steiker-Ginzberg made two versions of the Pennsylvania Statewide Mail-Ballot File available to me: (1) a version of the file generated on November 17, 2023 based on Department of State data from the SURE system corresponding to mail-ballots submitted in the November 2023 municipal election, under the file name VR_SWMailBallot_External 20231117.TXT; and (2) a version of the file generated on May 14, 2024 based on Department of State data from the SURE system corresponding to mail-ballots received in the April 2024 Pennsylvania

presidential primary election, under the file name VR_SWMailBallot_External 20240514.TXT.

10. For the May 14, 2024 SURE file, I identified mail ballots that were coded as canceled or pending because the voter neglected to write the date on the outer envelope by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - NO DATE” or “PEND – NO DATE.” For the November 17, 2023 SURE file, I identified mail ballots that were coded as canceled because the voter neglected to write the date on the outer envelope by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - NO DATE.” No “PEND – NO DATE” “Ballot status reason” values were present in the November 17, 2023 SURE file.

11. Similarly, for the May 14, 2024 SURE file, I identified mail ballots that were coded as canceled or pending because the voter wrote a date that was deemed “incorrect” by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - INCORRECT DATE” or “PEND – INCORRECT DATE”. For the November 17, 2023 SURE file, I identified mail ballots that were coded as canceled because the voter wrote a date that was deemed “incorrect” by selecting the rows in the files where the “Ballot status reason” field was set to “CANC - INCORRECT DATE.” No “PEND – INCORRECT DATE” “Ballot status reason” values were present in the November 17, 2023 SURE file.

12. Based on the methodology described above, I determined that:
- a. As of November 17, 2023, **6,804 mail-ballots** submitted in the November 2023 municipal election had been coded in the SURE file as canceled because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.” Of that total, 4,849 ballots were coded as canceled because the voter neglected to write the date on the outer envelope, and 1,955 were coded as canceled because the voter wrote a date that was deemed “incorrect.”
 - b. As of May 14, 2024, **4,421 mail-ballots** submitted in the April 2024 Pennsylvania presidential primary election had been coded in the SURE file as canceled or pending because the voter neglected to write the date on the outer envelope or because the voter wrote a date that was deemed “incorrect.” Of that total, 1,216 ballots were coded as canceled or pending because the voter neglected to write the date on the outer envelope, and 3,205 were coded as canceled or pending because the voter wrote a date that was deemed “incorrect.”

13. My conclusions, and the bases for my conclusion, are presented in this declaration. My work on these matters is ongoing, and I may make necessary

revisions or additions to the conclusions in this declaration should new information become available or to respond to any opinions and analyses proffered by Respondents. I am prepared to testify on the conclusions in this declaration, as well as to provide any additional relevant background. I reserve the right to prepare additional exhibits to support any testimony.

The statements made in this Declaration are true and correct to the best of my knowledge, information, and belief. I understand that false statements made herein are subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.



Ariel Shapell

5/27/2024

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

BRIAN T. BAXTER and SUSAN T. KINNIRY,	:	SEPTEMBER TERM, 2024
	:	
	:	NO. 02481
Petitioners,	:	
	:	ELECTION MATTER
v.	:	
	:	Control No. 24094566
PHILADELPHIA BOARD OF ELECTIONS,	:	
	:	
	:	
Respondent.	:	

ORDER

AND NOW, this 26th day of September, 2024, upon consideration of petitioners' Petition for Review in the Nature of a Statutory Appeal pursuant to 25 P.S. § 3157 from respondent's decision on September 21, 2024, not to count petitioners' and sixty-seven other registered voters' mail-in ballots in the September 17, 2024 Special Election because the date written on the outer envelope was missing or incorrect, and after a hearing on the Petition at which petitioners and respondent stipulated to the operative facts underlying their dispute, it is **ORDERED** as follows:

1. The Petition is **GRANTED** and the September 21, 2024 decision of the Philadelphia Board of Elections in which it refused to count petitioners' and the sixty-seven other registered voters' mail-in ballots is **REVERSED**:
 - a. Based on the stipulation and representations made on the record as set forth in the transcript of the hearing held on September 25, 2024, which is attached hereto as an exhibit; and

- b. Because the refusal to count a ballot due to a voter's failure to "date . . . the declaration printed on [the outer] envelope" used to return his/her mail-in ballot, as directed in 25 P.S. §§ 3146.6(a) and 3150.16(a), violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania, which states that "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."
2. Respondent Board of Elections shall cause petitioners' and the sixty-seven other registered voters' date-disqualified mail-in ballots from the Special Election to be verified, counted if otherwise valid, and included in the results of the Special Election.

BY THE COURT:



CRUMLISH, III, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

BRIAN T. BAXTER and SUSAN T. KINNIRY,	:	SEPTEMBER TERM, 2024
	:	
	:	NO. 02481
Petitioners,	:	
	:	ELECTION MATTER
v.	:	
	:	Control No. 24095206
PHILADELPHIA BOARD OF ELECTIONS,	:	
	:	
Respondent,	:	
	:	
And	:	
	:	
REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,	:	
	:	
Intervenors.	:	

ORDER

AND NOW, this 27th day of September, 2024, upon consideration of Petition of Republican National Committee and Republican Party of Pennsylvania to Intervene in the above action (filed September 26, 2024 the day after the hearing in the above matter) and the Joint Emergency Motion of Petitioners Baxter and Kinniry and Respondent Philadelphia Board of Elections wherein the parties do not oppose the Petition to Intervene, it is hereby **ORDERED** that the Petition to Intervene is **GRANTED**¹ and the Emergency Motion for Reconsideration and Clarification is **MOOT**.

¹ Intervenor disadvantaged under the time constraints of review, the court when counsel appeared at the hearing after it had already concluded and, for the first time, advised the court it had *already* filed a Petition to Intervene. Counsel advised the court that although a Petition “had been filed”, before the hearing but, it could not provide the court any such any filing on the 25th.

It is further ordered and due consideration, that Intervenor's Motion to Dismiss is **DENIED**.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Crumlish, III, J.", written over a horizontal line.

Crumlish, III, J.

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The court deferred considering Intervenor's Petition in this matter and repeatedly consulted the docket for a filing, but no Petition was reflected on the record as of the time the court submitted its order and its order was entered on the docket at 4:38 p.m. on September 25. The docket thereafter revealed that Petitioner's filing was not made (despite representations to the court to the contrary) until 1:13 pm the following day after the hearing had been concluded. Petitioner's delay disadvantaged the court insofar as the court had no basis at the trial to review the Intervenor's Petition and issue a ruling until such filing was made of record and the delay further has caused inconvenience to the parties in obtaining finality in the court's ruling and necessitating further proceedings to dispose of the Petition to Intervene.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

BRIAN T. BAXTER and SUSAN T. KINNIRY,	:	SEPTEMBER TERM, 2024
	:	
	:	NO. 02481
Petitioners,	:	
	:	ELECTION MATTER
v.	:	
	:	COMMONWEALTH COURT APPEAL
PHILADELPHIA BOARD OF ELECTIONS,	:	
	:	Nos. 1305 CD 2024, 1309 CD 2024
	:	
Respondent,	:	
	:	
And	:	
	:	
REPUBLICAN NATIONAL COMMITTEE : and REPUBLICAN PARTY OF : PENNSYLVANIA, :	:	
	:	
Intervenors.	:	

OPFLD-Baxter Etal Vs Philadelphia Board Of Elections [ACF]



1925a ORDER

This matter came before the court on an appeal of the decision of the Philadelphia Board of Elections not to count the Petitioners’ ballots in the September 17, 2024 Special Election. The court scheduled a hearing on September 25, 2024, at which the parties appeared and had the opportunity to present their arguments. Intervenor appeared at the hearing and sought to make asserted arguments it had already filed intervene (although contrary to representations of intervenor’s counsel) nor was the purported Petition available for the court at the hearing to consider and in fact had not yet been filed). The court did allow the purported intervenor to address the court. The parties also presented the court with a stipulated consent order to allow forthwith certification of the pending special election results. After argument on the Petition, the court ruled that the Board’s decision to reject Petitioners’ ballot for failure to affix the date deprived

them of their Pennsylvania Constitutional right to vote. The court's reasons for its decision were fully stated on the record at the hearing and are reflected in the transcript. The following day, the court entered an order memorializing that decision.

Prior to the court's written order being entered, but day after the hearing a Petition to Intervene was docketed. The court then set the matter of the Petition down for a hearing. The parties filed a joint emergency¹ motion for reconsideration of the court's order scheduling the hearing in which they stated that they had "intended" the court's ruling to be a final appealable order and the scheduled hearing appeared to leave the case open for further proceedings. The parties stated clearly that they would not take a position on the Petition and therefore deemed it uncontested. Thereafter, the court granted the Petition in an order which represented a final order. The reasons for the court's granting of the Petition were that the Parties did not oppose intervention. The court also denied a motion to dismiss that was appended to the Petition but identified or asserted at the hearing and not properly filed as a motion with time for the court or the parties to consider at the hearing. The court's reasons for denying the motion to dismiss were also because it was untimely and procedurally defective.



JAMES C. CRUMLISH, III, J.

¹ The parties objected to the court's order on the grounds that it was intended that the court's ruling on the Petition was "intended to be" a final appealable order and the parties were seeking to invoke the 3-day appeal period in the Supreme Court's rule related to the November 5, 2024 election. The Petition order in question related to a special election that had already occurred and did not involve voting in the November 2024 election

First Judicial District of Pennsylvania

240902481

Brian Baxter And Susan Kinniry V. Board Of Election

*Hearing Volume 1
September 25, 2024*



*First Judicial District of Pennsylvania
100 South Broad Street, Second Floor
Philadelphia, PA 19110
(215) 683-8000 FAX:(215) 683-8005*

*Original File 0925.txt, 23 Pages
CRS Catalog ID: 24091089*

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BRIAN T. BAXTER and : SEPTEMBER TERM 2024
SUSAN T. KINNIRY :

Petitioners, : NO. 02481

V. :

PHILADELPHIA BOARD OF : ELECTION APPEAL
ELECTIONS :

Respondent. :

September 25, 2024

Courtroom 602

The Juanita Kidd Stout Center for Criminal Justice
Philadelphia, Pennsylvania

BEFORE: THE HONORABLE JAMES C. CRUMLISH, J.

PETITION

[1] APPEARANCES

[2] ---

[3] STEPHEN A. LONEY, ESQUIRE

[4] ACLU OF PENNSYLVANIA
P.O. Box 60173

[5] Philadelphia, PA 19102
Attorney for Petitioners

[6] ALISON L. STOHR, ESQUIRE

[7] CITY OF PHILADELPHIA LAW DEPARTMENT
[8] 1515 Arch street
Philadelphia, PA 19102

[9] Attorney for Respondent

[10]

Also present:

[11] LINDA A. KERNS, ESQUIRE

[12] LAW OFFICES OF LINDA A. KERNS LLC
1420 Locust Street, Suite 200

[13] Philadelphia, PA 19102

Attorney for Republican National Committee and
[14] Republican Party of Pennsylvania

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

[1] (Call to order at 2:52 PM.)

[2] **THE COURT:** Good afternoon. All parties
[3] and representatives are here?

[4] **MR. LONEY:** For petitioners, yes,
[5] Your Honor.

[6] **MS. STOHR:** Yes, Your Honor, for
[7] respondent.

[8] **THE COURT:** Good afternoon. My name is
[9] Judge Crumlish. I am the trial judge assigned
[10] to this matter by the president judge. I'm
[11] sitting in the matter captioned as Baxter and
[12] Kinniry v. the Philadelphia Board Of Elections.
[13] This is case number 240902481. It is further
[14] captioned as an election appeal.

[15] It's a petition for review in the nature
[16] of a statutory appeal, I assume under 3157 of
[17] the Code.

[18] **MR. LONEY:** Yes, Your Honor.

[19] **THE COURT:** Will counsel please identify
[20] themselves for the record and their clients.

[21] **MR. LONEY:** Your Honor, Stephen Loney of
[22] the ACLU on behalf of petitioners. To my right
[23] are Susan Kinniry and Brian Baxter.

[24] **THE COURT:** Thank you.

[25] **MS. STOHR:** Alison Stohr on behalf of the

[1] Board of Elections. I'm joined by counsel
[2] Ilana Eisenstein and David Josefovits.

[3] **THE COURT:** Welcome, everyone. You can be
[4] seated. It's not necessary for counsel to
[5] stand to address the Court.

[6] I have had an opportunity to review the
[7] petition, and I understand that it is a
[8] petition supported by affidavits. That
[9] precisely, I think, is grounded in Article 1
[10] Section 5 of the Pennsylvania Constitution.

[11] Do I have that right?

[12] **MR. LONEY:** Yes, Your Honor.

[13] **THE COURT:** Secondly, the city
[14] commissioners sitting as the Board of Elections
[15] for the City and County of Philadelphia ruled
[16] and determined as a matter of the exercise of
[17] their discretion to not count approximately 22
[18] ballots that have part of the exterior
[19] authentication, I'll call it, the date and
[20] signature -- or either?

[21] **MR. LONEY:** We're focused solely on the
[22] date issue, Your Honor.

[23] Our understanding is that 23 were set
[24] aside because they did not have a date on the
[25] outer envelope. An additional 46 were set

[1] aside for some issue with the date, the date
[2] being deemed to be the incorrect date.
[3] Both of our petitioners, I believe, are in
[4] the former category that there was no date
[5] included on the date line.
[6] **THE COURT:** So is it uncontested that
[7] these absentee ballots were timely received
[8] irrespective of the exterior date or signature?
[9] That's not in dispute?
[10] **MS. STOHR:** Correct, Your Honor. Mail-in
[11] and absentee, yes.
[12] **THE COURT:** Got it. Having said that,
[13] I've reviewed the petition and also the
[14] Commonwealth Court opinions, plural, both of
[15] them not reported, however.
[16] I've also reviewed the preceding case in
[17] the Supreme Court of Pennsylvania. Therefore,
[18] at least I am familiar with the legal arguments
[19] that I expect to be presented.
[20] Is there any dispute as to the verified
[21] affidavits of your clients?
[22] **MR. LONEY:** Not that we're aware of.
[23] **THE COURT:** They say what they say, or do
[24] we need live testimony?
[25] **MS. STOHR:** In our opinion, we do not need

[1] certainly welcome to join us at least at this
[2] juncture as a participant, as a witness as to
[3] the regularity of the proceeding.
[4] **MS. KERNS:** Just to be clear, Linda Kerns
[5] Supreme Court ID 84495 for the Republican
[6] National Committee and Republican Party of
[7] Pennsylvania.
[8] **THE COURT:** Understood. Thank you. You
[9] can be seated.
[10] Petitioner, you may address the Court.
[11] **MR. LONEY:** Thank you, Your Honor. I know
[12] you said we didn't have to stand.
[13] **THE COURT:** It's an old habit.
[14] **MR. LONEY:** Yes. Old habit, and I'm a
[15] little jittery just baseline.
[16] As Your Honor noted, our arguments are in
[17] the papers and the basis for our claims under
[18] the Pennsylvania Constitution. In some ways
[19] this is an issue of first impression, but in
[20] other ways an issue that has gone the
[21] petitioner's way every time it has come up.
[22] Your Honor noted the recent opinion from
[23] the Commonwealth Court in the Black Political
[24] Empowerment Project, et al. v. Schmidt case,
[25] which has been vacated.

[1] live testimony. We do not object to any of the
[2] facts.
[3] **THE COURT:** So for the record, those are
[4] stipulated facts. If called to testify, the
[5] affiants would testify as reflected in those
[6] affidavits. Fair enough?
[7] **MR. LONEY:** Yes, Your Honor.
[8] **THE COURT:** Okay. As a matter --
[9] **MS. KERNS:** Excuse me, Your Honor. If I
[10] may.
[11] **THE COURT:** Yes.
[12] **MS. KERNS:** My name is Linda Kerns. I
[13] represent the Republican National Committee.
[14] The order that I received said this hearing
[15] started at 3:00. I apologize if I got the
[16] wrong order.
[17] **THE COURT:** No need to apologize,
[18] Ms. Kerns. You haven't intervened. I haven't
[19] seen a docket --
[20] **MS. KERNS:** We did. We filed an
[21] intervention.
[22] **THE COURT:** When?
[23] **MS. KERNS:** About within the last hour.
[24] **THE COURT:** Okay. I haven't had a chance
[25] to review it or approve it, but you're

[1] So I acknowledge that, but that was a 4-1
[2] ruling from an en banc panel of the
[3] Commonwealth Court ruling that all of the legal
[4] claims we make in this case are valid, that it
[5] is a violation of the fundamental right to vote
[6] reflected in Article 1 Section 5 of the
[7] Pennsylvania Constitution to disqualify ballots
[8] based on a requirement or a rule or a provision
[9] in the Election Code that serves no purpose
[10] other than to disqualify.
[11] We put in record evidence from the
[12] petitioners indicating that these ballots we
[13] are talking about are timely received. There's
[14] no dispute of that.
[15] **THE COURT:** Were they qualified electors?
[16] **MR. LONEY:** Yes, Your Honor. There's no
[17] dispute of that.
[18] In fact, in order to get a mail ballot
[19] package, they have to apply for it, and the
[20] Board of Elections has to confirm their
[21] qualifications before they even get the mail
[22] ballot package. So there's no dispute they're
[23] qualified electors.
[24] There's no dispute that they returned the
[25] mail ballot package on time. They signed the

[1] outer envelope.
[2] And there's also no dispute that the
[3] envelopes themselves are not, broadly speaking,
[4] undated. The Board of Elections date-stamps
[5] the envelope as soon as they receive it. So
[6] the handwritten date by the voter is a
[7] superfluous requirement, and it's been
[8] acknowledged to be such by multiple state and
[9] federal courts.

[10] The only question here that is left by
[11] those prior opinions is whether that
[12] constitutes a violation of the free and equal
[13] elections clause. An en banc panel of the
[14] Commonwealth Court has held that it does.

[15] **THE COURT:** Unfortunately in an
[16] unpublished opinion which limits our ability.
[17] It may be persuasive in the Court's analysis of
[18] this Article 1 Section 5 challenge. But again,
[19] both opinions, Judge Wojcik's and also Judge
[20] Ceisler's, are unpublished.

[21] **MR. LONEY:** That's fair enough,
[22] Your Honor.

[23] I will note that the internal operating
[24] procedures of the Commonwealth Court dictate
[25] that in an election case they issue unpublished

[1] opinions, dispense with the potentially
[2] time-consuming step of getting full court
[3] approval to publish, and they go back to it
[4] later if one of the parties applies for
[5] publication.

[6] So the fact that it's --

[7] **THE COURT:** I'm somewhat familiar with the
[8] IOPs.

[9] **MR. LONEY:** Understood, Your Honor.

[10] **THE COURT:** I just want to be clear
[11] because I am going to be asked to render an
[12] opinion at least where I stand now.

[13] And I include in at least my preliminary
[14] analysis that Justice Wecht has expressed some
[15] appreciation of the timeliness of this kind of
[16] challenge. I am just facing that without
[17] ruling on the merits just yet.

[18] **MR. LONEY:** Understood, Your Honor. We
[19] appreciate that as well.

[20] I should, to be above-board, tell
[21] Your Honor that also within the last hour in
[22] response to the Supreme Court's acknowledgement
[23] that it's important to decide the underlying
[24] legal issue expeditiously, we did file a King's
[25] Bench -- the ACLU of Pennsylvania and our

[1] cocounsel, not petitioner sitting here.

[2] **THE COURT:** On behalf of your client?

[3] **MR. LONEY:** On behalf of different
[4] clients.

[5] **THE COURT:** Which was the invitation of
[6] Judge Wecht, as I understood it.

[7] **MR. LONEY:** That's how we read it as well.

[8] This one, unlike the BPEP case, does include
[9] all 67 counties' Boards of Elections and the
[10] secretaries as respondents.

[11] And we hope that the Pennsylvania Supreme
[12] Court will take up the underlying
[13] constitutional issue and put this to bed, but
[14] we're dealing with the calendar that we're
[15] dealing with.

[16] We've got two voters who in the meantime
[17] have voted in a special election that's kind of
[18] off the normal calendar, and they are before
[19] the Court asking that their votes be counted
[20] and that their constitutional rights not be
[21] violated.

[22] And we also have no guarantee the court --
[23] I tend to agree with Your Honor that at least
[24] three of the justices kind of invited this
[25] King's Bench as a next step, but that's not the

[1] majority. We don't know if they will take this
[2] up. We see no reason the Court shouldn't call
[3] balls and strikes on the constitutional claim
[4] in this case in the meantime.

[5] I don't think you will hear from any party
[6] that the critical facts are disputed as to the
[7] timeliness and eligibility of the petitioners
[8] and the other 67 or so folks whose mail ballots
[9] were rejected on similar grounds or that there
[10] is any fraud here, that anybody did anything
[11] other --

[12] **THE COURT:** There is no suggestion of
[13] anything other than the utmost good faith and
[14] regular proceedings under the Home Rule Act as
[15] well as the Constitution of Pennsylvania of the
[16] city commissioners who are making these
[17] decisions. Fair enough?

[18] **MR. LONEY:** Fair enough.

[19] I will also note for the record, because
[20] Your Honor did mention the commissioners voting
[21] not to count these votes, that it was a 2-1
[22] vote.

[23] There was a dissenting commissioner who
[24] made an impassioned plea to uphold their oath
[25] as commissioners. We frankly think that

[1] commissioner was correct on the law, but the
[2] other two felt bound by the current state of
[3] play in the appellate courts.

[4] **THE COURT:** And there it falls to me under
[5] the code to call the balls and strike in that
[6] kind of dispute.

[7] **MR. LONEY:** Yes, Your Honor. The only
[8] thing I'll say to that is that in analyzing
[9] whether this Court is bound by prior appellate
[10] rulings, prior rulings from the Pennsylvania
[11] Supreme Court simply did not address the issues
[12] presented here.

[13] **THE COURT:** I'm familiar with the
[14] general -- that's why I suggested at the
[15] beginning of the argument that this was a
[16] unique fair exercise challenge as distinguished
[17] from some others. Fair enough?

[18] **MS. STOHR:** Yes, I think that's fair.

[19] **THE COURT:** Again, I'm trying to create a
[20] full record of undisputed -- and I understand
[21] this is really a pure issue of law asserted in
[22] good faith by the parties.

[23] And I have to agree with counsel for the
[24] petitioner that there's been a degree of
[25] invitation from the appellate courts to advance

[1] this for a final disposition.

[2] Let me ask the solicitor. Is this a
[3] circumstance at least from a purely legal
[4] standpoint that I have a constitutional
[5] imperative of what the exercise of the
[6] franchise looks like in the case of ballots
[7] omitting some kind of information?

[8] **MS. STOHR:** Yes, Your Honor, statutory and
[9] the case law interpreting that statute and the
[10] conflict between those two.

[11] **THE COURT:** But there's something of a
[12] paucity in the Article 1 Section 5 argument and
[13] the statute conflict.

[14] **MS. STOHR:** Yes, that's correct.

[15] In the lead-up to the vote that was taken
[16] on Saturday on these undated and incorrectly
[17] dated mail-in and absentee ballots, from the
[18] beginning of the special election through the
[19] actual counting, we started where Ball v.
[20] Chapman was good law stating that boards should
[21] not count undated and incorrectly dated
[22] ballots.

[23] Then we had the BPEP decision by the
[24] Commonwealth Court. Then that was vacated by
[25] the Supreme Court. So the Board is doing its

[1] best to keep up with the state of the law.

[2] **THE COURT:** I think we've now stipulated
[3] that this the utmost good faith of the public
[4] officials who oversee our elections here in the
[5] City and County of Philadelphia.

[6] **MS. STOHR:** And I appreciate that,
[7] Your Honor. Yes. Attempting to, you know,
[8] take all these decisions into account and vote
[9] according to what they believe those decisions
[10] require them to do.

[11] **THE COURT:** There's no doubt in my mind,
[12] having said all that, about the bona fides of
[13] these public officials in discharging their
[14] duties.

[15] The statute also puts it in the hands of
[16] this Court to make a fair and just
[17] determination in applying the statutory
[18] mandates of the Election Code, to paraphrase
[19] slightly. I don't know if anyone would
[20] disagree with that. Somebody might, as
[21] advocates are entitled to do.

[22] So we have a stipulated record of the
[23] affiants. We have what I think is a pretty
[24] clearly focused body of recent appellate law
[25] that creates, at least right now for me, a

[1] degree of uncertainty. There is no per se
[2] controlling law on this conflict issue.

[3] I think that Judge Ceisler and
[4] Judge Wojcik wrote very persuasive opinions,
[5] albeit non-reported and not necessarily the
[6] subject of confirmation by the supremes.

[7] The relief petitioner seeks is to reverse
[8] the decision of the city commissioners sitting
[9] as the Board of Elections and to allow the
[10] counting of these ballots that have this
[11] outward alleged defect in the dating.

[12] Is that fair enough?

[13] **MR. LONEY:** That's fair, Your Honor.

[14] And I should note in case it hasn't been
[15] clear on the record that we do not request as
[16] part of our requested relief any slowdown or
[17] stopping of the process of certification of
[18] results.

[19] The number of ballots at issue is not
[20] enough to impact the outcome, especially in an
[21] unopposed race, or two unopposed races. So
[22] we've agreed with the respondents here, and I
[23] believe there's a proposed order consented to
[24] that's either been filed or is about to be
[25] filed that certification can go forward

[1] notwithstanding.
[2] **THE COURT:** It would be really helpful to
[3] me if someone could give that to me today.
[4] **MS. STOHR:** It was filed.
[5] **THE COURT:** Yes. But I was running from
[6] the security in City Hall to this fine
[7] environment.
[8] **MR. LONEY:** The finer point on the
[9] requested relief is to amend the final vote
[10] count to include these votes. And that's --
[11] **THE COURT:** The 2-1 vote of the
[12] commissioners?
[13] **MR. LONEY:** I'm sorry. To reverse the
[14] vote of the commissioners and canvass these
[15] unopened envelopes, count the ballots if they
[16] are countable inside those envelopes, and then
[17] if that happens after certification of the
[18] results, to update the official vote count.
[19] **THE COURT:** In effect, amend.
[20] But is there a stipulation that it is
[21] unlikely if not impossible that these would be
[22] outcome determinative in the special election?
[23] **MS. STOHR:** It is impossible, Your Honor.
[24] **THE COURT:** So that's an important fact.
[25] **MS. STOHR:** Yes.

[1] **THE COURT:** All right. Based upon the
[2] representations of counsel and the precision of
[3] the record I am presented with, I do believe
[4] the petitioners made out a claim for Article 1
[5] Section 5 relief under the Pennsylvania
[6] Constitution which always prevails over a
[7] conflict in the statutory language, if any.
[8] I am also presented with a joint consent
[9] order which will allow expedited review by the
[10] appellate courts if the parties so choose.
[11] Again, this is upon the undeniable and
[12] confirmatory position of the parties that this
[13] will in no way prejudice the ordinary and
[14] efficient process of the Board of Elections in
[15] processing their faithful duty to the Election
[16] Code.
[17] Fair enough to everyone?
[18] **MR. LONEY:** Yes, Your Honor.
[19] **MS. STOHR:** Yes, Your Honor.
[20] **THE COURT:** Have I missed anything?
[21] **MR. LONEY:** For petitioners, no.
[22] **THE COURT:** For respondent?
[23] **MS. STOHR:** No, Your Honor.
[24] **THE COURT:** Thank you very much for being
[25] here on very short notice. As you know, we

[1] have now an accelerated timetable for making
[2] these decisions. I'm sure you all have a lot
[3] of work ahead of you.
[4] **MR. LONEY:** Ahead, behind, and around us,
[5] yes.
[6] **THE COURT:** As my dad always said, this is
[7] an all-volunteer army.
[8] **MS. STOHR:** True, Your Honor.
[9] **THE COURT:** You're in faithful service to
[10] the public. Thank you, everyone. Have a nice
[11] evening.
[12] Ms. Kerns?
[13] **MS. KERNS:** Yes, Your Honor. I would just
[14] like to preserve the Republican National
[15] Committee's and the Republican Party of
[16] Pennsylvania's petition to intervene in this
[17] matter. I had contacted the petitioners, and
[18] they said they did not take a position on the
[19] matter. The City hadn't responded yet, which
[20] I'm sure through no fault --
[21] **THE COURT:** Nor have I.
[22] **MS. KERNS:** Right.
[23] **THE COURT:** Succinctly stated, you oppose
[24] the petition that's before me today? Your
[25] client does?

[1] **MS. KERNS:** Yes, Your Honor.
[2] **THE COURT:** Okay. You understand the
[3] parties have stipulated to elemental facts.
[4] This is a real true issue of law for the Court.
[5] Do you understand that that is not with
[6] prejudice toward the Republican Party of
[7] Pennsylvania asserting any rights in the
[8] appellate process?
[9] **MS. KERNS:** Yes, Your Honor.
[10] **THE COURT:** Fair enough to everyone?
[11] **MS. KERNS:** I don't know what facts were
[12] stipulated to. That would be --
[13] **THE COURT:** Do you have the petition
[14] you're trying to intervene in? There's a
[15] petition that I just ruled on.
[16] **MS. KERNS:** Yes.
[17] **THE COURT:** Do you have that?
[18] **MS. KERNS:** Yes.
[19] **THE COURT:** Okay. Those are the
[20] stipulated facts.
[21] **MS. KERNS:** I understand, Your Honor.
[22] **MS. STOHR:** May I make one clarification?
[23] **THE COURT:** Absolutely.
[24] **MS. STOHR:** Just that the Board doesn't
[25] take a position on the merits of the arguments.

[1] **THE COURT:** I understand that.
 [2] **MS. STOHR:** But we do stipulate to all the
 [3] facts, not the arguments.
 [4] **THE COURT:** The facts. Under the statute,
 [5] especially on a review from administrative
 [6] agency, under the code I have that duty to
 [7] conform the constitutional mandates with the
 [8] statutory mandates. That's all I was saying.
 [9] **MS. STOHR:** Thank you.
 [10] **THE COURT:** Fair enough to everyone?
 [11] **MR. LONEY:** Yes, Your Honor.
 [12] **THE COURT:** All right. You look like you
 [13] have one last word on your mind.
 [14] **MS. KERNS:** Well, I'm a lawyer.
 [15] **THE COURT:** Don't put me in extra innings
 [16] now.
 [17] **MS. KERNS:** Hopefully we'll have a Red
 [18] October. I just want to be clear, Your Honor.
 [19] Is there no ruling now on our petition to
 [20] intervene?
 [21] **THE COURT:** I haven't reviewed it, so I
 [22] don't know the nature of it. But I have
 [23] allowed to you advance your client's argument.
 [24] I'll decide on that in due course. I can't do
 [25] things making them up as I go.

[1] **MS. KERNS:** I understand, Your Honor. I
 [2] just want to make sure I preserve my clients'
 [3] rights.
 [4] **THE COURT:** And you have. As I said, this
 [5] is a purely legal issue that I am ruling upon.
 [6] The parties have consented that the
 [7] constitutional mandate would require that these
 [8] ballots be counted and upon the factual record
 [9] before me and whatever appellate rights are
 [10] preserved. I'm sure, regrettably, the first in
 [11] line here making this decision.
 [12] **MS. KERNS:** Thank you, Your Honor. And
 [13] I'm sorry. Did the time move?
 [14] **THE COURT:** That's a second thing.
 [15] **MS. KERNS:** Did the time move and I did
 [16] not get that?
 [17] **THE COURT:** No. We were all here at 3:00.
 [18] **MS. KERNS:** Thank you.
 [19] **THE COURT:** Anything else?
 [20] **MR. LONEY:** No, Your Honor.
 [21] **THE COURT:** Thank you again.
 [22] (Hearing adjourned at 3:14 PM.)
 [23]
 [24]
 [25]

[1] CERTIFICATION
 [2]
 [3] I hereby certify that the proceedings
 [4] and evidence are contained fully and accurately in
 [5] the notes taken by me on the trial of the above case
 [6] and that this copy is a correct transcript of the
 [7] same.
 [8]
 [9]
 [10] Leah Blum, RPR
 [11] Registered Professional Reporter
 [12] Official Court Reporter
 [13]
 [14] -----
 [15]
 [16] (The foregoing certification of this
 [17] transcript does not apply to any reproduction of the
 [18] same by any means unless under the direct control
 [19] and/or supervision of the certifying reporter.)
 [20]
 [21]
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 [23]
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 [25]



**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY,
PENNSYLVANIA**

BRIAN BAXTER and SUSAN KINNIRY,

Petitioners,

v.

PHILADELPHIA BOARD OF
ELECTIONS,

Respondent.

ELECTION APPEAL
SEPTEMBER TERM, 2024

No. 02481
Control No. 24094566

**MEMORANDUM IN SUPPORT OF
INTERVENOR-DEFENDANTS'
MOTION TO DISMISS**

Filed on behalf of:
**Proposed Intervenor-Respondents,
Republican National Committee and
Republican Party of Pennsylvania**

Counsel of Record for this Party

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY,
FIRST JUDICIAL DISTRICT PENNSYLVANIA
CIVIL DIVISION**

BRIAN BAXTER and SUSAN KINNIRY,	:	ELECTION APPEAL
	:	SEPTEMBER TERM, 2024
	:	
Petitioners,	:	No. 02481
	:	Control No. 24094566
	:	
v.	:	
	:	
PHILADELPHIA BOARD OF	:	
ELECTIONS,	:	
	:	
Respondent.	:	

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR
REVIEW IN THE NATURE OF A STATUTORY APPEAL**

Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania (collectively, “Republican Committees”), by and through their undersigned counsel, submit this Brief in Support of their Motion to Dismiss¹ Petitioners’ Petition for Review in the Nature of a Statutory Appeal (the “Petition”).

¹ The Republican Committees have styled the motion supported by this brief as a Motion to Dismiss based on the Pennsylvania Commonwealth Court’s decision in *Schimes v. City of Scranton Non-Uniform Pension Bd.*, No. 1526 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 438 at *9 (Pa. Commw. Aug. 1, 2019), which found that “the Pennsylvania Rules of Civil Procedure are not applicable to statutory appeals; thus, preliminary objections, the grounds for which are set forth in Pa. R.C.P. 1028, cannot be used as a vehicle for challenging such an appeal” (*citing Appeal of Borough of Churchill*, 575 A.2d 550, 553 (Pa. 1990)). *See also Barros v. City of Allentown*, No. 1592 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 466 at *7 n. 4 (Pa. Commw. Feb. 17, 2012) (“Because preliminary objections are not permitted in statutory appeals, the common pleas court erred when it dismissed Barros’ appeal on the City’s preliminary objections. We find this error to be harmless, where the court could have treated the preliminary objections as a motion to dismiss . . . Accordingly, and because the parties are not prejudiced as a result, we will treat our review of the common pleas court’s order as though the City filed a motion to dismiss. . .”).

I. 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).² 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).

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

² 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.

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—often represented by Petitioners’ lawyers—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 repeatedly 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). Just a couple weeks ago, the Pennsylvania Supreme court vacated an opinion invalidating the date requirement, and it refused to exercise extraordinary jurisdiction to consider the *exact same arguments* Petitioners advance now. *See Order 1, Black Political Empowerment Project v. Schmidt*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (per curiam).

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 quadruple-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* Pet. ¶¶ 59-60. 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 *Pa. Democratic Party*. *See* 238 A.3d at 372-80. This proposed test is especially shocking as, just weeks ago, the Pennsylvania Supreme Court *reaffirmed* that mandatory ballot-casting rules only violates the Free and Equal Elections Clause if they “deny the franchise itself, or make it so difficult [to vote] as to amount to a denial.” *In re: Canvas of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7 (Pa. Sept. 13, 2024) (cleaned up). 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. *Pa. Democratic Party*, 238 A.3d at 372-80. Simply put, the Petition amounts to nothing more than an attempt to overrule *Pennsylvania Democratic Party, Ball*, and *In re: Canvas of Provisional Ballots in 2024 Primary Election*, by inviting this Court to invalidate the date requirement.

The Petition also suffers from serious procedural defects. Even as the Pennsylvania Supreme Court just vacated a lower court holding against the date requirement because Petitioners’ counsel failed to join all of Pennsylvania’s county boards of elections, Petitioners make the same

error here. The other 66 county boards have interests in this case, and they must be joined. *See id.* Further, Petitioners seek relief based on contested facts. Proposed Intervenor-Respondents *have* evidence that the date requirement serves important functions. For example, the date requirement was recently used as evidence in a voter-fraud prosecution that secured a conviction. *See Commonwealth v. Mihaliak*, CP-36-CR-0003315-2022 (Lancaster Cnty. 2022); Exhibit B (charging document in *Mihaliak*). Proposed Intervenor-Respondents would like to exercise their procedural rights to engage in factual development and conduct discovery. Other county boards might also wish to exercise those rights.

As a matter of law, the Court can reject the Petition because it is foreclosed by binding precedent. If the Court disagrees, the procedurally proper course is to proceed with all county boards and to allow the various respondents to develop a factual record about the date requirement. In no event should the Court issue an order before the imminent 2024 elections. A judicial order declaring the date requirement unenforceable as voters are imminently voting in the 2024 elections would unleash voter confusion,” “chaos,” *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 504-07 (Pa. 2006), and an erosion of the public “[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of participatory democracy,” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). It is simply too late to change the rules for the 2024 election, and this Court should not rush to do so.

II. FACTUAL BACKGROUND

Petitioners appeal from the decision of the Philadelphia County Board of Elections (the “Board”) to reject the Petitioners’ mail-in ballots due to their failure to date the declaration on the outer envelope in the September 17, 2024, Special Election for State House Districts 195 and 201 (the “Special Election”).

The Board’s decision complies with unambiguous statutory law. The Election Code requires voters who submit mail-in ballots to “fill out, date, and sign” the declaration on the outer envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The Pennsylvania Supreme Court has held that this requirement is mandatory, and that noncompliant ballots cannot be counted. *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023).

Petitioners do not dispute that they failed to comply with the Election Code, and they do not dispute that the Election Code mandates rejection of their ballots. Instead, they ask this Court to hold that the Free and Equal Elections Clause in the Pennsylvania Constitution renders the date requirement unconstitutional and enforceable. *See* Pet. ¶ 63. Petitioners ask the Court to do so—and thus destabilize the enforceability of the date requirement across the Commonwealth—even as voting in the 2024 general election is *already underway*. *See* 25 P.S. § 3146.2a (noting mail ballots can be sent out starting on September 16). And they ask for this Court to act immediately even as the Pennsylvania Supreme Court, just weeks ago, refused to exercise original jurisdiction to consider the *exact same arguments* Petitioners advance now. *See Black Political Empowerment Project*, Sept. 13, 2024 Order 1.

III. LEGAL STANDARD

A Court of Common Pleas can reverse the decision of a county board of elections “only for an abuse of discretion or error of law.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020) (citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); *see also*, 25 P.S. § 3157(b) (confining Court of Common Pleas’ review of decision of board of elections to matters involving “fraud or error”). In reviewing the decision of a board of elections, “[i]t is not the function of [the trial] court to substitute its judgment for that of the board’s. . . [the trial court is] bound to uphold the decision of the board unless it is in violation of

the law.” *Lower Saucon Twp. v. Election Bd. of Northampton Cty.*, 27 Pa. D. & C.3d 387, 393 (Northampton C.P. 1983).

IV. ARGUMENT

I. PETITIONERS’ CLAIM FAILS ON THE MERITS.

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. It recently declined to exercise extraordinary jurisdiction to revisit those challenges. *See Black Political Empowerment Project*, Sept. 13, 2024 Order 1.

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. Invalidating 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 v. Gore*, 531 U.S. 98, 115 (2000) (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, the Court should reject the Petition.

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* 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 of the Commonwealth 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. ¶¶ 55-66, 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*. *See* 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 is foreclosed by precedent. Indeed, the Pennsylvania Supreme Court recently declined to exercise extraordinary jurisdiction to revisit these challenges. *Black Political Empowerment Project*, Sept. 13, 2024 Order 1.

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 I.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.* Just a few weeks ago, the Pennsylvania Supreme Court reaffirmed *this* is the standard, *In re: Canvas of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7 (Pa. Sept. 13, 2024), not Petitioners’ proposed strict-scrutiny test.

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. 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&IsActive=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.³

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

³ 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).

(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; *How States Verify Voted Absentee/Mail Ballots*, National Conference of State Legislatures (Jan. 22, 2024), ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots. 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”), the rejection rates under the date requirement 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. Only 0.85% of the 1,258,336 mail ballots returned statewide in the 2022 general election were rejected. *See Black Political Empowerment Project*, 2024 WL 4002321 at *54 (McCullough, J., dissenting); U.S. Election Administration Commission, *Election Administration and Voting Survey 2022 Comprehensive Report: A Report from the U.S. Election Assistance Commission to the 118th Congress* at 45, 47, https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf. A requirement that over 99% of mail voters complied with cannot be “so difficult as to amount to a denial” of the “franchise.” *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 Black Political Empowerment Project*, 2024 WL 4002321 at *54-55 (McCullough, J., dissenting); 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 rejection rate under the date requirement actually *decreased* in the 2024 primary elections to 0.56%. *See Black Political Empowerment Project*, 2024 WL 4002321 at *54 (McCullough, J., dissenting). The vast majority of Pennsylvania mail voters therefore again complied with the date requirement, so it cannot violate the Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 810.

Finally, as even the majority in the now-vacated Commonwealth Court opinion recognized, there is every reason to think the rejection rate will only continue to decline. After all, the Secretary recently redesigned the mail-ballot declaration in a manner that “eliminates” the most common forms of dating errors in past elections. *Black Political Empowerment Project*, 2024 WL 4002321 at *9. Thanks to the Secretary’s actions, county boards must (1) preprint the entire year in the date field, thus “eliminat[ing]” the error of “a voter writing an incomplete or inaccurate year,” *id.* at *9; (2) print “Today’s date here (REQUIRED),” thus further specifying which date is “correct,” *id.* at *19; and (3) print four boxes in the date field and to specify that the date should be written in MM/DD format, thus eliminating any confusion regarding whether voters should use the American or International dating conventions. *See id.* at *9.

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. ¶¶ 55-63. 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 id.*

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 argue “strict scrutiny” applies to “any restriction” on voting. Pet. ¶ 59. 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 Pet. ¶ 59).

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.

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 I.A, and its precedent construing the Clause, *see supra* Part I.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 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.”).

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 be 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.

II. THE COURT CANNOT GRANT RELIEF TO PETITIONERS.

This Court can and should reject the Petition under binding precedent. But if it deems the date requirement’s constitutionality somehow unsettled, it cannot grant relief. This is true for several reasons.

First, factual development would be necessary to grant the Petition. The Petition asserts that the General Assembly’s date requirement is “meaningless.” Pet. ¶ 4. Proposed Intervenor-Respondents strongly disagree. *See supra* Part I.C.2. This is a factual dispute that cannot be resolved without record development.

Petitioners assert that other courts have found that the date requirement serves no function. *See* Pet. ¶ 4. This is false. The federal-court cases Petitioners cite dealt not with right-to-vote arguments, but with challenges under a federal statute (the Materiality Provision). *See Pa. State*

Conf. of NAACP v. Schmidt, 703 F. Supp. 3d 632, 668 (W.D. Pa. 2023), rev'd 97 F.4th 120; Pa. *State Conf. of NAACP Branches v. Schmidt*, 97 F.4th 120 (3d Cir. 2024) (rejecting challenges to date requirement). Statements respecting the date requirement are thus passing dictum, as they were 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 those courts did not give "full and careful consideration" to this point. *Id.* After all, they did not address the State's interest in documenting the date the voter completed the ballot as part of trustworthy election administration or as a back-up for scanning errors or SURE system malfunctions. See *Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment). They also did not address the State's interest in solemnity. See *Pa. State Conf. of NAACP*, 97 F.4th at 125. And the Third Circuit did not address the State's interest in deterring and detecting fraud or even mention the *Mihaliak* case, see *id.*, while the district court offered a footnote saying evidence of fraud was "irrelevant" under the Materiality Provision, 703 F.Supp.3d at 679 n.39. And the vacated Commonwealth Court decision Petitioners cite erroneously relied on those inapt federal cases, see *Black Political Empowerment Project*, 2024 WL 4002321, at *32, all without allowing 65 county boards of elections to participate and contribute to a record regarding the date requirement's functions.

Second, the other 66 county boards of elections must be allowed to participate in this case. The Pennsylvania Supreme Court already recognized that those county boards have interests in this case and must be joined. See Exhibit A at 1. It is therefore bewildering that Petitioners, represented by the same counsel who failed to join the other county boards just weeks ago, repeat the same reversible error.

Nor is this an empty formality. The other county boards may wish to participate in the development of a factual record about the date requirement. Some county boards have vigorously

defended the date requirement in parallel federal litigation. *See, e.g., Pa. State Conf. of NAACP*, 703 F. Supp. 3d at 643-44 (noting defenses by Lancaster and Berks County Boards). They should be given the chance to do so here.

Third, this Court cannot enter relief before the imminent and *ongoing* 2024 general election. Some county boards have *already* sent out mail ballots for the 2024 general election. *See* 25 P.S. § 3146.2a. Jeopardizing the enforceability of the date requirement would unleash voter confusion,” “chaos,” *Kuznik*, 902 A.2d at 504-07, and an erosion of the public “[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of participatory democracy,” *Purcell*, 549 U.S. at 4.

Chaos would be inevitable. There would be rushed appeals to the Pennsylvania Supreme Court and, potentially, the U.S. Supreme Court. *See, e.g., Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020) (equally divided vote in October, 2020 on whether to stay Pennsylvania Supreme Court rule change). The date requirement—which has already bounced in and out of effect repeatedly over the last few election cycles, would likely be put back into effect, confusing voters. At the same time, a judicial order barring enforcement of something as mundane and commonsensical as the date requirement would undermine public confidence in the integrity of Pennsylvania’s elections and Pennsylvania’s courts. *See, e.g., Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 29 (2020) (“Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.”).

But it would be worse than that—much worse. If this Court holds that the date requirement is unconstitutional, the Philadelphia County Board of Elections would presumably comply with that order for the 2024 general election. But no other county board would be bound to comply

with this Court’s order. In fact, the other county boards would be obliged to follow the Pennsylvania Supreme Court’s prior order in *Ball*, which ordered the county boards to comply with the date requirement in 2022, *see* 284 A.3d at 1189, just as Commissioner Bluestein understood in this case. *See* Pet. ¶ 50. That means that different counties would apply different standards for determining the validity of mail ballots—in violation of the U.S. Equal Elections Clause and the Pennsylvania Constitution.

Under the Equal Protection Clause of the U.S. Constitution, a “State may not, by [] arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush*, 531 U.S. 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 this Court would be doing if it grants Petitioners’ requested relief. Such an order would result in “varying standards to determine what [is] a legal vote” from “county to county” and be improper. *See id.* at 106-07.

Such an order would also violate the Pennsylvania Constitution, which decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State.” Pa. Const. art. VII, § 6. The Free and Equal Elections Clause’s mandate of “free and equal” elections, *id.* art. I, § 5, likewise prohibits discrimination against voters “based on considerations of the region of the state in which [voters] live[],” *League of Women Voters*, 178 A.3d at 808, and requires election rules to “treat[] all voters alike” and “in the same way under similar circumstances,” *Winston*, 91 A. at 523. The Election Code, moreover, requires that elections be “uniformly conducted”

throughout the Commonwealth. 25 P.S. § 2642(g). If this Court enters relief now, *during an ongoing election*, all these state-law commands would be violated.

The Pennsylvania Supreme Court could have adjudicated Petitioners' current arguments before the 2024 elections, but it chose not to do so. *See Black Political Empowerment Project*, Sept. 13, 2024 Order 1. This Court should follow that court's lead. Instead of rushing to judgement and unleashing chaos on the Commonwealth, the Court should adhere to normal procedures, allow proper factual development, allow all interested parties to participate, and withhold a decision until well after the imminent and ongoing 2024 elections.


V. CONCLUSION

For all of these reasons, Petitioners' Petition for Review in the Nature of a Statutory Appeal should be dismissed.

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Dated: September 25, 2024

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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: September 25, 2024

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the within ***BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL*** has been served on all counsel of record listed below via email this 25th day of September 2024:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 283 MD 2024

BLACK POLITICAL EMPOWERMENT PROJECT, et al.,

Petitioners,

v.

AL SCHMIDT, in his official capacity as Secretary of the Commonwealth, et al.,

Respondents.

**BRIEF OF *AMICI CURIAE* REPUBLICAN LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES BRYAN CUTLER,
PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE KIM
WARD AND MAJORITY LEADER OF THE PENNSYLVANIA SENATE
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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici Curiae, Republican Leader of the Pennsylvania House of Representatives Bryan Cutler, President Pro Tempore of the Pennsylvania Senate Kim Ward, and Majority Leader of the Pennsylvania Senate Joe Pittman (collectively the “Legislative Leaders” or “*Amici Curiae*”) hereby file this *amicus curiae* brief pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(1)(i) in opposition to Petitioners’ (and Intervenor-Petitioners’) Cross-Application for Summary Relief (“Petitioners’ Application”) and in support of Intervenor-Respondents’ Cross-Application for Summary Relief (“Respondents’ Application”).

This case concerns the constitutionality of important election laws enacted by the Pennsylvania General Assembly (the “General Assembly”), including the Legislative Leaders. The provisions challenged here have been the subject of numerous disparate challenges, under a plethora of legal theories, over the past several election cycles. The Legislative Leaders have either moved to intervene or filed an *amicus curiae* brief in a number of these cases.

The Legislative Leaders possess a strong legal interest in protecting their exclusive authority, as legislators in the General Assembly, to enact—or repeal—legislation concerning the administration of elections in Pennsylvania, a role which

¹ No party’s counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

Petitioners ask this Court to usurp. Accordingly, the Legislative Leaders file this *amici curiae* brief to bring issues to this Court’s attention about which they possess both a heightened interest and unique viewpoint.

SUMMARY OF ARGUMENT

In their latest attack on the Commonwealth’s democratically-enacted Election Code, Petitioners, who plainly lack standing to bring this action in the first place² and are represented by the same counsel who have already unsuccessfully challenged this statute on numerous grounds, now seek yet another bite at the apple. This time, Petitioners challenge on state constitutional grounds Election Code provisions that require voters submitting an absentee or mail-in ballot to “date and sign” their ballot return envelope. Petitioners blithely (and contrary to numerous recent judicial pronouncements of Pennsylvania and federal courts³) insist that this

² “[T]he right to vote is personal” and the rights sought to be vindicated in a challenge are “personal and individual.” *Albert v. 2001 Legis. Reapportionment Comm’n*, 790 A.2d 989, 995 (Pa. 2002) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)). When “the right to vote and the right to have one’s vote counted is the subject matter of a . . . challenge,” then “any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing.” *Id.* at 994–95; see also *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (dismissing Democratic Committee); Order ¶ 4, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017) (Exhibit 1) (dismissing one of the petitioners here, the League of Women Voters of Pennsylvania, because it was not authorized by law to exercise the right to vote in the Commonwealth). Here, none of Petitioners has standing since, as entities and not individual voters, they all lack the right to vote. Moreover, the harm alleged by Petitioners is based entirely on the belief that some voters could forget to sign their ballot envelopes. This is not an “immediate” interest, it is, at best, “remote” and “speculative.” See, e.g., *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005).

³ See *Ball v. Chapman*, 289 A.3d 1 (Pa. 2022); *Ritter v. Migliori*, 143 S. Ct. 297 (2022); *PA State Conference of NAACP Branches v. Schmidt*, 97 F.4th 120 (3d Cir. 2024).

requirement serves no purpose whatsoever and therefore violates the Free and Equal Election Clause of the Pennsylvania Constitution.

Their claim fails for a host of reasons. Every prior case finding a violation of the Free and Equal Elections Clause implicated the *right* to vote, whereas the dating requirement is merely one of many ballot-casting rules voters must follow, and it neither takes away, nor burdens so as to take away, the right to vote. The history of the Free and Equal Election Clause shows that it was designed to prevent discrimination against groups of Pennsylvanians, but the dating requirement applies to *all* voters and does not single out any geographic, political or other group. Petitioners are not entitled to strict scrutiny of the statutes in question, and they cannot overcome the strong judicial presumption that the dating requirement is constitutional.

Moreover, Act 77, which includes the rule Petitioners now criticize, was actually a historic *expansion* of voting rights. Continued debate within the General Assembly—along with the election law jurisprudence of Pennsylvania and federal courts—demonstrate that this question should be resolved by the legislature as a policy matter, not the judiciary.

As such, this Court should grant Respondents' Application and deny Petitioners' Applications.

BACKGROUND

The Pennsylvania Constitution provides that “[e]lections 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 (“Free and Equal Elections Clause”). A prototype of this edict originally appeared in Pennsylvania’s first organic charter of governance, adopted in 1776. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (“*LWV*”). The current iteration, “which has remained unchanged to this day by the people of this Commonwealth,” was added to the 1790 Constitution. *Id.* at 808. Despite this near-quarter-millennium history, few cases have been brought under it, and even fewer such challenges were successful.

In an early case applying the provision, the Pennsylvania Supreme Court elaborated that:

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Winston v. Moore, 91 A. 520, 523 (Pa. 1914). More recently, the Pennsylvania Supreme Court summarized “the actual and plain language of” the clause is to

“mandate[] that all voters have an *equal opportunity* to translate their votes into representation.” *LWV* at 804. (emphasis added).

This history shows that the dating requirement Petitioners challenge is not inconsistent with the history, meaning, and intent of the Free and Equal Election Clause. “Each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives.” *LWV* at 814 (emphasis in original). As explained below, the dating requirement does not violate this fundamental precept.

ARGUMENT

I. The Dating Requirement Is Presumptively Constitutional.

A. The Dating Requirement Does Not “Clearly, Palpably and Plainly” Violate the Constitution.

A bedrock principle of judicial review in Pennsylvania is the “judicial presumption that our sister branches take seriously their constitutional oaths.” *Stilp v. Commonwealth*, 905 A.2d 918, 938-39 (Pa. 2006). “It is well settled that a statute is presumed to be constitutional and will not be declared unconstitutional unless it *clearly, palpably and plainly violates the constitution.*” *Purple Orchid v. Pa. State Police*, 813 A.2d 801, 805 (Pa. 2002) (internal citations omitted) (emphasis added). Because of this high standard, “the party challenging the constitutionality of a statute has a heavy burden of persuasion.” *Id.* For the reasons discussed below, the dating requirement *is* constitutional, and Petitioners have not come close to meeting their

“heavy burden” of showing that the dating requirement “clearly, palpably and plainly violates the constitution.” *Id.*

B. The Dating Requirement Is Not Subject to Strict Scrutiny Review.

Petitioners argue that the dating requirement for absentee and mail-in ballots should be subject to strict scrutiny. But this presupposes that the dating requirement “burdens” and “interferes with” the right to vote in the first place. (Pet’rs’ App. for Prelim. Inj. at 14.) It does not.

Petitioners rely on *In re Nomination of Berg*, 712 A.2d 340, 342 (Pa. Commw. Ct. 1998), *aff’d*, 713 A.2d 1106 (Pa. 1998), to argue that “laws which *affect* a fundamental right, such as the right to vote . . . are subject to strict scrutiny” (emphasis added). But the *Berg* Court actually “declined to employ the strict scrutiny standard of review on the ground that no fundamental rights were affected by” the challenged requirement. *Berg*, 713 A.2d at 1106. That is because merely “affecting” a right is not enough—“a discriminatory law must have a real and appreciable *impact* on voters’ rights before the strict scrutiny test of reasonable necessity would be applied in the challenge.” *Cavanaugh v. Shaeffer*, 444 A.2d 1308, 1311 (Pa. Commw. Ct. 1982) (citing *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (emphasis added)); *see also William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 458 (Pa. 2017) (“[W]here a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny.”). This Court

has even gone as far to say that “[o]nly where a law imposes a *severe* burden on the right to vote is it subject to strict scrutiny.” *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1257 n. 22 (Pa. Commw. Ct. 2017) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (emphasis added)).

Far from being a “burden” or having a “real and appreciable impact on voters’ rights” (much less a “severe” one), writing the date on the ballot envelope as part of the voter declaration is one of the easiest steps in the entire voting process—significantly easier than finding a mailbox or drop box at which to deposit a ballot and little more burdensome than licking (or peeling and sticking) the flap of the completed envelope. Insisting that this minor procedural step—which Pennsylvanians are asked to do any time they sign a contract, write a check, fill out a form, pick their child up early from school or in countless other everyday situations—is a “burden” betrays an especially low view of voters. Indeed, another court recently “conclude[d] that the burden imposed by the handwritten date requirement is slight” *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 U.S. Dist. LEXIS 46352, at *24 (E.D. Pa. Mar. 16, 2022) (rejecting a strict scrutiny standard and considering only whether Pennsylvania has “important regulatory interests . . . to justify the restrictions”).⁴

⁴ Importantly, while this District Court decision was later overruled on other grounds, this part of the decision (declining to apply strict scrutiny) was not appealed to the Third Circuit. *See Migliori v. Lehigh Cty. Bd. of Elections*, No. 22-1499, Appellant’s Brief (ECF # 32) (filed March 29, 2022).

The dating requirement is also far less burdensome and impactful than other challenged election procedures that were not subjected to strict scrutiny analysis. For example, in *Berg*, the Petitioner challenged Pennsylvania's requirement that prospective gubernatorial candidates obtain 100 signatures from ten counties on their nominating petition. *Berg*, 712 A.2d at 340. A similar requirement for state Supreme Court candidates was previously challenged in *Cavanaugh v. Shaeffer*, 444 A.2d at 1308. In both cases, this Court concluded that the ballot access requirements did not have a "real and appreciable impact" on the right to vote and therefore applied the rational basis test, rather than strict scrutiny. *Berg*, 713 A.2d at 1109 (*quoting Cavanaugh*, 444 A.2d at 1311).

The only election case Petitioners identify where strict scrutiny applied is this Court's unreported decision in *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 Pa. Commw. Unpub. LEXIS 756 (Pa. Commw. Ct. Jan. 17, 2014), challenging the implementation of Pennsylvania's 2012 voter identification law. While a voter identification requirement is itself constitutional, the *Applewhite* court found issues with PennDOT's implementation of the law. In that case, the court applied strict scrutiny analysis only after it found that "[h]undreds of thousands of electors in Pennsylvania lack[ed] compliant photo ID" and concluded that the law would have "the effect of disenfranchising them through no fault of their own" because PennDOT had failed to create a process allowing these hundreds of thousands of

potential voters to obtain sufficient identification in time to be able to vote. *Id.* at *54. Effectively disenfranchising voters through no fault of their own is not the situation here; instead, at worst, an “individual’s vote [may not be] counted *because he or she did not follow the rules for casting a ballot,*” which is not a denial of “the right to vote.” *Ritter v. Migliori*, 142 S.Ct. 1824, 1825 (2022) (Alito, J., dissenting) (emphasis added). “Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the *forfeiture* of the right to vote, not the *denial* of that right.” *Id.* (emphasis added).

Petitioners naturally wish for this Court to jump straight to strict scrutiny review, which is legendarily “strict in theory, but fatal in fact.” Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). But they have not explained how writing a date imposes a “severe” burden or real and appreciable impact on the right to vote. Instead, this Court should follow the practical wisdom of our Supreme Court in *Berg* that “[t]o subject every voting regulation to strict scrutiny . . . would tie the hands of states seeking to assure that elections are operated equitably and efficiently.” 713 A.2d at 1109.

II. The Dating Requirement Does Not Abridge Any Voter’s Right to Participate in the Electoral Process.

The Free and Equal Election Clause permits reasonable election administration regulations, if those regulations do not impair or unduly burden the

right to vote itself. *See LWV* at 809. The dating requirement falls squarely within this permissible category, a reasonable regulation directing the manner of exercising the right to vote. It is a minor procedural requirement that does not prevent any eligible voter from casting one's ballot or having one's vote counted if the voter complies. The requirement applies equally to all absentee and mail-in voters, without discriminating against any particular group or class of voters.

A. The Dating Requirement Does Not Impair Anyone's *Right To Vote* or Make Voting So Difficult as to Amount to a Denial.

Petitioners correctly frame the Free and Equal Elections Clause as “establish[ing] the *right to vote* as a fundamental individual *right*.” (Pet’rs’ App. for Prelim. Inj. at 1 (emphasis added)). As the Pennsylvania Supreme Court observed (and to which Petitioners also cite), the Free and Equal Elections Clause “strike[s] . . . at all regulations of law which shall impair the *right* of suffrage,” and when legal voters are “denied the *right* to vote, the election is not free and equal.” *LWV* at 809, 813 n.71 (emphasis added).

But “[e]ven the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, *not the denial of that right*.” *Ritter v. Migliori*, 142 S.Ct. at 1825 (Alito, J., dissenting) (emphasis added). This is precisely why the Third Circuit recently concluded that the “individuals are not ‘denied’ the ‘right to vote’ if non-compliant ballots [lacking

a date] are not counted.” *NAACP*, 97 F.4th at 135.⁵ While arising in the context of the Materiality Provision, the Third Circuit nonetheless centered its analysis specifically on whether the “date and sign” requirement impaired the *right* to vote, ultimately concluding that there was “no authority that the ‘right to vote’ encompasses the right to have a ballot counted that is defective under state law.” *Id.* at 133; *see also Ball*, 289 A.3d at 22 (“[F]ailure to comply with the date requirement would render a ballot invalid in any election after 2020. Pennsylvania’s candidates, electors, and local officials therefore were on notice that ballots must be dated, and that failure to provide a date would result in disqualification.”); *Vote.org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) (“It cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under § 1971. Otherwise, virtually every rule governing how citizens vote . . . is suspect.”).

Indeed, just as multiple federal courts have agreed that the “date and sign” requirement does not deny the “right to vote” for purposes of the Civil Rights Act, the same holds true for purposes of the Pennsylvania Constitution, where our Courts have universally held that a violation would require the *right* to vote to be impaired.

⁵ *NAACP* is the latest of a series of cases concerning whether the “date and sign” requirement violated the Materiality Provision of the Federal Civil Rights Act, which provides that “[n]o person acting under color of law shall . . . deny the *right* of any individual to vote in any election because of an error or omission . . . if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

The history of Free and Equal Elections Clause cases makes this plain. In two such cases, election deadlines were extended when a natural disaster or emergency was found to impede voters' ability to timely cast their ballots. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); *In re General Election-1985*, 531 A.2d 836, 838-39 (Pa. Commw. Ct. 1987). In these instances, the courts concluded that the original election deadlines would have made voting “so difficult as to amount to a denial” of the *right* to vote. *Winston v. Moore*, 91 A. at 523.

The other applications of the Free and Equal Elections Clause arose in the contexts of voting districts that either explicitly or implicitly denied certain Pennsylvanians their *right* to vote. In the early 20th century, a new school district was created that overlapped with the boundaries of two existing school districts. *See In re New Britain Borough Sch. Dist.*, 145 A. 597 (Pa. 1929). The Pennsylvania Supreme Court found that residents of the two former school districts would “be deprived of their *right* to vote for school directors as allowed in all other fourth-class districts.” *Id.* at 599 (emphasis added). A similar result came when the legislative redistricting act of 1937 excluded 10 municipalities from any legislative district, obviously resulting in voters in those communities being “deprived of the *right* to vote for a representative in the General Assembly.” *Shoemaker v. Lawrence*, 31 Pa. D.&C. 681, 686 (Dauphin Co. C.C.P. 1938) (emphasis added).

More recently, the Pennsylvania Supreme Court struck down the General Assembly's 2011 congressional redistricting plan on the basis that it allegedly "subordinate[d] the traditional redistricting criteria in service of achieving unfair partisan advantage," which would "undermine[] voters' ability to exercise their *right* to vote in free and 'equal' elections." *LWW* at 821.

Contrary to these determinations, which were based on an abridgement of the *right* to vote, every eligible Pennsylvania voter currently "has the *right* to cast his [or her] ballot". *Winston*, 91 A. at 523; *see also Ritter*, 142 S.Ct. at 1825 ("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."). Nor does the dating requirement "deny the franchise itself, or make it so difficult as to amount to a denial." *Winston*, 91 A. at 523. Instead, the dating requirement is an exceptionally easy step to complete that does not impose any significant additional burden on voters beyond the other steps they must already take to complete and return their ballot. Voters must already fill out and sign the declaration on the envelope, which includes other attestations and identifying information. The simple step of writing the date on the envelope does not meaningfully increase the burden or complexity of the process.

The dating requirement does not deny Pennsylvanians their right to vote (or make voting so difficult as to effectively impair the right), nor preclude them from

having their ballot counted if they record the date on it; thus the requirement falls outside the ambit of what is proscribed by the Free and Equal Elections Clause.

B. Compliance with the Dating Requirement is a Choice Entirely Within Voters' Personal Control.

Another key difference between the dating requirement and election laws that have been found to violate the Free and Equal Elections Clause is the role of voters' own agency. That is, voters themselves possess the capacity to control whether they will satisfy the dating requirement when casting their ballot. This makes the dating requirement no different from all the other implicit and explicit requirements of casting a ballot, ranging from the trivial (like finding a pen to fill out the bubbles) to the substantive (like returning the ballot on time to the correct location). As Justice Alito has noted:

A registered voter who does not follow the rules may be unable to cast a vote for any number of reasons. A voter may go to the polling place on the wrong day or after the polls have closed. A voter may go to the wrong polling place and may not have time to reach the right place before it is too late. A voter who casts a mail-in ballot may send it to the wrong address.

Ritter, 142 S.Ct. at 1825 (Alito, J., dissenting). All of these mistakes (which, as discussed *supra* Part II.A, “constitute[] the forfeiture of the right to vote, not the denial of that right,” *id.*) are within voters' own control, subject to their own agency.

Conversely, where statutes have been found to violate the Free and Equal Elections Clause, it is because they operated to dilute or disenfranchise voters

independent of the voters' own best efforts to exercise the franchise. As noted in Part II.A, Pennsylvania courts postponed election deadlines in 1985 and 2020 on account of natural disasters and emergencies. In those instances, the courts suspended clear requirements of the Election Code where those emergencies – outside of the control of the voter – allegedly would have prevented voter compliance. *See, e.g., Pa. Democratic Party*, 238 A.3d at 371 (concluding that “the timelines built into the Election Code cannot be met by the USPS’s current delivery standards”). Voting districts struck down in other decisions would have either eliminated (in the case of *New Britain Borough School District* and *Shoemaker*) or diluted (in the case of *LWV*) the ability for voters to select representatives of their choosing, no matter how carefully voters followed the rules.

Thus, the dating requirement fundamentally differs from other enactments that were held to have violated the Free and Equal Elections Clause, which all involved impairments to voting that voters could not overcome.

C. The Dating Requirement Does Not Discriminate Against or Unduly Burden Certain Voters.

Not only does the dating requirement not impede any individual Pennsylvanian’s right to vote, it also does not benefit (or hinder) any group of voters. This is especially relevant in light of the history of the Free and Equal Elections Clause, which was first introduced to the Pennsylvania Constitution following a century of economic, religious and ethnic factionalism and a bloody revolution

against a heavy-handed British Crown. *See LWV*, 178 A.3d at 804-08. The Free and Equal Elections Clause should thus be “viewed against the backdrop of . . . intense and seemingly unending regional, ideological, and sectarian strife” as an attempt to end “the dilution of the right of the people of this Commonwealth to select representatives” of their choosing. *Id.* at 808-09. Charles Buckalew, a delegate to Pennsylvania’s 1873 Constitutional Convention, explained that the intent of the Free and Equal Elections Clause was to “exclude not only all invidious discriminations between individual electors, or classes of electors, but also between different sections or places in the State.” Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania: Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883); *see also LWV*, 178 A.3d at 809 (explaining that the Pennsylvania Supreme Court “has ascribed the same expansive meaning to the terms ‘free and equal’ in Article I, Section 5” as Buckalew).

But unlike other legislative enactments that violated the Free and Equal Elections Clause, the dating requirement does not disfavor any particular geographic, economic, religious, ethnic, regional, ideological or partisan faction. Far from discriminating against any voter “on the basis of his or her particular beliefs or view,” *LWV*, 178 A.3d at 809, or based on the “sections or places in the State” where they live, Buckalew, *An Examination of the Constitution of Pennsylvania, supra*, “[e]very voter is treated alike” by the ballot signature requirement, “[e]very voter

has the same right as any other voter, and every voter has the right to cast his ballot and have it counted,” *Commonwealth ex rel. Jones v. King*, 5 Pa. D.&C. 515, 518 (Dauphin Co. C.C.P. 1924).

In fact, Pennsylvania courts have rejected challenges under the Free and Equal Elections Clause when the challenged law applies equally to all voters. *See, e.g., Working Families Party v. Commonwealth*, 209 A.3d 270, 282 (Pa. 2019) (upholding that Pennsylvania’s “anti-fusion” statutes because minority party supporters had “the same right as every other voter”); *City Council of Bethlehem v. Marcincin*, 515 A.2d 1320, 1324 (Pa. 1986) (upholding a term limits ordinance because it “neither ‘denies the franchise’ to the electors nor dilutes the vote of any segment of the constituency”); *Shankey v. Staisey*, 257 A.2d 897, 899 (Pa. 1969) (upholding a ballot access statute because “minority party candidates and their supporters” had to “secure the same showing of public support before being put on the ballot as required by a majority party candidate”); *King*, 5 Pa. D.&C. at 518 (upholding a ballot access law because “[e]very voter is treated alike”).

In light of this history, this Court should reject Petitioners’ claim, because the dating requirement does not single out any particular group based on their geography, partisan leaning or other affiliation, but instead applies to all voters equally.

III. The Legislative History of the Dating Requirement Further Belies Petitioners' Arguments.

Courts have consistently recognized that state legislatures have a legitimate interest in enacting reasonable procedural requirements to ensure the integrity and reliability of the electoral process. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (upholding voter ID law as a reasonable procedural requirement to deter fraud and promote public confidence in elections). While “those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause,” *id.*, as explained above, the dating requirement is a reasonable and non-discriminatory regulation of the electoral process that does not deprive any Pennsylvanian of the right to vote. The requirement falls well within the General Assembly’s plenary authority to establish procedures for the orderly and secure administration of elections and is entirely consistent with the intent and meaning of the Free and Equal Elections Clause.

A. The Legislative History of Act 77 Demonstrates a Clear Commitment by the General Assembly to Free and Equal Elections.

Petitioners argue that the dating requirement enacted by the General Assembly curtails voting rights, but in reality, the General Assembly is responsible for the most significant voting expansion in the Commonwealth in a generation.

The dating requirement has a long history as a part of the Commonwealth’s Election Code. Originally, absentee voting was limited to military voters. It was then

extended to the general public in 1963. *See* Act No. 37, Session of 1963, Pub. L. No. 707, § 22. Even then, absentee voting was only permitted for those with a statutorily-defined reason for doing so, such as a physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. In order to cast an absentee ballot, a Pennsylvania voter was required to provide a permissible reason to do so and would have to return his or her absentee ballot no later than 5:00 PM on the Friday before the election. *Id.*

Since that 1963 enactment, the procedure for completing and submitting an absentee ballot has remained consistent. In particular, after marking his or her ballot, a Pennsylvania absentee voter must:

[F]old the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’ This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector . . . *The elector shall then fill out, date and sign the declaration printed on such envelope.* Such envelope shall then be securely sealed and the elector shall send same by mail . . . or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added).

In 2019, the General Assembly dramatically expanded the ability for Pennsylvanians to vote by mail. Rather than the limited eligibility to vote by absentee ballot, the General Assembly created a new category of “no excuse” mail-in voting through Act 77. For reasons including simplicity of legislative drafting, consistency with other non-in-person ballot forms, and familiarity for voters, Act 77

maintained identical procedures for filling out, dating and signing the ballot return envelope for no-excuse mail-in ballots that had always applied with respect to absentee ballots. *Compare* 25 P.S. § 3150.16(a) (procedure for mail-in ballots) *with* 25 P.S. § 3146.6(a) (procedure for absentee ballots).

In addition, the traditional voting options were maintained by Act 77 and remain available for Pennsylvanians—voters may still request an absentee ballot if they have a statutorily permitted reason for doing so, or they may vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12. Far from making it harder to vote, the upshot of Act 77 was making it dramatically *easier* for Pennsylvanians to cast a ballot on or before election day.

B. The Legislative History After Act 77 Indicates the General Assembly Believes the Dating Requirement is Constitutional.

Following passage of Act 77 in 2019, the General Assembly has continued to propose, debate and vote upon additional changes to the Election Code. In particular, legislators have proposed a series of revisions to the dating requirement. Although no substantive changes to this requirement have become law, the General Assembly's continued consideration of such changes reveals a collective understanding that the dating requirement is constitutional and can only be modified or repealed by the General Assembly itself.

During the 2021-22 legislative term, during second consideration of HB 1800, Representative (now Speaker of the House) Joanna McClinton offered amendment

A2942, which would have provided that a “missing or inaccurate date on the declaration of the elector on the outer return envelope shall not be a fatal defect for the ballot.” In support of her amendment she remarked that “[a] missing date or a missing outer envelope, an unsigned declaration—these things should not disenfranchise our neighbors who of course want to participate in the process of voting.” See *Pennsylvania Legislative Journal-House*, Nov. 17, 2021, 1591-92. She also introduced HB 2090, a bill substantively similar to her amendment A2942, which would have also deemed “a missing or inaccurate date [on] an absentee or mail-in ballot shall not be a fatal defect for the ballot.” House Bill 2090, Regular Session 2021-22.

During the current 2023-24 legislative term, Representative Scott Conklin introduced HB 847, which would provide that “[f]ailure to date the envelope . . . shall not disqualify the ballot if the declaration is otherwise properly executed.” Amendment A2305, offered by Representative Malcolm Kenyatta to SB 224, would have the same effect, that “[a] missing or inaccurate date on the declaration of the elector . . . of an absentee or mail-in ballot shall not be a fatal defect for the ballot.” And in the Senate, Senator Jim Brewster introduced SB 857, which would strike the dating requirement for mail-in ballots.

While none of these amendments or bills has yet become law, the fact they are being currently and actively proposed by members of the General Assembly

provides an insight into contemporaneous legislative intent—that legislators from both parties, not just *Amici*, believe the dating requirement is a statutory question for policymakers, rather than a constitutional question for the judiciary. Otherwise, legislators would need not attempt to eliminate the requirement via statute; they could leave it to the courts (especially with respect to a requirement that has been the subject of a multitude of court challenges in recent years, of which Pennsylvania legislators are undoubtedly aware).

C. The Dating Requirement Serves a Clear Purpose as a Part of the General Assembly’s Comprehensive Election Code.

Despite Petitioners’ glib pronouncements to the contrary, numerous courts have recognized that the requirement that electors date and sign their absentee or mail-in ballot return envelope serves a variety of important election administration purposes. For example,

The date on the ballot envelope provides proof of when the “elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot[.]” The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.

In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020) (“2020 Canvass”) (Dougherty, J., concurring and dissenting) (citation omitted); *see also Ritter v. Lehigh Cty. Bd. of Elections*, No.

1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1, at *10-11 (Pa. Commw. Ct. Jan. 3, 2022) (same).

The *Migliori* District Court similarly concluded that these statutory provisions serve “an important public interest in the integrity of an election process that ensures fair, efficient, and fraud-free elections is served by compliance with the statute mandating the handwritten date requirement.” *Migliori*, 2022 U.S. Dist. LEXIS 46352, at *38-39. And as Judge Leeson further observed:

An elector’s compliance with the signature and date requirement is an important guard against fraud. Where an elector fully complies with the instructions on the outer envelope, the electoral authorities conducting the election can be assured of the date on which the ballot was executed. Where, however, the outer envelope remains undated, the possibility for fraud is heightened, as individuals who come in contact with that outer envelope may, post hoc, fill in a date that is not representative of the date on which the ballot was executed.

Id. at *38.

A practical example comes from a recent Lancaster County election fraud case concerning a mail-in ballot cast 12 days after a voter’s death. There the date supplied on the ballot declaration was the only piece of evidence of fraud on the face of the ballot, and in conjunction with the Commonwealth’s SURE system, the date on the

ballot declaration helped to detect fraud. *See Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022.⁶

As the U.S. District Court for the Western District of Pennsylvania previously concluded, “the Pennsylvania legislature ‘weigh[ed] the pros and cons,’ and adopted a broader system of ‘no excuse’ mail-in voting as part of the Commonwealth’s Election Code.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 395 (W.D. Pa. 2020) (citing *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)). “And the key point is that the legislature made that judgment in the context of erecting a broader election scheme that authorizes other forms of voting and has many . . . safeguards in place to catch or deter fraud and other illegal voting practices.” *Id.* at 396. “In this larger context, the Court cannot say that the balance Pennsylvania struck across the Election Code was unreasonable, illegitimate, or otherwise not ‘sufficiently weighty to justify’” *Id.*

Lastly, as noted in Part III.A above, the General Assembly mirrored the existing ballot return procedures for absentee ballots when crafting Act 77 to create no-excuse mail-in voting. Again, this was an intentional approach to minimize the complexities of legislative drafting, remain consistent with laws governing absentee

⁶ While Petitioners insist the date is rarely used by counties, an inference could be made that the lack of affirmative “use” of the date in prosecuting fraud is evidence that the date works to deter fraud in the first place, as opposed to being a mere “superfluous” requirement.

ballot procedures, and maintain familiarity for voters wishing to take advantage of mail-in voting who may have previously cast an absentee ballot.

* * *

Therefore, given the General Assembly's well-recognized constitutional plenary power to prescribe the time, place, and manner of the Commonwealth's elections, the clear legislative mandate of what is required of the elector, and the election-administration purposes of the statute, the statute in question is an important part of Pennsylvania's Election Code that should be modified only by legislative enactment.

IV. Petitioners Should Not Be Permitted to Sow Election Chaos Through Their Cavalcade of Judicial Challenges or Intended Usurpation of the General Assembly.

Just as the rule of law is reinforced by the stability and predictability that come from adherence to legal precedent, consistency in voting procedures furthers public confidence in elections. Perpetual litigation, along with constantly shifting guidance from the Secretary of the Commonwealth over the dating requirement, conversely, serves only to raise doubts, and to confuse voters. To the extent voters are confused about the dating requirement, it is because they are now repeatedly told – six decades after expansion of absentee voting, including the dating requirement – that all of a sudden, it is unconstitutional.

Petitioners and their counsel should not be permitted to treat the Pennsylvania and federal judiciary like a roulette wheel, constantly testing out novel theories hoping they will eventually win something. It is fundamentally problematic that, in addition to their present Hail Mary on behalf of Petitioners claiming the dating requirement violates the Free and Equal Elections Clause, this same group of attorneys has filed voluminous, unsuccessful litigation challenging this requirement:

- Challenging the requirement under both the Materiality Provision and the First Amendment in 2022 before the U.S. District Court for the Eastern District of Pennsylvania, *see Migliori*, 2022 U.S. Dist. LEXIS 46352;
- Attempting to intervene and submitting an *amicus* brief opposing efforts to require elections officials to uphold the law as written in a 2022 Pennsylvania King’s Bench case, *see Ball*, 289 A.3d 1;
- Challenging the requirement under the Materiality Provision (again) in 2023, this time before the U.S. District Court for the *Western* District of Pennsylvania, *see Pa. State Conference of the NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 U.S. Dist. LEXIS 208213 (W.D. Pa. filed Nov. 21, 2023), *rev’d*, 97 F.4th 120 (3d Cir. 2024); and
- An amended challenge under the Equal Protection Clause, filed **just last week**, after the Third Circuit reversed and remanded *NAACP v. Schmidt*, *see Pa. State Conference of the NAACP v. Schmidt*, No. 1:22-CV-00339;

At a minimum, these challenges could have been consolidated for benefit of judicial economy and confidence in the Commonwealth’s election procedures, but instead, these same attorneys have continued a scattershot approach to challenging this democratically-enacted requirement which continues to sow doubt, chaos and confusion about the Commonwealth’s elections.

* * *

It is axiomatic that “[t]he judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceeds along suspect lines.” *Mercurio v. Allegheny Cty. Redev. Auth.*, 839 A.2d 1196, 1203 (Pa. Commw. Ct. 2003) (internal citations omitted); *see also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“Courts do not substitute their social and economic beliefs for the judgment of legislative bodies, [which] are elected to pass laws.”). Indeed, courts should be cautious before:

[S]woop[ing] in and alter[ing] carefully considered and democratically enacted state election rules when an election is imminent.

That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State’s interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.

Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28, 31 (2020) (Roberts, C.J., concurring). That is precisely why Justice Wecht wrote in *2020 Canvass* that “[a] court’s only ‘goal’ should be to remain faithful to the terms of the statute that the

General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said.*” 241 A.3d at 1082 (Wecht, J., concurring and dissenting) (emphasis in original).

“While the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Pa. Democratic Party*, 238 A.3d at 374. Moreover, our Supreme Court has previously “determined that the Election Code’s command [regarding the dating requirement] is unambiguous and mandatory.” *Ball*, 289 A.3d at 21-22 (enjoining undated ballots from being counted). Thus, the only way around that “unambiguous and mandatory” application would be for this Court to find that the dating requirement impacts the *right to vote* (which it doesn’t, as discussed in Part II.A), **and** to find discrimination in a statute that, by its express terms (as discussed in Part II.C), treats all voters **equally**.

This Court should decline to reward Petitioners’ (and their attorneys’ unending) litigation, put an end to this latest scattershot challenge to the democratically-enacted (and judicially-upheld) Election Code, and help ensure voter confidence.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court uphold the General Assembly’s constitutional power and responsibility as the

Commonwealth’s “democratically-elected representatives to weigh the pros and cons of various balloting systems,” *Weber*, 347 F.3d at 1106, and deny Petitioners’ Application.

Respectfully submitted,

/s/ Zachary M. Wallen

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Amicus Curiae Brief contains 6,997 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

Counsel for Amici Curiae

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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/ Zachary M. Wallen

Counsel for Amici Curiae

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EXHIBIT 1

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of
Pennsylvania, Carmen Febo
San Miguel, James Solomon,
John Greiner, John Capowski,
Gretchen Brandt, Thomas Rentschler,
Mary Elizabeth Lawn, Lisa Isaacs,
Don Lancaster, Jordi Comas,
Robert Smith, William Marx,
Richard Mantell, Priscilla McNulty,
Thomas Ulrich, Robert McKinstry,
Mark Lichty, Lorraine Petrosky,
Petitioners

v.

No. 261 M.D. 2017

The Commonwealth of Pennsylvania;
The Pennsylvania General Assembly;
Thomas W. Wolf, In His Capacity
As Governor of Pennsylvania;
Michael J. Stack III, In His Capacity
As Lieutenant Governor of Pennsylvania
and President of the Pennsylvania
Senate; Michael C. Turzai, In His
Capacity As Speaker of the
Pennsylvania House of Representatives;
Joseph B. Scarnati III, In His Capacity
As Pennsylvania Senate President
Pro Tempore; Pedro A. Cortes,
In His Capacity As Secretary of the
Commonwealth of Pennsylvania;
Jonathan M. Marks, In His Capacity
As Commissioner of the Bureau of
Commissions, Elections, and
Legislation of the Pennsylvania
Department of State,
Respondents

ORDER

AND NOW, this 13th day of November, 2017, in furtherance of the
Order of the Supreme Court of Pennsylvania entered on November 9, 2017, it is
hereby **ORDERED**:

1. The Application for Leave to Intervene filed August 10, 2017, is **GRANTED**.

2. Paragraph 3 of the Court's October 16, 2017 Order is **RESCINDED**.

3. In response to the brief filed pursuant to paragraph 2 of the Court's October 16, 2017 Order, Petitioners shall file their brief on or before November 17, 2017. The Court will not accept a reply brief.

4. Preliminary objections challenging the standing of Petitioner League of Women Voters of Pennsylvania (LWVP) are **SUSTAINED**, and LWVP is **DISMISSED** as a party petitioner in this action. *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (holding that entity not authorized by law to exercise right to vote in Commonwealth lacks standing to file political gerrymandering claims).

5. All remaining preliminary objections are **OVERRULED**. This ruling is based on the presence of disputed issues of fact and the exigency of the matter, which does not allow time for the Court to rule on the merits of these preliminary objections.

6. Answers to the Petition for Review must be filed by November 17, 2017.

7. Answers to New Matter, if any, must be filed by November 22, 2017.

8. Oral argument and, if necessary, hearing on motions in limine and remaining pretrial matters will be held on Monday, December 11, 2017, in Courtroom 3001 of the Pennsylvania Judicial Center, Harrisburg,

Pennsylvania, beginning at 9:30 a.m. Trial will begin the same day following disposition thereof and continue day-to-day until concluded.

9. A pre-trial conference will be held Thursday, November 16, 2017, at 1:00 pm., in the President Judge's Conference Room, Suite 5204 of the Pennsylvania Judicial Center, Harrisburg, Pennsylvania, for the purposes of discussing all scheduling matters not addressed in this Order and any other procedural matters which the parties wish to bring to the Court's attention.

10. No extensions of filing deadlines and/or requests for continuances of scheduled proceedings will be considered and/or granted absent extraordinary circumstances.



P. KEVIN BROBSON, Judge

Certified from the Record

NOV 13 2017

And Order Exit

IN THE SUPREME COURT OF PENNSYLVANIA

No. 68 MAP 2024

Black Political Empowerment Project, *et. al.*,

Petitioners/Appellees,

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/Appellants.

**BRIEF OF RESPONDENTS ALLEGHENY AND PHILADELPHIA
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INTRODUCTION

The Allegheny and Philadelphia County Boards of Elections (collectively, “Respondent Counties”) are committed to protecting the fundamental right to vote through the fair and orderly administration of elections in their respective counties. Respondent Counties have taken no position on the merits of Petitioners’ constitutional claims. Respondent Counties submit this brief to highlight the lack of any meaningful purpose served by the dating requirement, the disparate impact enforcement of that requirement has had on elderly and disadvantaged voters, and the administrative burdens associated with enforcing it.

Respondent Counties’ commitment to fair and orderly election administration also compels them to respond in opposition to the Republican Intervenors’ invitation to this Court to invalidate all of Act 77. This attack on Act 77—including its introduction of universal mail voting for all qualified voters in Pennsylvania—is as wrong as it is extreme. Declining to enforce the meaningless dating requirement does not trigger the nonseverability provision of Act 77. And even if it did, that would not justify invalidating the entirety of Act 77. A contrary conclusion will have staggering and profound implications for the electoral process in Pennsylvania, needlessly disenfranchise thousands of Pennsylvania voters, and sow electoral chaos shortly before the 2024 General Election.

ARGUMENT

I. Respondent Counties Need to Expend Considerable Time, Labor, and Resources to Enforce a Meaningless Dating Requirement.

No governmental entity in this case, including Respondent Counties, believes that the requirement to handwrite a date offers any benefit to the administration of elections.¹ The handwritten date is not used to determine a voter's qualification or the timeliness of the ballot, nor is it relied upon to prevent or detect fraud. After the ballot template is certified by the Pennsylvania Department of State, Mem. Op. 31, county boards of elections print and mail absentee and mail ballots to qualified voters who have successfully applied to receive such a ballot. When Respondent Counties receive an absentee or mail ballot, the ballot envelope is stamped with the date and time of receipt to confirm its timeliness. *Id.* at 77. Only ballots stamped before 8:00 p.m. on Election Day may be counted. *Id.* at 21.² If an absentee or mail ballot is

¹ While Respondent Counties usually would not be compelled to respond to misrepresentations in an amicus brief from an individual member of a single county board, the expedited nature of this case demands a correction that this Court would otherwise make on its own. The assertion that Respondent Counties helped Petitioners navigate this case through the Commonwealth Court is utterly baseless, as Respondent Counties have not taken a position on the merits of Petitioners' constitutional claims. If amicus is worried about the lack of governmental entities defending the date requirement in this litigation, he should look no further than his own board of elections, which chose not to intervene in this suit.

² This does not include military overseas ballots, which may be counted as timely if submitted for delivery no later than 11:59 p.m. the day before the election and received by a County Board of Elections by 5:00 p.m. on the seventh day following an election. *See* 25 P.S. §§ 3509(2), 3511(a).

timely received by a county board of elections, it could only have been marked and dated between the time it was sent to a qualified voter and 8:00 p.m. on Election Day. *Id.*

The dating requirement is a meaningless paperwork-related technicality, and it has been challenging and costly for Respondent Counties to enforce it. *Cf.* Brief of *Amicus Curiae* County Officials at 15-19. To process the large volume of absentee and mail ballots received each election,³ Respondent Counties rely on automated sorting machines to recognize when ballot envelopes are returned without handwritten signatures or without the internal secrecy envelope that is required by the Pennsylvania Election Code. Mem. Op. at 38 (citing Respondent Counties' Commonwealth Ct. Statement of Position at 4-5). These machines, however, cannot be configured to determine whether the date on the ballot's outer return envelope is "correct." *Id.* at 38. As a result, Respondent Counties must devote additional time and labor to manually inspect, identify, and set aside ballots that do not comply with the dating requirement. *Id.* at 38-39.

³ In the 2020 General Election, for example, Philadelphia County received more than 380,000 absentee and mail ballots before the Election Day deadline, and Allegheny County received more than 350,000 absentee and mail ballots. *See* Pennsylvania Department of State, Report on the 2020 General Election, *available at* <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/reports/2020-General-Election-Report.pdf> (May 14, 2021).

This labor-intensive and time-consuming manual review is compounded by the lack of guidance as to what constitutes an “incorrect” date. To be clear, since this Court’s decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), Respondent Counties have followed the mandate and invalidated ballots based on the non-substantive requirement in the Pennsylvania Election Code that voters handwrite a correct date on the outer return envelope of an absentee or mail ballot. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). But this Court left it to county boards to “evaluate the ballots that they receive in future elections . . . for compliance” with the dating requirement. Mem. Op. at 65-66 (citing *Ball*, 289 A.3d at 23). And as the Commonwealth Court observed, the Secretary “has thrice changed his guidance following *Ball*,” twice in the last year alone. *Id.* at 61, 81. This unnecessary administrative burden does not contribute to the integrity or efficiency of the election process in Allegheny or Philadelphia County. The only effect of the of the non-substantive date requirement is to reject timely ballots of otherwise qualified voters.

II. The Dating Requirement Disproportionately Affects Elderly Pennsylvania Voters.

Respondent Counties’ experience establishes that the dating requirement disproportionately affects elderly Pennsylvania voters, and resulted in the rejection of more than 10,000 Pennsylvania ballots in the 2022 General Election alone. Mem. Op. at 12, 38. For example, when the Philadelphia County Board of Elections analyzed its own data for the 2022 General Election, it found: (i) 60.9% of undated

ballots and 64.1% of misdated ballots were submitted by voters who were 60-years old or older, (ii) 37.5% of undated ballots and 40.9% of misdated ballots were submitted by voters who were 70 years old or older; (iii) 14.1% of undated ballots and 13.9% of misdated ballots were submitted by voters who were 80 years old or older; and (iv) 57 undated ballots and 15 misdated ballots were submitted by voters who were 90 years old or older.⁴ “The percentages all are significantly higher than the percentage of Philadelphia’s registered voters that these age groups represent.”⁵ While Respondent Counties have not taken a position on the merits of Petitioners’ constitutional claims, their experience demonstrates that enforcement of the dating requirement results in the practical disenfranchisement of thousands of elderly, qualified Pennsylvania voters who rely on mail voting to participate in elections.

III. Declining to Enforce the Dating Requirement Would Not Trigger Act 77’s Nonseverability Provision or Invalidate Act 77.

If this Court were to affirm that enforcement of the date requirement is unconstitutional, it need not also strike all of Act 77, including universal mail voting in Pennsylvania. (Republican Intervenors Br. at 55.) Republican Intervenors’ contrary argument misses the mark for two reasons: The Commonwealth Court’s

⁴ Transcript from November 18, 2022 Meeting of the Philadelphia County Board of Elections at 4-6, available at https://vote.phila.gov/media/111822_Meeting_Transcript.pdf.

⁵ *Id.*

order did not trigger Act 77's severability provision. And even if it did, the severability provision is not enforceable in the sweeping, reckless manner urged by the Republican Intervenors.

At the outset, affirming the Commonwealth Court's conclusion that enforcing of the dating requirement violates the Pennsylvania Constitution would not trigger Act 77's nonseverability provision. That provision (*i.e.*, Section 11 of Act 77) states: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." As the Commonwealth Court observed, its decision did not "invalidate" the date requirement, as voters are still required to date their declaration. *Mem. Op.* at 89-90; *see also Murphy v. NCAA*, 584 U.S. 453, 487-89 (2018) (Thomas, J. concurring) ("Invalidating a statute is not a 'remedy,' like an injunction, a declaration, or damages."). In other words, the decision below was directed at preventing county boards from rejecting ballots based on the date requirement, rather than altering the obligations of the voters themselves.

The Commonwealth Court's holding that the dating requirement does not need to be invalidated or stricken from Act 77 to grant Petitioners relief is consistent with its prior holding in *Bonner v. Chapman*, 298 A.3d 153 (Pa. Commw. Ct. 2023). In *Bonner*, as here, the issue was whether declining to enforce the dating requirement triggered Act 77's nonseverability provision. 298 A.3d. at 168-69. The

Commonwealth Court determined that Act 77's nonseverability provision was not triggered because a decision not to enforce the dating requirement did not "str[ike] the Dating Provisions from the Election Code," nor did it imply "that electors cannot or should not handwrite a date on the declaration in accordance with those provisions." *Id.* at 168. Here, too, Act 77's nonseverability provision is "not triggered" because "the Dating Provisions" will "remain part of the Election Code and continue to instruct electors to date the declaration on the return mailing envelope, which, as history has shown, a majority of electors will do." *Id.*

Additionally, even if this Court were to conclude that the nonseverability provision were triggered, such a conclusion would not justify invalidating Act 77 in its entirety. Pennsylvania statutes are presumptively severable, and this Court has ample discretion to exercise its independent judgment with respect to how to interpret and apply Act 77's nonseverability provision. *See Stilp v. Com.*, 905 A.2d 918, 970-75, 980 (Pa. 2006). In *Stilp*, this Court confronted a "boilerplate" nonseverability clause worded almost identically to the one found in Act 77⁶ but still

⁶ The provision in *Stilp* provided as follows, "The provisions 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." 905 A.2d at 970 (quoting Act 44, § 6). Whereas the provision in this case provides, "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.

held that the statute was severable unless: (1) “the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining provisions without the void one”; or (2) “the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” *Id.* at 970-74, 980-81 (quoting 1 Pa. C.S. § 1925).

As the *Stilp* Court explained, where a nonseverability clause “sets forth no standard for measuring nonseverability, but instead, simply purports to dictate to the courts how they must decide severability”—as is the case here—such provisions are not treated as “inexorable commands.” *Id.* at 972-73 (quoting *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664, 667 (Pa. 1964)). Additionally, a nonseverability provision improperly “intrude[s] upon the independence of the Judiciary and impair[s] the judicial function” where, as here, it “serve[s] an in terrorem function,” or operates to “guard against judicial review altogether by making the price of invalidation too great.” *Id.* at 979-80 (quoting Fred Kameny, *Are Inseverability Clauses Unconstitutional?*, 68 ALB. L. REV. 997, 1001 (2005)).

As in *Stilp*, it would impair the judicial function if this Court were to strike down all of Act 77 simply because the enforcement of an irrelevant, minor provision were held to violate the constitution. To interpret Act 77’s boilerplate

nonseverability provision in this sweeping manner raises separation-of-powers concerns because it sets “no standard for measuring non-severability, but instead simply purports to dictate to the courts how they must decide severability.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 397 n.4 (Pa. 2020) (Donohue, J., concurring and dissenting) (quoting *Stilp*, 905 A.2d at 973). Likewise, to strike all of Act 77—an enormously popular piece of legislation that broadened access to Pennsylvania elections—makes the price of invalidating minor provisions (like the dating requirement) too great.

This Court itself recognized that even the mail voting provisions of Act 77 “are only a fraction of the scope of the Act.” *McLinko v. Dep’t of State*, 279 A.3d 539, 543 (Pa. 2022). Act 77 also “eliminated the option for straight-ticket voting; moved the voter registration deadline from thirty to fifteen days before an election; allocated funding to provide for upgraded voting systems; and reorganized the pay structure for poll workers, along with other administrative changes.” *Id.* All these provisions would be invalidated under the Republican Intervenors’ nonseverability argument. For this reason, to treat Act 77’s nonseverability provision as an “inexorable command” would be to improperly “employ[] [it] as a sword against the Judiciary or the Executive, rather than as a shield to ensure preservation of a legislative scheme or compromise.” *Stilp*, 905 A.2d at 978. These types of boilerplate, standard-less nonseverability provisions are what led the Pennsylvania

Supreme Court in *Stilp* to admonish that it “has never deemed nonseverability clauses to be controlling in all circumstances.” *Id.* at 980.

Instead of adopting the Republican Intervenor’s argument to invalidate all of Act 77, this Court should apply the presumption of severability that it applied in *Stilp*, which requires severance “in those circumstances where a statute can stand alone absent the invalid provisions.” 905 A.2d at 970. This “specific, cogent standard” “emphasizes the logical and essential relationship of the void and valid provision” and makes clear that the remainder of Act 77 is severable from the dating requirement. *See id.*

That conclusion follows from the undisputed fact that the dating requirement serves no purpose in the administration of elections by the Allegheny and Philadelphia County Boards of Elections. The handwritten date is not used by either County Board to determine a voter’s qualification or the timeliness of the ballot, or to prevent or detect fraud. Mem. Op. at 76-79. Since the dating requirement serves no purpose, any suggestion that the statutory scheme cannot function without it—or that Act 77 would not have been enacted without it—falls flat. The legislative history of Act 77 does not even mention the dating requirement, much less suggest that it was “so essentially and inseparably connected with” the rest of Act 77 that the

General Assembly might not have enacted Act 77 without it.⁷ *See* 1 Pa.C.S. § 1925. Nor is there any reason to believe that without the dating requirement, Act 77 would be incomplete or incapable of being executed in accordance with the intent of the General Assembly. The numerous provisions of Act 77 that are unrelated to dating the outer envelopes of mail and absentee ballots surely can be enforced without the dating requirement, irrespective of whether the Act as a whole was, in the words of the Republican Intervenors, “a politically difficult compromise.” (Republican Intervenor Br. at 56.) Indeed, essentially all of Act 77 has nothing to do with the dating provision.⁸ And there is no reason to believe that the General Assembly intended that “invalidation” of any word, phrase, or sub-clause of the Act would trigger invalidation of Act 77, which “effected major amendments to the Pennsylvania Election Code” and “was an enormously popular piece of legislation on both sides of the aisle.” *McLinko*, 279 A.3d at 543. In these circumstances, it is

⁷ Act 77’s legislative history shows that several components of Act 77 were considered essential parts of the legislative compromise. *See, e.g.*, S. LEGIS. J. NO. 46, 203rd. SESS. at 1000-02 (Pa. 2019) (discussing how eliminating straight-ticket voting and the adequacy of election funding were key Republican concerns). The dating provision, by contrast, appears to have been a holdover from a previous version of the Election Code that was not discussed during Act 77’s passage. *See* H. LEGIS. J. NO. 64, 203rd SESS. at 1740 (Pa. 2019); *see also* 25 P.S. § 3146.6(a)(1) (effective prior to Act 77).

⁸ *See, e.g.*, Act 77, § 6 (eliminating straight-ticket voting); *id.* § 4 (adding 15 days to register to vote); *id.* § 3 (changing requirements for nominating petitions, requiring that sample ballots be published online, and restricting when the boundaries of election districts can be changed).

simply illogical to infer that the General Assembly intended to invalidate the entirety of Act 77—including its elimination of straight-ticket voting, introduction of universal mail ballots, and numerous other reforms to modernize Pennsylvania’s elections—based on the invalidation of “shall ... date” language that serves no purpose other than disenfranchising otherwise qualified voters. *See* 1 Pa.C.S. § 1922(1) (in interpreting a statute, it should be presumed “[t]hat the General Assembly does not intend a result that is absurd [] ... or unreasonable”).

That conclusion is further reinforced by the fact that the Pennsylvania Legislature has amended Act 77 several times without including a similar nonseverability provision.⁹ If the General Assembly intended that Act 77’s nonseverability provision would be applied in the face of those subsequent amendments, it would have included nonseverability clauses in those later enactments. Plus, accepting the Republican Intervenors’ nonseverability argument would, in effect, force this Court to parse each amendment to ascertain which parts of the Election Code would remain in effect after applying the nonseverability provision—a result plainly not contemplated by the General Assembly when it enacted Act 77. And even if this Court were to agree that all of Act 77 must be invalidated due to the nonseverability provision—and it should not reach that

⁹ *See, e.g.*, Act of Mar. 27, 2020, P.L. 41, No. 12, sec. 11, § 1306, 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422); *id.*, sec. 14, § 1306-D.

conclusion—the subsequent amendments would likely leave the remaining statutory scheme entirely incoherent. Subsequent amendments to the Election Code thus confirm that the General Assembly did not intend for all of Act 77 to be stricken over the enforceability of dating requirement. In sum, if the dating requirement is declared unconstitutional, this Court can and should conclude that Act 77’s nonseverability provision is either inapplicable or unenforceable. In either event, this Court should not invalidate all of Act 77.

IV. Invalidating Act 77 Would Disenfranchise Voters and Cause Electoral Chaos.

The Republican Intervenors ignore the staggering consequences of their extreme nonseverability argument. Accepting that argument would have dire consequences for Pennsylvania voters and the County Boards of Elections tasked by law with administering the 2024 General Election. Universal “no-excuse” mail voting has been a resounding success since the General Assembly adopted it in 2019. It has made voting more accessible and less burdensome to hundreds of thousands of voters. It has become a settled part of Pennsylvania’s electoral process, with over one million voters now relying on mail voting to exercise their constitutional right to vote. The sudden elimination of this time-tested and proven method of voting—mere months before the 2024 General Election—would be devastating to those who are unable to vote in person yet are excluded from the narrow categories of those permitted to vote by absentee ballot. Indeed, invalidating Act 77 would, in effect,

“disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election.” *Pa. Democratic Party*, 238 A.3d at 397 n.4 (Donohoe, J., concurring in part and dissenting in part).

Eliminating Act 77 would also be confusing to voters and extremely disruptive and chaotic to the electoral process. Act 77 is a comprehensive election modernization statute in which county boards of elections, elections officials, Pennsylvania voters, and candidates for office have developed significant reliance interests. Respondent Counties alone have invested significant time and resources implementing and complying with Act 77, including by ensuring that mail ballots are available to all qualified applicants in Allegheny and Philadelphia Counties and by developing robust processes for handling those ballots in a manner that complies with state and federal law. With the General Election soon approaching, eliminating Act 77 would be profoundly disruptive to those efforts.¹⁰

At least 5.5 million Pennsylvanians have voted in each of the last five presidential elections dating back to 2004.¹¹ As of April 23, 2024, nearly one million

¹⁰ Respondent Philadelphia County will be administering a Special Election on September 17, 2024, to fill recent vacancies in the 195th and 201st Legislative Districts. Delivery of absentee and mail ballots to qualified voters for the Special Election began on August 21, 2024, and the Board of Elections has already begun receiving completed absentee and mail ballots.

¹¹ Commonwealth of Pennsylvania, Voting & Election Statistics, *available at* <https://www.pa.gov/en/agencies/dos/resources/voting-and-elections-resources/voting-and-election-statistics.html> (last accessed September 4, 2024).

voters had already applied for mail ballots in the 2024 General Election¹² and are therefore already relying on their access to mail ballots to exercise their right to vote in the upcoming election. And Respondent Counties are preparing to send mail ballots to qualified applicants in the fall¹³—a significant task that would be disrupted if this Court were to declare Act 77 invalid. 25 P.S. § 3150.12a(b). Invalidating all of Act 77—which includes voting reforms that go well beyond the introduction of universal no-excuse mail voting—would sow chaos and place countless voters at risk of disenfranchisement. This Court should decline the invitation to create mass election confusion and chaos shortly before a major presidential election.

CONCLUSION

For these reasons, if this Court affirms the decision below on the merits of Petitioners’ constitutional claims, it should reject Republican Intervenors’ request to strike all of Act 77.

¹² Commonwealth of Pennsylvania, Elections Data - Daily Mail Ballot Report, <https://www.pavoterservices.pa.gov/2024%20Primary%20Daily%20Mail%20Ballot%20Report.xlsx> (last accessed September 4, 2024).

¹³ Respondent Allegheny County has already approved over 150,000 applications for mail ballots, and Respondent Philadelphia County has already approved over 120,000. The process for ordering, printing, and mailing these ballots is well underway.

Dated: September 4, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief contains 3,694 words, not including the supplementary materials as defined by Pa.R.A.P. 2135(b).

Dated: September 4, 2024

/s/ Ilana H. Eisenstein
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CERTIFICATE OF COMPLIANCE

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

Dated: September 4, 2024

/s/ Ilana H. Eisenstein
Ilana H. Eisenstein

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: September 4, 2024

/s/ Ilana H. Eisenstein
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA STATE CONFERENCE

OF THE NAACP, et al.,

Plaintiffs,

v.

LEIGH M. CHAPMAN, in her official capacity as
Acting Secretary of the Commonwealth, et al.,

Defendants.

Case No. 1:22-cv-00339-SPB

-- and --

BETTY EAKIN, et al.

Plaintiffs,

v.

ADAMS COUNTY BOARD OF ELECTIONS, et al.

Defendants.

Case No. 1:22-cv-340

Remote Deposition of Crista Miller

Monday, February 13, 2023

11:00 a.m.

Recorded Stenographically by:
Jennifer Miller, RMR, CRR, CCR
Job No.:222617

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2	Exhibits Cont'd
3	Exhibit 10 Document Bates-stamped 78 DAUPHIN000001_5
4	Exhibit 11 Document Bates-stamped 80 DAUPHIN000001_7
5	
6	Exhibit 12 Mihaliak police report 90
7	
8	Exhibit 13 Answers and Objections of 109 Defendant Lancaster County Board of Elections to Plaintiffs' First Set of Requests for Productions of Documents
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C. Miller

P R O C E E D I N G S

CHRISTA MILLER, after

having been first duly sworn, was examined and testified as follows:

MR. OSHER: Before Mr. Loney begins his questioning, I'd like to put on the record an agreement that was reached before we went on the record here, which is that we are here appearing in two different cases, the NAACP case, which is the 22-cv-339 case; and the Eakin case, which is 22-cv-340.

The parties have agreed that the questioning that is elicited by the plaintiffs in the 339 case will be usable in the 340 case and vice versa. And the Eakin plaintiffs have agreed that the time used by the 339 plaintiffs will count against their seven hours under the rules.

Mr. Zimolong, is that sufficient for you?

MR. ZIMOLONG: That's accurate.

Thank you.

MR. OSHER: And, Mr. Loney, is

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1 C. Miller
2 that good for you?
3 MR. LONEY: Yeah. That works
4 for plaintiffs in 339.
5 Thanks for putting that on the
6 record.
7 MR. OSHER: Okay. And my
8 understanding is that there's no objection
9 from any other party, but they should
10 speak up now if that is the case.
11 Thanks, all.
12 - - -
13 E X A M I N A T I O N
14 - - -
15 BY MR. LONEY:
16 Q. Okay. Good morning, Ms. Miller.
17 Thank you for taking the time today.
18 Just for the record, my name is
19 Steve Loney. I'm an attorney with the ACLU of
20 Pennsylvania, and I represent the plaintiffs in
21 the 339 case. That's the Pennsylvania State
22 Conference of the NAACP and all of the other
23 plaintiffs in that case.
24 Have you been deposed before?
25 A. I have not.

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1 C. Miller
2 counsel. But it's always helpful to make sure
3 we're on the same page.
4 So we have a Court Reporter on
5 the Zoom here. Everything we're saying is
6 being transcribed. So it's important for us to
7 speak as clearly as possible and to avoid
8 speaking over each other.
9 And I should ask: Can you hear
10 me clearly in the room where you're sitting?
11 A. Yes.
12 Q. Okay. And it's important to make
13 sure your responses are verbal, like the one
14 you just gave, because the Court Reporter can't
15 take down gestures or nods and the like.
16 Also there are a lot of lawyers
17 here attending for a lot of different parties,
18 including your counsel for the Lancaster board.
19 They have the right to object to
20 my questions as we go. I've been known to ask
21 some questions that trigger some objections
22 every once in a while.
23 So if your lawyer or anybody
24 else on the Zoom starts to speak when I am
25 completing a question, it's a little difficult

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1 C. Miller
2 Q. Okay. Have you ever given testimony
3 at a trial, you know, in a witness box in a
4 courtroom?
5 A. I have.
6 Q. How many times have you done that?
7 A. A few. I don't know the exact
8 number.
9 Q. And have any of those been in
10 connection with your role with the Lancaster
11 County Board of Elections?
12 A. Yes.
13 Q. And when was the last time that you
14 gave trial testimony in that capacity?
15 A. A few weeks ago.
16 Q. Okay. Do you remember what the case
17 was?
18 A. It was a hearing with the Department
19 of State.
20 Q. Did that case involve mail-in
21 ballots?
22 A. No.
23 Q. Okay. Well, I'm just going to go
24 through a couple of the basics of depositions,
25 some of which you may have heard from your

Page 13

1 C. Miller
2 over Zoom, but we just ask that you do what you
3 can to give whoever chimes in a moment to get
4 their objection on the record before you give
5 your answer.
6 But once the objection is
7 stated, you should generally answer the
8 question posed unless I withdraw the question.
9 Does that make sense?
10 A. Yes.
11 Q. The one exception to answering the
12 question posed is if your counsel objects on
13 the basis of privilege. So we don't want you
14 to disclose any information covered by the
15 attorney-client privilege, so you should let us
16 hash out any privilege objections before
17 answering my question if you hear one of those
18 objections.
19 If you don't understand a
20 question I ask, feel free to let me know. And
21 I'll do what I can to explain the question or
22 rephrase.
23 If you need a break at any time,
24 just say the word. We'll try to take breaks
25 around every hour, maybe a little bit more than

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1 C. Miller
2 that. And I'll do my best to accommodate a
3 request for a break unless there's a question
4 pending. We always ask that the question be
5 answered unless we're taking a break for one of
6 those privilege objections.
7 So, with that, can you think of
8 any reason why you might not be able to
9 understand or respond accurately to any of my
10 questions today?
11 A. No.
12 - - -
13 (Whereupon, there was an
14 off-the-record discussion.)
15 - - -
16 BY MR. LONEY:
17 Q. Okay. Ms. Miller, so I should note
18 for the record that this is a remote
19 deposition. We are in separate rooms.
20 It looks like you have
21 Mr. Zimolong there in the same room with you;
22 is that right?
23 A. That's correct.
24 Q. Is there anybody else in that room
25 with you?

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1 C. Miller
2 A. I am the chief clerk and chief
3 registrar of the Lancaster County Board of
4 Elections and Registration Commission.
5 Q. How long have you held -- how long
6 have you had that position?
7 A. Two years.
8 Q. What did you do before that?
9 A. I worked for USA Field Hockey as the
10 women's team manager.
11 Q. And so you've been in your current
12 position for two years.
13 So you were in that position
14 also during the November 2022 general election,
15 right?
16 A. Correct.
17 Q. And also during the primary election
18 in the spring of 2022?
19 A. Correct.
20 Q. Prior to your role with the -- strike
21 that.
22 Prior to your current role, did
23 you ever have any other position with the
24 Lancaster County Board of Elections?
25 A. I did not.

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1 C. Miller
2 A. No.
3 Q. And, obviously, you all are on a
4 computer to link into this Zoom.
5 Can you tell me how many screens
6 you have in front of you?
7 A. Two.
8 Q. And is there anything other than this
9 Zoom program open on any of those computer
10 screens?
11 A. No.
12 Q. Do you have a smartphone with you in
13 the room?
14 A. Yes.
15 Q. Okay. So I'm just going to ask that,
16 while we're on the record -- so other than
17 during breaks -- that you leave your phone to
18 the side and keep all of the windows, other
19 than this Zoom screen, closed on your computer
20 while we're on the record.
21 Can we agree to that for the
22 day?
23 A. Yes.
24 Q. Okay. So what is your current
25 position?

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1 C. Miller
2 Q. And prior to your current role, had
3 you ever had any other roles dealing with
4 elections?
5 A. I did not.
6 MR. LONEY: I'm going to share
7 my screen and ask that the document I'm
8 putting up be marked as Exhibit
9 Lancaster 1.
10 - - -
11 (Whereupon, there was an
12 off-the-record discussion.)
13 - - -
14 MR. LONEY: I'm about to show
15 what is in that folder as Tab Number 1.
16 - - -
17 (Whereupon, Exhibit 1 was marked
18 for identification.)
19 - - -
20 MR. LONEY: Hopefully I can do
21 this correctly.
22 BY MR. LONEY:
23 Q. Ms. Miller, do you see on your screen
24 right now a document with a court caption and a
25 title Notice of Deposition?

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1 C. Miller
2 A. Yes, I do.
3 Q. Do you see anything else on that
4 shared screen?
5 A. No.
6 Q. So I'm showing you on the screen
7 what's being marked as Exhibit Lancaster 1.
8 It's the notice of today's deposition.
9 Have you seen this deposition
10 notice before?
11 A. I have.
12 Q. And do you understand that you've
13 been designated to testify on behalf of the
14 Lancaster board --
15 A. Yes.
16 Q. -- concerning the topics in this
17 deposition notice?
18 A. Yes.
19 Q. So I'm going to scroll to the second
20 page, which is a list of topics.
21 Did you review these topics
22 before today's deposition?
23 A. I did.
24 Q. And what, if anything, did you do to
25 prepare yourself to speak about these topics on

Page 20

1 C. Miller
2 caption on them like this notice of deposition
3 does?
4 A. Yes.
5 Q. Did you review any other documents
6 without a court caption on them in preparation
7 for this deposition?
8 A. Just any documents that had been sent
9 over that we would be looking at today.
10 Q. So anything that you reviewed has
11 been produced to -- in this case?
12 A. From the best of my knowledge, yes.
13 MR. LONEY: Okay. Let's take
14 this down and put up -- for the Court
15 Reporter's benefit, it's Tab 2.
16 - - -
17 (Whereupon, Exhibit 2 was marked
18 for identification.)
19 - - -
20 MR. LONEY: And I'll ask that
21 this be marked as Exhibit Lancaster 2.
22 I'll share that now.
23 BY MR. LONEY:
24 Q. So, Ms. Miller, I'm showing on the
25 screen a document that's been marked as -- or

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1 C. Miller
2 the board's behalf?
3 A. I just reviewed the questions with my
4 lawyer.
5 Q. Did you speak with any other -- any
6 of the board members in preparation for this
7 deposition?
8 A. I did not.
9 Q. And you said that you met with your
10 lawyer. And I don't want to get into what was
11 discussed between you and your lawyer, but how
12 many times did you meet about this deposition?
13 A. Once.
14 Q. And for how long?
15 A. I believe an hour.
16 Q. Did you review any documents to get
17 ready for this deposition, other than the
18 notice that's up on the screen right now?
19 A. I did.
20 Q. What other documents did you review?
21 A. We reviewed -- I reviewed the
22 documents that we had submitted previously with
23 answers to questions.
24 Q. And we'll go through those in a
25 second, but did those also have a -- a court

Page 21

1 C. Miller
2 is being marked as Exhibit Lancaster 2. It's
3 the Lancaster board's answers to plaintiffs'
4 first set of requests for admissions.
5 Is this one of the documents you
6 reviewed in preparation for your deposition?
7 A. Yes.
8 Q. Did you personally review the
9 plaintiffs' request for admission before they
10 were submitted in this case on January 20th?
11 A. Yes.
12 Q. And did you approve the responses
13 before they were served on the other side?
14 A. I did.
15 MR. LONEY: I'll take that down
16 for now and move on to the next one,
17 which, for the Court Reporter, is Tab 3.
18 - - -
19 (Whereupon, Exhibit 3 was marked
20 for identification.)
21 - - -
22 MR. LONEY: And I'll ask that
23 this be marked as Lancaster 3.
24 BY MR. LONEY:
25 Q. Ms. Miller, I'm showing on the screen

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1 C. Miller
2 a document that is being marked as Lancaster 3.
3 It's the Lancaster board's answers and
4 objections to the plaintiffs' first set of
5 interrogatories.
6 Is this also one of the
7 documents that you reviewed in preparation for
8 your deposition today?
9 A. I did.
10 Q. And I'm going to scroll -- please
11 stop me if you feel the need to look at any
12 part of this document that I'm sort of going
13 past quickly, but I'm going to go to the last
14 page for now, which is a declaration page.
15 Is that your signature on the
16 declaration page?
17 A. It is.
18 Q. And did you review the answers to
19 these interrogatories before they were served
20 on January 20th?
21 A. Yes.
22 Q. And you approved the substance of the
23 answers?
24 A. I did.
25 MR. LONEY: I'm taking

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1 C. Miller
2 that were served in response to the plaintiffs'
3 request for production?
4 A. I did.
5 Q. So I'm going to -- again, let me know
6 if you feel the need to review the full
7 document, but I'm going to jump to Request
8 Number 2.
9 Hopefully, you can see me
10 highlighting that on the screen.
11 So this is a request for copies
12 of the mail ballot return envelopes that were
13 set aside because they either lacked a
14 handwritten date or showed a date that the
15 board deemed to be incorrect.
16 Do you see the request that I'm
17 referring to?
18 A. I do.
19 MR. ZIMOLONG: Objection to
20 form.
21 You can answer.
22 THE WITNESS: I do.
23 BY MR. LONEY:
24 Q. And just below the request is an
25 answer which includes some objections. And

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1 C. Miller
2 Lancaster 3 down.
3 I'm going to do one more before
4 we get into some more questions.
5 For the Court Reporter's
6 benefit, this is Tab 4.
7 - - -
8 (Whereupon, Exhibit 4 was marked
9 for identification.)
10 - - -
11 BY MR. LONEY:
12 Q. Ms. Miller, I'm showing on the screen
13 a document that is being marked as Lancaster 4.
14 It's the Lancaster board's
15 answers and objections to plaintiffs' first set
16 of requests for production of documents.
17 Is this also a document you
18 reviewed in preparation for your testimony
19 today?
20 A. Yes.
21 Q. And did you review the plaintiffs'
22 requests for production of documents before the
23 Lancaster board responded on January 20th?
24 A. Yes.
25 Q. And did you approve the responses

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1 C. Miller
2 scrolling a bit down to page 3 now where the
3 Lancaster board responded, notwithstanding the
4 objections, that the board "will produce copies
5 of the ballots, redacted where appropriate, for
6 inspection and review pursuant to an acceptable
7 confidentiality order and other order of the
8 Court."
9 Am I reading that correctly?
10 A. Yes.
11 Q. So were you aware that the board had
12 agreed to provide copies of the mail ballot
13 envelopes at issue pursuant to an acceptable
14 confidentiality order?
15 MR. ZIMOLONG: Objection.
16 That's not what it says.
17 BY MR. LONEY:
18 Q. Did the board not agree to produce
19 copies of the envelopes pursuant to an
20 acceptable confidentiality order?
21 MR. ZIMOLONG: Objection. Goes
22 to attorney-client work product litigation
23 strategy.
24 Don't answer.
25

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1 C. Miller
2 BY MR. LONEY:
3 Q. Are you going to follow your
4 counsel's instruction not to answer my last
5 question?
6 A. I am.
7 Q. Okay. Are you aware that the
8 Lancaster board consented to an acceptable
9 confidentiality order on February 3rd?
10 MR. ZIMOLONG: Objection.
11 BY MR. LONEY:
12 Q. You can answer.
13 MR. ZIMOLONG: Calls for
14 speculation.
15 BY MR. LONEY:
16 Q. Are you -- are you aware of that
17 fact?
18 MR. ZIMOLONG: Objection. Calls
19 for speculation. There's no acceptable
20 confidentiality order.
21 BY MR. LONEY:
22 Q. Okay. You can answer.
23 MR. ZIMOLONG: If you understand
24 it.
25 THE WITNESS: Yeah. I'm not

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1 C. Miller
2 representation in the exhibit marked
3 Lancaster 4.
4 So we're going to have to hold
5 this deposition open and come back to
6 complete it, if necessary, after the board
7 completes its production.
8 MR. ZIMOLONG: Well, no. And
9 we're not -- you can state whatever you
10 want for the record.
11 We're not agreeing to produce
12 another designee here.
13 The answers were served on
14 January 20th. It's January -- it's
15 February 13th. You've had these for
16 23 days.
17 On Friday night --
18 MR. LONEY: We've had the
19 enveloped for 23 days?
20 MR. ZIMOLONG: You've had the
21 answers for 23 days.
22 On Friday night you sent an
23 email to me stating produce the mail
24 ballot envelopes, which I've never agreed
25 to produce, because you believed that we

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1 C. Miller
2 sure exactly what you're asking. I never
3 saw -- I've not seen anything or -- or I
4 should say our board has not shown me
5 anything that they would have received.
6 BY MR. LONEY:
7 Q. Okay. So you're not aware that the
8 Court entered a confidentiality order in this
9 case on February 7th? That hasn't been shown
10 to you?
11 A. Not to my knowledge.
12 Q. Okay. Has the board or have you
13 prepared envelope copies for production and
14 inspection in this case?
15 A. I have not.
16 Q. Do you know if anybody has?
17 A. I do not.
18 Q. Have you or anybody else working for
19 the Lancaster board provided counsel with
20 copies of the envelopes at issue?
21 A. We did not.
22 MR. LONEY: All right. So I'll
23 note for the record that we also have not
24 received any requests for envelope copies,
25 despite our repeated requests and the

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1 C. Miller
2 agreed to produce them pursuant to our
3 answer to Request for Production Number 2.
4 You're wrong.
5 MR. LONEY: So can I just --
6 instead of your objection --
7 MR. ZIMOLONG: No. You can just
8 put something on the record. I'm not
9 speaking objection anything.
10 You just went on the record and
11 stated what you're going to do. And I'm
12 stating in response to that. That's not a
13 question. That's a statement. So I can
14 make a statement back.
15 MR. LONEY: All right. Go for
16 it.
17 MR. ZIMOLONG: And what I'm
18 saying is you've misrepresented what this
19 says. You've made a statement on the
20 record as if it were a fait accompli.
21 Ms. Miller is here as a designee
22 pursuant to Rule 30(b)(6). She's here for
23 seven hours. You agreed to it. She's not
24 coming back.
25 There's absolutely nothing wrong

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1 C. Miller
2 with this answer. You believe it's
3 incorrect. You believe that we made
4 something -- we have produced -- not
5 produced something has been agreed to be
6 produced or there was an unreasonable
7 objection.
8 Well, we can take that up. We
9 can meet and confer about it, and you can
10 advise the Court if you need it.
11 But to say here today,
12 February 13th, after having these answers
13 for 23 days, that you're going to bring
14 her back because you don't think the
15 production is full or complete, that
16 doesn't work -- it doesn't work that way.
17 So I'll let you keep continuing
18 your questioning.
19 MR. LONEY: Okay. So -- just so
20 that we're all clear, what I'm putting on
21 the record now is a reservation of rights
22 to hold this deposition open and also to
23 file a motion to compel now that I'm
24 hearing Lancaster County is now refusing
25 to produce the envelope copies requested

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1 C. Miller
2 So now you're in a deposition,
3 and you're making a statement that we're
4 refusing to produce it.
5 I have a difference of opinion.
6 MR. LONEY: Are you?
7 MR. ZIMOLONG: What's that?
8 MR. LONEY: Are you refusing to
9 produce them?
10 MR. ZIMOLONG: Yeah. We have an
11 objection to producing them.
12 MR. LONEY: Okay. So you're
13 refusing --
14 MR. ZIMOLONG: As stated in the
15 request for production, we have an --
16 Lancaster County Board of Elections has a
17 objection, as we've told you repeatedly.
18 Not us, not just us, Mr. Loney.
19 Multiple counties have an objection to it.
20 As we told you, when we were
21 negotiating the confidentiality order, we
22 have an objection to it. As we told you
23 in negotiating the confidentiality order,
24 it didn't alleviate our objection.
25 You agreed to it. You agreed to

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1 C. Miller
2 in Request for Production Number 2.
3 MR. ZIMOLONG: I never refused
4 that. I've objected to it.
5 MR. LONEY: So can I -- can I
6 ask you --
7 MR. ZIMOLONG: No.
8 MR. LONEY: Can I ask you just
9 for the record --
10 MR. ZIMOLONG: I'm not going to
11 have a deposition where you state
12 something on the record because you heard
13 they refused to produce --
14 MR. LONEY: Okay. So --
15 MR. ZIMOLONG: The answer is
16 on -- the answer is on the screen before
17 you. Okay?
18 MR. LONEY: Correct. And it
19 says --
20 MR. ZIMOLONG: The proper way --
21 and if you had a problem with that, up
22 until any of the previous 23 days, you
23 could have met and conferred with me about
24 that. Perhaps we could have broached that
25 impasse. Perhaps we couldn't.

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1 C. Miller
2 it.
3 MR. LONEY: I didn't.
4 MR. ZIMOLONG: Yeah, you agreed.
5 MR. LONEY: Can we stop making
6 speeches on the record? Can we do that?
7 MR. ZIMOLONG: You started it.
8 MR. LONEY: Okay.
9 MR. ZIMOLONG: I will be happy
10 for you to continue with your questioning.
11 MR. LONEY: So --
12 MR. ZIMOLONG: This colloquy is
13 a statement. And if you're going to make
14 statements on the record and make
15 misrepresentations on the record, I'm
16 going to make statements back.
17 MR. LONEY: Okay.
18 MR. ZIMOLONG: So if you want to
19 continue with your questioning, you're
20 free. I haven't interrupted your
21 questioning at all.
22 MR. LONEY: Okay.
23 MR. ZIMOLONG: But you started
24 making a statement on the record, and now
25 you don't like that I'm making a statement

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1 C. Miller
2 back.
3 So would you like to question
4 the witness, Mr. Loney?
5 MR. LONEY: Okay. So I'm going
6 to question the witness subject to our
7 ongoing objection to the refusal to
8 produce these envelopes.
9 And just to make sure there are
10 no open misstatements on the record, we
11 did meet and confer after receiving a
12 response on January 20th. We engaged in
13 lengthy meet-and-confers about an
14 acceptable confidentiality order. One was
15 entered, six days ago, and we are awaiting
16 the production that we asked for.
17 Now, given that you're not
18 providing it and you are standing on an
19 objection, despite the entry of a
20 confidentiality order, I'm noting for the
21 record that we may go to the Court.
22 There's no misrepresentation of
23 any of that. I'm telling you what we may
24 do after this.
25 Now, I'm going to continue with

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1 C. Miller
2 vote in the election in which they have cast a
3 ballot?" If so, what is the basis for that
4 contention?"
5 Did I read that correctly?
6 A. You did.
7 Q. And can you take a moment to read
8 over the Lancaster board's response?
9 A. Yeah, I will.
10 Q. Let me know when you're finished
11 reading.
12 A. Okay.
13 Q. So the response that you just read,
14 you reviewed that and approved it before it was
15 served in this case, right?
16 A. Yes.
17 Q. And so you agree, in the first
18 instance, looking at the first line of the
19 response, that the dates written on envelopes
20 are not material to the question of whether a
21 person is qualified to vote?
22 The date written on the
23 envelope, for example, doesn't tell you whether
24 the person is over 18 years old, right?
25 A. Correct.

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1 C. Miller
2 my questioning.
3 MR. ZIMOLONG: Well, you have
4 misrepresented it, but I'll let you --
5 I'll let you continue.
6 MR. LONEY: Okay. So I'm going
7 to take the document production responses
8 off the screen and go back to the
9 interrogatory responses, which are Exhibit
10 Lancaster 3.
11 BY MR. LONEY:
12 Q. And I have jumped here, Ms. Miller,
13 to Interrogatory Number 14.
14 Do you see that on your -- on
15 your screen?
16 A. I do.
17 Q. And, again, if you feel the need to
18 flip through this and look at anything else to
19 contextualize your answer, let me know. But,
20 otherwise, I'm just going to ask about Question
21 Number 14 for a moment.
22 So plaintiffs' interrogatory
23 reads: "Do you contend that the handwritten
24 date is material in determining whether a
25 ballot" -- "a mail ballot voter is qualified to

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1 C. Miller
2 Q. And the date written on the envelope
3 doesn't tell you whether the voter is or has
4 been a U.S. citizen for at least a month,
5 right?
6 A. Correct.
7 Q. And the date written on the envelope
8 doesn't tell you whether the voter has resided
9 in Lancaster County for at least 30 days, does
10 it?
11 A. Correct.
12 Q. And it also doesn't tell you whether
13 the person voting is incarcerated on a felony
14 conviction, right?
15 A. Correct.
16 Q. For all of those other things I just
17 went through -- citizenship, age, residence in
18 the county, whether the person is
19 incarcerated -- the Lancaster board has other
20 methods of confirming all of those things that
21 are relevant to qualification, right? You
22 don't need the -- the -- the date on the
23 envelope?
24 MR. ZIMOLONG: Objection to
25 form.

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1 C. Miller
2 You can answer.
3 THE WITNESS: That is correct.
4 BY MR. LONEY:
5 Q. But it's the Lancaster board's
6 position that -- and looking again at
7 Interrogatory Number 14 -- that the date is,
8 nevertheless, material in determining whether
9 the ballot was cast in compliance with the
10 election code; is that right?
11 A. That is correct.
12 Q. Okay. So can you help me understand
13 how that is?
14 Is it because the voter who
15 didn't write the correct date next to their
16 signature didn't comply with the election code
17 and its requirement to sign and date the outer
18 envelope?
19 A. Correct. The election code says that
20 it must be dated, and so we are looking to see
21 if there is a date or not to determine whether
22 we can open to count the ballot or not.
23 Q. Okay. So you've used the date or the
24 absence of a date to determine whether the
25 voter complied with the dating requirements.

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1 C. Miller
2 board's perspective; is that right?
3 A. Correct.
4 Q. Okay. So I'm going to flip back to
5 Exhibit Lancaster 2, which is the requests for
6 admission.
7 Do you have that on your screen
8 now?
9 A. I do.
10 Q. And I'm going to focus on the first
11 one, Request for Admission Number 1, on that
12 first page.
13 The request is -- or the
14 statement that we've asked the counties to
15 admit is: "You have never used or referred to
16 the date handwritten on the outer envelope
17 containing a mail ballot for any purpose
18 related to determining or confirming the mail
19 ballot voter's eligibility (that is, their age,
20 citizenship, county, and duration of residence
21 and felony status)."
22 Did I read that correctly?
23 A. Yes.
24 Q. And the Lancaster board replied to
25 that with one word, simply saying "Denied."

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1 C. Miller
2 Do I have that right?
3 A. Correct.
4 Q. And that's the only way a
5 voter-written date is relevant to whether the
6 vote is counted, right, to determine if the
7 voter complied with that requirement to date
8 and sign?
9 MR. ZIMOLONG: Objection to
10 form.
11 You can answer.
12 THE WITNESS: We use that date.
13 We follow the court order, if there is
14 one, for that election to give us the date
15 range and if there is a date there at all.
16 BY MR. LONEY:
17 Q. Right. If they don't include the
18 date, it's a noncompliant vote, based on the
19 most recent court order. And if they did
20 provide a date within a particular range, it's
21 a compliant vote.
22 Do I have that right?
23 A. That is correct.
24 Q. And that's -- that's the end of the
25 analysis of the date, from the Lancaster

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1 C. Miller
2 Can you help me square that with
3 the first sentence from the interrogatory
4 response we just saw that said the handwritten
5 date is not material to determining whether a
6 mail ballots voter is qualified to vote?
7 MR. ZIMOLONG: Objection to
8 form.
9 You can answer.
10 THE WITNESS: We have not used
11 it to determine someone's eligibility.
12 BY MR. LONEY:
13 Q. Okay. So the board's only basis for
14 denying this request is -- this overlaps with
15 Interrogatory 14.
16 Am I right that Interrogatory 14
17 tells us how the Lancaster board uses the date
18 on the envelopes?
19 A. Correct.
20 MR. ZIMOLONG: Go ahead.
21 THE WITNESS: Correct.
22 BY MR. LONEY:
23 Q. Is there anything else -- any other
24 way in which the date is relevant to the
25 board's decision whether to open and canvas the

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1 C. Miller
2 mail ballot inside an envelope other than what
3 we've already discussed and what's in these
4 written responses?
5 A. There is not.
6 MR. LONEY: I'm going to stop
7 sharing this.
8 BY MR. LONEY:
9 Q. So if we're talking about what -- the
10 election code requirement that the envelope be
11 signed and dated, does Lancaster County or the
12 Lancaster County Board of Elections take the
13 same position with respect to any provision in
14 the election code? If the code requires it,
15 then you require it to count the vote?
16 A. Yes.
17 Q. Would that include the requirement to
18 use blue, black, or blue-black ink in fountain
19 pen or ballpoint pen or black lead pencil or
20 indelible pencil to mark a ballot?
21 A. Yes.
22 Q. So that requirement for the -- either
23 using pencil or a particular color ink is on
24 the same level, from your perspective, as the
25 date requirement?

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1 C. Miller
2 MR. ZIMOLONG: Objection to
3 form.
4 You can answer.
5 THE WITNESS: Yes. The scanners
6 will not scan it.
7 BY MR. LONEY:
8 Q. But did the Lancaster board
9 disqualify any ballots for using a color ink
10 other than black, blue, or blue-black?
11 A. Not that I can think of.
12 Q. Let's say the legislature added a
13 provision to the election code requiring every
14 voter to write the name of their first pet or
15 their mother's maiden name on a return
16 envelope.
17 Would the mother's maiden name
18 be material to whether the ballot is eligible
19 to be counted, in your view?
20 MR. ZIMOLONG: Objection to
21 form. Calls for speculation.
22 THE WITNESS: Yeah, I mean, in
23 my opinion, there's -- I don't know that
24 that would ever happen. But if there was
25 a court order requiring it, we would be --

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1 C. Miller
2 we would have to follow it.
3 BY MR. LONEY:
4 Q. And if there's a requirement in the
5 election code, and the Court says follow it,
6 that says every voter has to draw a
7 self-portrait on their return envelope on their
8 mail ballot, would drawing the self-portrait be
9 material as to whether the ballot is eligible
10 to be counted?
11 MR. ZIMOLONG: Objection. Calls
12 for improper opinion testimony. Also
13 beyond the scope of the Rule 30(b)(6)
14 notice.
15 BY MR. LONEY:
16 Q. You can answer.
17 A. If there was a court order that we
18 were to follow that said it, we would have to
19 follow it.
20 Q. So I'll get back to the facts in this
21 case.
22 So you agree that, if a voter
23 returns a ballot or returned a ballot in
24 connection with the November 2022 election
25 without a handwritten date on it at all on the

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1 C. Miller
2 outer envelope, then Lancaster County did not
3 count their ballot.
4 Is that -- do I understand that
5 correctly?
6 A. That is correct.
7 Q. And if a voter returned a ballot with
8 a handwritten date that was outside of the
9 range defined by the Pennsylvania Supreme
10 Court, again, Lancaster board did not count
11 that ballot?
12 A. That is correct.
13 Q. I'm going to put back up the
14 interrogatories, which is Exhibit Lancaster 3.
15 And I'm going to jump to page 3 and the answer
16 to Interrogatory Number 2.
17 Do you see that Interrogatory
18 Number 2 on your screen?
19 A. I do.
20 Q. So in response to Interrogatory
21 Number 2, the Lancaster board offered some
22 objections and then, after that, stated that
23 the Lancaster board "set aside 232 mail ballots
24 under the orders of the Supreme Court of
25 Pennsylvania dated November 1st and

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1 C. Miller
2 November 5th, 2022, and the guidance of the
3 secretary of state."
4 Did I read that correctly?
5 I think I might have missed the
6 word "respectively" in there.
7 A. Yes, that is correct.
8 Sorry. I was just trying to
9 find it.
10 Q. Yeah. And to your knowledge, is that
11 number correct, 232? Was that the total number
12 of mail ballots envelopes set aside by the
13 Lancaster board in the November 2022 election?
14 A. That had to do with this Supreme
15 Court order, yes.
16 Q. Okay. Thanks for that clarification.
17 And that includes both the
18 envelopes received with no handwritten date and
19 envelopes with -- received with something
20 written in the date line but it was deemed
21 incorrect; is that right?
22 A. Correct.
23 Q. Of those 232, how many were set aside
24 because they had no voter-written date at all?
25 A. Off the top of my head, I don't know.

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1 C. Miller
2 - - -
3 (Whereupon, Exhibit 5 was marked
4 for identification.)
5 - - -
6 MR. LONEY: I'll share that on
7 my screen now.
8 BY MR. LONEY:
9 Q. Ms. Miller, do you have on your
10 screen a Supreme Court of Pennsylvania document
11 with a caption starting "David Ball"?
12 A. I do.
13 Q. Okay. So this is being marked as
14 Exhibit Lancaster 5. It's a November 1st,
15 2022, per curiam order of the Pennsylvania
16 Supreme Court in Ball versus Chapman, Case
17 Number 102 MM 2022.
18 And my only question on this,
19 Ms. Miller: Is this the November 1st order you
20 referenced in response to Interrogatory
21 Number 2?
22 A. Yes.
23 MR. LONEY: I'll ask the Court
24 Reporter to mark as Lancaster 6 Tab
25 Number 6 in the folder I sent.

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1 C. Miller
2 Q. And I'll ask the other way.
3 Do you know how many of those
4 were set aside because they had something
5 written in the date line that was deemed
6 incorrect?
7 A. Off the top of my head, I do not
8 know.
9 Q. But if we had those -- copies of the
10 ballot envelopes, we could see for ourselves,
11 right?
12 A. Correct.
13 Q. Do you have a sense for what the --
14 so I don't want you to guess. I'd like you to
15 estimate, if you can, based on your knowledge
16 of the -- of the numbers you've seen.
17 Do you think it was -- more than
18 200 of those 232 were completely undated?
19 A. No.
20 Q. Was it the majority?
21 A. It was approximately 50 percent.
22 MR. LONEY: Okay. I'm going to
23 ask the Court Reporter to mark as Exhibit
24 Lancaster 5 the document I previously sent
25 as Tab 5.

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1 C. Miller
2 - - -
3 (Whereupon, Exhibit 6 was marked
4 for identification.)
5 - - -
6 MR. LONEY: I'll share that now.
7 BY MR. LONEY:
8 Q. Ms. Miller, do you see on your screen
9 another Supreme Court of Pennsylvania document
10 with a caption starting "David Ball"?
11 A. I do.
12 Q. So this document on your screen is
13 being marked as Exhibit Lancaster 6. It is a
14 November 5th, 2022, supplemental order of the
15 Pennsylvania Supreme Court in Ball versus
16 Chapman, same case number as Exhibit 5.
17 Is this the November 5th order
18 you referenced in response to Interrogatory
19 Number 2?
20 A. Yes.
21 Q. Prior to these orders from the
22 Pennsylvania Supreme Court, the secretary of
23 state had instructed county boards to open and
24 canvass ballots received in envelopes without a
25 handwritten date on them, right?

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1 C. Miller
2 A. Correct.
3 Q. And the Lancaster board was going to
4 follow that guidance had the Supreme Court not
5 weighed in in November; is that right?
6 A. That is correct.
7 Q. In other words, had these orders not
8 come in the week before the election, Lancaster
9 board would have canvassed and opened the mail
10 ballot envelopes received without a handwritten
11 date on them?
12 A. Correct.
13 Q. And when these orders came out, did
14 the Lancaster board give anyone the opportunity
15 to -- strike that.
16 When the orders came out, did
17 the Lancaster board notify Lancaster County
18 voters of this change in approach?
19 A. We did not.
20 Q. Did the Lancaster board give anybody
21 the opportunity to correct any problems with
22 the missing or incorrect dates on their mail
23 ballot envelopes?
24 A. No.
25 Q. Did the Lancaster board notify

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1 C. Miller
2 A. No, not that I can remember.
3 Q. No, you don't know one way or the
4 other? Or, no, that didn't happen?
5 A. I am not sure.
6 Q. Okay. So I'm going to turn back to
7 Exhibit Lancaster 6, the November 5th order.
8 Spanning the first and second
9 page, the Supreme Court stated that for the
10 purposes of the November 8th, 2022, general
11 election, incorrectly dated ballots or --
12 strike that -- incorrectly dated outer
13 envelopes are those with dates that fall
14 outside the date range of September 19th, 2022,
15 through November 8th, 2022.
16 Did I read that correctly?
17 A. Yes, for mail ballots.
18 Q. So if somebody -- strike that.
19 And is this the instruction that
20 the Lancaster board followed in connection with
21 mail ballots submitted in the 2022 election?
22 A. Yes.
23 Q. So if somebody wrote a date on their
24 mail ballot envelope that preceded
25 November 19th, 2022, you would have set it

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1 C. Miller
2 anybody that their ballot was going to be set
3 aside on this basis?
4 A. No.
5 Q. If anybody had separately learned,
6 you know, by reading the news or following the
7 secretary of state's website, if they had
8 separately learned that this issue had come up,
9 could they have come in and cast a provisional
10 ballot on Election Day if they chose to do so?
11 MR. ZIMOLONG: Objection. Asks
12 the witness to guess.
13 BY MR. LONEY:
14 Q. Do you know whether that was an
15 option?
16 A. Any voter could vote a provisional
17 ballot on Election Day at their precinct.
18 - - -
19 (Stenographer clarification.)
20 - - -
21 BY MR. LONEY:
22 Q. Do you know if anybody, in fact, cast
23 a provisional ballot who also had their prior
24 attempt at voting by mail set aside based on
25 the Supreme Court's orders in Ball?

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1 C. Miller
2 aside?
3 A. Correct.
4 Q. And if somebody wrote September 20th,
5 2022, and everything else appeared in order,
6 that would have been in compliance with the
7 election code, as interpreted by the
8 Pennsylvania Supreme Court, and so the
9 Lancaster board would have opened that envelope
10 and canvassed the ballot?
11 A. If the date was withinside what the
12 order gave us, yes, we would have counted it.
13 Q. Including September 20th, in
14 particular?
15 A. I believe the order was from the 19th
16 through the 8th. So the 20th would have been
17 included.
18 Q. So am I correct, though, that
19 Lancaster County did not even start issuing
20 mail ballot packets until September 26th?
21 A. Correct.
22 Q. So nobody could have actually been
23 signing that envelope as early as
24 September 20th?
25 A. Correct.

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1 C. Miller

2 Q. But if they wrote "September 20th,

3 2022," the envelope would not have been set

4 aside on the basis of the Ball order?

5 A. Correct.

6 Q. If somebody wrote a date after

7 November 8th, 2022, you also would have set

8 that aside pursuant to the court order?

9 A. Correct. Except for a military

10 ballot was a different deadline.

11 Q. And what was the military ballot

12 deadline?

13 A. The military -- sorry.

14 Military ballots are due back to

15 county boards of elections one week

16 postelection. So this past election would have

17 been November 15th.

18 Q. Okay. So if a military ballot voter

19 got their ballot back by November 15th but

20 wrote a date on the envelope that postdated

21 November 15th, that would have been set aside?

22 A. Yes, that would have been set aside.

23 Q. What about somebody who wrote

24 "October 2022" but didn't provide the exact

25 day?

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1 C. Miller

2 Q. Why? Didn't that person date the

3 envelope, and isn't October 1st in the range?

4 A. Again, that would have been set aside

5 to be looked at at the canvass as part of the

6 election.

7 I do not believe that we had any

8 like that, though. So I would be speculating

9 what we would have done.

10 Q. Okay. And all of the -- just so I'm

11 clear, all of the ballots at issue in this case

12 were submitted for the 2022 general election,

13 right?

14 A. Correct.

15 Q. And you know for sure that nobody

16 submitting any of these ballots filled them out

17 earlier in the year than September 26th because

18 that's when you first started issuing the

19 ballot packages, right?

20 A. Military ballots are different from

21 that. But all normal mail-in or absentee

22 ballots, that is correct.

23 Q. Will you agree with me that the date

24 line on the voter declaration on the return

25 envelope doesn't actually specify that the

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1 C. Miller

2 A. I don't remember. I believe we would

3 have set those aside as it was not a full date.

4 Q. Okay. But the entire month of

5 October is within the range provided by the

6 Supreme Court, right?

7 A. Correct.

8 Q. But if they said "October 2022," you

9 still would have set that aside?

10 A. I don't remember that we had anything

11 like that to actually have looked at. Those

12 would have just been set aside to look at at

13 the canvassing, and then a decision would have

14 been made.

15 Q. Okay. And if we could look at the

16 copies of the mail ballot envelopes, we might

17 find some in there that say "October 2022"?

18 A. I don't know off the top of my head.

19 Q. What about if somebody wrote the

20 month and day that was between September 19th

21 and November 8th but didn't write a year?

22 So if somebody just wrote

23 "October 1st" with no year, would you have set

24 that aside?

25 A. Yes.

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1 C. Miller

2 voter has to write the year or, as you put it,

3 the full date?

4 MR. ZIMOLONG: Objection to

5 form. Calls for speculation.

6 THE WITNESS: I would need to

7 see one in front of me to look at how we

8 have it.

9 BY MR. LONEY:

10 Q. But sitting here right now, you don't

11 recall whether it says full date, month, day,

12 year?

13 A. I believe that it does, but I would

14 just need to see one to confirm that.

15 Q. Now, the November 5th supplemental

16 order of the Supreme Court said the envelopes

17 could be dated through November 8th, 2022.

18 Did the Lancaster board apply

19 that literally to mean, if somebody wrote

20 "November 8th, 2022," that was within the range

21 because it's through November 8th and that

22 ballot would be counted?

23 A. Yes.

24 Q. And we're only talking about

25 envelopes that were received by 8:00 p.m. on

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1 C. Miller
2 Election Day, right, leaving aside what -- the
3 qualification you gave earlier about military
4 votes?
5 A. Correct.
6 Q. Now, if an envelope comes in with a
7 postmark on it, you know that it was mailed and
8 not placed in a drop box by the voter, right?
9 A. Correct.
10 Q. And we know -- would you agree with
11 me that any ballot received through the U.S.
12 mail by 8:00 p.m. on Election Day must have
13 been placed in a mailbox sometime before
14 Election Day?
15 MR. ZIMOLONG: Objection to
16 form.
17 You can answer.
18 THE WITNESS: Correct.
19 BY MR. LONEY:
20 Q. Which must mean that anybody who
21 mailed their ballot in time for it to be
22 received on November 8th could not have been
23 signing the envelope on November 8th?
24 MR. ZIMOLONG: Objection.
25 Beyond the scope of the Rule 30(b) (6)

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1 C. Miller
2 else appeared to be in order, the Lancaster
3 board would have counted it, period, full stop,
4 right? There's no further evaluation as to
5 whether or not the person signed it on
6 November 8th?
7 MR. ZIMOLONG: Objection to
8 form.
9 THE WITNESS: As long as it was
10 received by 8:00 p.m. on Election Day.
11 BY MR. LONEY:
12 Q. And because that's what the Supreme
13 Court instructed, not because you're using the
14 voter-written date to make a determination as
15 to when the voter actually signed their
16 envelope, right?
17 A. Correct. We would not know that.
18 Q. Let's talk a bit about dates falling
19 after November 8th, and I'm going to limit
20 these questions to domestic mail-in ballots,
21 right. So leaving aside the military ballots
22 that might have come in by the 15th.
23 If you receive an envelope by
24 8:00 p.m. on Election Day, you know for a fact
25 that the voter didn't fill out their ballot

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1 C. Miller
2 notice.
3 She's here as a fact witness.
4 You're getting into opinion testimony.
5 You can answer to the extent you
6 understand it.
7 BY MR. LONEY:
8 Q. Do you understand my question?
9 A. I do.
10 We do work with our local postal
11 service, and they do deliver on Election Day.
12 Multiple carriers come in. So there is a
13 chance that, if someone put one in a mailbox on
14 the 8th, we would still receive it on the 8th.
15 Q. Fair enough.
16 So the Lancaster board didn't do
17 anything to evaluate when somebody put
18 "November 8th, 2022," on their mail-in envelope
19 to see whether they could have actually signed
20 it on the same day?
21 A. I'm not sure I understand that
22 question.
23 Q. I'll ask a different question.
24 If the date showing on the outer
25 envelope was November 8th, 2022, and everything

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1 C. Miller
2 after November 8th, regardless of what they
3 wrote on the envelope, right?
4 A. Correct.
5 Q. But pursuant to the court order, you
6 still would have set aside any envelope where
7 the voter wrote a date that falls after
8 November 8th, 2022, even if it was received by
9 8:00 p.m. on Election Day, right?
10 A. Correct.
11 Q. And that's because you're
12 following -- strictly following the court
13 order, not because you're using the
14 voter-written date to determine when the voter
15 actually filled out the ballot, right?
16 A. Correct.
17 Q. What about envelopes received after
18 Election Day?
19 Leaving aside for a second the
20 date issue on what's written on the envelope,
21 what does the Lancaster board do with mail
22 ballots received after Election Day?
23 A. They are time-stamped in to show when
24 we received them, and then they are set aside
25 and not -- and not counted.

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1 C. Miller

2 Q. And they're set aside and not counted

3 regardless of the date the voter writes on

4 them, right?

5 A. Correct.

6 Q. So if the voter doesn't get their

7 mail ballot to the board by 8:00p.m.

8 on Election Day, they couldn't possibly get

9 their late vote counted by backdating the

10 signature on the envelope, right?

11 A. Correct.

12 Q. So whether or not you receive a

13 ballot before 8:00 p.m. on Election Day has

14 nothing to do with whether the voter wrote

15 "November 8th, 2022," or some earlier date on

16 the envelope?

17 A. Correct.

18 Q. Now, going to the other end of the

19 timeline, envelopes dated before

20 September 19th, 2022. Again, I'll focus on

21 domestic mail ballots, leaving aside the

22 military ballots.

23 There is no way anybody in

24 Lancaster County could have actually filled out

25 the 2022 general election paperwork before

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1 C. Miller

2 A. Military ballots are absentee

3 ballots.

4 Q. So the Pennsylvania Supreme Court

5 said on November 5th, 2022, that an incorrectly

6 dated outer envelope for absentee ballots would

7 be one with a date falling outside the range of

8 August 30th, 2022, through November 8th, 2022.

9 But you still would have counted

10 a military absentee ballot received and dated

11 up through November 15th?

12 A. Received by the 15th. It still would

13 have to be dated by the 8th.

14 Q. Understood.

15 So if you receive a military

16 absentee ballot on November 14th, that met the

17 submission deadline; but if the date the voter

18 wrote on that envelope was November 9th, you

19 would have set it aside pursuant to the court

20 order?

21 A. Correct.

22 Q. Got it.

23 Would the same thing be true of

24 people who might have flipped the day and the

25 month in their -- in how they write their date?

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1 C. Miller

2 September 19th, right?

3 A. Correct.

4 Q. So even if somebody wrote "9/1/2022"

5 on their envelope, you knew for a fact they

6 could not have actually tried to vote using

7 this paperwork on 9/1/2022?

8 A. Correct.

9 Q. But you would have set aside that

10 envelope anyway because that's what the Supreme

11 Court instructed, right?

12 A. For mail ballots, yes. Absentees had

13 a different date range.

14 Q. Do you know what the date range was

15 for absentee?

16 A. August 30th through November 8th.

17 Q. And so I can put up the document

18 again, but I just read it. And good memory;

19 that's exactly what the document said in the

20 next part. It wasn't intended to be a memory

21 test.

22 But it said August 30th, 2022,

23 through November 8th, 2022, and did not set

24 forth a different deadline for military

25 ballots, right?

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1 C. Miller

2 So, for example, some people who

3 wish to indicate November 4th might write

4 4/11 instead of 11/4?

5 MR. ZIMOLONG: Objection to

6 form.

7 You can answer.

8 BY MR. LONEY:

9 Q. Is that something you're aware of

10 people doing out in the world?

11 MR. ZIMOLONG: Calls for

12 speculation as to what people out in the

13 world do.

14 THE WITNESS: If somebody did,

15 we -- yes. I mean, I'm sure that

16 happened. But that would be seen as

17 month, date, year in our office.

18 BY MR. LONEY:

19 Q. So your office would not have done

20 anything to evaluate whether flipping the day

21 and the month in the order would have actually

22 cured a problem? You just did not count it if

23 it didn't hit the range, assuming everybody is

24 writing month then day then year?

25 A. Correct.

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1 C. Miller
2 MR. LONEY: I think now would be
3 a good time to take five minutes before I
4 get into the next stretch.
5 Can we go off the record.
6 - - -
7 (Whereupon, a short recess was
8 taken.)
9 - - -
10 MR. LONEY: Ms. Miller, I'm
11 going to show the next exhibit and ask the
12 Court Reporter to mark Tab 7 as Exhibit
13 Lancaster 7.
14 - - -
15 (Whereupon, Exhibit 7 was marked
16 for identification.)
17 - - -
18 MR. LONEY: I'm sharing my
19 screen now.
20 BY MR. LONEY:
21 Q. Ms. Miller, do you see on the screen
22 a mail-in ballot envelope sample?
23 A. I do, yes.
24 MR. LONEY: Okay. And for the
25 record, I'll note that, in order to orient

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1 C. Miller
2 right now, from what Lancaster County voters
3 got?
4 A. Again, I would have to see ours
5 directly next to it in order to compare.
6 Q. Okay. Well, this exhibit shows a
7 date line. It says "today's date" and, in
8 parentheses, "required."
9 Do you see where I'm looking?
10 A. I do.
11 Q. And there's nothing there that
12 requires -- to our earlier conversation --
13 requires that month, day, and year be provided
14 in that order, is there?
15 MR. ZIMOLONG: Objection to
16 form.
17 You can answer.
18 THE WITNESS: Not for Dauphin
19 County. But, again, I would need to see
20 Lancaster's county next to it.
21 BY MR. LONEY:
22 Q. Do the counties have different forms
23 for these declarations and outer envelopes
24 within the Commonwealth of Pennsylvania?
25 A. Yes.

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1 C. Miller
2 my next line of questioning, I'm using a
3 couple of examples from Dauphin County's
4 production because we don't have any
5 produced by Lancaster County. And Dauphin
6 is a neighboring county to Lancaster that
7 redacted all of the personal identifying
8 information of any voter on any of these
9 envelopes.
10 I understand that the plaintiffs
11 in the 340 case have also received the
12 same production pursuant to protective
13 order.
14 BY MR. LONEY:
15 Q. So this Exhibit Number 7,
16 Lancaster 7, does this show the same
17 declaration form that voters in Lancaster
18 County would have gotten for the 2022 general
19 election?
20 A. I would need to see one of ours with
21 it to confirm, but it looks similar.
22 Q. You don't see anything on here
23 that -- other than the markings at the very
24 bottom for this case, you don't see anything on
25 here that would distinguish it, as you sit here

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1 C. Miller
2 Q. Okay. So we would need to see one of
3 the Lancaster envelopes to know whether there's
4 a month, day, year requirement?
5 A. Correct.
6 Q. Also, in Exhibit Lancaster 7, there
7 is a date stamp -- date and time stamp near the
8 top. I've just highlighted it.
9 Do you see that?
10 A. Yes.
11 Q. Did the Lancaster board also apply a
12 date stamp to incoming mail ballot envelopes?
13 A. Yes.
14 Q. And the date stamp on the return
15 envelope stamped by the Lancaster board would
16 reflect the day the envelope was received by
17 the board, right?
18 A. Correct.
19 Q. So if the date stamp applied by the
20 Lancaster board was before 8:00 p.m. on 1/8/22,
21 that envelope was received in time under the
22 election code, right?
23 A. Correct.
24 Q. Now, looking specifically at the
25 document marked Lancaster 7, there's a

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1 C. Miller
2 handwritten date on this envelope that reads
3 "11/7/2012."
4 Do you see that?
5 A. I do.
6 Q. Now, if this were received in
7 Lancaster County, it couldn't possibly be
8 somebody who actually tried to vote in 2012,
9 right?
10 A. Correct.
11 Q. And nobody -- none of us knew that
12 Dr. Oz was running for Senate in 2012.
13 So had you received an envelope
14 in Lancaster County where somebody, similarly,
15 wrote "2012" as the year instead of "2022,"
16 would that have indicated to you that the voter
17 was engaging in any sort of fraud?
18 A. Not fraud.
19 Q. But you would have set aside this
20 vote because it's incorrectly dated because it
21 falls outside the date range ordered by the
22 Supreme Court, right?
23 A. Correct.
24 Q. And that's because you were following
25 the Supreme Court's instructions, not because

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1 C. Miller
2 If the stamp on the envelope
3 indicates the mail ballot was received in time,
4 right -- so the stamp is on or before
5 November 8th, right?
6 A. Yes.
7 Q. And you know that nobody voted before
8 September 26th, 2022, because nobody could have
9 gotten the mail ballot forms before that,
10 right, in Lancaster County?
11 A. Correct.
12 Q. And so you know everybody who
13 submitted one of these envelopes between the
14 time you issued the mail ballot packages and
15 the November 8th stamp voted -- actually filled
16 out their envelope during that window, right?
17 MR. ZIMOLONG: Objection to
18 form. Calls for speculation.
19 THE WITNESS: One would have to
20 assume that.
21 BY MR. LONEY:
22 Q. I mean, there's no way they could
23 have voted before September 26th, right?
24 A. Correct.
25 Q. And there's no way they could have

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1 C. Miller
2 you would look at this 2012 date to determine
3 when the voter actually filled out their
4 ballot, right?
5 A. We would have been following the
6 order from the Court.
7 Q. But you wouldn't have viewed this
8 2012 date as any indication that somebody was
9 attempting to mark their ballot outside of the
10 allowable date, right?
11 A. I'm not sure I completely understand
12 that question.
13 Q. I'll ask a different question.
14 Does it matter to the Lancaster
15 County board whether somebody was actually
16 marking their ballot within the date range if
17 they got the wrong date on the envelope?
18 MR. ZIMOLONG: Objection to
19 form.
20 To the extent you understand the
21 question.
22 THE WITNESS: Yeah, I -- can you
23 rephrase that.
24 BY MR. LONEY:
25 Q. Sure. If somebody -- strike that.

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1 C. Miller
2 voted after November 8th if you stamped the
3 envelope "received" on or before November 8th,
4 right?
5 A. Correct.
6 Q. So in those situations, does any of
7 that matter once you see that somebody
8 mistakenly put "2012" instead of "2022" on
9 their envelope?
10 A. For this election, it did not because
11 the Supreme Court order gave us date ranges to
12 use.
13 MR. LONEY: I'm going to ask the
14 Court Reporter to mark the next exhibit,
15 which is Tab 8, as Lancaster 8.
16 - - -
17 (Whereupon, Exhibit 8 was marked
18 for identification.)
19 - - -
20 MR. LONEY: Share that on my
21 screen.
22 BY MR. LONEY:
23 Q. This is another example from Dauphin
24 County.
25 Do you have another mail ballot

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1 C. Miller
2 envelope sample up on your screen?
3 A. I do.
4 Q. And there's also a stamp on this
5 example near the top, similar to the date
6 stamps that the Lancaster board applied when it
7 received incoming mail ballots, right?
8 A. Correct.
9 Q. And there's also a handwritten date
10 on this envelope that reads "1/1/22," right?
11 A. Correct.
12 Q. And just like the last example, we
13 know nobody filled out a mail-in ballot for the
14 November '22 election as early as New Year's
15 Day 2022, right?
16 A. Correct.
17 Q. But if the person had just put an
18 extra 1 in front of the 1 that's currently
19 there for the month so that it would read
20 11/1/22 instead of 1/1/22, that would have been
21 in compliance with the dating rule, right?
22 A. If it said 11/1, yes.
23 Q. Right. So if the Lancaster board
24 didn't inquire as to whether that was a simple
25 mistake, that somebody wrote 1 instead of 11,

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1 C. Miller
2 BY MR. LONEY:
3 Q. Do you have another mail ballot
4 envelope sample up on your screen?
5 A. I do.
6 Q. And, again, this envelope has a
7 handwritten date on it that reads "8/11/22,"
8 right?
9 A. Correct.
10 Q. Now, this could be an example, could
11 it not, of what we were talking about before?
12 If somebody switched month and day, they wrote
13 day/month, then they were actually writing
14 Election Day on this envelope, right?
15 MR. ZIMOLONG: Objection to
16 form. Calls for speculation.
17 THE WITNESS: It's not up to our
18 office to assume what someone is writing.
19 We can only look at exactly what's in
20 front of us and what is submitted.
21 BY MR. LONEY:
22 Q. But you did assume that everybody
23 wrote month/day/year, and that was their
24 intent, right?
25 A. Again, I would have to look at our

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1 C. Miller
2 they would have set this aside based on what
3 appears on the face of the envelope, right?
4 MR. ZIMOLONG: Objection to
5 form.
6 You can answer.
7 THE WITNESS: Yes. We take the
8 date that is written by the voter.
9 BY MR. LONEY:
10 Q. And that's, again, because that's
11 what the Supreme Court instructed you to do,
12 not because you would look at a January date
13 and think that the person actually tried to
14 vote in January, right?
15 A. Correct.
16 MR. LONEY: I'm going to ask the
17 Court Reporter to mark the next one, which
18 is Tab 9, as Exhibit Lancaster 9.
19 - - -
20 (Whereupon, Exhibit 9 was marked
21 for identification.)
22 - - -
23 MR. LONEY: I'll share that up
24 on my screen now.
25

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1 C. Miller
2 envelope to see if that is actually on our
3 envelope.
4 Q. And we would also have to look at
5 your envelopes to see if they are actually on
6 your envelope, right?
7 A. Correct.
8 Q. But in any event, if somebody wrote a
9 date that -- assuming it's month/day/year and
10 that didn't fall within the range ordered by
11 the Supreme Court, the Lancaster board didn't
12 inquire as to whether it could have been
13 someone intending to write day/month/year?
14 A. We did not.
15 Q. And this example up on the screen,
16 this is one that you would have set aside
17 without further inquiry, right?
18 A. Correct.
19 MR. LONEY: I'll ask the Court
20 Reporter to mark the next one, which is
21 Tab 11, as Exhibit Lancaster 10, if that
22 makes sense.
23 - - -
24 (Whereupon, Exhibit 10 was
25 marked for identification.)

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1 C. Miller
2 - - -
3 MR. LONEY: And I'm sharing that
4 on the screen now.
5 BY MR. LONEY:
6 Q. Ms. Miller, do you see another sample
7 ballot envelope on your screen?
8 A. I do.
9 Q. And on this one, again, there's a
10 stamp near the top similar to the stamps that
11 the Lancaster board applied when it received
12 incoming mail ballots, right?
13 A. Yes.
14 Q. And that stamp is, in this example,
15 October 27th, 2022.
16 Do you see that?
17 A. I do.
18 Q. And there's also a handwritten date
19 on this envelope which reads "11/25/22," right?
20 A. Correct.
21 Q. Now, if you had received or seen an
22 envelope in Lancaster County dated
23 November 25th, 2022, would that have indicated
24 to you that somebody tried to vote after
25 Election Day?

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1 C. Miller
2 - - -
3 (Whereupon, Exhibit 11 was
4 marked for identification.)
5 - - -
6 BY MR. LONEY:
7 Q. Do you see another example mail
8 ballot envelope on your screen?
9 A. I do.
10 Q. So this document that's being marked
11 as Lancaster 11 actually has two dates written
12 on it. One reads "9/25/22." It looks like
13 somebody put an X through at least part of
14 that. And then there's another date written
15 below it that's "3/6/1944."
16 Do you see that?
17 A. I do.
18 Q. Now, did you -- do you remember, in
19 Lancaster County, receiving any mail ballot
20 envelopes and setting them aside that had dates
21 that were long in the past?
22 A. Yes.
23 Q. Did you look to see if any of those
24 ballots came from people who wrote their birth
25 dates on the envelopes instead of the day they

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1 C. Miller
2 A. No.
3 Q. And if you look at the comparison
4 between the date written and the date stamped,
5 if the person had put 10/25 instead of 11/25,
6 that would have been in compliance and signed
7 just two days before the board received it,
8 right?
9 A. Correct.
10 Q. But in Lancaster County's approach,
11 if you had seen this, you would set it aside
12 without further inquiry as to whether or not
13 the person intended to write "October" instead
14 of "November," right?
15 A. Correct.
16 Q. And, again, that's because that's
17 what the Supreme Court ordered and not because
18 you had any inclination that somebody mailed in
19 a ballot in October but actually filled it out
20 in November?
21 A. Correct.
22 MR. LONEY: I'm going to ask the
23 Court Reporter to mark as Exhibit
24 Lancaster 11 what we previously sent over
25 as Tab 12.

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1 C. Miller
2 were voting?
3 A. We did not go back to look at that.
4 We took just what the date was written.
5 Q. So in this example, you would have
6 set it aside because the date that's not
7 crossed out is from 1944, which is obviously
8 outside of the date range ordered by the
9 Supreme Court, right?
10 A. I would be speculating on that,
11 without seeing this unredacted, to see what
12 else was on this envelope and why there were
13 two dates.
14 Q. Ah. So you're saying -- so there are
15 a couple of things redacted here, not just the
16 signature.
17 Are you saying that you might --
18 if somebody wrote some sort of explanation
19 underneath, that might have weighed into your
20 thinking?
21 A. Again, I would just need to see it
22 unredacted to know what we would have done.
23 Q. Now, if the Lancaster board had seen
24 an envelope or if you had seen an envelope
25 submitted with just "3/6/1944" in the date line

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1 C. Miller
2 and nothing else other than the signature, you
3 would have set that aside, right?
4 A. Correct.
5 Q. And not because you thought somebody
6 had actually filled out a ballot in 1944 and
7 saved it until 2022, right? It's just because
8 you were following the Supreme Court's order
9 as -- as written, right?
10 A. Correct.
11 Q. Now, does this indicate to you, if
12 somebody wrote a date long in the past, that
13 the voter was engaging in any sort of voter
14 fraud?
15 A. No.
16 Q. And did the Lancaster board initiate
17 any investigations of any voters who wrote
18 dates from the 1900s on their outer envelopes
19 to see if they were committing voter fraud?
20 A. No.
21 Q. Did you refer anybody to the police
22 from the November 2022 general election for
23 putting dates long in the past in the 1900s?
24 A. No.
25 MR. LONEY: Is anybody else as

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1 C. Miller
2 Do you see where I'm reading
3 from?
4 A. Yes.
5 Q. And then the Lancaster board
6 responded: "Denied to the extent that the
7 request is referring to the deadline referenced
8 in Section 3150.16(c)."
9 Do I have that right?
10 A. Yes, I see that.
11 Q. Now, do you happen to know whether
12 3150.16(c) is the provision requiring mail
13 ballots to be received at the county Board of
14 Elections by 8:00 p.m. on Election Day?
15 A. Without it in front of me, I would be
16 speculating on that. But I believe that it is.
17 Q. Okay. So if we -- and I will
18 represent, for the purpose of the next
19 question, that that was our intent in writing
20 this request, right.
21 The question is asking the
22 Lancaster board to admit that it has never
23 referred to the date handwritten on the mail
24 ballot envelope to establish whether the ballot
25 was received on Election Day or before.

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1 C. Miller
2 disturbed as I am by continuing to say
3 "the 1900s" like it's three centuries ago?
4 You don't have to answer that.
5 MR. ZIMOLONG: No. I think
6 maybe people just aren't as disturbed as
7 you by it.
8 MR. LONEY: I'm going to go back
9 for a moment to the requests for
10 admission, which I believe are Exhibit
11 Lancaster 2.
12 I'm putting that back up on the
13 screen.
14 BY MR. LONEY:
15 Q. So do you have the requests for
16 admissions back up on the screen?
17 A. Yes.
18 Q. I'm going to focus in on the second
19 request and denial here.
20 Plaintiffs asked for an
21 admission that the Lancaster board had never
22 referred to the date handwritten on a mail
23 ballot return envelope to establish whether
24 you, the Lancaster board, received the ballot
25 by the applicable deadline.

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1 C. Miller
2 So with that understanding, can
3 you help me understand why this statement is
4 denied?
5 MR. ZIMOLONG: Objection.
6 BY MR. LONEY:
7 Q. It doesn't sound like, from our prior
8 conversation -- like the Lancaster board
9 actually uses the date written to determine the
10 date received.
11 MR. ZIMOLONG: Objection to
12 form.
13 BY MR. LONEY:
14 Q. Is that right?
15 A. We don't use -- can you rephrase
16 that. I'm sorry.
17 Q. Sure. I'll just ask it separate from
18 the request for admission.
19 The Lancaster board doesn't
20 actually use the date written on the envelope
21 to establish when the ballot is received by the
22 board, does it?
23 A. No.
24 Q. I mean, it stamps the date received
25 on the envelope.

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1 C. Miller
2 It doesn't adjust the date on
3 the stamp according to the date written by the
4 voter, right?
5 A. Correct.
6 Q. So if we had written this statement
7 more cleanly to say that -- to say exactly
8 that, that the Lancaster board does not use the
9 date written by the voter to determine whether
10 the envelope was received by Election Day, it
11 shouldn't be a denial, right? That should be
12 admitted?
13 MR. ZIMOLONG: Objection to
14 form.
15 You can answer.
16 THE WITNESS: I would be
17 speculating what the board would agree to
18 for that answer. But for my own self, I
19 would say correct.
20 BY MR. LONEY:
21 Q. So I asked a second ago about whether
22 anybody was referred to the police or
23 investigated for fraud.
24 Of the 232 voters whose mail
25 ballots were set aside in the 2022 general

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1 C. Miller
2 A. Correct. To the district attorney.
3 Q. To the district attorney. Okay.
4 Now, that person was referred
5 for voting another person's ballot, right? It
6 was their mother's ballot?
7 A. Correct.
8 Q. And that person was caught because
9 their mother was deceased by Election Day,
10 right?
11 A. Their mother was deceased when we
12 received the ballot back.
13 Q. And did that -- those are mail ballot
14 envelopes, right -- or it was a mail ballot
15 envelope that purported to come from the
16 deceased person, right?
17 A. Correct.
18 Q. Did that mail ballot envelope have a
19 date on it under the signature?
20 A. It did.
21 Q. Was the date within the range that --
22 strike that.
23 Did it have a correct date on
24 it?
25 MR. ZIMOLONG: Objection to

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1 C. Miller
2 election based on this envelope dating issue,
3 how many of those are being investigated for
4 voter fraud?
5 A. None.
6 Q. And are you aware of any other cases
7 involving alleged fraud in connection with this
8 mail ballot envelope-dating issue?
9 MR. ZIMOLONG: Objection to
10 form.
11 What do you mean "this mail
12 ballot dating envelope issue"?
13 BY MR. LONEY:
14 Q. Did you understand my question?
15 A. No.
16 Q. Okay. So I'll ask a different
17 question.
18 Are you aware of a Lancaster
19 County voter being referred to the police in
20 connection with the 2022 primary election --
21 A. Yes.
22 Q. -- for alleged voter fraud?
23 A. Yes.
24 Q. And you were the person who reported
25 this voter to the police, right?

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1 C. Miller
2 form.
3 You can answer.
4 THE WITNESS: It had a date on
5 it. There was -- there was not a Supreme
6 Court order for the primary with the date
7 range.
8 BY MR. LONEY:
9 Q. Do you know whether it had a date
10 that was many years in the past, into the
11 1900s?
12 A. No. The date on it was August 26th,
13 2022.
14 Q. August 26th or April 26th?
15 A. Sorry. April 26th.
16 Q. Have you seen the police report from
17 that referral of -- well, strike that. I'll
18 ask this first.
19 The voter who was referred to
20 the DA's office is named Cheryl Mihaliak; is
21 that right?
22 A. Correct.
23 Q. And have you seen the police report
24 or the criminal complaint against Cheryl
25 Mihaliak before today?

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1 C. Miller
2 A. Yes.
3 MR. LONEY: I'm going to ask the
4 Court Reporter to mark as Exhibit
5 Lancaster 12 the document that we
6 previously emailed over as Tab 13.
7 - - -
8 (Whereupon, Exhibit 12 was
9 marked for identification.)
10 - - -
11 MR. LONEY: I'll share my
12 screen.
13 BY MR. LONEY:
14 Q. Do you have the police criminal
15 complaint up on your screen?
16 A. I do.
17 Q. And is this -- I'm going to scroll
18 through it. Tell me to slow down if I need to.
19 My first question, as I scroll
20 through, is: Is the document on your screen,
21 Exhibit Lancaster 12, the criminal complaint
22 against Cheryl Mihaliak --
23 A. Yes.
24 Q. -- that we were just talking about?
25 A. Yes, it is.

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1 C. Miller
2 Q. Ah. Thank you very much.
3 It also says that Teresa
4 Mihaliak was removed from the voter rolls on
5 April 25th, 2022, right?
6 A. Correct.
7 Q. And that was before you received any
8 mail-in ballot for her?
9 A. Yes, the day before -- or three days
10 before.
11 Q. Got it.
12 So Lancaster -- the Lancaster
13 board has some mechanism for removing people
14 who die before Election Day from the voter
15 rolls, right?
16 A. Correct.
17 Q. And you would have done that in this
18 case for Teresa Mihaliak before any mail-in
19 ballot had been submitted on her behalf, right?
20 A. Correct.
21 Q. So as soon as you or the system saw
22 that Teresa Mihaliak had submitted a mail-in
23 vote after she had been removed from the voters
24 rolls because she had died, you knew that this
25 was an invalid vote, right?

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1 C. Miller
2 Q. And on the affidavit of probable
3 cause -- do you see where I am?
4 A. Yep.
5 Q. It appears to be written by Detective
6 Larry Martin.
7 Do you know who Larry Martin is?
8 A. I do.
9 Q. And did you provide a report of what
10 you knew about Ms. Mihaliak and her alleged
11 voter fraud to Detective Martin?
12 A. I did.
13 Q. Okay. In the second paragraph, it
14 says the ballot for the Democrat primary was
15 received on April 28th, 2022, by your office,
16 right?
17 A. Correct.
18 Q. And the mother, Teresa Mihaliak, had
19 been deceased since April 14th, right?
20 A. Correct.
21 Q. Now, the criminal complaint here does
22 not indicate what date, if any, was written on
23 Ms. Mihaliak's mail-in vote, right?
24 A. It was dated April -- it says it. It
25 says it was dated April 26th, 2022.

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1 C. Miller
2 A. Yes.
3 Q. You didn't need to look at the date
4 written on the envelope to determine that this
5 was an invalid vote?
6 A. We did.
7 Q. You did need to look at the envelope
8 to determine if this was an invalid vote?
9 A. Yes, because of when -- because of
10 how the dates lined up for all of it to have
11 happened.
12 She could have received -- she
13 did -- she would have received a ballot before
14 she died as well as the request. However, once
15 it was returned, she had already been deceased
16 for, I believe, almost two weeks.
17 Q. Right. And dying two weeks before
18 the ballot comes in makes the vote invalid as a
19 matter of course, right?
20 A. Oh, yes. It would have been
21 invalidated it either way.
22 Q. Right. So regardless of the date
23 written on the envelope, that vote would not
24 have counted?
25 A. Correct.

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1 C. Miller

2 Q. Because you had already caught that

3 Teresa Mihaliak had died and removed her from

4 the voter rolls before Election Day?

5 A. Yes.

6 Q. And I understand that the police are

7 interested in how the dates line up because

8 they're, presumably, going for a fraud case

9 against Cheryl Mihaliak.

10 But just focusing on whether

11 this was a valid vote, the date written on the

12 envelope didn't matter one way or the other?

13 A. Correct. When we received it back,

14 as we had already removed her, that ballot

15 would have been set to the side.

16 MR. LONEY: We can put this

17 aside for a second. I want to get back

18 for a moment to military and overseas

19 ballots.

20 And I'd like to go back to

21 Exhibit Lancaster 3, the interrogatory

22 responses.

23 If everybody would just bear

24 with me for a second while I'm chopping

25 things out of my outline to get us out of

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1 C. Miller

2 Interrogatory Number 1.

3 Is that back up on your screen?

4 A. Yes.

5 Q. In interrogatory Number 1, we asked

6 for the numbers, how many ballots and how many

7 military-overseas ballots voters returned to

8 the Lancaster board in the 2022 general

9 election.

10 And in response, the Lancaster

11 board stated that it had received 34,202 mail

12 ballots and 188 military-overseas ballots.

13 Do I have that right?

14 A. Yes.

15 Q. Now, I'm going to scroll down to

16 Interrogatory Number 15.

17 Please, again, let me know if

18 you feel like you need to read anything in

19 between to contextualize.

20 A. Okay.

21 Q. But in Number 15, we asked whether

22 the Lancaster board counted timely received

23 military-overseas ballots in the 2022 general

24 election where the voter failed to write a date

25 on the voter declaration or included a date

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1 C. Miller

2 here sooner.

3 BY MR. LONEY:

4 Q. Okay. So I'm sharing, again, Exhibit

5 Lancaster 3. And I've jumped to page 3, the

6 response to Interrogatory Number 1.

7 Do you see where I am?

8 A. I do.

9 Q. Actually, I'm going to ask to go off

10 the record for a few minutes.

11 - - -

12 (Whereupon, a short recess was

13 taken.)

14 - - -

15 BY MR. LONEY:

16 Q. Ms. Miller, we were talking right

17 before the break about Cheryl Mihaliak, if I

18 pronounced that correctly.

19 Are you aware of any other

20 Lancaster County voters being investigated for

21 voter fraud since your time working with the

22 Lancaster board?

23 A. I am not.

24 Q. Let me go back to sharing Exhibit

25 Lancaster 3. We were just about to talk about

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1 C. Miller

2 that was incorrect.

3 Do you see where I'm reading

4 from?

5 A. Yes.

6 Q. And the answer here from the

7 Lancaster board is no.

8 So the first question I have is:

9 Is that right that the -- of the 188

10 military-overseas ballots there were none set

11 aside because of a missing date or incorrect

12 date on the return envelope?

13 A. Correct.

14 Q. Now, is that because all 188 of those

15 voters wrote a correct date under their

16 signature on the return envelope, or is it

17 because the Lancaster board counted some

18 that -- strike that.

19 I'll just ask the first part of

20 that.

21 Is that because all 188 -- I'm

22 going to strike the last question or partial

23 question and just ask a new one, which is: Is

24 this answer to Interrogatory Number 15 because

25 all 188 military-overseas voters wrote a date

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1 C. Miller
2 that the Lancaster board deemed to be correct
3 on their outer envelopes?
4 A. Correct.
5 MR. LONEY: Those are all of my
6 questions for now. Thank you very much.
7 - - -
8 (Whereupon, there was an
9 off-the-record discussion.)
10 - - -
11 E X A M I N A T I O N
12 - - -
13 BY MR. OSHER:
14 Q. Good afternoon, Ms. Miller. My name
15 is Dan Osher. I represent the plaintiffs in
16 the second of these two cases, and I only have
17 a few questions for you to add on here.
18 Can you remind me? What is your
19 position at the county?
20 A. I am the -- sorry.
21 I am the chief clerk, chief
22 registrar of the Lancaster County Board of
23 Elections and Registration Commission.
24 Q. So how -- can you describe what the
25 relationship is between your position and the

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1 C. Miller
2 mean both mail-in ballots and absentee
3 ballots -- does the board make a determination
4 of whether that person is eligible to
5 participate in the election?
6 A. I'm not sure I understand.
7 Q. Sure. So you said -- in response to
8 my question of after the person successfully
9 registers to vote, I asked you does the board
10 make any future determinations about that
11 person's eligibility to participate in
12 elections, and you said the board does roll
13 maintenance.
14 And so my question was: When a
15 person submits an application to vote by mail,
16 whether mail-in or absentee, does the board
17 make a determination again as to whether that
18 voter is eligible to vote?
19 A. Yes. The first thing we do is to
20 make sure that that person is actually a
21 registered voter first before we process any
22 mail ballot applications.
23 Q. Okay. And -- okay. That answered my
24 question. Thank you.
25 So does the Board of Elections

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1 C. Miller
2 Board of Elections?
3 A. The Board of Elections directly
4 oversees my position at our office.
5 Q. Understood. Okay.
6 So in terms of when the board
7 actually determines when a person is eligible
8 to vote, when does that occur in the process of
9 a person -- let's say a person moves to
10 Pennsylvania, wants to register to vote and
11 participate in Pennsylvania's elections.
12 When does the Board of Elections
13 determine that that person is eligible to cast
14 a ballot in one of their elections?
15 A. When we are registering them to vote.
16 Q. Okay. After that point, let's say
17 that the person successfully registers to vote,
18 does the board determine whether that voter is
19 eligible to cast the ballot at any point in the
20 future?
21 A. There are many voter roll maintenance
22 programs that we do throughout every single
23 year, so yes.
24 Q. When a person submits a mail ballot
25 application -- and when I say "mail ballot," I

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1 C. Miller
2 use the date that is written on the mail ballot
3 return envelope to determine that person's
4 eligibility to vote?
5 A. In a way, yes. Because sometimes,
6 when they come back, if it's a deceased voter,
7 then we have to remove it.
8 Q. Okay. And when is that person's
9 eligibility to vote determined?
10 Is it based on when they
11 submitted the ballot? Is it based on Election
12 Day?
13 What is the date by which you
14 determine that person's eligibility to vote in
15 a particular election?
16 A. We pull deceased voter ballots up
17 through Election Day.
18 Q. So if a person passes away before the
19 election, you say you pull the ballot.
20 What does that mean?
21 A. If we received their ballot -- their
22 voted ballot already, we would then pull that
23 from those received ballots and set aside.
24 Q. And how do you determine whether a
25 person has passed away?

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1 C. Miller

2 A. We receive Department of Health

3 records, as all counties do. And we also use

4 local obituaries or if someone has a death

5 certificate that they have submitted to us.

6 Q. So if a person passes away before

7 Election Day and they -- and their ballot is

8 received for a particular election, that

9 person's ballot will not be counted?

10 A. Correct.

11 Q. And that is regardless of whether

12 there's a date on their return envelope,

13 whether the date is incorrect?

14 A. If there is not a date on the

15 envelope, we would have already pulled it for

16 it being no date. But, yes, otherwise, looking

17 at the date, yes, we still would pull it at

18 that point.

19 Q. So in response to Mr. Loney's

20 questions, you said that before the

21 Pennsylvania Supreme Court's order in November

22 of 2022 the Board of Elections was prepared to

23 count ballots regardless of whether they

24 contained a date on the envelope or whether

25 that date was correct; is that right?

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1 C. Miller

2 A. Yes.

3 Q. Okay. Are you familiar with those

4 opinions? Did you review them?

5 A. Very briefly. I wouldn't say I'm

6 super familiar with them.

7 Q. Has the board reviewed them?

8 A. I -- I know they have been sent them.

9 I can't speak to whether they have actually

10 reviewed them themselves or not.

11 Q. Okay. I'm going to now ask you

12 questions about what the board is intending to

13 do in future elections with respect to dates

14 written on the envelopes containing mail-in and

15 absentee ballots.

16 How is the Board of Elections

17 going to handle mail ballots contained in

18 envelopes in which there are no written dates

19 in future elections?

20 A. We have not spoken -- I've not spoken

21 with the Board of Elections to determine what

22 we will be doing going forward.

23 Q. You have not spoken to the Board of

24 Elections?

25 A. Since those orders have come out

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1 C. Miller

2 A. Correct.

3 Q. Okay. Prior to that, has the Board

4 of Elections ever rejected a ballot solely

5 because it was contained in an envelope that

6 did not contain a date written on the envelope

7 or the date was incorrect?

8 A. Previous to that, yes. We did set

9 ballots aside that did not have a date, and we

10 did not count them.

11 Q. And can you give me the time periods

12 for that?

13 A. This fall would have been the first

14 election that we would have counted ballots

15 with no date.

16 All other elections before that,

17 we would have set those aside. But per court

18 orders that came out -- or court cases, I

19 should say, that had determinations and updated

20 guidance by the Department of State, we were

21 following that for the fall election only.

22 Q. Got it. Thank you.

23 Are you aware that the Supreme

24 Court of Pennsylvania issued its opinions in

25 that Ball case last week?

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1 C. Miller

2 for -- to determine what we're doing going

3 forward, we have not met to speak about that

4 yet.

5 Q. Okay. Are you aware that, in the

6 notice -- the deposition notice that we sent

7 for this deposition, Topic Number 3 was "the

8 criteria that the Lancaster Board of Elections

9 will use during future elections to determine

10 whether the date written on the mail ballot

11 return envelope is correct"?

12 A. I believe that's what that said, yes.

13 Q. So were you aware that this

14 deposition was supposed to cover what the Board

15 of Elections was planning to do in future

16 elections?

17 A. I do. But those court orders also

18 just came out, and we have not had a chance to

19 meet to go over that yet.

20 Q. When will that determination be made?

21 A. I don't know if we have a date that

22 we have set yet. I assume it would be sometime

23 in March, though, but I would be guessing.

24 Q. Okay. You answered some questions by

25 Mr. Loney about the format of the date that's

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1 C. Miller
2 written on the mail ballot return envelope.
3 And you said that -- that you
4 rejected -- when I say "you," I mean the Board
5 of Elections -- you rejected -- you rejected
6 on -- ballots contained in envelopes where the
7 date was written in a format that suggested
8 that the -- let's say the date predated the
9 first date of the range set by the Pennsylvania
10 Supreme Court; is that right?
11 A. I believe.
12 Q. And you presumed that the format was
13 month, date, then year.
14 Did I hear that right?
15 A. I did. And, again, I would need to
16 see our ballot -- our ballot return envelope,
17 not Dauphin County's, because I believe that is
18 on our actual ballot return envelopes so people
19 have the right format.
20 Q. And can you tell me why you think
21 that?
22 A. I was -- I'm trying to remember
23 exactly what they look like, and I believe that
24 it is on there. But, again, without seeing it
25 in front of me, I cannot confirm that.

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1 C. Miller
2 I assume they're the same, but I
3 don't think there's any reason to risk it.
4 Thank you. I appreciate it.
5 And let's go to -- so this
6 doesn't actually contain the documents
7 that were produced, does it?
8 Okay. No problem. I will --
9 I'll offer a new exhibit then. If you
10 wouldn't mind just giving me one second.
11 All right. Jennifer, I did not
12 send an email before the deposition
13 containing our possible exhibits.
14 So I'm just going to put it in
15 the chat, if that works.
16 THE COURT STENOGRAPHER: That
17 works for me. Thank you.
18 MR. OSHER: Thanks.
19 THE COURT STENOGRAPHER: And
20 what are we marking this as?
21 MR. OSHER: I don't know what we
22 finished on.
23 MR. LONEY: The next one should
24 probably be Lancaster 13.
25 MR. OSHER: 13. Great. Thanks.

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1 C. Miller
2 Q. And what's your recollection about
3 what those instructions said?
4 A. I believe that it says today's date
5 required. And then after it, it says --
6 MM/DD/YYYY. But, again, without seeing it in
7 front of me, I can't confirm.
8 Q. Do you know whether you -- whether
9 the board did that for envelopes for overseas
10 and military ballots?
11 A. Off the top of my head, I cannot
12 remember.
13 Q. Would there have been any reason for
14 the board to provide that guidance in domestic
15 ballots but not military and overseas ballots?
16 A. Not that I can think of.
17 MR. OSHER: Mr. Loney, did you
18 mark already the board's responses to your
19 RFPs?
20 MR. LONEY: I did. Those should
21 be Lancaster 4.
22 MR. OSHER: Okay. I apologize.
23 Would you mind pulling that up? I think
24 it would be easier for you to do it rather
25 than me use a different document.

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1 C. Miller
2 - - -
3 (Whereupon, Exhibit 13 was
4 marked for identification.)
5 - - -
6 MR. OSHER: So I've just put in
7 the chat feature of Zoom a document that
8 we're going to mark as -- I'm sorry.
9 Mr. Loney, did you say 13 or 14?
10 THE COURT STENOGRAPHER: 13.
11 MR. OSHER: 13. Thank you.
12 So this will be Exhibit 13, and
13 I'm going to share my screen.
14 BY MR. OSHER:
15 Q. Can you see what I'm showing on the
16 screen here?
17 A. I can.
18 Q. And does this appear to you to be the
19 Lancaster Board of Elections response to the
20 NAACP plaintiffs request for production of
21 documents?
22 A. Yes.
23 Q. Okay. And is there any way -- can
24 you read this okay? Do I need to zoom in at
25 all?

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1 C. Miller
2 A. It's fine.
3 Q. Okay. Thanks.
4 I'm going to move down to page 9
5 of this document. And it looks like -- and
6 this is listed as Exhibit A to the responses to
7 the request for production.
8 I'm going to show you page 9,
9 which looks like half of a ballot envelope.
10 Does that look right?
11 A. Yes.
12 Q. Okay. And if -- you said before that
13 you recall that there might have been guidance
14 as to the format by which people should write
15 their date; is that right?
16 A. Correct.
17 Q. Would that have been -- so it looks
18 like, towards the bottom of this envelope, you
19 have the absentee -- it's cut off, so we can't
20 see everything that it says. But it appears to
21 be the absentee elector's declaration.
22 Where in this would the guidance
23 as to date, month, year have been or month,
24 date, year?
25 A. This -- these are used specifically

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1 C. Miller
2 A. No.
3 Q. Will the Board of Elections make that
4 assumption in future elections?
5 MR. ZIMOLONG: Objection to
6 form.
7 THE WITNESS: I can't speak to
8 what the Board of Elections will determine
9 without meeting with them first.
10 BY MR. OSHER:
11 Q. Does the Board of Elections provide
12 training to its workers about how to determine
13 whether the date written on a ballot is
14 correct?
15 A. We go over it with the staff, yes.
16 But I don't know that there's direct training
17 about dates specifically.
18 Q. Aside from your recollection that
19 there might have been guidance as to format of
20 the date that should be written on envelopes,
21 putting that aside, does the board provide
22 guidance to voters as to how they should format
23 the date written on the envelope?
24 A. I can't recall at the moment without
25 seeing something in front of me.

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1 C. Miller
2 for military ballots, not all of our absentee
3 and regulatory mail-in ballots. So this one
4 does not appear that it has it, but it would be
5 next to the date.
6 Q. But before, when I asked you if there
7 was any reason why the board would have
8 different instructions as to the format of the
9 dates between absentee ballots, domestic mail
10 ballots, and military ballots, you could not
11 think of any; is that right?
12 A. No, I couldn't think of any.
13 MR. OSHER: Okay. I am going to
14 stop sharing my screen.
15 BY MR. OSHER:
16 Q. So going back to the assumption that
17 the date written on the envelope would be
18 month, date, year.
19 Why did you make that
20 assumption?
21 A. Again, without seeing our -- for
22 domestic mail-in absentee ballots, without
23 seeing that in front of me, I believe that it
24 is on there, which is why we use that.
25 Q. Any other reason?

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1 C. Miller
2 Q. You're not aware of any?
3 A. I can't recall. I don't -- I just
4 don't remember what's exactly in our
5 instructions.
6 Q. Okay. I think in response to
7 Mr. Loney's questions you said that the board
8 does not provide notice to voters if their
9 ballot is rejected because of a missing or
10 incorrect date.
11 Do I have that right?
12 A. Correct.
13 Q. To your knowledge, does the board
14 have any intention of providing such notice in
15 the future?
16 A. I can't speak to what the board will
17 decide going forward.
18 Q. Sure. But to your knowledge, you
19 don't know of any intent to do that in the
20 future?
21 A. I am not sure what they will do with
22 that going forward.
23 Q. Earlier, in response to Mr. Loney's
24 questions, you said that the board uses the
25 date written on the envelope to determine

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1 C. Miller
2 whether the ballot is compliant with
3 election -- with the election code.
4 Do I have that right?
5 A. Correct.
6 Q. Does the board use the written date
7 on the envelope for any other purpose?
8 A. We do not.
9 Q. I have a few questions about the SURE
10 system.
11 So can you just explain what the
12 SURE system is?
13 A. It's the voter registration system
14 for Pennsylvania.
15 Q. Okay. And can you describe to me the
16 process by which the Board of Elections
17 interacts with the SURE system when a mail
18 ballot is returned to them?
19 A. So we have to -- all ballots have to
20 be scanned into the system to say that --
21 basically saying -- I was trying to think what
22 the exact wording is that it uses.
23 But it's basically saying that
24 we received that ballot. And then there are
25 rejection codes, should a rejection code be

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1 C. Miller
2 Q. What happens if the board receives a
3 mail ballot from the voter and then the voter
4 appears at a voting place and tries to vote in
5 person?
6 A. They would have to do a provisional
7 ballot.
8 Q. And if they submit a provisional
9 ballot and nothing else happens, what happens?
10 A. If we received their mail ballot,
11 their provisional ballot would not count.
12 Q. And is that because the mail ballot
13 was received first?
14 A. Correct.
15 Q. How does the election official at the
16 polling place know that the voter has submitted
17 their mail ballot?
18 A. It shows them in the poll book.
19 Q. And when it comes time to tabulate
20 the votes, how does the Board of Elections
21 know -- I'm sorry.
22 When it comes time to tabulate
23 the votes, the Board of Elections will always
24 know whether a mail ballot was submitted prior
25 to any provisional ballot submitted by the

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1 C. Miller
2 needed.
3 Q. And what are those rejection codes
4 reflecting?
5 A. I don't, off the top of my head, know
6 all of them. But that could be no secrecy
7 envelope, no signature or date. Things to that
8 nature.
9 Q. Does the rejection code differentiate
10 between missing signature and missing date?
11 A. I don't believe that it did. I
12 believe that has been changed going forward,
13 though.
14 Q. Do you know when that change was
15 made?
16 A. I do not. Again, I don't remember if
17 it actually updated that or not yet. I just
18 know there was talk of it.
19 Q. So am I correct that, when the mail
20 ballot is received by the Board of Elections,
21 it is time-stamped, and then that time and date
22 is entered into the SURE system?
23 A. Yes. They are scanned into the SURE
24 system that day so that the voter knows that we
25 have received their ballot.

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1 C. Miller
2 voter; is that right?
3 A. Correct.
4 Q. What happens if a mail -- if a -- if
5 a voter requests a mail ballot, the board sends
6 it out, and the voter then appears at a polling
7 place and it does not appear that they have
8 returned their mail ballot?
9 A. If they bring back their ballot as
10 well as their return envelope, there is a form
11 that they have to fill out. They turn that in
12 to the judge of elections, and then they may
13 vote at the polls.
14 If they do not have those two
15 pieces, then they must vote provisionally.
16 Q. And if they submit a provisional
17 ballot and the mail ballot comes in after that
18 and it's before the deadline, the 8:00 p.m.
19 deadline of Election Day, what happens then?
20 A. I don't know if we've ever had a case
21 of that, so I can't speak to what would happen.
22 Q. But in all events here, the board
23 will know when the mail ballot is returned and
24 when the provisional ballot has been cast,
25 correct?

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1 C. Miller
2 A. Correct.
3 Q. Aside from the incident that you
4 discussed with Mr. Loney regarding the 2022
5 primary, has the board identified any credible
6 fraud concerns relating to ballots,
7 specifically with respect to the date written
8 on their ballot, in any other instance besides
9 that one that you referred to?
10 A. No.
11 Q. If a mail envelope is missing a
12 written date, is that a reason to suspect voter
13 fraud?
14 MR. ZIMOLONG: Objection to the
15 form. Calls for speculation.
16 THE WITNESS: No, we would not
17 assume that.
18 MR. OSHER: All right. Can we
19 go off the record for about five minutes.
20 Let me just make sure that I don't have
21 any other questions.
22 - - -
23 (Whereupon, a short recess was
24 taken.)
25 - - -

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1 C. Miller
2 In preparing for this
3 deposition, as the representative of the Board
4 of Elections, you are not aware of that?
5 A. Correct.
6 Q. We went through a few formulations of
7 what happens when a voter submits a mail
8 ballot, comes to the polls, and variations of
9 that.
10 What if the mail ballot is
11 received by the Board of Elections and is
12 rejected because of a missing or incorrect date
13 and the voter then appears at the polling
14 place? What happens then?
15 A. Again, I'm not aware of any instances
16 that that has happened. So I would be
17 speculating as to how we would handle that
18 because we have not had to.
19 Q. Based on your preparation as a
20 representative of the board and your position,
21 how -- based on your understanding of how the
22 election code works, what is your understanding
23 of how the board would treat that voter?
24 MR. ZIMOLONG: Objection to
25 form.

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1 C. Miller
2 BY MR. OSHER:
3 Q. Ms. Miller, does the Lancaster board
4 coordinate at all with the boards of other
5 counties to ensure uniformity in the way that
6 they interpret the election code?
7 MR. ZIMOLONG: Objection to the
8 form.
9 You can answer.
10 THE WITNESS: I would be
11 speculating if I said I knew if the board
12 members were reaching out directly to
13 other boards.
14 BY MR. OSHER:
15 Q. Is there any formal system for that
16 that you're aware of?
17 A. Not that I'm aware of.
18 Q. Are you aware of any communication
19 between the boards of elections regarding how
20 they will deem dates to be correct or
21 incorrect?
22 A. No. Again, I would be speculating as
23 to what they sent to other people or talks
24 amongst themselves.
25 Q. But you're not aware of any of that?

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1 C. Miller
2 I don't believe that was one of
3 the topics that she was asked to prepare
4 for, but -- and also calls for
5 speculation.
6 But with those objections, you
7 can answer the question as best you can.
8 THE WITNESS: Again, it would be
9 speculation as to how the board would
10 choose to move forward on those
11 provisional ballots.
12 BY MR. OSHER:
13 Q. Do you have any reason to believe
14 that the voter's in-person ballot would not be
15 counted because of the rejected mail ballot
16 that was received before?
17 MR. ZIMOLONG: Objection to
18 form.
19 You can answer.
20 THE WITNESS: I would truly be
21 speculating if I gave an answer on that.
22 MR. OSHER: All right. I don't
23 have any more questions. Thank you.
24 THE COURT STENOGRAPHER: Does
25 anybody else have any questions?

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1 C. Miller
 2 This is Jeff Bukowski on behalf
 3 of Berks County. We have no questions.
 4 MR. ZIMOLONG: If no one else
 5 has any questions -- going once, going
 6 twice -- then we'll let Ms. Miller go.
 7 Okay. Thank you very much.
 8 - - -
 9 (Whereupon, the deposition
 10 was concluded at 1:22 p.m.)
 11 - - -
 12
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ERRATA SHEET

1
 2 Case Name:
 3 Deposition Date:
 4 Deponent:
 5 Pg. No. Now Reads Should Read Reason
 6 _____
 7 _____
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____
 13 _____
 14 _____
 15 _____
 16 _____
 17 _____
 18 _____
 19 _____
 20
 21 _____
 22 Signature of Deponent
 SUBSCRIBED AND SWORN BEFORE ME
 23 THIS _____ DAY OF _____, 2023.
 24 _____
 25 (Notary Public) MY COMMISSION EXPIRES: _____

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1 C. Miller
 2 CERTIFICATE
 3 I HEREBY CERTIFY that the
 4 proceedings, evidence and objections are
 5 contained fully and accurately in the
 6 stenographic notes taken by me upon the
 7 deposition of Crista Miller, taken on
 8 February 13, 2023 and that this is
 9 a true and correct transcript of same.
 10 Date, February 23, 2023
 11
 12
 13 *Jennifer Billstein-Miller*
 14 Jennifer Miller, RMR, CCR, CRR
 15 and Notary Public
 16
 17
 18
 19
 20
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