IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

BRIAN BAXTER and SUSAN KINNIRY,

Respondents,

v.

PHILADELPHIA BOARD OF ELECTIONS,

Respondent,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Petitioners.

INTERVENOR-PETITIONERS' EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF PENDING FILING OF PETITION FOR ALLOWANCE OF APPEAL

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Just a few weeks ago, this Court unequivocally stated and directed the Pennsylvania courts that it "will neither impose *nor countenance* substantial alterations to existing laws and procedures," including the enforceability of the General Assembly's date requirement for mail ballots, "during the pendency of an ongoing election." *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (emphasis added).[1] Yesterday, however—weeks *after* mail voting commenced for the ongoing 2024 General Election and at least thousands of Pennsylvanians have *already* cast mail ballots for President, U.S. Senate, Congress, and scores of state and local offices—a majority of the Commonwealth Court yet again violated that directive when it reinstated its prior (erroneous) holding that the date requirement violates the Free and Equal Elections Clause. *See* Majority Opinion, *Baxter et. al v. Philadelphia Bd. of Elecs. et. al*, Nos. 1305 C.D. 2024 & 1309 C.D. 2024 (Pa. Commw. Ct. Oct. 30, 2024) ("Maj. Op.") (reproduced in Addendum). As Judge Wolf explained in dissent, the majority's decision not only violates this Court's "crystal-clear directive," but has also unleashed chaos in the ongoing General Election because it "cause[s] a significant sea change in the election processes effectuated by the county boards," will improperly "influence voter behavior," and "risk[s] causing confusion [in] the

[1] This Application uses "mail ballot" to refer both to absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6, 3150.16.

General Election." Wolf Dissenting Opinion 2, 6 ("Wolf Dis. Op.") (reproduced in Addendum).

Extraordinary relief of a stay or, at a minimum, modification of the majority's order is warranted for this reason alone. The majority's protestations that its order applies only to the September 17, 2024 special election in Philadelphia and not to the ongoing "2024 General Election," *see* Maj. Op. 22-23 & nn.23-24; *see also id.* at 4, 13 n.6, 41, do not affect, much less alter, the need for the Court's intervention. To be sure, the Republican Committees *agree* that the majority's order does not address the 2024 General Election or any future election, but a stay or modification still is warranted because the order issued "*during* the pendency of an ongoing election." *New Pa. Project*, 2024 WL 4410884, at *1. That is particularly true in the circumstances here for several reasons.

For one thing, while the majority's opinion purported not to address the 2024 General Election or any future election, its *order* is silent regarding any such limitation. *See* Maj. Op. 43-44. For another, as Judge Wolf explained, "local election officials look to th[e Commonwealth] Court's decisions for guidance on legal requirements for counting and not counting votes," so "[i]t does not take a stretch of the imagination to anticipate that" election officials across the Commonwealth will rely upon the majority's decision to count mail ballots that do not comply with the date requirement in "the November 5th General Election." Wolf

Dis. Op. 5. And given that the disputed ballots "will not impact the outcome of [the] past special election" at issue in this case, *id.* at 6, "[t]he ***only*** reason that . . . the [m]ajority would rule on this question now ***is precisely***" because it hoped election officials would "***change the rules for the already underway general election***." McCullough Dissenting Opinion 7 (emphasis original) ("McCullough Dis. Op.") (reproduced in Addendum).

The Court therefore should stay or, at a minimum, modify the majority's order to make clear that all county boards of elections remain bound to enforce the General Assembly's date requirement in the 2024 General Election and all future elections pending this Court's decision on the forthcoming appeal of Intervenor-Petitioners the Republican National Committee and the Republican Party of Pennsylvania (collectively, the "Republican Committees").

If more were somehow needed, the Court should also grant a stay under the traditional standard because the Republican Committees have a "substantial case" that the majority erred in ignoring the procedural defects in this suit. *Commonwealth. v. Melvin*, 79 A.3d 1195, 1200 (Pa. Super. Ct. 2013). To start, even though this Court already held that *all* county boards of elections *must* be joined and allowed to participate in cases challenging the statewide date requirement, *see Black Political Empowerment Project v. Schmidt* (*B-PEP*), 322 A.3d 221, 222 (Pa. 2024), here the exact same panel of the Commonwealth Court ignored that holding and

struck down the date requirement without giving the other 66 county boards a chance to participate, *see* Wolf Dis. Op. 5. Moreover, neither the 66 county boards nor the Republican Committees were given *any chance* to develop a factual record in this case. The majority's unnecessarily rushed decision thus rests on disputed facts and violated the right of the 66 other county boards and the Republican Committees to develop a record regarding the claims brought by Respondents Brian Baxter and Susan Kinniry (collectively, "Individual Respondents"), the alleged burdens imposed by the date requirement, and the state interests supporting that requirement.

A stay is also warranted because the Republican Committees have a "substantial case on the merits" against Individual Respondents' Free and Equal Elections Clause challenge. *Melvin*, 79 A.3d at 1200. After all, this Court has *already* upheld against a Free and Equal Elections Clause challenge the *entire* mail-ballot declaration mandate of which the date requirement is a *single* component. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Furthermore, this Court has *never* invalidated a mandatory ballot-casting rule under the Free and Equal Elections Clause. In fact, just weeks ago, this Court reaffirmed that a mandatory ballot-casting rule can violate the Clause only if it "den[ies] the franchise itself, or make[s] it so difficult [to vote] as to amount to a denial." *In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 909 (Pa. 2024) (cleaned up). The majority relegated that binding holding to a footnote, reasoning it was only

about "provisional ballots, which are not at issue here." Maj. Op. 35-36 n.37. After effectively ignoring this Court's decision, the majority readopted its prior holding that all mandatory ballot-casting rules are subject to strict scrutiny—a radical holding that would transfer most of the General Assembly's power over elections to the judiciary.

Moreover, absent a stay, the Republican Committees will suffer "irreparable injury" because they will lose the right to seek review and, once the ongoing General Election has come and gone, cannot receive a remedy for election results tainted by votes counted in violation of the General Assembly's plain directives. *Melvin*, 79 A.3d at 1200. And issuance of a stay will *prevent* "harm" to other parties and to the public interest because it will preserve the integrity of the ongoing and pivotal General Election. *Id.* The Court should grant extraordinary relief pending its resolution of the Republican Committees' forthcoming appeal.[2]

[2] This Court's August 27, 2024 Order to "expedite appeals in matters arising under the Pennsylvania Election Code with respect to the November 5, 2024 General Election, and pursuant to Article V, Section 10 of the Pennsylvania Constitution," *In re: Temporary Modification and Suspension of the Rules of Appellate Procedure and Judicial Administration for Appeals Arising Under the Pennsylvania Election Code*, No. 622 (Pa. Aug. 27, 2024), is inapplicable to the Republican Committees' petition for allowance of appeal in this matter for three reasons. *First*, the majority itself stated that its decision does not relate to the November 5, 2024 General Election. Maj. Op. 13 n.16. *Second*, Individual Respondents brought a declaratory judgment action under the Pennsylvania Constitution, not a claim under the Election Code. *See Working Families Party v. Commonwealth*, 209 A.3d 270, 278 (2019) (A "declaratory judgment action" raising constitutional claims "does not 'arise under' the Election Code."). *Third*, the Commonwealth Court did not append a copy of this Court's August 27, 2024 Order to its decision, as that Order requires of matters it governs. Accordingly, the Republican Committees' petition for allowance of appeal is governed by the ordinary rule. *See* Pa. R. App. P. 1113(a).

Because time is of the essence, the Republican Committees respectfully request that the Court expedite its decision on this Application and enter an administrative stay to preserve the status quo pending such a decision. In all events, the Republican Committees respectfully request that the Court issue a decision on the Application no later than Monday, November 4, so that the Commonwealth's 67 county boards' obligation to enforce the General Assembly's mandatory date requirement in the ongoing 2024 General Election remains clear.

BACKGROUND

The law is well established: The General Assembly's date requirement for mail ballots is mandatory and must be enforced as a matter of state and federal law. *See Pa. Democratic Party*, 238 A.3d 345; *Ball v. Chapman*, 289 A.3d 1, 21-22 (Pa. 2022); *Pa. State Conf. of NAACP Branches v. Sec'y Commw. of Pa.*, 97 F.4th 120 (3d Cir. 2024). Nonetheless, earlier this year, a majority of the same Commonwealth Court panel that decided this case below struck down the date requirement under the Free and Equal Elections Clause. This Court vacated that opinion due to procedural and jurisdictional defects in the suit, including the failure to join all 67 county boards of elections. *B-PEP*, 322 A.3d at 222.

On remand, the Commonwealth Court majority did not respond by dismissing the suit as this Court's vacatur order required. Instead, the majority attempted to move full steam ahead with the case, requiring this Court to grant the Republican

Committees' Emergency Application for Enforcement and/or Clarification. *See* Sept. 19, 2024 Order, *Black Political Empowerment Project v. Schmidt*, No 68 MAP 2024 (Pa.). And when the *B-PEP* claimants—traveling under a reshuffled case caption, joining one additional claimant, and represented by the same counsel as Individual Respondents here—asked the Court to exercise extraordinary jurisdiction to adjudicate the Free and Equal Elections challenge to the date requirement before the 2024 General Election, the Court declined. *See New Pa. Project*, 2024 WL 4410884, at *1. The Court explained that it "will neither impose nor countenance substantial alterations to existing laws and procedures," including the enforceability of the General Assembly's date requirement for mail ballots, "during the pendency of an ongoing election." *Id*.

The majority below, however, held that the General Assembly's date requirement violates the Free and Equal Elections Clause, and it did so "during the pendency of [the] ongoing" 2024 General Election. *Id.*; McCullough Dis. Op. 6-7. The Republican Committees now seek relief from that decision.

BASIS FOR EXERCISE OF KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION

This Court possesses authority to "exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722." 42 Pa. C.S. § 502. That authority includes the "power of general

superintendency over inferior tribunals even when no matter is pending." *Bd. of Revision of Taxes, City of Phila. v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010); *see also Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020); *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015).

"King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Friends of Danny DeVito*, 227 A.3d at 884 (quoting *Williams*, 129 A.3d at 1206). "[T]he power of King's Bench allow[s] the Court to innovate a swift process and remedy appropriate to the exigencies of the event." *In re Bruno*, 101 A.3d 635, 672 (Pa. 2014).

The Court should grant the Application and exercise its extraordinary jurisdiction here. The Commonwealth Court majority violated this Court's plain directive when it held that the date requirement is invalid "during the pendency of an ongoing election." *New Pa. Project*, 2024 WL 4410884, at *1. Given that mail voting has been ongoing for weeks and Election Day is only 5 days away, there is simply insufficient time for this Court to resolve the issues presented according to the "ordinary process" of a merits appeal. *Friends of Danny DeVito*, 227 A.3d at 884. The issues presented are also of vital "public importance," *id.*: Voting is among the "most central of democratic rights," *League of Women Voters v. Commonwealth*,

178 A.3d 737, 741 (Pa. 2018) ("*LWV*"), and the majority's decision jeopardizes the right to vote of Pennsylvanians across the Commonwealth, *see* Wolf Dis. Op. 6-8; McCullough Dis. Op. 3-8; *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."). The Court therefore should meet "the exigencies of the event," *In re Bruno*, 101 A.3d at 672, by exercising its extraordinary jurisdiction to stay or, at a minimum, modify the majority's order to make clear that all county boards of elections are obligated to enforce the General Assembly's mandatory date requirement in the 2024 General Election and all future elections pending the Court's resolution of the Republican Committees' forthcoming appeal.

ARGUMENT

The majority's decision requiring the Philadelphia Board of Elections to count undated mail ballots "fundamentally alters the nature of the election" by permitting individuals to ignore with impunity the General Assembly's duly enacted and longstanding date requirement. *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (per curiam). The Court should stay, or at a minimum modify, the majority's order for at least three reasons.

First, regardless of the Court's view of the merits, the majority below improperly "impose[d] . . . substantial alterations to existing laws and procedures

during the pendency of an ongoing election." *New Pa. Project*, 2024 WL 4410884, at *1.

Second, the Republican Committees have a "substantial case on the merits." *Melvin*, 79 A.3d at 1200. To start, the majority ignored this Court's order in *B-PEP* by striking down the date requirement without the participation of the other 66 county boards of elections. Moreover, the majority also inappropriately based its decision on disputed facts and never gave the Republican Committees (or the missing 66 county boards) a chance to develop a record about the date requirement. *Id.* And the Republican Committees also have a "substantial case on the merits" that the majority's holding misinterpreted the Free and Equal Elections Clause and ignored this Court's binding precedents. *Id.*

Third, the equities also warrant a stay. The Republican Committees will suffer "irreparable injury" absent a stay, and a stay will promote the "public interest" and prevent "harm" to other parties because it will preserve the integrity of the ongoing election. *Id.*; *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

I. THIS COURT SHOULD STAY OR MODIFY THE MAJORITY'S ORDER UNDER ITS RECENT DECISIONS ADOPTING THE *PURCELL* DOCTRINE

As Judge Wolf explained, the majority's decision violates this Court's "crystal-clear directive," Wolf Dis. Op. 6, that Pennsylvania courts may not "impose

[]or countenance" alterations to the enforceability of the date requirement "during the pendency of an ongoing election," *New Pa. Project*, 2024 WL 4410884, at *1.

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

The *Purcell* principle forecloses invalidating the date requirement during the ongoing 2024 General Election. *See New Pa. Project*, 2024 WL 4410884, at *1. Jeopardizing the enforceability of the date requirement would unleash "voter

confusion" and "chaos," *Kuznik v. Westmoreland Cnty. Bd. Of Comm'rs*, 902 A.2d 476, 504-07 (Pa. 2006), as Judges Wolf and McCullough agreed, *see* Wolf Dis. Op. 2-6; McCullough 3-8. Plowing ahead—as the majority did here—makes last-minute appeals to this Court necessary, which will then be forced to overturn (again) the majority's newborn rule. 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.*, *DNC*, 141 S. Ct. at 30 (Gorsuch, J., concurring) ("Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.").

The majority tried to run around *Purcell* by saying that, as a formal matter, its order binds only the Philadelphia Board of Elections with respect to an already completed special election and does not affect any other board, the 2024 General Election, or any future election. Maj. Op. 22-23 & n.23. But Judges McCullough and Wolf accurately identified the likely effect of the majority's order: County boards (including boards other than Philadelphia) will extend it to justify ignoring the Election Code and declining to enforce the date requirement (including in elections other than the completed September special election). McCullough Dis. Op. 3-8; Wolf Dis. Op. 3-6. That is why, as Judge Wolf explained, the date

requirement was clearly the law in Pennsylvania, but that changed "[a]s of October 30, 2024" because of the majority's decision. Wolf Dis. Op. 3.

Without this Court's intervention, county boards will thus likely count undated ballots the General Assembly has said must not be counted. *See id.* at 3-6. This is no mere hypothetical concern: When a federal district court invalidated the date requirement after the 2023 general election—in an opinion that was ultimately *reversed* by the Third Circuit—the Montgomery County Board of Elections relied upon that after-the-fact decision to change the result of the Towamencin Township Board of Supervisors race. *See, e.g.*, Linda Stein, *Osei Wins Tiebreaker in Towamencin Supervisor Race, Holds Off on Declaring Victory*, https://delawarevalleyjournal.com/osei-wins-tiebreaker-in-towamencin-supervisor-race-holds-off-on-declaring-victory/; *see also Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 643-44 (W.D. Pa. 2023), *rev'd and remanded*, 97 F.4th 120 (3d Cir. 2024). A county board of elections, or multiple county board of elections, likewise may now seek to change the result of a race in the 2024 General Election—such as the *nationwide race for President or control of the U.S. Senate*—under the majority's order. That possibility alone warrants extraordinary relief pending appeal. McCullough Dis. Op. 3-8; Wolf Dis. Op. 3-6.

And it is even worse than that. Some county boards might *accept* the Commonwealth Court majority's reassurance that its latest attack on the date

requirement applies only to the past Philadelphia special election. Maj. Op. 13 n.16. But that would result in different county boards applying different standards for determining the validity of mail ballots, a textbook violation of the Equal Protection Clause of the U.S. Constitution and the Pennsylvania Constitution. Leaving the majority's order in place thus would result in a *violation*, rather than a *vindication*, of the Free and Equal Elections Clause.

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

Yet the majority's decision creates a high likelihood that the date requirement will *not* be uniformly applied throughout Pennsylvania. The majority's decision thus impermissibly establishes "varying standards to determine what [i]s a legal vote" from "county to county" and is thus improper. *See id.* at 106-07.

The majority's decision also violates the Pennsylvania Constitution, which decrees that "[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State," Pa. Const. art. VII, § 6, and the Election Code, which requires

that elections be "uniformly conducted" throughout the Commonwealth, 25 Pa. Stat. § 2642(g). And it even violates *the Free and Equal Elections Clause*. After all, the Clause's mandate of "free and equal" elections, Pa. Const. art. I, § 5, prohibits discrimination against voters "based on considerations of the region of the state in which [voters] live[],"*LWV*, 178 A.3d at 808, and requires election rules to "treat[] all voters alike" and "in the same way under similar circumstances," *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). The majority's invalidation of the date requirement in Philadelphia and only Philadelphia—particularly *during an ongoing election*—violates all of these state-law commands.

Regrettably, the majority has not gotten the message. There is no excuse—none—for the majority rushing to invalidate the General Assembly's date requirement less than a week before the 2024 General Election. McCullough Dis. Op. 1-2. Given this timing, the majority's strenuous claims that its ruling is limited to the "**special election that has already occurred**" and that it is "**not** being asked to make changes with respect to the impending 2024 General Election," Maj. Op. 22-23 (emphasis added), blinker reality. The majority's decision is neither "limited" nor "'as-applied'"; it, "in no uncertain terms, concludes that <u>any</u> county board of elections' decision not to count undated or incorrectly dated mail-in and absentee ballots violates the free and equal elections clause of the Pennsylvania Constitution." Wolf Dis. Op. 2. Thus, the majority's decision will "caus[e] confusion on the eve of

the 2024 General Election." *Id.* Indeed, "[t]he ***only*** reason that either the trial court or the [m]ajority would rule on this question now ***is precisely***" because they hoped election officials would "***change the rules for the already underway general election.***" McCullough Dis. Op. 7. The majority's decision "will undoubtedly influence the behavior of voters and election officials across the Commonwealth," no matter how much the majority pretends otherwise. Wolf Dis. Op. 7.

Indeed, this was Individual Respondents' exact purpose in this case. The sole rationale they gave the Commonwealth Court to request expedition of the briefing schedule in that court was that a decision was "necessary to guide Philadelphia and other county boards of elections as to the treatment of undated or misdated mail-in and absentee ballots" for "the November 5 general election." Application For Expedited Briefing Schedule ¶ 4 (Pa. Commw. Ct. Oct. 7, 2024) ("App. For Exp. Br."). The majority below obliged Individual Respondents' unlawful request, thus engendering confusion and undermining public confidence in the already-commenced 2024 General Election. *See* Wolf Dis. Op. 7 (noting that, "[w]hen word of the '*Baxter* decision' gets out, it may lead an elector or election official to believe that an undated or incorrectly dated ballot will be counted despite its defect").

The majority attempts to justify its last-minute ruling through this Court's statement that it will carry out its "appellate role with respect to lower court decisions" that arise "in the ordinary course." *New Pa. Project*, 2024 WL 4410884,

at *1 n.2; *see* Maj. Op. 22 n.23. But far from leaving the door open to judicial changes to the date requirement's enforceability, this Court's truism slams the door shut on actions like the majority's. Rather, if lower courts continue to invalidate rules in the Election Code, especially with the hope that those changes will be applied in the 2024 General Election, this Court will exercise its "appellate role with respect to lower court decisions" and reverse. *New Pa. Project*, 2024 WL 4410884, at *1 n.2; *see also In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d at 915 (Wecht, J., concurring) (criticizing the "proliferation" of lawsuits "advocating for the acceptance of ballots that do not comply with the plain terms of the Election Code"). That is what this Court should do with regard to the majority's late-breaking decision to invalidate the date requirement six days before the 2024 General Election. *See New Pa. Project*, 2024 WL 4410884, at *1.

In fact, the majority's erroneous decision not only violates this Court's binding instructions and the *Purcell* principle; it is also fundamentally unfair to the Commonwealth and its millions of voters. Moreover, staying that decision on *Purcell* grounds (as this Court should do) would work no unfairness to Individual Respondents or their counsel. Individual Respondents' counsel have brought multiple suits challenging the enforceability of the date requirement over the past two years—but waited until the eve and pendency of the 2024 General Election to raise their Free and Equal Elections challenge. *See New Pa. Project*, 2024 WL

4410884, at *1 (Brobson, J., concurring) (explaining how Individual Respondents' counsel "inexplicably" waited to bring Free and Equal Elections Clause challenges).

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

It was not until May 28, 2024—more than 18 months after filing their first suit—that Individual Respondents' counsel brought some of the federal plaintiffs and other petitioners to state court to raise the Free and Equal Elections challenge for the first time in *B-PEP*. This Court vacated the divided panel decision upholding that challenge. *See B-PEP*, 322 A.3d at 222. Individual Respondents' counsel nonetheless reordered the *B-PEP* caption and added one new petitioner in order to ask this Court to exercise extraordinary jurisdiction over their Free and Equal Elections challenge. This Court declined to do so. *See New Pa. Project*, 2024 WL 4410884, at *1.

And even though this Court took the occasion to adopt the *Purcell* principle and declare that it will not "countenance" changes to the date requirement "during

the pendency of an ongoing election," *id.*, Individual Respondents asked the Commonwealth Court to do precisely that, *see* App. For Exp. Br. ¶ 4. For now, they have succeeded. This Court should put an end to this piecemeal-litigation effort to invalidate the date requirement during the ongoing 2024 General Election. It should stay, or at a minimum modify, the majority's order.

II. THE REPUBLICAN COMMITTEES HAVE A SUBSTANTIAL CASE ON THE MERITS THAT THE MAJORITY'S JUDGMENT MISAPPLIES STATE LAW AND VIOLATES THE PENNSYLVANIA AND U.S. CONSTITUTIONS

The Court should grant a stay because the Republican Committees have a "substantial case on the merits" that the majority has ignored this Court's commands, misapplied state law, and violated state and federal law. *Melvin*, 79 A.3d at 1200; *see also Hollingsworth*, 558 U.S. at 190.

A. The Majority Ignored And Contravened This Court's Recent Judgment In *B-PEP*.

Just last month, this Court vacated the Commonwealth Court's judgment holding (like the majority did here) that the date requirement violates the Free and Equal Elections Clause. *B-PEP*, 322 A.3d at 222. This Court's reason was that "[t]he Commonwealth Court lacked subject matter jurisdiction to review the matter given the failure to name the county boards of elections of all 67 counties." *Id.* That decision simply applied well settled law. "It has long been established that unless all necessary and indispensable parties are parties to the action, a court is powerless

to grant relief." *Tigue v. Basalyga*, 304 A.2d 119, 120 (Pa. 1973); *see also id.* ("[T]he absence of an indispensable party goes absolutely to the court's jurisdiction."). Thus, this Court recognized that all county boards have interests in the statewide date requirement and must be joined to cases challenging it. *See B-PEP*, 322 A.3d at 222.

It is therefore bewildering that the *same* panel in the *same* court has committed the *same* error, while the ink was still drying on this Court's *B-PEP* order. Of the county boards of elections, *only* Philadelphia is a party to this case. Nonetheless, the majority moves forward, as it did before, to invalidate the date requirement under the Free and Equal Elections Clause. And, as Judge Wolf notes, it acknowledges this Court's recent commands "only in a footnote, without significant analysis or citation to case law." Wolf Dis. Op. 5.

It is hard to view what the majority did here as anything less than open defiance of this Court's recent order. The majority's only defense is its same tired argument that its decision only affects Philadelphia. Maj. Op. 23 n.25. That does nothing to distinguish this case from *B-PEP*. "A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988). Here, as Judge Wolf observes, the majority, "in no uncertain terms, concludes that any county board of elections' decision not to count undated or incorrectly dated

mail-in and absentee ballots violates the free and equal elections clause of the Pennsylvania Constitution." Wolf Dis. Op. 2 (emphasis original). The majority's decision "will cause a significant sea change in the election processes effectuated by the county boards," *id.* at 6, ands did so when only one county board was present.

This is no empty formality, especially in the context of an election which must be uniform. 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.

No court in this case has had subject-matter jurisdiction. This Court should not have to repeat itself, but the majority's decision below has made it necessary. The Republican Committees have a substantial case on the merits that the majority (and trial court) erred by issuing any decision at all.

B. The Courts Below Improperly Failed To Permit Factual Development.

The majority's decision below makes two mixed findings of fact and law that rest on disputed facts: (1) the date requirement imposes burdens on voters and (2) the date requirement does not meaningfully advance any state interests. Maj. Op. 37-38. The Republican Committees strongly disagree with both findings. *See infra* Part II.C. These are factual disputes that cannot be resolved without record

development, including discovery and potentially expert witnesses. The Republican Committees would also like to depose Individual Respondents to understand why they did not comply with the date requirement.

The Republican Committees made this point below to the Commonwealth Court, which simply ignored it. Fully adopting Individual Respondents' representations, the majority asserts that the relevant factual findings were already made in "multiple state and federal courts." Maj. Op. 4. This is false, for the same reasons the Republican Committees gave below. The federal-court cases Individual Respondents cited dealt not with right-to-vote arguments, but with challenges under a federal statute (the Materiality Provision). *See Pa. State Conf. of NAACP*, 703 F. Supp. 3d at 668; *Pa. State Conf. of NAACP*, 97 F.4th 120 (rejecting challenges to date requirement). Statements respecting the date requirement are thus passing dictum, as they were irrelevant to the federal courts' holdings. *See, e.g.*, *In re Nat'l Football League Players Concussion Inj. Litig.*, 775 F.3d 570, 583 n.18 (3d Cir. 2014).

Indeed, it is apparent those courts did not give "full and careful consideration" to this point. *Id.* (quoting *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000)). 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 v. Cohen*, 36 F.4th

153, 165 (3d Cir. 2022) (Matey, J., concurring in judgment), *vacated sub nom.*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022). They also did not address the State's interest in solemnity. *See Pa. State Conf. of NAACP*, 97 F.4th at 125, 127, 129. The Third Circuit likewise did not address the State's interest in deterring and detecting fraud or even mention the *Mihaliak* case, *see id*., while the district court offered a footnote saying evidence of fraud was "irrelevant" under the Materiality Provision, 703 F. Supp. 3d at 679 n.39. And the vacated Commonwealth Court decision Individual Respondents cited below erroneously relied on those inapt federal cases, *see Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321, at *32 (Pa. Commw. Aug. 30, 2024), all without allowing 66 boards of elections not joined to that case to participate and contribute to a record regarding the date requirement's functions.

The only plausible reason for the majority's decision to deny the Republican Committees (and the 66 absent county boards of elections) an opportunity to develop a factual record was to oblige Individual Respondents' request to rush a decision for the 2024 General Election. That gross violation of the Republican Committees' and the absent county boards' procedural rights also warrants a stay.

C. The Date Requirement Does Not Violate The Free And Equal Elections Clause.

A stay is also warranted because the Republican Committees' have a "substantial case" that the ruling below is wrong on the merits. *Melvin*, 79 A.3d at

1200. The Free and Equal Elections Clause provides that "[e]lections shall be free and equal." Pa. Const. art. I, § 5. Its purpose is to "ensure that each voter will have an equally effective power to select the representative of his or her choice, free from any discrimination on the basis of his or her particular beliefs or views." *LWV*, 178 A.3d at 809. That is not a free-floating license for courts to uproot state election laws. Rather, it remains the case that the "power to regulate elections is a legislative one [that] has been exercised by the general assembly since the foundation of the government," and "nothing short of gross abuse [will] justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted." *Winston*, 91 A. at 522-23.

1. Properly Understood, The Free And Equal Elections Clause Does Not Somehow Invalidate The Date Requirement.

The majority was wrong to hold that the date requirement somehow violates the Free and Equal Elections Clause. *First*, this Court has *already* rejected that sort of argument in *Pennsylvania Democratic Party*, where the petitioners brought a Free and Equal Elections challenge to the declaration mandate of which the date requirement is part. 238 A.3d 345. The petitioners' argument presaged the majority's: They claimed that rejecting ballots based on "minor errors" or "irregularities" in completion of the declaration would violate the Free and Equal Elections Clause. *Id.* at 372-73. They thus asked this 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.*

This Court disagreed. *Id.* at 374. And what is more, it explained why. There is "no constitutional or statutory basis that would countenance imposing the procedure" the petitioners "s[ought] to require." *Id.* This Court therefore held that the declaration mandate complies with the Clause. Obviously, because the *entire* declaration mandate is constitutional, so, too, is its date requirement *component*.

Second, even if this Court's precedent did not foreclose the majority's judgment, the date requirement plainly does not run afoul of the Free and Equal Elections Clause. *Pennsylvania Democratic Party* was no outlier decision: This Court has *never* struck down a neutral ballot-casting rule that governs how voters complete and cast their ballots under the Clause. *See* A. MCCALL, ELECTIONS, *in* K. GORMLEY ET AL., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 215-232 (identifying the types of cases the Clause has been applied in); *cf.* McCullough Dis. Op. 9.

And that is for good reason. The Free and Equal Elections Clause performs three limited functions. *First*, it prohibits arbitrary over-qualification rules that disqualify classes of citizens from voting. *LWV*, 178 A.3d at 807. *Second*, it prohibits intentional discrimination against voters based on socioeconomic status, geography, or religious or political beliefs. *Id.* And *third*, the Clause prohibits

"regulation[s]" that "make it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.* at 810 (quoting *Winston*, 91 A. at 523). Unless a regulation imposes such extreme burdens, "no constitutional right of [a] qualified elector is subverted or denied" and the regulation is not subject to judicial scrutiny under the Clause. *Id.*

There is no plausible argument that the date requirement unconstitutionally narrows who is eligible to vote or constitutes intentional discrimination. Thus, the merits of the Individual Respondents' Free and Equal Elections challenge rests entirely on whether the date requirement "make[s] it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.*

It does not. In the first place, Pennsylvania law permits *all* voters to vote in person without complying with the date requirement. *See, e.g.*, 25 Pa. Stat. § 2811. Far from making voting "so difficult as to amount to a denial" of "the franchise," *LWV*, 178 A.3d at 810 (citation omitted), the date requirement is *inapplicable* to an entire universally available method of voting—the method that the majority of Pennsylvania voters use to vote. *See* 2022 General Election Official Returns (Statewide), November 8, 2022 (22.8% of ballots counted in the 2022 U.S. Senate election—1,225,446 out of 5,368,021—were mail ballots), https://tinyurl.com/3kfzwpzh. It is hard to see how a rule regulating no-excuse mail voting, which was "unknown in the Commonwealth for well over two centuries and is wholly a creature of recent,

bipartisan legislat[ion]," can violate any right to vote. *Black Political Empowerment Project*, 2024 WL 4002321, at *39 (McCullough, J., dissenting).

In the second place, even if the Court could ignore the preferred voting method of most Pennsylvania voters and focus only on mail voting, there is nothing "difficult" about signing and dating a document, let alone "so difficult" as to deny the right to vote. *LWV*, 178 A.3d at 810 (citation omitted). Just a few weeks ago, this Court rejected a similar challenge in *In re: Canvass of Provisional Ballots in 2024 Primary Election*. There, the Luzerne County Board of Elections argued that the statutory requirement that individuals "shall place [their] signature on the front of the provisional ballot envelope" was constitutionally suspect under the Free and Equal Elections Clause. *Id.* at 905-06 (quoting 25 P.S. § 3050(a.4)(3)). This Court disagreed. The county board "d[id] not indicate how a statute that requires an elector . . . to sign the ballot's outer envelope denies the franchise or makes it so difficult as to amount to a denial." *Id.* at 909. The Court was thus "not persuaded constitutional principles require [it] to ignore" the "statutory requirement[]" to sign the ballot envelope. *Id.*

This Court should not treat the date requirement any differently. Individual Respondents' argument amounts to just the latest "invocation through litigation and jurisprudence that ballots are being disregarded because of 'mere technicalities.'" *Id.* at 919 (Wecht, J., concurring). There is no reason to think that dating a ballot

envelope is any more "difficult" than signing a ballot envelope—and the Court has just said that the latter does not "make [voting] so difficult as to amount to a denial" of the right of franchise. *Id.* at 909 (majority opinion). Notably, the majority below practically ignored this case, dismissing it as being only about provisional ballots. Maj. Op. 35-36 n.37. The majority's breezy and disrespectful treatment of this Court's most recent governing precedent is yet more evidence that it rushed a decision to alter the rules for the ongoing 2024 General Election.

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] Consequently, "[n]o reasonable person would find the obligation to sign and date a [mail-ballot] declaration to be difficult or hard or challenging." *Black Political Empowerment Project*, 2024 WL 4002321, at *54 (McCullough, J., dissenting).

Furthermore, both signing a piece of paper and writing a date on it are nothing more than the "usual burdens of voting," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.); *id.* at 204-09 (Scalia, J., concurring in the judgment), not a "difficult[y]" so severe "as to amount to a denial" of "the franchise,"

[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)(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).

LWV, 178 A.3d at 810 (citation omitted). Indeed, *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); *id.* § 3050 (requirement to maintain in-person voting poll books); *Electronic Poll Books*, National Conference of State Legislatures (June 17, 2024), ncsl.org/elections-and-campaigns/electronic-poll-books; *How States Verify Voted Absentee/Mail Ballots*, National Conference of State Legislatures (Oct. 9, 2024), ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots.

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

Moreover, the U.S. Supreme Court has upheld as constitutionally non-burdensome "the inconvenience of making a trip to the [Department of Motor Vehicles], gathering the required documents, and posing for a photograph" as required to obtain a photo identification for in-person voting. *Crawford*, 533 U.S. at

198 (Stevens, J.). It has also reasoned that "[h]aving to identify one's own polling place and then travel there to vote does not exceed the usual burdens of voting." *Brnovich v. DNC,* 594 U.S. 647, 678 (2021) (internal quotation marks omitted). Yet both of these tasks are far more difficult than 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." *LWV*, 178 A.3d at 810 (citation omitted).

In brief, properly understood, there is no constitutional defect with the longstanding, duly enacted date requirement.

2. The Majority Misapplied The Free And Equal Elections Clause.

Instead of applying those well-settled principles, the majority held that the date requirement restricts the "fundamental right to vote," and thus "must be evaluated under strict scrutiny." Maj. Op. 37. Both of those conclusions are erroneous and have no basis in this Court's precedents.

First, the majority is wrong to say that the date requirement implicates the "fundamental right to vote." When an individual "cast[s] a mail ballot and fail[s] or refuse[]s to follow the rules for doing so," he or she "ha[s] not been 'disenfranchised' because [his or her] *right to vote* remains unaffected, unabridged, and intact." McCullough Dis. Op. 9. "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." *Ritter v. Migliori*, 142 S. Ct. 1824, 1825

(2022) (Opinion of Alito, J.). The General Assembly's longstanding and commonsense date requirement no more implicates the fundamental right to vote than does requiring voters to show up to the polling station on a Tuesday.

Second, the majority improperly applies strict scrutiny to the facially nonburdensome and neutral date requirement. As noted above, the Court has never applied strict scrutiny in such circumstances, as it has confirmed in recent months. *See supra* Part II.C.1. Regardless, even accepting for the sake of argument that some sort of interest balancing applies, the date requirement easily satisfies it. As a majority of the Pennsylvania Supreme Court has recognized, the date requirement serves several weighty interests and an "unquestionable purpose." *In re: Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1090 (Pa. 2020) (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see id.* at 1087 (Wecht, J., concurring in part and dissenting in part) (noting that "colorable arguments . . . suggest [the date requirement's] importance"); *accord In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d at 906 (acknowledging Justices previously found date requirement to serve important purposes). To start, it "provides proof of when the 'elector actually executed the ballot in full.'" *In re: Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). It thus facilitates the "orderly administration" of elections,

undoubtedly a legitimate interest, *Crawford*, 553 U.S. at 196 (Stevens, J.). To be sure, election officials are required to timestamp a ballot and scan the barcode into the Statewide Uniform Registry of Electors ("SURE") upon receipt. *See Pa. State Conf. of NAACP*, 703 F. Supp. 3d at 665. And there is every reason to think that ordinarily happens. *See id.* But the handwritten date serves as a useful backstop, and would become quite important if officials failed to perform those tasks or if SURE malfunctioned—possibilities Third Circuit Judge Matey has highlighted. *See Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment).

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

sign and date documents is deeply rooted in legal traditions that prioritize clear and consensual agreements." *Black Political Empowerment Project*, 2024 WL 4002321, at *53 (McCullough, J., dissenting); *accord Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (an "original signature . . . carries solemn weight." (internal quotation marks omitted)).

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

criminally sentenced. *See Black Political Empowerment Project*, 2024 WL 4002321, at *15 n.33.

States do not need to point to evidence of election fraud within their borders in order to adopt rules designed to deter and detect it. *Brnovich*, 594 U.S. at 686. Yet here, where the requirement has actually been used to detect and prosecute fraud, the State's interest in "deterring and detecting voter fraud" is unquestionably advanced. *Crawford*, 553 U.S. at 191 (Stevens, J.). And the requirement's anti-fraud function advances the related vital state interest of preserving and promoting voter "[c]onfidence in the integrity of our electoral process[]" that is so "essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4.

III. THE EQUITIES WEIGH STRONGLY IN FAVOR OF A STAY

The equities also weigh strongly in favor of granting a stay. *First*, the Republican Committees would suffer "irreparable injury," *Melvin*, 79 A.3d at 1200, because without a stay, their request for review in this Court will become moot and they will forever lose their ability to obtain such review, including of any county board decisions to extend the majority's order to the ongoing 2024 General Election. Mail voting has already commenced in Pennsylvania, and Election Day is only 5 days away. This Court will likely not resolve the Republican Committees' request for review, much less decide the merits, by Election Day. And once the current election has come and gone, it will be impossible to repair election results that have

been tainted by illegally counted ballots. Without this Court's intervention, undated ballot declarations will be separated from the ballots they contain, and invalid ballots will be unlawfully counted without a mechanism for subsequently subtracting them from the vote totals. It is no answer to say that the Republican Committees have a right to be represented at pre-canvasses and canvasses and to object to any decision not to enforce the mandatory date requirement, *see* 25 P.S. §§ 3050(a.4)(4), 3146.8(g)(1.1)-(2), because election officials may place observers so far away from the ballots that they cannot see whether a dating defect is present, *see In re Canvassing Observation*, 241 A.3d 339, 162-65 (Pa. 2020). This likely mootness is classic irreparable harm and "'perhaps the most compelling justification'" for a stay. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *accord Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("'When . . . the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted.'").

Second, the "issue[]" presented is "precisely whether the votes that have been ordered to be counted" under the majority's judgment are "legally cast vote[s]" under Pennsylvania and federal law. *Bush v. Gore*, 531 U.S. 1046, 1046-47 (2000) (Scalia, J., concurring) (cleaned up). "The counting of votes that are of questionable legality . . . threaten[s] irreparable harm" not only to the Republican Committees, their voters, and their supported candidates, but also to all Pennsylvanians and even

"the country, by casting a cloud upon . . . the legitimacy of the [nationwide Presidential] election" in which Pennsylvania's electoral votes may prove dispositive. *Id.* at 1047. A stay should be "granted" for this reason alone. *Id.* at 1046 (per curiam).

Third, a judgment barring county boards "from conducting this year's elections pursuant to a statute enacted by the Legislature" would "seriously and irreparably harm the State," the General Assembly, and the Commonwealth's voters. *Abbott v. Perez*, 585 U.S. 579, 602-03 (2018). Indeed, in other words, it "serves the public interest" to "giv[e] effect to the will of the people by enforcing the laws they and their representatives enact." *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020).

Fourth, no party would be "substantially harm[ed]" by the grant of a stay. *Melvin*, 79 A.3d at 1200. No one can seriously claim that complying with the date requirement is difficult. "[E]very voting rule imposes a burden of *some* sort," *Brnovich,* 594 U.S. at 669 (emphasis added), and here, the burden is not even significant, let alone "substantially harm[ful]" to anyone, *Melvin*, 79 A.3d at 1200. Moreover, if the Commonwealth Court majority meant what it said about its decision not affecting the 2024 General Election, Maj. Op. 23, a stay would not prejudice Individual Respondents, whose ballots could still be counted at the end of this case in a completed special election in which they will not affect the outcome.

CONCLUSION

The Court should stay the majority's order. In the alternative, and at a minimum, the Court should modify the majority's order to make clear that all county boards of elections remain bound to enforce the General Assembly's date requirement in the 2024 General Election and all future elections pending this Court's resolution of the Republican Committees' forthcoming appeal.

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Respectfully submitted,

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