IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Black Political Empowerment Project, POWER Interfaith, Make the Road Pennsylvania, OnePA Activists United, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania, Petitioners	:	
v.	:	No. 283 M.D. 2024
	:	Argued: August 1, 2024
Al Schmidt, in his official capacity as Secretary of the Commonwealth, Philadelphia County Board of Elections, and Allegheny County Board of Elections Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: August 30, 2024

Today a majority of a truncated special *en banc* panel of this Court, in untethered and unprecedented fashion, declares unconstitutional the enforcement of innocuous and universally-applicable voter declaration requirements that do not burden the fundamental voting franchise of a single Pennsylvania voter. These voter declaration requirements, which have until now rightfully withstood challenges in both Pennsylvania and Federal courts, fall squarely within the purview of the General Assembly's authority to establish neutral ballot-casting rules for the very voting processes it has created. Indeed, although there is in Pennsylvania a

constitutional right to vote by absentee ballot in some form, there is no constitutional right to vote by mail without excuse, which process was unknown in the Commonwealth for well over two centuries and is wholly a creature of recent, bipartisan legislative grace. Our constitution and our Supreme Court's precedent soundly reserve the authority for establishing neutral procedures to govern both voting mechanisms to the General Assembly. That is, until today.

We are tasked in this original jurisdiction case with determining, quite simply, whether enforcement of the voter declaration requirements clearly, palpably, and plainly violate the Free and Equal Elections Clause[1] of the Pennsylvania Constitution. In other words, we must determine whether they render voting so difficult that they effectively deny the franchise altogether. To thus properly and precisely state the question is to answer it.

In no prior case has this Court or our Supreme Court applied the Free and Equal Elections Clause to declare unconstitutional a provision that regulates the manner and method of casting ballots. Nor has any Pennsylvania court ever applied "strict scrutiny" in considering whether neutral, generally-applicable manner-of-voting regulations enacted by the General Assembly violate the Free and Equal Elections Clause. And yet, to reach its desired end, the Majority today (1) finds jurisdiction where it does not exist, (2) ignores more than a century of sound Pennsylvania Supreme Court precedent interpreting the Free and Equal Elections Clause, (3) applies strict scrutiny without any authority for doing so, (4) accepts Petitioners' invitation to usurp the role of the General Assembly and re-write Act 77

[1] 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.").

of 2019[2] (Act 77), and, in a twist of tragic irony, (5) voids altogether absentee and mail-in voting in Pennsylvania.

Because I am convinced that the Majority's pronouncements in this case misapply the law and involve a wholesale abandonment of common sense, I respectfully, but vigorously, dissent.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION

A. Respondent Secretary Al Schmidt, the only Commonwealth party, is not indispensable.

The Majority preliminarily errs by concluding that this Court has subject matter jurisdiction over this action. It does not, for several interrelated reasons. First, this Court lacks subject matter jurisdiction because Secretary Al Schmidt (Secretary) is not an indispensable party. Our original jurisdiction is conferred by Section 761(a)(1) of the Judicial Code, which, relevant here, grants this Court original jurisdiction over civil actions "[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity." 42 Pa.C.S. § 761(a)(1). "Commonwealth government" is defined as:

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

Id. § 102 (emphasis added). To properly exercise jurisdiction under Section 761(a)(1), more is required than merely naming the Commonwealth or one of its

[2] Act of October 31, 2019, P.L. 552, No. 77.

officers in a lawsuit. Instead, the Commonwealth or one of its officers must be *indispensable* to the action. *Stedman v. Lancaster County Board of Commissioners*, 221 A.3d 747, 756-57 (Pa. Cmwlth. 2019). A party is indispensable when his or her rights are so intertwined with the claims in the litigation that relief cannot be granted without affecting those rights; in other words, justice cannot be accomplished without the party's participation. *Id.* at 757-58. By contrast, where the Commonwealth party's involvement in the suit is minimal and no relief can be afforded against it, it is not indispensable. *Id.* at 758. The question of indispensability is decided by examining the nature of the claims asserted and the relief sought to determine whether the party has a right or interest related to the claims and essential to their merits such that due process requires the party's participation in the litigation. *Rachel Carson Trails Conservancy, Inc. v. Department of Conservation and Natural Resources*, 201 A.3d 273, 279 (Pa. Cmwlth. 2018).

This Court very recently applied this indispensability standard in *Republican National Committee v. Schmidt* (Pa. Cmwlth., No. 447 M.D. 2022, filed March 23, 2023) (Ceisler, J.) (single-judge op.) (*RNC II*), where the petitioners, who included the Republican Intervenors here, filed a petition for review in the Court's original jurisdiction against then-Acting Secretary Al Schmidt, the Director of the Pennsylvania Bureau of Election Services and Notaries, and all 67 county boards of elections. The petitioners challenged certain "notice and cure" procedures that various county boards of elections had developed to pre-canvass mail-in and absentee ballots to check for voter errors in completing the signature and secrecy envelope requirements set forth in the Pennsylvania Election Code[3] (Election Code).

[3] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Id., slip op. at 2. The respondents preliminarily objected to this Court's exercise of subject matter jurisdiction, and, in a single-judge opinion, we agreed and dismissed the petition. Although the petitioners in *RNC II* challenged certain guidance issued by the Secretary regarding election procedures, this Court nevertheless concluded that such guidance did not sufficiently relate to the claims in the case, which centered on procedures developed by county boards. *Id.* at 20. This Court concluded:

> [The p]etitioners have not made any claims implicating the duties and responsibilities of the [ ] Secretary under the Election Code . . . . Although the [ ] Secretary may have a generalized interest in issues surrounding the administration of elections in the Commonwealth and the enfranchisement of voters, generally, the [ ] Secretary's interests in this regard are not essential to a determination of whether some [c]ounty [b]oards are unlawfully implementing notice and cure procedures with respect to absentee and mail-in ballots that are defective under the Election Code. Further, the [ ] Secretary does not have control over the [c]ounty [b]oards' administration of elections, as the General Assembly conferred such authority solely upon the [c]ounty [b]oards . . . . Because [the p]etitioners could conceivably obtain meaningful relief with respect to the [c]ounty [b]oards' purportedly unlawful actions without the [ ] Secretary's involvement in this case, the [ ] Secretary is not an indispensable party.

Id., slip op. at 20.

The same rationale applies here. The Secretary's only challenged conduct is the issuance of non-binding guidance that is not mandatory and does not determine whether, or in what circumstances, any county boards of elections count or reject absentee and mail-in ballots that contain an incomplete voter declaration. Indeed, pursuant to the Supreme Court's decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), the Secretary *may not* issue guidance to county boards instructing them to count such ballots. Thus, the relief Petitioners seek, namely, a state-wide ban on

enforcement of the voter declaration requirements, can *only* be afforded against county boards of elections. For that reason, the Secretary is not an indispensable party. Because the Secretary is the only Commonwealth officer named as a Respondent, this Court lacks subject matter jurisdiction and should dismiss the Petition for Review.

The Majority's attempt to distinguish *RNC II*'s holding in this regard is wanting. The Majority concludes that *RNC II* is distinguishable because, here, (1) Petitioners name the Secretary as a party with regard to his duties to develop the format of absentee and mail-in ballots and their voter declarations; (2) Petitioners allege that the Secretary has issued inconsistent guidance to county boards in the wake of *Ball*; (3) Petitioners seek relief against the Secretary; and (4) the Secretary will be impacted by our decision. *Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, filed August 30, 2024) (MO), slip op. at 46-48. None of these factors establishes the Secretary as an indispensable party.

First, the mere naming of the Secretary as a party avails nothing. Second, the format of mail-in ballots and the required, completed declaration are not at issue in this litigation. Whatever allegations Petitioners may make regarding them are irrelevant. Third, the Secretary's guidance is not binding on county boards of elections and, following *Ball*, any guidance may not as a matter of law direct county boards to count noncompliant ballots. Fourth, the only form of "relief" sought against the Secretary in the Petition for Review is his nominal inclusion in the Prayer for Relief. (Petition for Review, at p. 67.) No specific relief is sought against the Secretary because, as *RNC II* aptly recognized, none can be had. The rationale and holding in *RNC II* therefore is applicable and should be controlling here. Indeed, the

only meaningful difference between this case and *RNC II* in this regard is the identity of the petitioners.

B. Petitioners cannot maintain an original jurisdiction action against the county boards only.

By implication, the Court also lacks subject matter jurisdiction over any claims against Respondents Philadelphia County Board of Elections and Allegheny County Board of Elections (County Boards). This Court addressed this issue in *RNC II*, concluding that county boards of elections are local agencies over which the Court may not independently exercise original jurisdiction. (*RNC II*, slip op. at 28.) Simply put, without the participation of an indispensable Commonwealth party, there is no case in this Court.

C. Given the Commonwealth-wide relief that Petitioners seek (and that the Majority affords), Petitioners have failed to join 65 indispensable county boards of elections.

Lastly, even assuming that this Court had original jurisdiction over the County Boards, Petitioners fatally have failed to join all 67 county boards of elections against which they undoubtedly seek relief. At the core of this case, Petitioners ask this Court to require all county boards of elections across the Commonwealth to count ballots that include an incomplete voter declaration that *Ball*, at least until now, forbade them from counting. However, and notwithstanding the many allegations in the Petition for Review that reference allegedly aggrieved voters in many other counties, *see, e.g.*, Petition for Review, ¶¶ 4 & n.1, 64, and 76, Petitioners have failed to name any other county boards as Respondents. Without those boards' participation, the sought relief cannot be had. Moreover, any injunction granted against only the named County Boards (like the one the Majority enters today) would (and does) create varying standards for determining the legality

of votes across the Commonwealth and potentially subjects all 67 county boards of elections to an Equal Protection Clause[4] challenge. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 106-07 (2000).

For all of these reasons, this Court lacks subject matter jurisdiction over Petitioners' claims, which defect mandates dismissal of the Petition for Review.[5]

II. ENFORCEMENT OF THE VOTER DECLARATION REQUIREMENTS DOES NOT VIOLATE THE FREE AND EQUAL ELECTIONS CLAUSE

Even assuming this Court had jurisdiction to hear this matter, which it does not, Petitioners' claims fail as a matter of law.

A. The Constitutionality of Legislation is Strongly Presumed.

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. Cmwlth. 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** that the voter declaration requirements "**clearly, palpably, and plainly** violate the [c]onstitution." *League of Women Voters*, 178 A.3d at 801. Pennsylvania legislators are also, of course, charged with knowledge of the Pennsylvania Constitution. As United States Chief Justice John Marshall pointed out in *Marbury v. Madison*, 5 U.S. 137, 179-80 (1803), legislators,

[4] U.S. Const. amend. XIV, § 1.

[5] I acknowledge that Petitioners' standing to bring this action originally was challenged by preliminary objection. For purposes of this dissent, I assume without concluding that Petitioners' standing is established.

having taken the same oath as we take, surely are as committed to fidelity to the constitution as are we. Accordingly, we must, without reservation, assume that the drafters of Sections 1306(a) and 1306-D(a) of the Election Code,[6] 25 P.S. §§ 3146.6(a), 3150.16(a), were aware of the Free and Equal Elections Clause.

B. <u>The Free and Equal Elections Clause guarantees voters equal opportunity and power to elect their representatives; it does not guarantee the counting of ballots that do not comply with neutral and objective ballot-casting rules</u>.

Originally adopted in 1790, the Free and Equal Elections Clause provides:

> **Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage**.

Pa. Const. art. I, § 5 (emphasis added). Elaborating on the meaning of the Clause, our Supreme Court has opined that

> elections 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 any 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[;] and when no constitutional right of the qualified elector is subverted or denied him.

Shankey v. Staisey, 257 A.2d 897, 899 (Pa. 1969) (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)).

Pennsylvania precedent does not permit regulation of the right to vote in a fashion that denies the franchise, or "**make[s] it so difficult as to amount to a denial.**" *Winston*, 91 A. at 523 (emphasis added). The spirit of the Free and Equal

[6] Relevant here, Sections 6 and 8 of Act 77 amended Section 1306, added by Section 11 of the Act of March 6, 1951, P.L. 3, and added Section 1306-D to the Election Code.

Elections Clause "requires that each voter shall be permitted to cast a free and unintimidated ballot." *DeWalt v. Bartley*, 24 A. 185, 186 (Pa. 1892). The framers of the Clause chiefly sought to remedy the "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." *League of Women Voters*, 178 A.3d at 808-09. Thus, our Supreme Court noted long ago that "free and equal" election laws enacted by the General Assembly must "arrange all the qualified electors into suitable districts[] and make their votes equally potent in the election[] so that some shall not have more votes than others . . . ." *Id.* at 809 (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)). Laws that "dilut[e] the potency" of an individual's vote relative to other voters therefore will violate the Clause. *Id.*

In keeping with these principles, our courts have applied the Free and Equal Elections Clause to invalidate voting laws only in those instances where the law denied voters the right to cast their vote and have their vote counted. For example, in *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012), at issue was the initial implementation of a prior version of the voter photo identification (ID) law. *See* Former Section 1210 of the Election Code, *formerly* 25 P.S. § 3050. Various low-income and homeless petitioners sought an injunction against a recently implemented voter identification law, arguing that it would prevent qualified and eligible electors from voting in violation of the Free and Equal Elections Clause because the voters would not have enough time to learn about the law's requirements and obtain the necessary identification. *Applewhite*, 54 A.3d at 4-5. In particular, the question was whether the voters had adequate access to the free ID that the law provided to those who did not have any other qualifying ID. *Id.* The plaintiffs

argued that the voter ID law was being implemented in a manner that denied Pennsylvanians their fundamental right of suffrage under the Free and Equal Elections Clause. *Id.* The Pennsylvania Department of Transportation was requiring an original or certified copy of a birth certificate or its equivalent, along with a social security card and two forms of documentation showing current residency. It was clear that some qualified, low-income and homeless voters would be unable to meet these requirements because they either did not have an adequate opportunity to become educated about the requirements and navigate the process or, because of age, disability, and/or poverty, they would be unable to meet the requirements in time for the upcoming election. The petitioners argued that it was being implemented in a manner that denied Pennsylvanians their fundamental right of suffrage under the Clause. *Id.* This Court denied the injunction, but the Supreme Court reversed the denial and remanded the case so we could consider the issue further. In doing so, the Supreme Court

> agree[d] with [the petitioners'] essential position that if a statute violates constitutional norms [viz., the Free and Equal Elections Clause] in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future. Indeed, the most judicious remedy, in such a circumstance, is the entry of a preliminary injunction, which may moot further controversy as the constitutional impediments dissipate.

Id. at 5.

On remand, this Court was tasked with considering whether the flaws in the implementation of the voter photo ID law could be cured prior to the election. *Applewhite v. Commonwealth* (Pa. Cmwlth., No. 330 M.D. 2012, filed Jan. 17, 2014) (McGinley, J.) (single-judge op.). Finding that it could not, we enjoined under the

Free and Equal Elections Clause the implementation of the voter ID law because the legislation did not provide for a "non-burdensome provision of a compliant photo ID to all qualified electors." *Id.*, slip op. at 34. We concluded that the law could not stand because the law's identification requirements disproportionately burdened low-income and homeless voters, who were less likely to have a compliant ID and would face difficulty obtaining compliant identification. *Id.*, slip op. Appendix A, at 32-34. Thus, in that situation, this Court held that the voter ID law renders Pennsylvania's fundamental right to vote so difficult to exercise as to cause a *de facto* disenfranchisement. *Id.*, slip op. at 44-45.

Similarly, in *In re New Britain Borough School District*, 145 A. 597 (Pa. 1929), a law was struck down because it, in substance, granted the right to vote to a group of voters while denying it to another group. There, the Supreme Court struck down a legislative act that created voting districts for elective office that had the inadvertent effect of depriving voters in a new borough of their right to vote for school directors. In that case, the legislature created a new borough from parts of two existing townships and created a school district which overlapped the boundaries of the new borough. The law at issue directed that, "when a new school district is hereafter formed by the creation of a new city, borough, or township, the court of common pleas having jurisdiction shall determine and enter in its decree the class of school districts to which such new district shall belong, and shall appoint a board of school directors." *Id.* at 597 (additional quotations omitted). The trial court declared a new school district of the fourth class and appointed a board of school directors in the county in which the district was situated. *Id.* Residents of each of the former townships challenged the constitutionality of the effect of the combination of their former respective school districts under the Free and Equal

Elections Clause, arguing that they had been deprived of their right to select school directors.

The Supreme Court agreed and found that the residents of the two former school districts were effectively denied their right to elect representatives of their choosing to represent them on a body which would decide how their tax monies were spent. The Court noted that the residents of the newly-created school district could not lawfully vote for representatives on the school boards of their prior districts, given that they were no longer legally residents thereof, and they also could not lawfully vote for school directors in the newly created school district, given that the ballot for every voter was required to be the same, and, because the new school district had not been approved, the two groups of borough residents would each have to be given separate ballots for their former districts. *Id.* at 599. In the Court's discussion of the Free and Equal Elections Clause, it noted that the law's effect was to bar the voters in the new district from participating in the election of school directors, when taxpayers in fourth class school districts had that right. *Id.* The Court emphasized that the rights protected by the Free and Equal Elections Clause may not be taken away by an act of the legislature, and that that body is prohibited by this Clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence. *Id*.

The circumstances in *Applewhite* and *In re New Britain*, which impacted the **right** to vote, simply are not present here. Section 1306(a) of the Election Code relates to voting by absentee electors and provides, in relevant part, that an absentee "elector shall . . . **fill out, date and sign the declaration** printed on" the second, or outer, envelope "on which is printed the form of declaration of the elector," among other things. 25 P.S. § 3146.6(a). Section 1306-D(a) similarly

provides, in relevant part, that a mail-in "elector shall . . . **fill out, date and sign the declaration** printed on" the second, or outer, envelope "on which is printed the form of declaration of the elector," among other things. 25 P.S. § 3150.16(a). Petitioners' challenge to the nuts-and-bolts of election administration cannot be equated with state laws that deny equality of voting power, which are the principal types of state actions that the Supreme Court has declared to violate the Free and Equal Elections Clause. The voter declaration requirements are neutral ballot-casting rules governing **how** voters complete their voter declaration and cast their mailed ballots. On their face, the voter declaration requirements, which require the voter to date and sign the declaration, comport with the Free and Equal Elections Clause by granting to every Pennsylvania voter "the same free and equal opportunity" to either vote by mail in compliance with the Election Code **or** vote in person. The Election Code thus carries out the Clause's mandate that all Pennsylvania voters wield "equally effective power to select [their] representative[s,]" so long as they "follow the requisite voting procedures." *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 373 (Pa. 2020) (quoting *League of Women Voters*, 178 A.3d at 809).

Yet, without any legal analysis whatsoever, the Majority summarily posits that applying the voter declaration requirements to exclude undated or misdated ballots restricts the right to vote **to only those voters who correctly handwrite the date** on their declaration and **denies the *right* to vote to those who do not**. In other words, the Majority reckons that the voter declaration requirements **restrict the right to vote to only those voters who comply with the instructions to date their declarations**. This holding is wholly conclusory and contrary to sound reasoning. First, as correctly understood, the Free and Equal Elections Clause does not apply here because Petitioners have not challenged a law that, *de jure* or *de facto*,

grants the right to vote to some while **denying the vote to others**. The voter declaration requirements on their face make no distinctions whatsoever and do not grant or deny anyone's right to vote. The analysis can, and should, end here.

To get around this, though, the Majority creates two illusory classes: those who correctly complete their voter declarations and those who do not. The Majority then hastily concludes that the voter declaration requirements make voting so difficult for those who do not properly complete their ballot declarations that they are denied the right altogether, all without conducting any analysis of the **actual difficulty** relative to every other generic and neutral ballot-casting requirement of the Election Code, a comparison that is part of any Free and Equal Elections Clause analysis. To be sure, aside from the simple requirement to complete the declaration itself by adding the date, the Majority identifies no obstacle that blocks or seriously hinders voting.

The Majority likewise fails to consider Pennsylvania's voting system as a whole and the other voting methods made available to voters, a comparison with which is essential to assessing any alleged difficulty imposed on voting. As I explain below, to properly assess the difficulty imposed by the voter declaration requirements, we must consider the totality of the circumstances to determine if the requirements' **objective** difficulty denies the franchise. As I will demonstrate, the only sound conclusion in this respect is that voters who **choose** to vote by mail and fail to date their voter declarations labor under no unconstitutional difficulty and have the same right to vote as every other voter.

C. <u>The voter declaration requirements do not make voting so difficult that they effectively deny the franchise.</u>

1. The totality of the circumstances should be considered.

To reiterate: disenfranchisement under the Free and Equal Elections Clause means the denial of an **equal opportunity to participate in the electoral process** that thereby precludes an individual from exercising his or her **rights** to vote and have the vote counted. Judged by **this** test, enforcement of the voter declaration requirements cannot be invalidated on the grounds that they offend the Free and Equal Elections Clause.

First, the voter declaration requirements do not deny any qualified electors the right to vote. **By operation** they treat alike all voters who choose to vote by mail, and in **substance** impose no classifications. Any purported classification between those who comply with the requirements and those who do not has been created out of whole cloth. The requirements are facially neutral because they require **all** mail-in and absentee voters, regardless of their age, race, sex, religion, or creed, to place a date next to the signature on their ballot declaration. In my view, also critical to the analysis is the fact that Pennsylvania provides multiple ways to vote—not just by mail. Our citizens are free to cast their vote for their candidate of choice by mail-in, absentee, **or** in-person vote. Where a voter fails to comply with a ballot-casting rule that applies to only a subset of these methods, discounting that voter's ballot does not constitute an abridgment of the right to vote when the voter could have easily avoided the requirement.

In *Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021), the United States Supreme Court considered a challenge to the Democratic National Committee (DNC)'s challenges to two of three methods of voting in Arizona under the Voting Rights Act of 1965 (VRA)[7]: precinct-voting on election day and early

[7] 42 U.S.C. §§ 10101-10702.

mail-in voting.[8] In Arizona, if a voter votes in the wrong precinct, the vote is not counted. For Arizonans who vote early by mail, Arizona makes it a crime for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed. *Id.* at 661-62. The DNC and certain affiliates filed suit, alleging, *inter alia*, that Arizona's refusal to count ballots cast in the wrong precinct and its ballot-collection restriction had an adverse and disparate effect on Arizona's American Indian, Hispanic, and African American citizens in violation of Section 2(a) of the VRA, 52 U.S.C. § 10301(a).[9] *Id.* at 662.

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[8] Arizona also permits voters to vote at a "voting center" in their county of residence. That aspect of voting was not challenged.

[9] The VRA provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in [S]ection 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this [S]ection establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

The U.S. Supreme Court, looking at the "the totality of circumstances," identified certain guideposts that can help courts decide Section 2 cases. I believe those may be helpful here because both Section 2 of the VRA and our Free and Equal Elections Clause (1) concern counting votes, (2) require a showing that the political processes leading to an election are not equally open to all voters, and (3) require a showing that that some voters have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *See* 52 U.S.C. § 10301(b). One of the guideposts identified as useful by the U.S. Supreme Court in deciding Section 2 equal openness cases (which I submit is applicable to other time, place, or manner-of-casting-ballots vote denial cases) was to examine "the opportunities provided by the State's entire system of voting." *Id.* at 671. Justice Alito, delivering the opinion of the Court, explained that

> courts must consider the opportunities provided by a State's **entire system of voting when assessing the burden imposed by a challenged provision**. This follows from [Section] 2(b)'s reference to the collective concept of a State's "political processes" and its "political process" **as a whole**. Thus, **where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means**.

Id. (emphasis provided).

With regard to Arizona's out-of-precinct policy, the *Brnovich* Court concluded that even if it is marginally harder for Arizona voters to find their assigned polling places, the State offers other easy ways to vote:

> Any voter can request an early ballot without excuse. Any voter can ask to be placed on the permanent early voter list so that an early ballot will be mailed automatically. Voters may drop off their early ballots at any polling place, even one to which they are not assigned. And for nearly a month

> before election day, any voter can vote in person at an early voting location in his or her county.

Id. at 680. Regarding the alleged burden caused by Arizona's ballot-collection restriction, the Court considered that there were other means of voting:

> Arizonans who receive early ballots can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office within the 27-day early voting period. They can also drop off their ballots at any polling place or voting center on election day, and in order to do so, they can skip the line of voters waiting to vote in person.

Id. at 683.

In the end, the Court, considering several other guideposts, *see infra*, upheld Arizona's rules. Taking instruction from *Brnovich*, I believe we must consider the totality of the circumstances by looking at our political process as a whole, when deciding if the voter declaration requirements of the Election Code are so difficult so as to amount to the denial to vote under the Free and Equal Elections Clause. Like Arizona, Pennsylvania makes it very easy to vote and provides multiple ways to do so. Voters may cast their votes on Election Day in person. All qualified voters can vote by mail without providing a specific reason for not being able to vote in person on Election Day.[10] Voters who are unable to be present in their election district on Election Day due to duties, business, occupation, or physical incapacity can vote via absentee ballots.[11] An elector may legally receive assistance in filling out the absentee ballot if the elector has a physical disability that "renders

[10] Section 1301-D(a) of the Election Code, added by Act 77, 25 P.S. § 3150.11(a).

[11] Section 1306-D(a) of the Election Code, 25 P.S. § 3150.16(a).

him unable to see or mark . . . the ballot."[12] These methods provide Pennsylvania voters with multiple options to exercise their right to vote, accommodating varying needs and circumstances. The "difficulty" of the mail-in vote procedures must be considered in light of these other options. Any voter may **avoid** the voter declaration requirements by selecting in-person voting. The voter declaration requirements affect only one method of voting among several. All electors are **not** subject to the requirement to sign and date a voter declaration. The voter declaration requirements cannot violate the Free and Equal Elections Clause **merely because a voter chooses not to take advantage of the other avenues available to cast his or her ballot that do not involve having to sign and date a declaration.**

Every electoral law and regulation necessarily has some impact on the right to vote. The U.S. Supreme Court recognized as much in *Burdick v. Takushi*, 504 U.S. 428 (1992), observing that "[e]lection laws will invariably impose some burden upon individual voters." *Id.* at 433. However, not every election requirement rises to the level of a burden that seriously blocks or hinders the right to vote. Indeed, our Supreme Court has already resolved that the voter declaration requirements do not "make it . . . difficult" to vote, let alone "so difficult as to amount to a denial" of "the franchise." *See Pennsylvania Democratic Party* (rejecting as invalid a claim under the Free and Equal Elections Clause based exclusively on any "difficulty" created by a voter's noncompliance with minor and neutral ballot-casting rules specifically with regard to absentee and mail-in voting) (discussed more fully *infra*).

In *Brnovich*, the U.S. Supreme Court identified another "guidepost" that is useful in considering the measure of the burden imposed which involves

[12] Section 1306.1 of the Election Code, added by the Act of August 13, 1963, P.L. 707, 25 P.S. § 3146.6a.

comparison between the challenged law's burden and the "usual burdens of voting." It explained that

> the concepts of 'open[ness]' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important. After all, **every voting rule imposes a burden of some sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules**. **But because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is "equally open" and that furnishes an equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting."** *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 . . . (2008) (opinion of Stevens, J.).

594 U.S. at 669 (emphasis added).

The *Brnovich* Court concluded that neither Arizona's out-of-precinct rule nor its ballot-collection law exceed the usual burdens of voting. With regard to the out-of-precinct law, it concluded that "[h]aving to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting.'" *Id.* at 678. It found those tasks to be the "quintessential examples of the usual burdens of voting" and "unremarkable burdens." *Id.* at 678. With regard to the ballot-collection law, it reasoned,

> Arizonans who receive early ballots can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office within the 27-day early voting period. They can also drop off their ballots at any polling place or voting center on election day, and in order to do so, they can skip the line of voters

> waiting to vote in person. **Making any of these trips—much like traveling to an assigned polling place—falls squarely within the heartland of the "usual burdens of voting**."

Id. at 683.

Here, when compared to the usual burdens of voting, the unremarkable requirement to date one's voter declaration **in the space provided** when using the mailed ballot option cannot conceivably be deemed to exceed the "usual burdens of voting." In fact, this mundane task **is a quintessential example** of the "usual burdens of voting." All voting procedures place some burdens on voting. Voting in person is itself burdensome to many; it requires voters to be at the polling place by 8:00 p.m. on Election Day—which is a workday and not a national holiday. The burdens of voting in person include finding a method to transport oneself to a polling place during the voter's off hours on Election Day and waiting in line to vote, by a deadline set by statute. *League of Women Voters of Delaware v. Department of Elections*, 250 A.3d 922 (Del. 2020) (requirement that absentee and mail-in ballots be received by Election Day did not violate Delaware's free and equal elections clause). Based on my evaluation of these relevant factors in context of the totality of the circumstances, I conclude that the voter declaration requirements of the Election Code are not even remotely in violation of our Free and Equal Elections Clause.

2. The Voter Declaration Requirements are ballot-casting requirements that do not affect voter eligibility.

Without question, the legislature has the power to provide a standard for completing the voter declaration. The requirement to complete an attestation or declaration to accompany mailed ballots is a statutory question for policymakers, rather than a constitutional question for the judiciary. The Commonwealth "may

enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner." *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015). Indeed, "[t]he right to vote is the right to participate in an electoral process that is **necessarily structured to maintain the integrity of the democratic system**." *Burdick*, 504 U.S. at 441 (emphasis added).

It is also 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 County Redevelopment Authority*, 839 A.2d 1196, 1203 (Pa. Cmwlth. 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: "**swoop[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 National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Roberts, C.J., concurring) (emphasis added).

Like the U.S. Supreme Court, our Supreme Court has faithfully adhered to the rule of legislative primacy to set ballot-casting rules. It 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. In *Pennsylvania Democratic*

Party, 238 A.3d at 372-80, our Supreme Court expressly upheld against Free and Equal Elections Clause challenges to the declaration mandate—of which the date requirement is part—and the secrecy-envelope rule. In so doing, our Supreme Court recognized that "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the [l]egislature." *Id.* at 374.

Long ago, in *Winston*, the Supreme Court warned against undue judicial encroachment upon the General Assembly's prerogative to establish election procedures:

> The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government. Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself. . . . [B]allot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law.

91 A. at 455 (citations omitted). The *Winston* Court also reminded Pennsylvania jurists that separation of powers principles are of particular import in election matters:

> [i]f it were our duty to make the law, no doubt some of its provisions would be written differently; but we cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy. Questions of this character are for the [General Assembly] and not for the courts. If the restrictions complained of in this proceeding are found to be onerous or burdensome, the [General Assembly] may be appealed to for such relief, or for such amendments, as the people may think proper to demand.

Id. at 462-63. Further,

> [t]he legislature has from time to time passed various laws to regulate elections. The object has always been to protect the purity of the ballot. It is too late to question the constitutionality of such legislation, so long as it merely regulates the exercise of the elective franchise, and does not 'deny the franchise itself.' *See, also Patterson v. Barlow*, 60 Pa. 54. Abundance of authority might be cited, were it necessary. **The test is whether such legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial.**

DeWalt, 24 A. at 186 (emphasis added).

Our Supreme Court has routinely declined to find a constitutional violation where the law at issue merely **regulates the exercise of** the elective franchise and does not deny or dilute the franchise itself. Justice Todd emphasized this recently in *League of Women Voters*, 178 A.3d at 809, noting that the Court has "infrequently relied on this provision to strike down acts of the legislature pertaining to the conduct of elections."

For example, in *Working Families Party v. Commonwealth*, 209 A.3d 270, 271 (Pa. 2019), our Supreme Court rejected a Free and Equal Elections Clause challenge specifically because certain election rules, which in some sense **impacted** elections, nevertheless did not deprive any voters of either the *right* to vote or equal **power** to elect the representatives of their choice. In *Working Families Party*, the Court considered the constitutionality of provisions of the Election Code that prohibit fusion, the process by which two or more political organizations place the same candidate on the ballot in a general election for the same office. In rejecting the Free and Equal Elections Clause challenge to the anti-fusion provisions, the Court determined:

> The overarching objective of [the Free and Equal Elections Clause] of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her **vote** in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens. Viewed from this perspective, [the a]**ppellants have not established that their votes were diluted by the ban against cross-nomination.** Here, Appellants had the **opportunity to support and vote for the candidate of their choice** in the 2016 general election. In no sense were their votes diluted by the fact that Rabb appeared on the ballot only as the candidate of the Democratic Party. **Here, [the a]ppellants had "the same right as every other voter," and thus the foundational principle underlying Article I, [s]ection 5 is not offended.** *See Winston*, 91 A. at 523.

Id. at 282 (emphasis added). *Working Families Party* makes clear, then, that procedural voting rules violate the Free and Equal Elections Clause only when they, in effect, offend its central purpose to prohibit (1) the outright denial of the **opportunity** or **right** to vote and (2) the inequitable dilution of particular voters' power to vote for the candidate of their choice.

I also find *Scribner v. Sachs*, 164 N.E.2d 481 (Ill. Sup. 1960) to be instructive on this point. There, a statutory election provision expressly stated that voters must mark their paper ballots by making a cross (x) in the space next to the candidate of their choice. In concluding that the requirement did not violate the state's free and equal elections clause, the court noted that the state constitution left to the legislature the manner of holding an election. It reasoned that

> millions of electors cast their votes on proposed amendments and the possible symbols or words that could be used to express their intent is numberless. There are thousands of election officials who must interpret such symbols and words, and what may be clear to one official

> may be ambiguous to another. Therefore, it is necessary as well as usual and ordinary for the legislature to provide some standard for marking the ballot in order to prevent fraud and to [e]nsure uniformity as to which ballots are to be counted. We cannot, therefore, accept contestants' argument that the legislature has no power . . . to provide for the method of marking a ballot when a proposed amendment is submitted to the electors.
>
> It is also argued that to require a [(x)] in voting on a proposed constitutional amendment violates section 18 of article II of the Illinois constitution which provides for free and equal elections, that it creates an unreasonable interference with a citizen's privileges and immunities . . . . This argument is based on the premise that the legislature, by giving effect to a ballot marked only with a [(xx)], is discriminating against and giving less influence to the ballot marked with a check or 'yes.'
>
> As we have indicated the legislature has the power to provide a standard for marking a ballot. The standard set by the legislature is to mark the ballot with a [(x)]. **This requirement is applicable to all voters. There is no question of equal protection, due process, greater influence, et cetera, until a voter has failed to follow the standard set by the legislature. At this point it is not the statute that produces the result of which the contestants complain but the act of the voter in not following the definite and unambiguous standard set by the legislature**.

Id. at 491.

Here, the voter declaration requirements simply require a voter to sign and date his/her voter's declaration. This **requirement** is **applicable equally** to all voters. There is no question of the denial of the franchise, inequality, greater influence, or difficulty, etc., **until a voter has failed to follow the standard set by the legislature**. All voters have **the same opportunity** to vote by mail and to

comply with the simple rule to date the declaration. At this point it is not the Election Code provisions that produce the result of which Petitioners complain, but, rather, it is the act of the voter in not following the definite and unambiguous standard set by the legislature.

3. A voter does not suffer constitutional harm when his or her ballot is rejected because he failed to follow ballot-casting rules enacted by the General Assembly.

The Majority merely assumes, without elaboration, that a voter necessarily suffers constitutional harm when his/her ballot is rejected because he/she failed to follow the regulation for whatever reason. Unlike the Majority, I do not equate a voter's failure to comply with a simple ballot-casting rule with a deprivation of that voter's free and equal **opportunity** to select his or her representatives. Our Supreme Court has held that 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. In *Pennsylvania Democratic Party*, our Supreme Court already upheld the mandatory application of the **entire** declaration mandate for mail ballots—which encompasses the "fill out, date, and sign" requirements—without requiring an opportunity to cure. 238 A.3d at 372-74 (quoting 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). As Justice Baer, speaking for the Court explained, **the Free and Equal Elections Clause does not require counting mail ballots that "voters have filled out incompletely or incorrectly,**" even where voters have committed only "minor errors" on the declaration. *Id.* at 374 (emphasis added). Justice Baer went on to explain that

> **so long as a voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative[s] of his or her choice,**

which is all the Free and Equal Election Clause guarantees. *Id.* at 373 (emphasis added).

In *Pennsylvania Democratic Party*, the Supreme Court rejected the petitioner's argument that minor technical errors, such as not completing the voter declaration or using an incorrect ink color to complete the ballot should not be used to disenfranchise voters. There, petitioner argued, *inter alia*, that the lack of an opportunity to cure such facial defects impeded the right to vote. The petitioner relied upon the Free and Equal Elections Clause to contend that "[t]echnicalities should not be used to make the right of the voter insecure." 238 A.3d at 372. The Supreme Court rejected the argument, concluding that "the [e]lection [b]oards are not required to implement a 'notice and opportunity to cure' procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly." *Id.* at 374. The Supreme Court reasoned that the Free and Equal Elections Clause is violated where "application of the statutory language to the facts of [an] unprecedented situation results in an as-applied infringement of electors' right to vote," **but not where "a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of [Election Code] requirements[.]**" *Id.* at 362, 374 (emphasis added). In making this determination, and heeding its own cautionary admonitions from *Winston*, the Court explained:

> **While the Pennsylvania Constitution mandates that elections be "free and equal," it leaves the task of effectuating that mandate to the [l]egislature**. As noted herein, although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the notice and opportunity to cure procedure sought by [the p]etitioner**. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a**

> **notice and opportunity to cure procedure to alleviate that risk is one best suited for the [l]egislature.**

Id. (emphasis added) (some internal quotations and citations omitted). Thus, the Pennsylvania Supreme Court already has rejected as invalid any claim under the Free and Equal Elections Clause based exclusively on any "difficulty" created by a voter's noncompliance with minor and neutral ballot-casting rules specifically with regard to absentee and mail-in voting. This portion of *Pennsylvania Democratic Party* is controlling here and should have concluded the Majority's analysis. But the Majority does not mention, let alone apply, the Pennsylvania Supreme Court's rationale in this respect.

4. The Voter Declaration Requirements do not implicate voting eligibility—the "right" to vote.

Contrary to the Majority's assessment, Petitioners' constitutional challenge implicates only the opportunity to vote **by mail**–not the more fundamental eligibility to vote. As Intervenors correctly point out, the right to vote in any particular manner is not absolute. *See Burdick.* The voters' **choice** not to participate in the opportunities Pennsylvania provides, other than by mail, is, at least in part, the cause of their inability to vote – not the voter declaration requirements themselves.

In derogation of all of the above, the Majority has somehow resolved that requiring the voter **to complete his attestation/declaration** and discounting his/her ballot if he/she fails to do so implicates the Free and Equal Elections Clause because it significantly interferes with the fundamental right to vote. However, I am not persuaded that the requirement to date one's voter declaration is unconstitutional because I disagree that the Free and Equal Elections Clause confers a constitutionally protected right to cast an incomplete ballot. The precedent is clear that it does not.

A full consideration of the challenged voter declaration requirements of the Election Code in context demonstrates that counting an incomplete ballot was not intended by the legislature.

As to the validity of the ballot, the Election Code requires that the voter's declaration be in a particular form, which includes that it be dated and signed. The requirement to date the declaration is an integral part of the voter's attestation, *i.e.*, his/her affirmation that he/she is qualified to vote, and that the ballot inside the envelope represents his/her election choices. It is *prima facie* evidence that the declaration was properly executed on the date stated. In *In re Nov. 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020), our Supreme Court described the voter's declaration as a necessary confirmation that the voter who votes by mail is qualified to vote, and that he/she has not already voted in the election. The voter's declaration accompanies the mailed-in vote as a type of attestation, or oath. Justice Todd recognized that signing and dating one's voter declaration is comprised of both the signature and date:

> The **voter's declaration** is a pre-printed statement required to appear on the ballot return envelope containing a voter's absentee or mail-in ballot declaring: that **the voter is qualified to vote the ballot enclosed in the envelope, and that the voter did not already vote in the election for which the ballot was issued**. 25 P.S. § 3146.2. **The declaration also contains lines for the voter to print his or her name and address, a space for the voter to sign his or her name or make a mark if unable to sign, and a space for the voter to enter the date on which he or she executed the declaration. *Id.* § 3146.6.**

240 A.3d at 595 n.4 (emphasis added).

In *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 General Election*, 241 A.3d 1058, 1065 (Pa. 2020), the Supreme Court again regarded the declaration as an oath or affirmation, explaining that a signed voter declaration, attests, on pain of criminal penalty,[13] that the elector, *inter alia*, (1) is qualified to vote from the stated address; (2) has not already voted in the election; and (3) is qualified to vote the enclosed ballot.

The requirement to sign and date documents is deeply rooted in legal traditions that prioritize clear and consensual agreements, ensuring that all parties are aware of and agree to the terms at a specific time. The purpose of signing a document is to authenticate it, which means to verify that it comes from the person whose name is signed and to confirm that the signer agrees to the contents or obligations stated within the document. It is part of the authentication process. Including the date next to one's signature confirms the act of subscription and is as important as the signature itself in the declaration. It is all part of the same transaction, *i.e.*, declaring that the ballot cast by the particular voter is valid. When we strip the date from the signature and consider it in isolation, we distort the significance of the declaration itself. For that reason, I take issue with the Majority's focus on whether the date, divorced from the rest of the voter declaration requirements, has any purpose **to the election boards**. The Majority accepts

[13] *See* Section 1853 of the Election Code, added by the Act of January 8, 1860, 25 P.S. § 3553 ("If any person shall sign an application for absentee ballot, mail-in ballot or declaration of elector on the forms prescribed **knowing any matter declared therein to be false, or shall vote any ballot other than one properly issued to the person, or vote or attempt to vote more than once in any election for which an absentee ballot or mail-in ballot** shall have been issued to the person, or shall violate any other provisions of Article XIII or Article XIII-D of this act, the person **shall be guilty of a misdemeanor of the third degree,** and, upon conviction, shall be sentenced to pay a fine not exceeding two thousand five hundred dollars ($2,500), or be imprisoned for a term not exceeding (2) years, or both, at the discretion of the court.") (emphasis added).

Petitioners' contention that the date aspect of the voter declaration requirements serves no purpose. By couching it in such terms (no need to **date "the ballot"** because timeliness of mail ballots is established through the county board's scanning of a unique barcode), it allows Petitioners to steer the focus on the usefulness or uselessness of the **date of the ballot to the election boards,** when that really is not the issue at all. Asking and answering the question of whether the date "of the ballot" is useful to the **election boards** is misguided. The date is an integral part of the voter's attestation, *i.e.*, his/her declaration that he/she is qualified to vote, and that the ballot inside the envelope represents his/her choices. The date requirement must be considered in that context, not in isolation or in a vacuum, which is exactly what Petitioners and the Majority do when they conclude that "the date of the ballot," by itself, is meaningless to the election boards. **The question is not whether "the date of the ballot," by itself, is meaningless to the election boards, rather, the question in a Free and Equal Elections Clause analysis is whether the requirement to complete a voter declaration, which, of necessity, includes both the signature and date, is "so difficult as to amount to a denial."** *League of Women Voters*, 178 A.3d at 810. Because the date of one's signature is integral to, and part and parcel of, the voter's declaration, the only way to determine its purpose is to consider it in that proper context.

Signing and dating a voter declaration that must accompany a mailed vote is a commonsense procedural necessity, and it amounts to nothing more than a normal and usual step required to vote in Pennsylvania. As I stated above, this familiar task is no more of an imposition than is the exercise of the franchise itself, which can involve waiting in long lines and traveling distances in order to personally cast a ballot on Election Day. The responsibility of the voter is simply to fill out

his/her declaration correctly. It is neither a restraint nor a restriction. It is just one step, of several, that a voter must take in order to vote by mail. The evidence shows that the vast majority of Pennsylvania voters have met that burden and cast their ballots in our elections.

I cannot fathom how it could be considered unconstitutional to discount a ballot **that has an incomplete voter attestation**. No reasonable person would find the obligation to sign and date a declaration to be difficult or hard or challenging. Just like placing the ballot in a secrecy envelope, requiring a completed declaration does not translate into a constitutional violation. *See Pennsylvania Democratic Party*, 238 A.3d at 372-80. Unlike a vote made in person, mail-in and absentee ballots are not face-to-face; no identification is required. The only way to establish the authenticity of one's mailed ballot is to complete the voter declaration by signing and dating it. To say that requiring the voter to complete his/her declaration by including a date is so difficult as to deny one the right to vote, is to find that there can be no reasonable procedures for verification of any vote cast not in person whatsoever.

In order to function properly, elections must have rules, including ballot-casting rules. "The right to vote is the right to participate in an electoral process that is **necessarily structured to maintain the integrity of the democratic system**." *Burdick*, 504 U.S. at 441. As our Supreme Court recognized long ago, the right of suffrage may not be impaired or infringed upon in any way except through fault of the voter himself. *Appeal of Norwood*, 116 A.2d 552 (Pa. 1955). That is precisely what happened here. A subset of voters simply failed to follow the requisite voting procedures. That does not amount to a violation of the Free and Equal Elections Clause. Our Supreme Court has made clear time and again, 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. Justice Wecht wrote in *2020 Canvass*, "[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). We must adhere to that precept.

Nevertheless, in an effort to portray voter declaration requirements as being "so difficult as to amount to a denial," Petitioners point to **the number** of ballots discounted for lack of a date. However, Petitioners' argument is incomplete because they fail to support these figures with any relativeness. They provide no meaningful comparison that I believe is necessary to assess the burden or difficulty posed by the rule.

According to the figures relied upon by Petitioners, "10,657" mail ballots were not counted in the 2022 general election due to noncompliance with the date requirement. *See* Pet. Ex. 1 ¶¶ 8-9 (relying on data analysis by a lawyer advocating for invalidation of date requirement in parallel federal challenge). But that represents only 0.85% of the 1,258,336 mail ballots returned statewide in the 2022 general election.[14] **That is not even 1%. 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.

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[14] *See* U.S. Election Administration Commission, Election Administration and Voting Survey 2022 Comprehensive Report: A Report from the U.S. Election Assistance Commission to the 118th Congress at 45, 47, https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf (last visited August 22, 2024).

Moreover, this 0.85% noncompliance rate is actually lower than the historic noncompliance rate under the secrecy-envelope requirement.[15] Thus, because the secrecy envelope requirement does not violate the Free and Equal Elections Clause, *see Pennsylvania Democratic Party*, 238 A.3d at 376-80, the Majority is hard-pressed to conclude that the date requirement alone does.

Notably, the figures Petitioners rely on also show that the rate of noncompliance with the date requirement decreased in the 2024 primary elections. According to those figures, only 0.21% (4,000 out of 1,900,000) of all ballots submitted and only **0.56%** of all mail ballots submitted (4,000 out of 714,315) in those elections were rejected due to an incorrect or missing date. *See* Pet. ¶¶ 70, 73 and Exhibit A. Based on Petitioners' own figures, the vast majority of Pennsylvania mail voters therefore again complied with the date requirement. So, I am loath to conclude, as the Majority has, that the raw numbers establish a *per se* burden for purposes of the Free and Equal Elections Clause, especially here where the number of ballots discounted represented less than 1% of the total votes.

Additionally, pointing to the 10,000 ballots that were discounted for lack of a date on the declaration as *per se* evidence of the difficulty of complying with voter declaration requirements, without knowing the number of ballots discounted because they were not **signed**, is an unfair assumption. If the number of ballots discounted as unsigned equals or exceeds the number of ballots discounted for a lack of a date, then, the number of ballots discounted as undated cannot be proof that the dating requirement "make[s] it so difficult [to vote] as to amount to a

[15] *See* MIT Election & Science Lab, How Many Naked Ballots Were Cast in Pennsylvania's 2020 General Election? (statewide rejection rate for noncompliance with secrecy-envelope requirement around 1%), https://electionlab.mit.edu/articles/how-many-nakedballots-were-cast-Pennsylvanias-2020-general-election. (last visited August 24, 2024).

denial" of "the franchise" under the Free and Elections Clause. Without that data we cannot possibly conclude that the number of ballots discounted for a lack of a date is disproportionate to the number of ballots discounted for lack of a signature – which **no one** contends is so difficult so as to amount to a denial of the right to vote.

Rather, the standard under the Free and Equal Clause requires Petitioners to demonstrate objectively how the voter declaration requirements interfere with the right to vote. Petitioners offer no evidence or argument as to why or how adding a date to one's voter declaration is difficult let alone "so difficult as to amount to a denial" of "the franchise." Instead, they argue that unconstitutional difficulty is **impliedly** demonstrated by the raw numbers of ballots that were not counted in the past election **due to noncompliance** with the date requirement, which they characterize as a "large section of intelligent voters." *Black Political Empowerment v. Schmidt*, __ A.3d __, at __ (Pa. Cmwlth., No. 283 M.D. 2024, filed ___) slip op. at 81. They ask us to conclude that because this subset of voters' ballots were discounted because their declaration was undated, then the requirement **must,** consequently, be difficult. The Majority adopts Petitioners' unique "if then" analysis as the standard for evaluating a law's burdens, but it fails to articulate a coherent constitutional threshold—a point at which such a likelihood renders state voting practices unconstitutional. The Majority provides no framework whatsoever for determining when the numerical differences that are unavoidable in the election setting become constitutionally problematic. It seems to me that the Majority was swayed by the **raw numbers** and avoided applying the true test for evaluating a Free and Equal Elections Clause claim. However, as I just pointed out, the raw numbers do not tell the whole story. Clearly, **the raw numbers** were the whole impetus of, and basis for, this lawsuit. In my view, Petitioners have failed to meet their

extremely high burden of demonstrating that the voter declaration requirements "clearly, palpably, and plainly violate[] the Constitution." *League of Women Voters*, 178 A.3d at 801.

In *Brnovich*, the U.S. Supreme Court, analyzing Section 2 of the VRA, (the objectives of which are similar to the Free and Equal Elections Clause), cautioned against relying on the **mere** fact that there is some difference in impact, without conducting any meaningful comparison. It explained that

> the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters. And in assessing the size of any disparity, **a meaningful comparison is essential**. What are at bottom very small differences should not be artificially magnified.

594 U.S. at 671 (emphasis added). **"A policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open."** *Id.* at 680 (emphasis added).

Moreover, as one court, engaged in a burden measuring analysis (albeit in context of a Fourteenth Amendment Equal Protection Clause analysis), explained, "[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst." *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016). Yet, this is exactly what the Majority has done here. It is contrary to the Supreme Court's Free and Equal Elections Clause jurisprudence, which turns on the objective burden imposed on **all** voters by the challenged rule—*i.e.*, whether the challenged rule "make[s] [voting] so difficult as to amount to a denial" of "the franchise"—not the number of voters who fail to comply with it. *League of Women Voters*, 178 A.3d at 810. Here **all**

voters, regardless of any affiliation or personal characteristic, **are treated the same** – when they choose to vote by mail, they all must complete the voter declaration by signing and **dating** it. The date requirement applies non-discriminately to all voters.

In *Crawford*, 553 U.S. 181, the U.S. Supreme Court upheld an Indiana voter ID law. In support of their Fourteenth Amendment equal protection challenge to a voter ID law that applied non-discriminately to all voters, the plaintiffs urged the Court to consider the burden imposed on the "narrow class of voters" who could not afford or obtain a birth certification and had to return to the circuit court clerk's office after voting. *Id.* at 200 (opinion of Stevens, J.). The lead opinion refrained from weighing the "special burden" faced by "a small number of voters" because the evidence on the record gave "no indication of how common the problem is," which made it impossible "to quantify . . . the magnitude of the burden." *Id.* at 200. In a concurrence, Justice Scalia rejected outright the idea of measuring the burden on a subset of voters. "The Indiana law affects different voters differently, . . . but what petitioners view as the law's several light and heavy burdens," he reasoned, "are no more than the different **impacts** of the single burden that the law uniformly imposes on all voters." *Id.* at 205 (Scalia, J., concurring in the judgment) (emphasis in original). Justice Scalia went on to explain: "To vote in person in Indiana, everyone must have and present a photo ID that can be obtained for free. . . . The Indiana photo-ID law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes." *Id.*

Although *Crawford* involved rule challenges in an equal protection context, there is no reason why the rationale of measuring the burden on voting rights imposed by the rule is not equally applicable in this instance, where Petitioners are

claiming that the dating provisions are so difficult so as to amount to a denial of the right to vote. Burden-measuring is necessary under the Free and Equal Elections Clause to determine whether a rule dilutes or entirely deprives someone of the right or opportunity to vote. That is the whole analysis under that Clause, and it ends there.

I would, however, reject the urge to consider the individual impacts to determine the difficulty in complying with the voter declaration requirements.[16] I believe the Majority has been led astray by Petitioners' raw data, which is highly misleading. In so doing, the Majority, in essence, has concluded that requiring the voter to properly complete his attestation or declaration and discounting his ballot if he fails to do so must be difficult because a subset of voters failed to comply with it. However, a distorted picture can be created by relying on the raw data alone. Properly understood, Petitioners' statistics show only a small disparity that provides little support for concluding that Pennsylvania's political processes are not equally open. *Brnovich*, 594 U.S. at 681.

In summary, I believe the mistake the Majority makes is to confuse its role in this matter by rewriting the Election Code in an attempt to guarantee an errorless election. The failure to complete one's declaration by including the date should invalidate the ballot. I would follow Supreme Court precedent faithfully and leave the sign and date requirement intact and discount ballots that lack a complete attestation or affirmation. Even if that means .85% of the ballots are discounted.

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[16] As one court pointed out, individual impacts from the perspective of the affected voters **may** be relevant where the court is evaluating a **non-uniform rule** under a statute that effects "disparate treatment" on various classes of voters. *See e.g.*; *Mays v. LaRose*, 951 F.3d 775, 784-85 (6th Cir. 2020). In other words, the evaluation of a law's impact on certain subgroups of affected voters may be appropriate when a law directly distinguishes between those subgroups and accords them different voting rights. However, that analysis is not applicable here because there is no claim that the dating provision effects "disparate" treatment on various classes of voters.

D. The Majority Incorrectly Applies "Strict Scrutiny".

1. "Strict Scrutiny" does not apply to Free and Equal Elections Clause Challenges; it applies in the Equal Protection context.

The Majority's adoption of "strict scrutiny" to invalidate the enforcement of the voter declaration requirements under the Free and Equal Elections Clause is incorrect and reaches the wrong result accordingly. The traditional "scrutiny" analysis has never been utilized to determine whether neutral, objective, universally-applicable ballot-casting rules like the voter declaration requirements violate the Free and Equal Elections Clause. As I already have shown, that Clause guards against unequal voting power, the dilution of one vote compared with another, and the deprivation of the voting franchise altogether by burdensome and prohibitive procedural rules. In contrast, and as discussed below, "scrutiny" analysis is reserved for constitutional challenges, chiefly under the Equal Protection Clause, to distinction-making legislation. Pursuant to such analysis, we apply, as appropriate, varying degrees of scrutiny to determine whether legislative distinctions are precisely drawn to serve government interests of varying levels of importance.

In *League of Women Voters*, the Pennsylvania Supreme Court emphasized the unique analysis that applies to Free and Equal Elections Clause challenges as compared with other types of constitutional claims:

> Moreover, and importantly, when properly presented with the argument, our Court entertains as distinct claims brought under the Free and Equal Elections Clause . . . and the federal Equal Protection Clause, and we adjudicate them separately, utilizing the relevant Pennsylvania and federal standards. In *Shankey* . . . , a group of third-party voters challenged a Pennsylvania election statute which specified that, in order for an individual's vote for a third-party candidate for a particular office in the primary election to be counted, the total number of aggregate votes by third-party voters for that office had to equal or exceed

> the number of signatures required on a nominating petition to be listed on the ballot as a candidate for that office. The voters' challenge, which was brought under both the Free and Equal Elections Clause of the Pennsylvania Constitution and the Equal Protection Clause of the United States Constitution, alleged that these requirements wrongfully equated public petitions with ballots, thereby imposing a more stringent standard for their vote to be counted than that which voters casting ballots for major party candidates had to meet.
>
> Our Court applied different constitutional standards in deciding these claims. **In considering and rejecting the Article I, Section 5 claim—that the third-party candidates' right to vote was diminished because of these special requirements—our Court applied the interpretation of the Free and Equal Elections Clause set forth in *Winston, supra,* and ruled that, because the statute required major party candidates and third party candidates to demonstrate *the same numerical level of voter support* for their votes to be counted, the fact that this demonstration was made by ballot as opposed to by petition *did not render the election process unequal.*** By contrast, in adjudicating the equal protection claim, our Court utilized the test for an equal protection clause violation articulated by the United States Supreme Court and examined ***whether the statute served to impermissibly classify voters without a reasonable basis to do so.***

League of Women Voters, 178 A.3d at 812 (emphasis provided). *See also Shankey*, 257 A.2d at 897. Here, Petitioners challenge the voter declaration requirements under the Free and Equal Elections Clause and not the federal Constitution. Moreover, the voter declaration requirements impose no **actual** classifications, create no **actual** distinctions, and cause no **impermissible** disparate treatment among voters. Thus, "strict" or any other level of traditional scrutiny simply does not apply here.

The Majority's citation to *Pennsylvania Democratic Party* to support its invocation of strict scrutiny analysis is inapposite. There, and in conformity with *League of Women Voters*, the Pennsylvania Supreme Court conducted a "scrutiny" analysis **only** with regard to a poll watcher residency requirement that was challenged under the First[17] and Fourteenth Amendments of the federal Constitution. 238 A.3d at 353, 380. That Court concluded, **analyzing and applying only federal cases**, that the poll watcher requirement "imposes no burden on one's constitutional **right** to vote and, accordingly, requires only a showing that a rational basis exists to be upheld." *Id.* at 385 (emphasis added). Although the petitioners in *Pennsylvania Democratic Party* also challenged the poll watcher residency requirement under the Free and Equal Elections Clause, *see id.* at 353, the Supreme Court conducted no independent analysis under the Clause because, at least in this respect, it afforded no more protection than the federal Constitution. *Id.* at 386 n.35.

In contrast, in the relevant and controlling portion of *Pennsylvania Democratic Party*, which the Majority here sidesteps entirely, the Court considered whether the Free and Equal Elections Clause required county boards of elections to notify voters of "minor facial defects" in cast mail-in ballots and afford them an opportunity to cure. *Id.* at 372. We quote from the Court's analysis at length because it is controlling on this point:

> [The p]etitioner bases this claim on its assertion that the multi-stepped process for voting by mail-in or absentee ballot inevitably leads to what it describes as minor errors, such as not completing the voter declaration or using an incorrect ink color to complete the ballot. According to [the p]etitioner, these minor oversights result in many ballots being rejected and disenfranchising voters who believe they have exercised their right to vote.

[17] U.S. Const. amend. I.

[The p]etitioner submits that voters should not be disenfranchised by technical errors or incomplete ballots, and that the "notice and opportunity to cure" procedure ensures that all electors who desire to cast a ballot have the opportunity to do so, and for their ballot to be counted. [The p]etitioner further claims there is no governmental interest in either: (1) requiring the formalities for the completion of the outside of the mailing envelope to be finalized prior to mailing as opposed to prior to counting, or (2) rejecting the counting of a ballot so long as ballots continue to arrive under federal law, which is the [Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. §§ 20301-20311 UOCAVA)] deadline of seven days after Election Day.

As legal support for its position, [the p]etitioner relies upon the Free and Equal Elections Clause. It further emphasizes that election laws should be construed liberally in favor of voters, and that technicalities should not be used to make the right of the voter insecure. [The p]etitioner also asserts that ballots with minor irregularities should not be rejected, except for compelling reasons and in rare circumstances. Based on these legal principles, as well as this Court's broad authority to craft meaningful remedies when necessary, [the p]etitioner claims that the Pennsylvania Constitution and spirit of the Election Code require the [b]oards to provide a "notice and opportunity to cure" procedure, and that this Court has the authority to afford the relief it seeks.

. . . .

Upon review, we conclude that the [b]oards are not required to implement a "notice and opportunity to cure" procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly. Put simply, as argued by the parties in opposition to the requested relief, the [p]etitioner has cited no constitutional or statutory basis that would countenance imposing the procedure [the p]etitioner seeks to require (*i.e.*, having the [b]oards contact those individuals whose ballots the [b]oards have reviewed and identified as including "minor" or "facial"

> defects—and for whom the [b]oards have contact information—and then afford those individuals the opportunity to cure defects until the UOCAVA deadline).
>
> While the Pennsylvania Constitution mandates that elections be "free and equal," it leaves the task of effectuating that mandate to the legislature. As noted herein, although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the "notice and opportunity to cure" procedure sought by [the p]etitioner. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a "notice and opportunity to cure" procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government.

Id. at 372-74. Entirely absent from the Court's analysis is any "scrutiny" in the traditional sense, and certainly not "strict" scrutiny.

2. Even if I used the Majority's own test, "strict scrutiny" still would not apply.

Even if strict scrutiny could apply here, which it cannot, the voter declaration requirements in any event are not subject to such scrutiny according to the Majority's own standard. The Majority holds that strict scrutiny applies because the date requirements make voting so difficult for some voters that it denies them the franchise altogether. (Majority, slip op. at 75.) The Majority in this respect has unfortunately begun its "strict scrutiny" analysis with a wrong conclusion that it never would or should have reached after the correct analysis. As I note above,

merely because certain ballots are not counted because they are mailed in envelopes with undated or misdated voter declarations does not mean that the voters who failed to follow the rules have been subjected to an unconstitutionally burdensome difficulty in voting. Thus, even under the Majority's test, strict scrutiny would not apply here.

To illustrate, although the Court in *Pennsylvania Democratic Party* did not consider whether the procedural requirements for mail-in voting, if enforced, were unconstitutional under the Free and Equal Elections Clause, tacit to the Court's analysis is the principle that ballot-casting rules are not subject to judicial scrutiny under the Free and Equal Elections Clause where they do not burden the franchise but, rather, only result in the disqualification of objectively noncompliant ballots. That is the very principle that the Majority here refuses to countenance and that controls the outcome of this case. Justice Wecht emphasized this point in his concurring opinion in *Pennsylvania Democratic Party*, in which he stated his belief that the Court's holding under the Free and Equal Elections Clause extended to permit rejection of ballots based on "defects that are capable of objective assessment pursuant to uniform standards." *Id.* at 389 (Wecht, J., concurring). Pertinent here, Justice Wecht went on to illustrate:

> For example, the failure to "fill out, date and sign the declaration printed on" the ballot return envelope, as required by 25 P.S. § 3150.16(a), is a deficiency that can be readily observed. Absent some proof that the enforcement of such a uniform, neutrally applicable election regulation will result in a constitutionally intolerable ratio of rejected ballots, I detect no offense to the Free and Equal Elections Clause.

Id. at 389.

This same principle was enunciated, albeit in a slightly different legal context, in *Pennsylvania State Conference of NAACP Branches v. Secretary*, 97 F.4th 120 (3d Cir. 2024), where the Third Circuit Court of Appeals ruled that the "Materiality Provision" of the federal Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(b),[18] required the counting of undated or incorrectly-dated mail-in ballots notwithstanding that the Pennsylvania Supreme Court held in *Ball* that the dating requirement is mandatory and non-compliant ballots must not be counted. *Pennsylvania State Conference*, 97 F.4th at 125. The Third Circuit concluded that the materiality provision categorically does not apply to ballot-casting rules that determine **how** a qualified voter casts a ballot, regardless of whether they serve any valid state purpose. *Id.* at 125, 131. The Third Circuit noted that ballot-casting rules govern **how** a person votes and do not impact **whether** a person is qualified to vote, *i.e.*, his or her "right" to vote. *Id.* at 130, 135. Rather, the Court recognized that, "[t]o cast a ballot that is valid and will be counted, all qualified voters must abide by certain requirements, just like those authorized to drive must obey the State's traffic laws like everybody else." *Id.* at 130. Necessarily, then,

> individuals are not "denied" the "right to vote" if non-compliant ballots are not counted. Suppose a county board of elections excludes a voter's ballot from the vote tally because he cast more than the permissible number of votes. Or it sets aside a ballot because the voter revealed his identity by improperly marking the secrecy envelope containing the ballot. Is that person denied the right to vote? In both instances, the voter failed to follow a rule—

[18] As stated by the Third Circuit, the materiality provision "prohibits denial of the right to vote because of an 'error or omission' on paperwork 'related to any application, registration, or other act requisite to voting,' if the mistake is 'not material in determining whether [an] individual is qualified' to vote." 97 F.4th at 125 (quoting 52 U.S.C. § 10101(a)(2)(B)) (brackets in original).

> like the dat[ing] [provisions]—that renders his ballot defective under state law.

Id. at 135. *See also id.* (quoting *Ritter v. Migliori*, 142 S.Ct. 1824 (2022) (Alito, J.) ("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.")).

E. <u>The Majority Effectively Re-Writes the Elections Code and Sustains What is, in Actuality, a Facial Challenge to the Voter Declaration Requirements.</u>

In analyzing Petitioners' constitutional challenge, the Majority has incorrectly framed their claim as an "as-applied" challenge, when it is, at its core, a **facial** challenge to the voter declaration requirement. We have explained that "an as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a *particular person* under *particular circumstances* deprived *that person* of a constitutional right." *Nigro v. City of Philadelphia*, 174 A.3d 693, 699 (Pa. Cmwlth. 2017) (emphasis added). As such, "an as-applied challenge will not necessarily invalidate a law given that a law may operate in an unconstitutional way as to *one particular individual or company*, as to which it may be declared void, and yet may, as to others still be effective." *Id.* (emphasis added).

The Majority has stretched this concept to the absolute limit by declaring the voter declaration requirements of the Election Code— applicable to all 67 counties of this Commonwealth— "unconstitutional as applied to qualified voters who timely submit undated or incorrectly dated absentee and mail-in ballots" in Philadelphia and Allegheny Counties. (Order, ¶ 3.) This vague, overly-broad category of potential future voters flies in the face of, and is fundamentally inconsistent with, the limited nature of a true as-applied challenge to the validity of

a statute. Although the Majority intimates that the voter declaration requirements disparately impact the elderly, an intimation that I find insulting to that group of voters, among others, it has identified no "particular individual or company" allegedly deprived of a constitutional right. *Nigro*, 174 A.3d at 699.

Additionally, the relief the Majority affords for Petitioners' "as-applied" challenge is permanent, rather than temporary, and has not been implemented as a result of any unique or challenging circumstances, unlike that issued by our Supreme Court during the COVID-19 pandemic. *See Pennsylvania Democratic Party*, 238 A.3d at 371 (finding in context of as-applied Free and Equal Elections Clause challenge to statutory received-by timeline for absentee and mail-in ballots to unprecedented facts caused by COVID-19 pandemic resulted in infringement of electors' right to vote and adopting, under its extraordinary jurisdiction, three-day extension of deadline to allow for tabulation of ballots postmarked by 8:00 p.m. on Election Day). In sharp contrast, the relief ordered by the Majority here is neither temporary nor emergency-driven.

Given that Petitioners' challenge is in actuality a facial challenge to the voter declaration requirements of the Election Code, the Majority has proceeded to effectively re-write the statute in crafting its remedy.

III. THE RELIEF AFFORDED BY THE MAJORITY IS UNEQUAL, INCONSISTENT, AND PERMITS INVALIDATION OF BALLOTS IN 65 PENNSYLVANIA COUNTIES

With respect to the relief crafted by the Majority, I reemphasize that, under long-standing Pennsylvania Supreme Court precedent, "elections are free and equal within the meaning of the Constitution . . . *when every voter has the same right as any other voter*[.]" *Winston*, 91 A. at 523 (emphasis added). "[T]he *overarching objective* of [article I, section 5] of our constitution is to prevent dilution of an

individual's vote by mandating that the power of his or her vote in the selection of representatives be *equalized to the greatest degree possible with all other Pennsylvania citizens*." *League of Women Voters*, 178 A.3d at 817 (emphasis added).

Despite this clear directive, the relief ordered by the Majority accomplishes **the direct opposite**, in that it permits only **two** counties of this Commonwealth to ignore the voter declaration requirements, leaving the remaining 65 counties bound to follow the law as written. Thus, under the guise of promoting free and equal elections, the Majority has instead created a new system of inequality wherein voters who write an incorrect date on a mail-in or absentee ballot in Philadelphia County have their votes counted despite non-compliance with Election Code requirements, while the votes of those who make this same error in Lehigh County must be invalidated as prescribed by our General Assembly and, until today, our Supreme Court. I fail to see how equality is accomplished when the validity of a mail-in or absentee ballot with the same facial error turns upon the county in which that voter resides.

Additionally, the relief ordered by the Majority reveals the internal inconsistency of its logic, in that it includes a carve out specifying that the Philadelphia and Allegheny County Boards retain the authority to evaluate mail-in and absentee ballots for compliance with the voter declaration requirements to ensure timely submission "and thus prevent fraud." (Order, ¶ 6.) This carve out tacitly concedes that the dating provisions mandated by the legislature **do serve a purpose** and directly undercuts the Majority's repeated declarations that "the dating provisions are virtually meaningless" and are "not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud." (Majority Op. at 75-76.)

IV. ACT 77 IS NOW VOID IN ITS ENTIRETY

In his concurring and dissenting opinion in *McLinko v. Department of State*, 270 A.3d 1243 (Pa. Cmwlth.) (*McLinko I*), *aff'd in part and rev'd in part*, 279 A.3d 539 (Pa. 2022) (*McLinko II*), Judge Wojcik of this Court, joined by Judge Ceisler, aptly noted that

> 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. . . . Thus, if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77's provisions are void.

McLinko I, 270 A.3d at 1278 (Wojcik, J., concurring in part and dissenting in part). *See also McLinko II*, 279 A.3d at 609-10 (Brobson, J., dissenting) (noting that the DNC "advance[d] the nonseverability provision [of Act 77] as a reason why [the Supreme Court] should reject the constitutional challenge to Act 77's mail-in ballot provisions . . . , because doing otherwise would trigger the nonseverability provision and render the entirety of Act 77 invalid). I agree. The nonseverability clause of Act 77 is straightforward and provides 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 to this act are void." Section 11 of Act 77 (emphasis added). Sections 6 and 8 of Act 77 govern absentee and mail-in voting and contain the voter declaration requirements. It would seem to obviously follow, then, that this Court's forbidding of the enforcement of the voter declaration requirements, which our Supreme Court has held to be mandatory, renders all of Act 77 void and, resultantly, voids all absentee and mail-in voting in Pennsylvania. The Majority nevertheless

sidesteps Section 11 and ignores the intent of the General Assembly to save the remainder of Act 77 which, according to the Majority's keeping-up-with-the times wisdom, can function perfectly well as the Majority has now interpreted it. *See BPE*, ___ A.3d at ___, slip op. at 88-89. With this I cannot agree.

It is true that, generally speaking, statutes are presumed to contain severable provisions that each will remain in effect notwithstanding that one or more of the others are held to be invalid. *See* Section 1925(a) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1925(a). Where, however, a court determines that the (1) **General Assembly would not have enacted** the valid provisions without the invalid ones, or (2) the valid provisions, standing alone, cannot function **in accordance with legislative intent** without the invalid ones, the statute's provisions will not be severable. *Stilp v. Commonwealth*, 905 A.2d 918, 970 (Pa. 2006) (citing 1 Pa.C.S. § 1925(a)).

In line with these principles, nonseverability provisions in statutes are constitutionally proper. *Stilp*, 905 A.2d at 978. Although courts will decline to enforce such provisions where they constitute boilerplate attempts by the General Assembly to coerce the judiciary and thwart judicial review, *id.* at 978-79, our Supreme Court nonetheless has recognized that

> [t]here may be reasons why the provisions of a particular statute essentially inter-relate, but in ways which are not apparent from a consideration of the bare language of the statute as governed by the settled severance standard set forth in Section 1925 of the Statutory Construction Act[]. In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole. Or, there may be purely political reasons for such an interpretive directive, arising from the concerns and compromises which animate the legislative process. In an instance involving such

> compromise, the General Assembly may determine[] the court's application of the logical standard of essential interconnection set forth in Section 1925 might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place. Once again, this is a concern that would not necessarily be apparent to a court analyzing the bare language of the statute.

Id. at 978. Thus, where a nonseverabilty clause effectuates these legitimate purposes, it does not implicate separation of powers concerns and is enforceable. *Id.* at 978-79.

Here, there is clear evidence that Section 11 of Act 77 was an important component of the democratically-reached political compromises that brought about the Act's passage. The Democratic sponsor of Act 77, as well as the Republican Senate Majority Leader, acknowledged that Act 77 was a politically difficult compromise. *See Pennsylvania Legislative Journal-Senate*, October 29, 2019, 1000, 1002. Further, the nonseverability provision helped to reassure the General Assembly that all of the interworking component parts of the bipartisan bargain would not be discarded by the courts. For example, House of Representatives State Government Committee Chair Garth Everett commented as follows on the House floor:

> 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 severability.

> 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.

Pennsylvania Legislative Journal-House, October 29, 2019, 1740-41 (emphases added). Section 11 of Act 77 thus is not a generic, boilerplate nonseverability provision included by the General Assembly as a judicial hamstringing measure unrelated to the careful and laborious political compromises weaved throughout the statute. The General Assembly specifically listed certain non-negotiable sections of Act 77 that were essential to those compromises and, accordingly, are not severable. Both Sections 6 and 8 are included in that list. Section 11 therefore must be enforced by this Court.

The Majority appears to acknowledge, as it must, that its broad pronouncements here trigger the applicability of Section 11 of Act 77, which applies anytime the **application** of Act 77's provisions are declared to be invalid. Nevertheless, the Majority circumvents this by deciding that it will not enforce Section 11 because, in the Majority's view, the rest of Act 77 can function without the voter declaration requirements. The Majority conducts no analysis at all concerning the General Assembly's intent, but, rather, in its "discretion," decides not to enforce Section 11 because the **Majority's intent** is that the rest of Act 77 function without the voter declaration requirements. That decision simply is not the Majority's to make.

Finally, I hasten to reiterate my conclusion that the voter declaration requirements are valid and, accordingly, Act 77 can remain on the books and its provisions may be enforced. That is the most rationale, commonsense, and honest

application of the Free and Equal Elections Clause and our Supreme Court's precedent interpreting it. It is the Majority's **misapplication** of the Clause that necessitates an end run around the General Assembly's intent, all so the Majority can avoid being ascribed with exactly what it has done here: invalidate Act 77 and, with it, absentee and mail-in voting in Pennsylvania.

V. CONCLUSION

The members of the Majority have discarded their judicial robes and donned legislative hats to re-write both the Free and Equal Elections Clause and Act 77, all so that they might invalidate the simplest and perhaps **least** burdensome of all ballot-casting requirements. Today the Majority says that requiring the date on the voter declaration on a mail-in or absentee ballot envelope is subject to strict judicial scrutiny and cannot be enforced because doing so unconstitutionally denies the voting franchise altogether. I must wonder whether walking into a polling place, signing your name, licking an envelope, or going to the mailbox can now withstand the Majority's newly minted standard. Of course, those everyday ballot-casting requirements are all more burdensome and prohibitive than the voter declaration requirements, but they implicitly remain part of the Election Code. For now.

I would follow Supreme Court precedent faithfully, leave the voter declaration requirements intact, and not upend that Court's directive in *Ball* that ballots that contain undated or misdated voter declaration must not be counted. Changing, eliminating, or rendering directory the voter declaration requirements are all viable options for the General Assembly, but not for this Court. We must exercise judicial review with great care so as to not usurp the General Assembly's role in regulating the manner and method of voting. Adherence to this long-standing rule of jurisprudence and preservation of the separation of powers is especially important

in the politically-charged and highly partisan atmosphere in which we now live and work. Exceeding our function as impartial arbiters of the constitution and rewriting legislation to keep up with the times does little to reinforce trust and respect for the Commonwealth's system of justice. I fear that the Majority has neglected this important consideration today.

For all of the foregoing reasons, I dissent.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge