IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 68 MAP 2024

Black Political Empowerment Project, Power Interfaith, Make the Road Pennsylvania, ONEPA Activists United, New PA Project Education Fund, Casa San Jose, Pittsburgh United, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania,

Petitioners/Appellees,

v.

Al Schmidt, in his official capacity as Secretary of the Commonwealth, Philadelphia County Board of Elections, Allegheny County Board of Elections,

Respondents,

Republican National Committee and Republican Party of Pennsylvania,

Intervenors/Appellants.

INTERVENORS/APPELLANTS' PRINCIPAL BRIEF

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INTRODUCTION

The Commonwealth Court majority's decision is unprecedented, rests on multiple reversible errors, and threatens to unleash chaos, uncertainty, and an erosion of public confidence in the imminent 2024 general election in which millions of Pennsylvanians will vote for President, U.S. Senator, U.S. Representative, and scores of state and local offices.

In a first for Pennsylvania courts, the majority applied strict scrutiny to uphold a Free and Equal Elections Clause challenge to a neutral ballot-casting rule: the General Assembly's date requirement for mail ballots already upheld under state law by this Court, *see Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372-74 (Pa. 2020); *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022), 289 A.3d 1 (Pa. 2023), and under federal law by the Third Circuit, *Pa. State Conf. of NAACP v. Sec'y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024).[1] The majority arrived at this reversible result only by departing from this Court's controlling precedent, disregarding procedural defects in Petitioners' suit, and ordering a remedy that *violates* the Free and Equal Elections Clause.

Most obviously, the majority's decision is wrong because this Court *already rejected* a Free and Equal Elections challenge to the date requirement. The date

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

requirement is one component of the General Assembly's declaration mandate, which requires voters to "fill out, date, and sign" a mail-ballot outer envelope. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). In *Pennsylvania Democratic Party*, this Court upheld the declaration mandate against a Free and Equal Elections challenge, even though the General Assembly provided no notice-and-cure opportunity and instead required ballots to be "rejected due to minor errors" in compliance. 238 A.3d at 372, 374. Because the *entire* declaration mandate is constitutional, so, too, is its date requirement *component*.

Even if *Pennsylvania Democratic Party* did not directly control the question of the date requirement's constitutionality, it still would require reversal. There, the Court declined to apply strict scrutiny or any balancing test to resolve Free and Equal Elections challenges to ballot-casting rules. *See id.* at 374. Quite the contrary: This Court held that "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature." *Id.* It therefore resides with the General Assembly to determine "the procedures for casting and counting a vote by mail" and whether "minor errors" in compliance require "reject[ing]" ballots. *Id.*

The majority thus erred when it applied strict scrutiny. *See id.*; *Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998) ("To subject every voting regulation to strict scrutiny … would tie the hands of states seeking to assure that elections are operated

equitably and efficiently"). Nor could strict scrutiny apply because, if it did, the Clause would imperil *every* "reasonable, non-discriminatory restriction[]" the General Assembly has enacted "to ensure honest and fair elections" in Pennsylvania. *Pa. Democratic Party*, 238 A.3d at 369-70. Even Secretary Schmidt agreed below that strict scrutiny is inapplicable. *See* Secretary's Brief In Support Of Petitioners' Application 16 (June 24, 2024) ("Sec'y Br.").

Instead, as more than a century of this Court's precedent makes clear, a ballot-casting rule can violate the Clause only when it makes voting "so difficult as to amount to a denial … of the franchise." *Winston v. Moore*, 91 A. 520, 523-24 (Pa. 1914); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018) ("*LWV*"). The date requirement easily falls on the constitutional side of that line. Signing and dating important documents as part of everyday life—and dating a mail-ballot declaration is a usual burden of voting, not an effective "denial" of "the franchise." *LWV*, 178 A.3d at 810.

Petitioners adduced—and the majority cited—no evidence that the requirement is objectively "difficult" to comply with. *Id.* Instead, the majority pointed to the number of noncompliant ballots in past elections. *See* Appendix ("App.") 12-13, 75, 82. But even if that number were relevant, undisputed evidence the majority largely ignored *rebuts* the majority's conclusion.

In the first place, the date requirement is inapplicable to in-person voting, the method the majority of Pennsylvanians use according to Petitioners' figures. Moreover—again according to Petitioners' own figures—*more than 99% of mail voters comply* with the requirement, and that rate continues to *increase*. A rule that is inapplicable to most voters and complied with by more than 99% of the remainder cannot be "so difficult" as to deny "the franchise." *Winston*, 91 A. at 523, 524. And it has never been easier to comply with the requirement, thanks to the Secretary's new July 1, 2024 Directive: The Directive requires county boards to make changes to the mail-ballot declaration form that—even the majority agreed—"eliminate[]" the most common forms of dating errors in past elections. App. 19.

In its eagerness to address the merits, the majority dashed past procedural defects barring it from wading into this dispute in the first place. The panel lacked jurisdiction for two reasons. *First*, the Secretary is the only Commonwealth official named as a Respondent, but he is not an indispensable party because he does not enforce the date requirement and wields "no control over county boards' administration of elections." App. 46 (majority). *Second*, Petitioners failed to join indispensable parties: 65 county boards that *are* responsible for enforcing the requirement. *Id.* As a result, if anything, it is *the majority's Order that violates* the Free and Equal Elections Clause. The Order prohibits only the two county boards Petitioners joined—Philadelphia and Allegheny—from "strictly enforcing the" date

requirement, App. 93 ¶ 4, but has no effect on the other 65 county boards, which remain bound to enforce the "mandatory" requirement, *see Ball*, 289 A.3d 1. The Order thus does not "treat[]" Pennsylvania voters "alike" or "the same way under similar circumstances," so it violates the Clause, *see Winston*, 91 A. at 523, as well as another constitutional provision, Pa. Const. art. VII, § 6 (election rules must be "uniform throughout the State"), the Election Code, *see* 25 P.S. § 2642(g) (elections must be "uniformly conducted" throughout the Commonwealth), and the Equal Protection Clause, *see Bush v. Gore*, 531 U.S. 98, 106-07 (2000) (U.S. Constitution forbids use of "varying standards to determine what [is] a legal vote" from "county to county").

The Court should reverse.

BACKGROUND

In 2019, a bipartisan majority of the General Assembly adopted universal mail voting for the first time in history. Act of Oct. 31, 2019, P.L. 552, No. 77, sec. 8 ("Act 77"); *see* 25 P.S. § 3150.11(a). As part of that compromise in the historic Act 77, the General Assembly maintained the longstanding requirement that mail voters "fill out, date and sign the declaration" on the ballot return envelope. Act 77, sec. 6, 8; *see* 25 P.S. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3). This Court has already upheld this declaration mandate against a Free and Equal Elections challenge, *see Pa. Democratic Party*, 238 A.3d at 373-74, and held that the date requirement is

mandatory, *see Ball*, 289 A.3d at 20-23. The Third Circuit has upheld the requirement under the federal Materiality Provision. *Pa. State Conf.*, 97 F.4th 120.

Four original Petitioners in this suit—Black Political Empowerment Project, Make The Road Pennsylvania, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania—first filed a suit challenging the date requirement in federal court in November 2022. They lost that challenge, *see id.*, yet continue to pursue federal constitutional challenges in federal court, *see* Second Am. Compl., ECF No. 413, *Pa. State Conf. of NAACP v. Schmidt*, No. 22-CV-339 (W.D. Pa. filed June 14, 2024). Instead of pleading their various challenges in a single action, Petitioners have pursued a piecemeal approach. On May 28, 2024—more than 18 months after filing their first suit—Petitioners filed yet another action, this time in Commonwealth Court, raising a Free and Equal Elections challenge.

The Petition named three Respondents: Secretary of the Commonwealth Al Schmidt and two county boards of elections, Philadelphia and Allegheny (together, "the Boards"). *See* App. 225 ¶ 1. Petitioners did not join the 65 other county boards, even though they alleged that several have enforced the date requirement. *See* App. 226 ¶ 4. Petitioners sought an order "enjoin[ing] further enforcement" of the date requirement. App. 290-91 ¶ 92 (c).

The Election Code grants the Secretary no authority to enforce the requirement or determine whether any ballot is valid. *See* 25 P.S. § 2621 (setting out

Secretary's limited powers). Rather, those powers reside exclusively with the county boards. *See* 25 P.S. § 2642 (setting out boards' powers); App. 259-60 ¶ 44.

The only actions of the Secretary that Petitioners challenge are non-binding guidance documents he issued to county boards. *See, e.g.*, App. 228-86 ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36, 42-43, 79. Petitioners expressly disclaimed seeking any relief based upon the Secretary's prescription of the form of the mail-ballot declaration. *See* Petitioners' Memorandum In Support of Summary Relief 33 (June 24, 2024) ("Petitioners' Mem."). They told the Commonwealth Court that they "simply seek a ruling that *enforcement* of the date requirement" violates the Free and Equal Elections Clause and "do not seek an order barring Respondents from continuing to direct voters to date mail ballot declaration forms, or from continuing to include a date field next to the signature line" on the declaration. *Id.* (emphasis added); *see also* Petitioners' Opposition to Motion for Summary Relief 52 (July 8, 2024) (same) ("Petitioners' Opp.").

Because the named Respondents have consistently declined to defend the date requirement, the Commonwealth Court granted the Republican National Committee and Republican Party of Pennsylvania ("Republican Intervenors") intervention to defend it. The Commonwealth Court also granted intervention on Petitioners' side to the Democratic National Committee and Pennsylvania Democratic Party, who also intervened to challenge the date requirement in *Ball*, *see* Br. of Intervenor-

Respondents, *Ball v. Chapman*, No. 102 MM 2022, 2022 WL 18540587 (Pa. Oct. 25, 2022) ("Democratic Intervenors' *Ball* Br."), and in the Third Circuit appeal, *see* Order, ECF No. 129, *Pa. State Conf. of NAACP v. Sec'y*, No. 23-3166 (3d Cir. Jan. 3, 2024).

A divided Commonwealth Court panel held that the date requirement is unconstitutional under the Free and Equal Elections Clause. Applying strict scrutiny, the majority concluded that the requirement is unconstitutional because it mandates that "undated or incorrectly dated" mail ballots be rejected and, in the majority's view, is "meaningless." App. 82. The majority also rejected various procedural objections to Petitioners' suit. *See* App. 42-62.

The majority declared that "the Election Code's dating provisions are invalid and unconstitutional as applied to qualified voters who timely submit undated or incorrectly dated [mail] ballots." App. 93 ¶ 3. It also entered an Order permanently enjoining the Secretary and the Boards from "strictly enforcing" the date requirement. App. 93 ¶ 4. The Order makes no mention of the form of mail ballots or the mail-ballot declaration and does not direct the Secretary to make any changes to either. *See* App. 92-92. The Order has no effect on the 65 county boards not joined as Respondents, which remain bound to enforce the requirement. *See Ball*, 289 A.3d 1.

Judge McCullough dissented because the majority "usurp[ed] the General Assembly's role in regulating the manner and method of voting." App. 149. Republican Intervenors timely appealed.

STANDARD OF REVIEW

In reviewing grants of summary relief by the Commonwealth Court, this Court reviews questions of law "*de novo*, and [the] scope of review is plenary." *Pa. Mfrs. Ass'n. Ins. Co. v. Johnson Matthey, Inc.*, 188 A.3d 396, 398 (Pa. 2018).

ARGUMENT

The majority's decision fails at the threshold—and should be reversed—because the Commonwealth Court lacked jurisdiction over Petitioners' suit for at least two reasons. *First*, the Secretary is the only Commonwealth official named as a Respondent, but he lacks any authority to enforce the date requirement. He therefore is not an indispensable party to the *only* form of relief Petitioners seek: an order enjoining "enforcement" of the date requirement. App. 291 ¶ 92(c); Petitioners' Mem. 33; Petitioners' Opp. 52. The Commonwealth Court therefore lacked original jurisdiction. *See* 42 Pa. C.S. § 761(a)(1).

Second, Petitioners failed to join indispensable parties that *do* enforce the date requirement: the other 65 county boards. The result not only was a judgment issued without jurisdiction, but an Order that creates disparate treatment of identically situated voters across the Commonwealth in violation of the Pennsylvania

Constitution, the Election Code, and the Equal Protection Clause.

The Court therefore should reverse without even addressing the merits. But if it does reach the merits, it should reverse on that basis. The majority's decision rests on an unprecedented and patently erroneous application of strict scrutiny to a neutral ballot-casting rule that the General Assembly passed to facilitate universal mail voting as part of the historic bipartisan Act 77 compromise. It therefore is irreconcilable with *Pennsylvania Democratic Party*, *Ball*, and an unbroken line of this Court's precedent delineating the Free and Equal Elections Clause. The Court should reject the majority's flawed analysis and uphold the General Assembly's duly enacted and constitutional date requirement.

I. THE COMMONWEALTH COURT LACKED JURISDICTION.

The Court should reverse because the Commonwealth Court lacked jurisdiction for two reasons: The Secretary is not an indispensable party to Petitioners' sole requested relief, and Petitioners failed to join 65 county boards, which are indispensable to that relief.

A. The Secretary Is Not A Proper Or Indispensable Party.

"Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth." *Commonwealth v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009). The sole basis of subject matter jurisdiction that Petitioners invoked and the Commonwealth Court purported to exercise is 42 Pa. C.S.

§ 761(a)(1), App. 227 ¶ 7; App. 49 (majority), which grants the Commonwealth Court original jurisdiction only over civil actions "[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity." 42 Pa. C.S. § 761(a)(1). The "Commonwealth government" includes "departments, boards, commissions, authorities and officers and agencies of the Commonwealth," but not political subdivisions, local authorities, or local officers or agencies. *Id.* § 102.

"It is well settled that merely naming … a Commonwealth party as one of several defendants does not necessarily establish" jurisdiction "under Section 761." *In re Petition for Enforcement of Subpoenas*, 214 A.3d 660, 668 (Pa. 2019). Instead, "[c]ase law has long established that, in order for the Commonwealth Court to exercise original jurisdiction under 42 Pa. C.S. § 761(a)(1), the Commonwealth [entity] must be an indispensable party to the action." *Id.* at 664.

The "basic" indispensability inquiry is "whether justice can be done in the absence of" that party. *Pa. State Educ. Ass'n v. Dep't of Cmty. and Econ. Dev.*, 50 A.3d 1263, 1277 (Pa. 2012). A Commonwealth party may be declared indispensable only when "meaningful relief" cannot conceivably be afforded without that party's direct involvement in the action. *Id.* at 1267; *see also Scherbick v. Cmty. Coll. of Allegheny Cnty.*, 387 A.2d 1301, 1303 (Pa. 1978); *Foreman v. Chester-Upland Sch. Dist.*, 941 A.2d 108, 113 (Pa. Commw. Ct. 2008). Thus, a Commonwealth party is not indispensable when the claimant cannot or does not seek "meaningful relief"

from it. *Pa. State Educ. Ass'n*, 50 A.3d at 1267; *Scherbick*, 387 A.2d 1301, 1303; *see also In re Petition*, 214 A.3d at 667.

In 2022, the Commonwealth Court applied these principles to dismiss for lack of jurisdiction an action brought by Republican Party entities and voters against the Secretary and all 67 county boards. *See Republican Nat'l Comm. v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) (Ceisler, J.), App. 381. The *Republican National Committee* petitioners challenged certain boards' adoption of notice-and-cure procedures for defective mail ballots. App. 362. The only action of the Secretary they challenged was his guidance document regarding county boards' administration of elections. App. 369-75.

The Commonwealth Court held that any guidance of the Secretary regarding county boards' administration of elections is not legally binding on, or enforceable against, the boards. App. 374-75, 79-83; *see also In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020) ("[T]he Secretary has no authority to definitively interpret the provisions of the Election Code."); *Ziccarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at *5 n.6 (W.D. Pa. Jan. 12, 2021) ("[U]nder Pennsylvania law, the Secretary's pre-election guidance is just that—guidance. County boards of elections ultimately determine what ballots to count or not count in the first instance."). That is because the "Secretary does not have control over the County Boards'

administration of elections, as the General Assembly conferred such authority solely upon the County Boards." *Republican Nat'l Comm.*, App. 380 ("not[ing]" that the Secretary's "duties and responsibilities" under the Election Code are quite "limited"); *see also* 25 P.S. §§ 2621, 2642; *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *10 (Pa. Commw. Ct. Aug. 19, 2022) (the Secretary acknowledging he "does not have the authority to direct the Boards to comply with [a court] order.").

Accordingly, the Commonwealth Court held that the Secretary's issuance of non-binding guidance was insufficient to make him an indispensable party in a challenge to county boards' notice-and-cure practices. *See* App. 378-82. Rather, the Commonwealth Court concluded that because county boards administer elections free from the Secretary's authority or control, the petitioners could obtain "meaningful relief" without the Secretary through suits against county boards. *See* App. 371-73. It therefore dismissed the case for lack of subject matter jurisdiction. *See* App. 378-88.

Here as well, the Secretary is not an indispensable party. The only actions of the Secretary that Petitioners challenge are his non-binding guidance documents, *see, e.g.*, App. 228-86 ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36, 42-43, 79, but those documents do not make him indispensable, *see Republican Nat'l Comm.*, App. 375-76, 378-83; *see also In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1078

n.6; *Ziccarelli*, 2021 WL 101683, at *5 n.6. The only *relief* Petitioners seek is an injunction against enforcement of the date requirement, *see* App. 291 ¶ 92(c); Petitioners' Mem. 33; Petitioners' Opp. 52, but the Secretary has no authority, and plays no role, in such enforcement, *see* 25 P.S. § 2621. Rather, that authority rests exclusively with the county boards. *See id.* § 2642; App. 259-61 ¶ 44.

That the Secretary plays no role in enforcing the requirement is evident from this Court's remedial order in *Ball*. Even though the *Ball* petitioners named the Secretary as a respondent, the remedial order was directed only to the 67 county boards, *not* to the Secretary, thus confirming that enforcement of the requirement rests with the boards, not the Secretary. *See* 284 A.3d 1189, 1192, Nov. 1, 2022 Order ("The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting . . .").

Because the Secretary plays no role in enforcing the date requirement, Petitioners can—and must—obtain the "meaningful relief" they seek "in the absence of" the Secretary, *Pa. State Educ. Ass'n*, 50 A.3d at 1277; *Scherbick*, 387 A.2dat 1303; *see also In re Petition*, 214 A.3d at 667, through actions against county boards, *see* App. 99-100 (dissent) ("The relief Petitioners seek … can *only* be afforded against county boards of elections."); *see also Ball* Order; *Republican Nat'l Comm.* App. 375-76, 378-83. The Secretary therefore is not an indispensable party, meaning the Commonwealth Court lacked jurisdiction and should have dismissed the

Petition. *See* 42 Pa. C.S. § 761(a)(1); App. 99-100 (dissent); *Pa. State Educ. Ass'n*, 50 A.3d at 1277; *Scherbick*, 387 A.2d at 1303.

In fact, Petitioners not only can obtain meaningful relief from county boards, but any relief they obtain from the Secretary is also meaningless because it would do nothing to halt "enforcement" of the requirement. App. 291 ¶ 92(c); Petitioners' Mem. 33; Petitioners' Opp. 52. Take, for example, the majority's Order against "strictly enforcing" the requirement: That Order, as it runs against the Secretary, will *not* result in any county board declining to enforce the date requirement. *See Ball*, 289 A.3d 1. And any order directing the Secretary to rescind or modify his guidance documents—which the majority *did not even enter*, *see* App. 92-94—also would not result in any county board counting noncompliant ballots because those documents do not define boards' legal obligations, *see Ball*, 289 A.3d 1; *Republican Nat'l Comm.*, App. 371-72, 378-83; *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1078 n.6; *Ziccarelli*, 2021 WL 101683, at *5 n.6. For this reason, the Secretary not only is not indispensable; Petitioners also lack standing to sue him because his actions bear no "causal connection" to their alleged harm from enforcement of the requirement. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 473 (Pa. 2021).

The majority nonetheless concluded that the Secretary is indispensable on two bases, *see* App. 43-50, but neither succeeds.

First, the majority reasoned that "any declaration made in this case will certainly have an effect on [the Secretary's] duties and responsibilities under the Election Code as they relate to his prescription of the form of absentee and mail-in ballots generally, and the form of the declarations thereon specifically." App. 48. This is demonstrably incorrect: Petitioners *disclaimed* seeking any relief regarding the form of mail ballots or the declaration. *See* Petitioners' Mem. 33; Petitioners' Opp. 52. And, in fact, the majority's Order makes no mention of the form of the ballot or declaration and does not require the Secretary to make any changes to either. *See* App. 92-94. This suit—and the majority's Order against *enforcement* of the date requirement—thus have *no* "effect on [the Secretary's] duties and responsibilities under the Election Code." App. 48 (majority).

Second, the majority reasoned that the Secretary is indispensable because he has issued "various … guidance" documents regarding the date requirement. *See* App. 47. But once again, the Secretary's issuance of non-binding guidance does not make him indispensable in an action challenging enforcement of the requirement, which is the exclusive province of county boards. *See* 25 P.S. §§ 2621, 2642; *Republican Nat'l Comm.*, App. 374-75, 378-83; *see also In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1078 n.6; *Ziccarelli*, 2021 WL 101683, at *5 n.6.

Moreover, this is not a case where the Secretary issued guidance advocating one side of "an unsettled legal question." *Ball*, 289 A.3d at 20. Instead, the

Secretary's most recent guidance—which followed *Ball* and the Third Circuit ruling upholding the date requirement—merely lays out "an existing interpretation of settled law." *Id.* at 19; *see* Email On Behalf Of Deputy Secretary Marks to County Boards of Elections (Apr. 19, 2024) (cited App. 47). Petitioners thus have failed to prove standing to challenge the Secretary's actions, much less that the Secretary is indispensable. *See Ball*, 289 A.3d at 19.

Finally, Petitioners' joinder of the two Boards also does not suffice to invoke the Commonwealth Court's original jurisdiction. As even the majority agreed, county boards are local authorities, not Commonwealth agencies, for purposes of Section 761(a)(1). *See* App. 49; *Republican Nat'l Comm.*, App. 385-88. That holding is correct because the county boards are not denominated as, and have been conferred no powers of, Commonwealth agencies. Instead, their authority is strictly local to their own counties. *See, e.g.*, *T&R Painting Co., Inc. v. Phila. Hous. Auth.*, 353 A.2d 800 (Pa. 1976) (county housing authorities are local authorities, not Commonwealth agencies). The Commonwealth Court erred in exercising jurisdiction over this suit, and the Court should reverse on that basis alone.

B. Petitioners Failed To Join Indispensable Parties.

Even if the Secretary is indispensable, the Court still should reverse because Petitioners failed to join indispensable parties: the county boards that enforce the date requirement in 65 of Pennsylvania's 67 counties.

"Whenever it appears by suggestion of the parties or otherwise … that there has been a failure to join an indispensable party, the court shall … dismiss the action." Pa. R. Civ. P. 1032(b); *see also Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975) (proceeding without an "indispensable party … renders any order or decree of court null and void for want of jurisdiction"). This Court's analysis of "the indispensability of a party" turns on a variety of considerations, including whether the absent parties "have a right or interest related to the claim," "the nature of that right or interest," whether that "right or interest" is "essential to the merits" and whether "justice" can "be afforded without violating the due process rights of absent parties." *In re Petition*, 214 A.3d at 668. Thus, a party is indispensable when "his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002).

The Petition reveals that Petitioners believed the 65 county boards were indispensable: It makes allegations regarding some of those boards' enforcement of the date requirement, *see* App. 226-27 ¶ 4, and suggests that the 65 boards would be required to stop "setting aside mail ballot envelopes with missing or incorrect voter-written dates" if Petitioners' requested relief were granted, App. 286 ¶ 79. Petitioners therefore should have joined the 65 boards as a matter of their own pleading: Obviously, a court order changing those boards' obligations with respect

to enforcement of the date requirement affects their "right or interest essential to the merits" and cannot be entered in their absence without "violating the[ir] due process rights." *In re Petition*, 214 A.3d at 668. Petitioners *never* explained how a court order *in a case in which the boards were not even parties* could change the boards' obligation to enforce the requirement—much less how an order from the Commonwealth Court could override their enforcement obligations under this Court's decision in *Ball*.

In all events, the 65 boards are indispensable because the majority's Order granting Petitioners' requested relief ensnares them in a host of potential constitutional and legal violations. Those boards have obvious "interest[s]" in avoiding such violations on "the merits," and ensnaring them in such violations in a case in which they are not even parties "violat[es]" their "rights." *In re Petition*, 214 A.3d at 251; App. 101-02 (dissent).

Indeed, even the majority recognized that the Free and Equal Elections Clause requires voting laws to "treat[] all voters alike" and to impose any burdens on voters "in the same way under similar circumstances." App. 71 n.53 (citing *Winston*, 91 A. at 523). But its Order violates these precepts. It *prohibits* the two Boards from "strictly enforcing" the date requirement, App. 93-94 ¶ 4, but has *no* effect on the 65 non-joined boards, which remain *bound* to enforce the mandatory date requirement, *see Ball*, 289 A.3d at 20-23. Thus, voters in Allegheny and Philadelphia Counties

are not "treat[ed] … alike" and "in the same way under similar circumstances" as the voters in the rest of the Commonwealth, and the Court's Order violates the Clause. *Winston*, 91 A. at 523.

The Order's disparate treatment of voters based on their county of residence also violates the Pennsylvania Constitution's requirement that voting laws be "uniform throughout the State," Pa. Const. art. VII, § 6; *Kerns v. Kane*, 69 A.2d 388, 393 (Pa. 1949) ("To be uniform in the constitutional sense, such a law must treat all persons in the same circumstances alike."), the Election Code's requirement that elections be "uniformly conducted" throughout the Commonwealth, 25 P.S. § 2642(g), and the Equal Protection Clause, *see Bush*, 531 U.S. at 106-07 (U.S. Constitution forbids use of "varying standards to determine what [is] a legal vote" from "county to county"); App. 101-02 (dissent).

The majority's answers to these problems are baffling. It acknowledged the "mandatory" rule that, "in an action for a declaratory judgment, all persons having an interest that would be affected by the declaratory relief sought ordinarily must be made parties to the action." App. 51-52 (cleaned up). It even acknowledged that "all 67 county boards have an interest in this matter based on their duties and responsibilities to canvass and count [mail] ballots under the Election Code"—and that its decision could "affect the other 65 county boards' duties with respect to counting undated and incorrectly dated ballots." *Id.* at 52. Nevertheless, the

majority steamed ahead without the 65 boards on three rationales, none of which withstands scrutiny.

First, the majority thought it could proceed because the Petition "named *only* the Philadelphia and Allegheny County" boards. *Id.* But a claimant's pleading decisions do not affect, much less dictate, whether non-joined parties are indispensable; otherwise, a claimant would *never* have to join any party and there would be no indispensable parties rule. *See, e.g.*, *In re Petition*, 214 A.3d at 667-68; Pa. R. Civ. P. 1032(b). That is especially true here, where Petitioners sued only Respondents that *agree* with Petitioners' challenges on the merits, and where Petitioners intentionally did not join county boards that have vigorously defended the date requirement in parallel challenges Petitioners have brought in federal court. *See, e.g.*, *Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 643-44 (W.D. Pa. 2023) (noting defenses by Lancaster and Berks County Boards). Petitioners cannot use collusive litigation to leverage relief against 65 boards they did not bother to join.

Second, the majority thought "achieving justice is [not] dependent upon the participation of all the county boards" because the 65 boards did not seek "to intervene in this case." App. 52-53. The non-joined boards have no obligation to volunteer to be bound by a judgment in this case by seeking to intervene on the compressed schedule the Commonwealth Court adopted. Rather, Petitioners had the

obligation to join them and bear the consequence of dismissal for failing to do so. *See, e.g.*, Pa. R. Civ. P. 1032(b); *Mains v. Fulton*, 224 A.2d 195, 196 (Pa. 1966). And this is not a case where "[countless] parties" would have to be joined and make the case "impractical." App. 53 (majority) (discussing *City of Phila. v. Commonwealth*, 838 A.2d 566, 568 (2003)). Rather, this case is *exactly like Ball*, where *all 67 county boards were joined* to a dispute regarding enforcement of the date requirement that this Court resolved without any "impracticality." *See Ball*, 289 A.3d 1.

Third, the majority dismissed "equal protection concerns" because "all 67 county boards of this Commonwealth do not conduct elections in their respective counties with strict uniformity to each other county in all respects." App. 53. That is a strawman. The Equal Protection Clause prohibits disparate rules for determining "what [is] a legal vote," *Bush*, 531 U.S. at 107; it does not prohibit variations in any conceivable election-administration procedure (like different layouts for polling places). Indeed, three Justices of this Court voted to preliminarily enjoin the only arguably apt example of divergent rules cited by the majority—the offer of notice-and-curing procedures by some county boards but not others. *See* App. 53; *Republican Nat'l Comm. v. Chapman*, 284 A.3d 207, 208 (Pa. 2022) (Todd, CJ, Mundy, Brobson, JJ.).

Petitioners' failure to join the 65 boards meant the Commonwealth Court lacked jurisdiction. The Court should reverse.

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

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

The majority did something truly unprecedented: wield the Clause to strike down a neutral ballot-casting rule that governs how voters complete and cast their ballots. *See* App. 95 (dissent) (denouncing "untethered and unprecedented" decision); A. MCCALL, ELECTIONS, *IN* K. GORMLEY ET. AL., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 215-232 (identifying the types of cases the Clause has been applied in). But in order to function properly, elections must have rules, including ballot-casting rules. The Judiciary may not disregard those rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had his or her ballot rejected. *See, e.g.*, *Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009); *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017); *accord Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissental) ("When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.' Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot. 'Casting a vote,

whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.'" (quoting *Brnovich v. DNC*, 594 U.S. 647, 669 (2021)); *Pa. State Conf.*, 97 F.4th at 133-34.

Thus, a voter does not suffer constitutional harm when his ballot is rejected because he failed to follow the rules the General Assembly enacted for completing or casting it. As this Court held over a century ago (and recently reaffirmed), "[t]he power to regulate elections is legislative." *Pa. Democratic Party*, 238 A.3d at 373 (*quoting Winston*, 91 A. at 522). Thus, "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate"—including the adoption of ballot-casting rules and the decision whether ballots should be "rejected due to minor errors made in contravention of those requirements"— "to the Legislature." *Id.* at 374.

A party seeking to strike down a statute as unconstitutional must meet an extremely high burden. The "starting point" is the presumption that "all legislative enactments" are constitutional and "[a]ny doubts are to be resolved in favor of a finding of constitutionality." *Mixon v. Commonwealth*, 759 A.2d 442, 447 (Pa. Commw. Ct. 2000); *LWV*, 178 A.3d at 801. This presumption of constitutionality is strong. *Mixon*, 759 A.2d at 447. To overcome it, Petitioners must prove the date requirement "clearly, palpably, and plainly violates the Constitution." *LWV*, 178 A.3d at 801. Indeed, a "statute is facially unconstitutional only where no set of

circumstances exist under which the statute would be valid." *Pa. Env't Def. Found.*, 161 A.3d at 938 n.31.

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

Second, even if the Court deems that to be an open question, Petitioners' claims fail on the Clause's plain text and history and the controlling precedent construing it. *See, e.g.*, *LWV*, 178 A.3d at 807-10.

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

Fourth, Petitioners' requested relief is improper. Employing the Free and Equal Elections Clause to invalidate the date requirement would "impermissibly distort[]" state law and, thus, violate the Elections and Electors Clauses of the U.S. Constitution. *Moore v. Harper*, 600 U.S. 1, 38 (2023) (Kavanaugh, J., concurring) (cleaned up); *see id.* at 34-36 (holding that federal courts must review state-court interpretations of federal election laws passed by state legislatures). And if this Court fails to reverse, the entirety of Act 77—including its creation of no-excuse mail voting for all Pennsylvania voters—has been invalidated under the non-severability provision the General Assembly enacted to protect its political

compromises in the Act. *See McLinko v. Dep't of State*, 279 A.3d 539, 609-610 (Pa. 2022) (Brobson, J., dissenting).

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

The majority's decision fails because this Court already has upheld the date requirement against Free and Equal Elections challenges.

Start with *Pennsylvania Democratic Party*, where the petitioners—who included Intervenor Pennsylvania Democratic Party—brought a Free and Equal Elections challenge to the declaration mandate of which the date requirement is part. *See* 238 A.3d at 372. The petitioners argued that mail ballots should be counted notwithstanding "minor errors" or "irregularities" in completion of the declaration. *Id.* at 372-73. They therefore asked this Court to hold that the Clause requires county boards to provide voters notice and an opportunity to cure such "minor errors" before rejecting the ballot. *See id.* at 373-74.

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

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

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

The majority's position that the date requirement serves no purpose and that mandatory application of it violates the Clause was also presented to this Court in *Ball*, including by the Democratic Intervenors here. *See* Brief of Respondent *Ball v. Chapman*, No. 102 MM 2022, 2022 WL 18540590, at *37 (Pa. Oct. 25, 2022) ("Imposing draconian consequences for insignificant errors could, as is the case here [] implicate the Constitution's Free and Equal Elections Clause[.]"); Democratic Intervenors' *Ball* Br., 2022 WL 18540587, at *1-2 & *8-10 (discussion alleged lack of purpose), *29-32 (making argument under Free and Equal Elections Clause). This Court even noted those arguments in its opinion. *See* 289 A.3d at 14-15 (discussing Free and Equal Elections Clause arguments); 16 n.77 (discussing

requirement's alleged lack of "functionality"). It nonetheless upheld the requirement as "unambiguous and mandatory" such that noncompliance renders the ballot legally "invalid," *id.* at 20-23, thus rejecting those arguments. The majority's reconsideration of those issues is therefore foreclosed by *Ball*.

The majority did not seriously engage these dispositive points. Rather, it attempted to distinguish this case from *Pennsylvania Democratic Party* because "notice and opportunity to cure procedures are *not* at issue" here. App. 68 (emphasis original). But the majority's argument by emphasis offers a distinction without a difference: Because the Court declined to impose a notice-and-cure requirement, the express import of *Pennsylvania Democratic Party* is that the declaration mandate and its date requirement component are constitutional even though "minor errors" in compliance require rejection of ballots. 238 A.3d at 374. This, therefore, is a simple *a fortiori* case.

As for *Ball*, the majority insisted that this Court considered only statutory arguments, App. 67, thus ignoring the Free and Equal Elections arguments this Court noted, *see* 289 A.3d at 14-15, 16 n.77. The majority even suggested it disagrees with this Court's statutory holding, citing older cases distinguishing between "mandatory" and "directory" provisions and pondering "weighty interests." App. 82-83 n.61. But this Court has now decisively abandoned that former approach to statutory construction, emphasizing that the General Assembly's use of the word

"shall" in voting rules is mandatory and definitive. *See Ball*, 289 A.3d at 21-22; *In re 2020 Canvas*, 241 A.3d at 1079 (Wecht, J., concurring and dissenting); *id.* at 1090 (Dougherty, J., concurring and dissenting).

The majority offered no plausible detour around *Pennsylvania Democratic Party* and *Ball*. The Court should adhere to those prior decisions and reverse.

B. The Date Requirement Does Not Violate The Constitution.

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

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

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

Precedent and history demonstrate that the Clause performs three functions.

First, the Clause prohibits arbitrary voter-qualification rules that disqualify classes of citizens from voting. *LWV*, 178 A.3d at 807. During Pennsylvania's colonial period, large numbers of Pennsylvanians were prohibited from voting because of religious or property-based qualifications. *Id.* at 804-05. Pennsylvania's Framers prohibited such arbitrary and discriminatory qualifications when they adopted the Clause. *See id.* at 807; *see* McCall, *supra*, at 217.

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

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

In accordance with the Clause's plain text and purpose, this Court has never

used it to strike down a neutral ballot-casting rule governing how voters complete and cast ballots. *See* App. 96 (dissent); McCall, *supra*, at 215-232 (discussing different ways Clause has been used). In fact, it has routinely *upheld* ballot-casting rules—such as the declaration mandate and the secrecy-envelope rule—against such challenges. *See Pa. Democratic Party*, 238 A.3d at 372-80. And it granted only *temporary* relief from the received-by deadline during the COVID-19 pandemic; it did not *invalidate* the deadline for all time, such as Petitioners seek with the date requirement. *See id.* at 371-72.

These holdings make perfect sense: The Clause delegates to the "Legislature" the "task of effectuating" its mandate, subject only to a guarantee that every voter shall have an equal *opportunity* to cast a vote, not that every voter will successfully utilize that opportunity. *Id.* at 374; *LWV*, 178 A.3d at 810. It therefore does not—and has never been interpreted to—restrict the Legislature's authority to adopt neutral ballot-casting rules. *See* App. 108 (dissent).

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

2. The Date Requirement Does Not Violate The Clause.

This Court applied this governing precedent to reject challenges to two sets of ballot-casting rules in *Pennsylvania Democratic Party*: the declaration mandate and the secrecy-envelope rule. *See* 238 A.3d at 372-80. As part of the declaration mandate, and like the secrecy-envelope rule, the date requirement is a neutral, non-discriminatory ballot-casting rule that does not violate the Clause. *See id.* at 372-73; *Mixon*, 759 A.2d at 449-50.

The majority below did not—and could not—claim that the date requirement unconstitutionally narrows who is eligible to vote or constitutes intentional discrimination by the bipartisan majority of the General Assembly that enacted Act 77. *See LWV*, 178 A.3d at 807. Instead, it relied on the Clause's third protection and believed that the requirement "make[s] it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.* at 810; *see* App. 71 (majority).

That is nonsense. In the first place, Pennsylvania law permits *all* voters to vote in person without complying with the date requirement. *See, e.g.*, 25 P.S. § 2811. So far from making voting "so difficult as to amount to a denial" of "the franchise," *LWV*, 178 A.3d at 810, the date requirement is *inapplicable* to an entire universally available method of voting—the method that the majority of Pennsylvania voters use to vote, even on Petitioners' own figures. *See* App. 266 ¶ 55 & n.6; App. 274-75 ¶ 70 (suggesting that 37% of Pennsylvania voters voted by mail

in the 2024 primary elections); 2022 General Election Official Returns (Statewide), November 8, 2022 (22.8% of ballots counted in the 2022 U.S. Senate election—1,225,446 out of 5,368,021—were mail ballots), https://tinyurl.com/3kfzwpzh. It is hard to see how a rule regulating no-excuse mail voting, which was "unknown in the Commonwealth for well over two centuries and is wholly a creature of recent, bipartisan legislate[on]," can violate any right to vote. App. 96 (dissent).

In the second place, even if the majority was correct that the Clause requires ignoring the preferred voting method of most Pennsylvania voters and focusing only on mail voting, there is nothing "difficult" about signing and dating a document, let alone "so difficult" as to deny the right to vote. *LWV*, 178 A.3d at 810. Petitioners' own position contemplates as much, since they do not challenge the "sign" component of the declaration mandate—and they offer no explanation as to how *dating* the declaration can be more difficult than *filling out and signing* it. Moreover, signing and dating documents is a mandatory and common feature of life. The forms provided in Pennsylvania statutes which provide spaces for both a signature and a date are too numerous to list here.[2] Consequently, "[n]o reasonable person would

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

find the obligation to sign and date a [mail-ballot] declaration to be difficult or hard or challenging." App. 128 (dissent).

Furthermore, both signing a piece of paper and writing a date on it are nothing more than the "usual burdens of voting," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring); App. 127 (dissent), not a "difficult[y]" so severe "as to amount to a denial" of "the franchise," *LWV*, 178 A.3d at 810. Indeed, *every* State requires voters to write pieces of information on voting papers—both for in-person and mail voting. *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a) (signature requirement); *id.* § 3050 (requirement to maintain in-person voting poll books); *Electronic Poll Books*, National Conference of State Legislatures (Oct. 25, 2019), ncsl.org/elections-and-campaigns/electronic-poll-books; *How States Verify Voted Absentee/Mail Ballots*, National Conference of State Legislatures (Jan. 22, 2024), ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots.

In fact, dating a ballot declaration is far less difficult than other tasks that have been upheld as non-burdensome and constitutional under the Clause and other constitutional provisions. As noted, this Court has already upheld against Free and Equal Elections challenges the entire declaration mandate and the secrecy-envelope rule. *See Pa. Democratic Party*, 238 A.3d at 372-80. The date requirement—like the signature requirement Petitioners do not challenge—is necessarily *easier* to

comply with than the full range of rules (including the "fill out," "date," and "sign" requirements) that form the declaration mandate.

Moreover, the United States Supreme Court has upheld as constitutionally non-burdensome "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering . . . required documents, and posing for a photograph" as required to obtain a photo identification for in-person voting. *Crawford*, 533 U.S. at 198 (opinion of Stevens, J.). It has also reasoned that "[h]aving to identify one's own polling place and then travel there to vote does not exceed the usual burdens of voting." *Brnovich*, 594 U.S. at 678. Yet both of these tasks are far more difficult than dating a ballot envelope (especially one prepared in accordance with the Directive, *see infra* 37-38)—so, *a fortiori*, the date requirement does not "make it so difficult [to vote] as to amount to a denial" of "the franchise." *LWV*, 178 A.3d at 810.

The majority below did not dispute any of these points. Instead, in concluding the date requirement "make[s] it so difficult [to vote] as to amount to a denial of the franchise," *LWV*, 178 A.3d at 810, that court relied on *only one* factor: the number of rejected ballots. App. 75 (showing burden by pointing to those who could not "*correctly* handwrite the date"). But this Court has never equated burdens on the right to vote with the number of rejected ballots. To the contrary, this aspect of this Court's Free and Equal Elections jurisprudence turns on the objective *burden*

imposed by the challenged rule—*i.e.*, whether the challenged rule "make[s] it so difficult [to vote] as to amount to a denial" of "the franchise"—not the number of voters who fail to comply with it. *LWV*, 178 A.3d at 810. And the majority did not "conduct[] any analysis of the *actual difficulty* [of complying with the date requirement] relative to every other generic and neutral ballot-casting requirement of the Election Code." App. 109 (dissent).

Taking a somewhat different approach, Justice Wecht has suggested that an election-administration rule is constitutional unless it "will result in a constitutionally intolerable ratio of rejected ballots" *Pa. Democratic Party*, 238 A.3d at 389 (Wecht, J., concurring). The date requirement is also constitutional under that standard, as Petitioners' own figures demonstrate. *See* App. 129-31 (dissent).

In particular, according to the figures Petitioners invoke, "10,657" mail ballots were not counted in the 2022 general election due to noncompliance with the date requirement. *See* App. 227-28 ¶¶ 8-9 (relying on data analysis by a lawyer advocating for invalidation of requirement in parallel federal challenge). But that represents only 0.85% of the 1,258,336 mail ballots returned statewide in the 2022 general election. *See* U.S. Election Administration Commission, *Election Administration and Voting Survey 2022 Comprehensive Report: A Report from the U.S. Election Assistance Commission to the 118th Congress* at 45, 47,

https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf. A requirement that over 99% of mail voters complied with cannot be "so difficult as to amount to a denial" of the "franchise." *LWV*, 178 A.3d at 810.

Moreover, this 0.85% noncompliance rate is *lower* than the historic noncompliance rate under the secrecy-envelope requirement. *See* MIT Election & Science Lab, *How Many Naked Ballots Were Cast in Pennsylvania's 2020 General Election?* (statewide rejection rate for noncompliance with secrecy-envelope requirement around 1%), https://electionlab.mit.edu/articles/how-many-naked-ballots-were-cast-pennsylvanias-2020-general-election. Thus, because the secrecy-envelope requirement does not violate the Free and Equal Elections Clause, *see Pa. Democratic Party*, 238 A.3d at 376-80, the date requirement cannot either.

Notably, the figures Petitioners invoke also show that the noncompliance rate *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 dating errors. *See* App. 274-75 ¶¶ 70, 73.

Furthermore, as even the majority recognized, the rejection rate will likely only *further decrease* because the Secretary's new Directive requires county boards to change the declaration in a manner that "eliminates" the most common forms of

dating errors in past elections. *See* App. 19. In fact, thanks to the Directive, it has never been easier to comply with the date requirement for at least three reasons.

First, the Directive requires county boards to preprint the entire year in the date field, *see* App. 154-55, so it "eliminates" the error of "a voter writing an incomplete or inaccurate year," App. 19 (majority). It also reduces, if not eliminates, the likelihood of voters writing their "birthdate" in the date field. App. 80.

Second, the Directive requires county boards to print "Today's date here (REQUIRED)," *see* App. 162, thus further specifying which date is "correct," App. 80 (majority).

Third, the Directive requires county boards to print four boxes in the date field and to specify that the date should be written in MM/DD format. *See* App. 154-55. It thus eliminates any confusion regarding whether voters should use the American or International dating conventions. *See* App. 270 ¶ 64(c).

Petitioners adduced—and the majority identified—no evidence that the date requirement imposes an unconstitutional "difficult[y]" on voters. *LWV*, 178 A.3d at 810. To the contrary, the record *forecloses* that conclusion. The Court should reverse.

3. Pennsylvania Law Forecloses The Majority's Application Of Strict Scrutiny.

The majority escaped this conclusion only by applying *strict scrutiny*. But that contravened well-established Pennsylvania law—as even the Secretary

indicated below. *See* Sec'y Br. 16.

Indeed, this Court has *never* applied strict scrutiny—or *any* kind of balancing test—when it has addressed Free and Equal Elections challenges to the General Assembly's ballot-casting rules. *See Pa. Democratic Party*, 238 A.3d at 372-80. In fact, it has foreclosed "subject[ing] every voting regulation to strict scrutiny." *Petition of Berg*, 713 A.2d at 1109.

The authorities the majority cited do not support its radical departure from this Court's precedents or application of strict scrutiny. The majority pointed to *Pennsylvania Democratic Party*, suggesting this Court held that any "significant" burden on the right to vote must satisfy strict scrutiny. App. 74-75. That is a misreading: That portion of the opinion addressed *federal* right-to-vote and First Amendment challenges to Pennsylvania's poll watcher rules, which this Court rejected. 238 A.3d at 380-86. By contrast, when the Court discussed the Free and Equal Elections challenges, it made no mention of *any* tiers or type of scrutiny. *See id.* at 372-380.

Next, the majority relied on a series of cases applying a rule of statutory construction that ambiguous election rules should be construed in favor of enfranchising voters. App. 11-12, 74-75. Those cases *applied* Pennsylvania's statutory secret-ballot rule and, thus, provide no support for invalidating a statutory provision. In *Appeal of Norwood*, for example, this Court quoted the statutory

language and persuasively explained that the voter complied with the statute, noting in passing that the statutory canon favoring voting bolstered its conclusion. 116 A.2d 552, 554 (Pa. 1955). *Appeal of Gallagher* did exactly the same thing: interpret and apply, not invalidate, the statutory ballot-secrecy rules. 41 A.2d 630, 631-32 (Pa. 1945). Such cases are irrelevant to the Free and Equal Elections challenge here—and even to the statutory question, because this Court already held that the date requirement is unambiguous and mandatory. *Ball*, 289 A.3d at 20-23.

Nor do the majority's citations to its own precedents support its rule. *Petition of Berg declined* to apply strict scrutiny. 712 A.2d 340, 342-44 (Pa. Commw. Ct. 1998) (cited App. 74). And in *Applewhite v. Commonwealth* (cited at App. 69, 74, 77), an unpublished decision, the Commonwealth Court enjoined enforcement of Pennsylvania's voter-identification law because Commonwealth officials were not applying that law in accordance with its terms, and that misapplication resulted in "hundreds of thousands" of eligible voters being stripped of the opportunity to vote entirely. 2014 WL 184988, at *11, *20-21 (Pa. Commw. Ct. Jan. 17, 2014); App. 104-06 (dissent). *Applewhite* therefore was a straightforward application of the Clause's protection of voters' equal "right to cast their vote." App. 104 (dissent); *see also LWV*, 178 A.3d at 807 (Clause guarantees "universal suffrage" by invalidating arbitrary rules that deprive large numbers of eligible individuals of access to the ballot box).

Precedent aside, the majority's test would dramatically and improperly usurp the General Assembly's authority over elections. *See* App. 109 (dissent); *see also Petition of Berg*, 713 A.2d at 1109 ("[S]trict scrutiny … would tie the hands of states seeking to assure that elections are operated equitably and efficiently"). Under the majority's approach, courts could apply strict scrutiny to invalidate any voting rule they disfavor merely by positing that the rule imposes a "significant burden" because less than 1% of a subset of voters fail to comply with it. App. 75.

That is not the law—and the implications would be extraordinary if it were. Under the majority's reading, the Clause would imperil *every* "reasonable, non-discriminatory restriction[]" the General Assembly has enacted "to ensure honest and fair elections" in Pennsylvania. *Pa. Democratic Party*, 238 A.3d at 369-70. Pennsylvania courts would be forced to apply one of the law's most demanding standards to the General Assembly's work any time a political party, elected official, or voter disliked a mandatory election rule that resulted in some votes going uncounted. *See, e.g.*, G. Gunther, The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). That reading, therefore, would force the Judiciary to routinely "second-guess the policy choices of the General Assembly." *Ins. Fed'n of Pa., Inc.*, 970 A.2d at 1122 n.15.

That approach is wrong and must be rejected. "While the Pennsylvania Constitution mandates that elections [shall] be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature." *Pa. Democratic Party*, 238 A.3d at 374; *see* Pa. Const. art. VII, § 14(a). And the Judiciary "may not usurp the province of the legislature by rewriting [statutes] … as that is not [the court's] proper role under our constitutionally established tripartite form of governance." *In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018). Instead of seizing the General Assembly's authority over election rules, this Court should reaffirm that "ballot and election laws [are] peculiarly within the province of the legislative branch of government," *Winston*, 91 A. at 522, and uphold the General Assembly's duly enacted date requirement because complying with it is not so "difficult as to amount to a denial" of the franchise, *LWV*, 178 A.3d at 810.

4. This Court Should Also Reject the Secretary's Proposed Test.

Unsurprisingly, even the Secretary—who has opposed the date requirement's legality in multiple parallel cases—did not advocate for strict scrutiny below. Instead, he argued that ballot-casting rules must merely be "reasonable [and] non-discriminatory." Sec'y Br. 16. That proposed test sounds exactly like rational-basis review. As discussed below, the date requirement *easily* satisfies that standard. *See infra* 44-48.

But in truth, there is no support even for the Secretary's invitation to use rational-basis review to second-guess ordinary ballot-casting rules. Under this Court's precedents, a ballot-casting rule gets *zero scrutiny* unless it renders voting "so difficult as to amount to a denial" of the franchise." *LWV*, 178 A.3d at 810; *see Pa. Democratic Party*, 238 A.3d at 373-74 (declining to apply balancing).

The Secretary invoked a few cases in an attempt to support his proposed test below, but none does. *Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015) did not address the Free and Equal Elections Clause or a challenge to a ballot-casting rule. *Id.* at 176-77. Instead, it addressed challenges under various other provisions of the Pennsylvania and U.S. Constitutions to the Secretary's certification of electronic voting machines used only in certain counties. *See id.* This Court, moreover, *rejected* all of those challenges. *See* 110 A.3d at 176-77. *Banfield* thus is doubly irrelevant: it does not suggest, much less prescribe, the analysis for a Free and Equal Elections challenge to a ballot-casting rule, and its *rejection* of constitutional challenges lends no support for the Secretary's arguments.

The Secretary also cited *DeWalt v. Bartley*, but *DeWalt* did not address a ballot-casting rule; rather, it addressed a challenge to rules for ballot access, prohibitions on electioneering in polling places, rules for poll watchers, and measures to protect ballot secrecy. *See* 24 A. 185, 186-88 (Pa. 1892). If anything, that case supports *upholding* the date requirement: This Court upheld the law

because "[t]here is no doubt of the power of the legislature to regulate elections" and the law did not make voting "so difficult and inconvenient as to amount to a denial" of the franchise. *Id.* at 186. The same is true of the date requirement.

The Secretary's other authorities below were even more inapt. *Independence Party Nomination* was a statutory interpretation case, not a constitutional case, that in any event reaffirmed that "the Legislature has the power to regulate the details of place, time, manner, etc." for elections. *Indep. Party Nomination*, 57 A. 344, 345 (Pa. 1904) (interpreting provision as to party nominations). And *Shankey v. Staisey*, upheld against a *federal* Equal Protection Clause challenge a rule regulating ballot access by minor political parties. 257 A.2d 897, 899, 902 (Pa. 1969).

There is no basis to adopt the Secretary's proposed reasonableness test. Instead, the Court should uphold the date requirement because compliance presents no unconstitutional "difficult[y]," *LWV*, 178 A.3d at 810, so the Free and Equal Elections Clause leaves "to the Legislature" the decision to adopt it and to mandate rejection of ballots "due to minor errors made in contravention of" it. *Pa. Democratic Party*, 238 A.3d at 374.

5. The Date Requirement Satisfies Any Applicable Interest Balancing.

Thus, neither Petitioners, the majority, nor the Secretary justified application of a judicial balancing test to the date requirement. But even if such an approach

were legitimate, the Court still should reverse because the date requirement would satisfy it, and the majority erred in concluding otherwise.

As a majority of this Court has recognized, the requirement serves several weighty interests and an "unquestionable purpose." *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see id.* at 1087 (opinion of Justice Wecht) ("colorable arguments … suggest [the requirement's] importance"). To start, it "provides proof of when [an] 'elector actually executed [a] ballot in full,'" *id.* at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy), and thus facilitates the "orderly administration" of elections, undoubtedly a legitimate interest, *Crawford*, 553 U.S. at 196 (opinion of Stevens, J.). To be sure, election officials are required to timestamp a ballot and scan the barcode into the Statewide Uniform Registry of Electors ("SURE") upon receipt. *See Pa. State Conf. of NAACP*, 703 F. Supp. at 665. And there is every reason to think that *ordinarily* happens. *See id.* But the handwritten date serves as a useful backstop, and would become quite important if officials failed to perform those tasks or if SURE malfunctioned—possibilities Judge Matey has highlighted. *See Migliori v. Cohen*, 36 F.4th 153, 165 (3d Cir. 2022) (Matey, J., concurring in judgment).

Further, the requirement serves the State's interest in solemnity—*i.e.*, in ensuring that voters "contemplate their choices," including the choice to vote by mail

rather than in person, and "reach considered decisions about their government and laws." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 15 (2018); *see* App. 126-28 (dissent). Signature-and-date requirements serve a "cautionary function" by "impressing the parties with the significance of their acts and their resultant obligations." *Davis v. G N Mortg. Corp.*, 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003). Such formalities "guard[] against ill-considered action," *Thomas A. Armbruster, Inc. v. Barron*, 491 A.2d 882, 883-84 (Pa. Super. Ct. 1985), and the absence of formalities "prevent[s] … parties from exercising the caution demanded by a situation in which each ha[s] significant rights at stake," *Thatcher's Drug Store v. Consol. Supermarkets*, 636 A.2d 156, 161 (Pa. 1994). That is why the "requirement to sign and date documents is deeply rooted in legal traditions that prioritize clear and consensual agreements." App. 126 (dissent); *accord Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (an "original signature … carries 'solemn weight.'").

Moreover, the requirement advances the State's interests in "deterring and detecting voter fraud" and "protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.); *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1091 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). The requirement's advancement of the interest in preventing fraud is actual, not hypothetical: In 2022, the date requirement was used to detect voter fraud committed by a deceased individual's daughter. *See*

Commonwealth v. Mihaliak, CP-36-CR-0003315-2022 (Lancaster Cnty. 2022). In fact, because county boards may not conduct signature matching, *see In Re: Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 595 (Pa. 2020), the *only* evidence of third-party fraud on the face of the fraudulent ballot was the handwritten date of April 26, 2022, which was twelve days after the decedent had passed away. *See* App. 392-95 (charging document in *Mahaliak*). That evidence was used to secure a guilty plea from the fraudster, who was criminally sentenced. *See* App. 396-99.

States do not need to point to evidence of election fraud within their borders in order to adopt rules designed to deter and detect it. *Brnovich*, 594 U.S. at 686. Yet here, where the requirement has actually been used to detect and prosecute fraud, the State's interest in "deterring and detecting voter fraud" is unquestionably advanced. *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.). And the requirement's anti-fraud function advances the related vital state interest of preserving and promoting voter "[c]onfidence in the integrity of our electoral process[]" that is so "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

The majority below believed the date requirement is "virtually meaningless." App. 76. But it did not consistently embrace that belief: Its Order *permits* Respondents to "evaluate" compliance with the requirement "to ensure that [mail] ballots are timely submitted by qualified electors, and thus prevent fraud." App. 94

¶ 5. The majority thus apparently believed the requirement *is* useful as an election-administration backstop and fraud-detection device. *See id.* Thus, instead of attempting to hedge the scope of its Order, it should have *upheld* the requirement.

The majority's hedge is particularly puzzling because its opinion says nothing about the requirement's utility as an election-administration backstop or solemnity function. *See* App. 76. And it refused to engage with concrete evidence of the requirement's role in detecting and deterring fraud, relegating the *Mihaliak* case to passing mention in a footnote recounting the parties' arguments. *See id.* at 36 n.33. The Court should reverse.

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

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

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

As this Court has noted, twelve other States have "free and equal elections" provisions similar to the Clause. *LWV*, 178 A.3d at 813 n.71. Yet the majority below cited *zero* cases from any of those States in which a neutral ballot-casting rule like the date requirement was invalidated under such a provision.

That is because courts in those States have consistently held that, under analogous "free and equal" elections clauses, a ballot-casting rule is lawful "so long

as what it requires is not so grossly unreasonable that compliance therewith is practically impossible." *Simmons v. Byrd*, 136 N.E. 14, 17-18 (Ind. 1922); *see Mills v. Shelby Cnty. Election Comm'n*, 218 S.W.3d 33, 40-41 (Tenn. Ct. App. 2006) (provision "refers to the rights of suffrage and not to the logistics of how the votes are cast."). Other state courts interpret their "free and equal" election provisions merely to prohibit the use of coercion to bar access to voting or to require that lawfully-cast votes be given equal weight. *See, e.g.*, *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009); *Ross v. Kozubowski*, 538 N.E.2d 623, 627 (Ill. App. Ct. 1989) ("free and equal election" provision does not guarantee an election "devoid of all error" and requires "only" that "each voter have the opportunity to cast his or her [own] vote without restraint and that his or her vote have the same influence as the vote of every other voter"); *Graham v. Sec'y of State*, 684 S.W.3d 663, 684-85 (Ky. 2023) (violation only where "restraint or coercion, physical or otherwise, is exercised against a voter's ability to cast a vote"); *Gentges v. State Election Bd.*, 419 P.3d 224, 228 (Okla. 2018) (provision violated when there is "conscious legislative intent for electors to be deprived of their right to vote"); *Libertarian Party of Or. v. Roberts*, 750 P.2d 1147, 1152 (Or. 1988) (clause requires equal counting of votes); *Chamberlin v. Wood*, 88 N.W. 109, 110-12 (S.D. 1901) (clause prohibits coercion and requires equal counting of votes).

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

2. Federal Precedent Also Refutes Petitioners' Challenge.

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

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[3] Republican Intervenors made the same representation below, and Petitioners conceded cases supporting their position are "rare" in *any* State. Petitioners' Opp. 35-36. Moreover, the examples they cited are inapt. *McIntosh v. Helton* did not *invalidate* a rule but merely *applied* it, holding that writing a candidate's initials did qualify as writing a candidate's name. 828 S.W. 2d 364, 365-67 (Ky. 1992). Even less apt are *Wallbrech v. Ingram*, 175 S.W. 1022, 1027 (Ky. 1915), and *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 799 (Del. Ch. 2017), which did not invalidate or even interpret any state-law rules. And *Weinschenk v. State* dealt with a voter-identification provision and evidence that it would bar hundreds of thousands of people from the polling place. 203 S.W.3d 201, 212-13 (Mo. 2006). The date requirement is not remotely comparable.

To start, the U.S. Supreme Court has recognized that there is no constitutional right to vote by mail and that a State's regulation of one method of voting cannot violate the right to vote when another voting method remains available. *See, e.g.*, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-808 (1969); *Crawford*, 553 U.S. at 201 (opinion of Stevens, J.); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020). In other words, the federal constitutional right to vote is violated only when an individual is "absolutely prohibited from exercising the franchise" through any method. *McDonald*, 394 U.S. at 809.

The date requirement for mail ballots comports with the U.S. Constitution. *See* App. 115 (dissent). Indeed, "[Pennsylvania] permits [all voters] to vote in person" without complying with the requirement; "that is the exact opposite of 'absolutely prohibit[ing]' them from doing so." *Tex. Democratic Party*, 961 F.3d at 404; *see also McDonald*, 394 U.S. at 809. The right to vote under the federal Constitution is therefore unaffected by the requirement. *See McDonald*, 394 U.S. at 807; App. 115 (dissent).

Moreover, even if the Secretary is correct that this Court could apply a judicial balancing approach here, *see supra* 42-44, federal law underscores that the date requirement is constitutional even under such an approach. Courts assess alleged violations of the federal constitutional right to vote under the so-called *Anderson-Burdick* test. Under that framework, regulations imposing "severe burdens on

[voters'] rights must be narrowly tailored and advance a compelling state interest," while those imposing "[l]esser burdens … trigger less exacting review, and [the] State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Moreover, the "usual burdens of voting" cannot violate any right to vote under federal law. *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *accord Brnovich*, 594 U.S. at 669.

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

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

To be sure, the Third Circuit was discussing the statutory "right to vote" in the Materiality Provision. But the appellees there (including Intervenor Democratic National Committee) and the dissenting judge argued that the "right to vote" in the Materiality Provision is *broader* than the right to vote in the U.S. Constitution. *See id.* at 139-40 (Shwartz, J., dissenting); No. 23-3166 (3d Cir.) ECF 144 at 13-14, 17 n.1. If anything, the "right to vote" in the federal civil-rights laws is coterminous with the federal constitutional right—and there is no authority suggesting the federal constitutional right to vote is broader than the federal statutory right to vote. *See Brnovich*, 594 U.S. at 669-70 (consulting "standard practice" at the time "when § 2 [of the Voting Rights Act] was amended" to determine what "furnish[es] an equal 'opportunity' to vote in the sense meant by § 2"); *Baker v. Carr*, 369 U.S. 186, 247 (1962) (Douglas, J., concurring) (the "right to vote" was "protected by the judiciary long before that right received [] explicit protection" in civil-rights statutes). *A fortiori*, the Third Circuit's conclusion that the date requirement does not violate the statutory right to vote means that it cannot violate the constitutional right to vote either.

In all events, the date requirement easily passes muster even if it is subjected to interest balancing under the *Anderson-Burdick* framework. Any burden the requirement imposes is trivial compared to burdens the U.S. Supreme Court has held are minor under the *Anderson-Burdick* framework. *Compare, e.g.*, *Crawford*, 553

U.S. at 198 (obtaining photo ID) (opinion of Stevens, J.); *Brnovich*, 594 U.S. at 678 (identifying and traveling to correct polling place); *supra* 34-35.

Because the requirement imposes, at most, a minor burden on voting, it is subject to "rational basis review." *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020). Under that "quite deferential" standard, *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 153 (3d Cir. 2022), the "State's important regulatory interests will usually be enough to justify" election regulations, *Timmons*, 520 U.S. at 351-52. As explained, the date requirement passes rational-basis scrutiny with flying colors. *See supra* 44-48.

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

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

These provisions "expressly vest[] power to carry out [their] provisions in 'the Legislature' of each State, a deliberate choice [courts] must respect." *Moore*, 600

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

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

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

Finally, if this Court *were* to affirm, it would necessarily mean striking universal mail voting in Pennsylvania. App. 146-47 (dissent).

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

Act 77's non-severability provision states: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Act 77 § 11. The date requirement is part of the universal mail voting established in section 8, so invalidating "its application to any person or circumstance" voids the entire Act. *Id.*; *see McLinko*, 279 A.3d at 609-610 (Brobson, J., dissenting); *McClinko v. Dep't of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., dissenting in part); App. 146-50 (dissent).

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

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

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

The majority's decision and Order declare that the date requirement is "invalid and unconstitutional as applied to qualified voters who timely submit undated or incorrectly dated [mail ballots]" and enjoin Respondents from "strictly enforcing" the requirement against such voters. App. 93-94 ¶¶ 3-4. The majority therefore "held invalid" the requirement's "application to [such] person[s] [and] circumstances." Act 77 § 11. Thus, if affirmed, the majority's decision has voided the entirety of Act 77 and universal mail voting on the eve of the 2024 general

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

The majority's various attempts to avoid this consequence are unavailing. *First*, the majority suggested that its decision does not trigger Act 77's non-severability clause because Petitioners challenged only "*enforcement*" of the date requirement and "are *not* asking the Court to … strike any portion of Act 77." Maj. App. 86 (emphases original). The majority thus missed that enforcement *is* "application" of the date requirement. Act 77 § 11. Accordingly, its holding precluding enforcement holds "application" of the date requirement "invalid," thereby squarely triggering the non-severability provision. *Id.*

Second, the majority invoked the presumption of severability discussed in *Stilp*. *See* App. 87. But *Stilp* clarified this presumption gives way when, as in Act 77, a non-severability clause arises from a political "compromise" that would be undone by failing to enforce it. 905 A.2d at 978; *see also McLinko*, 279 A.3d at 609-610 (Brobson, J., dissenting); App. 146-51 (dissent).

Finally, the majority suggested it was "*declin[ing] Republican Party Intervenors' suggestion*" to invalidate Act 77. App. 88 (emphasis original). But it is Petitioners' requested relief, not Republican Intervenors, that has imperiled universal mail voting in Pennsylvania under Act 77's non-severability clause. Republican

Intervenors asked the panel—and now ask this Court—to *preserve* Act 77 by upholding, rather than invalidating, the General Assembly's date requirement.

CONCLUSION

The majority's decision—issued less than three weeks before mail voting begins for the 2024 general election and in favor of Petitioners who waited more than 18 months after first challenging the date requirement to raise their current claim—changes election rules that have been in place for decades and, thus, threatens to unleash "voter confusion," "chaos," *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 504-07 (Pa. 2006), and an erosion of public confidence in the Commonwealth's elections, App. 117 (dissent). Moreover, leaving uncorrected the majority's legal errors—including its unprecedented application of strict scrutiny—will open the floodgates to a potential deluge of challenges to broad swaths of the Election Code in the lead-up to and aftermath of the imminent general election, as well as future elections. The Court should prevent these unwarranted harms to the Commonwealth, correct the majority's errors, and reverse.

Dated: September 3, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum contains 13,989 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

Dated: September 3, 2024

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CERTIFICATE OF COMPLIANCE

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

Dated: September 3, 2024

/s/ Kathleen A. Gallagher
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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: September 3, 2024

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