

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 1305 C.D. 2024, 1309 C.D. 2024

BRIAN BAXTER and SUSAN KINNIRY,
Appellees,

v.

PHILADELPHIA BOARD OF ELECTIONS,
Appellant,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF
PENNSYLVANIA,
Intervenor-Appellants.

INTERVENOR-APPELLANTS' INITIAL BRIEF

**On Appeal from the September 26, 2024 Order and September 27, 2024 Final
Disposition Order of the Court of Common Pleas Of Philadelphia County,
September Term 2024, No. 02481**

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INTRODUCTION

The Pennsylvania Supreme Court has repeatedly upheld the General Assembly’s date requirement for mail ballots against a barrage of legal challenges, including the very same Free and Equal Elections Clause arguments the trial court credited in this case.¹ Just over a week ago, the Pennsylvania Supreme Court declined yet another invitation to consider a Free and Equal Elections challenge to the date requirement. *See New Pa. Project Education Fund v. Schmidt*, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (per curiam) (“*New Pa.*”). In so doing, that court could not have been clearer: It will not “countenance” *any* changes to the date requirement “during the pendency of [the] ongoing election.” *Id.*

The date requirement thus remains mandatory and uniform across the Commonwealth—and the Philadelphia Board of Elections (“the Board”), like the other 66 county boards, remains bound to enforce it for the ongoing 2024 General Election. Appellees nonetheless ask this Court to disregard the Pennsylvania Supreme Court’s order. Without even *mentioning* that order’s controlling language, Appellees now ask this Court (in a case that has nothing to do with the 2024 General Election) to invalidate the date requirement for the 2024 General Election. At the threshold, the Court should decline this invitation and reiterate that the Pennsylvania

¹ This Brief uses “mail ballots” to refer to both absentee ballots and mail-in ballots. *See* 25 Pa. Stat. §§ 3146.6, 3150.16.

Supreme Court has brought to an end Appellees’ continued campaign to render the date requirement unenforceable during the ongoing election in which millions of Pennsylvania voters are already receiving and casting their ballots for President, Congress, and scores of state and local offices.

In fact, the Court should reject Appellees’ challenge for past and future elections alike because it fails on the merits. The Pennsylvania Supreme Court has already upheld the General Assembly’s *entire* declaration mandate for mail ballots—of which the date requirement is part—against a Free and Equal Elections challenge. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020); *see also* 25 Pa. Stat. §§ 3146.6(a) (requiring voters who vote by absentee ballot to “fill out, date and sign the declaration printed on [the outer] envelope”), 3150.16(a) (same for mail-in ballots). Just two years ago, it again upheld the date requirement as mandatory while noting—and declining to adopt—Free and Equal Elections arguments against it. *See Ball v. Chapman*, 289 A.3d 1, 14-16 & n.77 (Pa. 2023). Accordingly, it ordered all 67 county boards of elections not to count mail ballots that do not comply with the requirement. *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022).

A month ago, the Pennsylvania Supreme Court vacated a decision of a divided panel of this Court that invalidated the date requirement on Free and Equal Elections grounds. *See Black Political Empowerment Project v. Schmidt*, __A.3d__, 2024 WL

4181592, at *1 (Pa. Sept. 13, 2024) (per curiam) (“*BPEP* Order”), *vacating Black Political Empowerment Project v. Schmidt*, 2024 WL 4002321, at *1 (Pa. Commw. Ct. Aug. 30, 2024) (“*BPEP*”). Along with *New Pennsylvania Project Education Fund*, that makes two orders in just over three weeks declining to exercise extraordinary jurisdiction to entertain Free and Equal Elections challenges to the date requirement. *See New Pa.*, 2024 WL 4410884, at *1. And those orders, in turn, followed the Third Circuit’s holding earlier this year that the mandatory date requirement does not violate the Materiality Provision of the Civil Rights Act of 1964 because it does not violate “the right to vote.” *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024).

The Pennsylvania Supreme Court’s holdings are not only binding on this Court; they are also correct. As that court has held for over a century—and recently reaffirmed *after* this Court’s divided panel decision in *BPEP*—a mandatory ballot-casting rule can violate the Free and Equal Elections Clause only if it “den[ies] the franchise itself, or make[s] it so difficult [to vote] as to amount to a denial.” *In re: Canvass of Provisional Ballots in 2024 Primary Election*, __A.3d__, 2024 WL 4181584, at *7 (Pa. Sept. 13, 2024) (cleaned up); *see also Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). And that standard presents an extraordinarily high bar for challengers to clear: The Pennsylvania Supreme Court has *never* invalidated a ballot-casting rule under it. *See A. MCCALL, ELECTIONS, IN K. GORMLEY ET. AL.,*

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(identifying the types of cases the Clause has been applied in).

The date requirement, too, falls far on the constitutional side of that line. No reasonable person could conclude that the obligation to date a ballot “make[s] it so difficult [to vote] as to amount to a denial” of the franchise. *In re: Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7; *see also BPEP*, 2024 WL 4002321, at *54 (McCullough, J., dissenting). The date requirement does not even apply to in-person voting, the voting method of choice for the majority of Pennsylvania voters. Even when it comes to mail voting, the date requirement is constitutional because signing and dating a document is a commonplace requirement of everyday life that is *less* burdensome than numerous voting rules that have been upheld against right-to-vote challenges. Moreover, on anyone’s account, well over 99% of individuals voting by mail have complied with the date requirement in every election. *See BPEP*, 2024 WL 4002321, at *54-55 (McCullough, J., dissenting). That number is only expected to increase thanks to Secretary Schmidt’s July 1, 2024 Directive that makes complying with the date requirement easier than ever. *See id.* at *9.

If more were somehow needed, Appellees’ suit never should have gotten off the ground because it suffers several serious procedural defects. *First*, even as the Pennsylvania Supreme Court just vacated the divided panel decision in *BPEP*

because the petitioners there failed to join all of Pennsylvania’s county boards of elections, *see BPEP Order*, 2024 WL 4181592, at *1 , Appellees made the same error here. The other 66 county boards have interests in this case and the date requirement, and they must be joined. *Second*, Appellees were granted relief based on contested facts. Intervenor-Appellants *have* evidence that the date requirement serves important functions. For example, the date requirement recently supplied evidence in a voter-fraud prosecution that secured a conviction. *See Commonwealth v. Mihaliak*, MJ-02202-CR-0000126-2022 (Lancaster Cnty. 2022) (charging document in *Mihaliak*), App. Ex. A, A-4. Intervenor-Appellants, to say nothing of other county boards, have the right to engage in factual development and conduct discovery—rights that the Court of Common Pleas below wholly ignored. *Third*, the trial court reversibly erred when it retroactively changed election rules for an already completed election.

For any and all of these reasons, and as explained more fully below, 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 § 8 (“Act 77”); *see* 25 Pa. Stat. § 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 §§ 6, 8; *see also* 25 Pa. Stat. §§ 3146.6(a), (b)(3), 3150.16(a), (b)(3).

Appellees are two voters who do not dispute that they failed to comply with the date requirement during the September 17, 2024 Special Election for State House Districts 195 and 201 (the “Special Election”). *See* Pet. ¶¶ 16, 21, App. Ex. B. Consequently, the Board complied with state law and declined to count their ballots. *Id.* ¶¶ 17, 21. Appellees then filed a petition for review in the Philadelphia Court of Common Pleas asking that court to invalidate the date requirement under the Free and Equal Elections Clause. *Id.* ¶ 63. They made this request even though voting in the Special Election was completed and the 2024 General Election was *already underway*. *See* 25 Pa. Stat. § 3146.2a (mail ballots for 2024 general election may be sent out starting on September 16).

After a brief hearing, the trial court granted the petition and held that refusal to count a ballot “due to a voter’s failure to date the declaration printed on the outer envelope used to return his/her mail-in ballot . . . violates [the Free and Equal Elections Clause].” Sept. 26 Order at 2, App. Ex. C (cleaned up). The trial court therefore ordered the Board to verify Appellees’ “and the sixty-seven other registered voters date-disqualified mail-in ballots from the Special Election,” to count all such ballots “if otherwise valid,” and to include the counted ballots “in the results of the Special Election.” *Id.* (cleaned up). The trial court issued a follow-on

order the next day that, among other things, granted Intervenor-Appellants Republican National Committee and Republican Party of Pennsylvania (the “Republican Committees”) leave to intervene. *See* Sept. 27 Order at 1-2, App. Ex. D.

The trial court has confirmed that Appellees’ petition “related to a special election that had already occurred and did not involve voting in the November 2024 election[.]” Oct. 10 Order at 2 n.1 (“Oct. 10 Order”), App. Ex. E. Appellees nonetheless have requested that this Court expedite its decision in this matter “in advance of the November 5 general election” because, in their view, a ruling from this Court “is necessary to guide Philadelphia and other county boards of elections as to the treatment of undated or misdated mail-in and absentee ballots, and to ensure that such ballots are not rejected on unconstitutional grounds.” Appellees’ Application For Expedited Briefing Schedule ¶ 4 (Oct. 7, 2024) (“Appellees’ Appl.”).

Both the Board and the Republican Committees timely appealed the trial court’s orders.

STANDARD OF REVIEW

A Court of Common Pleas can reverse the decision of a county board of elections “only for an abuse of discretion or error of law.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020)

(citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); see also 25 Pa. Stat. § 3157(b) (confining Court of Common Pleas’ review of decision of board of elections to matters involving “fraud or error”).

This Court reviews legal determinations of the Court of Common Pleas *de novo*. See *In re Canvassing Observation*, 2020 WL 6551316, at *1 n.3 (Pa. Commw. Ct. Nov. 5, 2020), *vacated on other grounds*, 241 A.3d 339 (Pa. 2020) (citing *Banfield v. Cortes*, 110 A.3d 155, 166 (Pa. 2015)).

SUMMARY OF ARGUMENT

This Court should reiterate that the date requirement remains in force for the ongoing 2024 General Election, foreclose any further challenges to the date requirement pertaining to that election, and reverse the trial court’s order on the merits or procedural grounds.

I. The Pennsylvania Supreme Court has decreed that it will not countenance changes to the mandatory date requirement for the ongoing 2024 General Election. The trial court’s order, moreover, does not even pertain to the 2024 General Election. The Court therefore should decline Appellees’ invitation to change the rules for the 2024 General Election, and reiterate that it will not enter any order affecting the enforceability of the date requirement for the 2024 General Election in this or any other case.

II. To the extent the Court addresses the merits, it should reject Appellees’ Free and Equal Elections challenge. The Pennsylvania Supreme Court has repeatedly upheld mandatory application of the date requirement to decline to count noncompliant mail ballots—including against Free and Equal Elections challenges—and the Third Circuit has rejected a right-to-vote challenge to the requirement. Indeed, the date requirement comports with, rather than contravenes, the Free and Equal Elections Clause because it does not bar access to or deny the franchise.

The Court should not follow the prior divided panel decision in *BPEP*. Since that decision issued, the Pennsylvania Supreme Court reaffirmed that election rules do not violate the Free and Equal Elections Clause unless they “deny the franchise itself, or make it so difficult as to amount to a denial.” *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at * 7 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). Unless a rule flunks *that demanding test*, it receives *no scrutiny* under the Free and Equal Elections Clause. *Id.* The vacated *BPEP* panel decision applied strict scrutiny to justify enjoining enforcement of the date requirement and, thus, is irreconcilable with the Pennsylvania Supreme Court’s intervening reaffirmation of the governing law.

III. Finally, the Court may reverse without even reaching the merits. *First*, Appellees’ suit suffers from the same procedural flaw that caused the Pennsylvania

Supreme Court to vacate the divided *BPEP* decision: Appellees failed to join all 67 county boards to this suit. *Second*, the trial court decided Appellees' petition without allowing the Republican Committees and the 66 non-joined county boards to present the factual record further underscoring the date requirement's constitutionality. *And third*, the trial court erred when it entered an order that changed the rules of the Special Election after it was completed. Each of these procedural failures alone warrants reversal.

ARGUMENT

The Court should reiterate that it will not enter any order affecting the date requirement's enforceability for the ongoing 2024 General Election, in this or any other case. It should also reverse the trial court's order on the merits or any of the host of procedural defects in Appellees' suit and the proceedings below.

I. THE COURT SHOULD REITERATE THAT IT WILL NOT ORDER ANY CHANGES TO THE ENFORCEABILITY OF THE DATE REQUIREMENT FOR THE ONGOING 2024 GENERAL ELECTION.

At the threshold, the Court should make clear that it will not order any changes to the date requirement's enforceability for the 2024 General Election.

The law of the Commonwealth is well established: The General Assembly's date requirement for mail ballots is mandatory and enforceable as a matter of state and federal law. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020); *Ball*, 289 A.3d at 14-16 & n.77; *BPEP Order*, 2024 WL 4181592, at *1; *Pa.*

State Conf. of NAACP, 97 F.4th at 125. Moreover, just days ago, the Pennsylvania Supreme Court could not have been clearer when it confronted another last-minute challenge to the date requirement from Appellees’ counsel: It will not “countenance” changes to the date requirement “during the pendency of [the] ongoing election.” *New Pa.*, 2024 WL 4410884, at *1.

As the Pennsylvania Supreme Court explained, this decision is rooted in “the *Purcell* principle” and “common sense.” *Id.* (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). The *Purcell* principle recognizes that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As [the] election draws closer, that risk will increase.” *Id.* at 3 n.1 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam)). Thus, it is a “basic tenet of election law” that “[w]hen an election is close at hand, the rules of the road should be clear and settled.” *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (mem.) (Kavanaugh, J., concurring). “[R]unning a statewide election is a complicated endeavor,” and involves “a host of difficult decisions about how best to structure and conduct the election.” *Id.* And those decisions must then be communicated to the “state and local officials” tasked with implementing them, who in turn “must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting.” *Id.*

The *Purcell* principle forecloses invalidating the date requirement during the ongoing 2024 General Election. See *New Pa.*, 2024 WL 4410884, at *1. Jeopardizing the enforceability of the date requirement would unleash “voter confusion” and “chaos.” *Kuznik v. Westmoreland Cnty. Bd. Of Comm’rs*, 902 A.2d 476, 504-07 (Pa. 2006). There would be rushed appeals right before Election Day to the Pennsylvania Supreme Court, which would be forced to reverse this Court again. At the same time, a judicial order barring enforcement of something as mundane and commonsensical as the date requirement would undermine public confidence in the integrity of Pennsylvania’s elections and Pennsylvania’s courts. See, e.g., *Democratic Nat’l Comm.*, 141 S. Ct. at 30 (Gorsuch, J., concurring) (“Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.”).

But it will be worse than that—much worse—if the Court attempts to alter the enforceability of the date requirement for the 2024 General Election in this case. This case does not even *present the question* of the date requirement’s application in the 2024 General Election. The trial court itself has confirmed that Appellees’ petition and its order “related to a special election that had already occurred and did not involve voting in the November 2024 election[.]” Oct. 10 Order at 2 n.1, App. Ex. E. Because the order does not *prospectively* bind anyone, the Board—like the 66 other county boards—must enforce the mandatory date requirement for the

ongoing 2024 General Election. *See Pa. Democratic Party*, 238 A.3d at 374; *Ball*, 289 A.3d at 14-16 & n.77; *BPEP Order*, 2024 WL 4181592, at *1; *New Pa.*, 2024 WL 4410884, at *1; *Pa. State Conf. of NAACP*, 97 F.4th at 125.

Moreover, any contrary order from this Court in this case would apply only to the Board, and no other county boards *could* choose to comply with it over the orders from the Pennsylvania Supreme Court by which *they* are bound. *See id.* Commissioner Bluestein understood as much when the Board addressed the validity of Appellees' ballots. *See* Pet. ¶ 50, App. Ex. B. Thus, any order of the Court in this case that the date requirement is unenforceable would result in different boards applying different standards for determining the validity of mail ballots—a textbook violation of the Equal Protection Clause of the U.S. Supreme Court and the Pennsylvania Constitution. To reiterate, it would result in a *violation*, rather than a *vindication*, of the Free and Equal Elections Clause.

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

Yet that is precisely what will happen if this Court instructs or permits the Board not to enforce the date requirement. Such an action would result in “varying standards to determine what [i]s a legal vote” from “county to county” and be improper. *See id.* at 106-07.

Such an order would also violate the Pennsylvania Constitution, which decrees that “[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State,” Pa. Const. art. VII, § 6, and the Election Code, which requires that elections be “uniformly conducted” throughout the Commonwealth. 25 Pa. Stat. § 2642(g). And it *would even violate the Free and Equal Elections Clause*. After all, the Clause’s mandate of “free and equal” elections, Pa. Const. art. I, § 5, prohibits discrimination against voters “based on considerations of the region of the state in which [voters] live[],” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808 (Pa. 2018) (“*LWW*”), and requires election rules to “treat[] all voters alike” and “in the same way under similar circumstances,” *Winston*, 91 A. at 523. Any order from this Court invalidating the date requirement in Philadelphia—particularly *during an ongoing election*—would violate all of these state-law commands.

Regrettably, Appellees’ counsel have not gotten the message. After this Court already ordered expedited briefing in this appeal, Appellees expressed dissatisfaction with the Court’s timing and requested even *further* expedition of the schedule. Their sole rationale for that request was that the Court should rush to a

decision “in advance of the November 5 general election” because, in their view, a ruling from this Court “is necessary to guide Philadelphia and other county boards of elections as to the treatment of undated or misdated mail-in and absentee ballots.” Appellees’ Appl. ¶ 4.

Even though Appellees’ counsel also represented the unsuccessful petitioners in *BPEP* and *New Pennsylvania Project Education Fund*, their application to this Court *failed to disclose* the Pennsylvania Supreme Court’s adoption of the *Purcell* principle and the express statement that it will not “countenance” changes to the date requirement “during the pendency of an ongoing election.” *Compare New Pa.*, 2024 WL 4410884, at *1, *with* Appellees’ Appl. ¶ 4. The application also provided no explanation as to how an order in this case—which would run only against the Board—could possibly give “guidance” to “other county boards” at all, let alone for the “November 5 general election.” Appellees’ Appl. ¶ 4. Of course, it could not, because all 66 such boards remain bound by the Pennsylvania Supreme Court’s orders, including the *New Pennsylvania Project Education Fund* order to which they are all parties. This Court lacks authority to disregard or override Pennsylvania Supreme Court orders. *See Pa. Democratic Party*, 238 A.3d at 374; *Ball*, 289 A.3d at 14-16 & n.77; *BPEP* Order, 2024 WL 4181592, at *1; *New Pa.*, 2024 WL 4410884, at *1.

Appellees instead hung their hat on the Pennsylvania Supreme Court’s statement that it will carry out its “appellate role with respect to lower court decisions” that arise “in the ordinary course.” Appellees’ Appl. ¶ 3 (quoting *New Pa.*, 2024 WL 4410884, at *1). That is surely right. But far from leaving the door open to judicial changes to the date requirement’s enforceability as Appellees suggest, this truism slams that door shut. If lower courts continue to invalidate rules in the Election Code, especially with an eye to applying those changes during the 2024 General Election, the Pennsylvania Supreme Court will exercise its “appellate role with respect to lower court decisions” and reverse. *New Pa.*, 2024 WL 4410884, at *1 n.2; see also *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at 11 (Pa. Sept. 13, 2024) (Wecht, J., concurring) (criticizing the “proliferation” of lawsuits “advocating for the acceptance of ballots that do not comply with the plain terms of the Election Code”). That will surely happen here if this Court tries to render the date requirement unenforceable for the 2024 General Election. See *New Pa.*, 2024 WL 4410884, at *1.

In fact, accepting Appellees’ counsel’s request to change the enforceability of the date requirement now not only would violate the Pennsylvania Supreme Court’s binding instructions and the *Purcell* principle; it would also be fundamentally unfair to the Commonwealth and its millions of voters. Moreover, it would work no unfairness to Appellees or their counsel. Appellees’ counsel have brought multiple

suits challenging the enforceability of the date requirement over the past two years— but waited until the eve and pendency of the 2024 General Election to raise their Free and Equal Elections challenge. *See New Pa.*, 2024 WL 4410884, at *1 (Brobson, J., concurring) (explaining how Appellees’ counsel “inexplicably” waited to bring Free and Equal Elections Clause challenges).

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

It was not until May 28, 2024—more than 18 months after filing their first suit—that Appellees’ counsel brought some of the federal plaintiffs and other petitioners to state court to raise the Free and Equal Elections challenge for the first time in *BPEP*. The Pennsylvania Supreme Court vacated the divided panel decision upholding that challenge. *See BPEP Order*, 2024 WL 4181592, at *1. Appellees’ counsel nonetheless reordered the *BPEP* caption and added one new petitioner in order to ask the Pennsylvania Supreme Court to exercise extraordinary jurisdiction

over their Free and Equal Elections challenge. The Pennsylvania Supreme Court declined to do so. *See New Pa.*, 2024 WL 4410884, at *1.

And even though the Pennsylvania Supreme Court took the occasion to adopt the *Purcell* principle and declare that it will not “countenance” changes to the date requirement “during the pendency of an ongoing election,” *id.*, Appellees want this Court to do precisely that, *see* Appellees’ Appl. ¶ 4. Appellees’ counsel will apparently stop at nothing in their assault on the General Assembly’s duly enacted and lawful date requirement. The Court should put an end to this piecemeal-litigation effort to invalidate the date requirement and declare that it will not order any changes to the date requirement during the ongoing 2024 General Election.

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

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

Appellees ask the Court to do something the Pennsylvania Supreme Court has *never* sanctioned: wield the Clause to strike down a neutral ballot-casting rule that governs how voters complete and cast their ballots. *See* A. MCCALL, ELECTIONS, *IN* K. GORMLEY ET. AL., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 215-232 (identifying the types of cases the 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., Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017) (“The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined”) (cleaned up); *Ins. Fed’n of Pa., Inc. v. Commonwealth, Ins. Dep’t*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) (“we have resolved the question of the General Assembly’s intent . . . based on the plain language of the statute; accordingly, it would be improper to stray into the arena of public policy in resolving this case”); *accord Pa. State Conf. of NAACP*, 97 F.4th at 133-34; *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissent) (“When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot. ‘Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.’” (quoting *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 669 (2021))).

Thus, a voter does not suffer constitutional harm when his ballot is rejected because he failed to follow the rules the General Assembly enacted for completing or casting it. As the Pennsylvania Supreme Court recently reaffirmed (and originally held over a century ago), “[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, Appellees must prove the date requirement “clearly, palpably, and plainly violates the Constitution.” *LWV*, 178 A.3d at 801 (cleaned up). 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.

Appellees’ Free and Equal Elections challenge to the date requirement fails for several reasons. *First*, the Pennsylvania Supreme 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, Appellees’ 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; *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7. Indeed, the Pennsylvania Supreme Court’s recent intervening decision reiterating the controlling standard and upholding a signature requirement further confirmed that the divided *BPEP* panel erred when it applied strict scrutiny and invalidated the date requirement. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7.

Third, case-law from other states with “free and equal elections” clauses and precedents construing the right to vote under the U.S. Constitution foreclose Appellees’ claims. *See infra*. Part II.C.

Fourth, Appellees’ 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-in 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, 609-10 (Pa. 2022) (Brobson, J., dissenting).

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

The trial court's order fails because the Pennsylvania Supreme Court already has upheld the date requirement against Free and Equal Elections challenges.

Start with *Pennsylvania Democratic Party*, where the petitioners 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 the Pennsylvania Supreme Court to hold that the Clause requires county boards to provide voters notice and an opportunity to cure such “minor errors” before rejecting the ballot. *See id.* at 372-74.

The Secretary of the Commonwealth 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.* (cleaned up). In other words, the Secretary concluded that the General Assembly does not violate the Clause when it mandates that ballots not be counted where a voter fails to “follow[] the requisite voting procedures” it has enacted. *Id.*

The Pennsylvania Supreme Court agreed and rejected the challenge. It reasoned that the Clause does not mandate a cure procedure “for [mail-in] 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.*

That 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.*

Appellees’ position that the date requirement serves no purpose and that mandatory application of it violates the Clause was also presented to the Pennsylvania Supreme Court in *Ball*. *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[.]”); Brief of Intervenor-Respondents DCCC, Democratic National Committee, Pennsylvania Democratic Party, *Ball v. Chapman*, No. 102 MM 2022, 2022 WL 18540587, at *1-2, (discussing the date requirement’s alleged lack of a function) *8-10 (same), *29-

32 (making argument under Free and Equal Elections Clause). The court even noted those arguments in its opinion. *See* 289 A.3d at 14-16 (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.

In its vacated decision, the *BPEP* panel majority attempted to distinguish *Pennsylvania Democratic Party* because “notice and opportunity to cure procedures are *not* at issue” in the newfound challenges to mandatory application of the date requirement. *BPEP*, 2024 WL 4002321, at *28. But that argument by emphasis offers a distinction without a difference: Because the Pennsylvania Supreme 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.

This Court should adhere to *Pennsylvania Democratic Party* and *Ball* 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 Pennsylvania Supreme Court Has Never Invalidated A Mandatory Ballot-Casting Rule Under The Clause.

Originally adopted in 1790, the Free and Equal Elections Clause provides that “[e]lections shall be free and equal.” Pa. Const. art. I, § 5. Its purpose is to “ensure that each voter will have an equally effective power to select the representative of his or her choice, free from any discrimination on the basis of his or her particular beliefs or views.” *LWV*, 178 A.3d at 809. 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 (emphasis added); *see also Pa. Democratic Party*, 238 A.3d at 373 (“So long as a voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative of his or her choice.”) (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, ELECTIONS at 217.

Second, the Clause prohibits intentional discrimination against voters based on social or economic status, geography of residence, or religious or political beliefs. *LWW*, 178 A.3d at 807. That is why the Pennsylvania Supreme Court held that the Clause prohibits partisan gerrymandering. *Id.* at 808-09. That 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.* Notably, the Pennsylvania Supreme Court reaffirmed *this* is the test just a few weeks ago in an opinion issued after the divided panel decision in *BPEP. In re Canvass of Provisional Ballots in 2024 Election*, 2024 WL 4181584, at *7.

In accordance with the Clause’s plain text and purpose, the Pennsylvania Supreme Court has never used it to strike down a neutral ballot-casting rule

governing how voters complete and cast ballots. *See* McCall, ELECTIONS at 215-232 (discussing different ways Clause has been used). In fact, it has routinely *upheld* ballot-casting rules against such challenges, including the declaration mandate and the secrecy-envelope rule, *see Pa. Democratic Party*, 238 A.3d at 372-80, and the provisional-ballot signature requirement, *In re Canvass of Provisional Ballots in 2024 Election*, 2024 WL 4181584, at *7.

Appellees may argue that the Pennsylvania Supreme Court wielded the Free and Equal Elections Clause to invalidate the mail-ballot received-by deadline in 2020. *See Pa. Democratic Party*, 238 A.3d at 371-72. But that is wrong: The Pennsylvania Supreme Court granted only *temporary* relief from the received-by deadline during the COVID-19 pandemic for the 2020 general election only. *See id.* It did not *invalidate* the deadline for all time; that deadline remains the law in Pennsylvania today. *See id.* Thus, that temporary remedial action in the midst of a once-in-a-century public health crisis provides no support for Appellees' request to invalidate the date requirement for all Pennsylvania voters for all elections forever.

The Pennsylvania Supreme Court's recent decision in *In re Canvass of Provisional Ballots in 2024 Primary Election* further proves that the date requirement is constitutional and that the *BPEP* panel majority erred in concluding otherwise. There, the Pennsylvania Supreme Court held that a county board was obligated to reject unsigned provisional ballots because the General Assembly had

unambiguously commanded that result. *Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *5. It reached that holding despite the argument that the signature requirement was “unnecessary and superfluous.” *See id.* at *3.

Moreover, it rejected a challenge under the Free and Equal Elections Clause, reaffirming that “voting regulations” are unconstitutional only if they “deny the franchise itself, or make it so difficult as to amount to a denial.” *Id.* at *7 (cleaned up). As the Pennsylvania Supreme Court reasoned, the act of “sign[ing] the ballot’s outer envelope” obviously did not “den[y] the franchise or make[] it so difficult as to amount to a denial.” *Id.* Notably, it arrived at this holding without *any* judicial scrutiny or second-guessing of the General Assembly’s policy choice in requiring those signatures. *Id.*

The Pennsylvania Supreme Court’s consistent 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). *Pa. Democratic Party*, 238 A.3d 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.

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.

The Pennsylvania Supreme Court applied this governing precedent to reject challenges to two sets of ballot-casting rules in *Pennsylvania Democratic Party*: the declaration mandate and the secrecy-envelope rule. *See* 238 A.3d at 372-80. It also applied this precedent to reject a challenge to the allegedly “unnecessary and superfluous” signature requirement for provisional ballots. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *3.

As part of the declaration mandate and as a companion to the signature requirement for mail ballots, and like the secrecy-envelope rule, the date requirement is a neutral, non-discriminatory ballot-casting rule that does not violate the Clause. *See Pa. Democratic Party* at 372-73; *Mixon*, 759 A.2d at 449-50. Appellees 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.

So they must invoke the Clause’s third protection and believe that the date requirement “make[s] it so difficult [to vote] as to amount to a denial” of “the franchise.” *Id.* at 810 (cleaned up).

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 Pa. Stat. § 2811. So far from making voting “so difficult as to amount to a denial” of “the franchise,” *LWV*, 178 A.3d at 810 (cleaned up), the date requirement is *inapplicable* to an entire universally available method of voting—the method that the majority of Pennsylvania voters use to vote. *See* 2022 General Election Official Returns (Statewide), November 8, 2022 (22.8% of ballots counted in the 2022 U.S. Senate election—1,225,447 out of 5,368,021—were mail ballots), <https://tinyurl.com/3kfzwpzh>. It is hard to see how a rule regulating no-excuse mail voting, which was “unknown in the Commonwealth for well over two centuries and is wholly a creature of recent, bipartisan legislat[ion],” can violate any right to vote. *BPEP*, 2024 WL 4002321, at *39 (McCullough, J., dissenting).

In the second place, even if the Court could ignore the preferred voting method of most Pennsylvania voters and focus only on mail voting, there is nothing “difficult” about signing and dating a document, let alone “so difficult” as to deny the right to vote. *LWV*, 178 A.3d at 810 (cleaned up); *see also In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7. Appellees’

own position contemplates as much, since they do not challenge the signature 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 find the obligation to sign and date a [mail-ballot] declaration to be difficult or hard or challenging.” *BPEP*, 2024 WL 4002321, at *54 (McCullough, J., dissenting); *see also In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7 (upholding provisional-ballot signature requirement).

Furthermore, both signing a piece of paper and writing a date on it are nothing more than the “usual burdens of voting,” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.); *id.* at 204-09 (Scalia, J., concurring), not a “difficult[y]” so severe “as to amount to a denial” of “the franchise,” *LWV*, 178 A.3d at 810 (cleaned up). Indeed, *every* State requires voters to write pieces of information on voting papers—both for in-person and mail voting. *See, e.g.*, 25 Pa. Stat. §§ 3146.6(a), 3150.16(a) (signature requirement); *id.* § 3050 (requirement to

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 Pa. Stat. § 201-7(j.1)(3)(ii) (emergency work authorization form); 42 Pa. C.S. § 8316.2(b) (childhood sexual abuse settlement form); 73 Pa. Stat. § 2186(c) (cancellation form for certain contracts); 42 Pa. C.S. § 6206 (unsworn declaration).

maintain in-person voting poll books); *Electronic Poll Books*, National Conference of State Legislatures (Oct. 25, 2019), nctl.org/elections-and-campaigns/electronic-poll-books; *How States Verify Voted Absentee/Mail Ballots*, National Conference of State Legislatures (Jan. 22, 2024), nctl.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, the Pennsylvania Supreme has already upheld the entire declaration mandate and the secrecy-envelope rule against Free and Equal Elections challenges. *See Pa. Democratic Party*, 238 A.3d at 372-80. The date requirement—like the signature requirement that Appellees do not challenge—is necessarily *easier* to comply with than the full range of rules (including the “fill out,” “date,” and “sign” requirements) that form the declaration mandate.

Moreover, the U.S. Supreme Court has upheld as constitutionally non-burdensome “the inconvenience of making a trip to the [Department of Motor Vehicles], gathering the required documents, and posing for a photograph” as required to obtain a photo identification for in-person voting. *Crawford*, 533 U.S. at 198 (Stevens, J.). It has also reasoned that “[h]aving to identify one’s own polling place and then travel there to vote does not exceed the usual burdens of voting.” *Brnovich*, 594 U.S. at 678 (cleaned up). Yet both of these tasks are far more difficult

than dating a ballot envelope (especially one prepared in accordance with the Secretary’s July 1 Directive, *see infra* at 35-36)—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 (cleaned up).

The *BPEP* majority 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 (cleaned up), that majority relied on *only one* factor: the number of rejected ballots. *BPEP*, 2024 WL 4002321, at *32 (showing burden by pointing to those who could not “*correctly* handwrite the date”) (emphasis added). But the Pennsylvania Supreme Court has never equated burdens on the right to vote with the number of rejected ballots. *See, e.g., In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7 (no discussion of rejection rates). To the contrary, this aspect of the Pennsylvania Supreme Court’s Free and Equal Elections jurisprudence turns on the objective *burden* imposed by the challenged rule—*i.e.*, whether the challenged rule “make[s] it so difficult [to vote] as to amount to a denial” of “the franchise”—not the number of voters who fail to comply with it. *LWV*, 178 A.3d at 810 (cleaned up). 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.” *BPEP*, 2024 WL 4002321, at *45 (McCullough, J., dissenting).

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). But past rejection rates under the date requirement *prove* the requirement’s constitutionality. *See BPEP*, 2024 WL 4002321, at *45 (McCullough, J., dissenting).

In particular, Appellees claim that about “10,000” mail ballots were not counted in the 2022 general election due to noncompliance with the date requirement. *See* Pet. ¶ 38, App. Ex. B. But that represents only 0.8% 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 (cleaned up); *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7.

Moreover, this 0.8% 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?*, Figure 1, <https://electionlab.mit.edu/articles/how-many-naked-ballots-were-cast-pennsylvanias-2020-general-election> (statewide rejection rate for noncompliance with secrecy-envelope requirement around 1%). Thus, because the secrecy-envelope requirement does not violate the Free and Equal Elections Clause, *see Pa. Democratic Party*, 238 A.3d at 376-80, the date requirement cannot either.

Notably, the rejection rate under the date requirement actually *decreased* in the 2024 primary elections to 0.56%. *See Black Political Empowerment Project*, 2024 WL 4002321, at *55 (McCullough, J., dissenting). The vast majority of Pennsylvania mail voters therefore again complied with the date requirement, so it cannot violate the Free and Equal Elections Clause. *LWV*, 178 A.3d at 810.

Finally, as even the *BPEP* majority recognized, there is every reason to think the rejection rate will only continue to decline. In fact, it has never been easier to comply with the date requirement: The Secretary recently redesigned the mail-ballot declaration in a manner that “eliminates” the most common forms of dating errors in past elections. *Black Political Empowerment Project*, 2024 WL 4002321, at *9. Thanks to the Secretary’s actions, county boards must (1) preprint the entire year in the date field, thus “eliminat[ing]” the error of “a voter writing an incomplete or

inaccurate year,” *id.* at *9; (2) print “Today’s date here (REQUIRED)” above the date field, thus further specifying which date is “correct,” and (3) print four boxes in the date field and to specify that the date should be written in MM/DD format, thus eliminating any confusion regarding whether voters should use the American or International dating conventions. *See* Directive Concerning the Form of Absentee and Mail-in Ballot Materials, Pa. Dep’t of State 12 (2024), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-Directive-Absentee-Mail-in-Ballot-Materials-v2.0.pdf>.

If one looks at the newly-designed declaration, which reflects the Secretary’s redesign directive, it is obvious that the date requirement is easy to comply with. *Id.*

Before you complete this side!
1. Seal your ballot in the yellow envelope that says “Official Election Ballot.”
2. Then seal that envelope inside this envelope.

Voter’s declaration
I am qualified to vote the enclosed ballot and I have not already voted in this election.
If I am unable to sign without help because I have an illness or physical disability, I have made my mark or somebody has helped me make my mark.

Sign and date

Sign or mark here (REQUIRED)
X _____

Today’s date here (REQUIRED)
____/____/20____
Month Day Year

For your witness only
If you have an illness or physical disability that prevents you from signing, have your witness complete this section.

Witness, sign here

Witness address
Street _____
City _____ Zip _____

For county election use only

3. Pennsylvania Law Forecloses Application Of Strict Scrutiny Or Any Other Judicial Balancing Test.

The *BPEP* majority took a starkly different approach and applied *strict scrutiny* to the date requirement. *BPEP*, 2024 WL 4002321, at *32. But that contravened well-established Pennsylvania law—for several reasons.

First, the Pennsylvania Supreme Court has *never* applied the Free and Equal Elections Clause in this manner. In fact, consistent with its historical aims, the Clause has been applied “infrequently,” *LWV*, 178 A.3d at 809, and *never* to invalidate a neutral ballot-casting rule. Moreover, when the Pennsylvania Supreme Court considered Free and Equal Elections challenges to the declaration mandate and the secrecy-envelope rule, it did not apply *any* kind of judicial scrutiny or balancing, let alone strict scrutiny. *See Pa. Democratic Party*, 238 A.3d at 372-80; *see also id.* at 374 (“task of effectuating” Free and Equal Elections mandate belongs to “the Legislature”). The Pennsylvania Supreme Court recently took the exact same approach to the provisional-ballot signature requirement. *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7.

Second, Appellees have argued “strict scrutiny” applies to “any restriction” on voting. Pet. ¶ 59, App. Ex. B. That would come as a surprise to the Pennsylvania Supreme Court, which in *Pennsylvania Democratic Party* recognized that the right to vote is fundamental but did *not* apply any scrutiny or balancing, let alone strict scrutiny, to the voting rules challenged there. *See* 238 A.3d at 372-80, 385. And in

the other case Appellees cited below for this proposition, this Court *declined* to apply strict scrutiny over an argument that the challenged law implicated the fundamental right to vote. *See Petition of Berg*, 712 A.2d 340, 342-44 (Pa. Commw. Ct. 1998) (cited at Pet. ¶ 59, App. Ex. B).

Third, expanding the Free and Equal Elections Clause to subject all neutral ballot-casting rules to an open-ended balancing test would be inconsistent with Pennsylvania’s separation of powers. “While the Pennsylvania Constitution mandates that elections 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 rushing to reinstate the *BPEP* decision against the date requirement, this Court should adhere to *In re Canvass of Provisional Ballots in 2024 Primary Election*, which the Pennsylvania Supreme Court issued after *BPEP*. The Pennsylvania Supreme Court’s approach to the Free and Equal Elections Clause challenge in that case *looks nothing like* what the panel majority did in *BPEP*. *See In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *7. Instead, the Pennsylvania Supreme Court did exactly what it did in

Pennsylvania Democratic Party: It upheld the challenged provision without applying *any* sort of judicial balancing test or second-guessing the General Assembly’s potential policy justifications for the challenged rule. *Compare id.*, with *Pa. Democratic Party*, 238 A.3d at 372-80.

As Justice Wecht explained, even “technicalities” in “the Election Code must be strictly enforced.” *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *15 (Wecht, J., concurring). In fact, Justice Wecht cited the date requirement as an example of a “technicality” that must be “strictly enforced,” even though he suggested it may be “superfluous.” *Id.* at *13, 15 & n.58 (Wecht, J., concurring). When it comes to ballot-casting rules, Justice Wecht explained that “[t]he question for a court is not what is ‘necessary’” but instead “what the statute means.” *Id.* at *13 (Wecht, J., concurring). Thus, “if the language is plain, the answer is clear.” *Id.* “The legislature, with the Governor’s approval, decides what is or is not necessary”; the courts do not. *Id.*

Adopting strict scrutiny or any other judicial balancing test for mandatory election rules would effectively force the Judiciary to routinely “second-guess the policy choices of the General Assembly.” *Ins. Fed’n of Pa., Inc.*, 970 A.2d at 1122 n.15. Even though “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government,” *Winston*, 91 A. at 522,

Appellees would subject all of Pennsylvania’s election laws to searching judicial scrutiny. This Court should reject that dangerous and legally unfounded approach.

4. The Date Requirement Satisfies Any Applicable Interest Balancing.

There is no basis to apply 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 court below erred in concluding otherwise.

As a majority of the Pennsylvania Supreme Court has recognized, the date requirement serves several weighty interests and an “unquestionable purpose.” *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see id.* at 1087 (Wecht, J., concurring in part and dissenting in part) (“colorable arguments . . . suggest [the date requirement’s] importance”); *accord In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *4 (acknowledging Justices previously found date requirement to serve important purposes). To start, it “provides proof of when the ‘elector actually executed the ballot in full.’” *Id.* at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). It thus facilitates the “orderly administration” of elections, undoubtedly a legitimate interest, *Crawford*, 553 U.S. at 196 (Stevens, J.). To be sure, election officials are required to timestamp a ballot and scan the barcode into the Statewide Uniform Registry of Electors (“SURE”)

upon receipt. *See Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 665 (W.D. Pa. 2023), *rev'd* 97 F.4th 120 (3d Cir. 2024). And there is every reason to think that ordinarily happens. *See id.* But the handwritten date serves as a useful backstop, and would become quite important if officials failed to perform those tasks or if SURE malfunctioned—possibilities Third Circuit Judge Matey has highlighted. *See Migliori v. Cohen*, 36 F.4th 153, 165 (3d Cir. 2022) (Matey, J., concurring in judgment), *vacated sub nom., Ritter v. Migliori*, 143 S. Ct. 297 (2022).

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

agreements.” *BPEP*, 2024 WL 4002321, at *53 (McCullough, J., dissenting); *accord Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (an “original signature . . . carries solemn weight.”) (cleaned up).

Moreover, the requirement advances the State’s interests in “detering and detecting voter fraud” and “protecting the integrity and reliability of the electoral process.” *Crawford*, 553 U.S. at 191 (Stevens, J.); *see also 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*, MJ-02202-CR-0000126-2022 (Lancaster Cnty. 2022) (charging document in *Mihaliak*), App. Ex. A, A-4. 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. Ex. A* (charging document in *Mihaliak*). That evidence was used to secure a guilty plea from the fraudster, who was criminally sentenced. *See BPEP*, 2024 WL 4002321, at *15 n.33.

States do not need to point to evidence of election fraud within their borders in order to adopt rules designed to deter and detect it. *Brnovich*, 594 U.S. at 686.

Yet here, where the requirement has actually been used to detect and prosecute fraud, the State’s interest in “deterring and detecting voter fraud” is unquestionably advanced. *Crawford*, 553 U.S. at 191 (Stevens, J.). And the requirement’s anti-fraud function advances the related vital state interest of preserving and promoting voter “[c]onfidence in the integrity of our electoral process[]” that is so “essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4.

This Court should not second-guess the General Assembly’s policy choice to enact and maintain the date requirement. As Justice Wecht has explained, “[t]he question for a court is not what is ‘necessary’” because “[t]he legislature, with the Governor’s approval, decides what is or is not necessary.” *In re Canvass of Provisional Ballots in 2024 Primary Election*, 2024 WL 4181584, at *13 (Wecht, J., concurring). The Court should reverse.

C. Other States’ “Free And Equal Elections” Precedent And Federal Right-To-Vote Precedent Foreclose Appellees’ Claims.

If more were somehow needed, other States’ “free and equal elections” jurisprudence and federal right-to-vote case-law also refute Appellees’ arguments.

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

As the Pennsylvania Supreme Court has noted, twelve other States have “free and equal elections” provisions similar to the Clause. *LWV*, 178 A.3d at 813 n.71. Yet neither Appellees nor the *BPEP* majority cited any 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, 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”) (cleaned up); *Graham v. Sec’y of State*, 684 S.W.3d 663, 684 (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, Intervenor-Appellants are aware of *zero* cases applying any other State’s “free and equal election” clause to invalidate a neutral ballot-casting rule. 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., Inc. 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 Appellees’ Challenge.

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

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 (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. Indeed, Pennsylvania “permits [all voters] to vote in person” without complying with the requirement; “that is the exact opposite of ‘absolutely prohibiting’ them from doing so.” *Tex. Democratic Party*, 961 F.3d at 404 (cleaned up). The right to vote under the federal Constitution is therefore unaffected by the requirement. *See McDonald*, 394 U.S. at 807, 809.

Moreover, even if the Court believes it can apply some sort of judicial balancing approach here, federal law underscores that the date requirement is constitutional even under such an approach. Courts assess alleged violations of the federal constitutional right to vote under the so-called *Anderson-Burdick* test. Under that framework, regulations imposing “severe burdens on [voters’] rights must be narrowly tailored and advance a compelling state interest,” while those imposing “[l]esser burdens . . . trigger less exacting review, and a 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) (cleaned up). Moreover, the “usual burdens of voting” cannot violate any right to vote under federal law. *Crawford*, 553 U.S. at 198 (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 (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 (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 in-person at the DMV) (Stevens, J.); *Brnovich*, 594 U.S. at 678 (identifying and traveling to correct polling place).

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* Part II.B.4.

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 that this Court 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).

The Pennsylvania Supreme Court has already held that the date requirement is mandatory, *Ball*, 289 A.3d at 20-23; has declined two invitations to wield the Free and Equal Elections Clause to invalidate it, *see supra* Part II.A; and has declined two more invitations to revisit that decision in recent weeks, *see supra* Part I. 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. *BPEP*, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

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); *McLinko v. Dep’t of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., concurring in part and dissenting in part); *BPEP*, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

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 trial court’s order stated that enforcement of the date requirement against Appellees violated the Free and Equal Protections Clause. Sept. 26 Order at 1-2, App. Ex. B. That court therefore “held invalid” the requirement’s “application to” some “person” and “circumstance.” Act 77 § 11. Thus, if affirmed, the trial court’s decision has voided the entirety of Act 77 and universal mail voting on the eve of

the 2024 general election. *See Pa. Democratic Party*, 238 A.3d at 391 (Wecht, J., concurring) (“A mandate without consequences is no mandate at all.”).

III. SEVERAL PROCEDURAL DEFECTS REQUIRE REVERSAL.

The Court need not even reach the merits because several procedural defects in Appellees’ suit and the proceedings below require reversal.

First, Appellees’ suit should be dismissed because they failed to join indispensable parties: the other 66 county boards of elections. *See BPEP Order*, 2024 WL 4181592, at *1; *accord Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988). Indeed, it was precisely the same failure to join all county boards that caused the Pennsylvania Supreme Court to vacate the divided panel decision in *BPEP*. Thus, the Pennsylvania Supreme Court has recognized that all county boards have interests in the date requirement and must be joined to cases challenging it. *See BPEP Order*, 2024 WL 4181592, at *1. It is therefore bewildering that Appellees, represented by the same counsel who failed to join the other county boards just weeks ago, repeated the same reversible error here.

Nor is this an empty formality. The other county boards may wish to participate in the development of a factual record about the date requirement. Some county boards have vigorously defended the date requirement in parallel federal litigation. *See, e.g., Pa. State Conf. of NAACP*, 703 F. Supp. 3d at 643-44 (noting

defenses by Lancaster and Berks County Boards). They should be given the chance to do so here.

Second, factual development would be necessary before granting relief in this case. Appellees' petition asserts that the General Assembly's date requirement is "meaningless." Pet. ¶ 4, App. Ex. B. Intervenor-Appellants strongly disagree. *See supra* Part II.B.4. This is a factual dispute that cannot be resolved without record development, including discovery and potentially expert witnesses. Intervenor-Appellants would also like to depose Appellees to understand why they did not comply with the date requirement.

Appellees asserted below that other courts have found that the date requirement serves no function. *See* Pet. ¶ 4, App. Ex. B. This is false. The federal-court cases Appellees cited dealt not with right-to-vote arguments, but with challenges under a federal statute (the Materiality Provision). *See Pa. State Conf. of NAACP*, 703 F. Supp. 3d at 668; *Pa. State Conf. of NAACP*, 97 F.4th 120 (rejecting challenges to date requirement). Statements respecting the date requirement are thus passing dictum, as they were irrelevant to the federal courts' holdings. *See, e.g., In re Nat'l Football League Players Concussion Inj. Litig.*, 775 F.3d 570, 583 n.18 (3d Cir. 2014). Indeed, it is apparent those courts did not give "full and careful consideration" to this point. *Id.* After all, they did not address the State's interest in documenting the date the voter completed the ballot as part of trustworthy election

administration or as a back-up for scanning errors or SURE system malfunctions. *See Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment). They also did not address the State’s interest in solemnity. *See Pa. State Conf. of NAACP*, 97 F.4th at 125, 127, 129. The Third Circuit likewise did not address the State’s interest in deterring and detecting fraud or even mention the *Mihaliak* case, *see id.*, while the district court offered a footnote saying evidence of fraud was “irrelevant” under the Materiality Provision, 703 F. Supp. 3d at 679 n.39. And the vacated *BPEP* decision Appellees cited below erroneously relied on those inapt federal cases, *see BPEP*, 2024 WL 4002321, at *32, all without allowing 66 boards of elections not joined to that case to participate and contribute to a record regarding the date requirement’s functions.

Third, the trial court erred in retroactively changing election rules for the Special Election. As the Pennsylvania Supreme Court and U.S. Supreme Court have instructed, judicial changes to election rules are not allowed even shortly *before* Election Day because they undermine “[c]onfidence in the integrity of our electoral processes.” *Purcell*, 549 U.S. at 4; *see supra* Part I. That rule applies “with much more force on the back end of elections.” *Trump v. Wis. Elections Comm’n*, 983 F.3d 919, 925 (7th Cir. 2020); *see League of United Latin Am. Citizens Ariz. v. Reagan*, 2018 WL 5983009, at *4 (D. Ariz. Nov. 14, 2018) (applying *Purcell* after an election). Orders before Election Day are made behind the veil of ignorance; neither

the court nor the public knows what effect, if any, they will have on the outcome. By contrast, orders “after election day” create suspicions that courts are interfering with the election results. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (mem.) (Thomas, J., dissenting); *see also Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (“Interference with impending elections is extraordinary . . . and interference with an election after voting has begun is unprecedented.”).

The lower court here should not have purported to retroactively invalidate the date requirement for the Special Election. Challenges to the General Assembly’s election rules must be brought *well in advance* of elections. *See New Pa.*, 2024 WL 4410884, at *1; *accord Reagan*, 2018 WL 5983009, at *4 (“[P]roblems can arise from rushed election-related decisions.”). And the General Assembly’s commands can only be constitutionally invalidated with great care after courts oversee a deliberate and orderly process that honors regular procedures. *See Mixon*, 759 A.2d at 447. The trial court’s order violated those rules. It purported to invalidate the General Assembly’s law with no factual development, no regular briefing, and not even the courtesy of reasoning in an opinion. The trial court showed little regard for the General Assembly—completely at odds with the *strong* presumption of constitutionality that legislative acts enjoy. *Id.* This Court should not repeat that error.

CONCLUSION

The Court should reverse.

Dated: October 14, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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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 13,176 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Kathleen A. Gallagher

Counsel for Intervenor-Appellants

CERTIFICATE OF COMPLIANCE

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

/s/ Kathleen A. Gallagher
_____ *Counsel for Intervenor-Appellants*

APPENDIX
TO
INTERVENOR-APPELLANTS'
INITIAL BRIEF

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COMMONWEALTH OF PENNSYLVANIA
COUNTY OF: Lancaster



POLICE CRIMINAL COMPLAINT
COMMONWEALTH OF PENNSYLVANIA
VS.

Magisterial District Number: 02-2-02

DEFENDANT:

(NAME and ADDRESS):

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

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

NCIC Extradition Code Type

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

DEFENDANT IDENTIFICATION INFORMATION

Docket Number **CR-126-22** Date Filed **06/03/22** OTN/NoScan Number **R 300522-5** Complaint **150** Incident Number **DA-22-0138** Request Lab Services? YES NO

GENDER Male Female DOB **6/13/1961** POB AKA First Name Middle Name Last Name Add'l DOB Co-Defendant(s)

RACE White Asian Black Native American Unknown

ETHNICITY Hispanic Non-Hispanic Unknown

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

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

DNA YES NO DNA Location WEIGHT (lbs.)

FBI Number **688907JA3** MNU Number **160**

Defendant Fingerprinted? YES NO FL HEIGHT In

Fingerprint Classification: **5 11**

DEFENDANT VEHICLE INFORMATION

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

Office of the attorney for the Commonwealth Approved Disapproved Because:

(The attorney for the Commonwealth may require that the complaint, arrest warrant affidavit, or both be approved by the attorney for the Commonwealth prior to filing. See Pa.R.Crim.P.507.)

Andrew J. Gonzalez (Name of the attorney for the Commonwealth) [Signature] (Signature of the attorney for the Commonwealth) 6/3/22 (Date)

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



POLICE CRIMINAL COMPLAINT

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

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

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

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

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

02-2-02
 (Magisterial District Court Number)

[Signature]
 (Issuing Authority)





POLICE CRIMINAL COMPLAINT

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

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

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

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

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

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

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

FORGERY-UTTER FORGED WRIT

Acts of the accused associated with this Offense:

PACC 4101(a)3 Forgery

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

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

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

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

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

Acts of the accused associated with this Offense:

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



Police Criminal Complaint

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

AFFIDAVIT OF PROBABLE CAUSE

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

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

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

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

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

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

I CERTIFY THAT THIS FILING COMPLIES WITH THE PROVISIONS OF THE CASE RECORDS PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA THAT REQUIRE FILING OF CONFIDENTIAL INFORMATION AND DOCUMENTS DIFFERENTLY THAN NO-CONFIDENTIAL INFORMATION AND DOCUMENTS.


(Signature of Affiant)

Sworn to me and subscribed before me this _____ day of _____,

_____ Date _____, Magisterial District Judge

My commission expires first Monday of January,



Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

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

Criminal Docket

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Cheryl Mihaliak

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CASE INFORMATION

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

STATUS INFORMATION

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

CALENDAR EVENTS

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

DEFENDANT INFORMATION

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

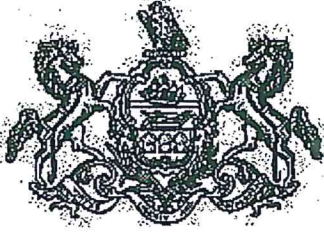
Advised of His Right to Apply for Assignment of Counsel?	Yes
Public Defender Requested by the Defendant?	No
Application Provided for Appointment of Public Defender?	No
Has the Defendant Been Fingerprinted?	No

Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

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

Criminal Docket



Commonwealth of Pennsylvania
v.
Cheryl Mihaliak

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CASE PARTICIPANTS

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

BAIL

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

CHARGES

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

DISPOSITION / SENTENCING DETAILS

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

ATTORNEY INFORMATION

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

Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

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

Criminal Docket

Commonwealth of Pennsylvania
v.
Cheryl Mihaliak

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DOCKET ENTRY INFORMATION

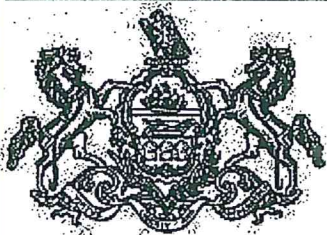
Filed Date	Entry	Filer	Applies To
07/25/2022	Bail Set	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/25/2022	Formal Arraignment Scheduled	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/25/2022	Waiver of Preliminary Hearing	Cheryl Mihaliak	Cheryl Mihaliak, Defendant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

Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

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

Criminal Docket



Commonwealth of Pennsylvania

v.

Cheryl Mihaliak

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DOCKET ENTRY INFORMATION

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

July 25, 2022

Date

Magisterial District Judge Bruce A. Roth



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Counsel for Petitioners
**Pro hac vice application*
to be filed



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

BRIAN T. BAXTER
2401 Pennsylvania Ave.
Philadelphia, PA 19130

and

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

Petitioners,

v.

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

Respondents.

CIVIL DIVISION

No. _____

ELECTION APPEAL

PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION

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

PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DECISION OF THE BOARD AT ISSUE

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

25. Petitioners appeal from that decision.

FACTUAL BACKGROUND

A. Voting by Mail in Pennsylvania

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Date Provision Serves No Purpose

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁵ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GROUND FOR APPEAL

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Dated: September 23, 2024

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**Pro hac vice applications*
to be filed

CERTIFICATE OF COMPLIANCE

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

Dated: September 23, 2024

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

VERIFICATION

I, BRIAN T. BAXTER, hereby state:

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

Brian T. Baxter

Dated: September 23, 2024

VERIFICATION

I, Susan T. Kinniry, hereby state:

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



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

Dated: September 23rd, 2024

EXHIBIT

1

DECLARATION OF BRIAN T. BAXTER

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

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

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

3. I live in Philadelphia, Pennsylvania.

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

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

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

including primary and general elections.

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

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

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

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

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

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

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

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

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

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

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

Brian T. Baxter

EXHIBIT

2

DECLARATION OF SUSAN T. KINNIRY

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

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

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

3. I am a resident of Philadelphia, Pennsylvania.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Susan T. Kinniry

Declaration

Exhibit A

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

Dear SUSAN T KINNIRY,

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

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

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

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

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

Thank you.

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

EXHIBIT

3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Ariel Shapell

5/27/2024

RECEIVED

SEP 26 2024
ROOM 521

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

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

DOCKETED
SEP 26 2024
R. POSTELL
COMMERCE PROGRAM

ORDER

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

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

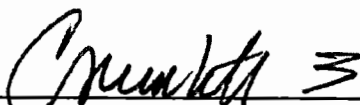
ORDER-Baxter Etal Vs Philadelphia Board Of Elections [RCP]



b. Because the refusal to count a ballot due to a voter's failure to "date . . . the declaration printed on [the outer] envelope" used to return his/her mail-in ballot, as directed in 25 P.S. §§ 3146.6(a) and 3150.16(a), violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania, which states that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

2. Respondent Board of Elections shall cause petitioners' and the sixty-seven other registered voters' date-disqualified mail-in ballots from the Special Election to be verified, counted if otherwise valid, and included in the results of the Special Election.

BY THE COURT:



CRUMLISH, III, J.

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

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

ORDER

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

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

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

BY THE COURT:



Crumlish, III, J.

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

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

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

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



1925a ORDER

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

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

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



JAMES C. CRUMLISH, III, J.

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