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IN THE SUPREME COURT OF PENNSYLVANIA

DAVID BALL, JAMES D. BEE, JESSE D. DANIEL, GWENDOLYN MAE DELUCA, ROSS M. FARBER, LYNN MARIE KALCEVIC, VALLERIE SICILIANO-BIANCANIELLO, S. MICHAEL STREIB, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA, *Petitioners* v. LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, and ALL 67 COUNTY BOARDS OF ELECTIONS, *Respondents*	:	No. 102 MM 2022

AMICUS CURIAE BRIEF OF THE HONEST ELECTIONS PROJECT

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I. STATEMENT OF INTEREST

The Honest Elections Project (the "Project")[1] is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable, and legal measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain.

The Project has an appreciable interest in this case. As part of its mission, the Project understands how crucial it is to ensure that elections are carried out using lawful methods. Indeed, roughly half a century ago, the United States Supreme Court recognized that "there must be a *substantial* regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (emphasis added). This remains just as true today as when Justice White penned it in 1974.

Given the Project's focus and expertise, it respectfully submits this brief in support of the Petitioners and to aid the Court as it resolves this action.

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[1] No person or entity other than Amicus Curiae its members, or counsel: (i) paid in whole or in part for the preparation of this amicus curiae brief; or (ii) authored in whole or in part this amicus curiae brief.

II. SUMMARY OF THE ARGUMENT

One of the issues this Court asked the Parties to brief is the way in which a provision of Pennsylvania's Election Code interacts with a provision of the federal Civil Rights Act of 1964. The Commonwealth's law expressly requires any person submitting a vote-by-mail ballot to "*date* and sign" a declaration printed on the back of the envelope. 25 P.S. § 3146.6(a) (emphasis added); *accord id.* § 3150.16(a). The federal law forbids any person "acting under color of law" to deny anyone the right to vote based on "an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified . . . to vote . . . ." 52 U.S.C. § 10101(b). In the view of the Pennsylvania Acting Secretary of State, a decision to enforce the former (which, in her view, is "an inconsequential" requirement, Sec. Br. 3), violates the latter.

The Acting Secretary's position fails for a fundamental reason. The dated-declaration requirement regulates the *vote-by-mail* process. The Civil Rights Act protects an individual's fundamental *right to vote*. Scores of caselaw throughout the Nation are in accord—voting by mail is not synonymous with voting, and regulation of the former does not amount to deprivation of the latter. Appreciating the difference between the Commonwealth-created accommodation to vote by mail

and the constitutionally enshrined right to vote provides another, independent reason for the Court to decide this case in favor of the Petitioners.

Should the Court disagree and reach the merits, however, the Acting Secretary's arguments still fail as a matter of law. Pennsylvania is not asking too much of its constituency to sign *and date* an envelope when they avail themselves of the Commonwealth's vote-by-mail accommodation; this is the sort of common sense requirement that any deadline-driven vote-by-mail system would self-evidently require. And despite the truly *de minimis* burden requirement places on voters, complying with it serves profoundly important goals—*e.g.*, the prevention of late voting and illegal voting.

The Commonwealth has decided to make voting easier by providing a vote-by-mail option. In return, it has asked those selecting this option to provide the minimally necessary information to ensure that elections in the Commonwealth remain free and fair. Enforcing the requirement to complete this small, yet critically important, task does not offend the Civil Rights Act of 1964. This Court should rule accordingly.

III. ARGUMENT

A. BECAUSE THE COMMONWEALTH'S DATED-DECLARATION REQUIREMENT DOES NOT IMPLICATE THE RIGHT TO VOTE, IT DOES NOT TRIGGER THE MATERIALITY PROVISION IN THE CIVIL RIGHTS ACT OF 1964.

Despite the Acting Secretary's protestations to the contrary, she is wrong to argue that the Civil Rights Act's materiality provision applies at all. The plain text of the materiality provision makes manifest this point: it prohibits persons "acting under color of law" from "*deny[ing] the right of any individual to vote* in any election" due to an immaterial error or omission. In other words, the denial of the right to vote is a prerequisite for any action under that provision. Without it, this section of the Civil Rights Act cannot apply.

The question, then, is whether Pennsylvania's dated-declaration requirement implicates the right to vote—and not just the Commonwealth's vote-by-mail accommodation. The answer is plain. There exists no unconditional right to vote by mail under either federal or Pennsylvania law. The dated-declaration requirement applies only to Pennsylvania's vote-by-mail accommodation. Like night follows day, it necessarily follows that the Acting Secretary cannot use federal law that expressly requires a voting-rights deprivation to excuse violations of Pennsylvania's unambiguous vote-by-mail rules.

1. There exists no federal right to vote by mail.

Courts throughout the federal system have long been in accord—"there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) (citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–09 (1969)). And when the government limits or regulates voting by mail but leaves unencumbered voting in person, courts universally recognize that "[i]t is thus not the right to vote that is at stake here but a claimed right to receive absentee [or mail] ballots." *McDonald*, 394 U.S. at 807. For that reason, the Supreme Court has squarely held that, short of "in fact absolutely prohibit[ing]" a plaintiff from voting, a person's voting rights are not impeded. *Id.* at 808 n.7.

Indeed, the Supreme Court squarely resolved this issue in *McDonald*, a case in which the Court held that an Illinois statute denying certain inmates mail-in ballots did not violate their right to vote. *Id*. at 807. Because the statute burdened only their *asserted* right to an absentee ballot, and because the inmates presented no evidence that they could not vote another way, *id*. at 807–08, the Court held that they had not shown that the state "in fact absolutely prohibited [them] from voting." *Id*. at 808 n.7. For this reason, the *McDonald* Court applied rational-basis review and upheld the absentee-ballot restriction. *Id*. at 808–11.

Other federal circuit courts of appeals have followed suit. In *Griffin v. Roupas*, the Seventh Circuit upheld a district court's motion to dismiss a claim on

behalf of "working mothers who contend[ed] that[,] because it [was] a hardship for them to vote in person on election day, the United States Constitution require[d] Illinois to allow them to vote by absentee ballot." 385 F.3d 1128, 1129 (7th Cir. 2004). In rejecting their claim, the Seventh Circuit noted that they had "claim[ed] a blanket right . . . to vote by absentee ballot"; in other words, "absentee voting at will." *Id.* at 1130. After noting the substantial issues that unregulated and unlimited voting by mail would cause,[2] *id*. at 1130-31, the Court declined to find that the plaintiffs' request violated their right to vote. *Id*. at 1131-33.

When COVID-19 emerged, plaintiffs throughout the Country attempted to cite the pandemic as a reason to expand, as a constitutional matter, vote-by-mail access via judicial fiat. They were nearly universally unsuccessful in doing so. *See generally, e.g., Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir 2020); *Coalition for Good Governance v. Raffensperger*, No. 1:20-cv-1677, 2020 U.S. Dist. LEXIS 86996 at *9 n.2. (N.D. Ga. May 14, 2020). The Acting Secretary's position in this case presumes the same principle that courts have continued to reject—i.e., that vote by mail and the right to vote are one and the same. Contrary to her position, no federal court has recognized (or should recognize) that the

[2] The Court discussed at length how regulating absentee voting helps reduce the danger of voting fraud, invalidly cast ballots, voter mistakes and errors, and deprivation of information that may surface late in elections. *Griffin,* 385 F.3d at 1130-31.

fundamental right to vote translates into a right to no-excuse, expanded-excuse, or (as the Acting Secretary argues here) lesser-regulated absentee voting. *See Mays*, No. 4:20-cv-341 (JM), 2020 U.S. Dist. LEXIS 54498 at *4-5.

For instance, in *Texas Democratic Party v. Abbott*, a Fifth Circuit motions panel stayed a Western District of Texas order granting a preliminary injunction that required state officials to, among other things, distribute mail-in ballots to any eligible voter who wanted one. In so doing, the Fifth Circuit held that: "[t]he Constitution is not 'offended simply because some' groups 'find voting more convenient than' do the plaintiffs because of a state's mail in ballot rules." 961 F.3d at 405 (quoting *McDonald*, 394 U.S. at 810). The Fifth Circuit's mind was not changed even though "voting in person 'may be extremely difficult, if not practically impossible,' because of circumstances beyond the state's control." *Id.* (quoting *McDonald*, 394 U.S. at 810). Critically, the Fifth Circuit indicated that the principles guiding its analysis would apply in the statutory context—in that case, specifically, the Voting Rights Act. *See id*. at 404 n.32 ("And here, unlike in *Veasey* [*v. Abbott*—a challenge to a Texas voter ID law under the Voting Rights Act], the state has not placed any obstacles on the plaintiffs' ability to vote in person." (emphasis in original)).[3]

[3] Judge Ho's concurring option further emphasized this point. *See Texas Democratic Party*, 961 F.3d at 444-45 (noting that "[f]or courts to intervene, a (continued) . . .

In cases arising before the COVID-19 pandemic, other exigencies were similarly unable to expand the right to vote into a right to vote by mail. In the wake of Hurricane Katrina, the Eastern District of Louisiana dismissed a request to extend the deadline for counting absentee ballots. *Assoc. of Communities for Reform Now v. Blanco*, No. 2:06-cv-611, Order at 1-2 (E.D. La. April 21, 2006) (ECF No. 58). The court found that the alleged harms "do not rise to the level of a constitutional or Voting Rights Act violation," *id*. at 3, and noted further the irony in the allegation that "a step taken by the State, apparently to allow as many displaced voters as possible the ability to request and receive an absentee ballot . . . is now being challenged as having the exact opposite effect." *Id*. For this reason, the court found the claim that the State's "efforts will 'disenfranchise' minority voters" to be disingenuous," and, accordingly, dismissed them. *Id*. at 5.

So too here. The Commonwealth endeavored to make voting easier by allowing the entire Pennsylvania electorate to request a vote-by-mail ballot. In return, it asked that those choosing to vote-by-mail include a date on their declarations. The Acting Secretary's personal opinion about this requirement—i.e., that it is "inconsequential," Sec. Br. 3—does not enable her either to skirt her duty to apply the Commonwealth's law as written or to use the Civil Rights Act of 1964

. . . (continued)
voter must show that the state 'has in fact precluded [voters] from voting'") (emphasis in original) (quoting *McDonald*, 394 U.S. at 808 & n.7)).

as an excuse to distort Pennsylvania's vote-by-mail accommodation into her preferred interpretation of it. Voting-by-mail is not synonymous with the constitutionally protected right to vote.

2. State courts have narrowly construed state law when examining the constitutionality of vote-by-mail requirements.

State courts have, like their federal brethren, also narrowly construed state constitutional provisions when those are used to challenge vote-by-mail regulations. In *Fisher v. Hargett*, 604 S.W. 3d 381 (Tenn. 2020), for instance, the Tennessee Supreme Court rejected a state constitutional challenge to election procedures premised on COVID-19-related difficulties because those procedures placed only "a moderate burden" on voting rights, if at all, and "the State's interests in the efficacy and integrity of the election process [were] sufficient to justify" them, especially in the context of absentee and mail voting. *Id.* And in *In re State*, the Texas Supreme Court narrowly construed Texas's absentee voting justifications and held that lack of immunity to COVID-19 is not itself a "physical condition" that renders a voter eligible to vote by mail within the meaning of Texas Law. 602 S.W.3d 549 (Tex. 2020).

The common thread in these cases is the same thread that forecloses the Acting Secretary's arguments here. Eligible citizens have a fundamental right to vote. They do not, however, have a fundamental right to vote-by-mail. The materiality provision in the Civil Rights Act of 1964 protects the former, but not

the latter. For this reason, the Acting Secretary cannot avail herself of the materiality provision because she would prefer not to enforce a plain, unobtrusive requirement that vote-by-mailers must date their respective vote-by-mail declarations.

3. Because there is no right to a mailed ballot, there can be no right to vote by mail while omitting a handwritten date.

The foregoing analysis is straightforward and unassailable. Pennsylvania's Election Code does not burden the right to vote. Instead, it makes voting easier by allowing the Commonwealth's electorate to vote-by-mail, provided that they comply with straightforward, commonsensical, non-intrusive safeguards. Although simple to satisfy, these safeguards remain critical to safeguard the legitimacy and orderly administration of Pennsylvania elections. *See infra* at Sec. II.

In other words, "this is not a case in which the state applied its own policy, adopted a rule, or enacted a statute that burdened the right to vote" in any way whatsoever. *Coalition v. Raffensperger*, No. 1:20-cv-1677, 2020 U.S. Dist. LEXIS 86996, 2020 WL 2509092 at *9 n.2 (N.D. Ga. May 14, 2020). Because the voting rights of the Commonwealth's electorate are not implicated by Pennsylvania's vote-by-mail regulations, it necessarily follows that the requirement to include a dated voter declaration does not implicate the right to vote, nor does setting a vote-by-mail ballot aside for failure to comply with this *de minimis* requirement. Without a voting-right infringement, the Civil Rights Act's materiality provision

never triggers. For this reason, the Court should reject the Acting Secretary's arguments to the contrary.

Indeed, all three of the Justices of the United States Supreme Court who have opined on this issue (the other six have not yet weighed in) agree. In *Ritter v. Migliori*, Justice Alito (joined by Justices Thomas and Gorsuch) reasoned that "[w]hen a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote'"; instead, "that individual's vote is not counted because he or she did not follow the rules for casting a ballot." 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from the denial of the application for stay pending a writ of certiorari) (quoting *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2338 (2021)). He recognized that "'[c]asting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules,'" and that "[a] registered voter who does not follow the rules may be unable to cast a vote for any number of reasons." *Id*. And he concluded that "[e]ven the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right" in a way that would trigger the materiality provision of the Civil Rights Act of 1964.

B. PENNSYLVANIA'S DATED-DECLARATION REQUIREMENT IS ENTIRELY MATERIAL.

Should the Court find that the materiality provision does apply (and for all the reasons discussed above, it should not), it does not help the Acting Secretary. Simply put, the Commonwealth's dated-declaration requirement is material in every sense of the word.[4] Unlimited and unregulated vote-by-mail systems breed chaos and confusion, and jurisdictions within the Commonwealth have experienced this firsthand. It is not too much to ask individuals who vote-by-mail to comply with certain basic, straightforward, readily discernible requirements to have mail ballot counted. Dispensing with such requirements is how problems regarding fraud, confidence, and orderly administration metastasize.

"[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (as quoted in *In re Nomination Paper of*

[4] Justices Alito, Thomas, and Gorsuch have noted that "[o]ne may argue that the inclusion of a date does not serve any strong purpose and that a voter's failure to date a ballot should not cause the ballot to be disqualified." *Ritter*, Slip Op. 4-5. They rejected the argument, however, because the materiality provision "does not address that issue"; instead, "[i]t applies only to errors or omissions that are not material to the question whether a person is qualified to vote" while leaving "to the States to decide which voting rules should be mandatory." *Ritter,* 142 S. Ct. at 1826 (Alito, J., dissenting).

Nader, 905 A.2d 450, 459-60 (Pa. 2006)).[5] The public's interest in the maintenance, order, and integrity of elections is compelling. *See, e.g., Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008). Scores of caselaw stand for this universally accepted principle.

Vote-by-mail options involve a tradeoff; as ballot-casting convenience expands, regulation must counterbalance risk. Indeed, in *Griffin v. Roupas*, Judge Posner recounted the many issues that can accompany unlimited absentee voting. In his view, "[v]oting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting." *Griffin*, 385 F.3d at 1130-31.[6] After analogizing no-excuse absentee voting to take-home exams, Judge Posner warned

[5] Although Pennsylvania's Free Speech and Association Clauses provide protections broader than its federal counterpart, this Court has continued to rely on the federal *Anderson-Burdick* jurisprudence to adjudicate claims related to the administration of elections and voting rights. *Working Families Party v. Commonwealth*, 209 A.3d 270, 284-86 (Pa. 2019) (relying on *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)). Furthermore, this Court has ruled that Pennsylvania's equal protections provisions are coextensive with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

[6] *See also Griffin*, 385 F.3d at 1130-31 (citing John C. Fortier & Norman J. Ornstein, *Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. & REFORM (2003); William T. McCauley, "Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy," 54 U. MIAMI L. REV. 625, 631–32 (2000); *Michael Moss, Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES (late ed.), Sept. 13, 2004, p. A1).

that "[a]bsentee voters . . . are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot." *Id*. at 1131.[7]

Indeed, the Commonwealth has in fact faced voting fraud, illegal vote-by-mail activity, and improperly cast and handled mail ballots in the past:

- In *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994), two elections officials conspired with a candidate to cause the casting of illegally obtained absentee ballots and the County Board of elections to reject four-hundred absentee ballots because they were from unregistered voters.

- In *Opening of Ballot Box of the First Precinct of Bentleyville*, 143 Pa. Commw. 12, 598 A.2d 1341 (1991), four signatures on absentee ballots did not match those on applications for the absentee ballots. An election challenger alleged fraud, and court agreed.

- In *In re Ctr. Twp. Democratic Party Supervisor Primary Election*, 4 Pa. D. & C.4th 555 (C.P. 1989), absentee ballot applications and absentee ballots were completed and submitted for fifteen entirely fictious persons. The candidate then beat their opponent by fourteen votes. The nomination was voided, and a run-off election was ordered.

[7] *See also Griffin*, 385 F.3d at 1131 (citing *Nader v. Keith*, 385 F.3d 729, 732-33 (7th Cir. 2004); R.W. Apple Jr., *Kerry Pins Hopes in Iowa on Big Vote From Absentees*, N.Y. TIMES (nat'l ed.), Sept. 28, 2004, p. A18; John Harwood, *Early Voting Begins in Presidential Battlegrounds: In Iowa, 'Ballot Chasers' Seek Decisions and an Edge Weeks Before Election Day*, Sept. 27, 2004, p. A1; Moss, *supra*; Ron Lieber, *Cast a Ballot From the Couch: Absentee Voting Gets Easier*, WALL St. J., Sept. 2, 2004, p. D1.).

The Commonwealth's dated-declaration requirement is meant to help prevent many of these issues. And as these examples illustrate, unsecure vote-by-mail processes only increases the chance for fraud, other illegal electoral activity, and improperly cast ballots.

Besides fraud or illegal electoral conduct, mistakes concerning mail-in-voting are well documented in Pennsylvania—even before the recent proliferation of mail-in-voting:

- In *In re November 3, 2009 Election for Council of Borough*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 208 (Allegheny County Dec. 2009), an error by an election official changed the vote and caused a tie in a Borough's councilperson election. The official did not call for the absentee ballot to be thrown out since it was cast in accordance with the law and did not involve fraud or tampering.

- In *In re Petition to Contest Nomination of Payton*, No. 0049, 2006 Phila. Ct. Com. Pl. LEXIS 366 (C.P. Sep. 14, 2006), a candidate was stricken from the ballot and mounted a well-organized write-in campaign. Some voters wrote in the candidate for the wrong election and claimed some in-person and absentee votes were incorrectly calculated, which changed the outcome of the election. The court granted a recalculation.

Mistakes happen. But they happen more frequently, and with greater consequences, when election officials dispense with commonsensical simple—yet nonetheless crucial—election regulations. The Court need not, and should not, do so here by acquiescing to the Acting Secretary's dismissive objection to the Petitioners' argument.

Vote-by-mail procedures, when adopted, must be accompanied by checks to assure the integrity of elections. Compelling policy considerations thus weigh heavily against permitting unsecured voting by mail in the Commonwealth by dispensing with easily satisfied safeguards. Already, the Acting Secretary has indicated that she has no interest in complying with her responsibility to enforce Pennsylvania law (at least any provision she deems to be "inconsequential," Sec. Br. 3). This Court should disabuse her of the notion that she wields that sort of extra-legal authority.

IV. CONCLUSION

For the foregoing reasons, Amicus Curiae, the Honest Elections Project, respectfully requests the Court rule in favor of the Petitioners.

Respectfully submitted,

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Dated: October 24, 2022

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Pa.R.A.P. 531(b)(3) CERTIFICATE OF COMPLIANCE

It is hereby certified that the foregoing *Amicus Curiae* Brief complies with the word count limit contained in Pa.R.A.P. 531(b)(3) because it contains 3,756 words, as computed by the "Word Count" function in Microsoft Word 2013, excluding the parts exempted by Pa.R.A.P. 2135(b).

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Pa.R.A.P. 127(a) CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned 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.

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