EXHIBIT 3

Brief Supporting Motion to Stay

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BETTE EAKIN, *et al.*,	:	
	:	
Plaintiffs	:	
	:	
v.	:	**No. 1:22–CV–340–SPB**
	:	
ADAMS COUNTY BOARD OF ELECTIONS, *et al.*,	:	
	:	
Defendants	:	

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS INTERVENOR IN SUPPORT OF ITS MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

In 2019, the General Assembly enacted Act 77, a sweeping package of reforms to Pennsylvania's Election Code. The Code now provides for universal, no-excuse mail-in and absentee voting. And it instructs Pennsylvanians availing themselves of that option to "fill out, *date*, and sign" a pre-printed declaration on the outer return envelope in which their ballot will travel to their county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added).

This Court's analysis of Plaintiffs' federal constitutional claims confirmed what common sense already suggests. The requirement that voters sign and date an envelope is facially nondiscriminatory. And compliance with the Election Code's command represents a minimal burden upon the franchise. (*See* ECF 438 at 16). Perhaps shaded by Plaintiffs' distinct claims under the federal Civil Rights Act, *see* 52 U.S.C. § 10101, however, the Court determined that enforcement of this requirement is "not justified by any state interest," and declared it a violation of the "First Amendment right to vote." (*Id.* at 8).

With a statewide primary election only 5 weeks away, and cognizant of significant friction within the Court's rationale, the Commonwealth of Pennsylvania respectfully requests a stay of the judgment pending its forthcoming appeal. Enforcing this provision of the Election Code does not offend any federal constitutional protection of the right to vote, and the public interest favors allowing

the Commonwealth to enforce its duly-enacted election laws before final resolution of this important question.

ARGUMENT

Courts traditionally consider four factors in evaluating requests for a stay pending appeal, the first two of which are the "most critical." *In re Citizens Bank, N.A.*, 15 F.4th 607, 615–16 (3d Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). A movant must demonstrate (1) a sufficient likelihood of success on the merits; (2) that they will suffer irreparable harm absent a stay; (3) that granting a stay will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. *See id.*[1]

With respect to the relief afforded by this Court's March 31 Order (ECF 439), all four factors weigh in favor of granting the Commonwealth's motion. The purpose of a stay pending appeal is to "preserve the status quo," *see Kawecki Berylco Indus., Inc. v. Fansteel, Inc.*, 517 F. Supp. 539, 540 (E.D. Pa. 1981), which is necessary here given the impending nature of primary election contests scheduled for May 20, 2025.

Far from asking this Court to conclude that its decision was incorrect, the instant motion simply suggests that there is a "reasonably possibility" of reversal on

[1] *See also Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Hum. Servs.*, No. 13–1144, 2013 WL 1277419, at *1 (3d Cir. Feb. 8, 2013) ("[T]he standard for obtaining a stay pending appeal is essentially the same as that for obtaining a preliminary injunction."); *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (setting forth standard).

appeal, *see Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, No. 3:01–CV–485, 2010 WL 817519, at *6 (M.D. Pa. Mar. 9, 2010), *aff'd*, 477 Fed. Appx. 740 (Fed. Cir. 2012), and that the equities favor enforcing election laws currently in effect before their constitutionality is "conclusively determined." *Nken*, 556 U.S. at 434. These conclusions are sufficient to warrant a stay.

A. The Commonwealth Has a Reasonable Possibility of Success in its Proposed Appeal

Understandably, "predicting the likelihood of [an] appellant's success on appeal is a difficult inquiry for the trial judge, who has already reached the … merits of the controversy and rendered a conclusion unfavorable to the moving parties." *Kawecki Berylco Indus., Inc.*, 517 F. Supp. at 541. That inquiry is made easier, however, by the applicable standard: the moving party must show that the odds of success on appeal are "significantly better than negligible," but need not show that they are "greater than 50%." *In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015); *accord First Amend. Coal. v. Jud. Inquiry & Rev. Bd.*, 584 F. Supp. 635, 636–38 (E.D. Pa. 1984). In other words, there must be a "reasonable possibility of success on appeal." *Arlington Indus., Inc.*, 2010 WL 817519, at *6 (citing *First Amend. Coal.*, 584 F. Supp. at 636–38). Such a reasonable possibility exists here.

Pennsylvania's Election Code provides that an absentee or mail-in voter must "fill out, date, and sign" the pre-printed declaration that appears on the envelope in which their ballot is transported to a county board of elections. 25 P.S. §§ 3146.6(a),

3150.16(a).[2] This Court recognized that the ballot-casting rule Plaintiffs challenged—that these declarations must include a date in order for the ballot inside to be counted—is "nondiscriminatory." (ECF 438 at 16). Furthermore, it "affects only the mechanics of voting," as opposed to core political activity and imposes only a "minimal burden" on the rights of voters. (*Id.* at 13, 16).[3] Nevertheless, because "the weight of the burden on the citizens' right to vote is not counterbalanced by evidence of *any* governmental interest," enforcement of the Election Code's command could not "pass constitutional muster." (*Id.* at 21) (emphasis added).

The Commonwealth respectfully submits that this Court's rationale evinces a significant divergence from established case law regarding the right to vote and constitutional review of reasonable state election regulations. Accordingly, the possibility of obtaining relief on appeal is "significantly better than negligible." *In re Revel AC, Inc.*, 802 F.3d at 571.

1. *The Anderson-Burdick Framework Does Not Apply*

In *Mazo v. New Jersey Secretary of State*, the Third Circuit synthesized decades of precedent regarding constitutional challenges to state election laws. 54

[2] The failure to do so invalidates a voter's ballot. *See Ball v. Chapman*, 289 A.3d 1, 22–23 (Pa. 2023).

[3] This Court consistently referred to "the date requirement," (*see, e.g.*, ECF 438 at 8, 13), but it bears mention that at issue a *component* of a larger declaration requirement—voters must "fill out, *date*, and sign" a pre-printed declaration. 25 P.S. §§ 3146.6(a); 3150.16(a) (emphasis added). In other words, to understand just how *de minimis* the burden at issue here is, it is worth remembering that the Pennsylvania voter who fails to include a handwritten date theoretically has a writing implement available and handy, as they have just provided a signature.

F.4th 124, 138 (3d Cir. 2022). The *Mazo* Court cogently and carefully explained when it is appropriate for courts to evaluate state election regulations under the "sliding-scale approach" developed by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992) (the *Anderson-Burdick* framework)—and when it is not.

Though the *Anderson-Burdick* framework concerned freedom of association claims under the First Amendment,[4] the framework extends beyond that context. *See Mazo*, 54 F.4th at 138. But the *Mazo* Court clearly stated that *Anderson-Burdick*:

> [c]ertainly … does **not** apply where the alleged right relates only to a statutory right, or there is otherwise no cognizable constitutional right at issue, or where the burden on a constitutional right is no more than *de minimis*.

Id. at 138–39 (emphasis added) (footnotes omitted). After all, it is "'common sense' that States must take an active role in structuring elections," and bring "some sort of order, rather than chaos" to "the democratic process." *Id.* at 136–37 (quoting

[4] In *Anderson*, the Supreme Court invalidated an Ohio deadline for filing nomination petitions that disadvantaged "persons who wish[ed] to be independent candidates." 460 U.S. at 790. This "early" deadline prevented such candidates "from entering the … political arena … and creating new political coalitions … at any time after mid-to-late March." *Id.* Juxtaposed against the "political advantage of continued flexibility" that major parties enjoyed, the state's treatment of independent candidates interfered with "the competitive nature of the electoral process" and stifled independent voters' rights to "associate with others for political ends." *Id.* at 790–91, 788.

In *Burdick*, the Supreme Court rejected a Hawaii voter's claim of a constitutional right to cast a protest vote for Donald Duck as a write-in candidate in a state election. *See* 504 U.S. at 438. Because "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system," the state's prohibition on write-in votes did not impermissibly burden the voter's associational or expressive rights. *Id.*

Burdick, 504 U.S. at 433; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up)); *Wilmoth v. Sec'y of New Jersey*, 731 Fed. Appx. 97, 101 (3d Cir. 2018) (acknowledging that states have broad power to regulate elections); *see also Burdick*, 504 U.S. at 441 ("the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system").

Returning to this Court's analysis, its conclusions that (1) compliance with the dating component does *not* implicate rights to expression or association (ECF 438 at 13 ("It cannot be said that handwriting a date on the outer ballot envelope is core political speech.")); and (2) application of the dating component is inherently *non*-discriminatory (*id.* at 15), should have ended the inquiry.

The federal Constitution does not *per se* protect the right to vote. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) ("[T]he Constitution does not confer the right of suffrage upon any one … [and] the right to vote, *per* se, is not a constitutionally protected right.") (quotations and citations omitted). Moreover, voting by mail-in or absentee ballot is a privilege granted by statute,[5] which courts have not understood as a constitutional imperative. *See Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 414 (9th Cir. 2016) (Bybee, J., dissenting)

[5] *See McLinko v. Dep't of State*, 279 A.3d 539, 543 (Pa. 2022) ("[T]he General Assembly … enacted legislation that allows for universal mail-in voting.")

("There is no constitutional or federal statutory right to vote by absentee ballot.") (citing *McDonald v. Bd. of Election Comm'rs of Chic.*, 394 U.S. 802, 807–08 (1969); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in judgment) ("That the State accommodates some voters by permitting … the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)). These precepts confirm that this case lands squarely within *Mazo*'s guidance—*Anderson-Burdick* does not apply.

In short, there is a fundamental tension in this Court's rationale between (i) its recognition that handwriting a date on an outer ballot envelope is in no way core political speech and (ii) its ultimate holding that "the date requirement burdens the First Amendment right to vote." (ECF 438 at 13, 15); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984) (listing activities protected by the First Amendment). There is no functional equivalent in this case to the independent voters and candidates seeking office in *Anderson*; or the protest voter in *Burdick*; or the slogan-writing candidates in *Mazo*—that is, this Court did not conclude that voters who fail to comply with the Election Code's instructions share a particular viewpoint, associate with one another or wish to associate with one another, or share protected characteristics.

It is true that the right to vote "includes the right to have one's vote counted *on equal terms with others*." *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (emphasis added) (citing *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*)). It is, however, "the right to vote *as the legislature has prescribed*" that is "fundamental"—"and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Id.* (emphasis added, internal quotations omitted) (quoting *Bush*, 531 U.S. at 104); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate on an equal basis with other citizens in the jurisdiction."). As this Court recognized, the dating component of the declaration requirement "applies to all vote-by-mail voters … [and] draws no distinctions." (ECF 438 at 15–16) (emphasis in original). That some voters did not exercise the franchise as the General Assembly prescribed does not mean they are being "disenfranchise[d]," (*id.* at 20), or that their votes are being afforded different weight or dignity.

The enforcement of Pennsylvania's Election Code in this context is thus consistent with federal constitutional protections of the right to vote. The right Plaintiffs claim is a statutory one, any burden on its exercise is *de minimis*, and no other constitutional protections are implicated. Following *Mazo*, this Court should not have conducted its analysis under the *Anderson-Burdick* framework. *See* 54

F.4th at 138–39; *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004) (declining to apply *Anderson-Burdick* where no First Amendment or equal protection interests were implicated).[6]

2. *Even If the Anderson-Burdick Framework Applied, Speculative Government Interests Are Sufficient to Pass Constitutional Muster*

As this Court acknowledged, "the rigorousness of [its] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [First and Fourteenth Amendment] rights." (ECF 438 at 14–15 (quoting *Burdick*, 504 U.S. at 434)). Even under the *Anderson-Burdick* framework, then, the "minimally burdensome and nondiscriminatory" nature of Pennsylvania's reasonable regulation means that "a level of scrutiny 'closer to rational basis'" applies. *Ohio Council 8 Am. Fed. of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citations omitted). Through that capacious lens, a governmental interest need not be substantiated by evidence to be cognizable.

This Court reasoned that it was "up to Defendants … to point to evidence that a governmental interest is furthered by the burden the date requirement imposes on the right to vote." (ECF 438 at 19). But under rational basis review, a legislature's

[6] In *Biener*, a non-indigent political candidate challenged the $3,000 filing fee necessary to participate in a primary for a House seat in Delaware. The Third Circuit evaluated the scheme under rational basis review, noting that it was "not the statute which perforce restricts the ballot *but the candidate's decision to pay or not to pay*"—the "availability of choice" was "fatal" to the candidate's equal protection claims. *See Biener*, 361 F.3d at 215 (cleaned up, citation omitted).

"judgment 'is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" *Parker v. Conway*, 581 F.3d 198, 202 (3d Cir. 2009) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 315 (1993)); (*cf.* ECF 438 at 20 (rejecting "solemnity," "voter confidence," and "fraud detection" as "unsupported by evidence of record")).[7] Rational basis review does not provide "license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* (internal quotations omitted). Respectfully, that fundamental principle again should have doomed Plaintiffs' claims.

This Court also recognized that the orderly administration of elections constitutes a valid state interest, but dismissed the suggestion that a handwritten date could serve as a "useful backstop … if Pennsylvania's SURE system malfunctioned." (ECF 438 at 18).[8] As some jurists have acknowledged, handwritten dates on outer return envelopes would be critical to the work of county boards if the SURE system were to, "despite its name … [,] fail or freeze, or just run out of funding down the road." *See Migliori v. Cohen*, 36 F.4th 153, 165 (3d Cir. 2022)

[7] It is unclear what evidence would be necessary to support the proposition that signing and dating official documents serves an interest in "solemnity." Providing a signature and date—a jurat—is a requirement that frequently appears in Pennsylvania statutes. *See*, *e.g.*, 57 Pa. C.S. § 316 (notarial acts); 23 Pa. C.S. § 5331 (parenting plan); 73 P.S. § 201-7(j.1)(iii)(3)(ii) (emergency work authorization); 42 Pa. C.S. § 8316.2(b) (childhood sexual abuse settlement); 73 P.S. § 2186(c) (contract cancellation); 42 P.S. § 6206 (unsworn declarations).

[8] As this Court recognized, "the Commonwealth's Statewide Uniform Registry of Electors, a uniform integrated computer system that, inter alia, tracks mail ballots from application through final tabulation." (ECF 438 at 17 n.8).

(Matey, J., concurring), *vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022). Because this Court found that "speculative assertion" to be unsupported by evidence, it found that there was no justification for the minimal burden associated with the dating requirement. (ECF 438 at 18).

Not so. It is well within the General Assembly's prerogative to factor into its enactments the potential fallibility of "Plan A," or even "Plan B" when ensuring the orderly administration of all elections in any circumstance. Legislatures need not assume that elections will be conducted without incident, or that the election infrastructure contemplated by other statutory measures will be sufficient to avoid the same. In short, legislatures may—and do—speculate.

The United States Supreme Court's holding in *Crawford* is illustrative. There, the state of Indiana required voters to present identification in order to vote at their polling stations, and justified that requirement by pointing to the risk of voter fraud. *Crawford*, 553 U.S. at 185–86 (plurality); *see also id.* at 209 (Scalia, J., concurring in judgment) ("the State's interests … are sufficient to sustain that minimal burden"). Though the record contained "*no evidence* of any such fraud actually occurring in Indiana *at any time in history*," the High Court determined that Indiana's interest in orderly elections sufficiently justified its "nonsevere" and "nondiscriminatory" identification requirement. *Id.* at 194–96 (emphases added).

In this case as much as *Crawford*, the judiciary must weigh and respect governmental interests, even when they are abstract or unproven. Such is the nature of rational basis review. *See Cabrera v. Att'y Gen. of U.S.*, 921 F.3d 401, 404 (3d Cir. 2019) (a plaintiff asserting no rational basis for government classification "must negate every conceivable justification for [it] in order to prove that the classification is wholly irrational"); *Newark Cab Ass'n v. City of Newark*, 901 F.3d 146, 156 (3d Cir. 2018) (calling rational basis review a "very deferential standard"); *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 216 (3d Cir. 2013) (courts may consider "any conceivable purpose" for government action and are "not limited to considering only the goal stated by the state actor"). Relying upon the lack of evidence supporting the various state interests asserted in this case was thus insufficient to resolve the question before this Court.

Even assuming, *arguendo*, that *Anderson-Burdick* applies, the speculative state interests presented were sufficient to justify the *de minimis* burden associated with dating an envelope. *See supra* n.3.

B. <u>The Commonwealth Will Suffer Irreparable Harm Absent a Stay</u>

As noted *supra*, primary elections throughout Pennsylvania are scheduled to take place on May 20, 2025. *See* Upcoming Elections (last accessed Apr. 15, 2025), available at https://www.pa.gov/agencies/vote/elections/upcoming-elections.html. The last day to request a mail-in or absentee ballot is one week beforehand, on

May 13. *See id.* Because this Court's injunction will necessarily prevent county boards from conducting the upcoming election pursuant to duly enacted laws, a stay pending appeal is necessary to prevent irreparable harm.

Recent guidance from the United States Supreme Court resolves this factor of the instant analysis. In *Abbott v. Perez*, 585 U.S. 579 (2018), a lower court determined that three legislative districts in Texas were invalid under Section 2 of the Voting Rights Act of 1965 as the results of racial gerrymandering. *Id.* at 592–93. When the lower court denied Texas's interlocutory request to stay its order, the High Court granted that relief instead and explained as follows:

> [T]he District Court's orders … constituted injunctions barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature. Unless that statute is unconstitutional, this would seriously and irreparably harm the State[.]

Id. at 602 (footnote omitted). The majority then doubled down on its conclusion in a footnote: "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Id.* at 602 n.7 (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)). Federal courts have followed suit, issuing stays pending appeal. *See, e.g.*, *Common Cause Indiana v. Lawson*, 978 F.3d 1036, 1041–42 (7th Cir. 2020) (granting stay pending appeal after district court granted injunctive relief in constitutional challenge to state election code); *New Georgia Project v. Raffensberger*, 976 F.3d 1278, 1283 (11th Cir. 2020) (granting stay pending appeal after district court enjoined state absentee ballot deadlines).

The risk of irreparable harm is even more apparent here, given Act 77's non-severability provision. Not only would the absence of a stay "disabl[e]" Pennsylvania "from vindicating its sovereign interest in the enforcement of" *this particular* election regulation, *see Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring), it would have the potential to wreak havoc across the Election Code. Section 11 of Act 77—the act which permitted universal no-excuse mail-in voting—provides that "[i]f any provision … or its application to any person or circumstance is held in valid," the remaining provisions therein "are void." *See Baxter v. Philadelphia Bd. of Elections*, No. 1305 C.D. 2024, 2024 WL 4614689, at *18 (Pa. Cmwlth. Oct. 30, 2024) (discussing severability), *allocatur granted in part*, No. 395–96 EAL 2024 (Pa. Jan. 17, 2025).[9] Absent a stay, it is at least likely if not probable that litigants will bring declaratory judgment actions to address this thorny legal question, with the result being widespread confusion, chaos, and expenditure of resources just weeks before a statewide election.[10]

In the context of elections, neither compensation in the form of damages nor later judicial redress can address the harms that would result absent a stay. *Cf. In re*

[9] Briefing in *Baxter* is ongoing as of the date of this filing, and Appellants' reply briefs are due on April 17, 2025.

[10] To be clear, the Attorney General is in no way conceding here that this Court's ruling requires the invalidation of Act 77 in its entirety. Nor is the Attorney General taking the position that this Court must resolve the severability question, which is properly left to Pennsylvania's state courts. Instead, the Attorney General merely notes that the *potential* that this Court's ruling could trigger Act 77's non-severability clause must factor into its evaluation of irreparable harm to county boards of election and millions of Pennsylvania voters.

Revel AC, Inc., 802 F.3d at 571–72 ("'The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'") (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). When balloting is completed and polls close, the die has been cast. The Commonwealth respectfully submits that irreparable harm to its sovereign interests absent a stay is both immediate and manifest. Accordingly, the first two, "most critical" factors of the instant analysis weigh in favor of granting a stay. *In re Citizens Bank, N.A.*, 15 F.4th at 615–16.

C. Plaintiffs Will Not Suffer Even Greater Harm as the Result of a Stay

When considering the third factor at issue for a stay pending appeal, courts must ask whether "harm to the movant outweighs harm to the nonmovant." *Powell v. PS Bank*, No. 23–CV–1755, 2023 WL 7302061, at *1 (M.D. Pa. Nov. 6, 2023) (quoting *In re Wedgewood Realty Grp., Ltd.*, 878 F.2d 693, 701 (3d Cir. 1989)). Here, on one side of the scale is the profound harm to the Commonwealth and Commonwealth entities associated with the inability to enforce its duly-enacted election laws during the upcoming primary elections. That harm is plainly greater than any associated with voters following the law as it is enforced—and has been enforced for the last several elections—pending resolution of the instant appeal.

Plaintiffs filed their initial complaint in this matter on November 7, 2022. (*See* ECF 1). Since then, three general elections and two primary elections have taken

place in Pennsylvania, during which enforcement of the dating component of the declaration requirement has remained the same.[11] Therefore, if any question remained as to whether Plaintiffs are aware that, under the status quo *ante*, they must follow all instructions for their ballots to be counted,[12] that question has been resolved conclusively in the affirmative.

While disenfranchisement unquestionably constitutes a serious harm, this Court must recognize that all Plaintiffs—and for that matter, all Pennsylvanians—are extremely well-situated to avoid such a result. After years of litigation and guidance from election officials, they are keenly aware of the "rules of the road." Accordingly, the irreparable harm to sovereign interests discussed *supra* substantially "outweighs" any harm to Plaintiffs, *see In re Wedgewood Realty Grp., Ltd.*, 878 F.2d at 701, which is by no means inevitable. They can avoid that harm by (i) following the uncomplicated instruction of which they are acutely aware, or (ii) simply casting their ballot in person.

[11] *See, e.g., Baxter v. Philadelphia Bd. of Elections*, 325 A.3d 645, 645 (Pa. Nov. 1, 2024) (*per curiam*) (ordering that effect of Commonwealth Court opinion validating state constitutional claims "shall not be applied to the November 4, 2024 General Election").

[12] *Cf.* ECF 228 ¶ 12 (Amend. Compl., filed Feb. 9, 2023) ("Ms. Eakin is concerned that her ballot will be similarly rejected in future elections" if "she forgets to include a date on her mail ballot"). Notably, at no time have Plaintiffs requested a preliminary injunction or other relief to temper their asserted fear or concern over the enforcement of dating component of the declaration requirement.

D. The Public Interest in the Orderly Administration of Elections Weighs in Favor of a Stay

A stay pending appeal would serve the public interest. The United States "Supreme Court has 'repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.'" *New Georgia Project*, 976 F.3d at 1284 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020)). Given the impending nature of the primary elections on May 20, 2025, this Court should similarly preserve the status quo, promote confidence in the electoral system, and prevent unnecessary voter confusion. *See id.* ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.") (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

Concerns about judicial economy and voter education weigh heavily in this instance. Absent a stay, if the Commonwealth's forthcoming appeal is successful, this Court's March 31 order will have produced a one-off suspension of election regulations that cannot be undone.[13] By contrast, if a stay is issued and the Commonwealth's forthcoming appeal is unsuccessful, this Court will have

[13] In a cautionary tale, at least one plaintiff in *Baxter v. Philadelphia Board of Elections* did not provide a handwritten date *in reliance upon* a then-vacated Commonwealth Court opinion, which had declared that enforcement of the dating requirement offends Pennsylvania's Free and Equal Elections Clause. *See Baxter*, 2024 WL 4614689, at *3 ("[Designated Appellee] did not attempt to fix her ballot because she read the news about this Court's decision in [*Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024].").

maintained the status quo *ante* and ensured that relief was granted only once the constitutional question at issue is conclusively resolved. These concerns are particularly acute where, as here, the legal question and constitutional right at stake are profoundly important and touch upon the regulation of a state's democratic process. *See, e.g.*, *Common Cause Indiana*, 978 F.3d at 1041–42; *New Georgia Project*, 976 F.3d at 1283.

Absent a stay, the way Pennsylvania structures and runs elections gives rise to particularly fertile ground for confusion. No Commonwealth entity has sole responsibility for administering elections or enjoys special authority over county and local election officials. Rather, elections are administered by 67 county boards of elections. *See Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *39 (Pa. Cmwlth. Jan. 17, 2024). Combined with the potential activation of Act 77's nonseverability provision, *see supra* Section B at 18–19, and a yet-to-be-heard state constitutional challenge to the same balloting rule in Pennsylvania's highest court, *see Baxter*, No. 395–96 EAL 2024 (Pa. Jan. 17, 2025) (granting *allocatur* in part), the injection of uncertainty into this decentralized scheme shortly before polls close would invite a perfect storm.

Instead of tempting fate, this Court should preserve the status quo while the Commonwealth's proposed appeal is pending. The constitutional claims in this case are important; but that fact should not overshadow how disruptive and costly it

would be for this Court's order to go into immediate effect, only 5 weeks before an election. Confusion among voters and election officials would be widespread and inescapable. Accordingly, a stay pending appeal would serve the public interests.

CONCLUSION

The Court should grant the Commonwealth's motion for a stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicole R. DiTomo, Chief Deputy Attorney General, do hereby certify that on this day, a true and correct copy of the foregoing brief has been filed electronically and is available on the Court's Electronic Case Filing System.

/s/ *Nicole R. DiTomo*
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Date: April 16, 2025