

IN THE SUPREME COURT OF PENNSYLVANIA

No. 68 MAP 2024

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

Petitioners-Appellees,

v.

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

Respondents,

v.

Democratic National Committee and the Pennsylvania Democratic Party, Intervenor-Appellees,

v.

Republican National Committee and the Republican Party of Pennsylvania,

Intervenor-Appellants.

On Appeal from the Commonwealth Court, No. 283 M.D. 2024

BRIEF OF APPELLEES THE DEMOCRATIC NATIONAL COMMITTEE AND THE PENNSYLVANIA DEMOCRATIC PARTY

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INTRODUCTION

Under Pennsylvania’s Election Code, people who choose to vote by mail or absentee ballot are required to complete several steps. One of those requirements is to handwrite, on the outer envelope in which the voter’s mail or absentee ballot is submitted, a date that could plausibly be the date on which the ballot was completed. But this “date requirement” serves no cognizable state interest. It does not serve to measure the timeliness of a mail or absentee ballot or determine the voter’s eligibility; timeliness is instead determined based on when the ballot is scanned into Pennsylvania’s mail-ballot tracking system, and eligibility is verified before a mail or absentee ballot is even sent to a voter.

This Court has previously held that ballots that do not comply with the date requirement cannot—as a matter of statutory interpretation—be counted. The question presented in this case is whether enforcement of that statutory command, i.e., whether denying a person’s right to vote only because a handwritten date that is irrelevant to the administration of the election was not properly provided, violates the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, §5, which guarantees and protects the fundamental right to vote. As this Court has explained, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *In re Nomination Papers of Nader*, 858 A.2d 1167, 1180 (Pa. 2004) (quotation marks and subsequent history omitted). Here, an en

banc panel of the Commonwealth Court correctly concluded that a missing or incorrect date does not justify denying qualified Pennsylvanians of that critically important right. Its decision should be affirmed.

The lawfulness of enforcing the date requirement has been litigated numerous times in recent years. But no prior case resolves whether enforcement of the requirement violates the Free and Equal Elections Clause—although three members of this (then-six-member) Court indicated in dicta last year that it would, *see Ball v. Chapman*, 289 A.3d 1, 27 n.156 (Pa. 2023) (Wecht, J., joined by Todd, C.J., and Donohue, J.), *cited infra* p.31. Other cases in which the requirement was challenged instead held that: (1) as a matter of statutory interpretation, the Election Code does “require[] the disqualification of ballots that arrive in undated or incorrectly dated return envelopes,” *Ball*, 289 A.3d at 23 (majority opinion); or (2) as a matter of federal law, enforcement of the date requirement does not violate the Voting Rights Act’s Materiality Provision, *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120, 139 (3d Cir. 2024) (“*NAACP*”).

Notably, in the *NAACP* case, the courts concluded after substantial discovery that the date requirement serves no cognizable purpose. Specifically, the Third Circuit agreed with the district court’s ruling that the “date requirement ... serves little apparent purpose,” with not one of Pennsylvania’s 67 boards of elections using it “to confirm timely receipt of the ballot or to determine when the voter completed it.” 97 F.4th at 125. In *Ball v. Chapman*, meanwhile, this

Court acknowledged the similar view of the Acting Secretary of the Commonwealth: Because the Election Code otherwise ensures that voters are eligible and their ballots are timely cast, the date requirement serves “no purpose other than as a means of inducing voter-generated errors that could be used to justify denying the right to vote.” 289 A.3d at 18 (quotation marks omitted).¹

Here, the Commonwealth Court recognized that because the date requirement does not serve an important, much less a compelling, state purpose, enforcement of the requirement to deny the right to vote violates the Free and Equal Elections Clause. This result was urged not only by the private-party appellees but also by the Secretary of the Commonwealth, who properly identifies the date requirement as a vestige of absentee-voting law incorporated into Act 77’s vote-by-mail provisions. As the Secretary and now the Commonwealth Court have recognized, the Free and Equal Elections Clause does not permit infusing a purposeless and vestigial requirement with life solely to impede the counting of a lawfully cast ballot.

Appellants respond largely by attacking strawmen. For example, they contend that the decision below would subject every electoral rule to strict scrutiny. But the Free and Equal Elections Clause requires exacting scrutiny here

¹ Although three justices expressed a different view in dissenting in a prior case, *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1090-1091 (Pa. 2020) (Dougherty, J., concurring in part and dissenting in part) (“*In re 2020 Canvass*”), this Court has not adopted that view. *See infra* pp.24-25.

because enforcement of the date requirement results in the disqualification of qualified and registered voters' ballots. Appellants also assert that any number of neutral ballot-counting rules would be invalidated under the Commonwealth Court's decision. But most ballot-counting rules (such as signature requirements) have plain and often compelling purposes. The date requirement, by contrast, serves no cognizable state interest, and therefore cannot withstand even less-than-strict scrutiny, as the Commonwealth Court held. Finally, appellants suggest that because not all 67 county boards of elections are parties here, the Commonwealth Court's decision will lead to inter-county variations in election administration that would violate equal protection. The Commonwealth Court rightly rejected that argument as insufficiently presented and hence waived. But the argument also fails on the merits, because every county board, whether a party here or not, will be obligated to follow a decision by this Court that enforcing the date requirement is unconstitutional—and any board that does not will unquestionably be brought into compliance promptly via a separate lawsuit. There is no equal-protection problem.

None of appellants' challenges have merit. This Court should affirm.

COUNTER-STATEMENT OF THE ISSUE ADDRESSED IN THIS BRIEF

Whether the Commonwealth Court correctly held that the Free and Equal Elections Clause of the Pennsylvania Constitution prohibits disqualifying otherwise-valid mail and absentee ballots solely for a voter not properly dating the return envelope.

COUNTER-STATEMENT OF THE CASE

A. The Date Requirement

Under a Pennsylvania law known as Act 77, *see* Act of October 31, 2019, P.L. 552, No. 77, every eligible and registered resident of the Commonwealth has the right to vote by mail. Voting by mail (or by absentee ballot, a right the Pennsylvania Constitution provides under certain circumstances) is a multi-step process. Voters must fill out their ballot, place the ballot in a yellow “secrecy” envelope, and place the secrecy envelope in an outer “return” envelope, on which the “declaration of the elector” is printed. 25 P.S. §3150.16(a) (mail); *id.* §3146.6(a) (absentee). The law also instructs that voters must complete the ballot in pencil or blue or black ink (using only a certain type of pen). *See* 25 P.S. §3150.16(a) (mail); *id.* §3146.6(a) (absentee). But under this Court’s precedent, the failure to do so is not a basis to disqualify a ballot, as long as the voter’s intent is clear. *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972).

After completing a mail or absentee ballot, the voter must “date and sign the declaration” on the outer envelope. 25 P.S. §3150.16(a) (mail); *see also id.* §3146.6(a) (absentee). Dating the outer envelope requires filling in a month and day because Pennsylvania Department of State guidance directs counties to fill in the year “with the digits reflecting the year of the election in which the envelopes are to be used.” Pennsylvania Department of State, *Directive Concerning the Form of Absentee and Mail-in Ballot Materials*, Version 2.0, at 4 (July 1, 2024).

The mandate that voters date their outer envelope before submitting their mail or absentee ballot is commonly referred to as the “date requirement.”

In *Ball*, this Court held, as a matter of statutory interpretation, that the date requirement is mandatory. 289 A.3d at 23. Hence, if a submitted outer envelope contains no date or an “incorrect” date (meaning a date that could not possibly be when the voter actually completed the ballot), then the Election Code, as construed by this Court, prohibits the ballot from being counted, even in the absence of any express language so stating. *Id.* at 20. During pre-canvassing and canvassing, county boards segregate and do not count any mail or absentee ballot that was submitted in an undated or incorrectly dated envelope, even if the ballot was timely received. 25 P.S. §3146.8; Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, Version 4.0, at 3-4 (April 3, 2023) (“DOS Guidance”). Many thousands of qualified Pennsylvania voters have been denied their fundamental right to vote in recent years solely because of the date requirement. *E.g.*, Commonwealth Court Slip Op. (“Op.”) at 60-61.

The date requirement is a vestigial provision of the Pennsylvania Election Code. Before 2019, when Act 77 gave all Pennsylvanians the right to vote by mail, people could vote in the Commonwealth prior to election day only by absentee ballot, i.e., only if they would be absent on election day due to “duties, occupation or business,” “illness or physical disability,” or “a religious holiday,” Pa. Const. art. VII, §14. And for many years (specifically, 1937-1968), absentee

ballots were timely even if they were received after election day—so long as they had been completed on or before that day. *See* Act of June 3, 1937, P.L. 1333, No. 320, §1317; Act of December 11, 1968, P.L. 1183, No. 375, sec. 8, §1308(a). Given that, the date on which an absentee ballot was completed actually affected the timeliness of many such ballots. The General Assembly thus enacted the date requirement. Act of August 13, 1963, P.L. 707, No. 379, sec. 22, §1304.

Since 1968, however, the timeliness of absentee ballots has been based solely on a ballot's receipt date; the date the ballot is completed (assuming that is what the handwritten date even shows) is irrelevant to timeliness. *See* Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, §1308(a). But the General Assembly never repealed the date requirement for absentee ballots—and when it enacted Act 77, the legislature took the Election Code's existing procedures for absentee voting (including the date requirement) and simply duplicated them for mail voting. *Compare* Act of October 31, 2019, P.L. 552, No. 77, §8 (art. XIII-D, §1305-D(a)), *with* 25 P.S. §3146.6(a). The date requirement thus remains on the books for both mail and absentee voting, even though its reason for being has long since passed.

Indeed, discovery in recent litigation confirmed that not one of Pennsylvania's 67 counties uses the date on the outer envelope to determine a ballot's timeliness. *See NAACP*, 97 F.4th at 125. Instead, the Statewide Uniform Registry of Electors ("SURE") system, 25 P.S. §1222 ensures that only timely received mail and absentee ballots are counted. Department of State guidance instructs counties to "stamp the date of receipt on the ballot-return envelope" and

“record the receipt of absentee and mail-in ballots daily in the [SURE] system.” Pennsylvania Department of State, *DOS Guidance* at 2. Counties must also scan the barcode on a mail ballot’s return envelope into the SURE system, creating an electronic record of when the ballot was received. *Id.* at 2-3; *see also Pennsylvania State Conference of the NAACP v. Schmidt*, 703 F.Supp.3d 632, 679 (W.D. Pa. 2023) (subsequent history omitted) (“*Schmidt*”); *Ball*, 289 A.3d at 16 n.77; *In re Canvass*, 241 A.3d at 1077.

The date requirement has disenfranchised countless otherwise qualified Pennsylvanians. In the April 2024 primary, for example, over 4,400 ballots were not counted due to a missing or “incorrect” date. *See Commonwealth of Pennsylvania, 2024 Primary Election Mail Ballot Requests Department of State* (updated May 14, 2024) (filtered by mail ballots coded “Canc[eled]-No Date,” “Pend[ing]-No Date,” “Canc[eled]-Incorrect Date,” and “Pend[ing]-Incorrect Date”), <https://tinyurl.com/bdhtwv7e>. Given that the number of ballots submitted by voters in the upcoming general election will almost surely be much higher, enforcement of the date requirement would likely mean denying many thousands (perhaps tens of thousands) of qualified Pennsylvanians their fundamental right to vote and have their vote counted.

B. Commonwealth Court Proceedings

Petitioners brought this action against the Secretary of the Commonwealth and the Philadelphia and Allegheny County Boards of Elections, alleging that the disqualification of any mail or absentee ballot based solely on non-compliance

with the date requirement violates the Free and Equal Elections Clause. Op.4-5. Appellants—the Republican National Committee and the Republican Party of Pennsylvania—intervened to defend such denials of the right to vote, while the Democratic National Committee (“DNC”) and the Pennsylvania Democratic Party (“PDP”) intervened in support of petitioners’ challenge. The Secretary likewise supported petitioners, while the two respondent county boards took no position on the merits. Op.6. The parties filed cross-applications for summary relief.

After briefing and oral argument on the cross-applications, a five-judge en banc panel of the Commonwealth Court, over a dissent by Judge McCullough, granted petitioners’ application in relevant part and denied appellants’. Op.91.

Recognizing that this is the “first case of its kind,” Op.2—i.e., the first to challenge the enforcement of the date requirement as unconstitutional under the Free and Equal Elections Clause—the Commonwealth Court concluded that, under this Court’s precedent, denying qualified and registered Pennsylvanians their fundamental right to vote solely for failure to handwrite a date on the outer envelopes of their mail or absentee ballots violates the Free and Equal Elections Clause, because (as had been determined in prior litigation) enforcing the requirement serves no valid purpose. Op.63-84. The court reached this conclusion applying strict scrutiny, which it deemed the proper level of scrutiny because of the fundamental nature of the right to vote. Op.75. And under strict scrutiny, the court stated, “the government bears the heavy burden of proving that

[enforcement of the date requirement] is ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* (quoting *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 385 (Pa. 2020)). Enforcement of the date requirement cannot withstand strict scrutiny, the court concluded—or even lesser scrutiny, it also concluded, Op.84 n.62—because the handwritten date is not used to determine a ballot’s timeliness, a voter’s eligibility, fraud, or anything else. Op.76. Indeed, the court noted, appellants had conceded that county officials rely on the barcodes and time-stamped date a ballot is received to determine timeliness, not the handwritten date. Op.77-78. Put simply, the court stated, “the dating provisions are virtually meaningless and, thus, serve no compelling government interest.” Op.76.

In reaching this conclusion, the Commonwealth Court reviewed this Court’s many cases protecting the right to vote, and the concomitant “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” Op.11 (quoting *Pennsylvania Democratic Party*, 238 A.3d at 360-361). The Commonwealth Court likewise invoked this Court’s oft-stated view that the power to reject ballots based on minor irregularities should be exercised only “**very sparingly**,” keeping in mind that voters “are not to be disenfranchised at an election **except for compelling reasons**” and that “[e]very rationalization within the realm of common sense should aim at **saving [a] ballot rather than voiding [it]**.” Op.11 (alterations in original)

(quoting *Appeal of Gallagher*, 41 A.2d 630, 632-633 (Pa. 1964), and *Appeal of Norwood*, 116 A.2d 552, 554-555 (Pa. 1955)).

Finally, the Commonwealth Court rejected appellants' claim that blocking enforcement of the date requirement mandated striking down all of Act 77. Op.86-90. And it held that the requirements for issuance of a permanent injunction blocking enforcement of the date requirement were met. Op.84-86.

Judge McCullouch dissented on each of the foregoing points, Op.PAM-3 to 56.

SUMMARY OF ARGUMENT

The Commonwealth Court correctly concluded that under this Court's precedent, enforcement of the date requirement to disqualify ballots timely submitted by qualified Pennsylvania voters violates the Free and Equal Elections Clause. That clause provides far-reaching protection for the fundamental right to vote. And consistent with its expansive text and its history, this Court has given that clause a broad scope, protecting the right to vote to such an extent that the Clause's principles are evident in cases in which the Court did not expressly rely on it. One core such principle, repeatedly invoked and enforced by this Court, is that a person's right to vote should not be denied via disqualification of her ballot because of minor errors or irregularities, but only when there is a compelling government interest in doing so.

Far from serving a compelling interest, the date requirement serves *no* legitimate purpose. As confirmed in prior litigation (in which appellants fully

participated), none of Pennsylvania's 67 county boards of elections uses the handwritten date on the outer envelopes of mail or absentee ballots for *any* reason other than to disqualify voters. It is not used to determine a ballot's timeliness, a voter's eligibility, the presence or absence of voting fraud, or anything else. It is purely a vestige of prior law, under which the date on which a ballot was completed could actually matter to the ballot's timeliness. That is no longer the case.

Because enforcement of the date requirement serves no valid state interest, it cannot justify denying the fundamental right to vote. It is indefensible—and conflicts with decades of this Court's precedent protecting the franchise—to assert that the government is free to take away what this Court has called one of our most precious liberties even though doing so advances no cognizable government interest. Because the date requirement has no legitimate purpose, in fact, denying the right to vote based solely on a failure to comply with the requirement would be unconstitutional under any level of judicial scrutiny—and hence this Court need not resolve the proper level of scrutiny. But if the Court chooses to do so, then it should affirm the Commonwealth Court's conclusion that strict scrutiny applies given the importance of the right to vote and the severe burden enforcement of the date requirement to disqualify ballots imposes. Whatever the level of scrutiny, affirming the Commonwealth Court by interpreting and applying the Pennsylvania Constitution would neither impermissibly intrude on the legislature's prerogatives nor require invalidating

all of Act 77. Nor would it create any equal-protection problem, although that argument was in any event correctly held below to have been forfeited, and hence is not properly before this Court.

ARGUMENT

DISQUALIFYING A MAIL OR ABSENTEE BALLOT SOLELY FOR FAILURE TO COMPLY WITH THE DATE REQUIREMENT VIOLATES THE FREE AND EQUAL ELECTIONS CLAUSE

A. The Free And Equal Elections Clause Establishes Voting As A Fundamental Right

The Free and Equal Elections Clause of the Pennsylvania Constitution (“Clause”) guarantees the fundamental right to vote. It reads: “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. This Clause, which “has no federal counterpart,” is part of what made “Pennsylvania’s Constitution, when adopted in 1776, ... the most radically democratic of all the early state constitutions.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (“*LWW*”). The Clause’s text and history, as well as case law interpreting and applying it, underscore just how expansively it protects the right to vote.

1. *The Clause’s Text Broadly Safeguards The Right To Vote*

This Court has held that the Clause’s text is “clear[] and unambiguous[],” using “the broadest possible terms.” *LWW*, 178 A.3d at 804. The Court has repeatedly explained that “the *minimum requirements* for ‘free and fair’ elections” include that “‘each voter under the law has the right to cast his ballot

and have it honestly counted” and that “the regulation of the right to exercise the franchise does not deny the franchise itself *or* make it so difficult as to amount to a denial.” *Id.* at 810 (emphasis added) (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). Beyond those “minimum requirements,” this Court has said the “plain and expansive sweep of the words ‘free and equal,’” is “indicative of the framers’ intent that *all* aspects of the electoral process, *to the greatest degree possible*, be kept open and unrestricted to the voters of [the] Commonwealth.” *Id.* at 804 (emphases added).

The Clause’s placement within the Constitution confirms that the right to vote is a “sacred” one, *Page v. Allen*, 58 Pa. 338, 347 (1868). Article I of the Constitution (the Declaration of Rights) “is an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.” *LWV*, 178 A.3d at 803-804. Indeed, the Constitution itself provides that “everything in [Article I] is excepted out of the general powers of government and *shall forever remain inviolate*.” Pa. Const. art. I, §25 (emphasis added).

2. *The Clause’s History Reinforces Its Broad Text*

The evolution of the Free and Equal Elections Clause likewise demonstrates the Commonwealth’s “longstanding and overriding policy ... to protect the elective franchise.” *Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993).

The Pennsylvania Constitution of 1776 included the first iteration of the Free and Equal Elections Clause, which stated “[t]hat all elections ought to be

free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office.” Pa. Const. of 1776, ch. I, §7. This provision was one of several significant changes in the Constitution in favor of democratic governance, including expanding the right to vote to all “freemen” twenty-one and older. *Id.* ch. II, §6. At the time, this was considered “universal suffrage.” *LWV*, 178 A.3d at 807.

Less than fifteen years later, a second constitutional convention took place, at which the Clause was amended to say simply that “elections shall be free and equal.” Pa. Const. of 1790 art. IX, §5. This language, which remains in the Clause today, strengthened the Clause—replacing the suggestive “ought” with the directive “shall”; inserting “equal”; and removing “all prior ambiguous qualifying language.” *LWV*, 178 A.3d at 807-808. The 1790 Constitution’s voting-related provisions also affirmed that voting is a “high” and “sacred right.” *Page*, 58 Pa. at 347. The Clause was last amended in 1874 to add its second clause (“and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”). Pa. Const. of 1874, art. I, §5.

In short, the Clause, which was amply protective of the right to vote even in its earliest iterations, has become only more so.

3. *This Court Has Consistently Construed The Clause As Broadly Protecting Voting Rights*

Consistent with the relevant text and history, this Court has given the Clause “expansive meaning.” *LWV*, 178 A.3d at 809. For example, the Court has explained that to be “free and fair,” any “regulation of the right to exercise the franchise [must] not deny the franchise itself”—as disqualifying ballots for failing to comply with a meaningless date requirement does—“*or* make it so difficult as to amount to a denial” of the “constitutional right” to vote. *Winston*, 91 A. at 523 (emphasis added). And more generally, the Court has explained that in cases implicating the right to vote, the courts’ “goal must be to enfranchise and not to disenfranchise.” *In re Luzerne*, 290 A.2d at 109. Indeed, this Court has long made clear that “[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter.” *Perles v. County Return Board of Northumberland County*, 202 A.2d 538, 540 (Pa. 1964). Therefore “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.*

This expansive reading is consistent with the Court’s robust protection of the right to vote even in cases not expressly invoking the Clause. Indeed, the Court has repeatedly limited the enforcement of election-code provisions that would otherwise disqualify ballots for voters’ errors—limits that reflect the mandate of the Clause even though the Court did not say so explicitly. In particular, the Court has repeatedly said that the “power to throw out a ballot for

minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised ... except for compelling reasons.” *Appeal of Gallagher*, 41 A.2d at 632, *quoted in Appeal of Norwood*, 116 A.2d at 554. In other words, “[t]echnicalities should not be used to make the right of the voter insecure.” *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954). And while election regulations that serve to “prevent fraud” may be enforced, *In re Luzerne County*, 290 A.2d at 109, defects that “are not willful errors” should not invalidate a ballot. *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963).

Put simply, this Court’s precedent, consistent with the fundamental nature of the right to vote, has provided far-reaching protection of that right, barring denial of the franchise save for compelling reasons—which do not include minor and otherwise inconsequential errors by voters in filling out their ballots.

Appellants suggest (Br.48-50) that this construction of the Free and Fair Elections Clause is an anomaly compared to the law in other jurisdictions, implying that burdening the right to vote in service of no cognizable state interest is routine elsewhere. But they cite no case, from any jurisdiction, allowing the right to vote to be denied for no reason. Nor are the DNC and PDP aware of any such decision. To the contrary, the practice in other states is that where a requirement serves no purpose, it will not be applied to disqualify voters. For example, although a Michigan statute requires the declaration that accompanies mail ballots to be dated, *see Mich. Comp. Laws §168.761*, a “signed absent voter

ballot envelope that is missing a date is processed in the same way as an absent voter envelope which is not missing the date,” Michigan Secretary of State, *Election Officials Manual*, ch. 8 at 5 (February 2024).

B. The Date Requirement Serves No Purpose

The date requirement does not advance any legitimate, let alone compelling, government interest. Indeed, as explained in the Counter-Statement, it has not done so for decades. None of Pennsylvania’s 67 county boards uses the handwritten date for any purpose. And the supposed purposes appellants ascribe to the date requirement are not remotely sufficient to justify denying qualified Pennsylvanians their fundamental right to submit a ballot that will be counted. In sum, the requirement plays no role in “ensur[ing] honest and fair elections that proceed in an orderly and efficient manner,” *Banfield v. Cortes*, 110 A.3d 155, 176-177 (Pa. 2015). It serves only “as a means of inducing voter-generated errors that could be used to justify denying the right to vote.” *Ball*, 289 A.3d at 18 (quotation marks omitted). It is a trap that ensnares thousands of qualified voters in each election.

1. *Timeliness.* The Election Code establishes that a voter’s handwritten date on a mail- or absentee-ballot envelope is irrelevant to determining the ballot’s timeliness, providing that timeliness is instead evaluated based on when a ballot is *received* by the county board of elections. Specifically, the code provides that to be timely, i.e., to meet the “[d]eadline,” “a completed mail-in ballot must be received in the office of the county board of elections no later than

eight o'clock P.M. on the day of the primary or election." 25 P.S. §3150.16(c); *accord id.* §3146.6(c) (same for absentee ballots). Accordingly, county boards must "maintain a record of ... [t]he date on which the elector's completed mail-in ballot is received by the county board." *Id.* §3150.17(b)(5); *accord id.* §3146.9(b)(5) (same for absentee ballots).

Department of State guidance similarly requires county boards to "stamp the date of receipt on the ballot-return envelope" and "record the receipt of absentee and mail-in ballots daily in the Statewide Uniform Registry of Electors (SURE) system." *DOS Guidance* at 2. And at oral argument before the Commonwealth Court in this case, counsel for the Secretary "confirmed that none of the county boards of elections use the handwritten date for any purpose," "that the county boards are required by law to record when they receive absentee and mail-in ballots, and that they 'certainly do.'" Op.76. Appellants have conceded that county election officials must timestamp a ballot upon receipt, and that county elections officials rely on the timestamped date when entering information into the SURE system. Op.77. In short, the date requirement does nothing to determine whether a mail or absentee ballot has been timely submitted.

2. *Voter Eligibility.* The requirement likewise does nothing to determine a voter's eligibility; eligibility is determined before mail and absentee ballots are even sent to voters. *See* Op.76. Under Pennsylvania law, an individual must "apply ... for an official mail-in ballot," 25 P.S. §3150.12(a), and "[t]he county board of elections, upon receipt of any [such] application" must

“determine the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant’s permanent registration card,” *id.* §3150.12b(a); *accord id.* §3302(a)-(b) (similar for absentee ballots). Only upon “receipt and approval of an application filed by a qualified elector . . . , shall [the board] deliver or mail official mail-in ballots.” *Id.* §3150.15; *accord id.* §3302(c) (similar for absentee ballots).

3. *Supposed Fraud.* The date requirement plays no cognizable role in detecting fraud either. For example, the date on a mail- or absentee-ballot envelope is not used to determine whether a ballot was fraudulently submitted in the name of a deceased voter; the Pennsylvania Department of Health is instead responsible for informing voter-registration commissions when an individual dies, 25 P.S. §1505(a). And the commissions in turn are responsible for inputting that information into the SURE system, 4 Pa. Code §183.7(a)(7), so that if a deceased voter submits a mail or absentee ballot, the potential fraud is flagged for the relevant county board. The handwritten date plays no role in this process.

Appellants say, however (Br.46) that “[i]n 2022, the date requirement was [actually] used to detect voter fraud” and prosecute the perpetrator. That is wrong. As a federal judge explained in rejecting this same argument, “the county board’s own Rule 30(b)(6) designee testified that the fraudulent ballot [in the case appellants cite] was first detected by way of the SURE system and Department

of Health records, rather than by using the date on the return envelope.” *Schmidt*, 703 F.Supp.3d at 679 n.39.

4. *NAACP*. If more were needed, the recent *NAACP* litigation has confirmed that, in practice, the date requirement is useless when it comes to maintaining the honesty and integrity of elections—resulting in judicial rulings that, for reasons explained immediately below, appellants are collaterally estopped from challenging. *See Op.76; NAACP*, 97 F.4th at 125, 127, 137.

As the Third Circuit in *NAACP* explained, the summary-judgment record there showed that none of the Commonwealth’s 67 counties uses the date requirement for any purpose. 97 F.4th at 125. In particular, the requirement is “irrelevant to whether a vote is received timely” and “not used ... to determine when the voter completed it.” *Id.* Rather, a ballot’s timeliness “is established both by a receipt stamp placed on the envelope by the county board and separately through scanning of the unique barcode on the envelope.” *Id.* at 127. The date requirement also “bears no relation ... to whether a voter is qualified under Pennsylvania law to vote.” *Id.* at 131; *accord id.* at 139-140 (Shwartz, J., dissenting).

Before the Commonwealth Court, appellants dismissed the Third Circuit’s agreement with the district court’s conclusion as dictum. That characterization was not correct (which may be why appellants do not reprise it here). As this Court has noted, “courts are bound ‘not only [by] the result[of a judicial decision,] but also [by] those portions of the opinion necessary to that result.’”

Commonwealth v. Batts, 163 A.3d 410, 439 (Pa. 2017) (first alteration in original) (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996)) (subsequent history omitted). In *NAACP*, the “result” on appeal, i.e., the court’s bottom-line holding, was that enforcement of the date requirement does not violate the “materiality provision” of the Civil Rights Act, which bars States from refusing to count any ballot based solely on the voter’s immaterial error or omission. 97 F.4th at 125 (citing 52 U.S.C. §10101(a)(2)(B)). The conclusion that the date requirement serves no purpose was unquestionably “necessary to that result,” *Batts*, 163 A.3d at 439, because if the date requirement served any purpose, then the legal issue the Third Circuit resolved—whether the materiality provision covers immaterial errors in voting (not just immaterial errors in registering)—would not have been properly before the court. If the requirement served any purpose, then failing to comply with it would not be an immaterial error or omission. The resolution of an issue predicate to a decision’s bottom-line holding is not dicta.

Third Circuit precedent leads to the same conclusion about the considered nature of the court of appeals’ view, *see* 97 F.4th at 125, that the date requirement serves no purpose. The Third Circuit considers a statement in a published opinion dicta only when the statement is “peripheral,” because peripheral reasoning “may not have received the full and careful consideration of the court that uttered it.” *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570, 583 n.18 (3d Cir. 2014) (quotation marks omitted). The date requirement’s

lack of purpose was no stray aside in *NAACP*. To the contrary, it was a substantial and integral part of the court’s analysis. Indeed, it was discussed in the opinion’s introduction, which (as one would expect) summarized the components predicate to the court’s decision. *See* 97 F.4th at 125. It was not remotely “peripheral.”

Given *NAACP*, appellants are collaterally estopped from arguing that the date requirement serves any purpose. Estoppel “avoid[s] the ‘cost and vexation’ of repetitive litigation, conserv[es] judicial resources,” and “encourag[es] reliance on adjudication.” *In re Coatesville Area School District*, 244 A.3d 373, 379 (Pa. 2021). It applies where: “[1] the issue is the same as in the prior litigation; [2] the prior action resulted in a final judgment on the merits; [3] the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and [4] the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action.” *Id.*

All four elements are met here. *First*, the relevant issue—whether the date requirement serves any purpose—is the same here as it was in the *NAACP* appeal. In fact, that the requirement serves no purpose was a key holding of the district court’s summary-judgment decision, which was based on an extensive factual record, *see Schmidt*, 703 F.Supp.3d at 676 (recounting undisputed facts); *see also* Op.76. And the Third Circuit affirmed this holding, explaining that “[n]o party disputed that election officials” do not use the handwritten date for any purpose related to determining a voter’s qualification, the ballot’s timeliness, or when the voter signed the declaration. 97 F.4th at 129. *Second*, the Third Circuit entered

a final judgment on the merits in *NAACP*. See Dkt. No. 266, *NAACP*, No. 23-3166 (3d Cir. May 8, 2024). *Third*, appellants were parties to the *NAACP* appeal. See *NAACP*, 97 F.4th at 123-124. *Fourth*, appellants had a full and fair opportunity to litigate whether the date requirement serves any purpose in *NAACP*.

In any event, appellants have never asserted in this case that any of the Commonwealth's 67 county boards makes any use of the handwritten date for any purpose. Therefore, even if appellants were not estopped from contesting the requirement's purposelessness in general, they have waived the argument that the handwritten date plays any role whatsoever in election administration.

5. *In re 2020 Canvass*. This Court has never held that the date requirement serves any purpose. In *In re 2020 Canvass*, three justices suggested in a partial dissent (without the benefit of the extensive factual record that was subsequently created) that the date requirement serves three purposes:

- “the date on the ballot envelope provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place”;
- “the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot”;
- “[t]he date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.”

241 A.3d at 1090-1091 (op. of Dougherty, J.) (quotation marks omitted). This Court, however, has not held that any of these is a valid state interest that the date

requirement serves. (The “Background” section of the Court’s opinion in *Ball* recounted the dissenters’ views in *In re 2020 Canvass*, see *Ball*, 289 A.3d at 10, but the “Analysis” section of the *Ball* opinion made no mention of purpose, whether those mentioned in *In re 2020 Canvass* or otherwise.) And particularly in light of the record developed since *Ball* and *In re 2020 Canvass* regarding how the date requirement is actually used (and not used), the DNC and PDP respectfully submit that the Commonwealth Court was correct to conclude that none of the three purposes identified by the dissenters in *In re 2020 Canvass* is a legitimate interest that the date requirement actually serves.

The first purpose mentioned is that “the date on the ballot envelope provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place.” *In re Canvass*, 241 A.3d at 1090 (op. of Dougherty, J.) (quotation marks omitted). But even if dating the outer envelope is considered part of executing the ballot, the handwritten date does not necessarily “provide[] proof of when the elector actually executed the ballot in full,” *id.* (quotation marks omitted). For example, a voter might sign and date the envelope before completing the ballot—perhaps to ensure that she did not forget to do so afterwards—and then might not complete the ballot until a later day. The Commonwealth Court has made much the same point in a single-judge opinion, noting that the purposes the *In re Canvass* dissenters “identified were, at least implicitly, based on the belief that the date written on the exterior envelope was the actual date the ballot was completed,”

but that in reality, “it would be difficult to determine whether the date accurately reflects the day the ballot was” completed. *McCormick for U.S. Senate v. Chapman*, 2022 WL 2900112, at *12-13 (Pa. Commw. Ct. June 2, 2022).

Moreover, even if dating the envelope did prove when a ballot was executed in full, such proof does not serve a state interest sufficient to deny people their fundamental right to vote. The *In re Canvass* partial dissent stated that it serves the purpose of “ensuring” the voter’s “desire to cast [a mail ballot] in lieu of appearing in person at a polling place.” 241 A.3d at 1090. But what shows the voter’s desire to cast a mail ballot is instead her submission of the ballot. If the partial dissent’s contrary suggestion were correct, then the voters who forgot to date their envelopes before submission would have shown up to vote in person, because the absence of a date would have meant those voters did not actually “desire to cast [a mail ballot] in lieu of appearing in person,” *id.*

Second, the *In re Canvass* partial dissent reasoned that “the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot.” 241 A.3d at 1090 (op. of Dougherty, J.). But the Election Code requires officials to verify eligibility before a mail or absentee ballot is even sent. *See supra* pp.19-20. And in any event, voter eligibility is measured as of election day—not an earlier point in time. For example, if a voter turns 18 on election day, she is eligible to vote in that election. 25 P.S. §2811. Neither the code itself nor counties’ implementation involves using the date to verify voter eligibility. *See id.* Indeed, in a partial concurrence and partial dissent in *Ball*, Justice

Brobson, joined by Justice Mundy, recognized this, stating that “*none* of the provisions of ... the Code [relating to absentee or mail voting] have any bearing on determining voter qualification at all.... The qualification of the elector is established ... *before* the mail-in or absentee ballot is sent to the elector, through the application and approval process ... in ...the Code.” 289 A.3d at 39.

Third, the *In re Canvass* partial dissent stated that “[t]he date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.” 241 A.3d at 1091 (op. of Dougherty, J.). Under the Election Code, however, and again as confirmed in litigation since *In re Canvass*, the date has nothing to do with either timeliness or detecting and preventing fraud. *See supra* pp.7, 20-21. For example, if an envelope is backdated, i.e., if a voter, at some time after the deadline for receipt of a mail or absentee ballot, writes a date on the envelope that is before that deadline, the ballot will not be counted because it will not be received before the deadline.

Appellants posit (Br.45) that the date requirement “serves the State’s interest in solemnity.” Most of the cases appellants cite in making this argument, however, are not even election cases (unsurprisingly, given the county’s unfortunate history of disqualifying eligible voters under the guise of “solemnity”). And not a single one involved a date requirement. Their leading case, *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018), never even mentions “solemnity.” That none of the cases involved a date requirement is

critical because the question here is not whether a solemnity rationale could *ever* suffice for any government regulation. The question is whether it makes sense to say that a voter will take the act of completing and submitting a mail or absentee ballot more seriously because of a mandate to date the ballot's outer envelope. Even appellants appear to recognize that the answer is no, as they do not even try to articulate the logic behind a solemnity rationale. Understandably so: The logic would be that a voter, while looking over her ballot—the candidates for each race, the offices being contested, and so on—will think: “This must be taken seriously, not because of the importance of the offices, not because I am playing my singular role in the mosaic of democracy, but because I will have to write a plausible date on the outer envelope.” That is untenable. And again, appellants cite no case endorsing a solemnity rationale for a date requirement.²

In sum, the dispositive point remains that both as a matter of state law and as a matter of the actual practice of every county board of elections, the date requirement serves no purpose.

² The Pennsylvania Department of State, moreover, is currently reprinting all mail- and absentee-ballots' outer envelopes to prefill “2024” ahead of the November election, so that voters fill in only the month and day. *See* Appellants' Br.4. Pennsylvania Department of State, *Directive Concerning the Form of Absentee and Mail-in Ballot Materials* at 3-4 (July 1, 2024). That change reinforces that completing the date is a mere formality, not a solemn act.

C. The Free And Equal Elections Clause Does Not Allow Qualified Voters' Ballots To Be Disqualified For No Valid Reason

Because the date requirement serves no purpose, and in any event is not narrowly tailored to serve even the purposes appellants posit, the level of judicial scrutiny applied here is ultimately irrelevant. If the robust protection of the right to vote that the Free and Equal Elections Clause provides means anything, it must mean that the fundamental right to vote cannot be denied in service of no cognizable state interest. Enforcement of the date requirement is thus invalid even under the most forgiving scrutiny, meaning the Court need not decide the applicable level of scrutiny. But if the Court opts to apply a particular level of scrutiny, then it should hold, consistent with its case law, that strict scrutiny applies because the date requirement severely burdens the fundamental right to vote by mandating the disqualification of ballots for no compelling reason (indeed, no legitimate reason at all). Appellants' contrary arguments lack merit.

1. This Court Has Not Decided The Free And Equal Elections Clause Challenge Presented Here

Appellants argue (Br.26-29) that in *Ball* and *Pennsylvania Democratic Party v. Boockvar* (“PDP”), this Court rejected challenges to the date requirement under the Free and Equal Elections Clause. As the Commonwealth Court recognized (Op.67-68), that is incorrect. And as was true in their briefing below, appellants cannot cite a single case or other authority reading either *Ball* or *PDP* as they do.

In *PDP*, this Court addressed whether the Free and Equal Elections Clause *requires* counties to notify voters who made a mistake completing their ballots and provide an opportunity for them to cure any problems. 238 A.3d at 373. The Court concluded that the Clause does not do so and thus explained that the challenger there (the Pennsylvania Democratic Party) was “not entitled to the relief it seeks,” *id.* at 374. That is a different question than whether the Constitution allows undated or misdated ballots to be discarded. *PDP* did not address the latter, and certainly never “held” (Appellants’ Br.27) that enforcement of the date requirement complies with the Clause. Again, appellants cite no case reading *PDP* as they do.

Appellants also cite (Br.27) *PDP*’s mention of the argument made there that discarding mail or absentee ballots returned without the secrecy envelope would violate the Free and Equal Elections Clause, 283 A.3d at 14-15. But the Court never addressed that argument, much less addressed the constitutionality of discarding ballots that do not comply with the *separate* date requirement. And once more, appellants cite no case that has read *PDP* to reject the constitutional argument advanced here.

A final point on *PDP*: Appellants repeatedly say (e.g., Br.2, 5) that there this Court “upheld the declaration mandate.” But there was no challenge in *PDP* to any part of the declaration mandate, including the date requirement. The relevant claim was that counties must contact voters who make a mistake in completing mail or absentee ballots and provide those voters a chance to fix the

mistake. It is simply incorrect to assert that *PDP* “upheld the declaration mandate” against any challenge.

Ball is equally unhelpful to appellants. *Op.67*. This Court held there, purely as a matter of statutory interpretation, that the Election Code “require[s] the disqualification of ballots that arrive in undated or incorrectly dated return envelopes.” 289 A.3d at 23. The Court made no holding about the Clause—although three members of the then-six-member Court suggested in dicta that enforcement of the date requirement *would* violate the Clause. *Id.* at 27 n.156 (Wecht, J., joined by Todd, C.J., and Donohue, J.). Although the Commonwealth Court here prominently quoted this three-justice footnote (*Op.66-67*), appellants notably have nothing to say about it.³

2. *Statutes That, Like The Date Requirement, Mandate The Disqualification Of Ballots Trigger Strict Scrutiny*

This Court analyzes claims under the Free and Equal Elections Clause by weighing the alleged “violat[ion of] the fundamental right to vote” or alleged “disparate treatment of any group of voters” against the state interest supposedly advanced by the challenged regulation. *Banfield*, 631 110 A.3d at 178. The

³ In their Commonwealth Court briefing, appellants asserted that this footnote was “referring to interpreting potential ambiguities in the federal Materiality Provision—not the date requirement.” That is incorrect. The footnote says that even if enforcing the date requirement did not violate the materiality provision (as three justices indicated it did), “failure to comply with *the date requirement* would not compel the discarding of votes in light of the Free and Equal Elections Clause.” 289 A.3d at 27 n.156 (emphasis added). The footnote therefore was about the date requirement.

magnitude of the state interest required to uphold a challenged regulation depends on the severity of the burden it places on citizens' exercise of the franchise. When an election regulation "do[es] not severely restrict the right to vote," the Court has been relatively deferential—so long as the regulation genuinely advances the Commonwealth's interest in ensuring "'honest and fair elections.'" *PDP*, 238 A.3d at 369-370 (quoting *Banfield*, 110 A.3d at 176-177). But "[w]hen a statute significantly interferes with the exercise of [the] fundamental right" to vote, it must be narrowly tailored to promote a compelling state purpose. *Id.* at 176 n.15; accord *Appeal of Norwood*, 116 A.2d at 555.

Appellants insist (Br.43) that *Banfield* is irrelevant here because it rejected the specific challenge there, the case is irrelevant here. That is wrong. *Banfield* says that "this Court has acknowledged that the right to vote is fundamental," 110 A.3d at 176, and that "[w]hen a statute significantly interferes with the exercise of a fundamental right, such a statute 'will be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose,'" *id.* at 176 n.15 (quoting *Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 947 (Pa. 2004)). The DNC and PDP submit that *Banfield* therefore supports the application of strict scrutiny here, because enforcement of the date requirement significantly interferes with the exercise of the right to vote.

This Court, in fact, has referred again and again in the election context—even where the Free and Equal Elections Clause was not formally invoked—to the need for a compelling state interest to justify the disqualification of ballots.

In *Appeal of Norwood*, for example, the Court reversed a county board's disqualification of a ballot that was not marked in compliance with state law, holding that "the power to throw out ... ballot[s] for minor irregularities," whether the ballots of "an individual voter or a group of voters," is not to be "exercised ... at an election except for compelling reasons." 116 A.2d at 555. As the mismarking of the ballot had no consequence beyond its technical non-compliance, the Court held that the ballot must be counted. *Id.* at 554-555. Likewise, in reversing the disqualification of ballots on purely technical grounds in *Appeal of Gallagher*, this Court reiterated that voters are not to be disenfranchised "at an election except for compelling reasons." 41 A.2d at 632.

As in these various cases, enforcing the date requirement would mean that "minor irregularities"—here, misdated or undated ballot-return envelopes—"render[] the votes void[]" and thus would "disenfranchise these vote[r]s." *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. As in the cases just discussed, therefore, the date requirement could be enforced only if doing so furthered a compelling state interest.

Enforcement would also have to be narrowly tailored in order to survive. In *In re Petitions to Open Ballot Boxes*, this Court held that ballots could be disqualified for having stray marks only where doing so was narrowly tailored to further the state's interest in preventing voting fraud—i.e., where there was evidence that the stray marks were "willful[ly] ... placed on the ballots by the voters for the purpose of identifying their ballots," because that could suggest that

“fraud was involved.” 188 A.2d at 255, 256. Likewise here, even if the date requirement actually served an anti-fraud purpose, the narrow-tailoring mandate would mean that ballots could be disqualified based on a failure to comply with the date requirement only if there were some basis to conclude that that failure occurred because “fraud was involved,” *id.* at 256. But no such tailoring exists.

To be sure, the General Assembly “may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176-177; *see* Op.PAM-23. But this general recognition of legislative authority to regulate elections does not permit the enforcement of a purposeless provision to disqualify votes. As discussed, *see supra* p.21, no county board or other election administrator uses the handwritten date for any purpose, because the Election Code now ensures the validity of mail and absentee ballots by defining their timeliness based on their receipt and by requiring county boards to stamp and scan ballot envelopes when they are received. The date requirement therefore does nothing to promote the honesty, fairness, orderliness, or efficiency of election administration. *See Banfield*, 110 A.3d at 177. And because the date requirement is useless, disqualifying ballots for its violation is not a “reasonable” regulation of the franchise. *Id.*

Appellants note, however (Br.31), that over a century ago, this Court stated that “nothing short of gross abuse would justify striking down an election law,” *Winston*, 91 A. at 523. But this Court has never applied that standard to any

statute limiting a voter's right under the Free and Equal Elections Clause to cast a ballot and have it counted. *Winston* itself addressed limitations on a ballot's structure and documentation requirements for candidates seeking to appear on it limitations that are markedly different than the disqualification of voters. *Id.* at 522-523. As the Court explained, the provisions challenged there "denie[d] no qualified elector the right to vote," and imposed "dut[ies] ... upon the candidate and not upon the elector." *Id.* at 523. In other words, "[t]he rights of the voter [we]re only incidentally involved." *Id.* By contrast, when analyzing the lawfulness of ballot disqualifications, i.e., where the government *does* "den[y] ... qualified elector[s] the right to vote," *id.*, cases like *Banfield* make clear that strict scrutiny applies.

Appellants also say (Br.39-40) that in *In re Berg*, 713 A.2d 1106 (Pa. 1998) (per curiam), this Court declined to apply strict scrutiny, *id.* at 1109, as did the Commonwealth Court, *see In re Berg*, 712 A.2d 340, 342-343 (Pa. Commw. Ct. 1998). But for starters, the claims in *Berg* were all *federal* claims; there was no claim under the Free and Equal Elections Clause. As explained, that clause provides greater protection of the right to vote than federal law. In any event, *Berg* did not involve discarding ballots. It concerned the minimum number of signatures a candidate needs to get on the ballot. *See Berg*, 713 A.2d at 1107. So it is entirely unsurprising (and unhelpful to appellants here) that strict scrutiny was not applied there.

Likewise unavailing is appellants' repeated quotation (Br.2-3, 39) of this Court's observation in *Berg* about the implications of "subject[ing] every voting regulation to strict scrutiny," 713 A.2d at 1109. That does nothing to help appellants because the Commonwealth Court's decision does not remotely subject every voting regulation to strict scrutiny.

Next, appellants try to avoid strict scrutiny by framing the burden the date requirement imposes, i.e., the alleged unconstitutional burden on the right to free elections, as whether it is "difficult" to "dat[e] a ballot declaration" (Br.34). That framing is inconsistent with decades of this Court's cases, which describe the burden of ballot-casting rules as "disfranchise[ment]." *Appeal of Gallagher*, 41 A.2d at 632. In one case, for example, this Court analyzed not the burden of the specific rule challenged (a rule against marking "[a]ny ballot ... by any other mark than an (X) in the space provided") but the burden resulting from "throw[ing] out a ballot for minor irregularities." *Appeal of Norwood*, 116 A.2d at 553, 555 (quoting 25 P.S. §3063(a)). Likewise, the relevant question here is not (as appellants would have it) whether the Free and Equal Elections Clause permits the legislature to direct voters to date their ballot-return envelopes; it is whether the Clause permits respondents to disenfranchise thousands of qualified voters each election solely for failing to comply with the purposeless date requirement. As to that question, strict scrutiny applies, just as it would if the question involved properly marking the ballot itself.

Finally, appellants say (e.g., Br.3) that “a ballot-casting rule can violate the Clause only when it makes voting so difficult as to amount to a denial ... of the franchise” (omission in original) (quotation marks omitted). As explained, that is not the entire relevant standard, *see supra* pp.14, 17, but even if it were it would be satisfied here. In election after election, thousands of mail or absentee ballots have been disqualified solely based on non-compliance with the date requirement. Op.12-13, 75, 72. Appellants say (Br.4) that denying *thousands* of eligible and registered Pennsylvanians their fundamental right to vote is of no concern because those voters are a small percentage of the total number of mail and absentee voters. That argument is directly contrary to this Court’s precedent holding, correctly, that “[t]he disfranchisement of even *one* person validly exercising his right to vote is an extremely serious matter.” *Perles*, 202 A.2d at 540 (emphasis added).

3. *The Date Requirement Cannot Satisfy Any Level Of Scrutiny*

Because the date requirement advances no purpose—let alone a compelling state interest it is narrowly tailored to advance—it cannot satisfy any level of scrutiny. The *only* reason an election official in Pennsylvania would examine the handwritten date on a ballot-return envelope is to determine whether to disqualify the ballot based on a “minor irregularit[y],” *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. Such purposeless disqualification is not “rationally related to the Commonwealth’s interest in ensuring honest and fair elections,” *Banfield*, 110 A.3d at 177. In fact, contrary to that interest, it unfairly

disqualifies thousands of eligible voters. Appellants' extended attacks on the court's application of strict scrutiny would therefore not warrant reversal even if those attacks had merit. Because enforcement of the date requirement is barred whatever the level of scrutiny, the Court may enjoin such enforcement without resolving which level applies.

Holding that the Free and Equal Elections Clause prohibits disqualifying ballots for failing the date requirement would be fully consistent with this Court's precedent. For instance, this Court has already held that although the Election Code requires that ballots be marked only in pencil or blue or black ink—a requirement codified in the same provision as the date requirement, *see* 25 P.S. §3150.16(a)—ballots *cannot* be disqualified solely for failure to comply with this requirement. *See In re Luzerne*, 290 A.2d at 109. Although the Court did not mention the Clause in its opinion, it based its decision to block the enforcement of the statutory command in the Court's "overriding concern at all times ... to be flexible in order to favor the right to vote," and the Court's "goal ... to enfranchise and not to disenfranchise," *id.* Those are principles underlying the constitutional protection of the right to vote enshrined in the Clause.

Appellants repeatedly say, however, that the date requirement cannot be unconstitutional because rules that disqualify ballots that fail "the usual burdens of voting" (e.g., Br.34) cannot violate the right to vote. But appellants never cite *any* Pennsylvania case that makes that a relevant standard. More importantly, the "usual burdens of voting" do not include complying with a requirement that

serves no state interest whatsoever. Appellants have identified no such “usual” burden, in Pennsylvania or elsewhere.

Much the same point answers appellants’ argument (Br.24) that “a voter does not suffer constitutional harm when his ballot is rejected because he failed to follow the rules the General Assembly enacted for completing or casting it.” If that were true, then the legislature could make the right to vote depend on compliance with any of an endless number of wholly senseless “rules.” This Court’s longstanding and consistent precedent (discussed earlier) shows that that is not the law. Rather, the right to vote cannot be denied without a compelling reason, and certainly not because of minor errors in complying with a rule that serves no purpose.

Finally, appellants suggest (Br.48-50) that applying the Free and Equal Elections Clause to block the disqualification of ballots here would be inconsistent with decisions of courts in other jurisdictions. That too is wrong. For example, under the free and equal elections provision of the New Hampshire constitution, that state’s high court struck down a law requiring new registrants to be informed of other obligations associated with in-state domicile. *Guare v. State*, 117 A.3d 731, 741 (N.H. 2015) (per curiam). Likewise, under Massachusetts’ free-elections provision, the Massachusetts Supreme Judicial Court struck down an impediment to voting by incarcerated individuals. *Cepulonis v. Secretary of the Commonwealth*, 452 N.E.2d 1137, 1140-1142 (Mass. 1983).

D. An Injunction Against Enforcement Of The Date Requirement Is Available And Appropriate Relief

1. Enjoining The Disqualification Of Ballots Solely Because Of Non-Compliance With The Date Requirement Does Not Require Striking Down All Of Act 77

Appellants assert (Br.55) that the relief requested here would require the Court to “strik[e] universal mail voting in Pennsylvania” entirely, due to the non-severability clause in the statute that created such voting, Act 77. As the Commonwealth Court recognized (Op.86-89), that is incorrect. The requested relief—enjoining the disqualification of ballots solely for failure to comply with the date requirement—would not require the Court to strike the date requirement from the statute books, so the non-severability clause would not be triggered by granting that relief.

Indeed, the Commonwealth Court recognized that point even before this case. In *Bonner v. Chapman*, 298 A.3d 153 (Pa. Commw. Ct. 2023), the court noted that two previous cases had “concluded that the [date-requirement] statute did not require an otherwise timely received, valid absentee or mail-in ballot cast by an eligible Pennsylvania elector to be thrown out,” *id.* at 168. But, *Bonner* continued, “[t]hese interpretations did not *invalidate* the Dating Provisions, as neither opinion struck the Dating Provisions from the Election Code or held that electors cannot or should not handwrite a date on the declaration in accordance with those provisions.” *Id.* (emphasis added). The court thus determined that Act 77’s “Nonseverability Provision was not triggered.” *Id.* at 169.

The same is true here. The relief requested is a judgment (1) *interpreting* the Free and Equal Elections Clause as prohibiting disqualification of otherwise-valid absentee and mail ballots received in undated or misdated ballot-return envelopes, and (2) *enjoining* enforcement of the date requirement to disqualify ballots solely for an omitted or erroneous date. Granting this relief would not require the Court to strike or invalidate the date-requirement statute, which would “remain part of the Election Code and continue to instruct electors to date the declaration on the return mailing envelope, which, as history has shown, a majority of electors will do.” *Bonner*, 298 A.3d at 168.

Even if the Court *were* to invalidate the date requirement, the Court still would not then have to eliminate *all* mail voting. Pennsylvania law neither requires nor permits that absurd result. As this Court has held, “courts have not treated legislative declarations that a statute is severable, or nonseverable, as ‘inexorable commands,’ but rather have viewed such statements as providing a rule of construction.” *Stilp v. Commonwealth*, 905 A.2d 918, 972 (Pa. 2006), *quoted in* Op.88. In particular, this Court has been wary of “boilerplate non-severability provision[s]” that “set[] forth no standard for measuring non-severability, but instead, simply purport[] to dictate to the courts how they must decide severability.” *Id.* at 973; *see also id.* at 970-981 (declining to enforce a boilerplate non-severability clause). Act 77 has just such a non-severability clause. *See PDP*, 238 A.3d at 398 n.4 (Donohue, J., concurring) (analogizing that clause to the one in *Stilp*).

Given this precedent, the proper course here if Act 77's non-severability provision were triggered would be for the Court to decline to enforce it as inconsistent with the Free and Equal Elections Clause itself. Applying the non-severability provision to invalidate mail-voting provisions not implicated here would throw the Commonwealth's election system into chaos shortly before an election, including by impeding the fundamental right to vote for millions of Pennsylvanians who have come to rely upon mail ballots after several election cycles to vote. *See PDP*, 238 A.3d at 398 n.4 (Donohue, J., concurring) (reasoning that "[i]n the context of the COVID-19 pandemic, applying the non-severability provision to void Act 77 in its entirety would itself be unconstitutional, as it would disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election"). That outcome could not be squared with the Clause's strong protection of the fundamental right to vote.

Because Act 77's non-severability clause could not be enforced here, the longstanding general presumption of severability (*see* 1 P.S. §1925) applies. Under that presumption, a statute is severable "unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.* Neither finding could be made here. Act 77

effected numerous significant changes to Pennsylvania’s election law: it “establish[ed] state-wide, universal mail-in voting”; “eliminated the option for straight-ticket voting; moved the voter registration deadline from thirty to fifteen days before an election; allocated funding to provide for upgraded voting systems; and reorganized the pay structure for poll workers.” *McLinko v. Department of State*, 279 A.3d 539, 543 (Pa. 2022). Nothing in the statute suggests that these important provisions are “inseparably connected with” the date requirement or are “incapable of being executed” without it. 1 P.S. §1925. And the only legislative history appellants can muster (Br.56-57) does not even mention the date requirement, let alone suggest that it was crucial to some legislative “concern[.]” or “compromise[.]” To the contrary, the legislature merely incorporated pre-existing absentee-voting procedures wholesale into the mail-ballot procedures. *See supra* p.7. In short, there is no reason to think the broad range of significant voting matters Act 77 addressed rises or falls with the validity of the separate date requirement.

2. *Enjoining Enforcement Of The Date Requirement Here Would Not Usurp The General Assembly’s Role Or Create Any Equal-Protection Problem*

a. Appellants briefly assert (Br.54-55) that enforcing the Free and Equal Elections Clause here would violate the Elections and Electors Clauses—U.S. Const. art. I, §4, cl. 1; *id.* art. II, §1, cl. 2—as interpreted in *Moore v. Harper*, 600 U.S. 1 (2023). To the contrary, *Moore* makes clear that appellants’ reliance on the two federal constitutional provisions is misplaced.

Moore in fact *rejected* a claim that a North Carolina court violated the Elections Clause by invalidating, under the state constitution’s free elections clause, the state legislature’s congressional districting map. In doing so, the U.S. Supreme Court reaffirmed the longstanding and commonsense propositions that “state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause,” 600 U.S. at 32, and that it is not federal courts but state courts—like this Court—that are the ““appropriate tribunals ... for the decision of questions arising under their local law,”” *id.* at 34 (quoting *Murdock v. Memphis*, 87 U.S. 590, 626 (1874)). *Moore* thus confirms that it is the prerogative of Pennsylvania courts to construe the scope of Pennsylvania’s Free and Equal Elections Clause and determine whether it precludes enforcement of the date requirement.

Moore did suggest that there may be “outer bounds” to the deference federal courts give state courts’ review of statutes regulating federal elections, so as to prevent state courts from “evad[ing] federal law” by “arrogat[ing] to themselves the power vested in state legislatures to regulate federal elections.” 600 U.S. at 34-36. But nothing in this case even approaches a “transgress[ion]” of “the ordinary bounds of judicial review,” *id.* at 36. This case asks the Court to enjoin enforcement of the date requirement under a classic form of constitutional scrutiny—one already applied in cases addressing the Election Code’s requirement to disqualify any ballot “so marked as to be capable of identification,” 25 P.S. §3063(a). *See supra* p.36. There would be nothing

extraordinary about this Court recognizing that the Pennsylvania Constitution’s protection of free elections—which goes beyond what the U.S. Constitution provides—precludes disqualifying ballots under a provision that serves no state interest. Much less would such a ruling even arguably constitute the courts “evad[ing] federal law,” *Moore*, 600 U.S. at 34.

b. Appellants argue (Br.20) that because not all 67 county boards are parties here, granting petitioners’ request relief could lead to variations across counties in canvassing ballots in undated and misdated envelopes that would implicate equal-protection concerns. The Commonwealth Court correctly deemed this argument insufficiently developed by appellants below. Op.53. That failure to “develop the issue” in a “fashion capable of review” renders it “waived.” *Wirth v. Commonwealth*, 95 A.3d 822, 837 (Pa. 2014) (citing *Commonwealth v. Johnson*, 985 A.2d 915, 924 (2009)).

But in any event, the argument fails on the merits. Appellants provide no basis to conclude that other county boards would ignore a declaration from this Court that the Free and Equal Elections Clause prohibits disqualifying ballots solely for non-compliance with the date requirement. Such a declaration would “assure uniformity” statewide—and it was the lack of such uniformity that underlay the U.S. Supreme Court’s finding of an equal-protection violation in *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

Nor have appellants offered any basis to conclude that county boards will fail to uniformly *implement* a constitutional directive from this Court to count

undated ballots. Ballots are either counted or not; there is no gray zone between the two. Moreover, the Commonwealth Court was correct to conclude (Op.53-54) that not *every* variation in how counties handle the counting of undated or misdated mail or absentee ballots violates equal protection. *See PDP*, 238 A.3d at 382-383.

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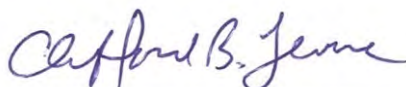
Appellants begin and end their brief with hyperbolic rhetoric about the Commonwealth Court’s decision “threaten[ing] to unleash chaos, uncertainty, and an erosion of public confidence.” Br.1; *accord* Br.59. None of that withstands scrutiny. Affirmance by this Court would create no “chaos”; county officials would simply count rather than discard mail and absentee ballots timely submitted by qualified Pennsylvanians whose intent to vote is clear. Nor would any “uncertainty” result from the clear and bright-line rule the Commonwealth Court adopted, i.e., that mail and absentee ballots cannot be disqualified solely because of a failure to comply with the date requirement. And it will inspire rather than erode the people’s confidence in our elections for this Court to reaffirm once more its century-plus of jurisprudence holding that the fundamental right to vote—the very core of our system of government—is not so transient and fleeting that it can be denied based on arbitrary requirements that serve no purpose other than to exclude people from having an equal voice in our democracy.

CONCLUSION

The Commonwealth Court's judgment should be affirmed.

September 4, 2024

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

According to the word-count function of the word-processing system used to prepare the brief, this brief contains 11,839 words that are countable under Pennsylvania Rule of Appellate Procedure 2135(a)(1).

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/s/ Clifford B. Levine

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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.

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

On September 4, 2024, I caused the foregoing to be electronically filed and to be served via the Court's electronic filing system on counsel of record for each party listed on the docket.

/s/ Clifford B. Levine