

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT
PROJECT, PHILADELPHIANS
ORGANIZED TO WITNESS, EMPOWER AND
REBUILD, MAKE THE ROAD
PENNSYLVANIA, ONEPA ACTIVISTS
UNITED, NEW PA PROJECT EDUCATION
FUND, CASA SAN JOSE, PITTSBURGH
UNITED, LEAGUE OF WOMEN VOTERS OF
PENNSYLVANIA, AND COMMON CAUSE
PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as
Secretary of the Commonwealth,
PHILADELPHIA COUNTY BOARD OF
ELECTIONS, AND ALLEGHENY COUNTY
BOARD OF ELECTIONS,

No. 283 MD 2024

Respondents,

and

DEMOCRATIC NATIONAL
COMMITTEE, PENNSYLVANIA
DEMOCRATIC PARTY,

Intervenor-Petitioners,

and

REPUBLICAN NATIONAL COMMITTEE,
REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Respondents.

**RESPONSE OF INTERVENOR-PETITIONERS DEMOCRATIC
NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC
PARTY IN OPPOSITION TO REPUBLICAN PARTY
INTERVENORS' APPLICATION FOR SUMMARY RELIEF**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	4
I. THE PENNSYLVANIA SUPREME COURT HAS NOT DECIDED THE FREE AND EQUAL ELECTIONS CLAUSE CHALLENGE PRESENTED HERE	4
II. THE REPUBLICANS’ ARGUMENTS REGARDING POSSIBLE PURPOSES FOR THE DATE REQUIREMENT FAIL	5
III. THE REPUBLICANS’ EFFORTS TO NARROW THE FREE AND EQUAL ELECTIONS CLAUSE AND EVADE STRICT SCRUTINY LACK MERIT.....	13
A. The Republicans Are Wrong That Disqualifying Ballots For Technicalities Falls Outside The Free And Equal Elections Clause’s Protection	13
B. The Republicans’ Arguments Against Applying Strict Scrutiny Are Meritless	17
C. Decisions From Other Jurisdictions Do Not Limit The Clause’s Scope.....	22
D. The Date Requirement Cannot Satisfy Even Rational-Basis Review	25
IV. ENJOINING RESPONDENTS FROM DISQUALIFYING BALLOTS IS AVAILABLE AND APPROPRIATE RELIEF.....	26
A. Enjoining Respondents Does Not Require Striking Down Pennsylvania’s Mail-Ballot Statute.....	26
B. Enjoining Respondents Would Not Usurp The General Assembly’s Role	30
V. THE REPUBLICAN INTERVENORS’ PROCEDURAL OBJECTIONS ARE UNAVAILING	31

A. Petitioners Have Standing To Bring Their Claims
Against The Secretary.....32

B. This Court Has Original Subject-Matter
Jurisdiction35

C. The Other 65 Boards Of Elections Are Not
Indispensable Parties.....39

CONCLUSION.....42

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

RETRIEVEDFROMDEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases

<i>Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services</i> , 309 A.3d 808 (Pa. 2024)	33
<i>Appeal of Gallagher</i> , 41 A.2d 630 (Pa. 1945)	16, 21
<i>Appeal of Norwood</i> , 116 A.2d 552 (Pa. 1955)	15, 21
<i>Ball v. Chapman</i> , 289 A.3d 1 (Pa. 2023)	<i>passim</i>
<i>Ball v. Chapman</i> , 2022 WL 18540588 (Oct. 24, 2022)	39
<i>Banfield v. Cortes</i> , 110 A.3d 155 (Pa. 2015)	18, 19, 24
<i>Bonner v. Chapman</i> , 298 A.3d 153 (Pa. Commw. Ct. 2023)	26, 27, 35
<i>Chadwick v. Caulfield</i> , 834 A.2d 562 (Pa. Super. Ct. 2023)	34
<i>City of Philadelphia v. Commonwealth</i> , 838 A.2d 566 (Pa. 2003)	32, 40
<i>Commonwealth v. Batts</i> , 163 A.3d 410 (Pa. 2017)	11, 12
<i>Firearm Owners Against Crime v. Papenfuse</i> , 261 A.3d 467 (Pa. 2021)	34
<i>In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election</i> , 241 A.3d 1058 (Pa. 2020)	6
<i>In re General Election November 6, 1971</i> , 296 A.2d 782 (Pa. 1972)	15
<i>In re Luzerne County Return Board</i> , 290 A.2d 108 (Pa. 1972)	15, 17
<i>In re National Football League Players Concussion Injury Litigation</i> , 775 F.3d 570 (3d Cir. 2014)	12
<i>In re Petitions to Open Ballot Boxes</i> , 188 A.2d 254 (Pa. 1963)	15-16
<i>League of Women Voters of Pennsylvania v. Boockvar</i> , 2021 WL 62268 (Pa. Commw. Ct. 2021)	17
<i>League of Women Voters of Pennsylvania v. Degraffenreid</i> , 265 A.3d 207 (Pa. 2021)	17

<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	2, 14, 15, 17, 22, 23
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	33
<i>Mazo v. New Jersey Secretary of State</i> , 54 F.4th 124 (3d Cir. 2022).....	24
<i>McLinko v. Department of State</i> , 279 A.3d 539 (Pa. 2022).....	29, 35
<i>Minnesota Voters Alliance v. Mansky</i> , 585 U.S. 1 (2018).....	8
<i>Moore v. Harper</i> , 600 U.S. 1 (2023)	30, 31
<i>Murdock v. Memphis</i> , 87 U.S. 590 (1875).....	30
<i>National Election Defense Coalition v. Boockvar</i> , 266 A.3d 76 (Pa. 2021).....	38
<i>Pennsylvania Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020).....	<i>passim</i>
<i>Pennsylvania School Boards Association v. Commonwealth Association of School Administrators</i> , 696 A.2d 859 (Pa. Commw. Ct. 1997).....	37, 39
<i>Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania</i> , 97 F.4th 120 (3d Cir. 2024).....	11, 12
<i>Pennsylvania State Conference of NAACP v. Schmidt</i> , 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023).....	5-6, 9, 11
<i>Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth</i> , 877 A.2d 383 (Pa. 2005)	32
<i>Petition of Berg</i> , 712 A.2d 340 (Pa. Commw. Ct. 1998).....	19
<i>Petition of Berg</i> , 713 A.2d 1106 (Pa. 1998)	19
<i>PG Publishing Co. v. Aichele</i> , 902 F.Supp.2d 724 (W.D. Pa. 2012)	40
<i>Rachel Carson Trails Conservancy, Inc. v. Department of Conservancy & Natural Resources</i> , 201 A.3d 273 (Pa. Commw. Ct. 2018).....	36

<i>Republican National Committee v. Chapman</i> , No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023)	38
<i>Robinson Township v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013)	16
<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44 (1996).....	11
<i>Shankey v. Staisey</i> , 257 A.2d 897 (Pa. 1969)	14
<i>Stedman v. Lancaster County Board of Commissioners</i> , 221 A.3d 747 (Pa. Commw. Ct. 2019)	36, 39
<i>Stilp v. Commonwealth</i> , 905 A.2d 918 (Pa. 2006).....	27, 28
<i>William Penn Parking Garage, Inc. v. City of Pittsburgh</i> , 346 A.2d 269 (Pa. 1975).....	33
<i>William Penn School District v. Pennsylvania Department of Education</i> , 294 A.3d 537 (Pa. 2023)	40
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914)	2, 17, 18, 19, 20, 21

Constitutional and Statutory Provisions

U.S. Constitution	
article I, §4, clause 1	30
article II, §1, clause 2.....	30
Pennsylvania Constitution, article I, §5	13, 15
52 U.S.C. §10101	11
1 Pennsylvania Consolidated Statutes §1925	28, 29
25 Pennsylvania Statutes	
§1222	37
§2621	36, 37
§3063	21, 31
§3146.3	36
§3146.4	36
§3150.13	36
§3150.14	36
§3154	37

§3158	37
§3159	37
42 Pennsylvania Consolidated Statutes	
§102	35
§761	35, 39
§7540	40

Other Authorities

The Bluebook R.1.2 (21st ed. 2020)	24
Pennsylvania Department of State, <i>Directive Concerning the Form of Absentee and Mail-in Ballot Materials</i> (July 1, 2024)	9
Pennsylvania Department of State, <i>Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, Version 4.0</i> (Apr. 3, 2023)	37
Pennsylvania Department of State, <i>Pennsylvania Absentee and Mail-in Ballot In-Person Return Guidance</i> (Sept. 25, 2023)	7

RETRIEVED FROM DEMOCRACY DOCKET.COM

INTRODUCTION

Respondent-intervenors, the Republican National Committee and Republican Party of Pennsylvania (“the Republicans”), offer no persuasive reason to deny petitioners’ application. As the Democratic National Committee (“DNC”) and Pennsylvania Democratic Party (“PDP”) explained (Br.17-20), disqualifying otherwise-valid absentee and mail ballots based solely on non-compliance with the date requirement, i.e., the requirement that voters handwrite the date when they sign the declaration on the outer envelopes in which they return their ballots, severely burdens the fundamental right to vote guaranteed by the Free and Equal Elections Clause of the Pennsylvania Constitution (the “Clause”). And the requirement fails the strict scrutiny that applies—or, for that matter, *any* conceivably applicable level of scrutiny—because it serves absolutely no purpose, as multiple courts and all three governmental respondents have acknowledged. BOEs Br.4-5; Secretary Br.1. The Republicans’ contrary arguments lack merit.

First, the Pennsylvania Supreme Court has not decided the Free and Equal Elections Clause challenge here. The cases the Republicans cite for that proposition did not address whether the date requirement complies with the Clause—with the exception of *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), in which half the justices (the only ones who expressed an opinion on the question) stated in dicta that that enforcement of the date requirement *would* violate the Clause.

Second, the Republicans establish no cognizable purpose for the date requirement. None of their three suggested purposes—that it could assist with proving a ballot’s timeliness, promote “solemnity,” or deter fraud—is grounded in the text or history of the election code, or in any evidence about actual election practice. By contrast, based on months of discovery regarding actual practice, a federal judge in the Western District of Pennsylvania concluded, and the Third Circuit affirmed, that the date requirement has no practical purpose.

Third, the Republicans attempt to limit the Clause’s text in several ways, including arguing that it ensures only equal treatment of voters—and hence that the date requirement does not violate the Clause because all voters have an equal opportunity to write the date correctly. But the *Free and Equal* Clause also ensures that elections shall be “free,” and underscores that mandate by providing nothing shall “prevent the free exercise of the right of suffrage.” Consistent with the Clause’s plain text, Pennsylvania Supreme Court case law recognizes that the Clause protects not just equality but also (for example) each voter’s “right to cast [a] ballot and have it honestly counted,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018) (hereafter “*LWV*”) (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)).

Fourth, the Republicans ignore case law explaining that election statutes are subject to strict scrutiny when they “significantly interfere” with the exercise of the

fundamental right to vote, as enforcement of the date requirement does, by disqualifying qualified voters' ballots because of a meaningless technicality. And the Republicans do not dispute that the date requirement fails strict scrutiny (as it does any level of scrutiny). In response, they suggest that only a "gross abuse" of the legislature's authority to enact election laws would render such a law unconstitutional. But the Pennsylvania Supreme Court has never applied that standard to uphold a law that resulted in the disqualification of ballots absent a compelling interest.

Fifth, none of the federal and out-of-state cases that the Republicans spend 14 pages recounting "forecloses" petitioners' claim under the Pennsylvania constitution. The Pennsylvania Supreme Court has made clear, for example, that the state constitution provides more protection of the right to vote than its federal counterpart.

Sixth, the Republicans argue that petitioners' constitutional claim would both require the Court to "strike universal mail voting" entirely (because of a non-severability provision in the election code) and usurp the general assembly's role in violation of the U.S. Constitution. But neither the code nor Pennsylvania case law would require striking the entire statute here, and the U.S. Constitution does not prevent Pennsylvania courts construing and enforcing the state's own constitution to protect the franchise.

Finally, the Republicans raise procedural arguments about petitioners' choice of respondents, arguing that the Secretary of the Commonwealth is not a proper respondent and that petitioners' choice to sue two county boards of election means petitioners had to sue all 67. But the Secretary (the appropriate respondent in cases regarding statewide interpretation of the election code) is a proper party here because he is central to the enforcement, implementation, and administration of the date requirement. Conversely, the counties are not indispensable to this suit, and petitioners properly sued only the parties against which they seek relief.

Petitioners' application should be granted.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT HAS NOT DECIDED THE FREE AND EQUAL ELECTIONS CLAUSE CHALLENGE PRESENTED HERE

The Republicans argue (Br.28-31) that in *Ball and Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Pennsylvania Supreme Court rejected challenges to the date requirement under the Free and Equal Elections Clause. That is incorrect.

In *Pennsylvania Democratic Party*, the 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 require counties to establish so-called "notice and cure" programs (programs that can and do involve

defects other than non-compliance with the date requirement) and thus explained that PDP was “not entitled to the relief it seeks,” *id.* at 374. *Pennsylvania Democratic Party* did not address whether enforcement of the date requirement complies with the Clause, let alone “held” (RNC Br.29) that it does.

Ball is equally unhelpful to the Republicans’ position. *Ball* held, 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—but three members of the then-six-member court did state 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.).¹

II. THE REPUBLICANS’ ARGUMENTS REGARDING POSSIBLE PURPOSES FOR THE DATE REQUIREMENT FAIL

As the DNC-PDP brief explained (pp.8-17), the date requirement does not serve any legitimate state interest, and the Republicans are bound under collateral estoppel by the federal courts’ ruling to that effect in *Pennsylvania State Conference*

¹ Amici argue (Br.25-27) that prior state and federal litigation regarding the date requirement should foreclose this challenge as a matter of policy. That argument is meritless. No amount of “stability and predictability” justifies the continued enforcement of an unconstitutional law, much less one that undermines democracy by denying thousands of Pennsylvanians their right to vote for no reason whatsoever.

of the NAACP v. Schmidt, 2023 WL 8091601, at *31 n.39 (W.D. Pa. Nov. 21, 2023) (subsequent history omitted) (hereafter “*NAACP*”).

The Republicans nonetheless offer three such purposes (Br.49-53): The date supposedly (1) provides “proof of when an elector actually executed a ballot,” (2) promotes “solemnity” in voting, and (3) assists in “deterring and detecting voter fraud.” The first and third rationales—but not the second—did appear in the partial dissent of three justices in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1090-1091 (Pa. 2020) (op. of Dougherty, J.). But the Pennsylvania Supreme Court has not agreed that the date requirement serves any of the purposes the dissenters posited. In any event, none of the three posited purposes is a legitimate one that the date requirement actually serves—which is likely why the Republicans offer no evidence that any Pennsylvania official has ever advanced any of the three to defend the date requirement.

1. *Timeliness*. The Republicans assert (Br.50) that the handwritten date establishes a ballot’s timeliness by proving “when [the] elector actually executed [her] ballot” (quotation marks omitted). The DNC-PDP already explained (Br.11-12) why that is wrong. And the Republicans all but recognize it is wrong, acknowledging (Br.50) that timeliness is instead based on receipt date. They thus pivot to saying (*id.*) that the handwritten date would “serve[] as a useful backstop”

if an envelope were mistakenly not time-stamped upon receipt or “if Pennsylvania’s SURE [Statewide Uniform Registry of Electors] system malfunctioned.” But the Republicans fail to identify any instance of either scenario happening, let alone both—nor did they do so in *NAACP*. And despite the Republicans’ use of “or” in making this argument, both would have to happen for this argument to even potentially make sense. That is because the manual time-stamp on the outer envelope and the digital record created by scanning the envelope into SURE provide “independent means of verifying that a mail ballot was received by the statutory deadline.” Secretary Br.7. Even if both scenarios occurred, moreover—and again the Republicans do not point to a single instance, in all of Pennsylvania, of even one occurring—the handwritten date would still not serve the posited purpose. That is because county boards segregate timely mail and absentee ballots from untimely ones. *See, e.g.*, Pennsylvania Department of State, *Pennsylvania Absentee and Mail-in Ballot In-Person Return Guidance* at 8 (Sept. 25, 2023) (“At 8:00 p.m. on election night, all Ballot Return Sites and drop-boxes must be closed and locked. Staff must ensure that no ballots are returned to Ballot Return Site after the close of polls.”). This segregation provides boards with a third means to confirm ballots’ timeliness. Guarding against a scenario that is so wildly unlikely—and that would involve penalizing the voter for two if not three errors by government officials—simply cannot create a legitimate state interest that the date requirement could be said to

serve. Much less can it justify depriving, in election after election, thousands of qualified voters of their right to vote and have that vote counted.

2. *Solemnity.* Equally infirm is the Republicans' claim (Br.51) that "the date requirement serves the State's interest in solemnity." Most of the cases they cite in making this argument (*id.*) are not even election cases, and not one involved a date requirement. (Their leading case, in fact, *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018), never 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 the slightest sense to say that a voter will take the act of completing and submitting a mail or absentee ballot because of a mandate to date the ballot's outer envelope more seriously. Even the Republicans appear to recognize that the answer is no, as they do not even try to articulate the logic behind a solemnity rationale here. 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, "I need to take this very seriously, not because of the importance of the offices and the need to have the best people filling them, not because I am playing my role in the democratic system and making my voice heard by sending in this ballot, choosing people who will make decisions that affect the lives of so many, but because I will have to write the date on the outer envelope."

That is, with all respect, simply absurd. Again, the Republicans cite no case endorsing a solemnity rationale for a date requirement.²

3. *Fraud.* Finally, the Republicans argue (Br.51-53) that the date requirement helps prevent voter fraud. As with the timeliness rationale, the DNC-PDP already explained (Br.16) why that is wrong. The Republicans say, however (Br.52) 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 the Republicans 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.” *NAACP*, 2023 WL 8091601, at *31 n.39.³

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. 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.

³ In making this argument, the Republicans complain (Br.52) about “Pennsylvania Supreme Court precedent preclud[ing] county boards of elections from” signature-matching, which the Republicans say means “the *only* evidence of third-party fraud on the face of the fraudulent ballot was the handwritten date of April 26, 2022, ... twelve days after the decedent had passed away.” But even putting aside that the date on an outer *envelope* is not “evidence ... on the face of the ... *ballot*,” *id.* (emphasis added), that is wrong. The precedent the Republicans cite in no way limits signature-matching as part of the investigation or prosecution of a crime. Moreover,

To be clear, states can take certain actions to detect and prevent voter fraud. But that does not help the Republicans here because there is simply no evidence that the date requirement furthers (or has ever furthered) that interest.

4. If more were needed, two overarching points underscore the infirmity of the Republicans' purpose arguments.

First, the Republicans do not address the history of the date requirement, history demonstrating that the requirement is a vestige of the regime that applied decades ago to absentee ballots. *See* Secretary Br.28-32. Under that regime, absentee ballots had to be set aside if the accompanying declaration was dated after election day. The date requirement thus served the purpose of enabling officials to determine compliance with that deadline. That purpose disappeared when the legislature changed the law to make timeliness depend on receipt date rather than the date a declaration was completed and dated. But the legislature retained the date requirement (seemingly without recognizing the requirement's lack of ongoing purpose), and then applied the requirement to mail ballots decades later even though the timeliness of those ballots likewise turned on receipt date. *See id.* Again, the Republicans say nothing about this critical point. Nor do they identify any election

it is not true that the handwritten date was the only evidence of fraud. As the Republicans' own exhibit C shows (in the affidavit of probable cause), the defendant told police that she had completed and submitted the ballot in her mother's name after her mother died.

code provision that creates a purpose for the date requirement (unsurprisingly, as the SURE system precludes any such purpose, *see* Secretary Br.7, 24, 26).

Second, the Republicans never assert that any of the Commonwealth's 67 county boards makes any use of the handwritten date. That confirms what a federal district court concluded at summary judgment in litigation challenging the legality of the requirement under federal law (a conclusion the Third Circuit upheld): Discovery from all 67 county boards left no genuine dispute about the fact that no board uses the handwritten date for any purpose. *See NAACP*, 2023 WL 8091601, at *20-22, *aff'd in relevant part*, 97 F.4th 120, 125 (3d Cir. 2024).

The Republicans dismiss (Br.53) the Third Circuit's agreement with the district court's conclusion as "passing dictum." That characterization is not correct. As the Pennsylvania Supreme 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 that is a 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 that the date requirement serves no purpose (*see* 97 F.4th at 125, *quoted in* DNC-PDP Br.3). The Third Circuit considers a portion of a published opinion to be dicta only when it 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 essential components of the court’s decision). *See* 97 F.4th at 125. It was not remotely “peripheral.”

III. THE REPUBLICANS' EFFORTS TO NARROW THE FREE AND EQUAL ELECTIONS CLAUSE AND EVADE STRICT SCRUTINY LACK MERIT

A. The Republicans Are Wrong That Disqualifying Ballots For Technicalities Falls Outside The Free And Equal Elections Clause's Protection

As the DNC-PDP brief explained (pp.4-7), the Free and Equal Elections Clause guarantees all Pennsylvanians the fundamental right to vote and to have their votes counted. Seeking to avoid the conclusion that this constitutional protection precludes enforcement of the date requirement, the Republicans offer various arguments regarding the scope of the Clause and its application to the date requirement. None has merit.

1. The Republicans assert (e.g., Br.32-33) that the Clause ensures only equal treatment. That impermissibly re-writes the provision, ignoring some (in fact most) of its text. The Clause uses the word “free” twice (compared to a single mention of equality); it provides that “[e]lections shall be free *and* equal” (not just equal), and it separately prohibits any interference to “prevent the free exercise of the right of suffrage.” Pa. Const. art. I, §5 (emphasis added). Under the Republicans’ reading, the entire second part of the Clause is meaningless, and the Clause in effect has four words (“[e]lections shall be equal”) instead of the actual 27. Not surprisingly, the Republicans cite no case in which a court endorsed that wholly atextual reading. This Court should not be the first.

Pennsylvania Supreme Court precedent honors the Clause’s plain text, making clear that the Clause guarantees both free elections and equal ones. For example, in *Shankey v. Staisey*, 257 A.2d 897 (Pa. 1969), the court explained that in that case (which challenged limitations on certifying votes for write-in as opposed to listed candidates), there was “no question as to ‘freedom’” because “each voter can vote for whomever he chooses,” *id.* at 899. Rather, the court said, the “complaint [wa]s as to ‘equality.’” *Id.* Saying this would have made no sense if the Clause did not protect voters’ “freedom” to vote in addition to protecting against unequal treatment under the election laws.

Reprising much the same argument, the Republicans suggest (Br.32-34) that the Clause has only “three functions”: prohibiting (1) “arbitrary voter-qualification rules,” (2) “intentional discrimination against voters,” and (3) “regulations that make it so difficult to vote as to amount to a denial of ‘the franchise’” (quotation marks omitted). But again, the Republicans’ argument cannot be reconciled with Pennsylvania Supreme Court precedent. Indeed, in a case the Republicans cite repeatedly in making this argument, the court noted several “functions” of the Clause beyond the three the Republicans identify—including, as noted at the outset, ensuring that “every voter under the law has the right to cast [a] ballot and have it honestly counted,” *LWV*, 178 A.3d at 810.

LWW, in fact, reaffirmed that the court (contrary to the Republicans' narrow reading) "has ascribed [an] ... expansive meaning to the terms 'free and equal' in Article I, Section 5." 178 A.3d at 809. As relevant here, the Clause "strike[s] ... at *all regulations* of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise." *Id.* (emphasis added). *LWW* also rejected the argument the Republicans make here (Br.31-32) that the Clause protects only against threats to the franchise that the court had "heretofore" declared unconstitutional. *Id.* at 821.

Nor is *LWW*'s broad reading of the Clause an outlier. To the contrary, the Pennsylvania Supreme Court has repeatedly held "that, in enforcing the Free and Equal Elections Clause," the judiciary "'possesses broad authority to craft meaningful remedies when required.'" *Pennsylvania Democratic Party*, 238 A.3d at 371 (quoting *LWW*, 178 A.3d at 822). And using that authority, the court (albeit sometimes invoking "the right to vote" that the Clause protects rather than naming the Clause itself) has enjoined election administrators from "throw[ing] out ... ballot[s] for minor irregularities" except "for very compelling reasons." *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972); accord, e.g., *In re General Election November 6, 1971*, 296 A.2d 782, 784-785 (Pa. 1972); *Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955); *In re Petitions to Open Ballot Boxes*, 188

A.2d 254, 256 (Pa. 1963); *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945). These cases are inconsistent with the Republicans' narrow reading of the Clause.

2. The Republicans contend (Br.41) that finding a violation of the Clause here “would be inconsistent with Pennsylvania’s separation of powers.” But that argument rests on the premise (Br.42) that finding a violation “would subject all of Pennsylvania’s election laws to searching judicial scrutiny.” That premise is wrong; as the DNC-PDP explained (Br.18), binding precedent holds that “enforcement of a regulation that ... *results in the disqualification of ballots* triggers strict scrutiny” (emphasis added). That holding in no way violates the separation of powers. A proper (in fact core) function of the judiciary is “to determine whether the Constitution ... require[s] or prohibit[s] the performance of certain acts.” *Robinson Township v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013). “[O]rdinarily,” moreover, “the exercise of the judiciary’s power to review the constitutionality of legislative action does not offend the principle of separation of powers.” *Id.* at 927-928.

3. Finally, the Republicans assert (Br.42) that many of the cases the DNC-PDP rely on should be ignored because they “are statutory construction cases” rather than constitutional-interpretation cases, and so supposedly “stand only for the proposition that certain ambiguities in the Election Code have been construed in favor of voters.” This Court’s precedent refutes that claim. For example, this Court

has described one of the cases the Republicans try to brush aside—*In re Luzerne County*—as being not just about statutory interpretation but about the principle that, in Pennsylvania, “[t]he goal of the courts is to protect the right to vote, not to disenfranchise voters.” *League of Women Voters of Pennsylvania v. Boockvar*, 2021 WL 62268, at *11-12 (Pa. Commw. Ct. 2021) (Ceisler, J.), *aff’d*, 265 A.3d 207 (Pa. 2021). That principle rests on the Clause, which the Pennsylvania Supreme Court has, as noted, repeatedly explained protects each voter’s “right to cast his ballot.” *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523).

In any event, even if the Republicans were right that the cases they cite “stand only for the proposition that certain ambiguities in the Election Code have been construed in favor of voters” (Br.42), that proposition undermines their position. Ambiguities are resolved in favor of voters *because of* Pennsylvania’s protection of the right to vote—which as just explained is enshrined in the Free and Equal Elections Clause. So cases applying that canon are constitutionally grounded.

In short, the Free and Equal Elections Clause and Pennsylvania case law demonstrate that the Clause should be broadly construed to enfranchise, rather than to disenfranchise.

B. The Republicans’ Arguments Against Applying Strict Scrutiny Are Meritless

As noted, under Pennsylvania Supreme Court precedent, the disqualification of ballots cast by qualified voters triggers strict scrutiny because it severely restricts

the fundamental right to vote, whereas other election regulations may incur lesser judicial scrutiny. *See, e.g., Banfield v. Cortes*, 110 A.3d 155, 176 & n.15 (Pa. 2015) (noting that “the right to vote is fundamental” 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 (quotation marks omitted)). The Republicans do not dispute that enforcing the date requirement to disqualify otherwise-valid ballots would fail strict scrutiny (because the requirement is not narrowly tailored to serve a compelling, indeed any, state interest). Instead, they offer various arguments (Br.40-43) about why strict scrutiny does not apply here. None has merit.

1. The Republicans note (Br.34) that over a century ago in *Winston*, the Pennsylvania Supreme Court stated that “nothing short of gross abuse would justify striking down an election law,” 91 A. at 523. But the 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. *Id.* at 522-523. And the court explained there that the challenged provisions “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 are 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,” *Winston*, 91 A. at 523, strict scrutiny applies.

2. The Republicans observe (Br.41) that in two other election cases—*Pennsylvania Democratic Party* and *Petition of Berg*, 712 A.2d 340 (Pa. Commw. Ct. 1998), *aff’d*, 713 A.2d 1106 (Pa. 1998) (per curiam)—the court declined to apply strict scrutiny. But strict scrutiny was not triggered in *Berg* because this Court concluded that “no fundamental rights are affected” by the challenged requirement, 712 A.2d at 343—a conclusion with which the Pennsylvania Supreme Court agreed on appeal, 713 A.2d at 1108-1109. *Berg* is consistent with the Pennsylvania Supreme Court’s practice of applying less searching review where a challenged election regulation “do[es] not severely restrict the right to vote.” But where a “statute significantly interferes with the exercise of [the] fundamental right” to vote, *Pennsylvania Democratic Party*, 238 A.3d at 369-370—including by disqualifying ballots cast by qualified electors—it “will be upheld only if ... necessary to promote a compelling state interest and [] narrowly tailored to effectuate” that interest, *Banfield*, 110 A.3d at 176 n.15; *see also* DNC-PDP Br.17-18. The Republicans never dispute that the requirement fails strict scrutiny.

As for *Pennsylvania Democratic Party*, the appropriate level of scrutiny for challenges under the Free and Equal Elections Clause was not before the court there, because the challenging party “ha[d] not asserted that the Pennsylvania Constitution

offers greater protection under the circumstances presented” than the U.S. Constitution. 238 A.3d at 386 n.35. The court thus “treat[ed]” the constitutions “as co-extensive” “for purposes of” that case. *Id.*

The Republicans, however, repeatedly cite (e.g., Br.1) *Pennsylvania Democratic Party*’s statement that “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature,” 238 A.3d at 374. To the extent the Republicans are suggesting this language means election laws can never violate the Clause, that reading is obviously wrong, as shown by the cases cited herein and in the DNC-PDP opening brief. The court was simply explaining that the Clause leaves the legislature some leeway to enact election laws. Indeed, in making the statement the Republicans invoke, the court cited *Winston*. As discussed, *see supra* pp.18-19, *Winston* explained that such deference to the legislature is appropriate when a law “denies no qualified elector the right to vote,” and imposes “dut[ies] ... upon the candidate and not upon the elector,” i.e., where “[t]he rights of the voter are only incidentally involved,” 91 A. at 523. That is not the situation here. As explained throughout the DNC-PDP briefs,

enforcement of the date requirement *does* deny “qualified elector[s] the right to vote, such that the rights of the voter are *not* “only incidentally involved,” *id.*⁴

3. The Republicans 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.” RNC Br.37; Amici Br.7-8, 13. That framing is inconsistent with decades of Pennsylvania Supreme Court 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, the 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 the Republicans 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

⁴ *Pennsylvania Democratic Party*, moreover, involved a request for a ruling that the Clause itself required notice-and-cure procedures, i.e., the court was interpreting the scope of the Clause’s affirmative protections for the right to vote. Here, by contrast, the question is whether an extant enactment of the General Assembly transgresses the negative protections (i.e., protections against infringement) that the Clause provides. Those two situations are different in kind.

respondents to disenfranchise thousands of qualified voters each election solely for failing to comply with the purposeless date requirement.⁵

C. Decisions From Other Jurisdictions Do Not Limit The Clause's Scope

1. *Federal Cases.* The Republicans argue at length (Br.45-53) that federal law refutes petitioners' request for relief under the Free and Equal Elections Clause, because the date requirement supposedly does not unduly burden federal constitutional rights. That argument fails. The Pennsylvania Supreme Court has repeatedly held that the Clause provides greater protection for the right to vote than the U.S. Constitution. Any limits on federal protection of voting rights therefore do nothing to foreclose relief under the Pennsylvania Constitution.

To begin with, the Free and Equal Elections Clause provides an affirmative constitutional guarantee of the right to vote that "has no federal counterpart." *LWV*, 178 A.3d at 802. The Clause "is contained within the Pennsylvania Constitution's 'Declaration of Rights,' which ... is an enumeration of the fundamental individual

⁵ Citing nothing, amici argue (Br.14) that compliance with the date requirement is "a choice" that is "entirely within a voter's personal control" (capitalization altered). That argument is hard to take seriously. Voters who misdated or do not date their outer envelopes are not choosing to do so. They are making a *mistake*. If amici's argument were right, states could require that every mail ballot sent out be accompanied by a 500-question test on multiplication, and that the ballot not be counted unless the voter returned the test with the ballot and answered all 500 questions correctly. It would certainly be "within a voter's personal control" to do so. But such a requirement would be utterly preposterous, because it would not serve any legitimate state interest. The same is true of the date requirement.

human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of the Commonwealth government to diminish.” *Id.* at 803. By contrast, the U.S. Constitution “furnishes no explicit protections for an individual’s electoral rights, nor sets any minimum standards for a state’s conduct of the electoral process;” it “instead defines the right through a negative gloss, detailing the various reasons states cannot limit the franchise” where it has been granted. *Id.* at 804. Given these differences, given the “centuries-old and unique history” “influenc[ing]” the “evolution” of the Free and Equal Elections Clause, and given that that the Pennsylvania Constitution is the “ancestor, not the offspring, of the federal Constitution,” the Pennsylvania Supreme Court has “reject[ed]” the suggestion “to utilize the same standard to adjudicate a claim of violation of the Free and Equal Elections Clause and . . . federal” constitutional claims. *Id.* at 741, 804, 813. Indeed, the court has “reaffirm[ed]” that claims under the Clause are “subject to entirely separate jurisprudential standards” from voting-related claims under the U.S. Constitution, and “expressly disavow[ed]” attempts to equate the two. *Id.* at 813.

More specifically, the Pennsylvania Supreme Court has not adopted federal law’s “*Anderson-Burdick* test,” under which courts assess alleged undue burdens on the federal right to vote, as the standard for assessing a claim under the Free and Equal Elections Clause. Rather, when the court in *Banfield* explained the varying

levels of scrutiny that apply under the Clause (depending on the nature of a particular burden on the franchise), it provided a “*cf.*” cite to *Burdick*. 110 A.3d at 177. The use of *cf.* indicates that the “[c]ited authority supports a proposition *different from* the main proposition.” The Bluebook R.1.2 (21st ed. 2020).

Regardless, the date requirement would fail even under *Anderson-Burdick*. Under that standard, strict scrutiny applies where state laws “impose[] a ‘severe’ burden” on the right to vote. *Mazo v. New Jersey Secretary of State*, 54 F.4th 124, 145 (3d Cir. 2022). That is the situation here. In fact, the date requirement imposes one of the most severe of all burdens—disenfranchisement—on those who do not comply with it. (The Republicans’ effort to reframe the burden as being just the burden of having to write a date fails. *See supra* pp.21-22.) As noted, the Republicans never dispute that the date requirement cannot satisfy strict scrutiny. But even if any lesser scrutiny applied under *Anderson-Burdick*—or otherwise—the date requirement could not survive that either because it serves no purpose whatsoever. DNC-PDP Br.8-17, 20.

In sum, federal case law does nothing to support the Republicans’ arguments here.

2. *Other States’ Cases.* The Republicans contend (Br.43-45) that other states have narrowly interpreted provisions in their state constitutions that are similar to the Free and Equal Elections Clause. That is likewise unavailing because the

Republicans cite no Pennsylvania case relying on such out-of-state precedent to interpret the Commonwealth's Clause narrowly. The absence of any such citation is not surprising given the Pennsylvania constitution's long history of robustly protecting the franchise. *See* DNC-PDP Br.5-7.

D. The Date Requirement Cannot Satisfy Even Rational-Basis Review

Finally, the Republicans assert (Br.49) that rational-basis review applies and that the date requirement satisfies such review. Setting aside that strict scrutiny applies here, the date requirement would not satisfy rational-basis review. The three rationales the Republicans posit—timeliness, solemnity, and voter fraud—have been addressed above. As noted, moreover, a federal court has already concluded after extensive discovery that the date requirement serves no purpose, and that ruling is binding here. It does not satisfy rational-basis review to disqualify ballots for no reason.

* * *

The Republicans' myriad efforts to cabin the scope of the Free and Equal Elections Clause so as to exclude from its scope restrictions that—*for no reason*—deny qualified voters the right to exercise the franchise at all have no basis in, and in most instances directly conflict with, Pennsylvania Supreme Court precedent (and well as fundamental first principles). Those efforts should be rejected.

IV. ENJOINING RESPONDENTS FROM DISQUALIFYING BALLOTS IS AVAILABLE AND APPROPRIATE RELIEF

A. Enjoining Respondents Does Not Require Striking Down Pennsylvania’s Mail-Ballot Statute

The Republicans assert (Br.56) that the relief requested in this case 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. That assertion is incorrect. The requested relief—enjoining respondents from disqualifying 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.

This Court explained as much in *Bonner v. Chapman*, 298 A.3d 153 (Pa. Commw. Ct. 2023). There, 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.” 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.

Precisely the same is true here. The relief requested is a judgment (1) *interpreting* the Free and Fair Elections Clause as prohibiting disqualification of otherwise-valid absentee and mail ballots received in undated or misdated ballot-return envelopes, and (2) *enjoining* respondents from enforcing 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. Thus, as in *Bonner*, the relief requested would not trigger Act 77’s non-severability provision.

But even if the Court *were* to invalidate the date requirement, the Republicans would still be wrong in arguing (Br.55-58) that the Court would then have to eliminate *all* mail voting. Pennsylvania law neither requires nor permits that absurd result. As the Pennsylvania Supreme 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). In particular, Pennsylvania courts have expressed wariness of “boilerplate nonseverability provision[s]” that “set[] forth no standard for measuring nonseverability, 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 nonseverability clause). Act 77 has just such a non-severability clause. *See Pennsylvania Democratic Party*, 238 A.3d at 398 n.4 (Donohue, J., concurring) (analogizing that clause to the one clause 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 Pennsylvania Democratic Party*, 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 Free and Equal Elections Clause.

Because Act 77's non-severability clause could not be enforced here, the longstanding general presumption of severability (*see* 1 Pa. C.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 Pa. C.S. §1925. And the only legislative history the Republicans can muster (Br.56) 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* Secretary Br.4. 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.

B. Enjoining Respondents Would Not Usurp The General Assembly's Role

The Republicans briefly assert (Br.54-55) that enforcing the Free and Fair 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 the Republicans' 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 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 (1875)). *Moore* thus confirms that it is the prerogative of Pennsylvania courts to construe the scope of Pennsylvania's Free and Fair 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 the Free and Fair Elections Clause context, 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* pp.21-22. There would be nothing extraordinary about this Court recognizing that the Pennsylvania Constitution’s protection of free elections—which, as noted, is a fundamental protection that goes beyond what the U.S. Constitution provides—precludes respondents from disqualifying ballots under a provision that serves *no* state interest. Much less would such a ruling constitute the courts “evad[ing] federal law,” *Moore*, 600 U.S. at 34.

V. THE REPUBLICAN INTERVENORS’ PROCEDURAL OBJECTIONS ARE UNAVAILING

The Republicans offer various procedural objections to petitioners’ claims and requested relief—although the objections are really all a single argument. That argument is that the only proper way to seek the relief sought here was to sue not the Secretary of the Commonwealth but the county boards of elections, and that because petitioners sued the Secretary, this Court lacks jurisdiction. That argument (in all the various forms presented) misapprehends the Secretary of the Commonwealth’s responsibilities with respect to the date requirement, turns on principles of federal

standing law that do not apply under Pennsylvania law, and ignores that substantial relief may be granted among the existing parties. The argument should be rejected.

A. Petitioners Have Standing To Bring Their Claims Against The Secretary

The Republicans' sole objection to petitioners' standing is that petitioners cannot show harm from the Secretary's actions because the Secretary has no role in whether county boards count undated or misdated ballots. That objection fails for multiple reasons.

First, it does not even matter whether petitioners have standing, because the DNC and PDP each do, and the Pennsylvania Supreme Court has repeatedly held that when "one party has standing, the Court need not consider whether another party also has standing," *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005) (citing *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 563 n.8 (Pa. 2003)). The Republicans do not object to either the DNC's or PDP's standing. Rightly so, as *Ball* held that political-party organizations (the Republicans, in fact) had standing to challenge the Secretary's guidance regarding whether undated or misdated ballots should be counted, precisely because the guidance had a causal connection to the parties' ability to

educate candidates, electors, and voting officials. 289 A.3d at 19-20. This Court need go no further to reject the Republicans’ standing objection.⁶

Second, the Republicans’ contention that relief against the Secretary would not “redress” (Br.11) petitioners’ injury confuses Pennsylvania and federal standing principles and in any event is incorrect. “Redressability” is a federal standing concept. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But the Pennsylvania Supreme Court has explained that “in our Commonwealth, standing is granted more liberally than in federal courts. Most critically, the federal standing analysis does not control our resolution of the standing issue because we are not bound by the dictates of Article III of the United States Constitution.” *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 309 A.3d 808, 832 (Pa. 2024) (quotation marks omitted). Standing in Pennsylvania turns instead on whether the plaintiff has been “aggrieved” by the challenged conduct. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975). That standard is met when the plaintiff’s “interest in the outcome of a given suit” is “substantial, direct, and immediate.” *Ball*, 289 A.3d at 19. And the Pennsylvania Supreme Court has already held (1) that a plaintiff’s “expenditure of

⁶ The Republicans’ assertion (Br.13-14) that the remedial order in *Ball* “implicitly recognized” the Secretary’s limited role does not affect the standing analysis, as the remedial order followed the threshold determination that the Republicans had standing to sue the Secretary in the first place.

resources to educate candidates, electors, and voting officials concerning adherence to the Election Code constitutes a substantial interest” in a case challenging the Secretary’s guidance; (2) that “the Secretary’s [election] guidance regarding an unsettled legal question” causes harm to those interests; and (3) “that the connection is neither remote or speculative.” *Id.* at 19-20. Under that standard, petitioners, who have expended resources educating voters about the date requirement, Pet. ¶¶10-36, unquestionably have standing here.

The Republicans’ cited cases cited do not hold otherwise. The language they quote (Br.11) from *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467 (Pa. 2021), is drawn from the “Factual and Procedural History” portion of the opinion, which simply recited the rulings below, not the “Analysis” portion—where the court made no mention of redressability. Their reliance on Justice Wecht’s concurring opinion in that case fares no better (and not just because it is a concurring opinion). Justice Wecht applied the traditional test that “[s]tanding depends upon whether the party is aggrieved,” *id.* at 491, and added that the Declaratory Judgments Act “is to be liberally construed and administered,” *id.* at 492. Finally, *Chadwick v. Caulfield*, 834 A.2d 562 (Pa. Super. Ct. 2023), did not adopt a redressability standard either. It mentioned redressability only in recounting a federal court’s standing analysis—under federal law, of course—in a different case. *Id.* at 570.

In any event, an order from this Court declaring the date requirement unconstitutional and enjoining its enforcement *would* redress petitioners’ injuries, by precluding enforcement of a statutory provision that disenfranchises voters and serves no purpose. That is precisely what the petition seeks. Pet. ¶92.

B. This Court Has Original Subject-Matter Jurisdiction

The Republicans’ challenge to this Court’s subject-matter jurisdiction (which, as noted, is just a rephrasing of their standing argument) is likewise infirm. This Court has original jurisdiction over civil actions “[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity.” 42 Pa. C.S. §761(a)(1); *see also id.* §102 (including the Secretary within the definition of the “Commonwealth government”). Since the enactment of Act 77 in 2019, the Secretary has responded to multiple challenges to the statute—including cases originating in this Court—and the courts have not taken issue with the Secretary’s joinder in any of them. *See McLinko*, 279 A.3d at 543-582; *Ball*, 289 A.3d at 7-28; *Pennsylvania Democratic Party*, 238 A.3d at 352-386; *Bonner v. Chapman*, 298 A.3d 153, 158 (Pa. Commw. Ct. 2023). Put simply, the Secretary has always been a proper party in challenges to Act 77’s constitutionality.

The Republicans nonetheless argue (Br.17-18) that this Court lacks jurisdiction because the Secretary is supposedly not indispensable to this action. That is so, they say, because petitioners supposedly challenge only “non-binding

guidance” issued by the Secretary “that has no effect on whether county boards of election enforce the date requirement.” *Id.* That misstates the Secretary’s role regarding the date requirement and misconceives the law regarding indispensability. “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Stedman v. Lancaster County Board of Commissioners*, 221 A.3d 747, 757 (Pa. Commw. Ct. 2019) (quoting *Rachel Carson Trails Conservancy, Inc. v. Department of Conservancy & Natural Resources*, 201 A.3d 273, 279 (Pa. Commw. Ct. 2018)). The Secretary, whose actions petitioners directly challenge, e.g., Pet. ¶¶37-43, easily meets this standard.

Indeed, the Secretary plays a critical role in enforcing, implementing, and administering the date requirement. For example, the Secretary designs the ballots and declaration envelopes for Pennsylvania’s absentee and mail ballots. *See* 25 P.S. §§3146.3(b), 3146.4 (absentee ballots); *id.* §§3150.13(b), 3150.14 (mail ballots). The Secretary also provides uniform instructions for voters on how to complete and submit their ballots. *See id.* §3146.4 (absentee ballots); *id.* §3150.14(c) (mail ballots). And the Secretary must educate the public on voting through “voluntary professional certification and poll worker training program[s] for county election officials in consultation with county boards of elections,” *id.* §2621(f.1), which necessarily includes instructing voters about the date requirement.

The Department of State, moreover, is responsible for developing and administering the SURE system. 25 P.S. §1222(a), (f). One way the Secretary administers that system is by providing codes for county boards of elections to input in order to identify how a ballot has been treated. *See Pennsylvania Department of State, Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, Version 4.0* at 3 (Apr. 3, 2023).

If more were needed, after county boards complete their canvassing, they submit their final and accurate returns to the Secretary. 25 P.S. §§3154(f), 3158. The Secretary must then complete an independent tabulation, computation and canvass of the votes cast for all federal and state offices. *See id.* §§2621(f), 3159. That means the Secretary is responsible for enforcing the date requirement, because under *Ball*, undated or misdated ballots cannot be tabulated, computed, or canvassed. 289 A.3d at 28.

The Secretary's pervasive responsibilities here stand in sharp contrast to the limited responsibilities the Secretary of Education had in *Pennsylvania School Boards Association v. Commonwealth Association of School Administrators*, 696 A.2d 859 (Pa. Commw. Ct. 1997), where this Court determined the Secretary of Education was not indispensable because that official "has no power to enforce, implement, or administer" the challenged legislation, *id.* at 867.

This case is also unlike Republicans’ unreported authority (Br.17-18), *Republican National Committee v. Chapman*, No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) (unreported memorandum opinion) (“RNC”). RNC was a challenge to several different policies—each adopted by a different board of elections—regarding notice-and-cure procedures. *Id.* at 7-10 (slip op.). Judge Ceisler concluded that, because the notice-and-cure policies were adopted and implemented solely by the boards of elections, the Secretary was not an indispensable party. *Id.* at 21. Here, by contrast, the date requirement has been adopted by the General Assembly rather than any board, the boards have no discretion regarding enforcement of the requirement, and the Secretary does have a significant role.

Additionally, the fact that petitioners’ challenge is partly to the Secretary’s guidance does not change the analysis. Even if non-binding, the guidance gives boards of elections an expert interpretation of binding law, from the individual “charged with the general supervision and administration of Pennsylvania’s election laws,” *National Election Defense Coalition v. Boockvar*, 266 A.3d 76, 79 (Pa. 2021). The Republicans’ unsupported assertion (Br.18) that the Secretary’s guidance “has no effect on whether county boards of elections enforce the date requirement” is not only illogical, but also was rejected in *Ball*, see 289 A.3d at 19-20. Indeed, in *Ball* the Republicans themselves asked that the Secretary’s guidance be “declar[ed] ... unlawful” because they expected that “county boards may choose to follow the ...

guidance.” Republican Petitioners’ Br., *Ball*, 2022 WL 18540588, at *9, *14 (Oct. 24, 2022). Their unexplained (indeed, unacknowledged) change of position here does not remotely support a finding that jurisdiction is lacking here.

In sum, this Court has subject-matter jurisdiction because the Secretary plays a central role in the administration, implementation, and enforcement of the dating requirement, and because petitioners directly challenge his own actions. Pet. ¶¶71-73, 92. Accordingly, the Secretary’s “rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *Stedman*, 221 A.3d at 757.

Finally, because this Court has subject-matter jurisdiction over claims against the Secretary, it also has jurisdiction over claims against the Philadelphia and Allegheny County Boards of Elections. *See* 42 Pa. C.S. §761(c). And even if the Court lacked subject-matter jurisdiction as to any claims in this case, the proper remedy would be to transfer those claims, not dismiss them. *See Pennsylvania School Boards*, 696 A.2d at 868 n.10.

C. The Other 65 Boards Of Elections Are Not Indispensable Parties

In yet another reprisal of their single procedural argument, the Republicans contend (Br.21-24) that the other 65 county boards of elections are indispensable parties. That too is wrong.

The Declaratory Judgments Act’s joinder provision, 42 Pa. C.S. §7540(a), “is subject to limiting principles,” *City of Philadelphia*, 838 A.2d at 582. In particular, although a constitutional challenge to a legislative enactment may affect “many classes of citizens, institutions, organizations, and corporations,” the Pennsylvania Supreme Court has recognized that the “joinder of all such parties would undermine the litigation process” and “would be impractical.” *Id.* at 582-583. Accordingly, joining all parties with incidental interests is not necessary where “substantial justice can be done” in their absence. *Id.* at 585.

Here, the other 65 boards of elections have nothing more than an incidental interest in the date requirement. Unlike *RNC*, this case does not present an issue regarding the adoption of discretionary policies by boards of elections. The boards do not have authority to decide whether to follow or ignore the Pennsylvania Constitution. Their “authority to ‘make and issue’ rules governing the conduct of elections extends only to the promulgation of rules that are ‘not inconsistent with law.’” *PG Publishing Co. v. Aichele*, 902 F.Supp.2d 724, 761 (W.D. Pa. 2012), *aff’d*, 705 F.3d 91 (3d Cir. 2013). The role of the boards regarding the date requirement is simply to follow and apply the law “as required by the Constitution.” *William Penn School District v. Pennsylvania Department of Education*, 294 A.3d 537, 871 (Pa. 2023). That role does not make them indispensable parties. *Id.*

Substantial justice can be done here in the other county boards' absence. The petition presents a facial challenge to the constitutionality of the date requirement; a ruling on that question will conclusively resolve whether the requirement is enforceable within the Commonwealth—and if this Court (or the Pennsylvania Supreme Court) ultimately declares the requirement unconstitutional, the county boards can be expected to follow that ruling, as they would any other, regardless of whether they were parties to the litigation.⁷

Finally, it bears mention that the regime the Republicans urge would engender enormous waste, delay, and uncertainty. Under their view, a party could not facially challenge an election statute that applies equally across the Commonwealth and that every county board must follow, by suing a single state-level executive official in this Court, so as to allow for a prompt statewide resolution of a pure question of law. Instead, the Republicans would require such a party to bring 67 different lawsuits—each involving the exact same question of law—in 67 different courts of common pleas, likely producing conflicting rulings that could result in varying treatment of ballots across counties for one or more elections, until a case eventually (after who knows how long) made its way to this Court and then likely the Pennsylvania

⁷ The Republicans also argue (Br.23) that if petitioners had sought injunctive relief against the Allegheny and Philadelphia County Boards of Elections, the remaining 65 boards “still” would be indispensable parties. But petitioners did not seek such relief, so the argument is irrelevant.

Supreme Court so that uniformity could be restored. There is no sound reason for such a regime, and this Court should not require it.

CONCLUSION

Petitioners' requested summary relief should be granted and respondents enjoined from enforcing the date requirements in any way that would disqualify mail or absentee ballots solely because they were submitted in an undated or misdated ballot-return envelope.

July 8, 2024

Seth P. Waxman
(admitted *pro hac vice*)
**WILMER CUTLER PICKERING
HALE AND DORR LLP**
2100 Pennsylvania Ave. N.W.
Washington, D.C. 20037
(202) 663-6000
seth.waxman@wilmerhale.com

Respectfully submitted,

/s/ Clifford B. Levine
Clifford B. Levine
Pa. Id. No. 33507
Alice B. Mitinger
Pa. Id. No. 56781
David F. Russey
Pa. Id. No. 84184
**DENTONS COHEN & GRIGSBY
P.C.**
625 Liberty Ave.
Pittsburgh, PA 15222
(412) 297-4998
clifford.levine@dentons.com

CERTIFICATE OF COMPLIANCE

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

/s/ Clifford B. Levine
CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served on all counsel of record on July 8, 2024 by this Court's electronic filing system.

/s/ Clifford B. Levine
CLIFFORD B. LEVINE