Designated Appellant County Board thereafter appealed the trial court's September 26, 2024 order on the merits of the Petition and its September 28, 2024 final order to this Court on October 1, 2024, and Designated Appellants RNC and RPP filed their cross-appeal of the same orders on October 3, 2024.[16]

By separate orders entered on October 3, 2024, the trial court directed Designated Appellants to file concise statements of the errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) within 21 days of the order. O.R., Items 20 & 21. This Court, by Order of October 3, 2024, *sua sponte* consolidated the cross-appeals and directed the filing of Statements of Issues to be Presented on Appeal by October 8, 2024, transmission of the record to this Court by October 10, 2024, and the filing of simultaneous briefs on the merits of the appeals no later than October 15, 2024. The Court also indicated the appeals would be submitted on briefs without oral argument unless otherwise ordered. By Order of October 8, 2024, this Court granted Designated Appellees' partially contested Application for Expedited

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Although the parties appealed the trial court's September 28, 2024 final order granting RNC and RPP's Intervention Petition, they raise no issues as to RNC and RPP's intervention on appeal. We therefore do not address their intervention further for purposes of these appeals and will affirm the trial court's final order in that regard.

[16] In their Notice of Appeal, RNC and RPP assert various reasons why the Supreme Court's August 27, 2024 Order is inapplicable to this matter. First, they assert that this case involves the September 17, 2024 Special Election in Philadelphia, not the November 5, 2024 General Election. They also claim the underlying Petition sought a declaration that the County Board's decision was unlawful under the Pennsylvania Constitution, not the Election Code; therefore, they concluded a 30-day appeal period for a declaratory judgment matter was appropriate. Finally, RNC and RPP point out that the trial court did not append a copy of the Supreme Court's Order to either its September 26 or September 28 orders. *See* O.R., Item 19.

This Court agrees with RNC and RPP that the Supreme Court's August 27, 2024 Order does not apply to this matter, **which relates to a Special Election that has already occurred, and not the 2024 General Election**. However, given that time is of the essence in any actions that may be required following issuance of this opinion, such as amending the Special Election vote count pursuant to the parties' Consent Order, the Court urges the parties to proceed expeditiously should they wish to appeal this decision.

However, as the parties point out in their briefs, our Supreme Court vacated our *BPEP II* order in *BPEP III*,[27, 28] relied solely on jurisdictional grounds in doing so,

[27] On September 13, 2024, the Supreme Court vacated our *BPEP II* order on jurisdictional grounds in *BPEP III*, concluding that we lacked subject matter jurisdiction to consider the matter in the absence of all 67 county boards being named as parties, and because the Secretary's joinder was not sufficient to invoke our original jurisdiction. *BPEP III*, 322 A.3d at 222 (further denying the request for extraordinary jurisdiction). Justice Wecht filed a dissenting statement, in which Chief Justice Todd and Justice Donohue joined, offering his view that "[a] prompt and definitive ruling on the constitutional question presented in th[e] appeal is of paramount public importance inasmuch as it will affect the counting of ballots in the upcoming general election." *BPEP III*, 322 A.3d at 222-23 (Wecht, J., dissenting). Justice Wecht also expressed that he would have exercised the Court's King Bench authority over the dispute and ordered that the matter be submitted on briefs. *Id.* at 223. Thus, at least three Supreme Court Justices appeared to agree with this Court, at least as to the public import of the same constitutional question involved in the instant appeals.

Six days later, on September 19, 2024, the Supreme Court granted the intervenor/appellants' Emergency Application for Enforcement and/or Clarification and clarified its September 13 Order in *BPEP III*, explaining that the Secretary was not an indispensable party, and that the other named county boards did not vest this Court with original jurisdiction. *BPEP IV*, slip op. at 1-2. The Court further clarified it vacated our order for an additional independent jurisdictional reason, i.e., the failure of the petition for review to join all indispensable parties—the other 65 county boards of elections. *BPEP IV*, slip op. at 2. Because this jurisdictional defect could not be remedied, the Court directed that we dismiss the matter upon remand, which we did by Order of September 20, 2024. *Id.*, slip op. at 2-3.

[28] As noted above, in *New PA Project*, the Supreme Court rejected a third attempt to have the constitutional issue heard under its King's Bench authority before the 2024 General Election. In its Order denying the petitioners' requested relief, the Supreme Court stated that it "will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New PA Project*, slip op. at 3. The Court's order also cited *Purcell*, which we have already determined is not a bar to our consideration of the constitutional issue in the context of these appeals involving the Special Election. *Id.*, slip op. at 3, nn. 1-2.

Justice Brobson filed a concurring statement, in which Justice Mundy joined, opining that laches also warranted denial of the application, in that the petitioners waited over a year after *Ball* was issued and after multiple elections had been held to challenge the dating provisions, as interpreted to be mandatory in *Ball*, under the free and equal elections clause. *New PA Project*, slip op. at 3-4 (Brobson, J., concurring). He further observed that the Court's disposition of the application in *New PA Project* "should discourage all who look to the courts of the Commonwealth to change the rules in the middle of an ongoing election." *New PA Project*, slip op. at 5 (Brobson, J., concurring). He expressed a similar sentiment in another election case decided the same day, *Republican National Committee v. Schmidt* (Pa., 108 MM 2024, order filed Oct. 5, 2024) (*RNC*)

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and did not consider the merits or disapprove of our reasoning on the merits of the constitutional claim. We do not believe the Supreme Court's order precludes our analysis of that issue now in these appeals relating to the Special Election. The record reveals that our reasoning in *BPEP II* was central to the trial court's reasoning in reversing the County Board's decision not to count the 69 mail ballots at issue, and we see no reason to depart from that reasoning here. *See* N.T. at 3-22; *see also* 10/10/2024 Trial Court "1925a Order" at 1-2.

The trial court found that the legal landscape that exists after *BPEP II* and *III* is uncertain, and the parties agree this essentially puts us back to square one on the merits of this important constitutional question that has arisen during our primary, general, and now **special** elections in this Commonwealth since 2020, when Act 77 went into effect. The question is one of first impression, and the parties have not identified any cases in which any court has considered this issue aside from *BPEP II*. We are left to interpret the law in this area as it existed before we issued our decision in *BPEP II*, beginning with the plain text of the dating provisions.

The dating provisions provide that absentee and mail-in electors "shall . . . fill out, **date** and sign the declaration printed on" the second, or outer, envelope "on

(per curiam), observing that deciding an issue regarding notice and cure issues "would . . . be highly disruptive to county election administration" given that the 2024 General Election is already underway. *RNC*, slip op. at 2 (Brobson, J., concurring).

Chief Justice Todd filed a dissenting statement in *New PA Project*, setting forth her opinion that the Court should exercise its King's Bench power and decide the issue of "grave importance" now, citing the possibility of disenfranchisement and potential post-election challenges related to the same. In Chief Justice Todd's view, both *Ball* and *BPEP II* and *III* "amply demonstrate continued uncertainty in this area of the law." *New PA Project*, slip op. at 3-4, n.2, 5 (Todd, C.J., dissenting). Justice Donohue issued a statement in support of denial, noting her view that the Court is not "standing on firm terrain" in the legal landscape surrounding the constitutional issue, consideration of which she characterized as "serious business," and observing that "[t]ime will tell if there is a future challenge, in the ordinary course, in a court of common pleas." *New PA Project*, slip op. at 3-4 (Donohue, J., statement in support of denial).

which is printed the form of the declaration of the elector," among other things. *See* 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). Designated Appellants RNC and RPP argue that the Supreme Court's decisions in *In re Canvass 2020*, *Pennsylvania Democratic Party*, and *Ball* require reversal of the trial court's order. We briefly address those cases before reaching the constitutional claim.

In *In re Canvass 2020*, 241 A.3d 1058, which involved five consolidated appeals, our Supreme Court addressed, in the context of the November 2020 General Election, whether the Election Code required county boards to disqualify mail ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, address, and/or the date, where no fraud or irregularity was alleged. *See id.* at 1061-62. The Court concluded that the Election Code did not require that county boards disqualify signed but undated mail ballot declarations, **reading the dating provisions' language as directory rather than mandatory.** *Id.* at 1076-77, 1079 (**noting the Court found that such defects, "while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters" and that "[h]aving found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals**" (emphasis added)). However, a majority of the Justices in *In re Canvass 2020* ultimately agreed that the failure to comply with the dating provisions would render noncompliant ballots invalid in any election after 2020. *See Ball*, 289 A.3d at 21-22 (reaffirming *In re Canvass 2020*'s majority's holding in this regard as a matter of statutory interpretation). As such, *In re Canvass 2020* is not helpful for our purposes.

In *Pennsylvania Democratic Party*, 238 A.3d 345, which notably was issued mere weeks before a hotly contested Presidential election and amid the novel

COVID-19 pandemic, our Supreme Court did not consider **any** issue regarding the Election Code's dating provisions specifically, let alone under the free and equal elections clause. Rather, *Pennsylvania Democratic Party* involved notice and opportunity cure procedures, which are **not** at issue in these appeals. RNC and RPP's reliance on this case is thus without merit.[29]

Most recently for our purposes, in *Ball*, 289 A.3d 1,[30] a majority of our Supreme Court weighed in on the interpretation of the dating provisions, recognizing

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[29] Designated Appellants RNC and RPP rely on this case for the proposition that the Supreme Court already rejected a challenge to the broader mail ballot declaration requirements, only one part of which is the dating provisions, under the free and equal elections clause. They point to the Supreme Court's consideration of whether the Constitution's free and equal elections clause required that county boards implement notice and opportunity to cure procedures for mail ballots containing minor defects, which is just one of the discrete issues that was before the Court in that case. *See Pa. Democratic Party*, 238 A.3d at 372-74. We reject these interpretations.

[30] For background purposes, we note that in *Ball*, the Supreme Court issued a per curiam Order on November 1, 2022, granting in part and denying in part the petitioners' request for injunctive and declaratory relief and ordering Pennsylvania county boards of elections to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 General Election that were contained in undated or incorrectly dated outer envelopes; further noting the Court was evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. § 10101(a)(2)(B) (i.e., the federal Materiality Provision); further directing the county boards to segregate and preserve any ballots contained in undated or incorrectly dated outer envelopes; and dismissing the individual voter petitioners from the case for lack of standing. The Court noted that opinions would follow, and that Chief Justice Todd and Justices Donohue and Wecht would find a violation of federal law, while Justices Dougherty, Mundy, and Brobson would find no violation of federal law. *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022) (per curiam).

On November 5, 2022, the Supreme Court issued a supplemental Order, clarifying that for purposes of the November 8, 2022 General Election, "incorrectly dated outer envelopes" are as follows: (1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022 (citing Sections 1302.1-D (added by Act 77), 1305-D (added by Act 77), 1302.1 (added by the Act of August 13, 1963, P.L. 707, and amended by Act 77), and 1305 (added by the Act of March 6, 1951, P.L. 3, and amended by Act 77), 25 P.S. §§ 3150.12a, 3150.15, 3146.2a(a), 3146.5(a)). *See Ball v. Chapman* (Pa., No. 102 MM 2022, suppl. order issued Nov. 5, 2022) (per curiam). Notably, this Order was issued by the Court **unanimously**.

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that "an undeniable majority [of that Court] already ha[d] determined that the Election Code's command is unambiguous and mandatory, and that undated ballots would **not** be counted in the wake of *In re* [] *Canvass* [*2020*]." *Ball*, 289 A.3d at 21-22 (noting that "[f]our Justices [in *In re Canvass 2020*] agreed that failure to comply with the date requirement would render a ballot invalid in any election after 2020") (emphasis in original). The *Ball* Court therefore reaffirmed the *In re Canvass 2020* majority's conclusion as a matter of statutory interpretation of the Election Code. *Id.* at 22. As for incorrectly dated mail ballots, which *In re Canvass* did not address, the Court rejected other state and federal courts' interpretation[31] that any date is "sufficient," reasoning that "[i]mplicit in the Election Code's textual command . . . is the understanding that the 'date' refers to the day upon which an elector signs the declaration." *Id.* The Court determined, however, that how county boards verify the date an elector provides is the day upon which he or she completed the declaration was, "in truth," a question beyond its purview. *Id.* at 23. Further, having issued guidance for the November 8, 2022 General Election in its November 5, 2022 supplemental Order,[32] the Court observed that "county boards of elections retain authority to evaluate the ballots that they receive in future elections—including those that fall within the date ranges derived from statutes indicating when it is possible to

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On February 23, 2023, the Court issued numerous opinions explaining the Court's rationale and/or agreement or disagreement with the Court's prior orders. *See Ball*, 289 A.3d 1.

[31] *See Chapman v. Berks Cnty. Bd. of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed Aug. 19, 2022) (Cohn Jubelirer, P.J.) (single-Judge op.), 2022 WL 4100998, at *18 (observing that the dating provisions say "date" but that the statute "does not specify which date"); and *Migliori v. Cohen*, 36 F.4th 153, 163 (3d Cir.) (observing that the county board of elections "counted ballots with obviously incorrect dates"), *vacated as moot*, 143 S. Ct. 297 (2022).

[32] It also clarified that its November 5, 2022 supplemental Order was intended to provide guidance and uniformity for the November 8, 2022 General Election, and that the date ranges included therein "were intended to capture the broadest discernible period of time within which an elector could have an absentee or mail-in ballot in hand, and thus could become able to 'fill out, date and sign' the declaration on the return envelope." *Ball*, 289 A.3d at 23.

send out mail-in and absentee ballots—for compliance with the Election Code." *Id.* This was the extent of the Supreme Court's interpretation of the dating provisions under state law in *Ball*.

With respect to whether the dating provisions violated the federal Materiality Provision, as to which the *Ball* Court was evenly divided[33] and regarding which it did not issue any order, we note, in relevant part, the Supreme Court's finding that "invalidating ballots received in return envelopes that do not comply with the [dating provisions] denies an individual the right of 'having such ballot counted and included in the appropriate totals of votes cast,' and therefore [] 'den[ies] the right of an individual to vote in any election.'" *Ball*, 289 A.3d at 25 (citing federal Materiality Provision). Further, recognizing that the interpretive rule against superfluities (i.e., that a statute should be read together so effect is given to all of its provisions and so none are rendered inoperative or superfluous) counseled against a reading of the Materiality Provision as including, in the term "voting,"[34] **all** steps involved in casting a ballot, which would render the Materiality Provision's term "other act requisite to voting" without meaning, the Court opined, as follows, in footnote 156:

> In the event that Congress' meaning in the phrase "other act requisite to voting" might be deemed ambiguous, we would reach the same result. In such a circumstance, **failure to comply with the [dating provisions] would not compel the discarding of votes in light of the**

[33] Three Supreme Court Justices at the time joined Part III(C) of *Ball* regarding the Materiality Provision, including Justice Wecht, Chief Justice Todd, and Justice Donohue.

[34] For context, we note the Materiality Provision provides, in relevant part, that "[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to **voting**, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." *See* 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

> **[f]ree and [e]qual [e]lections [c]lause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth.** *See* Pa. Const. art. I, § 5; [*Pa. Democratic Party*], 238 A.3d at 361.

Ball, 289 A.3d at 26-27, n.156 (emphasis added).

The precise issues that were before the Court in *Ball* were whether **the Election Code** required disqualification of undated and incorrectly dated absentee and mail-in ballots and whether failing to count mail ballots that do not comply with the dating provisions would violate the federal Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). Notably, the *Ball* Court did not decide the precise question raised in these appeals of whether the dating provisions' enforcement to reject undated and incorrectly dated but timely received absentee and mail-in ballots violates the free and equal elections clause. Nevertheless, the *Ball* Court recognized, albeit with respect to the federal Materiality Provision, that a free and equal elections clause challenge to the dating provisions may someday arise notwithstanding their unambiguous and mandatory command. We therefore reject RNC and RPP's contention that *Ball* settled the free and equal elections clause issue for purposes of these appeals.

Turning to the constitutional claim regarding the dating provisions, Designated Appellees argue that the failure to count their undated mail-in ballots in the Special Election violates the free and equal elections clause, and that the trial court was correct in so ruling. In considering this issue, we begin with the well-established principle that "'acts passed by the General Assembly are strongly presumed to be constitutional.'" *Cmwlth. v. Neiman*, 84 A.3d 603, 611 (Pa. 2013) (quoting *Pa. State Ass'n of Jury Comm'rs v. Cmwlth.*, 64 A.3d 611, 618 (Pa. 2013)). The Court is cognizant that "[t]he judiciary should act with restraint, in the election

arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair and efficient administration of public elections in Pennsylvania." *In re Clymer*, __ A.3d __ (Pa. Cmwlth., No. 376 M.D. 2024, filed Aug. 23, 2024) (three-Judge panel op.) (citing *Green Party of Pa. v. Dep't of State Bureau of Comm'ns, Elections & Legislation*, 168 A.3d 123, 130 (Pa. 2017) (quoting *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014))), slip op. at 24-25. However, **"[w]hile deference is generally due the legislature, we are mindful that the judiciary may not abdicate its responsibility to ensure that government functions within the bounds of constitutional prescription under the guise of its deference to a coequal branch of government**." *Mixon v. Cmwlth.*, 759 A.2d 442, 447 (Pa. Cmwlth. 2000) (emphasis added).

The free and equal elections clause is at the heart of these appeals, which provides that "[e]lections 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; *Applewhite v. Cmwlth.*, 54 A.3d 1, 3 (Pa. 2012); *see also League of Women Voters*, 178 A.3d at 803. Our Supreme Court has observed that

> [t]he broad text of the first clause of this provision mandates clearly and unambiguously, and in the broadest possible terms, that **all** elections conducted in this Commonwealth must be "free and equal." In accordance with the plain and expansive sweep of the words "free and equal," we view them as 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 our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government. Thus, [a]rticle I, [s]ection 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way,

> the actual and plain language of [s]ection 5 mandates that all voters have an equal opportunity to translate their votes into representation.

Id. at 804 (emphasis in original). Furthermore, in recognizing that it "has infrequently relied on this provision to strike down acts of the legislature pertaining to the conduct of elections, the qualifications of voters to participate therein, or the creation of electoral districts, [the Supreme Court noted its] view as to what constraints [a]rticle I, [s]ection 5 places on the legislature in these areas has been consistent over the years." *League of Women Voters*, 178 A.3d at 809.

In describing such constraints, the Supreme Court first cited *Patterson v. Barlow*, 60 Pa. 54, 75 (1869),[35] for the proposition that "while our Constitution gives to the General Assembly the power to promulgate laws governing elections, those enactments are nonetheless subject to the requirements of the [f]ree and [e]qual [e]lections clause . . . , and hence may be invalidated by our Court 'in a case of plain, palpable[,] and clear abuse of the power which actually infringes the rights of the electors'"; therefore, "any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of 'free and equal' elections afforded by [a]rticle I, [s]ection 5."[36] *League of Women Voters*, 178 A.3d at 809-10 (quoting *Patterson*, 60 Pa. at 75).

Next, citing its decision in *Winston*, 91 A. 520, which involved an unsuccessful challenge under the free and equal elections clause to an act of the

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[35] *Patterson v. Barlow*, 60 Pa. 54, 74-75 (1869), involved a challenge to an act of the legislature that established eligibility qualifications for electors to vote in all elections held in Philadelphia, and it specified the manner in which those elections were to be conducted.

[36] *League of Women Voters*, 178 A.3d 737, involved a constitutional challenge to Pennsylvania's 2011 congressional redistricting plan. The Court's holding is not particularly relevant for purposes of these appeals.

legislature that set standards regulating the nominations and elections for judges and elective offices in the City of Philadelphia, the Supreme Court noted it nevertheless prescribed in that case that elections shall be "free and equal" within the meaning of the Constitution

> when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; **when 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; and when no constitutional right of the qualified elector is subverted or denied him.

League of Women Voters, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523 (emphasis added)); *see also Banfield*, 922 A.2d 36, 48 (Pa. Cmwlth. 2007) (citing same standard).

It is undisputed that the fundamental right to vote guaranteed by our Constitution is at issue in these appeals. *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (observing that "the right to vote is fundamental and 'pervasive of other basic civil and political rights'") (citing *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)); *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (holding that, "where the fundamental right to vote is at issue, a strong state interest must be demonstrated"). However, the parties disagree about the applicable level of judicial review to be applied to the dating provisions' restriction on that right.[37]

[37] RNC and RPP claim that our Supreme Court recently reaffirmed that strict scrutiny does not apply and that mandatory ballot-casting rules only violate the free and equal elections clause if they deny the franchise itself or make it so difficult to vote so as to amount to a denial in *Walsh*. The *Walsh* Court held, *inter alia*, that a provisional ballot should not be counted because the envelope was unsigned, relying on the unambiguous language of the Election Code provision providing that such unsigned provisional ballot shall not be counted. It also rejected a free and equal elections clause challenge because the county board made no showing that a voter having to

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Because it is instructive, we return to *Pennsylvania Democratic Party*, in which our Supreme Court set forth the proper standards to be considered in evaluating whether state election regulations violate the Constitution. *See Pa. Democratic Party*, 238 A.3d at 384-85:

> In analyzing whether a state election law violates the constitution, courts must first examine the extent to which a challenged regulation burdens one's constitutional rights. *Burdick v. Takushi*, 504 U.S. 428, 434 . . . (1992). Upon determining the extent to which rights are burdened, courts can then apply the appropriate level of scrutiny needed to examine the propriety of the regulation. *See id.* (indicating that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment[, U.S. Const. amends. I, XVI,] rights").
>
> **Where a state election regulation imposes a "severe" burden on a plaintiff's right to vote, strict scrutiny applies and requires that the regulation is "narrowly drawn to advance a state interest of compelling importance."** *Id.* When a state election law imposes only "reasonable, nondiscriminatory restrictions," upon the constitutional rights of voters, an intermediate level of scrutiny applies, and "the State's important regulatory interests are generally sufficient to justify" the restrictions. *See* [*i*]*d.* (upholding Hawaii's ban on write-in voting in the primary where doing so places a minimal burden on one's voting right and supports the state's interest in supporting its ballot access scheme). Where, however, the law does not regulate a suspect classification (race, alienage, or national origin) or burden a fundamental constitutional right, **such as the right to vote,** the state need only provide a rational basis for its imposition. *See Donatelli* [*v. Mitchell*], 2 F.3d [508,] 510 & 515 [(3d Cir. 1993)].

sign the outer envelope of a provisional ballot denied the franchise or made it so difficult so as to amount to a denial. *Walsh* is readily distinguishable because, among other reasons, it involved provisional ballots, which are not at issue here. We therefore reject RNC and RPP's argument in that regard.

(Emphasis added.)[38]

Here, Designated Appellees argue that the dating provisions' restriction on their fundamental right to vote violates our Constitution, such that the restriction must be evaluated under strict scrutiny. We agree and conclude that the dating provisions impose a significant burden on Designated Appellees' constitutional right to vote, in that those provisions restrict the right to have one's vote counted in the Special Election to only those voters who **correctly** handwrite the date on their mail ballots and effectively deny the right to all other qualified electors who sought to exercise the franchise by mail in a timely manner but made minor mistakes or omissions regarding the handwritten date on their mail ballots' declarations. Accordingly, we hold that strict scrutiny applies to the dating provisions' restriction on that fundamental right, such that the government bears the heavy burden of proving that the law in question is "narrowly drawn to advance a state interest of compelling importance." *Pa. Democratic Party*, 238 A.3d at 385.

We also agree with Designated Appellees that the dating provisions cannot survive strict scrutiny, as they serve no compelling government interest. As the undisputed factual findings underlying the trial court's order illustrate, thousands of Pennsylvania voters have been disenfranchised by the County Board's rejection of their mail ballots due to missing or incorrect dates on their ballot envelopes, including Designated Appellees and the 67 other qualified voters who were disenfranchised as recently as September 21, 2024, the date the County Board voted

[38] *See also In re Clymer*, __ A.3d __ (Pa. Cmwlth., No. 376 M.D. 2024, filed Aug. 23, 2024) (three-Judge panel op.) (setting forth the same standards), slip op. at 24-28; *Appeal of Norwood*, 116 A.2d at 555; *Petition of Berg*, 712 A.2d 340, 341-42 (Pa. Cmwlth. 1998) (setting forth the same standards); *Applewhite v. Cmwlth.* (Pa. Cmwlth., No. 330 M.D. 2012, filed Jan. 17, 2014) (McGinley, J.) (single-Judge op.), 2014 WL 184988, at *20-21 (analyzing former voter ID law under strict scrutiny).

not to count their ballots in the September 17, 2024 Special Election. *See* O.R., Item 1, Pet., ¶¶ 5-6, 35-36 & Ex. 3, 37-40. The trial court also found that the date on the outer mail ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud. *Id.* ¶ 39. We further observe the trial court's findings that all 69 mail ballots at issue were timely submitted to the County Board by 8:00 p.m. on the day of the Special Election and timestamped with the date and time they were so received. *See* O.R., Item 1, Pet. ¶¶ 11, 14-18, 20-22, 41-43 & Exs. 1-2 (Baxter & Kinniry Decls.); H.T. at 5, 8-9, 12, 21. It is apparent that the trial court determined, as we did in *BPEP II* under similar factual circumstances, that the dating provisions are virtually meaningless and, thus, serve no compelling government interest.

We cannot countenance **any** law governing elections, determined to be mandatory or otherwise, that has the practical effect in its application of impermissibly infringing on certain individuals' fundamental right to vote, **which is "pervasive of other basic civil and political rights,"** relative to that of other voters who may be able to exercise the franchise more easily in light of the free and equal elections clause's prescription guaranteeing all citizens an equal right on par with every other citizen to elect their representatives. *See League of Women Voters*, 178 A.3d at 809-10; *Banfield*, 110 A.3d at 176 (emphasis added); *Patterson*, 60 Pa. at 75. To look at a mail ballot that substantially follows the requirements of the Election Code, save for including a handwritten date on the outer envelope declaration, **and which also includes a timestamped date indicating its timely receipt by the voter's respective county board of elections by 8:00 p.m. on Election Day**, and say that such voter is not entitled to vote for whomever candidates he or she has chosen therein due to a minor irregularity thereon "is to negate the

whole genius of our electoral machinery." *Appeal of James*, 105 A.2d at 66. Simply put, the "practical" regulation of requiring voters to date their mail ballot declarations "obstructs and hampers the independent voter" and places voters on unequal playing fields where voters timely submit their mail ballots, but one voter may inadvertently include an "incorrect" date, or a birthdate, or forgets to include the date altogether, and another may include the date on which they filled out the declaration. *Oughton v. Black*, 61 A. 346, 349 (Pa. 1905) (Dean, J., dissenting). Other voters' ballots may not be counted for unknown reasons.

While this Court is fully cognizant that the General Assembly is the entity tasked with effectuating "free and equal" elections vis-à-vis reasonable regulations directing the manner and method of voting, "when the effect of a restriction or a regulation is to debar a large section of intelli[gent] voters from exercising their choice, the Constitution is certainly violated in spirit, if not in letter." *See Oughton*, 61 A. at 349-50 (Dean, J., dissenting); *see also Ball*, 289 A.3d at 25; *In re Canvass 2020*, 241 A.3d at 1076-77, 1079.

Because the refusal to count the 69 undated and incorrectly dated but timely received mail ballots submitted by otherwise eligible voters in the Special Election because of meaningless dating errors violates the fundamental right to vote recognized in and guaranteed by the free and equal elections clause of the Pennsylvania Constitution, we hold that the trial court, faced with the above undisputed facts, did not err in reversing the County Board's decision not to count those ballots and directing the County Board to count them in the September 17, 2024 Special Election.

As a final matter, we address whether our holding triggers Act 77's nonseverability provision, which the trial court did not address. Act 77's

nonseverability provision is found in Section 11 of the Act, which provides, in relevant part: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act **or its application to any person or circumstance is held invalid**, the remaining provisions or applications of this act are void."[39] (Emphasis added.) In *Stilp*, 905 A.2d at 970, our Supreme Court recognized that Section 1925 of the Statutory Construction Act of 1972 (Statutory Construction Act), 1 Pa.C.S. § 1925,[40] established a presumption of severability applicable to all statutes which "is not merely boilerplate" and "does not mandate severance in all instances, but only in those circumstances where a statute can stand alone absent the invalid provision." It also "sets forth a specific, cogent standard, one which both emphasizes the logical and essential interrelationship of the void and valid provisions, and also recognizes the essential role of the Judiciary in undertaking the required analysis." *Id.* Furthermore, because severability "has its roots in a jurisprudential doctrine . . . , the 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." *Id.* at 972. Considering the substantive standard in Section 1925 of the Statutory Construction Act and the above principles, and the fact we are not asked in these

[39] For our purposes, we are concerned only with Sections 6 and 8 of Section 11 of Act 77, which comprise the dating provisions.

[40] It provides: "The provisions of every statute shall be severable. **If any provision of any statute or the application thereof to** any person **or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby**, 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." 1 Pa.C.S. § 1925 (emphasis added).

appeals to declare the dating provisions unconstitutional or otherwise strike them from Act 77, we decline to treat Act 77's nonseverability as an "inexorable command" requiring that the entirety of Act 77 be declared void. Rather, we find that the other provisions of Act 77, which enacted a comprehensive scheme of no-excuse mail-in voting that has since been upheld in full as a constitutional exercise of our General Assembly's legislative authority to create universal mail-in voting[41] will not be affected by our ultimate conclusion regarding the unconstitutional **application** of the dating provisions to the 69 voters **in the Special Election**.[42] For these reasons, we find in our judicial discretion that the nonseverability clause is ineffective, and, accordingly, we will not enforce it under the circumstances of this case. *See Stilp*, 905 A.2d at 977-81 (holding that nearly identical nonseverability provision was "ineffective and cannot be permitted to dictate [the Court's] analysis" and that "enforcement of the clause would intrude upon the independence of the Judiciary and impair the judicial function").

IV. CONCLUSION

These appeals have placed us in the position of having to decide a constitutional issue of first impression regarding whether the application of certain provisions of our Election Code, held to be unambiguous and mandatory but found to be otherwise meaningless, violates the free and equal elections clause of our

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[41] *See McLinko v. Department of State*, 279 A.3d 539, 582 (Pa. 2022).

[42] *See Stilp*, 905 A.2d at 973; *see also Pa. Fed'n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 754 (Pa. 1984). We observe that nothing in the otherwise valid provisions of Act 77 is "so essentially and inseparably connected with" the dating provisions, nor can we say that the remaining valid provisions of Act 77, "standing alone, are incomplete [or] are incapable of being executed in accordance with the legislative intent" of that Act. *See* 1 Pa.C.S. § 1925. We therefore see no reason to interfere with this comprehensive scheme enacted and amended multiple times by our Legislature since its inception in 2019, which allows voters of this Commonwealth to confidently vote from the comfort of their own homes.

Constitution. Under the circumstances of these appeals, and for the reasons stated above, we hold that the trial court did not err in ordering the County Board to count the 69 undated and incorrectly dated absentee and mail-in ballots cast in the September 17, 2024 Special Election for the 195th and 201st Legislative Districts on the basis that not counting those ballots violates the free and equal elections clause of the Pennsylvania Constitution. *See In re Canvass 2020*, 241 A.3d at 1076-77, 1079 (finding that defects in form of undated mail ballots, "while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement . . . of Pennsylvania voters" and that "[h]aving found no compelling reasons to do so," it **"decline[d] to intercede in the counting of the votes at issue in th[o]se appeals"** (emphasis added)). We also conclude that our narrow holding does not trigger Act 77's nonseverability provision.

Accordingly, we affirm.

/s/ *Ellen Ceisler*
ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry	:	**CASES CONSOLIDATED**
	:	
v.	:	Trial Ct. No. 2024 No. 02481
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024
	:	
Brian T. Baxter and Susan T. Kinniry	:	
	:	
v.	:	
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024
	:	

O R D E R

AND NOW, this 30th day of October, 2024, the Court of Common Pleas of Philadelphia County's (trial court) September 26 and September 28, 2024 orders are **AFFIRMED**. The Philadelphia County Board of Elections is **ORDERED** to count the undated mail-in ballots cast by Designated Appellees Brian T. Baxter and Susan T. Kinniry, and the absentee and mail-in ballots cast by the other 67 qualified electors whose ballots were rejected due to outer envelope dating errors, in the September 17, 2024 Special Election in the 195th and 201st Legislative Districts in

Philadelphia County, and take any other steps necessary in accordance with the parties' Consent Order of Court entered by the trial court on September 25, 2024.

/s/ *Ellen Ceisler*
ELLEN CEISLER, Judge

Order Exit
10/30/2024

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry	:	**CASES CONSOLIDATED**
	:	
v.	:	Trial Ct. No. 2024 No. 02481
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024
Brian T. Baxter and Susan T. Kinniry	:	
	:	
v.	:	
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024
	:	Submitted: October 15, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: October 30, 2024

This Court once again has unnecessarily hurried to change the mail-in voting rules in Pennsylvania, this time mere days before the consummation of a hotly

contested general election. The ballots at issue in this appeal were cast in an *uncontested* special election in Philadelphia County, and, although important in their own right, those ballots could not and will not change the outcome. Nevertheless, the Court of Common Pleas of Philadelphia County (trial court), and now this Court, have accepted the invitation of Brian T. Baxter and Susan T. Kinniry (Designated Appellees) to vitiate as unconstitutional the enforceability of the requirements in Sections 1306 and 1306-D of the Pennsylvania Election Code (Election Code)[1] that mail voters date the declarations on the envelopes enclosing their ballots (Declaration Dating Provisions). There simply was and is no reason to decide this question now, and the Majority certainly has not done so in ordinary course. Both the trial court and this Court should have declined to issue rushed and novel constitutional rulings that surely will confuse the expectations of both voters and county boards of elections alike. The rulings could and should have waited.

Further, and even to the extent that we could[2] or should rule on the merits of this appeal now, the Majority's decision suffers fatally from the same errors

[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591. Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3, and was amended by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). Section 1306 applies to votes cast by absentee electors and pertinently requires that they fill out, sign, and date the declaration on the outer envelope enclosing their ballots. 25 P.S. § 3146.6(a). Section 1306-D was added to the Election Code by Act 77 and includes the same language as Section 1306 with respect to votes cast by mail-in electors. 25 P.S. § 3150.16(a). For ease of discussion, I refer herein to both absentee and mail-in voting as "mail" voting.

[2] I agree with Judge Wolf's conclusion in his dissenting opinion that the Majority did not adequately address the question of whether this Court should have transferred this appeal directly to the Supreme Court for consideration pursuant to Section 722(7) of the Judicial Code, 42 Pa. C.S. § 722(7). Section 722(7) provides, in pertinent part, that the Supreme Court shall have exclusive jurisdiction over any "matters where the court of common pleas has held invalid as repugnant to the . . . [c]onstitution of this Commonwealth . . . any provision of . . . any statute of[] this Commonwealth[.]" *Id.* Here, although the trial court's order directs the counting of the

(Footnote continued on next page…)

that beset the now-vacated majority decision in *Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, filed August 30, 2024) (*BPEP II*), *vacated*, 322 A.3d 221 (Pa. 2024). I discussed at length in my dissenting opinion in *BPEP II*, and reiterate again here, that the Majority devises out of whole cloth a strict scrutiny standard that it wields to preclude the enforcement of generic, universally applicable ballot-casting requirements that do not "disenfranchise" any voters or burden or affect their "right" to vote to any degree.

Wrong decisions issued at the wrong time are doubly threatening to the integrity of Pennsylvania's elections and the public's confidence in them. Because the Majority here countenances, nay, orders, a substantial change to voting rules at the eleventh hour and on specious grounds, I must respectfully dissent.

I. The Majority Changes the Rules For the Upcoming General Election.

Designated Appellants Republican National Committee and Republican Party of Pennsylvania argue, and I agree, that the Pennsylvania Supreme Court only a few weeks ago ruled that it would "neither impose nor countenance substantial alternations to existing laws and procedures during the pendency of an ongoing election." *New PA Project Education Fund, NAACP v. Schmidt* (Pa., No. 112 MM 2024, filed October 5, 2024), slip op. at 1. Citing to both *Purcell v.*

contested mail ballots on the ground that to do otherwise would violate the free and equal elections clause, the trial court did not invalidate the Declaration Dating Provisions on their face. The Supreme Court nevertheless appears to have accepted jurisdiction under Section 722(7) to address as-applied constitutional rulings, *see, e.g.*, *Department of Transportation, Bureau of Driver Licensing v. Hettich*, 669 A.2d 323 (Pa. 1995), and I agree with Judge Wolf that a strong argument can be made that transfer was appropriate here. Nevertheless, given the thin record, the curt analysis below, and no express holding from the trial court as to the Provisions' validity, I leave the ultimate question of this Court's jurisdiction to our Supreme Court for a final determination. In the event that the Supreme Court determines that we do have jurisdiction, I proceed below to analyze the issues in this case.

Gonzalez, 549 U.S. 1, 4-5 (2006), and *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016), the High Court relied on the *Purcell*[3] principle, laches, and/or common sense (an increasingly scarce quality in our election law jurisprudence) to deny an application asking the Court to exercise King's Bench or extraordinary jurisdiction to invalidate under the free and equal elections clause[4] the enforceability of the same

[3] *Purcell* involved an Arizona election law that arguably discriminated against some voters because it required proof of citizenship to cast an in-person ballot on election day. Voting rights groups challenged the law, seeking to enjoin its implementation two years after it was approved but only months before the next election. They brought suit in federal district court, which summarily denied the motion. 549 U.S. at 2-3. On appeal, a two-judge motions panel of the Ninth Circuit Court of Appeals granted an injunction pending appeal, which had the effect of reversing the decision below and precluding enforcement of the law. In a *per curium* opinion, the United States Supreme Court vacated the Ninth Circuit's order just days before the 2006 election, once again restoring the status quo. *Id.* at *6.* In vacating the Ninth Circuit's order, the Supreme Court stated:

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So the Court of Appeals may have deemed this consideration to be grounds for prompt action. Furthermore, it might have given some weight to the possibility that the nonprevailing parties would want to seek *en banc* review. . . . These considerations, however, cannot be controlling here. It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.

Id. at 5. Finally, the Court concluded that, "[g]iven the imminence of the election and the inadequate time to resolve the factual issues, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id.* at 5-6.

[4] "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.