

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

Nos. 1 EAP 2025 and 2 EAP 2025

BRIAN BAXTER and SUSAN KINNIRY,
Respondents-Appellees,
PENNSYLVANIA DEMOCRATIC PARTY,
Intervenor,

v.

PHILADELPHIA BOARD OF ELECTIONS,
Respondent-Appellee,
REPUBLIC NATIONAL COMMITTEE and REPUBLICAN PARTY OF
PENNSYLVANIA,
Intervenors-Appellants.

BRIEF OF THE PENNSYLVANIA DEMOCRATIC PARTY

On Appeal from the Commonwealth Court,
Nos. 1305 C.D. 2024 & 1309 C.D. 2024

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ORDER IN QUESTION

The Commonwealth Court's order under review states:

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.

QUESTIONS ACCEPTED FOR REVIEW

1. Did the Commonwealth Court err in barring enforcement of the Election Code's mail-in and absentee ballot envelope dating requirements, *see* 25 P.S. §§3146.6(a), 3150.16, upon the rationale that those requirements violate the "Free and Equal Elections Clause," article I, section 5 of the Pennsylvania Constitution?

Suggested Answer: No.

2. If the Commonwealth Court did not so err, does its ruling activate the non-severability clause in section 11 of the Act of October 31, 2019, P.L. 552, No. 77 ("Act 77") (*see* 25 P.S. §2602, Note), so as to require invalidation of the entirety of Act 77?

Suggested Answer: No.

INTRODUCTION

The Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, §5, protects the fundamental right to vote. The question in this appeal is whether the clause—which this Court has repeatedly described expansively—permits enforcement of a purposeless, vestigial provision of the Election Code that disenfranchises tens of thousands of voters. As the Commonwealth Court held, it does not. That conclusion follows from two key points.

First, the vestigial provision—which requires mail- and absentee-ballot voters to handwrite on the outer envelope of their ballot packets the date on which they supposedly completed the ballot—serves no purpose. It does not, for example, serve to measure a ballot's timeliness or determine the voter's eligibility. Timeliness is determined when a ballot packet is scanned into Pennsylvania's mail-ballot tracking system, and eligibility is verified before a mail or absentee ballot is even sent to a voter. The handwritten date *did* serve a purpose decades ago, when absentee ballots could be timely even if they were received after election day, depending on when they were actually completed (something the provision could be used to determine). But since 1968, when the legislature made the timeliness of

absentee ballots depend solely on receipt date (and the same is now true of mail ballots), the handwritten-date provision has served no purpose.¹

Second, this issue implicates a fundamental right under the Pennsylvania Constitution: the right to vote. As this Court has explained, “[n]o right is more precious.... Other rights, even the most basic, are illusory if the right to vote is undermined.” *In re Nomination Papers of Nader*, 858 A.2d 1167, 1180 (Pa. 2004) (quotation marks and subsequent history omitted). Consistent with that view, the Pennsylvania Constitution provides broader protection of the right to vote than does federal law. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (“*LWV*”). In particular, the Free and Equal Elections Clause states:

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. If it means anything, this clause must mean that government cannot deny an individual’s fundamental right to vote for not complying with a rule that serves no purpose—indeed, no purpose at all other than providing a basis to disenfranchise.

From these two points, the Commonwealth Court’s conclusion inexorably follows: Because the handwritten-date provision serves no purpose, enforcing it to

¹ This brief hereafter uses “mail ballot” to refer to mail and absentee ballots collectively.

deny the fundamental right to vote violates the Pennsylvania Constitution. In other words, the Free and Equal Elections Clause does not permit infusing a purposeless and vestigial requirement with life *solely* to prevent the counting of ballots (tens of thousands in just the last few elections).

Appellants' principal response is to suggest that affirmance would subject every electoral rule to strict scrutiny. But to affirm here, this Court need not apply strict scrutiny (although the Court has done so where an "election regulation imposes a 'severe' burden on a plaintiff's right to vote," *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 385 (Pa. 2020) ("*PDP*"). That is because the date requirement's complete lack of any legitimate government purpose means it fails *any* level of judicial scrutiny. Appellants relatedly assert that any number of neutral ballot-counting rules would be invalidated under the Commonwealth Court's decision. But affirming here would pose no threat to rules (like those appellants invoke) that, unlike the date requirement, actually serve legitimate government purposes.

Finally, whatever the level of scrutiny, affirming the Commonwealth Court by interpreting and applying the Pennsylvania Constitution would neither impermissibly intrude on the legislature's prerogatives (although any federal claim along these lines is not properly presented), nor require invalidating all of Act 77.

The Commonwealth Court's judgment should be affirmed.

COUNTER-STATEMENT OF THE CASE

A. Voting By Mail In Pennsylvania

Under Pennsylvania's Act 77, *see* Act of October 31, 2019, P.L. 552, No. 77, every eligible and registered resident of the Commonwealth has the right to vote by mail. Voting by mail (or absentee, a right the Pennsylvania Constitution provides under certain circumstances) is a multi-step process. Voters must submit an application that includes the information election officials need to verify an applicant's eligibility. 25 P.S. §3150.12(b) (mail); *id.* §3146.2(b) (absentee). Once the county board verifies eligibility, it sends the applicant a package consisting of the mail ballot, a yellow "secrecy" envelope, and a pre-addressed outer "return" envelope, on which a "declaration of the elector" form is printed. *Id.* §3150.16(a) (mail); *id.* §3146.6(a) (absentee). Voters must fill out their ballot, place it in the secrecy envelope, and place that envelope in the outer envelope. Voters must also "date and sign the declaration" on the outer envelope. *Id.* §3150.16(a) (mail); *see also id.* §3146.6(a) (absentee).

A mail ballot is submitted timely if it is "received in the office of the county board of elections no later than eight o'clock P.M. on" election day. 25 P.S. §3150.16(c) (mail); *accord id.* §3146.6(c) (absentee). Upon receiving a mail ballot, the county board confirms its timeliness by stamping the outer envelope with the date of receipt and logging it in the Department of State's Statewide

Uniform Registry of Electors (“SURE”) system, the statewide database and mail-ballot tracking system. *Id.* §1222. The Election Code requires rejection of any mail-ballot packet received after 8 p.m. on election day. *Id.* §3146.8(g)(ii).

B. The Date Requirement

In *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), this Court reaffirmed that under the Election Code, “the date requirement is ... mandatory,” *id.* at 24. Hence, the Court explained, if an outer envelope is submitted with no date or an “incorrect” date (meaning a date that could not possibly be when the voter actually completed the ballot), then Pennsylvania statutory law prohibits the ballot from being counted. *Id.* at 28. County boards thus do not count any mail ballot that was submitted in an undated or incorrectly dated envelope, even if the ballot was timely received. 25 P.S. §3146.8; Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes, Version 4.0*, at 3-4 (April 3, 2023) (“*DOS Guidance*”).

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

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

Since 1968, however, the timeliness of absentee ballots has been determined based solely on the ballot’s receipt date; the date the ballot is completed (assuming that is what a handwritten date even shows) is irrelevant to timeliness. *See* Act of December 11, 1968, P.L. 1183, No. 375, sec. 8, §1308(a). Yet the General Assembly never repealed the date requirement for absentee ballots—and in enacting Act 77, the legislature simply repurposed the Election Code’s existing procedures for absentee voting (including the date requirement) by duplicating them for mail voting. *Compare* Act of October 31, 2019, P.L. 552, No. 77, §8 (art. XIII-D, §1305-D(a)), *with* 25 P.S. §3146.6(a). The date requirement thus remains on the books for both mail and absentee voting.

Since the General Assembly’s adoption of the SURE system, however, county boards of elections have used that computerized scanning system to ensure that only timely received mail ballots are counted. Department of State guidance instructs counties to “stamp the date of receipt on the ballot-return envelope” and

“record the receipt of absentee and mail-in ballots daily in the [SURE] system.”

Pennsylvania Department of State, *DOS Guidance* at 2. As discussed by various courts in recent cases, counties also scan the barcode on a mail ballot’s return envelope into the SURE system, creating an electronic record of when the ballot was received. *Id.* at 2-3; *see also Eakin v. Adams County Board of Elections*, No. 1:22-cv-340, slip op.17 n.8 (W.D. Pa. Mar. 31, 2025); *Pennsylvania State Conference of the NAACP v. Schmidt*, 703 F.Supp.3d 632, 679 (W.D. Pa. 2023) (subsequent history omitted) (“*Schmidt*”); *Ball*, 289 A.3d at 16 n.77; *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1077 (Pa. 2020) (“*In re 2020 Canvass*”).

Enforcement of the date requirement has caused the disenfranchisement of an enormous number of qualified Pennsylvanians. *E.g.*, R.79a & n.8. In the 2024 general election alone, approximately 4,000 ballots were not counted due to a missing or “incorrect” date. *See Commonwealth of Pennsylvania, 2024 General Election Mail Ballot Requests Department of State* (Nov. 25, 2024) (filtered by mail ballots coded “Canc[eled]-No Date” and “Canc[eled]-Incorrect Date”).²

Enforcement of the date requirement in future elections would almost certainly

² https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2024-General-Election-Mail-Ballot-Requests-Departm/3q5t-ddp8/data_preview.

likewise mean denying thousands of qualified Pennsylvanians their fundamental right to vote and have their vote counted.

C. Factual And Procedural History

1. The 2024 Special Election

Brian Baxter and Susan Kinniry, two residents of Philadelphia County, each timely applied for, received, and (as shown by the election board's date stamp on each ballot's outer envelope) timely submitted a mail ballot prior to the special election of September 17, 2024. R.80a. Baxter and Kinniry, however, each forgot to handwrite the date on those outer envelopes. *Id.* The board "acknowledged at its [canvassing meeting] that the [date requirement] serve[s] no purpose," but nevertheless declined to count Baxter's and Kinniry's ballots (and 67 other ballots cast by qualified voters who failed to comply with the date requirement), as *Ball* requires. R.82a.

2. Court Of Common Pleas

Baxter and Kinniry brought this action in the Court of Common Pleas, alleging that the board's refusal to count their votes based solely on non-compliance with the date requirement violates the Free and Equal Elections Clause. R.82a. The Court of Common Pleas agreed and ordered the board to count the 69 misdated or undated ballots. R.77a. The board, along with the

Republican National Committee and the Republican Party of Pennsylvania (which had intervened), appealed.

3. *Commonwealth Court*

A five-judge panel of the Commonwealth Court affirmed by a 3-2 vote. The court recognized that the question presented—whether enforcement of the date requirement violates the Free and Equal Elections Clause—“is one of first impression.” R.101a. And citing this Court’s precedent, the court concluded that denying qualified and registered Pennsylvanians their fundamental right to vote solely for failure to handwrite a date on the outer envelopes of their mail ballots violates the clause because (as had been determined in prior litigation) enforcing the requirement serves no valid government purpose. R.106a-113a. The court reached this conclusion applying strict scrutiny, which it deemed the proper level of scrutiny because of the fundamental nature of the right to vote. R.111a. Under strict scrutiny, the court stated, “the government bears the heavy burden of proving that [enforcement of the date requirement] is ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* (quoting *PDP*, 238 A.3d at 385).

Enforcement of the date requirement cannot withstand strict scrutiny, the court ruled, because the handwritten date “is not used to determine the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud,” and thus “serve[s] no compelling interest.” R.112a. In fact, the court determined (as had the county

board at its canvassing meeting) that the date requirement is “virtually meaningless.” *Id.*

In making this determination, the Commonwealth Court considered this Court’s many cases protecting the right to vote, and the concomitant “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” R.98a (quoting *PDP*, 238 A.3d at 360-361). The court also invoked this Court’s oft-stated view that the power to reject ballots based on minor irregularities should be exercised only “**very sparingly**,” keeping in mind that voters “are not to be disenfranchised at an election **except for compelling reasons**” and that “[e]very rationalization within the realm of common sense should aim at saving [a] ballot rather than voiding [it].” R.98a-99a (alterations and bolding in original). Finally, the Commonwealth Court rejected appellants’ claim that blocking enforcement of the date requirement required striking down all of Act 77. R.113a-115a.

Judge McCullough dissented on each of the foregoing points, R.126a-130a. Judge Wolf dissented solely on the ground that the court’s decision was “ill-timed” given the upcoming general election, R.132a, i.e., he took no position on the merits.

SUMMARY OF ARGUMENT

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

Far from serving a compelling interest, the handwritten-date provision serves *no* legitimate purpose. As confirmed in prior litigation (in which appellants fully participated), none of Pennsylvania's 67 county boards of elections uses the handwritten date for any reason other than to disqualify voters. It is not used to determine a ballot's timeliness, a voter's eligibility, the presence or absence of voting fraud, or anything else. It is purely a vestige of prior law, under which the date on which a ballot was completed could actually matter to the ballot's timeliness. That is no longer the case.

Because enforcement of the handwritten-date provision serves no valid state interest, it cannot justify denying the fundamental right to vote. It is indefensible as a matter of basic democratic principles—and conflicts with decades of this Court’s protection of the franchise—to assert that the government is free to take away what the Court has rightly called one of Pennsylvanians’ most precious liberties when doing so advances no cognizable government interest. Indeed, because the handwritten-date provision serves no legitimate purpose, denying the right to vote based solely on a failure to comply with the provision would be unconstitutional under any level of judicial scrutiny. This Court thus need not resolve the proper level. But if the Court chooses to do so, then it should affirm the Commonwealth Court’s conclusion that strict scrutiny applies given the importance of the right to vote and the severe burden enforcement of the date requirement to disqualify ballots imposes.

Prohibiting enforcement of the handwritten-date provision would not, as appellants argue, require invalidating all of Act 77, which gave all registered Pennsylvanians the right to vote by mail. Such a prohibition would not strike the statute, as required to trigger Act 77’s non-severability clause. In any event, since Act 77’s provisions are now “merg[ed] into” the Election Code, 1 Pa. C.S. §1953, what governs is *the code’s* severability clause, which states that the code’s provisions “are severable,” 25 P.S. §2603(a). And even if Act 77’s non-severability

clause were still operative, this Court’s holding in *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006), would preclude treating that “boilerplate nonseverability provision” as an “inexorable command[],” *id.* at 972-973, since doing so would throw the Commonwealth’s election system into chaos.

ARGUMENT

I. DISQUALIFYING A MAIL BALLOT SOLELY FOR NON-COMPLIANCE WITH THE DATE REQUIREMENT VIOLATES THE FREE AND EQUAL ELECTIONS CLAUSE

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

The Free and Equal Elections Clause of the Pennsylvania Constitution (“Clause”) guarantees the fundamental right to vote. It reads: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, §5. As this Court has explained, the Clause, which “has no federal counterpart,” is part of what made “Pennsylvania’s Constitution, when adopted in 1776, ... the most radically democratic of all the early state constitutions.” *LWV*, 178 A.3d at 802 (quotation marks omitted). The Clause’s text and history, as well as case law interpreting and applying it, underscore how expansively it protects the right to vote.

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

This Court has held that the Clause’s text is “clear[] and unambiguous[],” using “the broadest possible terms.” *LWV*, 178 A.3d at 804. The Court has also

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

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

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

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

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

Less than fifteen years later, a second constitutional convention took place, at which the Clause was amended to say simply that "elections shall be free and equal." Pa. Const. of 1790 art. IX, §5. This language, which remains today, strengthened the Clause—replacing the suggestive "ought" with the mandatory "shall"; inserting "equal"; and removing "all prior ambiguous qualifying language." *LWV*, 178 A.3d at 806-808. The 1790 Constitution's voting-related provisions also affirmed that voting is a "high" and "sacred right." *Page*, 58 Pa. at 347. The Clause was last amended in 1874 to add its second clause ("and no

power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”). Pa. Const. of 1874, art. I, §5.

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

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

a. Consistent with the text and history just discussed, this Court has consistently given the Clause “expansive meaning.” *LWV*, 178 A.3d at 809. For example, the Court has explained that to be “free and fair,” any “regulation of the right to exercise the franchise [must] not deny the franchise itself”—which disqualifying ballots for failing to comply with a meaningless date requirement does—“*or* make it so difficult as to amount to a denial” of the “constitutional right” to vote. *Winston*, 91 A. at 523 (emphasis added). More generally, the Court has explained that in cases implicating the right to vote, courts’ “goal must be to enfranchise and not to disenfranchise.” *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). Indeed, this Court has long made clear that “[t]he disfranchisement of even one person validly exercising his right to vote is an extremely serious matter.” *Perles v. County Return Board of Northumberland County*, 202 A.2d 538, 540 (Pa. 1964). Therefore, “[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.*

For nearly a century, this Court, when considering whether an inconsequential error in the voting process should deprive voters of the right to have their vote count, looked to whether an Election Code provision was directory or mandatory. In these cases (which referred to the fundamental right to vote even if they did not expressly invoke the Clause), the Court limited the enforcement of provisions that would otherwise disqualify ballots for voters' errors. In particular, the Court has repeatedly said that the "power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised ... except for compelling reasons." *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1964), quoted in *Appeal of Norwood*, 116 A.2d 552, 554 (Pa. 1955). In other words, "[t]echnicalities should not be used to make the right of the voter insecure." *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954). And while election regulations that serve to "prevent fraud" may be enforced, *In re Luzerne*, 290 A.2d at 109, defects that "are not willful errors" should not invalidate a ballot, *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963).

Put simply, this Court has repeatedly recognized the fundamental nature of the right to vote, a right based on the Clause. And the Court's cases have provided far-reaching protection of that right, barring denial of the franchise save for

compelling reasons—which do not include (and historically have not included) minor and otherwise inconsequential errors by voters in filling out their ballots.

b. None of the foregoing is changed by this Court’s recent decisions—cases like *In re Canvass* and *Ball*—regarding the proper *statutory interpretation* of the Election Code. Nothing about those cases’ holdings on how to construe Pennsylvania’s election statutes alters either the fact that the Free and Equal Elections Clause forbids discarding votes for no valid reason, or the fact that when a statute conflicts with the Constitution, the former must yield. As Justice Wecht put it, in opining that the 1972 “enactment of the Statutory Construction Act ... called into question” this Court’s prior cases to the extent those cases declined “to give ‘shall’ mandatory effect” when construing the Election Code, the legislature may impose mandatory voting requirements only “to any extent that steers clear of constitutional protections,” *In re Canvass*, 241 A.3d at 1081-1082 (Wecht, J., concurring in part) (citing *Appeal of Pierce*, 843 A.2d 1223, 1231 (Pa. 2003)).³

This Court’s cases in other areas of the law reaffirm the bedrock principle that statutes must yield to fundamental rights enshrined in Article I of the

³ In *Appeal of Pierce*, this Court referred to the 1972 “enactment of the Statutory Construction Act.” 843 A.2d at 1231. However, the General Assembly’s action in 1972 was simply a recodification of existing law, including the Statutory Construction Act of 1937. See *PPG Industries, Inc. v. Board of Finance and Revenue*, 790 A.2d 261, 267 (Pa. 2001). The relevant language of the Statutory Construction Act remained intact.

Constitution. For example, in *Pennsylvania Environmental Defense Fund v. Commonwealth*, 161 A.3d 911 (Pa. 2017), this Court—considering whether a statute violated the “Environmental Rights Amendments,” Pa. Const. art. I, §27—explained that the legislature “derives its power from Article III of the Pennsylvania Constitution which grants broad and flexible police powers to enact laws for the purposes of promoting public health, safety, morals, and the general welfare.” 161 A.3d at 930. But, this Court continued, those legislative “powers ... are expressly limited by fundamental rights reserved to the people in Article I of our Constitution.” *Id.* at 930-931; *see also id.* at 930 (rejecting the contrary approach in *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973)). One such “fundamental right[],” of course, is the right to vote, protected by the Free and Equal Elections Clause. Any statute that violates that clause, therefore, cannot be enforced.

c. Participating as amicus curiae here, the Attorney General argues (Br.16) that the “[s]tatutory construction cases” just discussed—cases like *Gallagher*, *James*, *Norwood*, and *Luzerne*—“are not relevant to the constitutional question.” That is wrong (which may explain why appellants raised this argument in prior litigation but have abandoned it here). As Justice Donohue recently explained, “there is a constitutional overlay to election statutes.” *In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 923 (Pa. 2024)

(“*Walsh*”) (Donohue, J., concurring in part and dissenting in part). Indeed, the Pennsylvania Constitution’s “demand[] that our elections shall be free and equal” is, as explained, the source of this Court’s oft-repeated “overarching principle that the Election Code should be liberally construed so as not to deprive ... electors of their right to elect a candidate of their choice.” *Id.* (quotation marks omitted).

For their part, appellants contend (Br.3) that this Court’s recent decision in *Walsh* suggests that the Clause’s scope is in fact “narrow.” But *Walsh* in no way departs from this Court’s understanding that the Clause bars denial of the right to vote except for compelling reasons, which do not include inconsequential errors. The Court there was “not persuaded [that] constitutional principles require” invalidating “a statute that requires an elector voting by *provisional* ballot to *sign* the ballot’s outer envelope.” 322 A.3d at 909 (emphases added). That signature requirement, the Court explained, serves obvious “interests” in the Commonwealth’s provisional-voting scheme, as county boards “must compare the signature on the outer envelope with the one on the elector’s registration form to assess whether it is genuine and executed by the same person who signed the affidavit” required for provisional voting. *Id.* at 907. Appellants omit this critical aspect of *Walsh* (far and away the most-cited case in their brief); they mention (Br.26) that the case involved “arguments that the signature requirement was

‘unnecessary and superfluous,’” but fail to note the key point: This Court *rejected* those arguments.

Appellants and the Attorney General each offer unsupported and arbitrary limits on the Clause: Appellants say (Br.24) it prohibits only “discrimination” and regulations that are sufficiently “difficult” to comply with, while the Attorney General says (Br.9) it ensures only “access” and “proportionality.” The fact that appellants and the Attorney General offer *different* glosses betrays the arbitrariness of their interpretations. And neither appellants nor the Attorney General square their respective interpretation with the Clause’s use of “the broadest possible terms” to protect the franchise. *LWV*, 178 A.3d at 804. As noted, those terms—“free and equal”—have a “plain and expansive sweep.” *Id.* They are “indicative of the framers’ intent that *all* aspects of the electoral process, *to the greatest degree possible*, be kept open and unrestricted.” *Id.* (emphases added).⁴

⁴ Appellants suggest (Br.45-50) that this Court’s robust construction of the Clause is an anomaly compared to the law in other jurisdictions, implying that burdening the right to vote in service of no cognizable state interest is routine elsewhere. But they cite no case, from any jurisdiction, allowing the right to vote to be denied for no reason. Nor is the Pennsylvania Democratic Party aware of any such decision. To the contrary, the practice in other states is that where a requirement serves no purpose, it will not be applied to disqualify voters. For example, although a Michigan statute requires the declaration that accompanies mail ballots to be dated, *see* Mich. Comp. Laws §168.761, a “signed absent voter ballot envelope that is missing a date is processed in the same way as an absent voter envelope that is not missing the date,” Michigan Secretary of State, *Election Officials Manual*, ch.8 at 5-6 (Oct. 2024). Likewise, although an Ohio statute provides that an absentee

B. The Date Requirement Serves No Purpose

In *Ball*, five justices of this Court agreed that the date requirement serves no purpose with respect to most aspects of the voting process. In particular, three justices concluded that “writing a date as part of a declaration on a ballot return envelope neither relates to registering to vote, nor to applying for a mail-in ballot, nor to marking an individual ballot[,] nor to transporting it to the appropriate authorities to be counted.” 289 A.3d at 26 (Wecht, J., joined by Todd, C.J., and Donohue, J.). And two others opined that the date requirement does not “have any bearing on determining voter qualification at all.” *Id.* at 39 (Brobson, J., joined by Mundy, J.). This Court’s holding in *Ball* forecloses most of appellants’ efforts to contrive a purpose for the date requirement. (As *Ball* explained, “it is possible to cobble together a holding out of a fragmented decision” so long as “a majority of the Court [was] in agreement on the concept which is deemed to be the holding.” 289 A.3d at 20.)

To the extent not foreclosed by *Ball*, the purposes appellants ascribe to the date requirement are illusory and in any event not remotely sufficient to justify a

voter’s “identification envelope ... shall be considered incomplete if it does not include ... [t]he voter’s date of birth,” Ohio Rev. Code §3509.06(D)(3)(a)(ii), “failure to complete the date of birth field on an absentee identification envelope is not a reason to reject an absentee ballot,” Ohio Secretary of State, *Election Official Manual*, ch.7 at 234 (2022). The Commonwealth Court’s decision here is thus fully consistent with the law of other states.

trap that ensnares thousands of qualified voters in each election, denying qualified Pennsylvanians their fundamental right to submit a ballot that will be counted.

Indeed, as the then-Acting Secretary of the Commonwealth explained in *Ball*, the date requirement serves only “as a means of inducing voter-generated errors that could be used to justify denying the right to vote,” 289 A.3d at 18 (quotation marks omitted). It plays no role in “ensur[ing] honest and fair elections that proceed in an orderly and efficient manner,” *Banfield v. Cortes*, 110 A.3d 155, 176-177 (Pa. 2015). Nor does it otherwise advance any legitimate government interest, let alone any such interest to which the date requirement is in any way tailored. As a federal district court recently found in holding that the date requirement violates the U.S. Constitution, “[n]one of the potential state interests suggested by the RNC” or any other party were “supported by any evidence.” *Eakin*, slip op.19.

1. *Voter Eligibility*. The requirement does nothing to determine a voter’s eligibility; as Justice Brobson noted in *Ball*, eligibility is determined before mail ballots are sent to voters. See R.112a. Specifically, under Pennsylvania law, an individual must “apply ... for an official mail-in ballot,” 25 P.S. §3150.12(a), and “[t]he county board of elections, upon receipt of any [such] application” must “determine the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant’s permanent registration card,” *id.*

§3150.12b(a); *accord id.* §3302(a)-(b) (similar for absentee ballots). Only upon “receipt and approval of an application filed by a qualified elector ... shall [the board] deliver or mail official mail-in ballots.” *Id.* §3150.15; *accord id.* §3302(c) (similar for absentee ballots).

2. *Timeliness.* The Election Code establishes that a voter’s handwritten date on a mail-ballot envelope is irrelevant to determining the ballot’s timeliness, providing that timeliness is instead evaluated based on when a ballot is received by the county board of elections. Specifically, the code provides that to be timely, i.e., to meet the “[d]eadline,” “a completed mail-in ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. §3150.16(c); *accord id.* §3146.6(c) (same for absentee ballots). Accordingly, county boards must “maintain a record of ... [t]he date on which the elector’s completed mail-in ballot is received by the county board.” *Id.* §3150.17(b)(5); *accord id.* §3146.9(b)(5) (same for absentee ballots).

Department of State guidance similarly instructs county boards to “stamp the date of receipt on the ballot-return envelope” and “record the receipt of absentee and mail-in ballots daily in the Statewide Uniform Registry of Electors (SURE) system.” *DOS Guidance* at 2. And at oral argument before the Commonwealth Court in a prior case, counsel for the Secretary of the Commonwealth “confirmed that none of the county boards of elections use the handwritten date for any

purpose,” “that the county boards are required by law to record when they receive absentee and mail-in ballots, and that they ‘certainly do.’” *Black Political Empowerment Project v. Schmidt*, 325 A.3d 1046, 2024 WL 4002321, at *33 (Pa. Commw. Ct. 2024) (table) (“*BPEP*”).

Appellants concede (Br.42) that county officials must timestamp a ballot upon receipt, and that those officials rely on the timestamped date when entering information into the SURE system. They assert, however (Br.42), that the handwritten date would become relevant if the SURE system malfunctioned. *Accord* AG Br.23-25. That argument ignores the clear requirement in the Election Code that it is the receipt of the ballot that governs its timeliness. Boards of elections simply do not accept any ballots received after 8 p.m. on election day.⁵

In short, the date requirement does nothing to determine whether a mail ballot has been timely submitted.

3. *Voting Fraud.* The date requirement plays no cognizable role in detecting fraud either. For example, the date on a mail-ballot envelope is not used to determine whether a ballot was fraudulently submitted in the name of a deceased voter; the Pennsylvania Department of Health is instead responsible for informing

⁵ This was the rule for absentee ballots even before the General Assembly incorporated use of the SURE system into the Election Code. *See Migliori v. Cohen*, 36 F.4th 153, 165 n.5 (3d Cir. 2022) (Matey, J., concurring) (citing 4 Pa. Code §171.14(a)).

voter-registration commissions when an individual dies, 25 P.S. §1505(a). And the commissions in turn are responsible for inputting that information into the SURE system, 4 Pa. Code §183.7(a)(7), so that if a deceased voter submits a mail ballot, the potential fraud is flagged for the relevant county board. The handwritten date plays no role in this process.

Appellants say, however (Br.43-44) that “[i]n 2022, the date requirement was [actually] used to detect voter fraud” and prosecute the perpetrator. That is wrong. As a federal judge explained in rejecting this same argument, “the county board’s own Rule 30(b)(6) designee testified that the fraudulent ballot [in the case appellants cite] was first detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope.” *Schmidt*, 703 F.Supp.3d at 679 n.39; *accord Eakin*, slip op.16-17.

4. *NAACP*. The recent *NAACP* litigation confirmed that, in practice, the date requirement is useless when it comes to maintaining the honesty and integrity of elections—resulting in judicial rulings that, for reasons explained immediately below, appellants are collaterally estopped from challenging. *See* R.78a; *Pennsylvania State Conference of NAACP Branches v. Secretary Commonwealth of Pennsylvania*, 97 F.4th 120, 125, 127, 137 (3d Cir. 2024).

a. As the Third Circuit in *NAACP* explained, the summary-judgment record there showed that none of the Commonwealth’s 67 counties uses the date

requirement for any purpose. 97 F.4th at 125. In particular, the requirement is “irrelevant to whether a vote is received timely” and “not used ... to determine when the voter completed it.” *Id.* Rather, a ballot’s timeliness “is established both by a receipt stamp placed on the envelope by the county board and separately through scanning of the unique barcode on the envelope.” *Id.* at 127. The date requirement also “bears no relation ... to whether a voter is qualified under Pennsylvania law to vote.” *Id.* at 131; *accord id.* at 139-140 (Shwartz, J., dissenting).

Before the Commonwealth Court in *BPEP*, appellants dismissed the Third Circuit’s agreement with the district court’s conclusion as dictum. That characterization was not correct (which may be why appellants do not reprise it here). As this Court has noted, “courts are bound ‘not only [by] the result[of a judicial decision,] but also [by] those portions of the opinion necessary to that result.’” *Commonwealth v. Batts*, 163 A.3d 410, 439 (Pa. 2017) (first alteration in original) (*quoting Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996)) (subsequent history omitted). In *NAACP*, the “result” on appeal, i.e., the court’s bottom-line holding, was that enforcement of the date requirement does not violate the Civil Rights Act’s “materiality provision” (52 U.S.C. §10101(a)(2)(B)), which bars States from refusing to count any ballot based solely on the voter’s immaterial error or omission. 97 F.4th at 125. 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, that is, then failing to comply with it would not be an *immaterial* error or omission. The resolution of an issue predicate to a decision’s bottom-line holding is not dicta.

Third Circuit precedent leads to the same conclusion about the considered nature of the court of appeals’ view that the date requirement serves no purpose. The Third Circuit considers a statement in a published opinion dicta only when the statement is “peripheral,” because peripheral reasoning “may not have received the full and careful consideration of the court that uttered it.” *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570, 583 n.18 (3d Cir. 2014) (quotation marks omitted). The date requirement’s lack of purpose was no stray aside in *NAACP*. To the contrary, it was a substantial and integral part of the court’s analysis. Indeed, it was discussed in the opinion’s introduction, which (as one would expect) summarized the components predicate to the court’s decision. *See* 97 F.4th at 125. It was not remotely “peripheral.”

b. Given *NAACP*, appellants are collaterally estopped from arguing that the date requirement serves any purpose. Estoppel “avoid[s] the ‘cost and

vexation’ of repetitive litigation, conserv[es] judicial resources,” and “encourag[es] reliance on adjudication.” *In re Coatesville Area School District*, 244 A.3d 373, 379 (Pa. 2021). It applies where: “[1] the issue is the same as in the prior litigation; [2] the prior action resulted in a final judgment on the merits; [3] the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and [4] the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action.” *Id.* All four elements are met here. *First*, the relevant issue—whether the date requirement serves any purpose—is the same here as it was in the *NAACP* appeal. In fact, the requirement’s lack of purpose was a key holding of the district court’s summary-judgment decision, which was based on an extensive factual record, *see Schmidt*, 703 F.Supp.3d at 676 (recounting undisputed facts); *see also* R.112a. And the Third Circuit affirmed this holding, explaining that “[n]o party disputed that election officials” do not use the handwritten date for any purpose related to determining a voter’s qualification, the ballot’s timeliness, or when the voter signed the declaration. 97 F.4th at 129. *Second*, the Third Circuit entered a final judgment on the merits in *NAACP*. *See* Dkt. No. 266, *NAACP*, No. 23-3166 (3d Cir. May 8, 2024). *Third*, appellants were parties to the *NAACP* appeal. *See NAACP*, 97 F.4th at 123-124. *Fourth*, appellants had a full and fair opportunity to litigate whether the date requirement serves any purpose in *NAACP*.

In *BPEP*, however, appellants disputed both that the issue was the same there as in *NAACP* and that they had a full and fair opportunity to litigate it. That argument lacked merit and would likewise lack merit here if raised in reply. Appellants not only had a full and fair opportunity to litigate the issue in *NAACP*; they actually did litigate it. Indeed, their Third Circuit briefs (written by the same counsel representing them here) made the exact same arguments about the date requirement's purpose that they make here. For example, their Third Circuit reply brief asserted the date requirement helps ensure timeliness (serving as a backstop in case the SURE system fails or election officials do not timestamp a ballot), promotes solemnity, and prevents fraud. Appellants' Reply Brief (ECF 188) at 22-24, *NAACP*, No. 23-3166 (3d Cir. Jan. 17, 2024). Those are the same arguments they make here. But the Third Circuit disagreed, reiterating the district court's finding that the requirement serves no purpose. And the court of appeals unquestionably issued a final judgment on the merits of the appeal. So again, all the collateral-estoppel requirements are met.

In any event, appellants have never asserted in this case that any of the Commonwealth's 67 county boards makes any use of the handwritten date for any purpose. Nor has any county board (or other state or local official charged with administering elections in Pennsylvania) filed a brief with this Court claiming that the date is used for any reason other than disqualifying voters. Therefore, even if

appellants were not estopped from contesting the requirement's purposelessness in general, they have waived the argument that the handwritten date plays any role whatsoever in election administration.

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

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

241 A.3d at 1090-1091 (op. of Dougherty, J.) (quotation marks omitted). This Court, however, has not held that any of these is a valid state interest that the date requirement serves. (The “Background” section of the Court’s opinion in *Ball* recounted the dissenters’ views in *In re 2020 Canvass*, see *Ball*, 289 A.3d at 10, but the “Analysis” section of the *Ball* opinion made no mention of purpose, whether those mentioned in *In re 2020 Canvass* or otherwise.) And particularly in light of the record developed since *Ball* and *In re 2020 Canvass* regarding how the date requirement is actually used (and not used), the Commonwealth Court was correct

to conclude that none of the three purposes identified by the dissenters in *In re 2020 Canvass* is a legitimate interest that the date requirement actually serves.

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

McCormick for U.S. Senate v. Chapman, 2022 WL 2900112, at *12-13 (Pa. Commw. Ct. June 2, 2022) (emphasis omitted).

Moreover, even if dating the envelope did prove when a ballot was executed in full, such proof does not serve a state interest sufficient to deny people their

fundamental right to vote. The *In re Canvass* partial dissent stated that the requirement serves the purpose of “ensuring” the voter’s “desire to cast [a mail ballot] in lieu of appearing in person at a polling place.” 241 A.3d at 1090. But what shows the voter’s desire to cast a mail ballot is simply her submission of the ballot. If the contrary suggestion were correct, then the voters who forgot to date their envelopes before submission would have shown up to vote in person, because the absence of a date would have meant those voters did not actually “desire to cast [a mail ballot] in lieu of appearing in person,” *id.*

Second, the *In re Canvass* partial dissent reasoned that “the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot.” 241 A.3d at 1090 (op. of Dougherty, J.). But as discussed, the Election Code requires officials to verify eligibility before a mail ballot is even sent. *See supra* p.24-25. In any event, voter eligibility is measured as of election day, not any earlier point in time. For example, if a voter turns 18 on election day, she is eligible to vote in that election. 25 P.S. §2811. Neither the code itself nor counties’ implementation involves using the date to verify voter eligibility. *See id.* Indeed, in a partial concurrence and partial dissent in *Ball*, Justice Brobson, joined by Justice Mundy, recognized this, stating that “none of the provisions of ... the Code [relating to absentee or mail voting] have any bearing on determining voter qualification at all.... The qualification of the elector is established ... *before* the

mail-in or absentee ballot is sent to the elector, through the application and approval process ... in ...the Code.” 289 A.3d at 39.

Third, the *In re Canvass* partial dissent stated that “[t]he date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.” 241 A.3d at 1091 (op. of Dougherty, J.). Under the Election Code, however, and again as confirmed in litigation since *In re Canvass*, the date has nothing to do with either timeliness or detecting and preventing fraud. *See supra* pp.24-27. For example, if an envelope is backdated, i.e., if a voter, at some time after the deadline for receipt of a mail ballot, writes a date on the envelope that is before that deadline, the ballot will not be counted because it will not be received before the deadline.

Appellants offer yet another rationale, positing (Br.42) that the date requirement “serves the Commonwealth’s interest in solemnity.” Most of the cases they cite in making this argument, however, are not even election cases (unsurprisingly, given the country’s unfortunate history of disqualifying eligible voters under the guise of “solemnity”). And not a single one involved a date requirement. Their leading case, moreover, *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018), never even mentions “solemnity.” That none of the cases involved a date requirement is critical because the question here is not whether a solemnity rationale could *ever* suffice for *any* government regulation. The

question is whether it makes sense to say that a voter will take the act of completing and submitting a mail ballot more seriously because of a mandate to date the ballot's outer envelope. Even appellants appear to recognize that the answer is no, as they do not even try to articulate the logic behind a solemnity rationale. Understandably so: The logic would be that a voter, while looking over her ballot—the candidates for each race, the offices being contested, and so on—will think: “This must be taken seriously, not because of the importance of the offices, not because I am playing my singular role in the mosaic of democracy, but because I will have to write a plausible date on the outer envelope.” That is untenable. And again, appellants cite no case endorsing a solemnity rationale for a date requirement. Unsurprisingly, then, a federal court just rejected this very “solemnity” argument as “based solely on supposition.” *Eakin*, slip op.17-18.⁶

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

⁶ Reinforcing that completing the date is a mere formality, not a solemn act, the Pennsylvania Department of State now requires all mail-ballots' outer envelopes to prefill the year, so that voters fill in only the month and day. *See* Pennsylvania Department of State, *Directive Concerning the Form of Absentee and Mail-in Ballot Materials* at 3-4 (July 1, 2024).

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

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

1. This Court Has Not Decided The Question Presented Here

Appellants argue (Br.18-22) that in *Ball* and *PDP*, this Court rejected challenges to the date requirement under the Free and Equal Elections Clause. As the Commonwealth Court recognized (R.101a-106a), that is incorrect. In fact, appellants do not cite a single case or other authority reading either *Ball* or *PDP* as they do.

In *PDP*, this Court addressed whether the Free and Equal Elections Clause requires counties to notify voters who made a mistake completing their ballots and provide an opportunity for them to cure any problems. 238 A.3d at 373. The Court concluded that the Clause does not do so and thus explained that the challenger there was “not entitled to the relief it seeks.” *Id.* at 374. Under *PDP*, then, the Clause does not obligate counties to try to help voters *bring ballots into compliance* with the date requirement. That is a different question from the consequences when a ballot is *not* brought into compliance, i.e., a different question than whether the Constitution allows undated or misdated ballots to be discarded. *PDP* did not address the latter, and certainly never “held” (Appellants’ Br.20) that enforcement of the date requirement complies with the Clause. Again, appellants cite no case reading *PDP* as they do.

Appellants likewise go astray in saying (Br.1) that *PDP* “upheld the declaration mandate.” There was no challenge in *PDP* to any part of the declaration mandate, including the date requirement. The relevant claim, again, was that counties must contact voters who make a mistake in completing mail ballots and provide those voters a chance to fix the mistake. It is simply incorrect to assert that *PDP* “upheld the declaration mandate” against any challenge.

Ball is equally unhelpful to appellants (and as noted actually forecloses many of their arguments, *see supra* pp.23). This Court held there, as a matter of

statutory interpretation, that the Election Code “requires the disqualification of ballots that arrive in undated or incorrectly dated return envelopes.” 289 A.3d at 23. The Court made no holding about the Clause—although three members of the then-six-member Court suggested in dicta that “failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth,” *id.* at 27 n.156 (Wecht, J., joined by Todd, C.J., and Donohue, J.). Although the Commonwealth Court here prominently quoted this three-justice footnote (R.105a-106a), appellants notably have nothing to say about it.⁷

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

Because the date requirement advances no purpose, it cannot satisfy any level of judicial scrutiny. The *only* reason an election official in Pennsylvania would examine the handwritten date on a ballot-return envelope is to determine whether to disqualify the ballot based on a “minor irregularit[y],” *In re Petitions*,

⁷ Any argument that this footnote was referring to interpreting potential ambiguities in the federal materiality provision—not the date requirement—is incorrect. The footnote says that even if enforcing the date requirement did not violate the materiality provision (as three justices indicated it did), “failure to comply with *the date requirement* would not compel the discarding of votes in light of the Free and Equal Elections Clause.” 289 A.3d at 27 n.156 (emphasis added). The footnote therefore was about the date requirement.

188 A.2d at 256. Such purposeless disqualification is not “rationally related to the Commonwealth’s interest in ensuring honest and fair elections,” *Banfield*, 110 A.3d at 177. In fact, contrary to that interest, it unfairly disqualifies thousands of eligible voters. Appellants’ extended attacks on the court’s application of strict scrutiny would therefore not warrant reversal even if those attacks had merit. Because enforcement of the date requirement is barred whatever the level of scrutiny, the Court may enjoin such enforcement without resolving which level applies.

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

Appellants repeatedly say, however (e.g., Br.31, 48), that enforcing the date requirement cannot violate the Clause because rules that disqualify ballots that fail “the usual burdens of voting” are per se consistent with the Clause. But appellants cite *no* Pennsylvania case that makes that an actual standard. More importantly, the “usual burdens of voting” do not include complying with a requirement that serves no state interest whatsoever. Appellants cite no authority to the contrary (from Pennsylvania or elsewhere). Their only support is the assertion (Br.30) that “[e]very state requires voters to write pieces of information on voting papers.” Whether that is true or not is irrelevant. The date requirement violates the Clause not because it requires voters to write information on voting papers but because it disqualifies votes for no legitimate reason. As noted, appellants cite *no* jurisdiction in which that has been allowed, whereas the Pennsylvania Democratic Party has identified multiple states with practices ensuring that where a requirement serves no purpose, it will not be applied to discard ballots. *See supra* p.22 n.4.

Much the same point answers appellants’ argument (Br.15) that a “voter’s failure to follow the rules for voting is not a denial of the right to vote by the Commonwealth.” If that were true, then the legislature could make the right to vote depend on compliance with any of an endless number of wholly senseless “rules.” This Court’s longstanding and consistent precedent (discussed earlier)

shows that that is not the law. Rather, the right to vote cannot be denied because of minor errors in complying with a rule that serves no purpose.

Appellants next contend (Br.17) that enforcing the date requirement does not offend the Clause because such enforcement fails to satisfy *Winston v. Moore*'s supposed "gross abuse" standard. But this Court has never applied that standard to a statute limiting a voter's right under the Clause to cast a ballot and have it counted, and *Winston* itself addressed limitations on a ballot's structure and documentation requirements for *candidates* seeking to appear on it—limitations markedly different than the disqualification of *voters*, 91 A. at 522-523. Indeed, *Winston* explained that the provisions challenged there "denie[d] no qualified elector the right to vote," and imposed "dut[ies] ... upon the candidate and not upon the elector." *Id.* at 523. In other words, "[t]he rights of the voter [we]re only incidentally involved." *Id.* In that circumstance, deference to the legislature (manifested in the "gross abuse" language appellants invoke) makes sense. By contrast, when analyzing the lawfulness of election rules that result in ballot disqualifications, this Court has made clear that such rules must at least be "rationally related to the Commonwealth's interest in ensuring honest and fair elections," *Banfield*, 110 A.3d at 177.

Appellants further suggest (Br.28-35) that enforcement of the date requirement accords with the Clause by framing the burden the date requirement

imposes as whether it is “difficult” to date the return envelope. But that framing is inconsistent with this Court’s cases describing the burden of ballot-casting rules as “disfranchise[ment],” *Appeal of Gallagher*, 41 A.2d at 632; *see also Appeal of Norwood*, 116 A.2d at 555 (quoting 25 P.S. §3063(a)). The relevant question here is whether the Clause permits respondents to disenfranchise thousands of qualified voters each election solely for failing to comply with the purposeless date requirement. As explained, the answer to that question is no. *Cf. Eakin*, slip op.21 (enforcement of the date provision violates federal law because “the weight of the burden on the citizens right to vote is not counterbalanced by evidence of any governmental interest”).

Appellants relatedly argue (e.g., Br.33) that enforcing the date requirement cannot violate the Clause unless enforcement makes voting so difficult as to amount to a denial of the franchise. As explained, *see supra* pp.14-15, that is not the standard, and the two sentences in *Walsh* devoted to the Clause (which merely echo and summarily reject a party’s peripheral argument under the Clause) do not suggest otherwise, *see Walsh*, 322 A.3d at 909. Indeed, the same cases appellants rely on for their “so difficult” argument explain that another “minimum requirement[] for ‘free and fair’ elections” is that “each voter under the law has the right to cast his ballot and have it honestly counted.” *LWV*, 178 A.3d at 810

(quoting *Winston*, 91 A. at 523). Appellants acknowledge (Br.38) as much. The date requirement improperly denies that right.

Even if “so difficult” *were* the standard, it would be satisfied here. In election after election, thousands of mail ballots have been disqualified solely based on non-compliance with the date requirement. R.79a n.8. “The disfranchisement of even *one* person validly exercising his right to vote is an extremely serious matter.” *Perles*, 202 A.2d at 540 (emphasis added). The Court should not endorse appellants’ blithe dismissal (Br.33-35) of thousands of Commonwealth residents being denied—for no reason—one of their most foundational rights.

Finally, appellants suggest (Br.45-50) that applying the Clause to block the disqualification of ballots here would be inconsistent with decisions of courts in other jurisdictions. That too is wrong. For example, under the free and equal elections provision of the New Hampshire constitution, that state’s high court struck down a law requiring new registrants to be informed of other obligations associated with in-state domicile. *Guare v. State*, 117 A.3d 731, 741 (N.H. 2015) (per curiam). Likewise, under Massachusetts’ free-elections provision, the Massachusetts Supreme Judicial Court struck down an impediment to voting by incarcerated individuals. *Cepulonis v. Secretary of the Commonwealth*, 452 N.E.2d 1137, 1140-1142 (Mass. 1983).

Nor does federal law support appellants' position. Appellants say (Br.47) that under federal law, "a state's regulation of one method of voting cannot violate the right to vote when another voting method remains available." But even assuming appellants accurately describe federal law, Pennsylvania law is, as noted, more protective of the right to vote than federal law. Under Pennsylvania law, "[t]echnicalities should not be used to make the right of the voter insecure." *James*, 105 A.2d at 66. That principle is impossible to square with the discarding of ballots (cast by any method) for no valid reason.

3. *If This Court Opt To Resolve Which Level Of Scrutiny Applies, It Should Apply Strict Scrutiny Because The Date Requirement Mandates The Disqualification of Ballots*

Should the Court resolve the proper level of judicial scrutiny applicable here, strict scrutiny applies.

This Court analyzes claims under the Clause by weighing the alleged "violation of] the fundamental right to vote" or alleged "disparate treatment of any group of voters" against the state interest supposedly advanced by the challenged regulation. *Banfield*, 631 110 A.3d at 178. Appellants insist (Br.37) that *Banfield* is irrelevant here because it rejected the specific challenge there. That is wrong. *Banfield* says that "this Court has acknowledged that the right to vote is fundamental," 110 A.3d at 176, and that "[w]hen a statute significantly interferes with the exercise of a fundamental right, such a statute 'will be upheld only if it is

necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose,” *id.* at 176 n.15 (quoting *Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936, 947 (Pa. 2004)); *see PDP*, 238 A.3d at 369-370. Further, *Banfield* is consistent with this Court’s election jurisprudence—even when the Clause is not cited—requiring a compelling state interest to justify ballot disqualification. *See Appeal of Norwood*, 116 A.2d at 554-555; *Appeal of Gallagher*, 41 A.2d at 632; *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. *Banfield* therefore supports the application of strict scrutiny here, because enforcement of the date requirement significantly interferes with the exercise of the right to vote. Indeed, appellants do not claim that it doesn’t.

None of this gainsays this Court’s recognition that the General Assembly “may enact ... reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176-177. This authority does not permit the enforcement of a purposeless provision to disqualify votes. That is not a “reasonable” regulation of elections. *Id.*

4. *Enjoining Enforcement Of The Date Requirement Would Not Violate The Separation Of Powers*

Appellants argue (Br.39) that enforcing the Free and Equal Elections Clause here “would contravene the Pennsylvania Constitution’s separation of powers.” But contrary to their contention, the separation of powers does not mean that all

“‘technicalities’ in ‘the Election Code must be strictly enforced’” notwithstanding constitutional limits. Br.40 (quoting *Walsh*, 322 A.3d at 920 (Wecht, J., concurring)). The U.S. Supreme Court rejected that contention in *Moore v. Harper*, 600 U.S. 1 (2023), holding that election laws *are* “subject to the ordinary constraints on lawmaking in the state constitution,” *id.* at 30. Accordingly, Justice Wecht’s point in the opinion appellants quote was that “the legislature is free to impose technicalities” only “[w]ithin the bounds of constitutional protections,” such that “the Constitution’s Free and Equal Elections Clause may moderate [the Election Code’s] enforcement,” *Walsh*, 322 A.3d at 920 (Wecht, J., concurring) (emphasis added).

Petitioners purport in a footnote (Br.41 n.5) to “preserve the argument” that affirmance would violate the Elections and Electors Clauses of the U.S. Constitution by usurping the legislature’s authority to regulate elections. Under Pennsylvania law, however, “arguments raised only in brief footnotes [are] too undeveloped for review” and may be “ineffective to avoid waiver.” *Madison Construction Co. v. Harleysville Mutual Insurance Co.*, 735 A.2d 100, 109 n.8 (Pa. 1999). This Court thus should deem appellants’ federal constitutional argument waived. In any event, affirmance would not violate the Elections or Electors Clauses because such a ruling would not remotely “transgress the ordinary bounds of judicial review,” *Moore*, 600 U.S. at 36. Indeed, there would be nothing

extraordinary about this Court recognizing (again) that the Pennsylvania Constitution’s protection of free elections—which extends beyond what the U.S. Constitution provides—precludes disqualifying ballots under a provision that serves no state interest.

II. ENJOINING ENFORCEMENT OF THE DATE REQUIREMENT DOES NOT REQUIRE STRIKING DOWN ALL OF ACT 77

Appellants—but not the Attorney General—assert (Br.51) that the relief requested here would require the Court to “stri[k]e ... universal mail voting in Pennsylvania” entirely, due to the non-severability clause in the statute that created such voting, Act 77. As the Commonwealth Court recognized (R.113a-115a), that is incorrect. The requested relief, enjoining the disqualification of ballots solely for failure to comply with the date requirement, would not require the Court to strike the date requirement from the statute books, so the non-severability clause would not be triggered by granting that relief.

In fact, the Commonwealth Court had recognized that point in a previous case. In *Bonner v. Chapman*, 298 A.3d 153 (Pa. Commw. Ct. 2023), the court noted that two previous cases had “concluded that the [date-requirement] statute did not require an otherwise timely received, valid absentee or mail-in ballot cast by an eligible Pennsylvania elector to be thrown out,” *id.* at 168. But, *Bonner* continued, “[t]hese interpretations did not *invalidate* the Dating Provisions, as neither opinion struck the Dating Provisions from the Election Code or held that

electors cannot or should not handwrite a date on the declaration in accordance with those provisions.” *Id.* (emphasis added). The court thus determined that Act 77’s “Nonseverability Provision was not triggered.” *Id.* at 169.

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

Even if the Court were to invalidate the date requirement, that still would not require eliminating *all* mail voting; Pennsylvania law neither requires nor permits that absurd result. To start, Act 77’s non-severability clause ceased to have any relevance when the 180-day period for challenging Act 77 expired, *see* Act of Oct. 31, 2019, P.L. 552, No. 77, §13(2)-(3). Given that Act 77’s provisions are now “merg[ed] into” the Election Code, 1 Pa. C.S. §1953, it is the *code*’s severability clause that applies—and that clause states that the code’s provisions “are severable,” 25 P.S. §2603(a). In fact, it is unclear how Act 77’s non-severability

clause could be applied at this point, as the Election Code provisions supplied by Act 77 have since been amended with provisions that themselves contain no severability language, *see* Act of November 27, 2019, P.L. 673, No. 94; Act of March 27, 2020, P.L. 41, No. 12.

In any event, if Act 77's non-severability provision were relevant, "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*, 905 A.2d at 972 (quoted at R.114a-115a). In particular, this Court has been wary 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 non-severability clause). Act 77 has just such a non-severability clause. *See PDP*, 238 A.3d at 398 n.4 (Donohue, J., concurring) (analogizing that clause to the one in *Stilp*).

Appellants argue (Br.53) that *Stilp* is relevant only where a non-severability clause gives rise to separation-of-powers concerns. That is wrong; *Stilp*'s presumption in favor of severability is in fact codified in Pennsylvania's Statutory Construction Act, which provides that "[t]he provisions of every statute shall be severable," 1 P.S. §1925. In any event, Act 77's non-severability clause serves

precisely the same “in terrorem function”—by making “the price of invalidation too great”—that *Stilp* deemed “improper.” *Stilp*, 905 A.2d at 970, 979-980.

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 and impede the fundamental right to vote for millions of Pennsylvanians who have come to rely upon mail ballots after several election cycles. *See PDP*, 238 A.3d at 398 n.4 (Donohue, J., concurring) (reasoning that “[i]n the context of the COVID-19 pandemic, applying the nonseverability 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”).

Because Act 77’s non-severability clause could not be enforced consistent with the Free and Equal Elections Clause, the longstanding general presumption of severability (*see* 1 P.S. §1925) applies. Under that presumption, a statute is severable “unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court

finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” *Id.* Neither finding could be made here. Act 77 effected numerous significant changes to Pennsylvania’s election law: It “establish[ed] state-wide, universal mail-in voting”; “eliminated the option for straight-ticket voting; moved the voter registration deadline from thirty to fifteen days before an election; allocated funding to provide for upgraded voting systems; and reorganized the pay structure for poll workers.” *McLinko v. Department of State*, 279 A.3d 539, 543 (Pa. 2022). Nothing in the statute suggests that these important provisions are “inseparably connected with” the date requirement or are “incapable of being executed” without it. 1 P.S. §1925. And the only legislative history appellants muster (Br.51-52) does not even *mention* the date requirement, let alone suggest that it was crucial to some legislative “concern[.]” or “compromise[.]” To the contrary, the legislature merely incorporated pre-existing absentee-voting procedures wholesale into the mail-ballot procedures. *See supra* p.7. In short, there is no reason to think the broad range of significant voting matters Act 77 addressed rises or falls with the validity of the separate date requirement.

CONCLUSION

The Commonwealth Court's judgment should be affirmed.

March 31, 2025

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

According to the word-count function of the word-processing system used to prepare the brief, this brief contains 12,352 words that are countable under Pennsylvania Rule of Appellate Procedure 2135(a)(1).

/s/ Clifford B. Levine

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

/s/ Clifford B. Levine

CERTIFICATE OF SERVICE

On March 31, 2025, I caused the foregoing to be electronically filed and to be served via the Court's electronic filing system on counsel of record for each party listed on the docket.

/s/ Clifford B. Levine