**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| ROBERT ROSSMAN, in his official capacity as member of the Potter County Board of Elections,<br><br>Petitioner,<br><br>v.<br><br>DEPARTMENT OF STATE OF THE COMMONWEALTH OF PENNSYLVANIA and AL SCHMIDT, in his official capacity as Secretary of the Commonwealth,<br><br>Respondents. | No. 516 MD 2024 |

# RESPONDENTS' BRIEF IN SUPPORT OF THEIR CROSS-APPLICATION FOR SUMMARY RELIEF

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Respondents Pennsylvania Department of State and Al Schmidt, in his official capacity as Secretary of the Commonwealth (collectively "the Department"), respectfully submit this brief in support of their cross-application for summary relief.

Commissioner Robert Rossman, a member of the Potter County Board of Elections, seeks to invalidate a 2018 Directive issued by the Department of State that informs county boards of elections of their duties under the federal Help America Vote Act ("HAVA").[1] This past month, an *en banc* panel of this Court unanimously rejected a different challenge to the same 2018 Directive. *See PA Fair Elections v. Pennsylvania Dep't of State*, No. 1512 C.D. 2023, 2025 WL 1271208 (Pa. Cmwlth. May 2, 2025) (affirming decision that Directive was consistent with federal law). Commissioner Rossman's challenge should meet the same fate.

The 2018 Directive Rossman challenges instructs counties that, under HAVA, they must require individuals who seek to register to vote to provide either a driver's license number or partial social security number (if they possess either), and that the county must compare the

[1] The Directive is attached as Exhibit A.

number provided with information in one of two government databases. But it further instructs boards that they may not reject an application (or leave it pending indefinitely without a decision) based *solely* on a mismatch between the number provided by the applicant and the information in the database. Rather, in such cases, the county board is to investigate further to determine if the applicant is, in fact, an eligible voter.

Rossman objects to the Directive's instruction to counties that they may not reject a registration application based solely on a database mismatch. But he concedes that decisions as to whether to accept registration applications are to be made under state law—as this Court recognized in *PA Fair Elections*. *See* 2025 WL 1271208, at *2. And he further concedes that Pennsylvania's voter registration statute does not require applicants to submit driver's license numbers or social security numbers at all, much less instruct counties to reject applications based solely on a mismatch between the number provided by the voter and the information in a government database. In fact, that statute sets forth the specific bases on which a County may reject a voter registration application, and none of those bases involves mismatches between the

number provided by a voter and the information in a government database. As a result, the Directive is fully consistent with state law, and Rossman's claims should be rejected.

The Department is also entitled to summary relief for the additional reason that Rossman, a single member of the Potter County Board, lacks standing to bring this action. He attempts to assert claims that would, if anything, belong solely to the board as a whole. Yet the Board is not a petitioner here, and no other member has chosen to join him in this suit. He cannot show that he has suffered any individual injury, and therefore he cannot invoke this Court's jurisdiction.

The Department's cross-application for summary relief should be granted, and this case should be dismissed.

## BACKGROUND

### I. Voter Registration in Pennsylvania

Citizens of Pennsylvania are qualified to vote if they satisfy four criteria: they must (1) be at least 18 years old on the day of the election; (2) have been a U.S. citizen for at least one month prior to the election; (3) have lived in Pennsylvania and in their election district for at least thirty days prior to the election; and (4) not be imprisoned for a felony

conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a).[2] In addition, voters in Pennsylvania must be registered. State law provides multiple ways of registering, including in person at a county election office, by mail, at a driver's license center, and at other government agencies. *See* 25 Pa.C.S. § 1321.

By law, the Secretary is required to "prescribe the form of an official voter registration application" that Pennsylvania citizens can return to their county boards of elections. 25 Pa.C.S. § 1327(a)(1). That form must ask for the following information from the voter: (a) full name; (b) residence address; (c) mailing address; (d) name and address on any previous registration; (e) political party; (f) date of birth; (g) telephone number; and (h) race. *Id.* Nowhere does Pennsylvania law require applicants to submit driver's license numbers or social security numbers with their voter registration applications.

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[2] *See also Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Cmwlth. 2000), *aff'd*, 783 A.2d 763 (2001) (holding that individuals with felony convictions, other than those currently incarcerated, may register to vote); 1972 Op. Atty. Gen. No. 121 (concluding that *Dunn v. Blumstein*, 405 U.S. 330 (1972), prohibits the enforcement of certain durational residency requirements longer than 30 days); U.S. Const. amend. XXVI (prohibiting denial of right to vote to citizens 18 years of age or older on account of age).

Under the Pennsylvania Voter Registration Act, Act 3 of 2002 ("the Registration Act"), county registration commissions are responsible for processing voter registration applications. In most cases, the county's commissioners comprise the registration commission. 25 Pa.C.S. § 1203(b)(1).[3] A registration commission is required to accept a registration application and register the applicant if it determines that: "(i) The application requests registration" and "(ii) The application contains the required information indicating that the applicant is a qualified elector of the county." 25 Pa.C.S. § 1328(b)(3).

A commission is required to reject an application if it determinates that the application was incomplete; that the applicant is not qualified; that the applicant is not entitled to an address change; or that the applicant is not entitled to a name change. 25 Pa.C.S. § 1328(b)(2). Any rejection "shall be made no later than ten days before the election succeeding the filing of the application," which allows the applicant time to seek redress from a Court of Common Pleas. *Id.*; *see also id.* § 1602 (appeal process); 25 P.S. § 3073.

[3] This brief uses "county board" and "registration commission" interchangeably.

## II. The Help America Vote Act

Under the federal Help America Vote Act (HAVA), a state must "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State." 52 U.S.C. § 21083(a)(1)(A). HAVA also contains two provisions requiring voters to provide specific identifying information to state officials: one provision that applies when individuals register to vote, and another that applies when certain registered voters cast their ballots.

**HAVA's Registration Rule:** Under HAVA, a state may not process an application to register to vote for federal office unless the application contains a current and valid driver's license number or the last four digits of a social security number, provided that the applicant possesses one or both numbers. 52 U.S.C. § 21083(a)(5)(A)(i).[4] HAVA also

[4] For applicants who have neither a current and valid driver's license nor a social security number, HAVA provides a "Special Rule,"

requires a state's chief election official to enter into an agreement with the state motor vehicle authority, which in turn must enter into an agreement with the Commissioner of Social Security, to enable the matching of information in the statewide voter registration system with information in the motor vehicle authority's database. 52 U.S.C. § 21083(a)(5)(B).

While HAVA requires that certain information must be provided on applications to register to vote in federal elections, it leaves it to states to "determine whether the information provided by an individual is sufficient to meet [this requirement] in accordance with State law." 52 U.S.C. § 21083(a)(5)(A)(iii).

**HAVA's First-Time Voter Rule:** Separately, HAVA requires that a voter who registered by mail and is voting in the state for the first time must provide identification when they attempt to vote. 52 U.S.C. § 21083(b)(1). This requirement applies regardless of whether the individual is voting by mail or in person. *Id.* § 21083(b)(2)(A). An in-person voter must present "a current and valid photo identification" or "a

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which requires states to assign the applicant a number that will serve to identify the applicant for voter registration purposes. 52 U.S.C. § 21083(a)(5)(A)(ii).

copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." *Id.* § 21083(b)(2)(A)(i). Mail voters must return a copy of one of these documents with their ballots. *Id.* § 21083(b)(2)(A)(ii).

Importantly, this provision does not apply if the voter provided a driver's license number or partial social security number when registering to vote, and election officials matched that information against the state's records. *Id.* § 21083(b)(3)(B)(i)–(ii).

## III. The Department's Directive

The Department complies with its obligation under HAVA to implement an "interactive computerized statewide voter registration list" by operating the Statewide Uniform Registry of Electors (SURE) system. *See* 25 Pa.C.S. § 1222. Among other functions, the SURE system assists counties in processing voter registration applications. 25 Pa.C.S. § 1222(c). SURE allows a county to designate the status of a voter registration application—that is, whether it was approved, rejected, or whether it remains pending. *See* Declaration of Jonathan Marks (attached as Exh. B). Within each category, there are different options; for instance, the status "PEND – HAVA NOTICE SENT" indicates that,

due to a mismatch between the information provided by the voter and the information in the relevant database, a follow-up notice has been sent seeking additional information. *Id.*

In 2018, the Department issued a document entitled, "Directive Concerning HAVA-Matching Drivers' Licenses of Social Security Numbers for Voter Registration Applications" ("the Directive"), which Rossman has challenged in this action. The Directive spelled out certain requirements of state and federal law relating to the processing of voter registration applications.

The Directive instructed counties as to their obligation under HAVA. It specifically reminded county boards of HAVA's registration rule, instructing them that HAVA required:

> (1) that all applications for new voter registration include a current and valid PA driver's license number, the last four digits of the applicant's social security number, or a statement indicating that the applicant has neither a valid and current PA driver's license or social security number; and
>
> (2) that voter registration commissions compare the information provided by an applicant with the Department of Transportation's driver's license database or the database of the Social Security Administration.

Exh. A. In addition, the Directive informed county election officials that "Pennsylvania and federal law are clear that voter registrations may *not*

be rejected based *solely* on a non-match between the applicant's identifying numbers on their application and the comparison database numbers." *See* Exh. A (second emphasis added). Finally, it further informed county election officials that they could not leave an applicant in "pending" status indefinitely based upon a mismatch with a submitted driver's license number or social security number.

The Directive did not prohibit counties from comparing the driver's license number or partial social security number submitted by the applicant with information in the state's databases; to the contrary, it instructed them that HAVA requires them to do so. Nor did it instruct counties to ignore the results of this comparison. Rather, it simply told them that a mismatch could not be the *sole* basis for a rejection of an application, and that they could not leave applications in "pending" status indefinitely.

Under the Directive, the proper response for a county that receives an application generating a mismatch is to investigate further, which will typically involve contacting the applicant for more information. Mismatches have many innocuous causes, including sloppy handwriting; data-entry error; or an error in the database itself. In most cases, these

errors can be easily identified, and they should not serve as a barrier to accepting the voter's application.

If, on the other hand, further investigation reveals that the applicant is not qualified or that the application is fraudulent, then the proper course is for the county to reject the application and, if appropriate, refer the matter to law enforcement. Nothing in the Directive prevents counties from doing so. What the Directive instructs them not to do is to deny an application *without* any further investigation, or to leave the investigation in "pending" status indefinitely. Doing the latter denies the applicant the opportunity to appeal the board's decisions, which is guaranteed by law.

## IV. This Action

On November 4, 2024, Petitioner, a member of the Potter County Board of Elections, filed his Petition for Review, seeking declaratory and injunctive relief against the Department. The Petition contains two counts: Count I alleges that the Directive violates state law relating to the processing of voter registration applications; and Count II alleges that the Directive constitutes an unlawful regulation that was

promulgated without adherence to the proper procedure.[5] In response, the Department filed preliminary objections to the petition, which have been fully briefed. Rossman has filed an application for summary relief, and the Department has responded to that application.

On May 29, the Court entered an order determining "that there are no outstanding questions of fact and that this matter involves purely legal questions" and concluding "that disposing of this matter via cross-applications for summary relief is the most expeditious means of resolving the legal issues in dispute." Consistent with that order, the Department is now moving for summary relief.

## STANDARD OF REVIEW

Applications for summary relief are "properly evaluated according to the standards for summary judgment." *McGarry v. Pennsylvania Bd. of Prob. & Parole*, 819 A.2d 1211, 1214 n.7 (Pa. Cmwlth. 2003). Thus, a party seeking summary relief must demonstrate that its "right to relief

[5] As discussed above, this Court recently rejected a challenge to the Directive. *See PA Fair Elections*, No. 1512 C.D. 2023, 2025 WL 1271208. A third challenge remains pending in this Court. *See McLinko v. Department of State*, No. 1205 CD 2024 (filed Sept. 16, 2024). A federal challenge to the directive was unsuccessful. *See Keefer v. Biden*, 725 F. Supp. 3d 491 (M.D. Pa. 2024), *aff'd sub nom. Keefer v. President*, No. 24-1716, 2025 WL 688924 (3d Cir. Mar. 4, 2025).

is clear" and that "no issues of material fact are in dispute." *Id.* Here, the Court has concluded that that are no disputes of material fact and that the only remaining issues concern questions of law.

## SUMMARY OF ARGUMENT

The Department is entitled to summary relief for two separate reasons. First, as a single member of the Potter County Board of Elections, Petitioner lacks standing. He cannot assert claims that would belong to the Board, nor can he show how the Directive injures him in any way. Second, the Directive he challenges is fully consistent with state law, and was issued pursuant to the proper procedures. State law does not require an applicant to submit a driver's license number or social security number, so it cannot fairly be read to require states to reject applications based solely on the fact that the number provided by an applicant does not correspond to information in a government database. The Department's application should be granted.[6]

[6] As noted above, the Department has submitted preliminary objections raising the same arguments.

## ARGUMENT

### I. Commissioner Rossman Lacks Standing

To invoke this Court's jurisdiction, Petitioner Rossman must show that he "has a substantial, direct, and immediate interest in the matter." *Markham v. Wolf*, 136 A.3d 134, 140 (2016). As a single member of the Potter County Board of Elections, he cannot make this showing.

To establish standing, a petitioner must identify "some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *William Penn Parking Garage v. Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). An interest is direct if the challenged law causes "harm to the party's interest." *Markham*, 136 A.3d at 140 (cleaned up). An interest is immediate if the "causal connection is not remote or speculative." *Id.* (cleaned up).

Here, Rossman has brought this action in his capacity as a single member of the Potter County Board of Elections. The Board itself is not a petitioner, nor have either of Petitioner's fellow commissioners joined him in this action. Rather, Commissioner Rossman—one of three votes on the Board—has brought this case solely on his own.

Rossman alleges that the Directive improperly requires him to register individuals who (he contends) do not meet the requirements for eligibility. But in Pennsylvania, "[a]ctions of a [registration] commission must be decided by a majority vote of all members except as otherwise provided in this part." 25 Pa.C.S. § 1203. Pennsylvania law makes clear that only the commission as a whole—and not any individual commissioner—can decide whether to accept or reject an application.

Specifically, decisions regarding registration applications are governed by Section 1328(b), which provides: "Decision.—A commission shall do one of the following," followed by eight different options, including registering the applicant, rejecting the application, or forwarding the application to the proper commission if the applicant is a resident of a different county. 25 Pa.C.S. § 1328(b). A single commissioner cannot make a decision with respect to a voter registration application; only a majority of the commission can do so. And consistent with this scheme, the Department's 2018 Directive explains the legal duties of *commissions* with respect to making determinations of eligibility. It does not impose any duties on individual commissioners.

This fact is fatal to Rossman's claims, as individual members of an elected body lack standing to represent the interests of that body. For example, this Court held that a single councilmember could not appeal a Philadelphia Zoning Board decision when the law only "grants standing to City Council as a body." *O'Neill v. Philadelphia Zoning Bd. of Adjustment*, 169 A.3d 1241, 1245 (Pa. Cmwlth. 2017). Likewise, this Court concluded that a single township commissioner lacked standing to bring a declaratory judgment action challenging the employment contract between the township and the township manager. *Szoko v. Twp. of Wilkins*, 974 A.2d 1216, 1220 (Pa. Cmwlth. 2009); *see also Miller v. Bd. of Prop. Assessment, Appeals & Review of Allegheny Cnty.*, 703 A.2d 733 (Pa. Cmwlth. 1997) (one member of the board of commissioners lacked standing to appeal the trial court's order declaring the county's property tax assessment practice to be unlawful).

In his opposition to the Department's Preliminary Objections, Rossman has asserted that he "does not purport to represent the interests the Potter County Registration Commission as a whole." *See See* Pet's Br. in Opp. to Prelim. Objs. at 22 (May 5, 2025) ("Rossman P.O. Opp."). Yet his petition repeatedly alleges that the Directive interferes with the

obligations of the *Commission* under § 1328(b). *See, e.g.*, Pet. ¶ 82 ("But for the Department's 2018 Directive—and the implied threat of consequences therein—the Board would not approve applications with mis-matched driver's license numbers or social security numbers, until having exercised reasonable effort to reconcile the disparity with the applicant."). These claims are inaccurate, but they also demonstrate why this action fails: Rossman cannot represent the interests of the Commission as a whole. So even if it were the case that the Directive conflicted with the requirements of Section 1328(b), only the Commission—and not Rossman himself—could assert that injury.

Nor does Section 1328(a)—which governs the "[e]xamination" of voter registration applications—help Rossman's argument. That section simply provides that, before the commission makes a decision as to an application, the application is to be examined by "a commissioner, clerk or registrar of a commission." Nothing in the Directive interferes with the review process specified in Section 1328(a). Rossman's complaint with the Directive is that it requires the registration of citizens he does not believe are qualified. But it does not prevent him—or any other

commissioner or employee of the Potter Board—from *reviewing* the application pursuant to Section 1328(a).

In fact, Section 1328(a) does not impose any duties on Rossman at all: it simply requires that *someone*—"a commissioner, clerk or registrar of a commission"—conduct an "[e]xamination" of each application before the Board determines whether to accept it. Rossman does not plead, and has offered no facts to demonstrate, that he performs this clerical role for the Potter County board. But more importantly, nothing in the Directive interferes with the initial review of registration applications required by Section 1328(a), and Rossman has offered no credible arguments to the contrary. Simply put, Section 1328(a) does not give him "a substantial, direct, and immediate interest" such that he can maintain this action. *See Markham*, 136 A.3d at 140.

For the same reasons, Rossman's claim that he is subject to criminal or civil penalties for complying with the Directive likewise rings hollow. Again, he confuses his individual role with that of the Potter County Commission as a whole. For instance, he relies heavily on 25 Pa.C.S. §§ 1803 & 1804, *see* Pet. ¶¶ 75–77, but those provisions only apply if "a commission," *see id.* § 1803(b)—not an individual member—

fails to comply with its legal obligations; and they impose penalties *on the county*, *see id.* § 1804(b)—not on individual board members. Indeed, Rossman claims that the threat of criminal and civil penalties leads him "to register new applicants whose driver's license number or last four digits of the social security number does not match the applicant's information located in the appropriate database," Pet. ¶ 77, again ignoring that decisions regarding whether to accept or reject an application are the responsibility of the Board as a whole.

The logic of this Court's decision in *Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024 (Pa. Cmwlth. July 18, 2024) (single-judge op.) ("*BPEP*") (attached as Exhibit C), is directly relevant here. In *BPEP*, the Court rejected an attempt by a single county commissioner—who, like Rossman, lacked support from either of his two fellow commissioners—to intervene in a lawsuit regarding the proper interpretation of certain provisions of the Election Code. Because the commissioner sought to intervene solely on his own, the Court concluded that he wished "to do nothing more than merely offer his perspective on the correctness of his own future government conduct as a member of the [board] and what he believes is correct with respect to the law" and

therefore his interest in the dispute was "no greater than that of the general citizenry in having duly enacted statutory provisions enforced." *Id.* at 51. The same is true here.[7]

## II. Rossman's Claims Fail on the Merits

Because Rossman lacks standing, the Court need not address the merits of his claims. But if it does so, it should grant the Department summary relief as to both counts. The 2018 Directive is wholly consistent with state law, and it was issued pursuant to the proper procedure. As a result, both of Rossman's claims fail.

### A. The Directive Is Lawful

On the merits, the Department is entitled to summary relief as to Count I, because the Directive is fully consistent with state law. Rossman's claims to the contrary rest on misstatements both as to what state law requires and as to what the Directive actually says.

State law does not require applicants to submit driver's license numbers or partial social security numbers to register to vote. That

[7] The Supreme Court subsequently ruled that this Court lacked jurisdiction over the underlying action in *BPEP*. *See Black Pol. Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024). It did not question this Court's decision on intervention.

requirement comes entirely from HAVA, which is a federal statute. The Registration Act specifically requires applicants to provide eight pieces of information, which do not include driver's license numbers or social security numbers. *See* 25 Pa.C.S. § 1327(a)(1); *supra* at 4 (listing information required). And because state law does not require applicants to submit this information, it certainly does not authorize county boards to reject applications based on mismatches between the information provided and that in government databases. Rossman's allegation that *state* law requires county boards to reject applications based solely on mismatches with respect to information that is only required by *federal* law makes no sense.

In fact, Rossman has conceded elsewhere that "the Registration Act itself does not explicitly require applicants to provide a DLN or a Partial SSN." *See* Rossman P.O. Opp. at 33. That should be the end of the matter: HAVA provides that state law governs the processing of applications to register to vote, *see supra*, and Pennsylvania's voter registration statute does not require the submission of driver's license numbers or partial social security numbers, as Rossman acknowledges. So certainly state law does not require the rejection of applications based solely on

inconsistencies between those numbers and the information in a government database.

But while Rossman concedes that the Registration Act does not require providing a driver's license number or partial social security number, he claims that state *regulations* have imposed that obligation. *See* Rossman P.O. Br. at 13–14 ("Specifically, while not mandated in statute, the Registration Act's attendant regulations, which have the force and effect of law, specifically require all applicants to supply either a DLN or Partial SSN.").

Of course, no regulation could change the plain requirements of the Registration Act. The Constitution sets forth the eligibility requirements for voting in the Commonwealth and authorizes the General Assembly to enact "laws requiring and regulating the registration of electors." Pa. Const. art. vii, § 1. The General Assembly has done so through the Registration Act, which, among other things, lists the information that a prospective voter must provide—which does not include either a driver's license number or partial social security number. And under the Registration Act, an application is to be accepted if "[t]he application requests registration [and] [t]he application contains the required

information indicating that the applicant is a qualified elector of the county." Neither the Constitution nor the Registration Law allows for imposing additional requirements by regulation.

Regardless, the regulation that Rossman claims imposes a state-law matching requirement, *see* Pet. ¶ 25, does nothing of the sort. Rossman's argument rests entirely on the fact that, in the SURE regulations, the term "Voter Registration Mail Application Form (VRMA)" is defined as "[t]he Statewide voter registration application form … which contains … requests for information from applicants," including the applicant's driver's license number or partial social security number. *See* 4 Pa. Code § 183.1 ("Definitions"). So, according to Rossman, because that definition states (accurately) that the standard voter registration mail application form includes spaces for the applicant's driver's license number and partial social security number, it somehow imposes a state law obligation on County Boards to reject applications based on mismatches between the number provided by a voter and the information in the relevant database.

Even if this argument made logical sense, the Department made clear in promulgating the regulation that it was simply reflecting the

requirements of HAVA in the definition of "Voter registration mail application form," and that these requirements did not come from the Registration Act:

> **The definition of a Voter Registration Mail Application Form (VRMA) not only includes the requirements of 25 Pa.C.S. § 1327(a)** (relating to preparation and distribution of applications), **but also the requirements for** citizenship, age, **driver's license number and the last four digits of the applicant's Social Security number in compliance with section 303(a)(5)(A)(i)(I) and (II) of the HAVA** (42 U.S.C.A. § 15483(a)(5)(A)(i)(I) and (II)).

Statewide Uniform Registry of Electors (SURE), 32 Pa.B. 6340, 6341 (Dec. 28, 2002) (emphasis added).

There is no dispute that HAVA requires applicants to submit a driver's license number or partial social security number, if they possess either—as this definition reflects. But the question at issue in this case is whether state law authorizes county commissions to reject applications solely because there is a mismatch between the number provided by the voter and that in the relevant database. And Rossman concedes that "HAVA does not require states to reject applications if there is a mismatch." Pet. ¶ 16; *see also PA Fair Elections*, 2025 WL 1271208. And he further concedes that the Registration Act does not do so either. *See supra* at 21. But somehow he contends that a state regulatory definition

that simply acknowledges HAVA's requirements creates such a requirement under state law out of whole cloth. This argument defies reason.

Finally, Rossman's continued reliance on *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), does nothing to help his claim. That case addressed a *Florida* law that *expressly imposed a matching requirement:*

> A voter registration application, including an application with a change in name, address, or party affiliation, may be accepted as valid *only after the department has verified the authenticity or nonexistence of the driver license number, the Florida identification card number, or the last four digits of the social security number provided by the applicant.*

Fla. Stat. § 97.053(6) (emphasis added). The question in *Browning* was whether this statute was preempted by HAVA, and the court held that it was not. But it did not conclude that HAVA, on its own, imposes such a requirement—and, as discussed above, Rossman concedes that it does not, *see* Pet. ¶ 16, and this Court had recently held as much, *see PA Fair Elections.*

*Browning* analyzed the interplay between HAVA and Florida's statute; it is of no use in determining what *Pennsylvania* law requires. Rossman simply asks the Court to assume that Pennsylvania has

adopted a requirement like Florida's, and then points to *Browning* to argue that this made-up requirement is valid. But simply comparing the plain statutory language at issue in *Browning* with the utter lack of anything similar in Pennsylvania law shows why this argument falls flat.

### B. The Directive Was Properly Issued

The Department is also entitled to summary relief as to Count II, because there is no merit to Rossman's claim that the Directive was improperly issued. State law gives the Department the authority "to take any actions … which are necessary to ensure compliance and participation by the commissions." 25 Pa.C.S. § 1803(a). Consistent with this authority, the Department issued the Directive "to ensure compliance" with Pennsylvania law relating to voter registration.

The Directive does not create any new obligations. To the contrary, it "merely construes and does not expand upon the terms of a statute." *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev.*, 983 A.2d 1231, 1236 (2009) (citation omitted). A regulation that "merely construes" a statute—otherwise referred to as an "interpretive regulation"—is valid "if it genuinely tracks the meaning of the underlying statute." *Id.* at 1237 (cleaned up). Such "interpretive regulations" are not

subject to the procedural requirements that apply to a regulation that "creates a new controlling standard of conduct." *Id.* at 1238.

The plain language of the Directive makes clear that it is interpreting existing law, not creating new obligations. The relevant language is presented as a statement of current law: "This Directive underscores *that Pennsylvania and federal law are clear* that voter registrations may not be rejected based solely on a non-match between the applicant's identifying numbers on their application and the comparison database numbers." Exh. A (emphasis added).

For the reasons explained above, the Directive "genuinely tracks the meaning of the underlying statute." In fact, Rossman concedes that the *statute* does not impose a matching requirement, *see supra* at 21, and instead claims the Department's implementing regulations somehow do. As explained above, this argument falls flat. Regardless, the Directive is an accurate summary of what "the underlying statute" requires. It did not "create[] a new controlling standard of conduct," and there is therefore no merit to Rossman's claim that the Department did not follow the proper procedures.

## CONCLUSION

For the reasons set forth above, the Department's cross-application for summary relief should be granted, and this case should be dismissed.

Dated: June 30, 2025

Respectfully submitted,

*/s Michael J. Fischer*

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**CERTIFICATION REGARDING PUBLIC ACCESS POLICY**

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

Dated: June 30, 2025 */s Michael J. Fischer*
Michael J. Fischer

# Exhibit A

pennsylvania
DEPARTMENT OF STATE

# DIRECTIVE CONCERNING HAVA-MATCHING DRIVERS' LICENSES OR SOCIAL SECURITY NUMBERS FOR VOTER REGISTRATION APPLICATIONS

Pursuant to Section 1803(a) of Act 3 of 2002, 25 Pa.C.S. § 1803(a), the following Directive is issued by the Department of State to clarify and specify legal processes relating to HAVA-matching of drivers' license numbers (or PennDOT ID card numbers) and Social Security numbers when voters submit new voter registration applications or an application to reactivate a cancelled record.

**This Directive underscores that Pennsylvania and federal law are clear that voter registrations may *not* be rejected based solely on a non-match between the applicant's identifying numbers on their application and the comparison database numbers.**

As stated in the Department of State's August 9, 2006 *Alert Re: Driver's License and Social Security Data Comparison Processes Required by The Help America Vote Act (HAVA),* HAVA requires only the following:

> (1) that all applications for new voter registration include a current and valid PA driver's license number, the last four digits of the applicant's social security number, or a statement indicating that the applicant has neither a valid and current PA driver's license or social security number; and
>
> (2) that voter registration commissions compare the information provided by an applicant with the Department of Transportation's driver's license database or the database of the Social Security Administration.

HAVA's data comparison process "was intended as an administrative safeguard for 'storing and managing the official list of registered voters,' and not as a restriction on voter eligibility." *Washington Ass'n of Churches v. Reed*, 492 F.Supp.2d 1264, 1268 (W.D. Wash. 2006).

**Counties must ensure their procedures comply with state and federal law, which means that if there are no independent grounds to reject a voter registration application other than a non-match, the application may *not* be rejected and must be processed like all other applications.**

It is important to remember that any application placed in 'Pending' status while a county is doing follow-up with an applicant whose driver's license or last four of SSN could not be matched **MUST** be accepted, unless the county has identified another reason to decline the application. Leaving an application in Pending status due to a non-match is effectively the same as declining the application while denying the applicant access to the statutory administrative appeals process, and as described above is **not** permitted under state and federal law.

# Exhibit B

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

| | |
|---|---|
| ROBERT ROSSMAN, in his official capacity as member of the Potter County Board of Elections,<br><br>Petitioner,<br><br>v.<br><br>DEPARTMENT OF STATE OF THE COMMONWEALTH OF PENNSYLVANIA and AL SCHMIDT, in his official capacity as Secretary of the Commonwealth,<br><br>Respondents. | No. 516 MD 2024 |

**DECLARATION OF JONATHAN MARKS**

I, Jonathan Marks, declare under penalty of perjury pursuant to 18 Pa.C.S. § 4902 that:

1. I am Deputy Secretary for Elections and Commissions for the Department of State (the "Department") of the Commonwealth of Pennsylvania. I have held this position since February 2019, and served in the Department in other election-related roles since 2002. Prior to serving as Deputy Secretary, I served as Commissioner for the Bureau of Commissions, Elections and Legislation, and before that, the Division

Chief for the Statewide Uniform Registry of Electors (SURE). I have worked at the Department since 1993 and been involved with the Department's election-related responsibilities since 2002.

2. As part of my duties, I supervise and manage the implementation and maintenance of technology related to the SURE System, used by the Department and the county voter registration commission in the administration of our duties under the Election Code and voter registration law. The Department also works closely with the 67 county election boards and voter registration commissions and other stakeholders to develop and implement projects and procedures impacting election operations in the Commonwealth.

3. Given my role and experience at the Department, I am personally knowledgeable about the matters referenced in this Declaration and the business records of the Department. I have also consulted with colleagues about certain matters referenced in this Declaration. If called as a witness, I could testify competently to the matters set forth below.

4. In Pennsylvania, counties are responsible for registering voters. To support the counties' work, the Department administers and

maintains the SURE System. After receiving and processing a voter registration application, a county enters information about the application into the SURE System.

5. When a county enters an application into the SURE System, it can use one of several codes to designate the status of the application. Some examples include "APPR – NEW APPLICATION" (if a new registration was approved), "DECL - DUPLICATE REGISTRATION" (if the registration was declined because the voter was already registered), or "DECL - OUT OF JURISDICTION" (if the application was declined because the applicant does not live in the jurisdiction).

6. In addition, counties can place an application in a "pending" status. Relevant here, a county can use the status "PEND – HAVA NOTICE SENT" if the applicant provides a driver's license number or partial social security number (which are required by the federal Help America Vote Act, or HAVA) that does not match what is in the relevant database. In such cases, counties are directed to send a follow-up letter asking the applicant to review and either correct or confirm the information they have provided. An example of such a follow-up letter is attached.

7. At any given time, there are thousands of voter registration applications statewide with a status of "PEND- HAVA NOTICE SENT." This fact does not imply that all of these individuals were unable to register; it is possible, for instance, that an applicant submitted a second application that was accepted while the first application was in pending status.

8. Data in the SURE System reflects that Potter County utilizes the "PEND – HAVA NOTICE SENT" status. As of April 29, 2025, there were 12 voter registration applications submitted last year with a status of "PEND – HAVA NOTICE SENT" in Potter County. These twelve applications were submitted between May 22 and November 15, 2024.

9. While counties may place an application in "PEND – HAVA NOTICE SENT" status while they await a response to the follow-up letter, they may not leave an application in that status indefinitely. This instruction is reflected in a 2018 Directive issued by the Department, which I understand is the subject of this litigation.

10. The 2018 Directive was issued in part because counties were leaving large numbers of applications in pending status indefinitely,

and were not making a decision to accept or reject the applications. As a result, potential voters were being disenfranchised.

11. The fact that Potter County utilizes the "PEND – HAVA NOTICE SENT" status is evidence that the County does, in fact, conduct the matching required by HAVA (as reflected in the 2018 Directive) and the necessary follow-up investigation in the event of a mismatch. And it is inconsistent with the statement in the Petition that the Department's 2018 Directive "prohibits investigation and requires officials to register potential mismatched voters without placing them in pending status until completion of investigation." Pet. ¶ 69.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 2025.

Jonathan Marks

**Cumberland County**
Bureau of Elections,
1601 Ritner Highway
Ste 201
Carlisle, PA 17013

Phone: (717) 240-6385
Fax : (717) 240-7759

Friday, November 8, 2024

[redacted]
MECHANICSBURG, PA 17050

Dear Applicant,

Thank you for your recent application to register to vote. Unfortunately, we were unable to process your application because **we could not verify your name, date of birth, and identification with PennDOT or the Social Security Administration.** Please review your information below and let us know if it is correct or if it needs to be updated before mailing this form back to our office.

**Your Information submitted on 09/05/2023**

| FIRST NAME | MIDDLE NAME | LAST NAME | SUFFIX |
|---|---|---|---|
| [redacted] | | [redacted] | |

| DATE OF BIRTH | Pennsylvania driver's license or Photo ID Number | Partial SSN (LAST 4 DIGITS) |
|---|---|---|
| [redacted] | [redacted] | [redacted] |

Please be aware that, if you have a valid Pennsylvania driver's license or photo ID number, you must provide it instead of your partial SSN. You may also list both forms of ID.

- If your information is correct, please check the box below, sign and date this form, and mail back to our office.

  ☐ My information is correct.

- If your information is not correct, please correct your information using the "Applicant Updates" section below, sign and date this form, and mail back to our office.

**It's important you respond to this notice as quickly as possible so your voter registration application is not delayed.** You are also required to verify your identification prior to voting. If you have any questions, please call our office at the number listed at the top of the form.

Sincerely,
Bureau of Elections

Applicant Updates (if applicable)

- My full name _____
- My date of birth: _____
- My Pennsylvania driver's license or Photo ID number: _____
- My partial SSN (last 4 digits): _____

Applicant Signature **X** _____ Date: _____

HVCOMB 256086428

# Exhibit C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Black Political Empowerment Project, POWER Interfaith, Make the Road Pennsylvania, OnePA Activists United, New PA Project Education Fund, Casa San José, Pittsburgh United, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania, Petitioners | : | |
| v. | : | No. 283 M.D. 2024 |
| | : | HEARD: July 8, 2024 |
| Al Schmidt, in his official capacity as Secretary of the Commonwealth, Philadelphia County Board of Elections, and Allegheny County Board of Elections, Respondents | : | |

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE CEISLER FILED: July 18, 2024

On May 28, 2024, the Black Political Empowerment Project, POWER Interfaith, Make the Road Pennsylvania, OnePA Activists United, New PA Project Education Fund, Casa San José, Pittsburgh United, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania (collectively, Petitioners) filed a Petition for Review Addressed to the Court's Original Jurisdiction (Petition for Review) seeking declaratory and injunctive relief against Al Schmidt, in his official capacity as Secretary of the Commonwealth (Secretary), the Philadelphia County

Board of Elections (Philadelphia County BOE), and the Allegheny County Board of Elections (Allegheny County BOE) (collectively, Philadelphia and Allegheny County BOEs). Petitioners seek a declaration under the Declaratory Judgments Act (DJA)[1] that continued enforcement of the absentee and mail-in ballot return envelope dating provisions set forth in Sections 1306 and 1306-D of the Pennsylvania Election Code (Election Code),[2] 25 P.S. §§ 3146.6(a) and 3150.16(a) (dating provisions) (requiring that absentee and mail-in electors "shall . . . fill out, date and sign the declaration printed on" the second, or outer, envelope), to reject timely submitted absentee and mail-in ballots of eligible voters because they are undated and/or incorrectly dated is an unconstitutional interference with the exercise of the right to suffrage in violation of the free and equal elections clause set forth in article I, section 5 of the Pennsylvania Constitution, Pa. Const. art. I, § 5.[3] (Petition for Review (PFR) ¶¶ 81-85 (Count I); 92 & Wherefore Clause ¶¶ (a)-(b).) Petitioners also seek, *inter alia*, preliminary and permanent injunctive relief, enjoining further enforcement of the dating provisions to reject such ballots in the November 5, 2024 General Election and all future elections. (PFR ¶ 92 & Wherefore Clause ¶¶ (c)-

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[1] 42 Pa.C.S. §§ 7531-7541.

[2] 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 thereafter amended by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). Section 1306 relates to voting by absentee electors and provides, in relevant part, that an absentee "elector shall . . . fill out, date and sign the declaration printed on" the second, or outer, envelope "on which is printed the form of declaration of the elector," among other things. *See* 25 P.S. § 3146.6(a).

Section 1306-D was added to the Election Code by Act 77, relates to voting by mail-in electors, and similarly provides, in relevant part, that a mail-in "elector shall . . . fill out, date and sign the declaration printed on" the second, or outer, envelope "on which is printed the form of declaration of the elector," among other things. *See* 25 P.S. § 3150.16(a).

[3] The free and equal elections clause provides: "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.

(e).) According to Petitioners, given that the Secretary, the 67 county boards of elections, and the federal courts have all confirmed the dating provisions serve no purpose and have been inconsistently and arbitrarily applied, Petitioners request, in the alternative, that the dating provisions be reinterpreted and applied as "directory," rather than "mandatory," such that Respondents cannot use noncompliance with those provisions to disenfranchise eligible voters. (PFR ¶¶ 86-91 (Count II).) On May 29, 2024, Petitioners also filed an Application for Special Relief in the Nature of a Preliminary Injunction (Application for Preliminary Injunction) pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), Pa.R.A.P. 1532(a) (relating to special relief), and a Memorandum of Law in Support thereof, asking this Court for similar relief to that requested in the Petition for Review.

Before the Court is the Application for Leave to Intervene by Westmoreland County Commissioner Doug Chew (Proposed Intervenor), in his Official Capacity as a Member of the Westmoreland County Board of Elections (Application to Intervene), which only Petitioners and the Secretary opposed. The Court held a hearing on the Application to Intervene on July 8, 2024, via WebEx videoconferencing, and denied the Application by Order of July 9, 2024. This Memorandum Opinion explains the Court's reasoning for its July 9, 2024 Order.

## I. BACKGROUND & PROCEDURAL HISTORY

Because Petitioners' claims in the Petition for Review bear directly on the November 5, 2024 General Election and all future elections, the Court made every effort to fast-track this case and expeditiously hear and decide Proposed Intervenor's Application to Intervene. Accordingly, for purposes of transparency, the Court will first explain the background and procedural history of this matter, the factual

averments of the Petition for Review which are undisputed, and the general law on intervention, followed by the averments of the Application to Intervene, the parties' arguments, the evidence presented at the hearing, and finally, the Court's reasoning for its July 9, 2024 Order.

On May 31, 2024, the Court scheduled a status conference for June 10, 2024, via WebEx, for the purpose of discussing, *inter alia*, filing deadlines and dates for scheduling oral argument. On June 7, 2024, the Republican National Committee and the Republican Party of Pennsylvania (RNC and RPP), and the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP), sought to intervene in this case, and by Order of June 10, 2024, the Court permitted those organizations to participate in the status conference.

The Court issued another Order on June 10 (Scheduling Order) following the status conference, noting that all parties agreed there is no objection to the RNC and RPP's (collectively, Republican Party Intervenors or Intervenor-Respondents), and the DNC and PDP's (collectively, Democratic Party Intervenors or Intervenor-Petitioners), intervention, and granting those Applications.[4] The Order additionally noted the parties' agreement that there are no outstanding questions of fact, nor factual stipulations required in this case; that this matter involves purely legal questions; and that disposing of the matter via cross-applications for summary relief was the most expeditious means of resolving the legal issues in dispute. Further,

[4] The Court's Order directed the Prothonotary to docket Republican Party Intervenors' Preliminary Objections (POs) attached to their intervention application, which raise various potential bars to the relief sought in the Petition for Review, including lack of standing, legal insufficiency of a pleading (demurrer), lack of subject matter jurisdiction, failure to join indispensable parties (i.e., the 65 other county boards of elections), and failure to state a claim under the free and equal elections clause. The Court's Order noted, however, that there would be no separate briefing on the POs; instead, the Court permitted Republican Party Intervenors to address the claims raised in their POs in their application for summary relief and supporting brief.

Petitioners agreed to convert their Application for Preliminary Injunction to an application for summary relief to expedite the final resolution of this case and to ensure there is sufficient time for any appeals to be filed and decided in the Pennsylvania Supreme Court under very tight time constraints imposed by the upcoming election. The Court also set an expedited briefing schedule for cross-applications for summary relief and supporting/opposing briefs; reply briefs were not permitted.

On June 11, 2024, Proposed Intervenor filed the instant Application to Intervene, asserting that he could have been joined as an original party under Pennsylvania Rule of Civil Procedure 2327(3), Pa.R.Civ.P. 2327(3), that he has a legally enforceable interest that may be affected by a judgment in this action, and that there exist no grounds for refusal of intervention under Rule 2329.[5] Only Petitioners and the Secretary filed answers and briefs in opposition to the Application to Intervene, per this Court's June 12, 2024 Order. All the other parties were thus unopposed to the Application to Intervene.

By Order of June 20, 2024, the Court granted, in part, Proposed Intervenor's June 20 Application for Leave to File Reply Brief in Further Support of Application

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[5] Pennsylvania Rule of Appellate Procedure 1531(b) provides, as follows:

> **(b) Original jurisdiction petition for review proceedings.** A person not named as a respondent in an original jurisdiction petition for review who desires to intervene in a proceeding under this chapter, may seek leave to intervene by filing an application for leave to intervene (with proof of service on all parties to the matter) with the prothonotary of the court. The application shall contain a concise statement of the interest of the applicant and the grounds upon which intervention is sought.

Pa.R.A.P. 1531(b). Pursuant to Pa.R.A.P. 106 and 1517, the Pennsylvania Rules of Civil Procedure govern applications to intervene in original jurisdiction matters before this Court. *See* Pa.R.Civ.P. 2326-2350.

to Intervene (Application for Leave to File Reply Brief) and directed the Prothonotary to docket Proposed Intervenor's Reply Brief; the Court held the other part of the Application for Leave to File Reply Brief[6] in abeyance pending the Court's future disposition of Proposed Intervenor's Application to Intervene. On June 24, 2024, Proposed Intervenor filed an Application to Submit Proposed Intervenor's Application for Summary Relief and Brief in Support Thereof Pending Disposition of the Application to Intervene (Application to Submit),[7] which the Court also held in abeyance, by Order of June 25, 2024, pending future disposition of the Application to Intervene. Also on June 24, 2024,[8] the Court scheduled the hearing on the Application to Intervene and directed that witness and exhibit lists be filed by noon on July 1, 2024.[9] By Order of July 1, 2024, the Court rescheduled the hearing from July 3 to July 8, 2024.

The intervention hearing was held as scheduled on July 8, 2024, following which the Court issued its July 9, 2024 Order denying the Application to Intervene. The Court's Order also dismissed as moot the remaining portions of Proposed Intervenor's Application for Leave to File Reply Brief and Application to Submit; granted in part and denied in part Proposed Intervenor's July 8, 2024 Application to

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[6] This Application requested that the Court docket Proposed Intervenor's attached Answer and New Matter.

[7] This Application requested that the Court docket Proposed Intervenor's attached Application for Summary Relief and brief in support thereof.

[8] Pursuant to this Court's June 10 Scheduling Order, on June 24, 2024, and July 8, 2024, respectively, the parties filed cross-applications for summary relief and memoranda of law in support thereof, responses and memoranda in opposition to the cross-applications, position statements, and/or *Amicus Curiae* briefs. By Order of July 11, 2024, the Court scheduled oral argument on the parties' cross-applications for summary relief for August 1, 2024, before a special en banc panel of this Court.

[9] Petitioners, the Secretary, and Proposed Intervenor filed their respective prehearing filings on July 1, 2024, as directed.

Submit Proposed Intervenor Chew's Response to Summary Relief Applications Pending Disposition of Proposed Intervenor's Application to Intervene; and directed the Prothonotary to docket Proposed Intervenor's attached Brief in Response to Summary Relief Applications as an *Amicus Curiae* Brief. (*See generally* Cmwlth. Ct. Order, dated July 9, 2024 (indicating "[o]pinion to follow").)

## II. PETITION FOR REVIEW

In their Petition for Review, Petitioners set forth their concern that Pennsylvania election officials, including the Secretary and officials at the Philadelphia and Allegheny County BOEs, "have arbitrarily disqualified thousands of plainly eligible voters' timely[ ]submitted mail-in ballots in every primary and general election since 2020 merely because the voters neglected to write a date, or wrote an 'incorrect' date, on the ballot[ ]return envelope." (PFR ¶ 1.) Petitioners assert that the refusal to count undated or incorrectly dated, but timely received, mail ballots[10] submitted by otherwise eligible voters because of "an inconsequential paperwork error" violates the fundamental right to vote recognized in the free and equal elections clause. (*Id.* ¶¶ 1, 3 (citing, *inter alia*, *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023)).)

According to Petitioners, nearly 10,000 voters were disenfranchised in the 2022 General Election and "thousands" more voters were disenfranchised in the 2024 Presidential Primary Election. (PFR ¶¶ 4 (listing disenfranchised voters' names from various counties, including Allegheny, Philadelphia, Montgomery, York, Bucks, Chester, Berks, and Dauphin Counties), 55-57, 58 (noting "[o]n information and belief," that thousands of ballots were rejected in 2024 Presidential

[10] The term "mail ballots" used by Petitioners means both absentee and mail-in ballots.

Primary Election), 59 (noting that over 10,000 timely absentee/mail-in ballots were rejected in 2022, and that nearly 7,000 were initially rejected in 2023), 75-76; Exhibit (Ex.) 1 (Declaration (Decl.) of A. Shappell).) Petitioners claim that without declaratory and injunctive relief from this Court, Petitioners,[11] Petitioners' members, and thousands of qualified Pennsylvania voters will suffer the irreparable harm of having their timely-submitted mail-in ballots rejected in this year's election and at every election thereafter. (*Id.* ¶ 5.) Further, Petitioners point out that multiple state and federal courts have recently found that the dating provisions' requirement that voters handwrite the date on ballot return envelopes is meaningless, as it neither establishes voter eligibility nor timely ballot receipt. (*Id.* ¶¶ 6, 51-54, 60 (citing cases), 67.) However, they highlight that no court has ever decided whether applying the dating provisions to disenfranchise voters violates their fundamental right to vote under the free and equal elections clause, "[u]ntil now." (*Id.* ¶¶ 6, 61-62.)

In support of their claims, Petitioners inform that, prior to the 2024 Presidential Primary Election, the Secretary redesigned the mail-in ballot return envelope to now include a field that pre-populated "20" at the beginning of the year on the outer return envelope; however, voters still made dating mistakes. (PFR ¶¶ 40, 74.) They also point to prior guidance from the Secretary to the county boards of elections regarding undated and/or incorrectly dated absentee and mail-in ballots. (*Id.* ¶ 42 (citing Secretary's and his predecessors' November 3, 2022 guidance to segregate and exclude from tabulation undated/incorrectly dated mail-in ballots and

[11] Petitioners bring this matter as "nonpartisan organizations dedicated to promoting American democracy and the participation of Pennsylvania voters in our shared civic enterprise" and "to ensure that their members, the people they serve, and other qualified Pennsylvania voters do not again lose their constitutional right to vote based on a meaningless requirement." (Petition for Review (PFR) ¶ 2.)

April 3, 2023 guidance to set aside and not count undated ballots and to set aside and segregate incorrectly dated ballots).) They further note that following the Third Circuit's decision in *Pennsylvania State Conference of NAACP Branches v. Secretary*, 97 F.4th 120 (3d Cir. 2024) (No. 23-3166) (*NAACP*),[12] the Department of State (Department) continues to instruct counties not to count ballots arriving in undated or incorrectly dated declaration envelopes. (*Id.* ¶¶ 43 (citing an April 19, 2024 email from Deputy Secretary Jonathan Marks stating the Department's view that certain handwritten dates can reasonably be interpreted as the date in which the voter completed the declaration, but noting that the Department has not otherwise modified its prior guidance), 68-69; Ex. 13 (4/19/2024 Email).) They also point to evidence adduced in prior litigation over the dating provisions regarding the age of voters whose ballots had no date, (PFR ¶ 63); inconsistencies across the Commonwealth in how voters have been treated with respect to the rejection and/or counting of undated/incorrectly dated ballots, (*id.* ¶ 64(a)-(f) (including examples)); and the rejection of thousands of timely received mail ballots, (*id.* ¶ 65(a)-(c) (including examples)).

Petitioners claim that, as of the date of the Petition for Review, the county boards of elections have recorded their receipt of 714,315 mail ballots in the Statewide Uniform Registry of Electors (SURE) System for the 2024 Presidential Primary Election, representing more than 37% of all ballots cast in that election.

[12] On March 27, 2024, the United States Court of Appeals for the Third Circuit, in a 2-1 decision, reversed the United States District Court for the Western District of Pennsylvania's November 21, 2023 order in *Pennsylvania State Conference of the NAACP v. Schmidt*, Civil Action No. 1:22-CV-00339, 2023 WL 8091601 (W.D. Pa. 2023); held that the federal Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B), only applies when the state is determining who may vote and, thus, does not apply to rules, like the dating provisions, that govern how a qualified voter must cast his/her ballot; and remanded for consideration of the equal protection claim.

(PFR ¶ 70.) However, pursuant to the Secretary's guidance, no boards canvassed any undated or incorrectly dated mail ballots; thus, "thousands" have been set aside and segregated, and not counted. (*Id.* ¶¶ 71-72, 73 (citing Decl. of A. Shappell and noting more than 4,000 ballots were marked as cancelled in the SURE System).) Petitioners identify several disenfranchised individuals whose votes were not counted in the 2024 Presidential Primary Election because of dating errors, (*see* PFR ¶ 76(a)-(k) (declarations of voters from various Pennsylvania counties)), and claim that voters will continue to be disenfranchised by the Philadelphia and Allegheny County BOEs, and the other 65 county boards of elections, based on the Secretary's guidance, in the upcoming November 2024 General Election and beyond, absent a declaration from this Court that the dating provisions are unconstitutional and an injunction enjoining those provisions' continued enforcement to reject undated and/or incorrectly dated mail ballots. (PFR ¶¶ 77, 78 (noting those voters impacted are disproportionately senior citizens), 79-80 (asserting the Pennsylvania Constitution requires that ballots with missing or incorrect dates be counted and that the disenfranchisement of voters constitutes irreparable harm for which there is no adequate remedy at law and for which court intervention is required).) Petitioners therefore seek the above-described declaration under the DJA, and preliminary and permanent injunctive relief enjoining further enforcement of the Election Code's dating provisions beginning with the November 5, 2024 General Election.[13]

[13] The Court observes that, since the Petition for Review was filed, some facts averred therein have changed. Specifically, on July 1, 2024, the Secretary issued a Directive to all county boards of elections, directing them to, *inter alia*, preprint the full year (2024) in the date field of absentee and mail-in ballots' declaration on the outer return envelope, effective immediately for all elections taking place following issuance of the Directive. (*See* Republican Party Intervenors' July 10, 2024 Notice of Supplemental Authority, attachment (July 1, 2024 Pennsylvania Department of State "Directive Concerning the Form of Absentee and Mail-in Ballot Materials,"
**(Footnote continued on next page…)**

## III. LAW ON INTERVENTION

Pennsylvania Rule of Civil Procedure 2327 governs who may intervene in an action, providing, in pertinent part:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . . .
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.Civ.P. 2327(3)-(4). The corollary rule on intervention is Pennsylvania Rule of Civil Procedure 2329, which provides:

> Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if
>
> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
>
> (2) the interest of the petitioner is already adequately represented; or
>
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

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at 7-8 & Appendix E).) In their Notice of Supplemental Authority, Republican Party Intervenors opined that the Secretary's Directive eliminates the risk of a voter writing an incomplete or inaccurate year, among other things.

Pa.R.Civ.P. 2329. "[A] court need only engage in an analysis under Rule 2329 when it finds that a proposed intervenor has satisfied one of the requirements in Rule 2327." *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 309 A.3d 808, 849 n.28 (Pa. 2024) (*Allegheny Reprod. III*).

The Pennsylvania Supreme Court recently reiterated that "[t]o intervene, the prospective intervenor must first establish that [he] has standing[,]" and that "[t]he concerns animating the concept of standing are inextricably linked to questions of intervention pursuant to Rule 2327." *Allegheny Reprod. III*, 309 A.3d at 843-44 (citing, *inter alia*, *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016)). To have standing, a person must demonstrate "that [he] is 'aggrieved,' by establishing a substantial, direct, and immediate interest in the outcome of the litigation." *Allegheny Reprod. III*, 309 A.3d at 832 (quoting *Robinson Twp., Wash. Cnty., PA*, 83 A.3d 901, 917 (Pa. 2013) (*Robinson Twp. II*), and citing *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)).

> A [proposed intervenor's] interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a [proposed intervenor's] interest is immediate when the causal connection with the alleged harm is neither remote nor speculative.

*Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021) (*Firearm Owners II*) (citations omitted). "The 'keystone to standing in these terms is that the person must be negatively impacted in some real and direct fashion.'" *Markham*, 136 A.3d at 140 (quoting *Pittsburgh Palisades Park, LLC v. Cmwlth.*, 888 A.2d 655, 660 (Pa. 2005)). With these principles in mind, the Court considered the arguments both for and against intervention in this case.

## IV. PROPOSED INTERVENOR'S & PARTIES' ARGUMENTS

### A. Proposed Intervenor's Arguments

In the Application to Intervene, Proposed Intervenor asserted that he is permitted to intervene under Rule 2327 because he could have been joined as an original party and because the outcome of this matter may affect his legally enforceable interest. (Application to Intervene (Appl.) ¶¶ 39-41, 52.) Regarding Rule 2327(3), Proposed Intervenor argued that, based on his statutory duties under the Election Code, *see infra*, he could have originally been joined in this action because he is a member of the Westmoreland County Board of Elections (Westmoreland County BOE), and is obligated to follow the Election Code's requirements for administering elections, including the dating provisions. (Appl. ¶¶ 40, 52.) This is the extent of Proposed Intervenor's argument as to Rule 2327(3).

Regarding Rule 2327(4), Proposed Intervenor argued that he has an "acute" interest in this matter by virtue of his status as Vice Chairman of the Westmoreland County Board of Commissioners and one of three elected members of the Westmoreland County BOE. (Appl. ¶¶ 10-11, 41.) He pointed out that as a member of the Westmoreland County BOE, he is tasked with administering the 2024 General Election and is required, per the Election Code, to purchase and maintain election equipment, equip polling places, and appoint various employees responsible for administering elections, among other required duties. (*Id.* ¶¶ 12-15 (citing and quoting Section 302(b)-(i) and (k) of the Election Code, 25 P.S. § 2642(b)-(i) and (k) (outlining powers and duties of county boards of elections)).) Further, he pointed out his other duties, like making regulations; issuing subpoenas for hearing matters related to the administration and conduct of elections; canvassing and computing

ballots; and submission of the same to the Secretary. (*Id.* ¶¶ 15-16 (citing Sections 304, 1404, and 1408 of the Election Code, 25 P.S. §§ 2644(a), 3154, and 3158).)

Relevantly, Proposed Intervenor highlighted his required duties specific to absentee and mail-in ballots, including processing and approving absentee and mail-in ballot applications, transmitting absentee and mail-in ballots to eligible voters, canvassing those ballots, and enforcing the Election Code's dating provisions under Sections 1306(a) and 1306-D(a) of the Election Code. (Appl. ¶¶ 17-19 (citing Sections 1301-1308 of the Election Code,[14] 25 P.S. §§ 3146.1-3146.8), 20-21 (citing Sections 1301-D - 1306-D of the Election Code,[15] 25 P.S. §§ 3150.11-3150.16).) He asserted that he would be subject to suit should he fail to perform any of these statutory obligations, including possible felony charges, for neglecting or refusing to perform his duties under the Election Code regarding absentee and mail-in ballots. (Appl. ¶¶ 22-23 (citing Section 1853 of the Election Code,[16] 25 P.S. § 3553 (providing for violations of absentee and mail-in ballot provisions)).)

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[14] Sections 1301-1308 were added to the Election Code by the Act of March 6, 1951, P.L. 3.

[15] Sections 1301-D - 1306-D were added to the Election Code by Act 77.

[16] Section 1853 was added to the Election Code by the Act of January 8, 1960, P.L. (1959) 2135. It provides, in relevant part, as follows:

> If any chief clerk or member of a board of elections, member of a return board or member of a board of registration commissioners, shall neglect or refuse to perform any of the duties prescribed by Article XIII or Article XIII-D of this act, or shall reveal or divulge any of the details of any ballot cast in accordance with the provisions of Article XIII or Article XIII-D of this act, or shall count an absentee ballot or mail-in ballot knowing the same to be contrary to Article XIII or Article XIII-D, or shall reject an absentee ballot or mail-in ballot without reason to believe that the same is contrary to Article XIII or Article XIII-D, or shall permit an elector to cast the elector's ballot at a polling place knowing that there has been issued to the elector an absentee ballot, the elector shall be guilty of a felony of the third degree, and, upon conviction, shall be punished by a fine not exceeding fifteen

**(Footnote continued on next page…)**

In support of his argument that he has standing to intervene, Proposed Intervenor cited *McLinko v. Department of State*, 270 A.3d 1243, 1266-67 (Pa. Cmwlth.) (*McLinko I*), *affirmed in part and reversed in part*, 279 A.3d 539 (Pa. 2022) (*McLinko II*), *cert. denied sub nom. Bonner v. Chapman*, 143 S. Ct. 573 (2023), in which this Court concluded that an individual elected member of a county board of elections had standing to challenge the constitutionality of an Election Code provision based on the direct link between his interest in his statutory duties and the Election Code. (Appl. ¶¶ 24-28, 31-34, 49-50.) Proposed Intervenor also cited *Robinson Township, Washington County, PA v. Commonwealth*, 52 A.3d 463 (Pa. Cmwlth. 2012) (*Robinson Twp. I*), *affirmed in part and reversed in part by Robinson Township II*, which this Court cited in *McLinko I*, claiming it also supports his intervention. (Appl. ¶¶ 29-31 (stating that this Court in *Robinson Township I* held that individual members of borough council and board of supervisors had standing, and citing *Fumo*, 972 A.2d 487).) Acknowledging that standing is necessarily part of any intervention inquiry under Rule 2327, Proposed Intervenor argued that he has a direct, immediate, and substantial interest in the outcome of this case given his responsibilities under the Election Code, like the county board member in *McLinko I* and the township officials in *Robinson Township I*. (*Id.* ¶¶ 32-36, 51.)

Proposed Intervenor then clarified that he has a "legally enforceable interest" in the continued enforcement of the Election Code's dating provisions that is greater than all the parties in this case; that if Petitioners succeed on their Petition for Review, which directly implicates his statutory duties, he would be required to count

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> thousand dollars ($15,000), or be imprisoned for a term not exceeding seven (7) years, or both, at the discretion of the court.

25 P.S. § 3553.

ballots, and certify election results, that he believes are expressly prohibited from being counted under the Election Code, thus subjecting him to possible felony charges under Section 1853; that he has previously explained to the public that the Westmoreland County BOE has not in the past certified undated or incorrectly dated ballots and has therefore followed state and federal court decisions[17] concluding that the dating provisions are mandatory and enforceable; and that the dating provisions serve an important anti-fraud purpose and are effective when used in conjunction with other requirements of the Election Code. (Appl. ¶¶ 42-47.) Proposed Intervenor also noted that Westmoreland County shares portions of the 12th Congressional District with named Respondent Allegheny County BOE, which heightens his interest to ensure ballots in the entire election district are treated the same. (*Id.* ¶ 48.) If permitted to intervene, Proposed Intervenor assured that he would follow the Court's June 10 Scheduling Order. (*Id.* ¶¶ 53-54 (acknowledging he did not attach a pleading to the Application to Intervene, as required by Rule 2328(a)).)

Regarding the grounds for refusal in Rule 2329, Proposed Intervenor argued[18] that his interests differ from and are not adequately represented by the existing parties, as the Secretary has different statutory duties under the Election Code; the Philadelphia and Allegheny County BOEs have not made clear they will vigorously defend the dating provisions given their Democratic majorities, and Westmoreland

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[17] Proposed Intervenor cited *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *In re Canvass of Absentee & Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (Opinion Announcing Judgment of Court); and *NAACP*, 97 F.4th 1290.

[18] Proposed Intervenor also argued his claim is in subordination to and in recognition of the propriety of the pending action, as it concerns the enforcement of the Election Code's dating provisions. This is the extent of his argument regarding Rule 2329(1), which the Court need not address further in this opinion. *See infra* note 32.

County BOE is not bound by how those counties administer their elections; and the Republican and Democratic Party Intervenors are not bound by Proposed Intervenor's duties under the Election Code. (Appl. ¶¶ 56-61, 66.) Proposed Intervenor also claimed that his arguments in this case will differ from the other parties' arguments.[19] (*Id.* ¶¶ 62-65.) Finally, Proposed Intervenor claimed that he has not unduly delayed filing his Application to Intervene, as it was filed two weeks after the Petition for Review was filed, and that no delay, embarrassment, or prejudice would result from his intervention. (*Id.* ¶ 67.)

**B. Petitioners' Arguments**

Petitioners denied that Proposed Intervenor can intervene under Rule 2327(3) or (4), and asserted that at least two grounds for refusing intervention are met. (Pet'rs' Ans. in Opp'n at 1-2, ¶¶ 10, 66; Memo. of Law at 4-5.) Petitioners acknowledged that the Election Code prescribes duties of the **county boards**; however, they highlighted that there are no duties imposed **on individual members of the county boards**. (Pet'rs' Ans. in Opp'n ¶¶ 12-16, 18-22, 24, 40, 42-43, 45-46, 51-52; Memo. of Law at 4-5.) They further denied that a member of a county board who carries out his duties in accordance with binding precedent could be subject to felony charges under Section 1853. (Pet'rs' Ans. in Opp'n ¶¶ 23, 44.) Petitioners also observed that the holding of *McLinko I* was reversed by the Supreme Court and opined that *Robinson Township II* is distinguishable because the Supreme Court relied on the municipal officials' status as individual landowners and residents, not on their status as elected officials. (*Id.* ¶¶ 25, 27-31, 33, 49-50; Memo.

[19] In this regard, Proposed Intervenor stated that he would defend the dating provisions; argue that the dating provisions serve an anti-fraud purpose and that the proposed relief will cause a violation of the free and equal elections clause; argue standing; and, finally, argue that some factual development is required for Petitioners to prevail on the merits. (Appl. ¶¶ 62-65.)

of Law at 5-6.) According to Petitioners, Proposed Intervenor cannot establish he could have been joined as an original party or that he has a legally enforceable interest in perpetuating unconstitutional disenfranchisement of voters. (Memo. of Law at 6.)

Petitioners added that Proposed Intervenor's interests are already adequately represented by the other Respondents, including Republican Party Intervenors; that allowing intervention would unduly delay the final resolution of the case because he "seeks to inject an unnecessary sideshow [of factual development] into the litigation that will interfere with the Court's prompt resolution of the legal issues in dispute"; and that having to hold a hearing on this contested Application to Intervene under Rule 2329 would interfere with and be contrary to the expedited track of this case envisioned by the Court's Scheduling Order. (Pet'rs' Ans. in Opp'n ¶¶ 53-54; Memo. of Law at 6-8, 9 n.8.) Petitioners also pointed out that federal court litigation in which the Westmoreland County BOE participated established that none of the county boards used the handwritten date on the return envelope to determine when a voter's ballot was received. (Pet'rs' Ans. in Opp'n ¶¶ 47, 63, 65; Memo. of Law at 8-9.) Petitioners also argued that Proposed Intervenor failed to attach a pleading to his Application to Intervene, as required by Rule 2328. (Pet'rs' Ans. in Opp'n ¶¶ 37-38; Memo. of Law at 6-7, 9 n.8.)

### C. Secretary's Arguments

Because the Secretary's Arguments largely overlap with Petitioners' arguments, the Court summarizes his arguments only to the extent they differ from Petitioners. In his brief, the Secretary first clarified the "legally enforceable interest" alleged to be at stake here, i.e., Proposed Intervenor's belief that undated and/or incorrectly dated mail ballots "are expressly prohibited from being counted under

the Election Code." (Secretary's Brief (Sec'y's Br.) at 4 (citing Appl. ¶ 42).) He then outlined why intervention should be denied here.

First, Proposed Intervenor does not represent the Westmoreland County BOE or its interests and, thus, mischaracterizes the extent of his authority as a single member of the Westmoreland County BOE, which itself has not moved to intervene in this case. (Sec'y's Br. at 4-5.) Contrary to Proposed Intervenor's claims that he, on his own, carries out the above-described statutory duties under the Election Code, the Secretary pointed out that the Westmoreland County BOE has only **collective** duties and powers, as each Election Code provision Proposed Intervenor cites implicates the powers and duties **of the county boards**, not individual members. (*Id.* at 5-6 (citing Section 303(a) of the Election Code, 25 P.S. § 2643(a) (providing that "[a]ll actions of a county board shall be decided by a majority vote of all the members . . . ")).) Thus, even if Proposed Intervenor wanted to exclude undated and/or incorrectly dated mail ballots from the election returns certified by the Westmoreland County BOE, Proposed Intervenor could not do so without the concurrence of a majority of the Westmoreland County BOE. (*Id.* at 6.)

Second, Proposed Intervenor has not satisfied the narrow circumstances in which an individual member of an elected body has standing to intervene on his own behalf, because this matter does not threaten to infringe on his authority as a Westmoreland County BOE member. (Sec'y's Br. at 4, 6.) In support, the Secretary cited, as examples, *O'Neill v. Philadelphia Zoning Board of Adjustment*, 169 A.3d 1241 (Pa. Cmwlth. 2017), *Szoko v. Township of Wilkins*, 974 A.2d 1216 (Pa. Cmwlth. 2009), and *Miller v. Board of Property Assessment, Appeals and Review of Allegheny County*, 703 A.2d 733 (Pa. Cmwlth. 2007), and numerous federal cases, and asserted that it is well established that individual members of an elected body

lack standing to represent the interests of that body. (Sec'y's Br. at 6-9 (acknowledging that the Westmoreland County **BOE** would have a basis to intervene).)

Regarding the narrow circumstances Proposed Intervenor must meet to intervene as an individual member of an elected body, the Secretary argued that the lack of any negative impact on Proposed Intervenor's authority as a member of the Westmoreland County BOE necessarily means he has no legally protected interest sufficient to warrant intervention. (Sec'y's Br. at 9 (citing *Allegheny Reprod. III*, *Markham*, and *Fumo*).) According to the Secretary, an individual member of an elected body has standing only if he can show "a discernible and palpable infringement on [his] authority" as a member of that elected body. (*Id.* at 10 (citing *Allegheny Reprod. III*, 309 A.3d at 844 (quoting *Fumo*)).) This means that the individual member has standing to intervene only if the individual's "direct and substantial interest in [his] ability to participate in the voting process is negatively impacted" or if the individual "has suffered a concrete impairment or deprivation of an official power or authority to act as" a member of that body. (*Id.* (citing *Allegheny Reprod. III*, 309 A.3d at 845 (citing *Markham*)).) Further, the individual member's interest must implicate "a defense of the power or authority of [his] office[ ]or a defense of the potency of [his] right to vote." (*Id.* (citing *Robinson Twp., Wash. Cnty., PA v. Cmwlth.*, 84 A.3d 1054, 1055 (Pa. 2014) (*Robinson Twp. III*)).) If, the Secretary continued, the alleged injury falls outside of these two categories, then the individual member cannot intervene because the interest would be "akin to a general grievance about the correctness of governmental conduct." (*Id.* at 10-11 (citing *Allegheny Reprod. III*, 309 A.3d at 845 (quoting *Markham*)).) In this regard, the Secretary asserted that *Fumo*, involving legislative standing, is instructive here. (*Id.*

at 11-12.) However, the Secretary asserted, Proposed Intervenor cannot show that this matter poses "a discernible and palpable infringement on [his] authority" as a member of the Westmoreland County BOE, as the consequence of a voter omitting or using an incorrect date on a mail ballot return envelope does not have any negative impact on Proposed Intervenor's "ability to vote" as a member of the Westmoreland County BOE, and the consequence of such omission or error does not threaten to usurp Proposed Intervenor's authority as a Westmoreland County BOE member. (*Id.* at 12.)

Finally, the Secretary argued that Section 1853 of the Election Code does not establish a legally cognizable interest, as the county boards do not have discretion to reject mail ballots that meet relevant criteria under the Election Code and are consistent with state and federal law. (Sec'y's Br. at 12-17 (further asserting that Proposed Intervenor's reliance on *McLinko I* and *Robinson Township I* and *II* is misplaced).)

**D. Proposed Intervenor's Reply Brief**

Proposed Intervenor responded that Petitioners and the Secretary misconstrue his alleged interests, doubling down on his theory that Section 1853 of the Election Code prescribes criminal consequences **for a county board member's** refusal to comply with the Election Code's absentee and mail-in ballot provisions. (Reply Br. at 4-6.) He also clarified that the above-cited statutory duties are imposed upon **him** and are directly implicated in this matter. (*Id.* at 6.) Proposed Intervenor further elucidated, **for the first time**, that the dilemma he faces between violating Section 1853 and violating his legal and ethical obligations to uphold the Pennsylvania Constitution and enforce the Election Code's dating provisions places him in an untenable and objectionable position that is sufficient to create a legally enforceable

interest. (*Id.* at 6-7 (citing *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 513 (Pa. Cmwlth. 2019) (*Firearm Owners I*), for proposition that standing exists where a litigant faces "a Hobson's Choice" to either comply with a law believed to be unlawful or subject oneself to possible criminal prosecution).) Even if this Court decides that Petitioners and the Secretary correctly characterize the interests at play here, Proposed Intervenor asserted that *McLinko I*'s holding is unmistakable and constitutes binding precedent requiring his intervention. (Reply Br. at 8-9.)[20] Further, according to Proposed Intervenor, the cases cited by the Secretary are inapplicable because they dealt with the narrowly construed concept of legislative standing, which this Court should decline to apply to all members of elected bodies. (*Id.* at 11-13 (acknowledging county commissioners principally serve an executive and administrative function, not a legislative one).) Proposed Intervenor also disagreed with Petitioners' and the Secretary's characterization of *Robinson Township I* and *II*. (*Id.* at 13-15.) Finally, Proposed Intervenor added that

[20] Further, Proposed Intervenor also argued that the Supreme Court's holding in *McLinko II* that the matter was properly subject to judicial review encompasses standing, which he claimed this Court subsequently recognized in *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022) (single-Judge op.) (Cohn Jubelirer, P.J.), with respect to this Court's conclusion that the Secretary's predecessor had standing in that case. (Reply Br. at 9-10, 11 (additionally noting "the Secretary fails to recognize that *McLinko* [*I*] was decided by an en banc panel and, thus, may only be reversed only [sic] by an en banc panel").)

Proposed Intervenor's reliance on *Chapman*, which cited and discussed this Court's standing discussion in *McLinko I*, is misplaced, as whether the **then-Secretary** had standing in *Chapman* is not relevant to whether Proposed Intervenor, an elected member of the Westmoreland County BOE, has standing to intervene **in this case**. Accordingly, the Court need not address *Chapman* further in this opinion for purposes of the Application to Intervene.

The Court also notes that Proposed Intervenor's statement that "the Secretary fails to recognize that *McLinko* [*I*] was decided by an en banc panel and, thus, may only be reversed only [sic] by an en banc panel" ignores the fact that the Pennsylvania Supreme Court has the power to reverse an en banc panel decision of this Court, which it did, in part, in *McLinko II*, 279 A.3d 539.

his interests are not adequately represented by Republican Party Intervenors. (*Id.* at 16-17.)

## V. INTERVENTION HEARING

During the July 8, 2024 hearing, neither Proposed Intervenor nor the parties offered any documentary evidence for admission into the record. Rather, the bulk of the hearing consisted of oral argument, with some brief questioning of Proposed Intervenor, which the Court summarizes as follows.

Relevantly, when asked by the Court under oath why he was the only Westmoreland County BOE member who sought to intervene in this case, Proposed Intervenor candidly responded that the other two members did not agree to intervene as a board and did not say why. Further, when asked by the Court what "factual development" Proposed Intervenor sought to introduce if permitted to intervene, as relayed without any real explication in his filings and despite the parties' prior agreement there are no disputed factual issues in the case, Proposed Intervenor's counsel responded by repeating the merits of Proposed Intervenor's claim that he should be permitted to intervene based on his legally enforceable interest in his statutory duties and the potential civil and criminal consequences he may face in voting on the undated and/or incorrectly dated ballots at issue in this case. Conversely, Petitioners' counsel characterized the liability issue as a "red herring," and upon questioning by Petitioners' counsel, Proposed Intervenor admitted and agreed that he had not been named in any lawsuits since 2020 or subjected to any liability, that the Westmoreland County BOE has not counted undated or incorrectly dated absentee and mail-in ballots for the past four election cycles, and that individual BOE members must follow the law (later agreeing this is regardless of

whether they disagree with the law). The Court then overruled Proposed Intervenor's objection[21] to Petitioners' counsel's question regarding whether Proposed Intervenor would follow a declaration by the Supreme Court regarding the constitutionality of the dating provisions, regardless of whether Proposed Intervenor was bound by such an order. Proposed Intervenor responded that he would have to consult his solicitor on the law.

There was also some discussion of and disagreement amongst the parties about *Firearm Owners I* and *II*, which Petitioners characterized as involving "a real Hobson's choice" between the appellees breaking the law or following it and filing suit to vindicate their rights. Upon questioning by his counsel, Proposed Intervenor confirmed his personal belief that it is unlawful to count undated and/or incorrectly dated mail ballots under the Election Code, which he indicated would guide him unless and until the Supreme Court rules otherwise. Proposed Intervenor also expressed his concern that the Philadelphia and Allegheny County BOEs view the dating provisions as unnecessary and irrelevant, and confirmed his belief that he is the only individual who wants to uphold the constitutionality of the dating provisions in this litigation. Further, in response to questioning by the Secretary's counsel, Proposed Intervenor agreed that decisions are made by a majority vote of the Westmoreland County BOE, that he could not decide absentee or mail-in ballot questions on his own, and that even if he voted against a decision of the BOE, it is still a decision of the BOE and not him individually.[22] Finally, the Secretary's

[21] Republican Party Intervenors' counsel joined in this objection for the record.

[22] There was also discussion regarding Proposed Intervenor having been named individually and/or along with the two other Westmoreland County BOE members previously in the "*Ziccarelli* case" in 2020. However, Proposed Intervenor could not recall specifics about the case, and this Court's docket reflects that neither Proposed Intervenor, nor the Westmoreland

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counsel offered a new theory on Section 1853 of the Election Code, opining that it contains a drafting error and asserting that criminal liability only attaches to an elector, not to an individual county board of elections member, under that provision.

The Court has considered the above testimonial evidence offered during the hearing, the arguments both for and against intervention, and the relevant case law. Although the Court found Proposed Intervenor generally credible, the Court determined that his brief testimony reinforced the opposing parties' positions that intervention must be denied. Keeping in mind that the only question before the Court was whether Proposed Intervenor should be permitted to intervene in this case, the Court stresses that it did not pass upon the question of apparent first impression presented by the Petition for Review, namely, whether the Election Code's dating provisions are unconstitutional under the free and equal elections clause. On the sole intervention question before it, the Court concluded that (1) Proposed Intervenor did not demonstrate a legally enforceable interest under Rule 2327(4), as he is not aggrieved by the underlying challenge to the dating provisions either by virtue of his status as an elected Westmoreland County BOE member, his duties under the Election Code, or any potential liability he may face because of his counting or not counting undated or incorrectly dated absentee and mail-in ballots in accordance with the law; and (2) Proposed Intervenor's intervention is also not proper under Rule 2327(3). The Court will address each conclusion in turn.

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County BOE, was named in either of the *Ziccarelli* cases. *See In Re 2,349 Ballots in 2020 Gen. Election* (Pa. Cmwlth., No. 1162 C.D. 2020, filed Nov. 19, 2020), *rev'd*, *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020); *In Re Allegheny Cnty. Provisional Ballots in the 2020 Gen. Election (Appeal of Ziccarelli)* (Pa. Cmwlth., No. 1161 C.D. 2020, filed Nov. 20, 2020), *appeal denied*, 242 A.3d 307 (Pa. 2020).

## VI. DISCUSSION

The Court begins with Rule 2327(4) and its decision in *McLinko I*, 270 A.3d 1243, which Proposed Intervenor primarily relied upon as support for his assertion that he has a legally enforceable interest in this action that requires his intervention. The Court notes that the only relevant part of *McLinko I* is this Court's discussion of the county board member petitioner's standing. (*See* Reply Br. at 9); *see also* 270 A.3d at 1265-68. However, some brief background of the case is helpful.

In *McLinko I*, McLinko, an elected member of the Bradford County Board of Elections (Bradford County BOE), filed a petition for review, and later an amended petition, in this Court's original jurisdiction seeking a declaration that Article-XIII-D of the Election Code (governing voting by qualified mail-in electors)[23] violated the Pennsylvania Constitution and was therefore void. The basis of McLinko's argument was that the Pennsylvania Constitution required qualified electors to present their ballots in person at their designated polling places on Election Day, except where the electors met one of the constitutional exceptions for absentee voting. McLinko argued that no-excuse mail-in voting therefore could not be reconciled with the Pennsylvania Constitution. *McLinko I*, 270 A.3d at 1247-48. Another petition for review was filed by 14 members of the Pennsylvania House of Representatives (Bonner, among others), and the cases were consolidated because they raised the same constitutional question. *Id.* Ultimately, a five-Judge en banc panel of this Court[24] granted McLinko's application for summary relief, rejected the

[23] Article XIII-D was added to the Election Code by Act 77.

[24] Judge Wojcik issued a Concurring and Dissenting Opinion in *McLinko I*, which the undersigned joined. Judge Wojcik joined the *McLinko I* Majority on the issues of standing and the procedural objections to the amended petition for review, but he disagreed that Act 77's no-excuse mail-in voting scheme violated the Pennsylvania Constitution. In his view, article VII,

**(Footnote continued on next page…)**

Acting Secretary's procedural challenges as to timeliness and McLinko's standing and denied her application for summary relief, and held that Act 77's no-excuse mail-in voting scheme violated article VII, section 1 of the Pennsylvania Constitution and was therefore void. *See also McLinko v. Dep't of State*, 270 A.3d 1278 (Pa. Cmwlth. 2022) (companion opinion to *McLinko I*, 270 A.3d 1243, which, *inter alia*, rejected the Acting Secretary's and Democratic intervenors' challenge to the Bonner petitioners' standing to bring their action), *aff'd in part & rev'd in part by McLinko II*.

Regarding her relevant procedural objection, the Acting Secretary argued that McLinko lacked standing because his duties under the Election Code did not give him a substantial or particularized interest in the statute's constitutionality; his duties did not encompass challenging Act 77's constitutionality; and the multi-member board could only act through a majority of its members. *McLinko I*, 270 A.3d at 1266. In response, McLinko argued, *inter alia*, that as a member of the Bradford County BOE, he held an interest that is separate from the interest all Pennsylvania citizens have in statutes that conform to the Pennsylvania Constitution, which, considering his various duties under the Election Code, was sufficient to establish his standing. *McLinko I*, 270 A.3d at 1266. Relying on the Court's decision in *Robinson Township I*, 52 A.3d 463, in which the Court determined that one member of a borough council and one member of a board of supervisors had standing to challenge the constitutionality of a statute, this Court concluded that McLinko was similarly required to count ballots and certify election results that he believed were unconstitutional. *McLinko I*, 270 A.3d at 1266-67. This dilemma, the Court in

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section 4 of the Pennsylvania Constitution specifically empowered the General Assembly to provide for another means by which an elector could cast his or her ballot through legislation, like Act 77. *McLinko I*, 270 A.3d at 1273-74 (Wojcik, J., concurring & dissenting).

*McLinko I* concluded, conferred standing on McLinko as an elected official, and, as such, he did not need the entire board to participate to demonstrate standing. *Id.* at 1267 (citing *Fumo*).[25]

As Petitioners and the Secretary in the instant matter have highlighted extensively in their filings and during the hearing, however, this Court's decision in *McLinko I* was reversed by the Supreme Court, except as to the reviewability of the challenged statutory provisions. *See McLinko II*, 279 A.3d 539. The Supreme Court stated, in relevant part, as follows:

> **Section 13 of Act 77 is not a bar to our consideration of the universal mail-in voting provisions of the Act.** . . . We find no restriction in our Constitution on the General Assembly's ability to create universal mail-in voting. **The order of the Commonwealth Court is affirmed as to the reviewability of the challenged statutory provisions. Otherwise, the decision is reversed.**

*McLinko II*, 279 A.3d at 582 (emphasis added).

In this Court's view, the phrase "reviewability of the challenged statutory provisions" is an unmistakable reference to this Court's holding in *McLinko I* that "Section 13 [of Act 77] did not establish a 180-day statute of limitations for bringing a constitutional challenge to Act 77." *McLinko I*, 270 A.3d at 1272. It is **only** that holding from *McLinko I* that the Supreme Court affirmed in *McLinko II*; otherwise, this Court's decision was reversed. This Court cannot now assume that the Supreme Court affirmed this Court's separate discussion of McLinko's standing, yet also reversed that part of this Court's decision. Accordingly, the Court must treat its order in *McLinko I* as being without any force as to that issue. Although the Supreme

[25] This Court also concluded that McLinko met the requirements for taxpayer standing, which is not at issue here. *McLinko I*, 270 A.3d at 1267-68.

Court could have discussed, and even affirmed or explicitly reversed, this Court's determination on McLinko's standing, it did not do so. In fact, the Supreme Court's opinion is **silent** on this Court's standing analysis regarding McLinko. It is thus not clear whether the Supreme Court adopted this Court's reasoning as to McLinko's standing. As such, this Court assumes, for purposes of intervention in this matter, that the Supreme Court affirmed this Court's order on one basis only – as to the reviewability of the challenged statutory provisions under Section 13 of Act 77. *See Cmwlth. v. Brown*, 269 A.3d 383, 385 n.1 (Pa. Super. 1970). For these reasons, the Court concluded that Proposed Intervenor's argument that *McLinko I* supports his intervention in this case is without merit.

Proposed Intervenor's reliance on *Robinson Township I*, *affirmed in part and reversed in part by Robinson Township II*, is similarly misplaced. In *Robinson Township I*, 52 A.3d 463, this Court considered whether a member of a borough council (Ball) and one member of a board of supervisors (Coppola), who brought suit on behalf of their municipalities, had standing to challenge the constitutionality of an oil and gas statute that they alleged could subject them to personal liability and require them to vote on the passage of zoning amendments to comply with that statute. *Robinson Twp. I*, 52 A.3d at 475. They also alleged that as individual landowners and residents, they lived in a district that is zoned residential and in which oil and gas operations were then permitted under the statute; further, they alleged lost opportunities for future development in residential areas due to drilling, devaluation of their home values, and an inability to guarantee no industrial uses would exist in the residential area in the future. *Id.* at 475-76. This Court concluded that the individual council and board members had an interest sufficient to confer standing upon them "[a]s local elected officials acting in their official capacities for

their municipalities and being required to vote for zoning amendments they believe[d were] unconstitutional[.]" *Id.* at 476.

However, in *Robinson Township II*, 83 A.3d at 918, the Supreme Court explicitly declined to consider whether the individual elected township officials had standing as local elected officials, stating that "because Coppola and Ball both have standing to sue **as landowners and residents** and they assert the same claims in both individual and official capacities, **we need not address whether they have a separate interest as local elected officials sufficient to confer standing**." (Emphasis added.) As Proposed Intervenor's counsel readily conceded during the hearing, *Robinson Township I* and *II*, and even *Robinson Township III*,[26] do not support Proposed Intervenor's intervention here.

The Court next considered the cases cited by the Secretary in support of his assertion that individual members of an elected body lack standing to represent the interests of that body. (*See* Sec'y's Br. at 6-7 (citing *O'Neill*, 169 A.3d 1241; *Szoko*, 974 A.2d 1216; and *Miller*, 703 A.2d 733).) While these cases generally support the Secretary's contention in this regard, the cases are inapposite on both procedural and substantive grounds.

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[26] The *Robinson Township* matter has a long procedural history, which the Court need not explain in detail for purposes of intervention here. The Court notes for the sake of clarity that only three of the six opinions issued in the matter are relevant for our purposes—hence, the references to *Robinson Township I*, *II*, and *III* in this opinion.

Notably, *Robinson Township III* is a Per Curiam Order of the Supreme Court that affirmed a prior decision of this Court, holding that two state legislators, who sought to intervene, did not have a legally enforceable interest in the action. *See Robinson Twp., Wash. Cnty., Pa. v. Cmwlth.* (Pa. Cmwlth., No. 284 M.D. 2012, filed Apr. 20, 2012) (single-Judge op.) (Quigley, S.J.), *aff'd*, *Robinson Twp. III*. The Supreme Court applied legislative standing principles in its Order and concluded that the legislators simply sought to offer their perspective on the correctness of governmental conduct, i.e., that the Legislature did not violate the substantive and procedural requirements of the Pennsylvania Constitution in enacting the oil and gas statute at issue. *Robinson Twp. III*, 84 A.3d at 1055.

Specifically, in *O'Neill*, 169 A.3d 1241, this Court concluded that a single councilman of the Philadelphia City Council could not appeal a zoning board of adjustment (ZBA) decision regarding the grant of a variance for a proposed residential development, because the plain language of the First Class City Home Rule Act (Home Rule Act), Act of April 21, 1949, P.L. 665, *as amended*, 53 P.S. §§ 13101-13157, and the Philadelphia Zoning Code (Zoning Code) granted standing to appeal a ZBA decision to City Council as a body, and not to individual councilmembers. *Id.* at 1245. The Court secondarily determined, based on the councilman's allegation that the ZBA's decision usurped City Council's authority to legislate for and create public streets, that the councilman lacked standing under legislative standing principles because the councilman had misconstrued the issues (the variance did not involve a street but, rather, a driveway); the ZBA's decision was not a discernible and palpable infringement on the councilman's authority as a legislator; and the decision did not deprive or diminish the councilman's right to vote or other power of authority. *Id.* at 1245-46 (quoting *Fumo*). Rather, the issues the councilman sought to raise **on appeal from the underlying trial court order** that affirmed the ZBA's decision were "general grievances about the correctness of the decisions of the trial court and the" ZBA, which was insufficient to establish standing. *Id.* at 1246 (noting the councilman argued the trial court failed to follow Pennsylvania Supreme Court precedent and whether the variance requirements were met). This Court therefore quashed the councilman's appeal for lack of standing. *Id.*

While the legislative standing discussion in *O'Neill* is helpful, that case's primary holding was that the plain language of the Home Rule Act and the Zoning Code did not confer standing on the individual councilman to challenge a ZBA

decision but, rather, granted standing **to appeal** to City Council only, which substantively distinguishes the case from the instant matter. Further, the councilman was not a party before the ZBA, but he nevertheless sought to appeal the ZBA's decision to the trial court and then the trial court's decision to this Court in its appellate jurisdiction, which procedurally distinguishes it from this case. If anything, *O'Neill* supports this Court's overarching conclusion that legislative standing principles can and should be applied here in determining whether Proposed Intervenor has standing, in the absence of any statutory provision explicitly conferring standing upon him.

In *Szoko*, 974 A.2d 1216, this Court considered whether an elected member (commissioner) of the Wilkins Township Board of Commissioners (board), who was the plaintiff below and sought a declaration declaring an amended employment agreement between the board and the township manager void *ab initio*, had standing **to appeal a trial court order** sustaining preliminary objections based on, *inter alia*, the commissioner's lack of standing to contest the validity of the contract and failure to join the other commissioners and the township manager. Observing that "an individual asserting that he or she has standing must plead facts establishing that he or she has suffered a substantial, direct[,] and immediate injury[,]" this Court rejected the facts pled by the commissioner that his position with the board and his "special responsibility" for financial matters as chairman of the board's finance committee imbued him with standing to bring his action. *Id.* at 1220. The Court noted that, "absent further elaboration, these facts are not sufficient to establish that [the commissioner] has an interest that surpasses the common interest of all citizens in seeking obedience to the law[,]" and that the commissioner failed to explain how he was harmed by the employment agreement; thus he could not show a causal

connection between the agreement and his injury, and, therefore, he had no substantial, direct, or present interest in the matter. *Id.*

*Szoko* is also distinguishable from this matter. First, the individual commissioner was the named plaintiff in the underlying declaratory judgment action, who sought to directly challenge the contract authority of the board, and he later sought to appeal the trial court's order to this Court in its appellate jurisdiction. Second, the case was decided on the basis that the individual commissioner failed to plead facts that were sufficient to establish a substantial, direct, or immediate interest in the matter under traditional standing principles. The case did not discuss legislative standing principles. Accordingly, the Court did not find *Szoko* to be helpful.

In *Miller*, 703 A.2d 733, the issue was whether a member (commissioner) of the Allegheny County Commissioners, who was named individually in the underlying complaint along with the other county commissioners, had standing **to appeal** on his own behalf and as a member of the county commissioners **a trial court order** declaring unlawful a property tax assessment freeze allegedly caused by the county commissioners via the Board of Assessment. The taxpayer plaintiffs moved to quash the appeal for lack of standing, arguing, *inter alia*, that their complaint for declaratory judgment did not seek relief against any of the individual commissioners, nor did the trial court's orders have any impact on the individual commissioners. *Id.* at 734. The commissioner argued he had standing because he was named individually in the complaint. *Id.* In determining that the commissioner did not have standing to appeal, this Court relied exclusively upon United States Supreme Court case law in support of "the proposition that [the commissioner's] status as a member of the [c]ounty [c]ommissioners did not confer upon him the

power to seek an appeal either individually or on behalf of the [c]ounty [c]ommissioners." *Id.* at 736. Specifically, the Court observed that the complaint neither named the commissioner individually nor sought a judgment against him in his individual capacity, and that the trial court's orders were clearly directed to the county commissioners as a group. *Id.* at 735-36.

Although *Miller* appears helpful at first blush, it is nevertheless distinguishable, both because it involved standing **to appeal** and did not involve intervention, and because the county commissioners in that case were all named as parties in the underlying declaratory judgment action. The *Miller* Court relied exclusively on federal precedent regarding an individual school board member's standing **to appeal** a decision entered against the entire school board, which is not the same situation here, as the Westmoreland County BOE has not been named as a party and in fact declined to participate in this case. *Miller* also did not discuss legislative standing principles. For these reasons, *Miller* is also not very helpful for purposes of the instant intervention inquiry.

Next, the Court considered Proposed Intervenor's argument that he should be permitted to intervene in this action based on the purported dilemma he faces between violating Section 1853 of the Election Code and violating his legal and ethical obligations to uphold the Pennsylvania Constitution and enforce the Election Code's dating provisions, which he claimed places him in an untenable and objectionable position that is sufficient to create a "legally enforceable interest." Stated another way, he claimed he must choose between the equally unappealing options of not counting undated and/or incorrectly dated absentee and mail-in ballots that he believes are unconstitutional under the Election Code, or counting them and risking civil and/or criminal liability under Section 1853. In support of these

assertions, Proposed Intervenor cited this Court's decision in *Firearm Owners I*, *affirmed by Firearm Owners II*, for the proposition that standing exists where a litigant faces "a Hobson's Choice" to either comply with a law believed to be unlawful or subject oneself to possible criminal prosecution. He also cited *Robinson Township II*, likening his situation to the physician in that case, who was found to have standing by the Supreme Court because of the untenable position he faced of having to choose between violating the law, violating his ethical obligations to treat a patient by acceptable standards, and refusing medical care to patients. The Court will address each case in turn.

In *Firearm Owners I*, an en banc panel of this Court considered whether the named appellants, who were the plaintiffs below, had standing to challenge the legality of five local ordinances of the City of Harrisburg (City) through a declaratory judgment action. 218 A.3d at 501. The appellants consisted of Firearm Owners Against Crime (FOAC) and three individuals. Their complaint alleged that the challenged ordinances unconstitutionally infringed on their right to bear arms conferred by the Second Amendment to the United States Constitution, U.S. Const. amend. II, and article I, section 21 of the Pennsylvania Constitution, Pa. Const. art. I, § 21, and were preempted by the Pennsylvania Uniform Firearms Act of 1995, 18 Pa.C.S. §§ 6101-6128. *Firearm Owners I*, 218 A.3d at 502. Notably, each of the challenged ordinance sections, or parts of them, regulated in some fashion the use, possession, ownership, and/or transfer of firearms within the City, and provided that a violation thereof could lead to issuance of a citation, summary criminal proceedings, fines, forfeiture of property, and even imprisonment. *Id.* at 502-03.

Relevantly, the City, the Mayor, and the Chief of Police filed preliminary objections (POs) in the trial court asserting, among other things, that the appellants'

lacked standing. The trial court granted the POs on the basis the appellants failed to plead any facts to show they were harmed by any of the ordinances; they did not allege they had ever been cited or personally threatened with citation under the ordinances; and the harm asserted was entirely speculative and based on events that may never occur, which the trial court determined was an improper use of the DJA. *Id.* at 503-05.

On appeal, this Court affirmed in part and reversed in part the trial court's order. Noting that the purpose of the DJA is remedial and that its purpose is to settle and afford relief from uncertainty, the Court first considered the individual appellants' standing, which they asserted they had under, *inter alia*, traditional standing principles. 218 A.3d at 505-06. The appellants alleged that the current, actual, and threatened enforcement of the challenged ordinances created a chilling effect on the appellants' rights to engage in constitutionally protected firearms activities, and they feared criminal prosecution. *Id.* at 506.

This Court held that the individual appellants had standing under three (Discharge, Lost/Stolen, and Parks Ordinances) of the five challenged ordinances. In so doing, this Court applied traditional standing principles and determined that the appellants' interest was substantial because each appellant lived in, worked in, or regularly visited the City, and the ordinances restricted their lawful use and possession of firearms. *Firearm Owners I*, 218 A.3d at 508 (observing their interest in the legality of the ordinances surpassed the common interest of all citizens). Their interest was direct because they established a causal connection between their possession and use of firearms and the City's efforts to restrict that activity through passage and enforcement of the ordinances. *Id.* Their interest was immediate, because the ordinances then curbed their possession and use of firearms, and the City

publicly indicated its active enforcement of the ordinances. *Id.* The Court therefore concluded the individual appellants were proper plaintiffs to challenge the legality of those ordinances because they were then adversely affected by the existence and enforcement of the ordinances. *Id.*; *see Firearms Owners II*, 261 A.3d at 473-74.

With regard to the State of Emergency Ordinance, the Court determined that while the appellants' status as current lawful gun owners evidenced an interest in the legality of the ordinance that surpassed that of the general public, the appellants nevertheless failed to allege any facts in their complaint that the particular ordinance directly and immediately affected, regulated, or impaired their individual possession, use, or enjoyment of their firearms. *Firearm Owners I*, 218 A.3d at 509-10. Thus, the Court held that neither the individual appellants nor FOAC had standing to challenge the State of Emergency Ordinance. *Id.* at 510. The Court concluded, however, that FOAC had associational standing to challenge the legality of the Minors Ordinance. *Id.* at 510-11. Recognizing that its decision that the individual appellants and FOAC had standing under the traditional analysis to challenge four (Discharge, Lost/Stolen, and Parks Ordinances (individual appellants); and Minors Ordinance (FOAC)) of the five ordinances conflicted with its prior case law holding that plaintiffs lack standing where they failed to allege in their pleadings that they have violated the ordinances, intend to violate the ordinances, or have been prosecuted for violating the ordinances, this Court proceeded to discuss the Supreme Court's decision in *Robinson Township II* issued thereafter. *Id.* at 512.

For purposes of brevity and clarity, the Court quotes the Supreme Court's own discussion of its decision in *Robinson Township II*, from its decision in *Firearm Owners II*:

In *Robinson Township II*, this Court reversed the Commonwealth Court's decision dismissing a physician's challenge to a statute restricting his ability to obtain and share information with other physicians about chemicals used in fracking. *Robinson Twp.* [*II*], 83 A.3d at 923-25. The Commonwealth Court held that the physician would not have standing to challenge the statute unless he actually requested the confidential information, and his request was either denied, or his access to the information was restricted in such a way as to prevent him from providing care to his patient, or he actually possessed the information and wished to disclose it to others in violation of the statute's confidentiality provision. *Id.* at 923. In rejecting the Commonwealth Court's reasoning, this Court stated:

> [The physician] describes the untenable and objectionable position in which [the oil and gas statute] places him: choosing between violating a . . . confidentiality agreement and violating his legal and ethical obligations to treat a patient by accepted standards, or not taking a case and refusing a patient medical care. The Commonwealth's attempt to redefine [the physician's] interests and minimize the actual harm asserted is unpersuasive. Our existing jurisprudence permits pre-enforcement review of statutory provisions in cases in which petitioners must choose between equally unappealing options and where the third option, here refusing to provide medical services to a patient, is equally undesirable. . . .
>
> In light of [the physician's] unpalatable professional choices in the wake of [the oil and gas statute], the interest he asserts is substantial and direct. Moreover, [the physician's] interest is not remote. A decision in this matter may well affect whether [the physician], and other medical professionals similarly situated, will accept patients and may affect subsequent medical decisions in treating patients—events which may occur well before the doctor is in a position to request information regarding the chemical composition of fracking fluid from a particular Marcellus Shale industrial operation. Additional factual development that would result from awaiting an actual request for information on behalf of a patient is not likely to shed more light upon the constitutional question of law presented by what is essentially a facial challenge to [the statute at issue].

*Id.* at 924-25.

> The Commonwealth Court concluded that [the individual appellants], who believe the ordinances violate their rights under the United States and Pennsylvania Constitutions had "no real alternative avenue to address their grievance." [*Firearm Owners I*], 218 A.3d at 513. Like the physician in *Robinson Township* [*I* and *II*], they faced the equally unappealing options of "curb[ing] their conduct to conform to the ordinances' mandates or [ ] willfully violat[ing] the law and fac[ing] criminal prosecution." [*Firearm Owners I*], 218 A.3d at 513. Accordingly, the Commonwealth Court overruled [its prior conflicting case law regarding standing]. *Id.*

*Firearm Owners II*, 261 A.3d at 474-76 (quoting *Robinson Twp. II*, 83 A.3d at 924-25).

Relying on, *inter alia*, its decision in *Robinson Township II*, the Supreme Court, in *Firearm Owners II*, thus agreed with this Court's reasoning and conclusion in *Firearm Owners I* that the individuals' and FOAC's averments in their complaint were sufficient to demonstrate their standing to bring the declaratory judgment action challenging the constitutionality and statutory preemption of four out of the five gun ordinances at issue. *Firearm Owners II*, 261 A.3d at 487. The Supreme Court noted specifically that the individuals and FOAC

> currently must make a choice to either comply with the ordinances, thereby forfeiting what they view as their constitutionally and statutorily protected firearms rights; or violate the ordinances by exercising their rights, thereby risking criminal prosecution. [They] also have a third option, which is to stop living in, commuting to, or travelling to the City to avoid being subject to its ordinances, which would of course entail relocating from the City, changing employers, or for[]going legislative advocacy. That [they] are confronted with these options shows that their interest in the outcome of the constitutionality and preemption of the challenged ordinances is substantial, immediate, and direct. The individual[s'] interest is substantial because they, as lawful possessors of firearms and concealed carry licenses, seek a determination of the validity of the City's Discharge, Parks, and Lost/Stolen Ordinances, which

> criminalize aspects of their ability to carry and use firearms within the City and impose reporting obligations for lost or stolen firearms. This exceeds the "abstract interest of all citizens in having others comply with the law." Their interest is direct because the challenged ordinances allegedly infringe on their constitutional and statutory rights to possess, carry, and use firearms within the City. Their interest is immediate because they are currently subject to the challenged ordinances, which the City is actively enforcing, and must presently decide whether to violate the ordinances, forfeit their rights to comply with the ordinances, or avoid the City altogether. This alleged harm to their interest is not remote or speculative.

*Firearm Owners II*, 261 A.3d at 487-91 (citations omitted). Accordingly, the Supreme Court affirmed this Court's order in *Firearm Owners I*.

Returning to the instant matter, this Court rejected Proposed Intervenor's arguments that he has a "legally enforceable interest" sufficient to intervene in this action based on Section 1853 of the Election Code, and the *Firearm Owners* and *Robinson Township* cases. In so deciding, this Court did not discount the fact that Proposed Intervenor's status as a member of the Westmoreland County BOE, by itself, evidences an interest in the legality of the Election Code's dating provisions that surpasses that of the general public, as there is no question that Proposed Intervenor has important statutorily prescribed duties and obligations under the Election Code with respect to the administration of elections in this Commonwealth, including the canvassing and certification of votes cast by absentee and mail-in ballots. However, for the reasons discussed more fully in the next section, Proposed Intervenor has failed to show that his interest in this regard is directly or immediately affected by this litigation.

Regarding Section 1853 specifically, Proposed Intervenor has failed to show that the alleged harm, or dilemma, of having to choose between counting undated or incorrectly dated absentee and mail-in ballots, which he believes are unconstitutional

under the Election Code, or counting them and risking prosecution, is neither remote nor speculative. This is what distinguishes this case from the individual appellants in *Firearm Owners I* and *II*, who had to choose between violating the challenged ordinances, surrendering their constitutional and statutory rights, or avoiding the City, and the physician in *Robinson Township II*, who had to choose between violating the oil and gas statute at issue, violating his legal and ethical obligations in treating patients, or refusing medical care to patients.

Additionally, Proposed Intervenor's contentions surrounding Section 1853 are belied by his failure to cite any case law showing he has in the past been prosecuted under that section, *see supra* note 22, or supporting the possibility that he could be prosecuted in the future under that section.[27] His contentions in this regard are further belied by his statements made on the record during the hearing, as well as the current state of the law on undated and incorrectly dated absentee and mail-in ballots. As to the first point, Proposed Intervenor conceded at the hearing that he had not been named in any lawsuits with respect to the elections that have occurred over the past four years and that he is required to follow the law as a Westmoreland County BOE member even if he disagrees with that law. As to the second point and bearing in mind that the Court does not pass upon the ultimate question presented by this case of whether the dating provisions violate the free and equal elections clause, the Court observes that the law is now settled in Pennsylvania that the dating provisions of the Election Code are **unambiguous and mandatory**.

[27] The Court's research has not revealed any case law involving a county board of elections member's civil or criminal prosecution under Section 1853 for not counting undated or incorrectly absentee and mail-in ballots, or for any similar conduct. The Court therefore declined to opine on the Secretary's new theory expressed during the hearing that Section 1853 contains a drafting error and only imposes criminal liability as to an elector, not an individual county board of elections member.

*See Ball*, 289 A.3d at 20 (further rejecting *Chapman*'s interpretation that any date is sufficient for purposes of the Election Code's dating provisions).[28] As the Supreme Court observed in *Ball*, however, how **county boards** verify the date any elector provides is the day upon which he or she completed the declaration was a question beyond its purview; nevertheless, "**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 send out mail-in and absentee ballots—for compliance with the Election Code." *Ball*, 289 A.3d at 23 (emphasis added). Accordingly, because Proposed Intervenor has not established a legally enforceable interest based on Section 1853 of the Election Code, or the *Firearm Owners* and *Robinson Township* cases, Proposed Intervenor's arguments in this regard are meritless.

The above conclusion necessarily resulted in Proposed Intervenor's interest being grounded only in his statutory duties as a member of the Westmoreland County BOE under the Election Code and his belief that counting undated and/or incorrectly dated mail ballots is prohibited by the Election Code. The Court already determined that neither *McLinko I*, nor *O'Neill*, *Szoko*, or *Miller*, are directly controlling. As such, the Court next considered the other cases cited by the Secretary in support of his assertion that that the narrowly construed legislative standing principles for legislators and individual councilmembers govern this matter. *See Fumo*, 972 A.2d 487; *Markham*, 136 A.3d 134; and *Allegheny Reprod. III*, 309 A.3d 808. Proposed Intervenor has not provided any argument as to why this Court should

[28] Notably, all six Supreme Court Justices at the time joined Part III(B)(1) of *Ball* regarding undated ballots, including Chief Justice Todd and Justices Wecht, Donohue, Dougherty, Brobson, and Mundy, and four out of the six Justices joined Part III(B)(2) regarding incorrectly dated ballots, including Justices Wecht, Dougherty, Brobson, and Mundy.

not apply those principles to members of a county board of elections, other than his bald assertion requesting as much. (*See* Reply Br. at 11-13.) Accordingly, the Court agreed with the Secretary and applied those principles in considering whether Proposed Intervenor has standing to intervene in this case in his official capacity as a member of the Westmoreland County BOE. *See Fumo*, 972 A.2d at 501 (observing that both legislators **and individual councilmembers** have been permitted to bring actions based upon their special status where there was a discernible and palpable infringement on their authority as legislators); *see also Allegheny Reprod. III*, 309 A.3d at 844 (observing that "for a party to a legal action to have standing, they must be aggrieved or 'negatively impacted in some real and direct fashion'" and that "[s]uch intervention is as permissible for individual legislators **as anyone else** 'where there [is] a discernible and palpable infringement on their authority as legislators'" (quoting *Fumo*, with emphasis added)).

In *Fumo*, 972 A.2d 487, state legislators, the Philadelphia City Council, and a City Council councilmember challenged the City of Philadelphia Department of Commerce's issuance of a license for the construction of a casino upon submerged lands in the Delaware River. The state legislators asserted that the Department of Commerce's actions usurped their sole and exclusive legislative authority to regulate riverbeds, as the General Assembly had the sole and exclusive authority to grant a legally enforceable interest in or the license for use of submerged lands belonging to the Commonwealth; the legislators argued, alternatively, that the Commerce Director unlawfully exercised the City's statutory licensing authority under statutory law. City Council and the councilmember asserted the following in support of their claim of standing:

> City Council asserts that it has standing to seek review of the executive decision of the Commerce Department because City Council comprises the duly elected legislators of the City of Philadelphia. City Council argues that it has a direct and substantial interest in any determination of the City's authority under Act 321. Council claims that its interest in seeking review of the Commerce Department's decision is clear and immediate because it aims to overturn the exercise of improper power by the Commerce Department. Councilman DiCicco further claims standing to challenge what he views as unauthorized executive decisions as a council member and as a resident.

*Fumo*, 972 A.2d at 496.

In addressing the casino's application for summary relief challenging the legislators', City Council's, and the councilmember's standing, the *Fumo* Court first summarized the seminal legislative standing principles set forth in prior cases, explaining as follows:

> The existing case law addressing legislative standing reflects a sensible approach. Legislators **and council members** have been permitted to bring actions based upon their special status where there was a discernible and palpable infringement on their authority as legislators. The standing of a legislator **or council member** to bring a legal challenge has been recognized in limited instances in order to permit the legislator to seek redress for an injury the legislator **or council member** claims to have suffered in his official capacity, rather than as a private citizen. **Legislative standing has been recognized in the context of actions brought to protect** a legislator's right to vote on legislation or **a council member's viable authority to approve municipal action. Legislative standing also has been recognized in actions alleging a diminution or deprivation of** the legislator's **or council member's power or authority**. At the same time, however, legislative standing has not been recognized in actions seeking redress for a general grievance about the correctness of governmental conduct.

*Fumo*, 972 A.2d at 501 (emphasis added). Noting that the legislators' first claim regarding the usurpation of their authority as members of the General Assembly reflected their interest in maintaining the effectiveness of their legislative authority

and their vote, the *Fumo* Court concluded that the legislators had standing to challenge the City's action on that basis. However, the Court rejected that the legislators had standing to assert their second claim regarding the City unlawfully exercising its statutory authority, because it reflected "nothing more than the state legislators' disagreement with the way in which the Commerce Director interpreted and executed her duties on behalf of the City" and did "not demonstrate any interference with or diminution in the state legislators' authority as members of the General Assembly." *Fumo*, 972 A.2d at 503.

More relevantly, the *Fumo* Court next determined that neither City Council nor the councilmember had legislative standing to pursue the claim that the City was without authority to issue the submerged lands license to the casino, as neither alleged that their vote or official authority was undercut by the Commerce Director's action, and they did not seek to restore the prerogatives of their office. They also did not identify a specific legally protected interest arising from their status as local legislators that had been interfered with or diminished by the Commerce Director's decision. *Fumo*, 972 A.2d at 503. In so determining, the Court explained as follows:

> All that City Council and Councilman DiCicco allege is that as an elected municipal legislative body, City Council has not only the right, but an obligation to Philadelphia residents to make basic inquiries about the impact that construction of the gaming facility will have on City residents. While the asserted obligation may be accurate politically, it provides no basis for legislative standing to challenge the lawfulness of an executive decision premised upon a power granted by a statute passed by the General Assembly, a statute which contemplates no role for City Council. City Council does not assert that it has the executive authority in Philadelphia to issue riparian licenses. Indeed, City Council does not have any authority under the Philadelphia Code to consider, approve, or disapprove applications made to the Department of Commerce pursuant to Phila[delphia] Code[ Section] 18-103. Nor does City Council have authority, under the [Pennsylvania Race Horse

> Development and] Gaming Act,[ 4 Pa.C.S. §§ 1101-1904,] to second-guess the Gaming Board's selection of sites for casino licenses.

*Fumo*, 972 A.2d at 503.[29] Accordingly, the *Fumo* Court concluded that City Council and Councilman DiCicco lacked standing.

In *Markham*, 136 A.3d 134, state legislators sought to intervene in an action challenging an executive order issued by the Governor that authorized home health care workers to organize. In considering this question, the Supreme Court reiterated that the legislators had to satisfy traditional standing requirements to demonstrate they are aggrieved, and that they could only demonstrate a direct and substantial interest where their "ability to participate in the voting process is negatively impacted . . . or when" their official power or authority to act as a legislator is impacted in some way. *Id.* at 145. The Court also clarified that legislators lack standing "where [they have] an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct." *Id.*

Considering those principles, the Supreme Court concluded that the legislators who sought to intervene were not aggrieved because their interests in the underlying challenge were too indirect and insubstantial, and, further, they did not establish that the executive order impacted their "ability to propose, vote on, or enact legislation." *Id.* The executive order also did "not touch upon the constitutional or legislative prerequisites for the voting upon and enacting of legislation. Nor [did] the order prevent [the legislators] from acting as legislators with respect to advising,

[29] The *Fumo* Court went on to address City Council's standing to proceed as residents and taxpayers. Such discussion is irrelevant for purposes of the instant Application to Intervene because Proposed Intervenor only asserts that he has standing to intervene in this case by virtue of his duties and responsibilities as a county board of elections member under the Election Code.

consenting, issuing, or approving matters within their scope of authority as legislators." *Id.* The Court stated the legislators' claims were "more . . . in the nature of a generalized grievance about the correctness of governmental conduct. Simply stated, the assertion that another branch of government . . . is diluting the substance of a previously-enacted statutory provision is not an injury which legislators, as legislators, have standing to pursue." *Id.* The legislators therefore lacked the legally enforceable interest required for intervention.

Most recently, in *Allegheny Reproductive III*, 309 A.3d 808, the Supreme Court rejected this Court's rationale in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 225 A.3d 902 (Pa. Cmwlth. 2020) (*Allegheny Reproductive II*), that state legislators may intervene based on a theory that striking down an abortion-related coverage exclusion would affect their authority to appropriate government funds.[30] Although the case is factually distinguishable because it involved, *inter alia*, state legislators' rather than

[30] Like with the *Robinson Township* matter, *Allegheny Reproductive* has a long procedural history. The Court notes for the sake of clarity, however, that only three of the four opinions issued in the case are relevant for our purposes—hence, the references to *Allegheny Reproductive I*, *II*, and *III* in this opinion.

Prior to this Court's decision in *Allegheny Reproductive II* in 2020, which the Court need not discuss in detail here, Judge Simpson had authored a decision in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (Pa. Cmwlth., No. 226 M.D. 2019, filed June 21, 2019) (single-Judge op.) (Simpson, J.) (*Allegheny Reproductive I*), in which he denied the state legislators' applications to intervene for lack of standing. This Court thereafter granted reargument as to Judge Simpson's decision and subsequently issued its 2020 decision in *Allegheny Reproductive II*. A third decision was issued by this Court in 2021 in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 249 A.3d 598 (Pa. Cmwlth. 2021) (en banc), in which this Court addressed the merits of underlying petition for review in that case, including whether certain sections of the abortion statute comprising the coverage exclusion were unconstitutional, as well as whether the reproductive health center petitioners had standing to initiate the litigation surrounding the coverage exclusion. Thereafter, the Supreme Court considered both *Allegheny Reproductive II* and this Court's 2021 decision together in *Allegheny Reproductive III*.

individual councilmembers' or county board of elections members' standing to intervene, the Supreme Court's decision nevertheless reinforces that the legislative standing principles described and applied at length in *Fumo* and *Markham* with respect to both an individual councilman and state legislators are in fact "limited . . . to particular circumstances" in which "a legislator's direct and substantial interest in h[is] ability to participate in the voting process is negatively impacted, or when a legislator has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator." *See Allegheny Reprod. III*, 309 A.3d at 845 (citing *Markham*, 136 A.3d at 145).

In rejecting this Court's rationale in *Allegheny Reproductive II* that the state legislators had standing to intervene, the *Allegheny Reproductive III* Court stated the following, which this Court found instructive in analyzing whether Proposed Intervenor has standing to intervene here:

> [The i]ntervenors' interest in the Coverage Exclusion is too attenuated to satisfy our intervention requirements. With respect to any negative impact on their ability to vote, we find none. Other than passing budgets in contemplation of the parameters of Medical Assistance, the last time that the Legislature voted on the Coverage Exclusion at issue in this case was in 1989, and thus, it cannot be said that this litigation directly affects [i]ntervenors' ability to vote with respect to this exclusion. *See Wilt v. Beal*, . . . 363 A.2d 876, 881 ([Pa. Cmwlth.] 1976) ("Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases."). In other words, [i]ntervenors' direct connection with this specific piece of legislation ceased when it was last voted on and went into effect. **Thus, [i]ntervenors have no interest greater than the ordinary citizen to have duly-enacted statutes enforced.** If anything, [i]ntervenors' only concern appears to be with voting on **future** legislation. . . . **This is too speculative of a concern and too attenuated from the exclusion that is under review.** We have before us a challenge to the Coverage Exclusion that is presently in effect and not a hypothetical statutory provision that has yet to be drafted. There is no defined legislative right

> to vote on future appropriation bills that specifically refuse public funding for abortions, particularly when the constitutionality of such a provision is currently under review by the courts. **If it is ultimately decided that the challenged provisions are unconstitutional, then the legislators cannot genuinely claim that their future interests in unconstitutional legislation are violated.** *See* [*Hosp. &*] *Healthsys*[.] *Ass'n of Pa. v.* [*Cmwlth.*], . . . 77 A.3d 587, 598 ([Pa.] 2013) (stating that "regardless of the extent to which the political branches are responsible for budgetary matters, they are not permitted to enact budget-related legislation that violates the constitutional rights of Pennsylvania citizens"). **This further illustrates that [i]ntervenors' interest is merely defending the constitutionality of the Coverage Exclusion, making their interests no greater than that of the general citizenry.**

*Allegheny Reprod. III*, 309 A.3d at 846-47 (some emphasis added).

Here, the Court is concerned with the dating provisions set forth in Sections 1306(a) and 1306-D(a) of the Election Code, 25 P.S. §§ 3146.6(a) and 3150.16(a), which require that absentee and mail-in electors "shall . . . fill out, date and sign the declaration printed on" the second, or outer, envelope of absentee and mail-in ballots. Petitioners are asking for a declaration that the dating provisions are unconstitutional under the free and equal elections clause, and they seek preliminary and permanent injunctive relief to enjoin those provisions' prospective enforcement to prevent against further disenfranchisement of voters based on what they perceive to be a "meaningless" date requirement. Proposed Intervenor, in his capacity as a Westmoreland County BOE member, posited that if the relief requested by Petitioners in the Petition for Review is granted and the dating provisions are ruled unconstitutional and their enforcement is enjoined, his identified laundry list of statutory responsibilities with respect to elections under the Election Code will be directly implicated and, concomitantly, his "legally enforceable interest" in continued enforcement of the dating provisions will be hampered by him having to

count ballots and certify election results that **he believes** are expressly prohibited from being counted under the Election Code.

This Court concluded that Proposed Intervenor failed to establish that he is aggrieved by this litigation, notwithstanding his special duties and responsibilities under the Election Code with respect to absentee and mail-in ballots. Specifically, Proposed Intervenor's asserted interest in continued enforcement of the dating provisions neither seeks redress for an injury he claims to have suffered in his official capacity as a Westmoreland County BOE member, rather than as a private citizen, nor does Proposed Intervenor seek to protect his viable authority to vote on or approve municipal action. *See Allegheny Reprod. III*, 309 A.3d at 846; *Markham*, 136 A.3d at 145; *Fumo*, 972 A.2d at 501. In this regard, Proposed Intervenor agreed during the hearing that decisions are made by a majority vote of the Westmoreland County BOE, that he could not decide absentee or mail-in ballot questions on his own, and that even if he voted against a decision of the BOE, it is still a decision of the BOE and not him individually. *See* Section 303(a) of the Election Code, 25 P.S. § 2643(a) (providing that "[a]ll actions of **a county board** shall be decided by a majority vote of **all the members**," with certain exceptions (emphasis added)). Proposed Intervenor also agreed that individual BOE members must follow the law, regardless of whether they disagree. Accordingly, this Court decided that Proposed Intervenor has not, and likely will not, suffer any negative impact regarding his ability to vote on absentee and mail-in ballot decisions pursuant to the dating provisions and in accordance with whatever the law is at the time that would necessitate his intervention in this action. *See Ball*, 289 A.3d at 20.

Proposed Intervenor also has not alleged any diminution or deprivation of his power or authority as a Westmoreland County BOE member with respect to counting

undated and incorrectly dated absentee and mail-in ballots, as the Court has already determined that the alleged harm he asserts he may endure, i.e., possible felony charges under Section 1853 of the Election Code, is remote, in the absence of any past history of such prosecutions or controlling case law on the subject, and also entirely speculative at this point, where no ballots have been counted yet in the November 5, 2024 General Election or in any future election. The purported harm is also speculative because the constitutionality of the dating provisions is still under review by the courts. *See Allegheny Reprod. III*, 309 A.3d at 846. As the Supreme Court recognized in *Allegheny Reproductive III*, once a final decision on the constitutionality of the dating provisions is made, Proposed Intervenor may continue to vote on absentee and mail-in ballot questions as he chooses in conformity with his statutory duties and responsibilities under the Election Code. *See id.* at 847.

Finally, like City Council and the individual councilman in *Fumo*, the individual commissioner in *O'Neill*, and the legislators in *Allegheny Reproductive III*, *Markham*, and *Robinson Township III*, it appears clear here that Proposed Intervenor seeks to do nothing more than merely offer his perspective on the correctness of **his own** future government conduct as a member of the Westmoreland County BOE and what **he believes** is correct with respect to the law on counting undated and incorrectly dated absentee and mail-in ballots. Unlike Petitioners, who seek to prevent further disenfranchisement of voters based on what they perceive to be a "meaningless" date requirement, Proposed Intervenor offered that his purpose for intervening as a party in this case is **to defend the constitutionality of the dating provisions**, argue that the dating provisions serve salutary anti-fraud purposes in conjunction with other requirements of the Election Code, argue standing, and advocate that additional, but unspecified, fact-finding must be completed before

Petitioners' requested relief may be granted. This further supports the Court's conclusion that Proposed Intervenor's interest in this litigation is merely to defend the constitutionality of the dating provisions, thus making his interest no greater than that of the general citizenry in having duly enacted statutory provisions enforced. *See Allegheny Reprod. III*, 309 A.3d at 846.

Accordingly, for the foregoing reasons, this Court concluded that Proposed Intervenor's interest as a member of the Westmoreland County BOE, does not, as pled in his papers or argued at the hearing, constitute a legally enforceable interest that entitles him to intervene in this case pursuant to Rule 2327(4).

Regarding Rule 2327(3), Proposed Intervenor argued only that he could have been joined as an original party to this action because, as a member of the Westmoreland County BOE, he is obligated to follow the Election Code's requirements with respect to administering elections, which includes the dating provisions for absentee and mail-in ballots. However, because the Court concluded that Proposed Intervenor has not demonstrated a legally enforceable interest based on his status as a member of the Westmoreland County BOE, or because of his duties under the Election Code, he cannot intervene under Rule 2327(3). This conclusion is supported by the fact that the relief requested in the Petition for Review implicates only the Philadelphia and Allegheny County BOEs' statutorily prescribed administrative and executive functions requiring **those BOEs, and not merely one of their members or any of the other 65 county boards of elections**, to count absentee and mail-in ballots in accordance with the law. (*See* Reply Br. at 11-13 (acknowledging county commissioners principally serve an executive and administrative function, not a legislative one).)

During the hearing, Petitioners' counsel explained that Petitioners intentionally named as Respondents the Secretary, challenging his various guidance on the dating provisions, and the Philadelphia and Allegheny County BOEs only, because those are the two counties where Petitioners "know" voters are being harmed by enforcement of the dating provisions. The Court recognizes that **the Westmoreland County BOE** could have been joined as an original party to this action, which neither Proposed Intervenor nor the opposing parties dispute. Indeed, Proposed Intervenor testified during the hearing that the other two Westmoreland County Commissioners comprising the Westmoreland County BOE declined to join him in his quest to participate in this case.

Like the *Allegheny Reproductive III* Court recognized in rejecting the legislators' argument that they had standing to intervene in that case because any case determining the constitutionality of a statute implicates their legislative authority to appropriate government funding, Proposed Intervenor's argument here that he should be permitted to intervene because of his status **as a member** of the Westmoreland County BOE and because his duties under the Election Code may be tangentially implicated, would likewise result in there being "no discernible limiting principle to individual [councilman, or county board of elections member,] intervention." *Allegheny Reprod. III*, 309 A.3d at 847. To endorse such an argument that Proposed Intervenor has standing to participate as a party in this case merely because of his status **as an individual county board member** and his duties under the Election Code would broaden the scope of individual councilmember standing set forth in *Fumo* and subsequent cases to such a degree that **any individual county board of elections member of any of the 67 county boards of elections** would be permitted to intervene in virtually any case in which the constitutionality of a piece

of election legislation tangentially touching upon one or more of the county boards' powers and duties is being challenged. *See Allegheny Reprod. III*, 309 A.3d at 847. The Court declined to endorse such an approach. Proposed Intervenor therefore has not demonstrated that he could have been joined as an original party in his official capacity as a member of the Westmoreland County BOE under Rule 2327(3).[31]

[31] This conclusion is further bolstered by the plain language of the Election Code, which provides, *inter alia*, that the responsibility of canvassing, counting, and certifying the results of absentee and mail-in ballots falls squarely on the Commonwealth's **67 county boards of elections**, and **not** any one individual member of any county board, as Proposed Intervenor argued. *See* Sections 302(k); 303(a); 1308(a), (g)(1)-(7), & (h); 1404(a); and 1408 of the Election Code, 25 P.S. §§ 2642(k) (setting forth powers and duties of **county boards** and requiring, *inter alia*, that **county boards** "shall . . . receive from district election officers the returns of all primaries and elections, **to canvass and compute the same**, and to certify . . . the results thereof to the Secretary"); 2643(a) (providing that "[a]ll actions of **a county board** shall be decided by a majority vote of all the members"); 3146.8(a) (providing that "[t]he **county boards of election**, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the **county board of elections**"; further providing that absentee and mail-in ballots "shall be canvassed in accordance with subsection (g)"), (g)(1)-(7), & (h) (generally providing **"[t]he county board of elections** shall" canvass ballots in accordance with this section, including specific instructions for how ballots must be counted, and providing, *inter alia*, which ballots may **not** be counted); 3154(a) (providing for computation of returns by **county boards**), 3158 (requiring **the county board** to forward the returns cast for specific offices to the Secretary).

Accordingly, because Proposed Intervenor did not establish a legally enforceable interest that surpasses that of the common interest of all citizens in seeking obedience to the law, and because it is not readily apparent that he could have been joined as an original party in this action, the Court denied the Application to Intervene by Order of July 9, 2024.[32]

/s/ *Ellen Ceisler*
ELLEN CEISLER, Judge

[32] Given that Proposed Intervenor failed to demonstrate that he satisfied one of the requirements of Rule 2327, the Court need not address the grounds for refusing intervention under Rule 2329. *See Allegheny Reprod. III*, 309 A.3d at 849, n.28. For the sake of completeness, however, the Court will address Rule 2329.

"Even if there is a legally enforceable interest under Rule 2327(4), a mere prima facie basis for intervention is not enough and intervention may be denied if the interest of the petition is already adequately represented." *Larock v. Sugarload Twp. Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Cmwlth. 1999). During the hearing, Proposed Intervenor stressed that his goal in this litigation is to advocate for the constitutionality of the dating provisions and to advance the anti-fraud purposes served by the dating provisions when considered alongside other provisions of the Election Code. The Court observes, however, that Proposed Intervenor sought to raise unspecified equal protection concerns regarding Petitioners' failure to join indispensable parties and election uniformity; and argue lack of subject matter jurisdiction for failure to join indispensable parties (i.e., the 65 other county boards), the Secretary is not an indispensable party, and Petitioners' claims are legally insufficient; and assert ripeness concerns. Republican Party Intervenors raise similar, if not the same, issues in their respective summary relief filings. Accordingly, the Court concluded that Proposed Intervenor's interest in this case is already adequately represented by Republican Party Intervenors under Rule 2329(2). Further, the Court found that Proposed Intervenor's intervention at this stage, after the parties' cross-applications for summary relief and supporting/opposing briefs have already been filed on an expedited basis, would unduly delay the prompt resolution of this case in time for the November 5, 2024 General Election under Rule 2329(3).