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IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

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

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, PHILADELPHIA COUNTY BOARD OF ELECTIONS, AND ALLEGHENY COUNTY BOARD OF ELECTIONS,

Respondents.

BRIEF OF *AMICUS CURIAE* WESTMORELAND COUNTY COMMISSIONER DOUG CHEW IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WESTMORELAND COUNTY BOARD OF ELECTIONS FILED ON BEHALF OF REPUBLICAN INTERVENORS

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I. STATEMENT OF INTEREST

Under the Election Code, the boards of elections of counties of the Commonwealth are charged with conducting the election process and enforcing the Election Code's mandates. This includes operating polling stations, canvassing ballots, and investigating voter fraud. The Election Code requires that a mail-in or absentee voter fill out, sign, and date their ballot. The Commonwealth Court, however, concluded that the date requirement is unconstitutional and that undated ballots could be counted, at least in Allegheny and Philadelphia counties.

Doug Chew (Commissioner Chew) is a commissioner on Westmoreland County's board of elections. Given that the process for counting mail-in and absentee ballots will be directly impacted by this Court's decision in this matter, in that the date requirement could be found to be unconstitutional by this Court and that counties must count undated ballots, Commissioner Chew has a direct interest in this matter. Indeed, as Petitioners have made clear, thousands of votes

could be at stake, and, as part of his role in Westmoreland County, Commissioner Chew has an interest in seeing that the law is upheld. [1]

II. INTRODUCTION

There is no sugarcoating the Opinion and Order that is the subject of this appeal. It is unprecedented. And portends consequences for the rule of law that are as devastating as they are irrational. But if that were not enough, the implications of the Commonwealth Court's decision on election administration are even worse. This Court should reverse the decision below—and, to forestall the impending chaos augured by the decision below, it should so swiftly.

From the start, the Election Code never stood a chance. Petitioners, determined to obtain relief this Court has repeatedly denied,[2] devised a scheme that would finally undo statutory requirements that they have long opposed. Their scheme was smart (if not novel): a lawsuit against three parties who find the statutory requirements inconvenient or undesirable—*i.e.*, Al Schmidt, in his

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[1] Pursuant to Pa.R.A.P. 531(b)(2), Restoring Integrity and Trust in Elections, a 501(c)(4) non-profit organization with the mission of protecting the rule of law in the qualifications for, administration of, and tabulation of voting in the United States, paid for the preparation of this *amicus curaie* brief.

[2] These provisions provide, *inter alia*, that a mail-in or absentee voter must "fill out, date and sign the declaration" on the envelope of their ballot.

official capacity as Secretary of the Commonwealth (Secretary), and the Allegheny and Philadelphia County Boards of Elections (BOEs). With no other governmental entity or elected official to oppose their views, or defend the constitutionality of a statute duly enacted by the political branches, the Commonwealth Court was overwhelmed with a chorus parroting the same canard: requiring voters to date their sworn declarations is so burdensome as to be unconstituional.

Of course, such actions—sometimes called "collusive lawsuits"—are not a new phenomenon. But long-standing rules of civil procedure and principles of justiciability have long been used to prevent judicial entanglement in such schemes. Inexplicably, however, the Commonwealth Court became a willing participant in this attempt to achieve through litigation that which the parties have been unable to accomplish in the halls of the General Assembly.

The Commonwealth Court's legal errors are palpable at every turn. As an initial matter, in order to retain subject matter jurisdiction, the panel concluded the Secretary—who merely issues non-binding guidance to counties regarding the enforcement of the date requriement—somehow was indispensible base on duties unrelated to

the relief sought by Petitioners. What is more, this matter was allowed to proceed wihtout any input from sixty-five of the sixty-seven county boards of elections, each of which are headed (at least in some measure) by elected officials answerable to their constituents and sworn to uphold the law. Justice could be afforded without any input from 97% of the governmental entites tasked within enfocring the challenged provisions, the *en banc* panel reasoned, because releif was being sought only against the two handpicked boards. Yet, despite the assurances that the interests of the remaining sixty-five counties would not be impaired, the decision below now seemingly purports to bind all of them—a fact that is apparent on the face of the order that is the subject of this appeal.

All of this is disconcerting in its own right. But what makes this matter particularly troubling is that the Commonwealth Court's decision has implications that reach far beyond this case. Among other things, the intermediate court has sent a clear signal that any petitioner dissatisfied with the impact of a duly enacted law can sue government officials friendly to their cause to take down a presumptively constitutional statute without opposition—laying waste to a century's

worth of threshold justiciability principles. The constitutionality of legislative enactments—whether related to elections or not—is a question far too important to be decided upon an uneven playing field and the Commonwealth Court's willingness to ignore these concerns cannot be countenanced. This matter should be reversed for all of the reasons ably developed in Republican Intervenors's principal brief and for those examined by Judge McCullough in her dissent.

III. ARGUMENT

A. With no Commonwealth entity to defend the constitutionality of the statute and in the absence of ninety-seven percent of the local governmental units responsible for administering elections, this collusive lawsuit should have been dismissed at the outset.

Merits (or lack thereof) aside, the ease with which Petitioners were able to user this case through the Commonwealth Court is a harbinger of a dangerous reconstruction of how legal proceedings will be conducted in the future, absent intervention from this Court.

To begin, this case never belonged in the Commonwealth Court because the Secretary has neither the power, nor the duty, to enforce the date requirement. But undeterred, Petitioners named him anyway, insisting that he was an indispensable party because he designs the

envelopes on which the declaration forms are printed and issues guidances—which, strictly speaking, have as much force of law as blog post on Reddit. Sidestepping its own precedent, the panel accepted this Trojan horse (argument) when it should have closed its gates.

The jurisdictional defects do not stop there. There are sixty-seven county boards of elections, each of which are statutorily required to enforce the date requirements. Petitioners, however, named only two of those boards—both of whom, not-so-coincidentally support Petitioners' claims. Given that the power to design the declaration envelope and advise counties on how to canvass ballots was sufficient to render the Secretary indispensable, it would be fair to assume that the entities responsible for actually canvassing those ballots would also be indispensable. Not so, according to the panel. Instead, the Commonwealth Court inexplicably excused Petitioners' failure to join the other sixty-five indispensable parties—many of whom would argue *against* Petitioners' claims—and retained subject matter jurisdiction where it had none to start. These reasons alone are a sufficient basis to reverse.

1. The Secretary was not an indispensable party.

Initially, the Secretary is not an indispensable party because the relief requested by Petitioners does not implicate any of his duties. *See Stedman v. Lancaster Cty. Bd. of Commissioners,* 221 A.3d 747, 757 (Pa. Cmwlth. 2019) (*en banc*) (holding that a Commonwealth government official is indispensable if he has the power and duty to enforce the statutory provisions specifically at issue in the case and that a generalized power of oversight is not sufficient). In fact, the panel need not have looked far because the Commonwealth Court—in a single-judge opinion authored by Judge Ceisler, who also authored the opinion in this matter—previously considered this very issue, reaching the correct conclusion. *See Republican National Committee v. Chapman*, No. 447 M.D. 2022 (Pa. Cmwlth. Sept. 29, 2022) (*RNC II*).[3]

[3] In *RNC II*, the petitioners were challenging county boards of elections' notice and cure procedures with regard to signature and secrecy envelope defects in mail-in and absentee ballots and named the Secretary as an indispensable party. *See id*. at 2-3. Judge Ceisler reject the petitioners' effort and held that the Secretary was not indispensable because none of the claims implicated the Secretary's limited duties and responsibilities and that the Secretary's non-binding guidance on the subject matter general interest in election administration were insufficient to confer subject matter jurisdiction because they did not "implicate what is truly at the heart of" the case. *Id*. 20.

Yet suddenly, according to this panel, the Secretary's very same general duties and non-binding guidance are sufficient to confer subject matter jurisdiction. This remarkable turnabout, is emblematic of the panel's eagerness to run through foundational procedural barriers to reach the merits. Indeed, not one of the "distinctions" between this case and *RNC II* warrant a result different from *RNC II*. *See* Cmwlth. Ct. Op. at 47-48.

The Commonwealth Court attempts to square this circle in several ways, none of which are availing. *First*, the panel notes that, the Secretary has issued various guidances on the subject. That is undoubtedly true. But how these non-binding memos—which have absolutely no legal force, are often ignored by the county boards, and are routinely rejected by courts—show a legal interest in this action remains a mystery. What is more, no effort is made to explain how the very same guidances that were insufficient to confer jurisdiction two years ago may do so now.

Second, the Commonwealth Court notes that "unlike in RNC II, the Secretary, as the chief election official in Pennsylvania, also now supportsPetitioners' position in this litigation and joins in their request

for relief with respect to the dating provisions, which was not the case regarding the notice and cure procedures at issue in *RNC II*." Cmwlth. Ct. Op. at 47. This explanation can only be read to mean one thing, the Secretary gets to decide whether he wants to be sued in the Commonwealth Court. If any provision of the Election Code is not to the Secretary's liking—no matter how remotely related it is to his powers—the Secretary need only find a party who agrees with him and is willing to name him as a respondent. The message sent by this rationale will be heard far-and-wide and the damage that follow will be severe.

Finally, the Court concludes that "any declaration made in this case will certainly have an effect on his duties and responsibilities under the Election Code as they relate to his prescription of the form of absentee and mail-in ballots generally, and the form of the declarations thereon." Cmwlth. Ct. Op. at 48. If this were true, the panel's conclusion would undoubtedly be correct. But it is not. And tellingly, the panel never bothers to explain how the Secretary's general duties regarding the *form* of mail-in and absentee ballots, or his guidance regarding the date requirement are implicated by the relief sought by

Petitioners. *See Stedman*, 221 A.3d at 760. In fact, Petitioners—together with the Secretary and the DNC—expressly argued that they were ***not*** seeking relief that would change the form of the ballot, since their argument would not require the dating requirement to be stricken, but rather, only prohibit the enforcement. Instead, according to those parties, the Election Code would continue to require voter declarations to include a blank space for a date and voters would still be instructed to put a date.[4]

Far from being "truly at the heart of" this case, those duties and guidance's are ancillary and forgettable. *Third*, the panel noted that "the PFR specifically seeks relief against the Secretary," Cmwlth. Ct. Op. at 48, and in an apparent attempt to give this rationale some force, the Commonwealth Court's order permanently enjoins the Secretary from strictly enforcing the date requirement. But the panel's order in this regard is entirely meaningless because the Secretary cannot be enjoined from something he was never statutorily permitted to do in the first place. Rather, as explained below, the duties of every county board

[4] In this connection, it should be noted that, if the form of the voter declaration is at issue and has "certainly" been altered by the Commonwealth Court's decision that any (minimal) colorable argument against severability is now extinct.

of elections is what is truly at the heart of this case. The sixty-five county boards of elections that Petitioners were not joined in this matter have a significant interest in administering elections pursuant to the Election Code's plain language, as each county board of elections is vested with , the duty to enforce the Election Code's requirement that the declaration on the outer envelope of absentee and mail ballots is dated, *see* 25 P.S. §§ 3146.6(a); 3150.16(a), as well as a host of critical obligations related to the conduct of elections within their respective counties, including *inter alia*, 25 P.S. §§ 2642(f)-(i), (k); 2644(a); §§ 3154, 31583146.1-3146.8.; 3150.11-3150-16.

2. Counties.

Based on the foregoing responsibilities, the sixty-five county boards of elections should have undoubtedly be brought into this litigation before a critical component of a statute pertaining to their administration of mail-in and absentee ballots is discarded as "unconstitutional." That is especially true given that the court's invalidation was premised, primarily, upon its record-less conclusion that the counties have no use for that component. Yet, under the Commonwealth Court's decision, it need only have heard from the

Allegheny and Philadelphia County BOEs to reach its conclusion that appears to apply throughout the state. The Commonwealth Court's two-part reasoning in support of that conclusion is indefensible.

First, the Commonwealth Court observed that, under *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003), requiring any and all *tangentially interested* parties to be joined to a matter would be impractical. *See* Commonwealth Ct. Op. at 52 ("[W]hile any decision in this case may tangentially affect the other 65 county boards' duties with respect to counting undated and incorrectly dated ballots . . . ."(citing and quoting *City of Philadelphia*, 838 A.2d at 583-85)). True enough, this Court's precedent does not require joinder of parties whose interests are minimal or entirely ancillary to the relief sought. But nowhere in its decision does the Commonwealth Court offer any cogent justification for characterizing the absent boards of elections as "tangentially interested." Nor could it, as the sixty-five county boards of elections are far from "tangentially interested" parties; rather, they are the "'officers charged with the enforcement of the'" very statutory provisions that the Commonwealth Court declared to be unconstitutional. *City of Phila.*, 838 A.2d at 570 (quoting *White House*

Milk Co. v. Thomson, 81 N.W.2d 725, 729 (Wis. 1957)). And it did so based principally on its conclusion that they serve no discernible purpose in the administration of elections—the oversight of which is the responsibility of the very boards of elections not present before the court.

Setting aside the fact that the absent county boards are plainly not "tangentially interested," unlike the present case, in *City of Philadelphia*, the record was clear that there was no daylight between the existing parties and those who were absent. Indeed, the Court's refusal to dismiss for failure to join indispensable parties was based, in no small part, on the fact that the existing parties were vigorously *defending* the rights of the absent parties, which is not comparable to the present set of facts. In short, therefore, the Commonwealth Court's attempt to invoke *City of Philadelphia* is entirely misplaced.

In its next attempt to excuse Petitioners' failure to join the sixty-five county boards of elections, which constitute 97% of the boards in this Commonwealth, the Commonwealth Court reasoned that "none of the 65 county boards, save for Commissioner Chew (as a member of one county board), sought to intervene in this case, despite that they could

have, which militates against finding that any of those county boards are indispensable to this case." Cmwlth. Ct. Op. at 53 (emphasis omitted). This reasoning is flawed on multiple grounds.

First, it is a rudimentary principle of civil procedure that that joinder and intervention are distinct concepts. And it is indisputable that the burden of joining indispensable parties is borne by the plaintiffs. The burden of proving that all interested persons have been made parties to the action, or have received reasonable notice, is on the petitioner. *See, e.g.*, *Moraine Valley Farms, Inc. v. Connoquenessing Woodlands Club, Inc.*, 442 A.2d 767, 769 (Pa. Super. 1982). Indeed, as best as *amici* can tell, no court has ever excused a party's failure to join an indispensable party is somehow excused by the absent party's failure to avail itself of its right to intervene. And with good reason. Such a holding would make no sense whatsoever because it would absolve plaintiffs in every instance from joining indispensable parties, allowing them to hope that those parties simply do not learn about their case or otherwise elect to sit it out.

Moreover, parties may elect not to intervene in a case against other defendants for a variety of reasons. Most obviously, they are not

served with process and may not have notice. Or they may dispute the subject matter jurisdiction of the court in question. Or they may not wish to be tied to other defendants who take a different view of the procedural and merits issues at stake. Just because a party may be "indispensable" does not mean it has to jump into the fray on the terms set by the plaintiff.

Consider the circumstances of this case. It is entirely plausible—indeed, probable—that may counties were perfectly content with this Court's decision in *Ball* and, having no expectation that they be bound by a ruling in a case they were never made a party to, made a deliberate decision to avoid becoming subject to an unfavorable Commonwealth Court decision. Now, those boards who did not intervene have at least preserved their right to argue that they are not bound by this as-applied challenge.[5]

Nor does calling the order "as-applied" salvage the situation. If plaintiffs gambit of suing only select counties conforms to Pennsylvania law, then the game here is forever changed. Plaintiffs need not pursue

[5] Furthermore, unlike the Secretary, who has a team of lawyers that specialize in election matters at his disposal, most county boards of elections operate on a tight budget and must incur additional costs in litigating matters of this nature.

their objectives of invalidating democratically elected laws through adversarial engagement. Rather, they can selectively invalidate laws through collusive litigation with friendly counties. Not only is this contrary to the rule of law, but it is a recipe for introducing gross disuniformity into the administration of elections in this state, notwithstanding a clear constitutional directive to the contrary.

Moreover, given the inexplicable decision to rush through this case without ***any*** discovery and on an expedited briefing schedule in the middle of the summer, it is also entirely possible that many boards of elections were simply unable to act in time to intervene. In this regard, it bears reiterating that, the Commonwealth Court had already conducted case management conference and set this case for a full-merits disposition on June 10—less than two weeks after this action was filed. And when Commissioner Chew filed a motion to intervene a day later, the Secretary and the DNC Intervenors protested that his participation would unduly delay the resolution of this action.

Finally, and most importantly, when Commissioner Chew sought to intervene in this matter, the Commonwealth Court *denied his application for intervention*. The Commonwealth Court's contradictory

reasoning creates an untenable position: either a party seeks to intervene and is denied, or a party does not seek intervene and, nonetheless, is bound by an unfavorable decision. The Commonwealth Court cannot have it both ways.

Ultimately, the panel's decision to reject Republican Intervenors failure to join argument has left this litigation in an unbalanced state. Not one government official, and more importantly, not one *elected* official tasked with administering elections who would have defended the constitutionality of the date requirement was a party to this litigation.. Stated otherwise, the panel was satisfied to allow a political party whose only interests are partisan to defend the constitution rather than allow those elected officials whose primary duty is to the Election Code. That is a dangerous norm to establish in a hyper-partisan climate where judicial proceedings are supposed to be a reservoir of objectivity and fairness.

Not only does this cast an unmistakable partisan hue over the proceedings, it also removes from consideration relevant facts that only those who actually administer the statute could proffer. None of the remaining parties, *i.e.*, Petitioners, the Secretary, and the Allegheny

and Philadelphia County BOEs, can ascertain the specific facts relative to the other county boards of elections regarding whether the date requirement is "meaningless and inconsequential," as the Commonwealth Court broadly opined in support of its ultimate holding.[6] Cmwlth. Ct. Op. at 3, 76. In this regard, it is significant that Petitioners concede that the individual county boards of elections have different processes for enforcing the Election Code.

Further, despite that Petitioners raised an as-applied rather than facial constitutional challenge to the date requirement, paragraph 3 of the Commonwealth Court's order suggests it applies statewide.[7] In considering the cross-motions for summary relief below, however, the factual assertions the Commonwealth Court accepted as true (as required by that procedural posture) pertained only to the Allegheny

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[6] In fact, the Commonwealth Court's "meaningless and inconsequential" finding was the primary factual pillar supporting its conclusion that the date requirement is unconstitutional. *See* Cmwlth. Ct. Op. at 3, 76.

[7] Paragraph 3 of the Commonwealth Court's order provides:

> It is hereby DECLARED that the Election Code's dating provisions are invalid and unconstitutional as applied to qualified voters who timely submit undated or incorrectly dated absentee and mail-in ballots to their respective county boards, as the dating provisions strict enforcement to reject such ballots burdens the fundamental right to vote guaranteed by the free and equal elections clause set forth in article I, section 5 of the Pennsylvania Constitution, Pa. Const. art. I, § 5.

and Philadelphia County BOEs. As such, the Commonwealth Court concluded that the date requirement is "meaningless and inconsequential" based on facts concerning two county boards of elections—*i.e.*, Allegheny and Philadelphia—but ostensibly applied that holding to *sixty-five county boards of elections not a party to this case*.

Even if the Commonwealth Court's order applied only to the Allegheny and Philadelphia County BOEs, it would still engender a violation of Pennsylvania's Free and Equal Elections and Uniformity Clauses resulting in further litigation. *See* Pa. Const. art. I, § 5; art. VII, § 6; *see generally In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election,* 241 A.3d at 1090-91 (Wecht, J., concurring and dissenting) ("The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee

voters an "equal" election, particularly where the election involves inter-county and statewide offices.") (quotation omitted). The panel, unwilling to confront this fatal flaw in its analysis, discarded Republican Intervenors' argument on this front as undeveloped. *See* Cmwlth. Ct. Op. at 53. But if the court intends to issue a decision that purportedly affects only two boards of elections, it is required to consider the potential constitutional side-effects of its decision. And when the equal protections argument is fairly weighed, it is clear that the panel's decision is constitutionally infirm.

To explain, the other sixty-five county boards of elections will be allowed to continue to administer their elections by enforcing the date requirement even if this Court concludes that Allegheny and Philadelphia Counties are not obligated to do so. This result will create an unequal enforcement of the Election Code that will unconstitutionally increase or diminish an individual's right to vote depending on where they live such that the right to vote will not be "equal" as required by the Pennsylvania Constitution. Thus, whether framed as an as-applied or facial constitutional challenge to the date requirement, there can be little doubt that the 65 county boards of elections not a party to this matter are

indispensable. *See, e.g.*, *City of Philadelphia v. Com.*, 838 A.2d 566, 567 (Pa. 2003) (explaining that a party is indispensable. "when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." (quoting *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988)).

In sum, the Commonwealth Court gave artificial importance to the Secretary's otherwise general duties regarding the form of ballots in order to corral him into this dispute so that it could retain subject matter jurisdiction. The panel then disregarded the critical role that individual county boards of elections play in election matters, overlooked that there may be (and very well are) unique facts and processes to each county to demonstrate that the date requirement is not "meaningless and inconsequential," and based its ultimate conclusion that the date requirement is unconstitutional on "facts" pertinent to *two* county boards of elections but applied that holding to county boards of elections statewide. In so doing, the Commonwealth Court puts this Court in the precarious position of considering a challenge to the constitutionality of the date requirement that overlooks the election concerns of 97 percent of the Commonwealth's county election boards. This is not the proper

manner to consider such a challenge, particularly when the validity of thousands of votes is at stake.

B. Strict scrutiny now applies to every minor detail of the Election Code allowing the judiciary to line-item veto the General Assembly's legislative enactments.

Left unaltered, the Commonwealth Court's results-driven opinion will have pernicious consequences that will fundamentally alter settled precepts of judicial review. Most importantly is that all minor aspects of the Election Code, from the hours of operation of a polling place to the leasing of voting machines, are now subject to strict scrutiny under the Commonwealth Court's ruling. The Commonwealth Court explained: "Where a state election regulation imposes a 'severe' burden on a plaintiff's right to vote, strict scrutiny applies and requires that the regulation is 'narrowly drawn to advance a state interest of compelling importance.'" Cmwlth. Ct. Op. at 74 (quoting *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 384-85 (Pa. 2020)). The Commonwealth Court proceeded to conclude:

> In examining the constitutionality of the dating provisions under the above-described standards, we agree with Petitioners and find that the dating provisions impose a significant burden on one's constitutional right to vote, in that they restrict the right to have one's vote counted to only

> those voters who correctly handwrite the date on their mail ballots and effectively deny the right to all other qualified electors who seek to exercise the franchise by mail in a timely manner but make minor mistakes regarding the handwritten date on their mail ballots' declarations. Stated another way, the dating provisions make it ***so difficult*** for some voters to exercise the franchise that it effectively amounts to a denial of the franchise itself.

Id. at 75 (emphasis added). This is an extraordinary holding that squarely contravenes binding precedent. *See Oughton v. Black*, 61 A. 346, 348 (Pa. 1905) ("If marking is inequality, writing is more so.").[8]

To put a fine point on it, this holding means that, in Pennsylvania, the law considers it to be a "severe burden" to ask a person to write the date they voted onto an envelope. This demand does not involve a secret piece of information. It is almost certainly known (or at least easily knowable) to each and every voter in this state. And it is certainly ascertainable by any person with the mental competency required to vote. Nor does it require any special instrumentation to accomplish. The envelope is supplied by the state. And the required markings can be made with the same instrument the voter uses to mark the ballot.

[8] Notably, further showing how far it was willing to depart from authority, the Commonwealth Court's decision relies on the ***dissent*** from *Oughton*, sidestepping the majority opinion entirely.

To put it bluntly: If writing a known piece of information on a government-supplied piece of paper with an instrument already in each and every voter's hand constitutes a "severe burden," then every single requirement imposed on voters by the Election Code does so as well. And each of them must either be justified by strict scrutiny or be construed such that the voter has no real obligation to comply with them. Under the Commonwealth Court's reasoning, the "trivial" is simply "reimagined" as to be "severe" and constitutional invalidation of disfavored democratically enacted laws follows. This is untenable.

Foremost, a mail-in or absentee voter generally writes the date on their ballot on the date that the voter signs it, so it is unclear precisely how a county board of elections might, on a typical basis, determine that the signing date provided on a ballot is *incorrect*. Second, if the standard for a "severe" burden to enfranchisement is providing the date of signature on a voter's mail-in or absentee ballot, it is unclear where the buck stops. As indicated above, a voter might allege that the Election Code imposes a severe burden upon voting because it causes polling stations to close at 8:00 p.m., rather than 8:02 p.m., because, after all, being two minutes late to vote is a minor irregularity and an

innocent oversight. This, according to the Commonwealth Court, would harm some would-be voters who fail to adhere to the requirement to arrive on time. And such persons would be severely burdened because their attempt to vote would be frustrated.

The point is not whether the state could somehow justify the earlier closing time. It is that under the Commonwealth Court's reasoning, it must do the justifying. And not just any justification will do. Strict scrutiny would demand that the state *produce actual evidence* that the earlier closing time is *narrowly tailored* to a compelling government interest. That is the state mush somehow show that it could not achieve the same objectives by leaving the polls open for another 5, 10, 15, 20, 25, 30 minutes or even longer.

Other examples abound. Under the Commonwealth Court's reasoning, voters could claim that the Election Code imposes a severe burden upon voting because it does not permit voter registration within 15 days of an election. Again, the question is not whether this is a justifiable cut off. It is that the state would have to somehow compile evidence showing that it could not make do with 14 days or even zero. In effect, the Commonwealth Court's holding would more or less compel

the implementation of same day registration in this state as a matter of "Free and Fair" elections under the Constitution. This Court's admonition, ably put, rings as true today as it did 120 years ago:

> This system of regulating free and equal elections would be more than a human device if it did not encounter criticism. Perfect though it were as the wisdom of man could make it, there would still be those among men to point to its defects, and, as in every case of legislation not in accord with the view or sense of right and propriety of those affected by it, the Constitution would be turned to as the shibboleth to strike it down. It may or may not be wise legislation. The convenience of the elector may not have been properly considered when it was passed. Another system might be more convenient. Defects in it may be fairly pointed out, and improvements suggested. But these are not matters for us. Our duty is to apply the touchstone of the Constitution, and if the response is, 'Freedom and equality,' the act must be upheld. Such is the response here.

Oughton, 61 A. at 349.

Significantly, the constitutional analysis as set forth above does not revolve around whether a provision of the Election Code is meaningful or consequential; it revolves around whether that provision imposes a *severe* burden upon the right to vote. And according to the court, that is assessed by whether the rule's enforcement has some effect on voting, and not, as it should be, on an assessment of what the voter must do to comply. The Commonwealth Court's finding, based on

nothing, that the dating provision is "meaningless and inconsequential," just goes to whether the state can satisfy strict scrutiny, not to whether the rule in question must be evaluated according to that usually fatal standard. As such, significant portions of the Election Code are subject to erosion unless those processes serve a *compelling* government interest—which is an incredibly high standard.

Along these lines, the panel blatantly ignores a legitimate government interest that the date requirement serves: to mark the point in time when the voter purports to be eligible to cast their ballot. Critically, the date requirement has indisputably served its purported interest in ferreting out election fraud on at least one occasion. *See* Cmwlth. Ct. Op. at 36, n.33 (citing *Commonwealth v. Mihaliak*, CP-36-CR-0003315-2022 (Lanc. Cty. CCP 2022)). Even the Court's order acknowledges that the date can be used for this very purpose. Yet the court made no effort to unravel the paradox of how requirement could be both meaningless and inconsequential and also useful at the same time. That the date requirement was effectively relied upon only once is enough to conclude that it serves *some* legitimate government interest. Even if it captures only a small portion of potential fraud, it cannot be

said to be meaningless and inconsequential. One instance of voter fraud is too many and the legislature is free to deploy different mechanisms to deter fraud at different stages of the voting process.

Despite the panel's contrary conclusion, the date requirement does, in fact, mark a point in time at which the voter is certifying their eligibility to cast the ballot. A voter's eligibility can change from the time they request and receive a mail-in ballot to when they cast the ballot if, for example they move (in or out of state), die, or go to prison. In those circumstances, the ballot could be timely received as indicated by the barcode, but nevertheless be invalid because it was cast by a person who was, at they time they signed the verification, ineligible to vote. Viewed through this lens, the date requirement serves a legitimate anti-fraud purposes which fills a potential gap in the Election Code that postage stamps and barcodes alone cannot cover.

In effect, the Commonwealth Court grants the judiciary *carte blanche* to line-item veto legislative requirements related to an individual's right to vote that do not achieve the highest level of importance—*i.e.*, a compelling government interest. By lowering the bar, the Commonwealth Court invites legal challenges to all aspects of

the election process. The impact of the Commonwealth Court's decision cannot be understated. It must be reversed.

IV. CONCLUSION

It's clear that the panel was more determined to move quickly than deliberatively. The Court rendered a decision without all of the relevant facts and without all of the relevant parties. This Court should correct those errors and reverse the panel's hasty decision. If left to stand, the panel's decision will have longstanding consequences that will negatively impact election litigation in the Commonwealth.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 2135(a)(1). Based on the word count feature of the word processing system used to prepare this brief, it contains 6,732 words, exclusive of the cover page, tables, and the signature block.

Dated: September 3, 2024 /s/ Matthew H. Haverstick