

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

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**No. 68 MAP 2024**

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**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/Appellees,**

**v.**

**Al Schmidt, in his official capacity as Secretary of the Commonwealth,  
Philadelphia County Board of Elections, and Allegheny County  
Board of Elections**

**Respondents,**

**and**

**Republican National Committee and Republican Party of Pennsylvania,**

**Intervenors/Appellants**

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**BRIEF OF AMICUS CURIAE, PENNSYLVANIA AFL-CIO IN SUPPORT  
OF APPELLEES**

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## **I. STATEMENT OF INTEREST OF AMICUS CURIAE**

Pursuant to Pennsylvania Rule of Appellate Procedure 531, Your Amicus Curiae, the Pennsylvania AFL-CIO, submits this brief in support of Appellees;<sup>1</sup> Your Amicus Curiae is a Federation of Labor Organizations operating throughout the Commonwealth of Pennsylvania, that is well recognized as the Central Address of Organized Labor in the Commonwealth. Its affiliated Local Unions, District Councils, Regional Councils, Central Labor Councils and Area Labor Federations represent in excess of 750,000 public and private sector working men and women engaged in the virtually all of the extraordinary range of occupations, vocations and professions present in our diverse economy and who reside in virtually every community in the Commonwealth who, together with their families, comprise an extraordinarily significant portion of voting age Pennsylvania citizens. Those voting age citizens include individuals who (1) are elderly, infirm, mobility challenged, or partially disabled, (2) who have family, employment, organizational and avocational responsibilities, obligations and interests that do not always coincide with a precise 13-hour period on a statutorily designated Spring or Fall (November) day (3) are regionally matriculated college and/or university students, (4) do not operate a motor vehicle or have effective access to public transit systems, and/or (5)

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<sup>1</sup> No person or entity other than these Amicus Curiae or their counsel has paid for the preparation of this brief or authored the brief, in whole or in part.

lack the reasonable physical, practical and/or economic means of always safely and securely exercising their sacred franchise in person despite being validly registered Pennsylvania electors and voters. Therefore, Your Amicus Curiae has a direct and substantial interest in Appellees' effort to secure affirmance of the decision of our Commonwealth Court partially striking the General Assembly's enactment of burdens on the Free and Equal elections requirement of the Constitution of Our Commonwealth putatively imposed by Act 77 at issue in the instant matter, and it files this brief in support of the Appellees in the instant appeal.

Additionally, members of organizations affiliated with the Pennsylvania AFL-CIO are employed by various Pennsylvania counties, assigned to work duties on behalf of various County Boards of Election and are assigned tasks associated with and are called upon to implement and/or administer election operations and activities on and associated with primary and general elections throughout the Commonwealth's sixty-seven (67) counties. Among the goals of the Pennsylvania AFL-CIO is the protection, assurance, and advancement of the cause of social and economic justice for the residents and citizens of our Commonwealth at the workplace, in civic affairs, in their Pennsylvania communities, in political participation and, significantly, in the unfettered and easily accessible exercise of their franchise right in their capacity as Pennsylvania citizens and voters.



Like Appellees, Your Amicus Curiae is interested in protecting the interests of eligible voters across the Commonwealth of Pennsylvania and in upholding the requirements of our Commonwealth's Constitution. Further, the Pennsylvania AFL-CIO has an interest in ensuring that otherwise eligible voters are not impermissibly or illegitimately disenfranchised or restricted in their ballot access by incorrect application of Constitutional interpretation. Your Amicus Curiae believes this Honorable Court will benefit from this brief because it provides an overview of the present and historic state Constitutional issues and development involved in the review and interpretation of the provisions of Act 77 implicated in the instant appeal, and explains the significant, and irreversible affects the Constitutionally impermissible burdens on the exercise of the franchise that the superfluous requirements of a portion of this law will have on voting and citizen access to voting rights in this year's general election and beyond.

## II. STATEMENT OF THE CASE<sup>2</sup>

### A. Act 77 of 2019

On October 31, 2019, Governor Tom Wolf signed Act 77 into law—a bipartisan statute that represents the most significant expansion in how Pennsylvanians exercise the franchise since the passage of the Election Code in 1937.<sup>3</sup> Under this amendment to the Election Code, all qualified Pennsylvania voters may request and cast their ballots by mail. 25 P.S. § 3150.11. To do so, voters must request, in a designated number of days before an election, either online or via mail, a mail-in or absentee ballot to seasonably cast the mail-in ballot. 25 P.S. § 3150.12a(a). The deadline for returning those ballots to the county board of elections office is 8 p.m. on the designated Election Day. 25 P.S. § 3150.16.

Once the county board of elections approves a voter’s request for a mail-in ballot, it sends the voter a ballot in an envelope marked “Official Election Ballot”

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<sup>2</sup> Your Amicus Curiae incorporate the facts as articulated in Appellees’ Petition for Review filed with the Court below. That Petition was decided through Cross Applications for Summary Relief pursuant to Pennsylvania Rule of Appellate Procedure 1532(a). After a status conference, the parties agreed “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 expedition means of resolving the legal issues in dispute.” *Black Political Empowerment Project, et al. v. Al Schmidt et al*, Memorandum Opinion (Aug. 30, 2024 Cmwlth. Court) (non-reported decision), at 7 (hereinafter “*BPEP*”)

<sup>3</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591 (“Election Code”). Act 77 was added by the Act of October 31, 2019, P.L. 552, No. 77 (“Act 77”), 25 P.S. §§3150.11-3150.17.

(hereinafter “interior envelope”), and a second larger envelope containing, “[The form of declaration of the elector, and the address of the elector’s county board of elections and the local election district of the elector” (hereinafter “exterior envelope”). 25 P.S. §§ 3150.14, 3150.16. The voter must make his or her selections on the ballot, insert and enclose the ballot in the interior envelope, and then place that envelope in the larger exterior envelope for mailing. 25 P.S. § 3150.16(a). “The elector shall then fill out, date and sign the declaration printed on [the exterior] envelope.” *Id.*

To return the mail-in ballot, the voter may either mail it or deliver it, “in person to the county board of election[s].” *Id.* The Election Code permits county boards of elections to open multiple other offices (hereinafter “satellite offices”), other than the one generally used for this purpose, so that voters may deliver their ballots, in person, to the satellite offices. 25 P.S. § 2645(b). The Election Code also permits county boards of elections to receive mail-in ballots at ballot depository boxes (hereinafter “drop boxes”) at places other than the county board of elections office, “as ha[ve] been designated by the board.” 25 P.S. § 3151.

## **B. Voting Rights under the Pennsylvania Constitution**

In considering the constitutionality of Act 77, it is vital to understand Pennsylvania’s long and distinguished history of being among the first States to create meaningful popular sovereignty, whereby the people select their elected

officials. KEN GORMLEY ET AL., *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES*, (2004); Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 *TEMP. L. REV.* 575, 588-592; Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 *TEMP. L. REV.* 541, 548-561 (1989). Among the primary means by which the 1776 Constitution achieved this goal was to extend the franchise to non-propertied freemen, regardless of race, who had paid appropriate State or local taxes. GORMLEY, *supra*, at 216; Herrington, *supra*, at 580; ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 329 (2000). In its current iteration and consistent with the Thirteenth, Nineteenth, and Twenty-Sixth Amendments, Article VII, Section 1 of the Pennsylvania Constitution extends the right to vote to all men and women of twenty-one (21) years of age, regardless of race, property, or the payment of taxes. PA. CONST. art. VII, § 1; *see also* U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.<sup>4</sup>

Pennsylvania also achieved greater participatory democracy through a provision that has existed in some form since the 1776 Constitution and is currently

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<sup>4</sup> Although as written the 1968 Constitution states that a Pennsylvanian must attain the age of twenty-one (21) to vote, that was effectively amended with the adoption of the Twenty-Sixth Amendment to the United States Constitution. *See* U.S. CONST. amend. XXVI.

found in Article I, Section 5 (hereinafter “the Free and Equal Elections Clause”). GORMLEY, *supra*, at 216-17 (citing PA. CONST. of 1776, Ch. I, § VII; PA. CONST. of 1790, Art. IX, § V). The current iteration of this provision states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5.

This Court has recognized that the Free and Equal Elections Clause protects the fundamental right to vote. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018) (holding that the 2010 reapportionment of Pennsylvania’s congressional districts violated the Free and Equal Elections Clause); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (declaring “this Court has acknowledged that the right to vote is fundamental and ‘pervasive of other basic civil and political rights’”) (citing and quoting *Bergdall v. Kane*, 731 A.2d 1261 (Pa. 1999)). Recognizing the extraordinary and foundational nature of the right to vote in a constitutional democracy, this Court has declared that there is a, “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *In re Cioppa*, 626 A.2d 146, 148 (Pa. 1993); *see also In re Wieskerger Appeal*, 290 A.2d 108, 109 (Pa. 1972) (“Our goal must be to enfranchise and not to disenfranchise.”).

In the most powerful articulation of the constitutional significance and importance of the Free and Equal Elections Clause, this Court announced:

[Our] analysis of the Free and Equal Elections Clause — its plain language, its history, the occasion for the provision and the circumstances in which it was adopted, the case law interpreting this clause, and consideration of the consequences of our interpretation — leads us to conclude the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so.

*League of Women Voters*, 178 A.3d at 814. Ultimately, the Free and Equal Elections Clause guarantees the foundational nature of the right to vote and any statutory requirement in Act 77 that compromises that right must, of necessity, cede to the Clause's requirements.

### III. ARGUMENT

#### A. **The Commonwealth Court Properly Concluded Below That Act 77's Provision Commanding Voters to Provide a Date on the Outer Envelope of their Mail-In Ballot Violates the Free and Equal Election Clause of the Pennsylvania Constitution.**

There is an essential factor for our courts to consider when interpreting a statute such as Act 77 or any constitutional provision that concerns or impacts the foundational nature of the right to vote: “[T]he longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise.” *In re Cioppa*, 626 A.2d at 148 (citations omitted). Thus, this Court commands that such constitutional or statutory provisions involving the right to vote be, “liberally

construed.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) (“[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.”) (citing *In re Nomination Petition of Gallagher*, 359 A.2d 791, 792 (Pa. 1976)); *Shamback v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (“[A]lthough election laws must be strictly construed to prevent fraud, they ‘ordinarily will be construed liberally in favor of the right to vote.’”) (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)); *In re Cioppa*, 625 A.2d at 148 (“[O]ur Election Code should be liberally construed so as not to deprive a candidate of the right to run for office or the voters their right to elect a candidate of their choice.”)

Thus, when considering the constitutionality of a statute, such as Act 77, this Court stated:

When faced with any constitutional challenge to legislation, we proceed to our task by presuming constitutionality in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths. See [Section 1922(3) of the Statutory Construction Act of 1972,] 1 Pa.C.S. § 1922(3). (“In ascertaining the intention of the General Assembly in the enactment of a statute the ... presumption [is] [t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.”; *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, [877 A.2d 383, 393, (Pa. 2005) (hereinafter “PAGE”)]).

*Stilp v. Commonwealth*, 905 A.2d 918, 938-39 (Pa. 2006).

Furthermore, “in interpreting provisions of the Pennsylvania Constitution, [a court’s] ultimate touchstone is the actual language of the constitution itself.” *Yocum v. Commonwealth, Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017). Thus, “a legislative enactment will not be deemed unconstitutional unless it *clearly, palpably, and plainly violates the Constitution*. *PAGE*, 877 A.2d at 393 (emphasis added). “All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.” *Working Families Party, v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019). Courts considering a facial challenge to a statute may only declare that statute unconstitutional, “where there are no other circumstances under which the statute would be valid,” and “the law is unconstitutional in all of its applications.” *Germantown Cab. Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

Furthermore, this Court has explained the standard of review when considering the constitutionality of provisions of the Election Code. In *Pennsylvania Democratic Party v. Boockvar*, this Court stated:

In analyzing whether a state election law violates the constitution, courts must first examine the extent to which a challenged regulation burdens one's constitutional rights. *Burdick v. Takushi*, 504 U.S. 428, 434 . . . (1992). Upon determining the extent to which rights are burdened, courts can then apply the appropriate level of scrutiny needed to examine the propriety of the regulation. *See id.* (indicating that “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth



Amendment [, U.S. Const. amends. I, XVI,] rights”).

Where a state election regulation imposes a “severe” burden on a plaintiff’s right to vote, strict scrutiny applies and requires that the regulation is “narrowly drawn to advance a state interest of compelling importance.” *Id.* When a state election law imposes only “reasonable, nondiscriminatory restrictions,” upon the constitutional rights of voters, an intermediate level of scrutiny applies, and “the State’s important regulatory interests are generally sufficient to justify” the restrictions. *See [i]d.* (upholding Hawaii’s ban on write-in voting in the primary where doing so places a minimal burden on one’s voting right and supports the state’s interest in supporting its ballot access scheme). Where, however, the law does not regulate a suspect classification (race, alienage, or national origin) or burden a fundamental constitutional right, such as the right to vote, the state need only provide a rational basis for its imposition. *See Donatelli [v. Mitchell]*, 2 F.3d [508,] 510 & 515 [(3d Cir. 1993)].

*Pa. Democratic Party v. Boockvar*, 238 A.3d 35, 384-85 (Pa. 2020).

In this case, the majority of the Commonwealth Court properly held unconstitutional, as applied, Act 77’s rule requiring a proper date on the outer envelope of mail-in ballots. First, under the undisputed facts of the case, “nearly 10,000 voters were disenfranchised in the 2022 General Election and ‘thousands’ more voters were disenfranchised in the 2024 Presidential Primary Election,” due to the refusal to count timely submitted and otherwise conforming mail-in ballots with incorrect or no date on the outer envelope. *BPEP*, at 12. Furthermore, as poignantly noted by the Commonwealth Court, “voters will continue to be disenfranchised by the Philadelphia and Allegheny [Boards of Election], and the other 65 county boards of election....” *BPEP*, at 17. A rule that leads to Pennsylvania citizens having their properly requested, conformingly completed, and timely submitted mail-in ballots

go uncounted constitutes a significant burden to their right to vote. As the Commonwealth Court correctly concludes:

[W]e ... 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.

*BPEP*, at 75.

Second, because the dating provision clearly constitutes a significant burden to a fundamental right -- the right to vote -- the Commonwealth Court correctly concluded that strict scrutiny applies to determine its constitutionality, "*i.e.*, the dating provisions, [are] "narrowly drawn to advance a state interest of compelling importance." *Id.* (citing *Pa. Democratic Party*, 238 A.3d at 385; *Appeal of Gallagher*, 41 A.2d 630, 632-33 (Pa. 1945); and *In re Nader*, 858 A.2d 1167, 1180 (Pa. 2004)).

As was made clear in the litigation below, there is simply no compelling state interest with respect to the statutory requirement that a voter place a date on his or her declaration appearing on the outer envelope of the mail in ballot. The Commonwealth Court explained:

[C]ounsel for the Secretary [of State] confirmed that none of the county boards of elections use the handwritten date for any purpose, and he further relayed that the only reason the date is included on absentee and mail-in ballot envelope declarations is because such requirement is in

the Election Code. Counsel for the Secretary also pointed out that the county boards are required by law to record when they receive absentee and mail-in ballots, and that they “certainly do.” He also confirmed that county boards having to confirm whether dates are correct or incorrect burdens the county boards and results in unequal treatment of mail ballots across the Commonwealth, as no two county boards approach this endeavor the same way, and further, ensuring consistency across the boards is difficult.

*BPEP*, at 77.

Thus, as the Commonwealth Court correctly concluded, there is no compelling state reason to require voters place a date on the outer envelope of the mail-in ballot or, more significantly, refuse to count ballots that have an incomplete, incorrect, or no date. As succinctly stated by the Commonwealth Court,

To look at a mail ballot that substantially follows the requirements of the Election Code, save for including a handwritten date on the outer envelope declaration, **and which also includes a barcode unique to that ballot as well as a timestamped date indicating its timely receipt by the voter’s respective county board of elections by 8:00 p.m. on Election day**, and say that such voter is not entitled to vote for whomever candidates he or she has chosen therein due to a minor irregularity thereon “is to negate the [w]hole genius of our electoral machinery.”

*BPEP*, at 79 (emphasis in original). In sum, the Commonwealth Court properly concluded that, “the refusal to count undated or incorrectly dated, but timely received, mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential clerical errors violates the fundamental right to vote recognized in and guaranteed by the Free and Equal Elections Clause of the Pennsylvania Constitution.” *Id.* at 82.

For all these reasons, the Commonwealth Court engaged in and applied the proper analysis and reached the proper result based on that analysis. Thus, this Court should affirm the determination below that Act 77's provision on dating the declaration on the outside envelope of a mail-in ballot, *as applied*, violates the Free and Equal Elections Clause.

**B. The Commonwealth Court Properly Did Not Rest Its Holding on a Statutory Interpretation of the Dating Provision of Act 77, Because the Issue Before the Court Was Whether or Not It Violated the Free and Equal Elections Clause.**

The Commonwealth Court made clear in its ruling that it was not deciding the issue before it based on statutory construction. “We are not asked to interpret the dating provisions’ language under statutory construction principles, as our Supreme Court has already done so and found such language to be unambiguous and mandatory in *Ball [v. Chapman]*, 289 A.3d 1 (Pa. 2003).” *BPEP*, at 78. This decision was the correct one.

The issue before the Commonwealth Court was not the interpretation of Act 77's provision regarding the dating of the declaration on the outside envelope, but whether that provision as applied violated the Free and Equal Elections Clause of Our Constitution. That question necessitated the Commonwealth Court to engage in constitutional, not statutory, interpretation, which, as explained in Section III.A, *supra*, required an analysis to determine if strict scrutiny applied and, if it did,

whether there was a compelling state interest justifying the provision. The Commonwealth Court found that the provision in question caused a significant burden to voters' fundamental right to cast a ballot and have their votes counted. It further concluded that there was no compelling state interest justifying the requirement to date the exterior mailing envelope's declaration:

[The Commonwealth Court] cannot countenance **any** law governing elections, determined to be mandatory or otherwise, that has the practical effect in its application of impermissibly infringing on certain individuals' fundamental right to vote, **which is "pervasive of other basic civil and political rights,"** relative to that of other voters who may be able to exercise the franchise more easily in light of the free and equal elections clause's prescription guaranteeing **all citizens an equal right on par with every other citizen** to elect their representatives.

*BPEP*, at 79 (citing *League of Women Voters*, 178 A.3d at 809-10; *Banfield*, 110 A.3d at 176 (emphasis added); *Patterson v. Barlow*, 60 Pa. 59, 75 (1869)) (emphasis in original).

Thus, there was no need for the court below, nor a present need for this Honorable Court, to engage in an analytical discussion regarding whether Act 77's provision imposing a dating declaration on the outside envelope of a mail-in ballot was mandatory or directory, or what is the proper meaning to be ascribed to the word "shall" in the provision. Instead, the relevant inquiry was, and remains, whether there was a fundamental right at stake, whether that fundamental right was significantly burdened by the provision, and whether the Commonwealth had a compelling state interest to require the proper dating on the declaration. Applying the correct analysis,

the Commonwealth Court held that the provision, as applied, violates our Free and Equal Elections Clause and cannot stand in the face of proper constitutional scrutiny. Undoubtedly, the Commonwealth Court applied the proper analysis and reached the correct result.

For these reasons, this Court should engage in the same constitutional analysis of Act 77's dating requirement of the declaration, rather than a statutory construction analysis, and affirm the Commonwealth Court's Order that the provision in question violates the Free and Equal Elections Clause

#### **IV. CONCLUSION**

For the reasons set forth above, this Court should affirm the Order of the Commonwealth Court below that the dating requirement in Act 77 violates the Free and Equal Elections Clause as applied.

Respectfully submitted,

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Dated: September 4, 2024

## **CERTIFICATES OF COMPLIANCE WITH WORD LIMIT**

I certify that this Amicus Brief was prepared in word-processing program Microsoft Word on Microsoft Office, version 2016, and I further certify that, as counted by Microsoft Word, this Brief contains 3,898 words.

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## **CERTIFICATION REGARDING PUBLIC ACCESS POLICY**

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

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