

IN THE SUPREME COURT OF PENNSYLVANIA

No. 68 MAP 2024

**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,**

Appellees,

v.

**AL SCHMIDT, in his official capacity as Secretary of the Commonwealth,
PHILADELPHIA COUNTY BOARD OF ELECTIONS, and ALLEGHENY
COUNTY BOARD OF ELECTIONS,**

Appellants.

**Appeal of: REPUBLICAN PARTY of PENNSYLVANIA and REPUBLICAN
NATIONAL COMMITTEE**

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF APPELLEES

Mary Catherine Roper
PA I.D. No. 71107
LANGER, GROGAN & DIVER P.C.
1717 Arch St., Ste 4020
Philadelphia, PA 19103
Tel: (215) 320-5660
mroper@langergrogan.com

Joshua Matz
HECKER FINK LLP
1050 K Street NW, Suite 1040
Washington, DC 20001
(202) 763-0885
jmatz@heckerfink.com

Adam Sopko
STATE DEMOCRACY RESEARCH
INITIATIVE
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
adam.sopko@wisc.edu

Anna Collins Peterson
HECKER FINK LLP
350 Fifth Avenue, 63rd Floor
New York, New York 10118
(212) 763-0883
apeterson@heckerfink.com

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INTEREST OF *AMICI CURIAE*¹

Amici are legal scholars with recognized expertise in state constitutional law, state and local government law, and the law of democracy. They have researched and published extensively in these areas, and they have a professional interest in promoting a proper understanding of the constitutional and democratic principles at issue in this case.

Amicus Curiae Jessica Bulman-Pozen is the Betts Professor of Law at Columbia Law School and Co-Director of the Center for Constitutional Governance.

Amicus Curiae Jerry Dickinson is Professor of Law at University of Pittsburgh School of Law.

Amicus Curiae Miriam Seifter is Professor of Law at University of Wisconsin Law School and serves as Faculty Co-Director of the State Democracy Research Initiative.

Amicus Curiae Robert F. Williams is Distinguished Professor of Law Emeritus at Rutgers Law School and Director of the Center for State Constitutional Studies.

¹ *Amici curiae* certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *Amici* and their counsel contributed money intended to fund this brief.

Amicus Curiae Robert Yablon is Associate Professor of Law at University of Wisconsin Law School and serves as Faculty Co-Director of the State Democracy Research Initiative.

Amicus Curiae Quinn Yeargain is the 1855 Professor of the Law of Democracy and Associate Professor of Law at Michigan State University College of Law.

SUMMARY OF ARGUMENT

The Pennsylvania Constitution creates a state government by and for the people, with a foundation of robust electoral participation. As this Court has long recognized, the Free and Equal Elections Clause promotes that vision and protects the right to vote. For the reasons given below and by Appellees, that Clause also (and more specifically) prohibits enforcement of the dating provisions set forth in Sections 1306 and 1306-D of Pennsylvania’s Election Code to exclude otherwise timely ballots submitted by eligible voters. Here, *Amici* show that this conclusion draws additional support from the text, structure, and history of the Pennsylvania Constitution, which contemplates robust protection for rights of democratic participation. This “democracy principle,” which reflects legal commitments to popular sovereignty, majority rule, and political equality, supports the decision below and helps to secure popular self-rule through free and fair elections.

Part I of this brief describes the Pennsylvania Constitution’s democracy principle and shows how it has been applied in this Court’s jurisprudence. Part II

explains that this democracy principle supports the sound decision below. Part III establishes that other state courts have adopted a similar approach to burdens on democratic participation. Simply put, under Pennsylvania law (which reflects widespread American practice), pointless administrative hurdles cannot be applied to disenfranchise or obstruct voters. For these reasons, the decision below should be affirmed.

ARGUMENT

Pennsylvania’s Constitution embraces democracy. From its textual commitment to “free and equal” elections, to its structural commitment to popular sovereignty, to its historical origins and development through tradition, the Pennsylvania Constitution has always centered democratic governance. In these specific respects—text, structure, and history—the Constitution is animated by a democracy principle. And here, that principle supports the Commonwealth Court’s conclusion that enforcement of the dating provisions impermissibly burdens Pennsylvanians’ fundamental right to vote. Affirming the Commonwealth Court’s decision would place this Court in good company: Courts in other states have regularly protected their state constitutions’ democratic promises by rejecting needless obstacles to electoral participation.

I. PENNSYLVANIA’S CONSTITUTION ENSHRINES A DEMOCRACY PRINCIPLE.

This Court has properly emphasized that the Pennsylvania Constitution adopted in 1776 was “the most radically democratic of all the early state constitutions.” *League of Women Voters v. Commonwealth*, (“LWV”), 178 A.3d 737, 802 (Pa. 2018) (citation omitted). That democratic foundation has long informed how this Court interprets the language of the Constitution: “The Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption,” and the Court “must favor a natural reading . . . which reflects the views of the ratifying voter.” *Id.* (cleaned up). On that basis, the Court has repeatedly recognized that the text, the structure, and history of the Constitution reflect its purpose as a democracy-supporting document—one committed to popular sovereignty, access to the franchise, and public engagement. Consistent with that democracy principle, this Court has long required a compelling justification before the Commonwealth may disqualify timely ballots from eligible voters.

A. The Constitution’s Text, Structure, and History

The Constitution is built on bedrock principles of popular sovereignty, political equality, and majority rule. Its text, structure, and history all reflect this overarching commitment to an inclusive vision of democratic participation. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 865 (2021).

Prominent in the first Article of the Constitution is the guarantee of self-government, vesting “all power” in the people “to alter, reform or abolish their government.” Pa. Const. art. I, § 2. This provision frames the document’s democratic promise and provides a meaningful source of authority for the people to govern themselves. Recognizing the importance of elections to self-government, the Constitution goes on to declare that “[e]lections shall be free and equal,” and promises that “[e]lectors shall . . . be privileged from arrest during their attendance on elections.” *Id.* art. I, § 5; *id.* art. VII, § 5. The Constitution’s text also demonstrates a commitment to political equality, enshrining voter qualifications for citizens of voting age in the Constitution, art. VII, § 1, recognizing that all people “are born equally free and independent,” art. I, § 1, and guaranteeing “[e]quality of rights under the law” regardless of sex, race, or ethnicity, art. I, §§ 28, 29.

This democratic commitment extends from specific textual provisions to the document’s overarching structure. After enshrining an array of individual rights that sustain and support self-government, see *id.* art. I, the Constitution establishes the Commonwealth’s legislative, executive, and judicial institutions and subjects all three branches to direct popular control through regular elections, see *id.* arts. II, IV, V. The Constitution then devotes an entire article to “Elections,” which, among other things, defines the electorate broadly and sets forth rules to facilitate participation and promote scrupulous electoral administration. See art. VII. Beyond elections, the

Constitution subjects public officials to an array of procedural and substantive constraints designed to ensure that they remain the people’s faithful agents. *See id.* arts. II-V. Taken together, the Constitution’s provisions reveal a document designed to enable Pennsylvanians to participate in charting their collective course.

The Constitution’s historical path further reflects the democracy principle. Pennsylvania’s “radically democratic” Constitution was adopted a decade before the United States Constitution. *LWV*, 178 A.3d at 802. And it was revolutionary, at least by the standards of the day, in its call for a “people’s government,” premised on majority rule and broad-based political participation. 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, 549-61 (1989) (recounting the democratic pedigree of the Commonwealth’s first constitution).

As Pennsylvanians revised the Constitution over time, they expanded rights and liberties, more expressly guaranteed political equality, enhanced checks on government institutions (especially the legislature), and more. *See* Ken Gormley & Joy G. McNally, *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 58-74 (2d. ed. 2020). In doing so, they established rights and duties designed to ensure that democracy remains the Commonwealth’s north star. *See McLinko v. Dep’t of State*, 279 A.3d 539, 572-73 (Pa. 2022); *LWV*, 178 A.3d at 804-09. As one delegate

to a 19th Century constitutional convention observed, the Constitution’s promise that elections be “free and equal” “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *LWV*, 178 A.3d at 809.

Thus, the Pennsylvania Constitution’s text, structure, and history illustrate that its design was no mere “reaction” to constitutional trends. *Id.* at 802. Instead, the Constitution’s pro-democracy orientation and commitments reflect a deliberate choice on the part of the people of the Commonwealth to govern themselves as political equals through elected representatives who wield power in their name. *Cf.* *Bulman-Pozen & Seifter, supra*, at 364. As such, the Constitution “acts as a wholly independent protector of the rights of the citizens of the Commonwealth,” *LWV*, 178 A.3d at 802, and represents a democratic commitment by and to the people of the Commonwealth.

B. The Democracy Principle and Constitutional Interpretation

The democracy principle that flows through the Constitution’s text, structure, and history has historically led this Court to interpret the Constitution with a robust presumption in favor of facilitating democratic participation, particularly when that participation is threatened by statutory or administrative burdens with frail justifications. In interpreting statutes and the Constitution itself, this Court has repeatedly

recognized the importance of democratic participation. Just as other structural doctrines inform constitutional interpretation, so too does the democracy principle.

The command to interpret statutes in favor of electoral participation is well established by this Court. *E.g.*, *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954) (“Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage.”); *In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 310 (Pa. 1974) (“The case law interpreting this section clearly announces a policy to interpret this section to favor enfranchisement rather than disenfranchisement.”); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (“In construing election laws while we must strictly enforce all provisions to prevent fraud our overriding concern at all times must be to be flexible in order to favor the right to vote.”); *Reuther v. Delaware Cnty. Bureau of Elections*, 205 A.3d 302, 308 (Pa. 2019) (“[E]lection laws must be liberally construed to protect a candidate’s right to run for office and the voters’ right to elect a candidate of their choice.”); *see also* Richard L. Hasen, *The Democracy Canon*, 62 *Stan. L. Rev.* 69 (2009) (collecting cases and discussing the pro-democracy canon’s historical pedigree).

This Court has similarly protected electoral participation in interpreting the guarantees of the Constitution, recognizing the foundational nature of democratic participation and approaching burdens on that participation with skepticism. For

instance, recognizing that gerrymandered congressional maps diluted the right of the people “to select the representative of his or her choice” and “undermined the governance of Pennsylvania,” the Court held them unconstitutional, because “each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives” “for [the Commonwealth’s] form of government to operate as intended.” *LVW*, 178 A.3d at 808-09, 814; *see also Carter v. Chapman*, 270 A.3d 444, 470 (Pa. 2022) (reiterating this political equality guarantee). The Court previously upheld the use of ballot drop boxes and the extension of absentee ballot deadlines in light of the Constitution’s clear and unambiguous “mandate[] . . . that all elections conducted in this Commonwealth must be free and equal,” and its command “to equalize the power of voters in our Commonwealth’s election process[.]” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (internal citations and quotation marks omitted); *see also McLinko*, 279 A.3d at 573 (rejecting a constitutional challenge to expanded mail-in voting as inconsistent with the Constitution’s commitment to robust political participation). And when a reorganization of township school districts resulted in “bar[ring] the voters therein from participation in the election of school directors,” this Court invalidated the reorganization, recognizing that “[b]y our fundamental law it is provided that ‘elections shall be free and equal.’” *In re New Britain Borough Sch. Dist.*, 145 A. 597, 598-99 (Pa. 1929).

In this case, too, the Court should reaffirm what it has already repeatedly recognized: that the “longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise,” with the “goal . . . to enfranchise and not to disenfranchise [the electorate].” *Pa. Democratic Party*, 238 A.3d at 360-61 (internal quotation marks omitted). While legislative enactments enjoy a presumption of constitutionality, that presumption is overcome when a statute clearly violates the Constitution. *LWV*, 178 A.3d at 801. In considering whether such a violation has been shown, this Court properly considers the textual, structural, and historical aspects of the Pennsylvania Constitution that together comprise a democracy principle and militate in favor of expanding access to democratic participation. Here, those considerations all support the decision below, since the right to vote is fundamental under the Constitution (as all parties agree) and any burden on fundamental rights ordinarily faces strict scrutiny. *See Black Pol. Empowerment Proj. v. Schmidt*, No. 283 M.D. 2024, Slip op. at 32 (Pa. Commw. Ct. Aug. 30, 2024) (collecting cases); *see also*, e.g., *Shoul v. Commonwealth, Dept. of Trans.*, 173 A.3d 669, 677 (Pa. 2017) (strict scrutiny); *William Penn School Dist. v. Pa. Dept. of Educ.*, 170 A.3d 414, 458 (Pa. 2017) (same).

Drawing on structural constitutional principles to guide constitutional interpretation is commonplace. For centuries, American courts have applied principles of federalism, the separation of powers, and state sovereignty to interpret

constitutional text, even though these principles are usually derived from text, structure, and history rather than enumerated in a specific constitutional provision. *See, e.g., Bond v. United States*, 564 U.S. 211, 220-21 (2011); *Alden v. Maine*, 527 U.S. 706, 713 (1999). So too here. Pennsylvania’s Constitution is animated by a democracy principle grounded in every traditional tool of constitutional analysis, and that principle is a useful interpretive touchstone in a voting rights case like this one. *See Bulman-Pozen & Seifter, supra*, at 865 (analogizing the state constitutional democracy principle “to more familiar constitutional concepts, such as federalism or the separation of powers”).

II. THE DATING PROVISIONS FLOUT THE PENNSYLVANIA CONSTITUTION.

As the Commonwealth Court held and Appellees contend, the dating provisions conflict with the Constitution’s Free and Equal Elections Clause. That clause is an especially clear textual reflection of the Constitution’s commitment to democracy: “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. Under this clause, strict scrutiny is the appropriate standard and the dating provisions simply cannot withstand that review. Accordingly, the dating provisions cannot be applied. This conclusion is consistent with this Court’s longstanding

interpretation of the Constitution, which reflects a commitment to the document's democracy principle.

The Constitution, through both its text and democracy principle, protects Pennsylvania citizens' right to vote as fundamental. *Black Pol. Empowerment Proj.*, Slip op. at 71. It thus favors democratic participation over strict adherence to vacuous technical requirements. This Court has interpreted the Free and Equal Elections Clause as "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters." *LWV*, 178 A.3d at 804. And this Court has reasoned that an election is free and equal only "when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial." *Id.* at 810 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). Therefore, this Court has long held that

The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.

Appeal of Gallagher, 41 A.2d 630, 632 (Pa. 1945); *see also Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955); *In re Canvass of Absentee Ballots of 1967 Gen. Election*, 245 A.2d 258, 263 (Pa. 1968).

Consistent with this settled jurisprudence, the Court has rejected multiple efforts to burden the franchise through mechanisms that served no significant purpose,

holding repeatedly that “the power to throw out a ballot for minor irregularities should be sparingly used.” *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963) (citing *Appeal of Norwood*, 116 A.2d 552); *see also Appeal of McCaffrey*, 11 A.2d 893, 895-96 (Pa. 1940) (requiring the counting of ballots despite extraneous marks); *Appeal of Gallagher*, 41 A.2d at 631-33 (same). For example, although the Election Code provided that a ballot “marked by any other mark than an (X) or check (✓) . . . shall be void,” this Court held that voters’ ballots on a referendum question would be counted, even where marked with “yes” or “no” because “[t]o say that the minor irregularities rendered the votes void, would disenfranchise these votes for very picayune reasons.” *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. Similarly, where the Commonwealth required ballots be disqualified when voters marked them in the wrong color ink to ensure ballot secrecy, this Court ruled such ballots would be counted “unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable.” *In re Luzerne Cnty. Return Bd.*, 290 A.2d at 109. And again, where the Commonwealth required an “x” or checkmark, but voters filled in the box on the ballot, this Court held that “unless there is a clear showing that the filling in of the blocks was for the purpose of making the ballots identifiable, those ballots, too, are valid.” *In re Gen. Election Nov. 6, 1971*, 296 A.2d 782, 784 (Pa. 1972); *see also Shambach v. Bickhart*, 845 A.2d 793, 801-03 (Pa. 2004) (holding that write-in votes for a candidate whose name was already printed

on the ballot should be counted and explaining that rejecting the votes would neither foster efficient administration nor minimize fraud). Animating the Court’s analysis in all these cases was its view that “the right of suffrage is the most treasured prerogative of citizenship,” and the holders of that right deserve to have their voices heard. *Appeal of Norwood*, 116 A.2d at 549-53.

That line of precedent dooms the dating provisions at issue in this litigation, which fail to serve any function that justifies a departure from the Constitution’s democratic commitments. At most—and in purely abstract terms—the provisions are said to serve the Commonwealth’s interest in preventing election fraud. But as Appellees have demonstrated and the Commonwealth Court confirmed, the provisions do nothing to advance that purpose in concrete terms. Indeed, in the Commonwealth Court, the Secretary conceded the handwritten date does not serve “any purpose.” *Black Pol. Empowerment Proj.*, Slip op. at 76. Prior litigation reached the exact same conclusion. *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pennsylvania*, 97 F.4th 120, 127 (3d Cir. 2024) (“[T]he date on the declaration plays no role in determining a ballot’s timeliness.”).

This is a commonsense determination. County boards record when ballots are received—not when they are completed—and rely on digital timestamps to determine a ballot’s timeliness. *See* 25 P.S. §§ 3146.6(c), 3146.9(b)(5), 3150.16(c), 3150.17(b)(5). While preserving the integrity of the franchise is undoubtably

important, there is simply no evidence that the dating provisions help to accomplish that task: the information that they supposedly provide is already available to election officials through other means. Yet non-compliance with these provisions results in a ballot's disqualification. *Ball v. Chapman*, 289 A.3d 1, 21-22 (Pa. 2023). In the 2024 spring primary alone, more than 10,000 ballots were disqualified on this basis. *Black Pol. Empowerment Proj.*, Slip op. at 61. These regulations are wholly “superfluous,” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1076-77 (Pa. 2020), but disenfranchise thousands of qualified voters, offending the Constitution's democratic promise.

This Court has repeatedly invalidated burdens on electoral participation that fail to serve any substantive and important purpose and should not hesitate to do so again here. To be sure, the Legislature plays a central role in administering elections and in safeguarding the collective interest in efficient, widely available, and accurate elections. *See McLinko*, 279 A.3d at 579-81; *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004). But to fulfill that role and comport with the Constitution's core democratic principles, election-related statutes must genuinely advance those important collective interests. Where a statutory burden risks disenfranchising many eligible voters with no benefit to the administration or security of elections, the Free and Equal Elections Clause requires that the burden give way—a conclusion only bolstered by the Constitution's text, structure,

and history, which together comprise a democracy principle that powerfully supports the decision below.

III. OTHER STATE COURTS LIKEWISE REJECT BURDENS ON VOTING THAT SERVE LITTLE PURPOSE.

Pennsylvania courts are not alone in recognizing that state constitutional commitments to democracy call for skepticism of pointlessly exclusionary election practices. Across the country, state courts have invalidated needless participatory hurdles and declined to discard votes based on immaterial technicalities. Affirming the decision below and rejecting the dating provisions' purposeless burden on voting rights would accord with the rulings of these sibling states.

Courts nationwide have appreciated the fundamentally democratic nature of their states' constitutions. Nearly every state constitution expresses a commitment to popular sovereignty, and, unlike the U.S. Constitution, *every* state constitution expressly confers the right to vote. Bulman-Pozen & Seifter, *supra*, at 869-70. State courts have recognized these democratic commitments in interpreting their constitutions, particularly with respect to voting. *See, e.g., Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. 2006) (“Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.”); *Mont. Democratic Party v. Jacobsen*, 545 P.3d 1074, 1087 (Mont. 2024) (“The Montana

Constitution as a whole also reflects the people’s desire to retain authority—of which the right to vote is essential.”); *State v. Arctic Vill. Council*, 495 P.3d 313, 321 (Alaska 2021) (“We start with the bedrock principle that ‘the right of the citizens to cast their ballots and thus participate in the selection of those who control their government is one of the fundamental prerogatives of citizenship.’”) (citation omitted).

The out-of-state cases cited by Intervenors/Appellants (Int. Br. at 48-49) are not to the contrary. In fact, the very states they point to for support have vigorously applied their Free and Equal Clauses and other democracy-supporting constitutional provisions to enable votes to be cast and counted. Illinois courts, for example, have recognized that Illinois’s Free and Equal Elections Clause, like the Commonwealth’s, was enacted under “the belief that broad participation is essential to the proper working of our democracy, that only the most necessary requirements for limiting that participation can be justified, and that the burden of proof for any limitations rests heavily upon those advocating them.” *Orr v. Edgar*, 670 N.E.2d 1243, 1252 (Ill. App. Ct. 1996) (quoting Record of Proceedings, Sixth Illinois Constitutional Convention). They have made clear, moreover, that “the concept of free and equal elections [] appl[ies] to *all* aspects of the election process” and that “[a]ny plan or design whose result might impede, impair or frustrate full participation in the electoral process cannot endure.” *Id.*; see also *Clark v. Illinois State Bd. of Elections*, 17 N.E.3d 771, 779 (Ill. App. Ct. 2014) (explaining that the Free and Equal Elections

clause “gives constitutional priority to the state’s public policy of encouraging the full and effective participation of the entire electorate” and collecting related cases). Kentucky courts have similarly applied their Free and Equal Elections Clause to strike regulations that “unnecessarily” burden the right to vote. *See, e.g., Smith v. Kelly*, 58 S.W.2d 621 (Ky. 1933) (invalidating reduction in number of polling locations); *Perkins v. Lucas*, 246 S.W. 150 (Ky. 1922) (invalidating cutback to voter registration period).

Further examples abound in which state courts have rejected cramped views of their Free Elections Clauses and robustly safeguarded fundamental democratic principles. Earlier this year, the Montana Supreme Court applied that state’s constitution, which includes a “free and open” elections provision, to reject state statutes that narrowed access to the franchise, including by reducing the availability of absentee voting. *Jacobsen*, 545 P.3d 1074. In so doing, the court concluded that the state’s asserted interests in efficient administration and ballot security did not suffice to justify the burdens on voting and democracy that these provisions imposed. *Id.* at 1093-1107; *see also Ladd v. Holmes*, 66 P. 714, 718 (Or. 1901) (“To be free means that the voter shall be left in the untrammelled exercise, whether by civil or military authority, of his right or privilege; that is to say, no impediment or restraint of any character shall be imposed upon him, either directly or indirectly, whereby he shall be hindered or prevented from participation at the polls.”); *Wallbrecht v. Ingram*,

175 S.W. 1022, 1026-27 (Ky. 1915) (“[N]o election can be free and equal, within its meaning, if any substantial number of persons entitled to vote are denied the right to do so.”); *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 858-59 (Del. Ch. 2015) (“An election in which the government engages in conduct that discriminates against the aged and disabled is not ‘free and equal.’”); *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983) (invalidating statute that limited pool of qualified voters under provision analogous to Free and Equal Elections Clause); *Gaddis v. McCullough*, 827 N.E.2d 66, 74 (Ind. Ct. App. 2005) (noting the Free and Equal Elections Clause’s intent “is to encourage exercise of the franchise” and explaining that such a principle militates against hyper-technical regulation of the franchise); *Priorities USA v. State*, 591 S.W.3d 448, 452, 454 (Mo. 2020) (rejecting “contradictory and misleading” affidavit requirement in the state’s voter ID law); *Weinschenk*, 203 S.W.3d at 211, 222 (holding that a law requiring photo identification to cast a ballot violated the Missouri constitution’s guarantee that elections be “free and open”). As these examples show, and Appellants’ argument does not refute, courts elsewhere do not hesitate to invalidate laws that serve little purpose when those laws risk disenfranchising otherwise qualified voters.

Courts have rejected superfluous voting regulations under their state constitutions even in states that lack Free and Equal Elections Clauses. The New Hampshire Supreme Court, for example, recently invalidated a statute requiring voters to

complete a series of complex forms to prove their domicile, recognizing that “[v]oting is of the most fundamental significance under our constitutional structure” and that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *N.H. Democratic Party v. Sec’y of State*, 262 A.3d 366, 374 (N.H. 2021). Similarly, the Alaska Supreme Court enjoined the enforcement of absentee witness requirements during the pandemic, since those requirements “would force some voters to choose between risking their health and exercising their right to vote.” *Arctic Vill. Council*, 495 P.3d at 322.

And in cases spanning a range of constitutional and sub-constitutional contexts, courts in still more states have disapproved of using pointless, technical requirements to rob voters of their fundamental right to vote. The Ohio Supreme Court, for example, enjoined a requirement that absentee voters check a box on their application affirming that they are registered voters, concluding that it served “[n]o vital public purpose or public interest” to reject applications merely because of an unmarked box where there was “no evidence of fraud.” *State ex rel. Myles v. Brunner*, 899 N.E.2d 120, 124 (Ohio 2008). And in New York, the Court of Appeals ruled in favor of counting absentee ballots sent to voters who had not fully completed their absentee ballot applications beforehand with details of their absence on Election Day, reasoning that the ballots of qualified voters should not be invalidated for such a technical defect since the voters later supplied the required information. *Stewart v.*

Chautauqua Cnty. Bd. of Elections, 924 N.E.2d 812, 818-20 (N.Y. 2010). See also *Boyd v. Tishomingo Cnty. Democratic Exec. Comm.*, 912 So. 2d 124, 131-32 (Miss. 2005) (similarly declining to invalidate absentee ballots based on legal errors “of a technical nature” where there was “no evidence of fraud or wrongdoing”); *Matter of Election Contest as to Reorganization of New Effington Indep. Sch. Dist. No. 54-3*, 462 N.W.2d 185, 190 (S.D. 1990) (holding that absentee ballots should be counted despite minor deviations from the state’s absentee voting laws because there had been “no substantial violation” that “prevented a free and fair expression of the will of the voters”).

Like the Commonwealth Court here, those courts (and many others) balanced legislative power to enact election codes against state constitutional protections for democracy. And like the court below, those courts held that needless burdens on access to democratic participation cannot prevail against the right to vote. That rule—grounded expressly in the Free and Equal Elections and grounded more deeply in the Constitution’s democracy principle—controls here. Accordingly, this Court should affirm the decision below and vindicate its precedents protecting democracy.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to affirm the decision below.

Dated: September 4, 2024

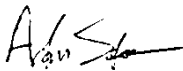
Respectfully submitted,



Mary Catherine Roper
PA I.D. No. 71107
LANGER, GROGAN & DIVER P.C.
1717 Arch St., Ste 4020
Philadelphia, PA 19103
Tel: (215) 320-5660
mroper@langergrogan.com



*Joshua Matz
HECKER FINK LLP
1050 K Street NW, Suite 1040
Washington, DC 20001
(202) 763-0885
jmatz@heckerfink.com
*not admitted in Pennsylvania



Adam Sopko*
STATE DEMOCRACY RESEARCH INITIATIVE
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
adam.sopko@wisc.edu
Telephone: (608) 262-4645
*not admitted in Pennsylvania



*Anna Collins Peterson
HECKER FINK LLP
350 Fifth Avenue, 63rd Floor
New York, New York 10118
(212) 763-0883
apeterson@heckerfink.com
*not admitted in Pennsylvania

Counsel for Amici

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I certify that this *Amici Curiae* Brief was prepared in word-processing program Microsoft Word 365 (for Windows), and I further certify that, as counted by Microsoft Word 365, the body of this *Amici Curiae* Brief contains 4851 words, and complies with Pa. R.A.P. 531(b)(3).

Dated: September 4, 2024

s/ Mary Catherine Roper
Mary Catherine Roper

CERTIFICATE OF COMPLIANCE

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 than non-confidential information and documents.

Dated: September 4, 2024

s/ Mary Catherine Roper
Mary Catherine Roper