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IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

BRIAN BAXTER and SUSAN KINNIRY,

Respondents,

v.

PHILADELPHIA BOARD OF ELECTIONS,

Respondent,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Petitioners.

PETITION FOR ALLOWANCE OF APPEAL

Appeal from the October 30, 2024 Memorandum Opinion and Order of the Pennsylvania Commonwealth Court at Consolidated Case Nos. 1305 C.D. 2024 & 1309 C.D. 2024 affirming the September 26, 2024 and September 27, 2024 Orders of the Court of Common Pleas of Philadelphia County, No. 2024-02481

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

This case represents the most recent attempt to invalidate the General Assembly's longstanding and duly enacted date requirement for mail ballots.[1] Time and again, litigants—including the counsel for Respondents Baxter and Kinniry ("Individual Respondents")—have sought to overturn the date requirement. And every time, this Court has refused the invitation, on procedural grounds, *New Pa. Project Education Fund v. Schmidt*, No. 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024), jurisdictional grounds, *Black Political Empowerment Project v. Schmidt*, 322 A.3d 221, 222 (Pa. 2024) ("*B-PEP*"), and the merits, *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); *Ball v. Chapman*, 289 A.3d 1 (Pa. 2022). Nevertheless, a bare 3-2 majority of the Commonwealth Court reinstated a prior holding striking down the date requirement—in a decision several Justices recognized was rushed. Majority Opinion, *Baxter v. Philadelphia Bd. of Elections*, Nos. 1305 C.D. 2024 & 1309 C.D. 2024 (Pa. Commw. Ct. Oct. 30, 2024) ("Maj. Op.") (reproduced in Appendix A); *see* Concurring Statement of Justice Dougherty, *Baxter v. Philadelphia Bd. of Elections*, No. 77 EM 2024 (Pa. Nov. 1, 2024) ("Dougherty Concurring Statement") (reproduced in Appendix C); Concurring Statement of Justice Donohue, *Baxter v. Philadelphia Bd. of Elections*, No. 77 EM

[1] This Petition uses "mail ballot" to refer to both absentee ballots and mail-in ballots. *See* 25 P.S. §§ 3146.6, 3150.16.

2024 (Pa. Nov. 1, 2024) ("Donohue Concurring Statement") (reproduced in Appendix C).

The decision below suffers from several fatal defects. To start, even though this Court already held that all county boards of elections *must* be joined in cases challenging the statewide date requirement, *see B-PEP*, 322 A.3d at 222, here the exact same panel of the Commonwealth Court—albeit with Judge Wolf now dissenting—struck down the date requirement in the absence of 66 county boards, *see* Wolf Dissenting Opinion 5 ("Wolf Dis. Op.") (reproduced in Appendix A). Moreover, neither those 66 boards nor Intervenor-Respondents the Republican National Committee and the Republican Party of Pennsylvania (the "Republican Committees") were given *any* chance to develop a factual record in this case. The majority's hurried decision thus rests on disputed facts and violated the right of the 66 boards and the Republican Committees to develop a factual record regarding Individual Respondents' claims, the purported burdens imposed by the date requirement, and the state interests supporting that requirement.

Just as egregious is the majority's rejection of this Court's precedents construing the Free and Equal Elections Clause. This Court has *already* upheld against a Free and Equal Elections challenge the *entire* mail-ballot declaration mandate of which the date requirement is a *single* component. *See Pa. Democratic Party*, 238 A.3d 345. Furthermore, this Court has *never* invalidated a mandatory

ballot-casting rule under the Free and Equal Elections Clause. In fact, just weeks ago, this Court reaffirmed that a mandatory ballot-casting rule can violate the Clause only if it "den[ies] the franchise itself, or make[s] it so difficult [to vote] as to amount to a denial." *In re: Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 909 (Pa. 2024) ("*In re Provisional Ballots*") (citation omitted). The majority relegated that binding decision to a footnote, reasoning it addressed only "provisional ballots, which are not at issue here." Maj. Op. 35-36 n.37. In place of the Court's binding ruling, the majority readopted its own prior holding that all mandatory ballot-casting rules are subject to strict scrutiny—a radical position that would transfer most of the General Assembly's power over elections to the judiciary.

That is far from the respect the General Assembly's statutes deserve. The Pennsylvania Constitution "leaves the task of effectuating [its] mandate" that "elections be 'free and equal'"—and the "open policy questions" that attend that mandate—to the General Assembly. *Pa. Democratic Party*, 238 A.3d at 374. "[T]he wisdom of a public policy is one for the legislature, and the General Assembly's enactments are entitled to a strong presumption of constitutionality rebuttable only by a demonstration that they clearly, plainly, and palpably violate constitutional requirements." *Commonwealth v. Torsilieri*, 232 A.3d 567, 584 (Pa. 2020) (citation omitted). Especially so for the Election Code. "[N]othing short of gross abuse would justify a court in striking down an election law demanded by the people, and

passed by the law-making branch of government in the exercise of a power always recognized and frequently asserted." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

The Commonwealth Court majority failed to heed that command. Instead, its order has all but deleted the General Assembly's date requirement from the Election Code, has done so without jurisdiction, and has contravened this Court's precedents in the process. This Court should grant the Petition and reverse.

OPINION BELOW

The Commonwealth Court majority opinion was authored by Judge Ceisler and joined by President Judge Jubelirer and Judge Wojcik. Judge Wolf and Judge McCullough dissented and filed separate opinions. A copy of the majority and separate opinions and the related order are attached as Appendix A.

The orders of the Court of Common Pleas of Philadelphia County, which were affirmed by the Commonwealth Court majority, are attached as Appendix B.

ORDER IN QUESTION

The text of the Commonwealth Court's Order states: "AND NOW, this 30th day of October, 2024, the Court of Common Pleas of Philadelphia County's (trial court) September 26 and September 28, 2024 orders are **AFFIRMED**. The Philadelphia County Board of Elections is **ORDERED** to count the undated mail-in ballots cast by Designated Appellees Brian T. Baxter and Susan T. Kinniry, and the absentee and mail-in ballots cast by the other 67 qualified electors whose ballots

were rejected due to outer envelope dating errors, in the September 17, 2024 Special Election in the 195th and 201st Legislative Districts in Philadelphia County, and take any other steps necessary in accordance with the parties' Consent Order of Court entered by the trial court on September 25, 2024."

QUESTIONS FOR REVIEW

1. Whether, as this Court held in *B-PEP*, 322 A.3d at 222, the Commonwealth Court lacked jurisdiction and the majority improperly issued a decision on the merits, where Individuals Respondents joined only a single county board of elections to this suit and not the other 66 county boards that are indispensable parties?

Suggested Answer: Yes.

2. Whether the Commonwealth Court erred in issuing a decision on the merits where this Court has exclusive subject-matter jurisdiction over this appeal under 42 Pa. C.S. § 722(7)?

Suggested Answer: Yes.

3. Whether the majority erred when it ruled in favor of Individual Respondents when the 66 absent county boards of elections and the Republican Committees were denied any opportunity to develop the factual record?

Suggested Answer: Yes.

4. Whether the majority erred by invalidating the General Assembly's

longstanding date requirement under the Free and Equal Elections Clause, when this Court has never applied the Clause to invalidate a nonburdensome, neutral ballot-casting rule, and has recently declined to subject such rules to strict scrutiny under the Clause?

Suggested Answer: Yes.

5. Whether, to the extent it binds or permits any county board not to enforce the date requirement, the majority's order violates the Electors and Elections Clauses of the U.S. Constitution?

Suggested Answer: Yes.

6. Whether failing to reverse the majority's decision strikes down all of Act 77 and universal mail voting in Pennsylvania?

Suggested Answer: Yes.

STATEMENT OF THE CASE

In 2019, a bipartisan majority of the General Assembly adopted universal mail voting for the first time in Pennsylvania's history. Act of Oct. 31, 2019, P.L. 552, No. 77 § 8 ("Act 77"). As part of that compromise in the historic Act 77, the General Assembly maintained the longstanding requirement that mail voters "fill out, date and sign the declaration" on the mail-ballot return envelope. Act 77 §§ 6, 8; *see also* 25 P.S. §§ 3146.6, 3150.16.

Individual Respondents are two voters who failed to comply with the date requirement during the September 17, 2024 Special Election for State House Districts 195 and 201 (the "Special Election"). Maj. Op. 5-6. Consequently, the Philadelphia Board of Elections ("the Board") complied with state law and declined to count their ballots. *Id.* at 8. Individual Respondents then filed a petition for review in the Philadelphia Court of Common Pleas asking that court to invalidate the date requirement under the Free and Equal Elections Clause. *Id.* at 8-9.

After a brief hearing, the trial court granted the petition and held that refusal to count a ballot "due to a voter's failure to date the declaration printed on the outer envelope used to return his/her mail-in ballot . . . violates [the Free and Equal Elections Clause]." Sept. 26 Order at 2 (included in Appendix B) (cleaned up). It therefore ordered the Board to verify Individual Respondents' "and the sixty-seven other registered voters' date-disqualified mail-in ballots from the Special Election," to count all such ballots "if otherwise valid," and to include the counted ballots "in the results of the Special Election." *Id.*. The next day, the trial court granted the Republican Committees leave to intervene. *See* Maj. Op. 12.

The trial court confirmed that Individual Respondents' petition "related to a special election that had already occurred and did not involve voting in the November 2024 election[.]" *Id.* at 14. After the Board and the Republican Committees appealed to the Commonwealth Court, however, Individual

Respondents asked that court to expedite its decision because, in their view, a Commonwealth Court ruling was "necessary to guide Philadelphia *and other county boards of elections*"—none of which they joined to the suit—"as to the treatment of undated or misdated mail-in and absentee ballots, and to ensure that such ballots are not rejected on unconstitutional grounds." Individual Respondents' Application For Expedited Briefing Schedule ¶ 4 (Oct. 7, 2024) (emphasis added).

Both the Board and the Republican Committees timely appealed. Sixteen days after briefing concluded, the Commonwealth Court majority affirmed the trial court's orders, and held that the date requirement violates the Free and Equal Elections Clause. Maj. Op. 39. In the process, the majority dismissed this Court's order in recent weeks that vacated a Commonwealth Court decision on this same issue for failure to join all 67 county boards; the majority apparently believed it could avoid *that* binding precedent by purporting to limit its order to the Board. *Id.* at 23 n.25.

The majority also rejected the Republican Committees' request to engage in factual development and instead adopted multiple disputed premises as "stipulated." *Id.* at 4. The majority then decided that the longstanding date requirement implicated "the fundamental right to vote," and that, because the requirement fails strict scrutiny, it must be invalidated under the Free and Equal Elections Clause. *Id.* at 35, 37. It did not matter to the majority that this Court recently refused to apply that

standard under the Clause in *In re Provisional Ballots* because that case, said the majority, involved provisional ballots. *Id.* at 35-36 n.37. No explanation was offered for why the governing constitutional standard under the Clause turns on the type of ballot an individual casts. *See id.*

Judge Wolf and Judge McCullough each dissented. Judge Wolf criticized the majority for reaching a "landmark decision" on such an "expedited" basis, and pointed out that this caused the majority to "gloss over important procedural issues." Wolf Dis. Op. 3. For example, the majority did not even bother to address 42 Pa. C.S. § 722(7), which gives this Court "exclusive jurisdiction" to hear appeals when "the court of common pleas has held invalid as repugnant . . . to the Constitution of this Commonwealth,. . . any statute of[] this Commonwealth." And the majority relegated this Court's recent decision vacating the Commonwealth Court's attempt to invalidate the date requirement to "a footnote, without significant analysis or citation to caselaw"—even though the majority's decision would foreseeably "have an effect on election officials throughout the Commonwealth." Wolf Dis. Op. 5.

Judge McCullough agreed "that the [m]ajority did not adequately address the question of whether this Court should have transferred this appeal directly to the Supreme Court." McCullough Dissenting Opinion 2-3 n.2 ("McCullough Dis. Op."). She also disputed the majority's conclusion on the merits. In her view, the majority was wrong on its description of the record because "it is far from undisputed

here that the [dating requirement] serve[s] no purpose." *Id.* at 8. She also explained that the majority was wrong on the law: The date requirement does not implicate the fundamental right to vote because an individual whose ballot is not counted for failure to follow "facially nonburdensome and neutral ballot-casting rules" is "not disenfranchise[d]." *Id.* at 9. Furthermore, the majority was wrong to apply strict scrutiny because this Court did not so much as "mention the 'scrutiny' analysis at all" in its recent decisions applying the Free and Equal Elections Clause. *Id.* at 10. Finally, Judge McCullough noted that the majority's invalidation of the date requirement voids all of Act 77. *Id.* at 11.

The next day, the Republican Committees filed an emergency motion seeking a stay or modification of the majority's order, which this Court granted. *See* Order, *Baxter v. Philadelphia Bd. of Elections*, No. 77 EM 2024 (Pa. Nov. 1, 2024) (reproduced in Appendix C). Justice Donohue and Justice Dougherty each filed concurring statements. Justice Donohue noted that the "decision and order of the Commonwealth Court was ill timed," and further acknowledged that other "county boards of elections might look to [the Commonwealth Court majority's decision] for guidance in canvassing and pre-canvassing mail in ballots" in future elections. Donohue Concurring Statement 1. Justice Dougherty criticized the Commonwealth Court majority for "deciding [the] case six days before an election and then 'urg[ing] the parties to proceed expeditiously should they wish to appeal' to this Court."

Dougherty Concurring Statement 13 n.10 (quoting Maj. Op. 13 n.16). Because there has "never been any doubt that this Court will have the final say on this issue," the majority's purpose could only have been to force "rushed consideration of [this case's] highly important question." *Id.*

The Republican Committees now petition for allowance to appeal.

REASONS FOR ALLOWANCE OF APPEAL

Granting allowance to appeal is appropriate where "the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court," where "the question is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court," and where "the issue involves the constitutionality of a statute of the Commonwealth." Pa. R.A.P. 1114(b)(2), (4), (5).

Each of those circumstances is present here. *First*, this case concerns the "constitutionality" of the General Assembly's date requirement. *Id.* 1114(b)(5).

Second, the majority's decision "conflicts with" multiple "holding[s]" of this Court. *Id.* 1114(b)(2). In particular, this Court has upheld the entire declaration mandate of which the date requirement is part against a Free and Equal Elections challenge, *Pa. Democratic Party*, 238 A.3d 345, and declared that courts lack subject-matter jurisdiction to decide constitutional challenges to the date requirement unless *all* 67 county boards are present, *B-PEP*, 322 A.3d at 222. The

majority disobeyed each of these directives when it held that the date requirement violates the Free and Equal Elections Clause in a case in which only a single board was joined.

And finally, the majority's decision is inarguably "one of such substantial public importance as to require prompt and definitive resolution by" this Court. Pa. R.A.P. 1114(b)(5). Voting is, after all, among the "most central of democratic rights," *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018) ("*LWV*"), and that right is jeopardized when unlawful ballots are counted. "Voters who fear their legitimate votes will be outweighed" by illegitimate ones "will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Additionally, as explained below, by invalidating the date requirement, the majority has voided the *entirety* of Act 77 and, thus, universal mail voting for *all* Pennsylvania voters.

The majority's decision was erroneous at every turn. This Court should grant allowance to appeal and reverse.

I. The Majority Ignored And Contravened This Court's Recent Judgment In *B-PEP*.

Mere weeks ago, this Court vacated the Commonwealth Court's holding (like the majority here) that the date requirement violates the Free and Equal Elections Clause because that court lacked "subject matter jurisdiction . . . given the failure to name the county boards of elections of all 67 counties." *B-PEP*, 322 A.3d at 222.

That decision simply applied well-settled law. "It has long been established that unless all necessary and indispensable parties are parties to the action, a court is powerless to grant relief." *Tigue v. Basalyga*, 304 A.2d 119, 120 (Pa. 1973); *see also id.* ("[T]he absence of an indispensable party goes absolutely to the court's jurisdiction."). Thus, this Court recognized that all county boards have interests in the statewide date requirement and must be joined to cases challenging it. *See B-PEP*, 322 A.3d at 222.

It is therefore bewildering that the *same* panel in the *same* court has committed the *same* error, while the ink was still drying on this Court's *B-PEP* order. Philadelphia is the *only* county board joined to this case. Nonetheless, the majority moved forward, as it did before, to invalidate the date requirement under the Free and Equal Elections Clause. And, as Judge Wolf notes, the majority acknowledged this Court's recent command "only in a footnote, without significant analysis or citation to case law." Wolf Dis. Op. 5.

It is hard to view what the majority did here as anything less than open defiance of this Court's recent order. The majority's sole defense is that its decision affects only Philadelphia. Maj. Op. 23 n.25. That does nothing to distinguish this case from *B-PEP*. "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." *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988). Here, as Judge Wolf

observes, the majority, "in no uncertain terms, concludes that any county board of elections' decision not to count undated or incorrectly dated mail-in and absentee ballots violates the free and equal elections clause of the Pennsylvania Constitution." Wolf Dis. Op. 2 (emphasis original). Indeed, as Justice Donohue noted, the influence of the majority's order extends far beyond Philadelphia. *See* Donohue Concurring Statement 1 (noting that all "county boards of elections might look to" the majority's decision "for guidance in canvassing and pre-canvassing mail in ballots"). It was wrong for the majority to reach this "landmark decision," Wolf Dis. Op. 3, when only one county board was present.

This is no empty formality, especially in the context of an election rule which must be uniformly applied across the Commonwealth. The other county boards may wish to participate in the development of a factual record or otherwise to defend the date requirement. *See, e.g.*, *Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 643-44 (W.D. Pa. 2023) ("*NAACP I*") (noting defenses by Lancaster and Berks County Boards in parallel federal litigation), *rev'd and remanded*, 97 F.4th 120 (3d Cir. 2024). They have the right to do so.

No court in this case has had subject-matter jurisdiction. This Court should not have to repeat itself, but the majority's decision has made repetition necessary. The Court should grant allowance to appeal, and reverse this latest shirking of its commands.

II. The Majority Erred When It Issued A Decision On The Merits Because This Court Has Exclusive Subject-Matter Jurisdiction Over This Appeal.

There is one more reason the majority erred in entering a judgment at all: It lacked jurisdiction. The law in Pennsylvania is clear. "The Supreme Court shall have *exclusive* jurisdiction of appeals from final orders of the courts of common pleas" in "[m]atters where the court of common pleas has held invalid as repugnant. . . to the Constitution of this Commonwealth . . . any statute of[] this Commonwealth." 42 Pa. C.S. § 722 (emphasis added). Furthermore, "[i]f an appeal" is brought to a court without jurisdiction, that court "*shall* transfer" the appeal "to the proper tribunal of this Commonwealth." *Id.* § 5103(a) (emphasis added); *see also In re: Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1087 (Pa. 2020) ("*In re 2020 Canvass*") (Wecht, J., concurring) (the word "shall" in a statute is "mandatory").

An "issue of subject matter jurisdiction is not waivable," and parties may not "confer subject matter on a court or tribunal by agreement or stipulation." *Blackwell v. State Ethics Comm'n*, 567 A.2d 630, 636 (Pa. 1989). Rather, courts "must first determine" whether they "ha[ve] jurisdiction to consider" the case before "entertain[ing] the merits" of the underlying claim. *Commonwealth v. Blystone*, 119 A.3d 306, 311 (Pa. 2015).

Here, the Court of Common Pleas heard a constitutional challenge to the date requirement and ruled in the challengers' favor. It thus "held" the date requirement

"invalid as repugnant" to the Pennsylvania Constitution. 42 Pa. C.S. § 722. An appeal from that decision lies "exclusive[ly]" in the jurisdiction of this Court, not the Commonwealth Court. *Id.* In such circumstances, the Commonwealth Court "shall transfer" the appeal to this Court. *Id.* § 5103. It did not do so here. Just like its rejection of *B-PEP*, the majority's disregard of the General Assembly's direct statutory commands—over the concerns of two Judges, *see* Wolf Dis. Op. 2-5; McCullough Dis. Op. 2-3 n.2—indicates that the majority erred not only on the merits, but by entering *any* judgment *at all*.

Individual Respondents' meager retorts to this straightforward application of governing law do not persuade. *First*, they argue that the trial court "did not hold" the date requirement to be "invalid" under the Pennsylvania Constitution because it only decided that "the Board's decision to reject" undated ballots "deprived [the ballot casters] of their Pennsylvania Constitutional right to vote." Individual Respondents' Resp. to Appl. for Stay 33 n.12. That is nonsense. As this Court has now held repeatedly, *see Ball*, 289 A.3d 1, the date requirement *mandates* that the Board reject undated ballots. To say that following the date requirement "deprive[s]" individuals "of their Pennsylvania Constitutional right to vote" thus *is* to say that the date requirement is "repugnant" to the Pennsylvania Constitution.

Second, Individual Respondents aver that the parties waived this jurisdictional defect under 42 Pa. C.S. § 704, which provides the circumstances in which "[t]he

failure of an appellee to file" a jurisdictional objection "shall, unless the appellate court otherwise orders, operate to perfect the appellate jurisdiction of such appellate court." But they ignore the caveat—"unless the appellate court otherwise orders." Here, Section 5103 *required* the majority to "order[]" a transfer to this Court. Because the General Assembly placed exclusive appellate jurisdiction over this matter in *this* Court, it is *this* Court's "prerogative and duty to decide the substantive question[]" of the constitutionality of the date requirement, not the Commonwealth Court's. *Mohn v. Bucks Cnty. Republican Comm.*, 218 A.3d 927, 933-34 (Pa. Super. Ct. 2019) (en banc). When a "potential substantive issue . . . invokes" another court's jurisdiction, the Commonwealth Court "must transfer *prior to* reaching the merits of the appeal." *Id.* at 934.

The majority failed to do so. Thus, at the very least, this Court should vacate the decision below as entered without jurisdiction.

III. The Courts Below Improperly Failed To Permit Factual Development.

As explained more fully below, the majority erred in applying strict scrutiny under the Free and Equal Elections Clause. *See infra* Parts IV.A & IV.B. The majority's application of strict scrutiny was infected not only with legal error, *see id.*, but also with the lower courts' procedural error in failing to permit the absent 66 county boards and the Republican Committees to develop any factual record in this case.

Indeed, the majority's holding rested on its view that the "undisputed factual findings" demonstrate that the date requirement fails strict scrutiny. Maj. Op. 37. But the Republican Committees *do* dispute those alleged factual findings. In particular, the majority's decision pointed to two "undisputed" facts that are, in fact, *disputed*: (1) the date requirement imposes burdens on voters and (2) the date requirement does not meaningfully advance any state interests. *Id.* at 37-38. The Republican Committees strongly disagree with both findings. *See infra* Part IV.B.

These are factual disputes that cannot be resolved without record development and, potentially, expert witnesses. *Cf. Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008) (summary relief is appropriate only when "no material issues of fact are in dispute" (citation omitted)). The Republican Committees would also like to depose Individual Respondents to understand why they did not comply with the date requirement. *Cf.* Pa. R.C.P. 1035.2 Explanatory Comment of 1996 (noting that the intent of providing for summary judgment "is not to eliminate meritorious claims prematurely before relevant discovery has been completed").

The Republican Committees made this point below, *see* Intervenor-Appellants' Initial Br. 54-55, 1305 C.D. 2024 & 1309 C.D. 2024 (Oct. 14, 2024), but the majority ignored it. Fully adopting Individual Respondents' *representations*, the majority asserted that the relevant factual findings were already made in "multiple state and federal courts." Maj. Op. 4. This is false, as the Republican

Committees explained below. The federal-court cases Individual Respondents cited dealt not with right-to-vote arguments, but with challenges under a federal statute (the Materiality Provision). *See NAACP I*, 703 F. Supp. 3d at 643-44; *Pa. State Conf. of NAACP v. Sec'y Commw. of Pa.*, 97 F.4th 120 (3d Cir. 2024) ("*NAACP II*") (rejecting challenges to date requirement). Statements respecting the date requirement are thus passing dictum, as they were irrelevant to the federal courts' holdings. *See, e.g.*, *In re NFL Players Concussion Inj. Litig.*, 775 F.3d 570, 583 n.18 (3d Cir. 2014).

Indeed, it is apparent those courts did not give "full and careful consideration" to this point. *Id.* (citation omitted). They did not address the State's interest in documenting the date the voter completed the ballot as part of trustworthy election administration or as a back-up for scanning errors or SURE system malfunctions. *See Migliori v. Cohen*, 36 F.4th 153, 165 (3d Cir. 2022) (Matey, J., concurring in judgment), *vacated sub nom.*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022). They also did not address the State's interest in solemnity. *See NAACP II*, 97 F.4th at 125, 127, 129. The Third Circuit likewise did not address the State's interest in deterring and detecting fraud or even mention the *Mihaliak* case, *see id.*, while the district court offered a footnote saying evidence of fraud was "irrelevant" under the Materiality Provision, 703 F. Supp. 3d at 679 n.39. And the vacated Commonwealth Court decision Individual Respondents cited below erroneously relied on those inapt

federal cases, *see Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321, at *32 (Pa. Commw. Aug. 30, 2024), all without allowing 66 county boards not joined to that case an opportunity to contribute to the record.

The only plausible reason for the majority's decision to deny the Republican Committees (and the 66 absent county boards of elections) an opportunity to develop a factual record was to oblige Individual Respondents' request to rush a decision for the 2024 General Election. *See* Dougherty Concurring Statement 13 n.10. Now that the Court has rejected the only basis for skipping factual development, the Court should, at minimum, grant review and reverse on that basis.

IV. The Majority Contravened This Court's Precedents In Holding That The Date Requirement Violates The Free And Equal Elections Clause.

For all the foregoing reasons, this Court should grant this Petition and reverse the majority's judgment without even delving into the merits. But the majority's analysis is equally flawed on that front. The Free and Equal Elections Clause provides that "[e]lections shall be free and equal." Pa. Const. art. I, § 5. Its purpose is to "ensure that each voter will have an equally effective power to select the representative of his or her choice, free from any discrimination on the basis of his or her particular beliefs or views." *LWV*, 178 A.3d at 809. That is no free-floating license for courts to uproot state election laws. Rather, the "power to regulate elections is a legislative one" that "has been exercised by the general assembly since the foundation of the government," and "nothing short of gross abuse [will] justify

a court in striking down an election law demanded by the people, and passed by the law-making branch of government in the exercise of a power always recognized and frequently asserted." *Winston*, 91 A. at 522-23.

A. Properly Understood, The Free And Equal Elections Clause Does Not Invalidate The Date Requirement.

The majority was wrong to hold that the date requirement somehow violates the Free and Equal Elections Clause. *First*, this Court has *already* rejected that argument in *Pennsylvania Democratic Party*, where the petitioners brought a Free and Equal Elections challenge to the declaration mandate of which the date requirement is part. 238 A.3d 345. The petitioners' argument presaged the majority's: They claimed that rejecting ballots based on "minor errors" or "irregularities" in completion of the declaration would violate the Free and Equal Elections Clause. *Id.* at 372-74. They thus asked this Court to hold that the Clause requires county boards to provide voters notice and an opportunity to cure such "minor errors" before rejecting the ballot. *Id.*

This Court disagreed. *Id.* And what is more, it explained why. There is "no constitutional or statutory basis that would countenance imposing the procedure" the petitioners "s[ought] to require." *Id.* This Court therefore held that the declaration mandate complies with the Clause. Obviously, because the *entire* declaration mandate is constitutional, so, too, is its date requirement *component*.

Second, even if this Court's precedent did not foreclose the majority's judgment, the date requirement plainly does not run afoul of the Free and Equal Elections Clause. *Pennsylvania Democratic Party* was no outlier decision: This Court has *never* struck down a neutral ballot-casting rule that governs how voters complete and cast their ballots under the Clause. *See* A. MCCALL, ELECTIONS, *in* K. GORMLEY ET AL., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 215-32 (identifying the types of cases the Clause has been applied in); *cf.* McCullough Dis. Op. 9.

And for good reason. The Free and Equal Elections Clause performs three limited functions. *First*, it prohibits arbitrary over-qualification rules that disqualify classes of citizens from voting. *LWV*, 178 A.3d at 807. *Second*, it prohibits intentional discrimination against voters based on socioeconomic status, geography, or religious or political beliefs. *Id.* And *third*, the Clause prohibits "regulation[s]" that "make it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.* at 810 (citation omitted). Unless a regulation imposes such extreme burdens, "no constitutional right of [a] qualified elector is subverted or denied" and the regulation is not subject to judicial scrutiny under the Clause. *Id.* (citation omitted).

Neither Individual Respondents nor the majority below have suggested that the date requirement unconstitutionally narrows who is eligible to vote or constitutes intentional discrimination. Thus, Individual Respondents' Free and Equal Elections

challenge rests entirely on whether the date requirement "make[s] it so difficult [to vote] as to amount to a denial" of "the franchise." *Id.* (citation omitted).

It does not. In the first place, Pennsylvania law permits *all* voters to vote in person without complying with the date requirement. *See, e.g.*, 25 P.S. § 2811. Far from making voting "so difficult as to amount to a denial" of "the franchise," *LWV*, 178 A.3d at 810 (citation omitted), the requirement is *inapplicable* to an entire universally available method of voting—the method that the majority of Pennsylvania voters use to vote. *See* 2022 General Election Official Returns (Statewide), November 8, 2022 (22.8% of ballots counted in the 2022 U.S. Senate election—1,225,446 out of 5,368,021—were mail ballots), https://tinyurl.com/3kfzwpzh. It is hard to see how a rule regulating no-excuse mail voting, which was "unknown in the Commonwealth for well over two centuries and is wholly a creature of recent, bipartisan legislat[ion]," can violate any right to vote. *Black Political Empowerment Project*, 2024 WL 4002321, at *39 (McCullough, J., dissenting).

In the second place, even if the Court could ignore the preferred voting method of most Pennsylvania voters and focus only on mail voting, there is nothing "difficult" about signing and dating a document, let alone "so difficult" as to deny the right to vote. *LWV*, 178 A.3d at 810 (citation omitted). Just a few weeks ago, this Court rejected a similar challenge in *In re Provisional Ballots*. There, the

Luzerne County Board of Elections argued that the statutory requirement that individuals "shall place [their] signature on the front of the provisional ballot envelope" was constitutionally suspect under the Free and Equal Elections Clause. *Id.* at 905-06 (quoting 25 P.S. § 3050(a.4)(3)). This Court disagreed. The county board "d[id] not indicate how a statute that requires an elector . . . to sign the ballot's outer envelope denies the franchise or makes it so difficult as to amount to a denial." *Id.* at 909. The Court was thus "not persuaded constitutional principles require [it] to ignore" the "statutory requirement[]" to sign the ballot envelope. *Id.*

The same rings true for the date requirement. Individual Respondents' argument amounts to just the latest "invocation through litigation and jurisprudence that ballots are being disregarded because of 'mere technicalities.'" *Id.* at 919 (Wecht, J., concurring). There is no reason to think that dating a ballot envelope is any more "difficult" than signing a ballot envelope—and the Court has just said that the latter does not "make [voting] so difficult as to amount to a denial" of the right of franchise. *Id.* at 909 (majority opinion). Notably, the majority below practically ignored this case, dismissing it as addressing only provisional ballots. Maj. Op. 35-36 n.37. The majority's breezy and disrespectful treatment of this Court's most recent governing precedent is yet another symptom of its inappropriate haste to release a decision. *See* Dougherty Concurring Statement 8-13.

Moreover, signing and dating documents is a mandatory and common feature of life. The forms provided in Pennsylvania statutes which provide spaces for both a signature and a date are too numerous to list here.[2] Consequently, "[n]o reasonable person would find the obligation to sign and date a [mail-ballot] declaration to be difficult or hard or challenging." *Black Political Empowerment Project*, 2024 WL 4002321, at *54 (McCullough, J., dissenting); *accord Democratic Senatorial Campaign Comm. v. Iowa Sec'y of State*, 950 N.W.2d 1, 7 (Iowa 2020) ("In this proceeding, [the court was] not persuaded that the obligation to provide a few items of personal information on an absentee ballot application is unconstitutional . . . .").

Furthermore, both signing a piece of paper and writing a date on it are nothing more than the "usual burdens of voting," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.); *id.* at 204-09 (Scalia, J., concurring in the judgment), not a "difficult[y]" so severe "as to amount to a denial" of "the franchise," *LWV*, 178 A.3d at 810 (citation omitted). Indeed, *every* State requires voters to write pieces of information on voting papers—both for in-person and mail voting. *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a) (signature requirement); *id.* § 3050 (requirement to maintain in-person voting poll books); *Electronic Poll Books*,

[2] *See, e.g.*, 23 Pa. C.S. § 5331 (parenting plan); 42 Pa. C.S. § 8316.2(b) (childhood sexual abuse settlement form), § 6206 (unsworn declaration); 57 Pa. C.S. § 316 (short form certificates of notarial acts); 73 P.S. § 201-7(j.1)(3)(ii) (emergency work authorization form); § 2186(c) (cancellation form for certain contracts).

National Conference of State Legislatures (June 17, 2024), ncsl.org/elections-and-campaigns/electronic-poll-books; *How States Verify Voted Absentee/Mail Ballots*, National Conference of State Legislatures (Oct. 9, 2024), ncsl.org/elections-and-campaigns/table-14-how-states-verify-voted-absentee-mail-ballots.

In fact, dating a ballot declaration is far less difficult than other tasks that have been upheld as non-burdensome and constitutional under the Clause and other constitutional provisions. As noted, this Court has already upheld the entire declaration mandate and the secrecy-envelope rule against Free and Equal Elections challenges. *See Pa. Democratic Party*, 238 A.3d at 372-80. The date requirement—like the signature requirement that Individual Respondents do not challenge—is necessarily *easier* to comply with than the full range of rules (including the "fill out," "date," and "sign" requirements) that form the declaration mandate.

Moreover, the U.S. Supreme Court has upheld as constitutionally non-burdensome "the inconvenience of making a trip to the [Department of Motor Vehicles], gathering the required documents, and posing for a photograph" as required to obtain a photo identification for in-person voting. *Crawford*, 533 U.S. at 198 (Stevens, J.). It has also reasoned that "[h]aving to identify one's own polling place and then travel there to vote does not exceed the usual burdens of voting." *Brnovich v. DNC,* 594 U.S. 647, 678 (2021) (internal quotation marks omitted). Yet both of these tasks are far more difficult than dating a ballot envelope, so, *a fortiori*,

the date requirement does not "make it so difficult [to vote] as to amount to a denial" of "the franchise." *LWV*, 178 A.3d at 810 (citation omitted).

In brief, properly understood, there is no constitutional defect with the longstanding, duly enacted date requirement. Because the majority erroneously overturned "a statute of the Commonwealth" (an election statute, no less), this Court should grant the Petition and reverse. Pa. R.A.P. 1114(b)(5).

B. The Majority Misapplied The Free And Equal Elections Clause.

Instead of applying this Court's well-settled principles for evaluating Free and Equal Elections challenges, the majority held that the date requirement restricts the "fundamental right to vote," and thus "must be evaluated under strict scrutiny." Maj. Op. 37. The majority's novel analysis is wrong and has no basis in this Court's (or even other courts') precedents.

First, the majority is wrong to say that the date requirement implicates the "fundamental right to vote." An individual who "cast[s] a mail ballot and fail[s] or refuse[s] to follow the rules for doing so" has "not been 'disenfranchised,'" because [his or her] *right to vote* remains unaffected, unabridged, and intact." McCullough Dis. Op. 9. "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissental). The General Assembly's longstanding and commonsense date

requirement no more implicates the fundamental right to vote than does requiring voters to show up to the polling station on a Tuesday.

Second, the majority improperly applies strict scrutiny to the facially nonburdensome and neutral date requirement. As noted above, the Court has never applied strict scrutiny in such circumstances, as it has confirmed in recent months. *See supra* Part IV.A. Regardless, even accepting for the sake of argument that some sort of interest balancing applies, the date requirement easily satisfies it. As a majority of the Pennsylvania Supreme Court has recognized, the date requirement serves several weighty interests and an "unquestionable purpose." *In re 2020 Canvass*, 241 A.3d at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see id.* at 1087 (Wecht, J., concurring in part and dissenting in part) (noting that "colorable arguments . . . suggest [the date requirement's] importance"); *accord In re Provisional Ballots*, 322 A.3d at 906 (acknowledging Justices previously found date requirement to serve important purposes). To start, it "provides proof of when the 'elector actually executed the ballot in full.'" *In re 2020 Canvass*, 241 A.3d at 1090 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). It thus facilitates the "orderly administration" of elections, which is undoubtedly a legitimate interest. *Crawford*, 553 U.S. at 196 (Stevens, J.). To be sure, election officials are required to timestamp a ballot and scan the barcode into the Statewide Uniform Registry of Electors ("SURE") upon receipt. *See NAACP I*,

703 F. Supp. 3d at 665. And there is every reason to think that ordinarily happens. *See id.* But the handwritten date serves as a useful backstop, and would become quite important if officials failed to perform those tasks or if SURE malfunctioned—possibilities Third Circuit Judge Matey has highlighted. *See Migliori*, 36 F.4th at 165 (Matey, J., concurring in judgment).

Further, the requirement serves the State's interest in solemnity—*i.e.*, in ensuring that voters "contemplate their choices," including the choice to vote by mail rather than in person, and "reach considered decisions about their government and laws." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 15 (2018) (cleaned up). Signature-and-date requirements serve a "cautionary function" by "impressing the parties with the significance of their acts and their resultant obligations." *Davis v. G N Mortg. Corp.*, 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003). Such formalities "guard[] against ill-considered action," *Thomas A. Armbruster, Inc. v. Barron*, 491 A.2d 882, 884 (Pa. Super. Ct. 1985) (citation omitted), and the absence of formalities "prevent[s] . . . parties from exercising the caution demanded by a situation in which each ha[s] significant rights at stake," *Thatcher's Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc.*, 636 A.2d 156, 161 (Pa. 1994). That is why the "requirement to sign and date documents is deeply rooted in legal traditions that prioritize clear and consensual agreements." *Black Political Empowerment Project*, 2024 WL 4002321, at *53 (McCullough, J., dissenting); *accord Vote.Org v. Callanen*, 89 F.4th 459, 489

(5th Cir. 2023) (an "original signature . . . carries solemn weight." (internal quotation marks omitted)).

Moreover, the requirement advances the State's interests in "deterring and detecting voter fraud" and "protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 191 (Stevens, J.); *see also In re 2020 Canvass*, 241 A.3d at 1091 (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). The requirement's advancement of the interest in preventing fraud is actual, not hypothetical: In 2022, the date requirement was used to detect voter fraud committed by a deceased individual's daughter. *See Commonwealth v. Mihaliak*, MJ-02202-CR-0000126-2022 (Lancaster Cnty. Ct. Common Pleas 2022). In fact, because county boards may not conduct signature matching, *see In re: Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 595 (Pa. 2020), the *only* evidence of third-party fraud on the face of the fraudulent ballot was the handwritten date of April 26, 2022, which was twelve days after the decedent had passed away. *See Mihaliak*, MJ-02202-CR-0000126-2022. That evidence was used to secure a guilty plea and criminal sentence against the fraudster. *See Black Political Empowerment Project*, 2024 WL 4002321, at *15 n.33.

States do not need to point to evidence of election fraud within their borders before adopting rules designed to deter and detect it. *Brnovich*, 594 U.S. at 686. Yet here, where the requirement has actually been used to combat fraud, the State's

interest in "deterring and detecting voter fraud" is unquestionably advanced. *Crawford*, 553 U.S. at 191 (Stevens, J.). And the requirement's anti-fraud function advances the related vital state interest of preserving and promoting voter "[c]onfidence in the integrity of our electoral process[]" that is so "essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4.

Third, the majority's analysis is not just contrary to this Court's precedents—it is out of step with *other* states' jurisprudence as well. As this Court has noted, twelve other States have "free and equal" elections provisions similar to Pennsylvania's. *LWV*, 178 A.3d at 813 n.71. And courts in those States have consistently held that, under their "free and equal" elections clauses, a ballot-casting rule is lawful "so long as what it requires is not so grossly unreasonable that compliance therewith is practically impossible." *Simmons v. Byrd*, 136 N.E. 14, 18 (Ind. 1922); *see Mills v. Shelby Cnty. Election Comm'n*, 218 S.W.3d 33, 40-41 (Tenn. Ct. App. 2006) (provision "refers to the rights of suffrage and not to the logistics of how the votes are cast."). Other state courts interpret their "free and equal" election provisions merely to prohibit the use of coercion to bar access to voting or to require that lawfully-cast votes be given equal weight. *See, e.g.*, *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009); *Ross v. Kozubowski*, 538 N.E.2d 623, 627 (Ill. App. Ct. 1989) ("free and equal election" provision does not guarantee an election "devoid of all error" and requires "only" that "each voter have the opportunity to cast his or

her vote without any restraint and that his or her vote have the same influence as the vote of any other voter" (cleaned up)); *Graham v. Sec'y of State*, 684 S.W.3d 663, 684 (Ky. 2023) (election is not "free" only where "restraint or coercion, physical or otherwise, is exercised against a voter's ability to cast a vote"); *Gentges v. State Election Bd.*, 419 P.3d 224, 228 (Okla. 2018) (provision violated when there is "conscious legislative intent for electors to be deprived of their right to vote"); *Libertarian Party of Or. v. Roberts*, 750 P.2d 1147, 1152 (Or. 1988) (clause requires equal counting of votes); *Chamberlin v. Wood*, 88 N.W. 109, 110-12 (S.D. 1901) (clause prohibits coercion and requires equal counting of votes). In fact, after a diligent search, Intervenor-Petitioners are aware of *zero* cases applying any other State's "free and equal" election clause to invalidate a neutral ballot-casting rule.

The majority's decision is thus unprecedented in all the worst ways. This Court should grant the Petition and reverse.

C. The Majority's Decision Violates State and Federal Law.

Indeed, rather than follow state law, the majority's order if anything *violates* state and federal law. Under the Equal Protection Clause of the U.S. Constitution, a "State may not, by . . . arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Accordingly, county boards may not "use[] varying standards to determine what [i]s a legal vote," at least in the same election across more than one county, such as a Commonwealth-

wide election. *Id.* at 107. Likewise, the Pennsylvania Constitution decrees that "[a]ll laws regulating the holding of elections . . . shall be uniform throughout the State," Pa. Const. art. VII, § 6; the Election Code requires that elections be "uniformly conducted" throughout the Commonwealth, 25 P.S. § 2642(g); and the Free and Equal Elections Clause mandates that election rules "treat[] all voters alike" and "in the same way under similar circumstances," *Winston*, 91 A. at 523.

The majority's order contravenes *all* of these rules to the extent it binds or authorizes any county board not to enforce the date requirement in any future election involving more than one county. After all, the other 66 county boards remain bound to enforce the requirement under this Court's controlling precedents. *See, e.g.*, *Pa. Democratic Party*, 238 A.3d 345; *Ball*, 289 A.3d at 21-22; *see also NAACP II*, 97 F.4th 120. Of course, the majority's order cannot absolve the Board of its obligation to adhere to the Court's holding that the date requirement complies with the Free and Equal Elections Clause. *See Pa. Democratic Party*, 238 A.3d 345; *see also supra* Part IV.A. But to the extent the Board, the Commonwealth Court, or some other court concludes otherwise, the Board would violate the U.S. Constitution, the Pennsylvania Constitution, and *even the Free and Equal Elections Clause* if it *declines to enforce* the date requirement in the same election in which another county board *dutifully enforces* it. *See Bush,* 531 U.S. at 107; Pa. Const. art. VII, § 6; *Winston*, 91 A. at 523. In that foreseeable scenario, the majority will have

ushered in an election regime where a voter in Philadelphia is treated differently than a voter in Cambria County, and where identically submitted ballots will be counted or discarded depending on which county it was submitted in.

This result is intolerable. Only this Court can restore the uniformity that the U.S. Constitution and Pennsylvania's statutes and Constitution require. For this reason, too, this Court should allow this appeal and reverse.

V. The Majority's Order Violates The Elections And Electors Clauses To The Extent It Binds Or Permits Any Board Not To Enforce The Date Requirement In A Federal Election.

The majority's order also violates the Elections and Electors Clauses of the U.S. Constitution to the extent it binds or permits any county board not to enforce the date requirement in any federal election. The Elections Clause directs: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Electors Clause grants the General Assembly plenary authority to prescribe the "Manner" by which the Commonwealth "appoint[s] [Presidential] . . . Electors." U.S. Const. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

These provisions "expressly vest[] power to carry out [their] provisions in 'the Legislature' of each State, a deliberate choice that this Court must respect." *Moore*, 600 U.S. at 34. Thus, "state courts do not have free rein" in interpreting or applying

state constitutions to election laws passed by the state legislatures. *Id.*; *accord id.* at 38 (Kavanaugh, J., concurring). State courts cannot "impermissibly distort[]" state law "beyond what a fair reading require[s]." *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) (endorsing this standard); *id.* at 34-36 (holding that federal courts must review state courts' treatment of election laws passed by state legislatures regulating federal elections).

This Court has already held that the date requirement is mandatory, *Ball*, 289 A.3d at 20-23; has declined two invitations to wield the Free and Equal Elections Clause to invalidate it, *see Pa. Democratic Party*, 238 A.3d at 372-74; *Ball*, 289 A.3d at 14-16; and has declined two more invitations to revisit that decision in recent weeks, *see New Pa. Project*, 2024 WL 4410884, at *1; *B-PEP*, 322 A.3d at 222. And as established, there is no support in the Clause's text or history, Pennsylvania case-law, precedents interpreting analogous state constitutional provisions, or federal constitutional law for invalidating it. *See supra* Part IV. The majority's decision to do so anyway "transgress[es] the ordinary bounds of judicial review" in violation of the U.S. Constitution. *Moore*, 600 U.S. at 36. The Court should reverse for this reason as well.

VI. Failing To Reverse The Majority's Order Would Strike Act 77 And Universal Mail Voting In Pennsylvania.

Finally, any failure of this Court to reverse the majority's decision strikes the entirety of Act 77—and, with it, universal mail voting in Pennsylvania. *Black*

Political Empowerment Project, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

Act 77's non-severability provision states: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Act 77 § 11. The date requirement is part of the universal mail voting established in section 8, so invalidating "its application to any person or circumstance" voids the entire Act. *Id.*; *see McLinko v. Dep't of State*, 279 A.3d 539, 609-10 (Pa. 2022) (Brobson, J., dissenting); *McLinko v. Dep't of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., concurring in part and dissenting in part); *Black Political Empowerment Project*, 2024 WL 4002321, at *62-64 (McCullough, J., dissenting).

As "a general matter, nonseverability provisions are constitutionally proper." *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). That is especially true where they arise from "the concerns and compromises which animate the legislative process." *Id.* Here, the non-severability provision was a crucial element in the political compromise that led to Act 77's passage. *See Stilp*, 905 A.2d at 978. Both the Democratic sponsor and the Republican Senate Majority Leader described Act 77 as a politically difficult compromise. *See* 2019 Pa. Legislative Journal–Senate 1000, 1002 (Oct. 29, 2019). The non-severability provision helped reassure

legislators that their parts of the bargain would not be discarded by courts while their concessions remained in place. Consider the following colloquy on the House floor involving State Government Committee Chair Garth Everett:

> Mrs. DAVIDSON. . . . Then I also understand it also reads that the provisions of the bill will be nonseverable. So is that to mean that if somebody wants to challenge whether or not they were discriminated against because they did not have a ballot in braille, would they be able to – would that be a suit that they could bring to the Supreme Court under the severability clause?
>
> Mr. EVERETT. Thank you, Mr. Speaker.
>
> There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because **the intent of this is that this bill works together, that it not be divided up into parts** . . . .
>
> Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.
>
> Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.
>
> Mrs. DAVIDSON. All right. Thank you.

2019 Pa. Legislative Journal—*House* 1740-41 (Oct. 29, 2019) (emphasis added).

The majority held that enforcement of the date requirement violated the Free and Equal Elections Clause. *See* Maj. Op. 39. It therefore "held invalid" the requirement's "application to" some "person" and "circumstance." Act 77 § 11. Thus, if allowed to stand, the majority's decision has voided the entirety of Act 77

and universal mail voting. *See Pa. Democratic Party*, 238 A.3d at 391 (Wecht, J., concurring) ("[A] mandate without consequences is no mandate at all.").

The Court should protect the right of all Pennsylvanians to vote by mail and reverse for this reason alone.

CONCLUSION

This Court should grant the Petition and reverse.

Dated: November 12, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Petition for Allowance of Appeal contains 8,990 words, exclusive of the supplementary matter as defined by Pa. R.A.P. 2135(b).

Dated: November 12, 2024

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Counsel for Intervenor-Petitioners

CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 127

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: November 12, 2024

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Counsel for Intervenor-Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2024, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: November 12, 2024

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Counsel for Intervenor-Petitioners

APPENDIX

TO
INTERVENOR-PETITIONERS'
PETITION FOR ALLOWANCE OF APPEAL

TABLE OF CONTENTS

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry	:	**CASES CONSOLIDATED**
	:	
v.	:	Trial Ct. No. 2024 No. 02481
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
	:	
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024
Brian T. Baxter and Susan T. Kinniry	:	
	:	
v.	:	
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024
	:	SUBMITTED: October 15, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE CEISLER FILED: October 30, 2024

In these consolidated cross-appeals, we must decide whether a court of common pleas correctly reversed a county board of elections' decision not to count 69 undated and incorrectly dated absentee and mail-in ballots in a special election in

accordance with Sections 1306 and 1306-D of the Pennsylvania Election Code (Election Code),[1] 25 P.S. §§ 3146.6(a) and 3150.16(a) (dating provisions), on the basis that such refusal violates the free and equal elections clause set forth in article I, section 5 of the Pennsylvania Constitution, Pa. Const. art. I, § 5.[2]

The Philadelphia County Board of Elections (County Board or Board), and the Republican National Committee and the Republican Party of Pennsylvania (RNC and RPP) (collectively, Designated Appellants), appeal from the Court of Common Pleas of Philadelphia County's (trial court) September 26, 2024 order that granted Brian T. Baxter and Susan T. Kinniry's (Designated Appellees) Petition for Review in the Nature of a Statutory Appeal (Petition) filed pursuant to Section 1407 of the Election Code, 25 P.S. § 3157,[3] and reversed the County Board's September 21, 2024 decision not to count Designated Appellees' and 67 other registered voters'

---

[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591. Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3, and thereafter amended by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). Section 1306 relates to voting by absentee electors and provides, in relevant part, that an absentee "elector shall . . . fill out, date and sign the declaration printed on" the second, or outer, envelope "on which is printed the form of declaration of the elector," among other things. 25 P.S. § 3146.6(a). Section 1306-D was added to the Election Code by Act 77 and includes the same language as Section 1306 with respect to voting by mail-in electors. 25 P.S. § 3150.16(a).

[2] The free and equal elections clause provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5.

[3] Section 1407(a) provides, in relevant part:

> (a) Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not, to the court specified in this subsection, setting forth why he feels that an injustice has been done, and praying for such order as will give him relief.

25 P.S. § 3157(a).

undated and incorrectly dated mail ballots[4] in the September 17, 2024 Special Election to fill two seats in the Pennsylvania House of Representatives (House) in the 195th and 201st Legislative Districts in Philadelphia County. In so doing, and relying on the parties' stipulation of the facts and representations made on the record at a hearing held on September 25, 2024, the trial court determined that the refusal to count a mail-in ballot due to a voter's failure to "**date** . . . the declaration printed on" the outer envelope used to return his/her ballot to county election officials, as required by the Election Code's dating provisions, violates the free and equal elections clause set forth in article I, section 5 of the Pennsylvania Constitution. The trial court thus directed the County Board to count Designated Appellees' and the 67 other registered voters' date-disqualified mail ballots to be verified, counted if otherwise valid, and included in the results of the Special Election for the 195th and 201st Legislative Districts.[5]

On appeal, the County Board agrees with the trial court's ruling that the Board erred in not counting the 69 undated and incorrectly dated mail ballots at issue based on the meaningless dating provisions in violation of the free and equal elections clause given the unsettled nature of the case law addressing that issue, and further asserts there are no impediments to us addressing the issue now based on the undisputed facts of these matters. However, the Board confusingly requests that this Court reverse the trial court's September 26, 2024 order. RNC and RPP argue that several procedural issues preclude this Court's review of the constitutional issue.

[4] The term "mail ballots" used in this opinion encompasses both absentee and mail-in ballots, unless otherwise indicated.

[5] Designated Appellants also appeal the trial court's order entered on September 28, 2024 (dated September 27, 2024), which granted RNC and RPP's unopposed Petition for Leave to Intervene (Intervention Petition); declared as moot Designated Appellees' and the County Board's Joint Emergency Motion for Reconsideration and Clarification (Joint Emergency Motion); and denied RNC and RPP's Motion to Dismiss Designated Appellees' Petition.

Alternatively, they contend that the law is well settled that the dating provisions are mandatory and enforceable, and not violative of the free and equal elections clause, and that the trial court erred in changing the rules for determining the validity of mail ballots after the Special Election. Designated Appellees request that this Court affirm the trial court's ruling directing that the noncompliant ballots, including theirs, be counted in the Special Election. Upon careful review, we affirm the trial court under the circumstances of this case.

I. BACKGROUND

Designated Appellees and the County Board[6] stipulated to the operative facts of this matter as garnered at the September 25, 2024 trial court hearing and as set forth in Designated Appellees' Petition filed in the trial court, as follows. *See* 9/25/2024 Hearing Transcript (H.T.) at 4-9, 12-17, 20-21; Original Record (O.R.), Items 1 (Petition (Pet.)) & 12 (9/26/2024 Trial Court Order).

State law in Pennsylvania provides that mail ballots that fail to comply with the dating provisions shall not be counted. *See* O.R., Item 1, Pet. ¶ 3 (citing *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023)); H.T. at 14. However, multiple state and federal courts have determined that the dating provisions are meaningless, as they do not establish voter eligibility, timely ballot receipt, or fraud. *Id.* ¶¶ 39-40.[7] This is illustrated by the fact that a voter whose ballot was timely received could have signed the declaration form only in between the date the county board sent the mail ballot package and the election day deadline, and ballots received after 8:00 p.m. on

[6] Counsel for the RNC and RPP also indicated her understanding of the stipulated facts at the hearing. 9/25/2024 Hearing Transcript (H.T.) at 19-22.

[7] Designated Appellees cited *Pennsylvania State Conference of the NAACP v. Schmidt*, 703 F. Supp. 3d 632 (W.D. Pa. 2023), 2023 WL 8091601 (*NAACP I*), *reversed & remanded*, *Pennsylvania State Conference of NAACP Branches v. Secretary*, 97 F.4th 120 (3d Cir. 2024) (*NAACP II*), as support for their assertion that courts have previously found the dating provisions to be meaningless.

election day are not counted regardless of the handwritten date. *Id.* Enforcement of the dating provisions has resulted in the arbitrary and baseless rejection of thousands of timely ballots, resulting in disenfranchisement in violation of the free and equal elections clause. *Id.* ¶¶ 5-6, 8, 37.[8] Notwithstanding the state and federal cases addressing this, the only case to have addressed whether enforcement of the meaningless dating provisions violates the free and equal elections clause found that it did; however, that decision has since been vacated on procedural grounds by the Supreme Court of Pennsylvania. *Id.* ¶¶ 7, 62 (citing *Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, filed Aug. 30, 2024) (*BPEP II*) (en banc),[9] 2024 WL 4002321, *vacated*, 322 A.3d 221 (Pa. 2024) (Pa., No. 68 MAP 2024, order filed Sept. 13, 2024) (*BPEP III*) (per curiam) (vacating for lack of original jurisdiction), *order clarified*, (Pa., No. 68 MAP 2024, order filed Sept. 19, 2024) (*BPEP IV*) (per curiam) (clarifying Supreme Court's September 13, 2024 order)).

As it relates to the instant appeals, Designated Appellees opted to vote by mail in the September 17, 2024 Special Election for the 195th Legislative District in

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[8] Designated Appellees pointed out that nearly 10,000 voters whose mail ballots were timely received were disenfranchised in the 2022 General Election and thousands more voters were disenfranchised in the 2023 Municipal Election and the 2024 Presidential Primary Election. O.R., Item 1, Pet. ¶¶ 5-6, 35-38 (providing these figures and citing, *inter alia*, Ex. 3, Declaration of Ariel Shapell, ¶ 12, which notes that more than 10,000 mail ballots in the November 2023 Municipal Election and 2024 Presidential Primary Election were marked as cancelled in the Statewide Uniform Registry of Electors (SURE) System due to missing or incorrect handwritten dates). We note that "[t]he SURE system is . . . the statewide database of voter registration maintained by the Department of State and administered by each county." *In re Nom. Pet. of Morrison-Wesley*, 946 A.2d 789, 792 n.4 (Pa. Cmwlth. 2008).

[9] In *Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, order filed July 9, 2024, & opinion filed July 18, 2024) (Ceisler, J.) (single-Judge order & opinion) (collectively, *BPEP I*), this Court denied the intervention application of Westmoreland County Commissioner Doug Chew. *BPEP I* is not relevant for purposes of the instant appeals.

Philadelphia. O.R., Item 1, Pet., Ex. 1, ¶ 9 (Declaration of Brian T. Baxter (Baxter Decl.)) & Ex. 2, ¶ 9 (Decl. of Susan T. Kinniry (Kinniry Decl.)). Designated Appellees are qualified electors who are registered to vote in Pennsylvania and live in Philadelphia. They validly applied for, received, and timely submitted their mail-in ballots prior to the Special Election on September 17, 2024. They signed the outer envelopes, and while lacking handwritten dates, the outer envelopes do in fact contain the County Board's date stamps of the dates the ballots were received. The Designated Appellees' undated mail-in ballots were set aside and not counted. O.R., Item 1, Pet. ¶¶ 11, 14-18, 20-22, 41-43; H.T. at 8-9, 12. The timeliness and eligibility of the 67 other voters whose mail ballots were rejected on similar grounds is undisputed. H.T. at 5, 12, 21.

On September 9, 2024, the County Board posted a list of mail ballots received ahead of the Special Election that were "administratively determined to be potentially flawed," which stated that such ballots "have the possibility of **NOT** being counted" and provided information about requesting a replacement ballot or casting a provisional ballot. O.R., Item 1, Pet. ¶ 44 & n.14.[10] Designated Appellees' names appeared on the list of defective ballots,[11] but they did not correct the error on their ballots before 8:00 p.m. on the day of the Special Election. Designated Appellee Kinniry additionally attested to the fact that she received an email from the County Board on August 27, 2024, informing her that her vote would not be counted if she did not take additional steps to fix her omission of the date. However, she did

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[10] *See* https://vote.phila.gov/news/2024/09/09/2024-special-election-unverifiable-identification-undeliverable-and-or-potentially-flawed-ballots/ (last visited Oct. 28, 2024).

[11] *See* O.R., Item 1 (Petition ¶ 44 & n.14) (citing https://vote.phila.gov/media/2024_Special_Election_Deficiency_List.pdf (listing, *inter alia*, Brian T. Baxter and Susan T. Kinniry and indicating "Ballot Status Reason" for each as "NO DATE") (last visited Oct. 28, 2024)).

not attempt to fix her mail-in ballot because she read the news about this Court's decision in *BPEP II*, in which this Court held that it is unconstitutional for county boards of elections to reject mail ballots for noncompliance with the Election Code's dating provisions. *Id.*, Ex. 2, Kinniry Decl., ¶¶ 12, 14 & Ex. A (email from County Board). Designated Appellee Baxter, who is 81 years old, attested that his old age and increasing forgetfulness likely contributed to his failure to date his mail-in ballot. *Id.*, Ex. 1 (Baxter Decl.), ¶¶ 2, 11.

Following the September 17, 2024 Special Election, and pursuant to Section 1404(f) of the Election Code, 25 P.S. § 3154(f) (providing for computation of returns by county board, among other things), the County Board met in a public meeting on Saturday, September 21, 2024, to review the mail ballots from the Special Election, 23 of which had been segregated due to missing dates and 46 of which had been segregated for possible incorrect dates. O.R., Item 1, Pet. ¶¶ 24, 45-46, 52 & n.16 (citing County Board Agenda); H.T. at 4-5. Regarding the 23 undated ballots, Philadelphia City Commissioner[12] Sabir moved to not count them, which motion was seconded by Commissioner Bluestein. *Id.* ¶ 46, n.17 (citing link to County Board Meeting livestream). Commissioner Deeley responded by reading an excerpt from this Court's now-vacated opinion and order in *BPEP II*, providing that a strict scrutiny standard of review applies to the dating provisions' restriction on the fundamental right to vote guaranteed by our Constitution and holding that in the absence of any compelling reasons therefor, the refusal to count undated or incorrectly dated but timely mail ballots submitted by otherwise eligible voters because of meaningless and inconsequential paperwork errors violates the fundamental right to vote recognized in the free and equal elections clause. O.R.,

[12] The Philadelphia City Commissioners sit as the County Board for the City and County of Philadelphia. *See* H.T. at 4; O.R., Item 1 (Pet. ¶ 23, n.5).

Item 1, Pet. ¶¶ 47-48. Commissioner Deeley thus concluded, based on *BPEP II* and the Commissioners' sworn oath to uphold the Pennsylvania Constitution, that not counting the 23 undated mail-in ballots because of meaningless and inconsequential errors would violate the Pennsylvania Constitution. *Id.* ¶¶ 48-49. Although Commissioner Bluestein indicated his apparent concurrence in principle that the 23 ballots should be counted, he noted the Supreme Court's ruling in *BPEP III*, vacating this Court's *BPEP II* decision, and that the Commissioners have an obligation to follow the law as it currently stands, which prohibits the counting of the 23 undated ballots. *Id.* ¶ 50. As for the 46 incorrectly dated ballots, the County Board moved to not count them, and Commissioner Deeley again noted her objection considering this Court's *BPEP II* ruling that the free and equal elections clause requires that the ballots be counted, with which Commissioner Sabir appeared to agree. *Id.* ¶¶ 52-53. Despite that the County Board acknowledged at the September 21 meeting that the dating provisions serve no purpose, it nevertheless voted 2-1 as to each set of defective mail ballots and thereafter orally announced its decision not to count the 69 undated and incorrectly dated mail ballots, including Designated Appellees' undated but timely received mail-in ballots. *Id.* ¶¶ 24 & nn.8-9, 51, 54, 61; H.T. at 5 (stating that all 69 undated and incorrectly dated mail ballots were timely received by the County Board), 6 (noting Exs. 1-2 (Baxter & Kinniry Decls.) are stipulated facts of record), 12-13.

On September 23, 2024, Designated Appellees timely filed their Petition in the trial court, setting forth the above facts and asserting that the County Board's failure to count Designated Appellees' undated mail-in ballots violated their fundamental right to vote under the free and equal elections clause of the Pennsylvania Constitution. Designated Appellees argued that a strict scrutiny

standard of review applies to the dating provisions' restriction on that right, under which the party defending the challenged action must prove that it serves a compelling government interest. According to Designated Appellees, the County Board cannot demonstrate a compelling interest that justifies its wholesale disenfranchisement of voters where the handwritten date requirement serves no purpose in determining timeliness of receipt or voter qualifications, which the County Board acknowledged at its September 21 meeting. Designated Appellees thus requested that the trial court issue an order reversing the County Board's decision, declaring that the Pennsylvania Constitution requires the counting of their mail-in ballots, and directing the County Board to count their undated mail-in ballots cast in the September 17, 2024 Special Election. *See* O.R., Item 1, Pet. ¶¶ 55-63 & Wherefore Clause.

The trial court held a hearing on the Petition on September 25, 2024, during which many of the above facts were again relayed by the parties. Designated Appellees' counsel also acknowledged during the hearing that "[t]he number of ballots at issue is not enough to impact the outcome, especially in an unopposed race, or two unopposed races." H.T. at 16-17 (further recognizing "[i]t is impossible" that the at-issue ballots "would be outcome determinative in the [S]pecial [E]lection"), 18. The County Board thus filed a proposed Consent Order of Court (Consent Order) between it and Designated Appellees, which the trial court signed and entered on the docket on September 25, 2024, stating as follows:

> 1. The [County Board] is authorized to certify the results of the September 17, 2024 Special Election to the Pennsylvania Department of State [(Department)] and to take any and all such other actions necessary to accomplish the same, without impacting the pending litigation; and

> 2. The parties have agreed that if either or both of the [p]etitioners [(i.e., Designated Appellees)] ultimately prevail on the merits, the [County Board] will open and canvass their mail ballots and file an amended vote count with the . . . Department . . . reflecting their votes in the September 17, 2024 Special Election.

O.R., Item 10, Consent Order of Court signed 9/23/2024 & entered 9/25/2024; H.T. at 16-18.

Also during the hearing, RNC and RPP preserved their Intervention Petition filed prior to the hearing, which the trial court indicated it had yet to review; however, the court allowed RNC and RPP to participate in the proceedings and noted their objection to Designated Appellees' Petition. H.T. at 6-7, 19-20; *see* O.R., Item 11, RNC/RPP Intervention Petition. RNC and RPP also filed the proposed Motion to Dismiss Designated Appellees' Petition with their Intervention Petition, and a supporting brief, asserting that the holdings in *In re Canvass of Absentee & Mail-in Ballots*, 241 A.3d 1058 (Pa. 2020) (*In re Canvass 2020*), and *Ball* that the dating provisions are mandatory remain controlling here; that the Supreme Court already rejected a free and equal elections clause challenge to the dating provisions in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); that the Supreme Court rejected a request for it to exercise its extraordinary jurisdiction in in *BPEP III*, 322 A.3d at 222; and that, even if Designated Appellees' challenge to the dating provisions' constitutionality is an open question, the clause's plain text and history and controlling federal and other states' precedent foreclose such claim. RNC and RPP also argued that granting the requested relief would distort state law and violate various provisions of the United States and Pennsylvania Constitutions, would result in nonuniformity amongst the county boards in applying the dating provisions and sow chaos amid an ongoing election, and would require invalidation of the entirety of Act 77 under its nonseverability provision. Even if the trial court

did consider the issue, they further highlighted that the Supreme Court recently reaffirmed that strict scrutiny does not apply and that mandatory ballot-casting rules only violate the free and equal elections clause if they deny the franchise itself or make it so difficult to vote so as to amount to a denial in *In re Canvass of Provisional Ballots in 2024 Primary Election (Walsh)*, __ A.3d __ (Pa., No. 55 MAP 2024, filed Sept. 13, 2024) (also citing *Winston v. Moore*, 91 A. 520 (Pa. 1914)). Finally, RNC and RPP contended that the Petition is procedurally defective for the same jurisdictional reasons the Supreme Court cited in vacating our *BPEP II* decision.

Based upon the above undisputed facts, the trial court recognized that "a degree of uncertainty" had been created by recent appellate case law, including *Ball* and *BPEP II* and *III*, regarding whether undated and incorrectly dated mail ballots should or should not be counted and observed that "[t]here is no per se controlling law on this conflict issue." H.T. at 9, 14-16. In apparent reliance on our vacated decision in *BPEP II*, the trial court then ruled on the record that Designated Appellees made out a claim under the free and equal elections clause of article I, section 5 of the Pennsylvania Constitution, noting the Constitution "always prevails over a conflict in the statutory language" and that its ruling was based "upon the undeniable and confirmatory position of the parties that this will in no way prejudice the ordinary and efficient process of the [County] Board . . . in processing [its] faithful duty to the Election Code." H.T. at 18, 21-22. The court also reserved ruling on RNC and RPP's Intervention Petition. *Id.* at 21-22.

On September 26, 2024, the trial court issued its order granting Designated Appellees' Petition, reversing the County Board's decision not to count Designated Appellees' undated mail-in ballots and the 67 other registered voters' defective mail ballots because such refusal violates the free and equal elections clause, and

directing the County Board to verify, count if otherwise valid, and include in the results of the Special Election all 69 defective mail ballots. O.R., Item 12, 9/26/2024 Trial Court Order. By separate Rule to Show Cause order issued on September 26, 2024, the trial court directed the parties to respond to RNC and RPP's Intervention Petition. *See* O.R., Item 13, 9/26/2024 Trial Court Rule to Show Cause Order.[13]

On September 27, 2024, Designated Appellees and the County Board filed their Joint Emergency Motion, asserting that RNC and RPP's Intervention Petition was uncontested and seeking clarification on whether the trial court intended its first September 26, 2024 order on the merits of the Petition to be the final order in this case for appeal purposes considering the Supreme Court's August 27, 2024 Order shortening certain election-related appeal deadlines,[14] or whether the trial court intended to conduct further proceedings in light of its second September 26, 2024 Rule to Show Cause order regarding the Intervention Petition. O.R., Item 16, Joint Emergency Motion. The trial court thereafter entered its final order on September 28, 2024 (dated September 27, 2024), granting RNC and RPP's Intervention Petition,[15] declaring moot the parties' Joint Emergency Motion, and denying RNC and RPP's Motion to Dismiss. O.R., Item 17, 9/27/2024 Trial Court Final Order.

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[13] By September 27, 2024 order, the trial court declared as moot the parties' "Filed Stipulation," as it was duplicative of their Consent Order. *See* O.R., Item 15 (9/27/2024 Trial Court Order).

[14] The Supreme Court's Order was effective as of August 29, 2024. *See In Re Temporary Modification and Suspension of the Rules of Appellate Procedure and Judicial Administration for Appeals Arising Under the Pennsylvania Election Code* (Pa., No. 622 Judicial Admin. Dkt., filed Aug. 27, 2024) (per curiam), slip op. at 3.

[15] The trial court noted that the Intervention Petition was not docketed until the day after the court issued its September 25, 2024 order on the Petition (which is actually dated and entered as of September 26, 2024), and that this delayed the matter and caused inconvenience to the parties in obtaining finality of the court's ruling and necessitated further proceedings to dispose of the Intervention Petition. *See* O.R., Item 17 (9/27/2024 Trial Court Final Order), at 1, n.1.

(Footnote continued on next page…)

Designated Appellant County Board thereafter appealed the trial court's September 26, 2024 order on the merits of the Petition and its September 28, 2024 final order to this Court on October 1, 2024, and Designated Appellants RNC and RPP filed their cross-appeal of the same orders on October 3, 2024.[16]

By separate orders entered on October 3, 2024, the trial court directed Designated Appellants to file concise statements of the errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) within 21 days of the order. O.R., Items 20 & 21. This Court, by Order of October 3, 2024, *sua sponte* consolidated the cross-appeals and directed the filing of Statements of Issues to be Presented on Appeal by October 8, 2024, transmission of the record to this Court by October 10, 2024, and the filing of simultaneous briefs on the merits of the appeals no later than October 15, 2024. The Court also indicated the appeals would be submitted on briefs without oral argument unless otherwise ordered. By Order of October 8, 2024, this Court granted Designated Appellees' partially contested Application for Expedited

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Although the parties appealed the trial court's September 28, 2024 final order granting RNC and RPP's Intervention Petition, they raise no issues as to RNC and RPP's intervention on appeal. We therefore do not address their intervention further for purposes of these appeals and will affirm the trial court's final order in that regard.

[16] In their Notice of Appeal, RNC and RPP assert various reasons why the Supreme Court's August 27, 2024 Order is inapplicable to this matter. First, they assert that this case involves the September 17, 2024 Special Election in Philadelphia, not the November 5, 2024 General Election. They also claim the underlying Petition sought a declaration that the County Board's decision was unlawful under the Pennsylvania Constitution, not the Election Code; therefore, they concluded a 30-day appeal period for a declaratory judgment matter was appropriate. Finally, RNC and RPP point out that the trial court did not append a copy of the Supreme Court's Order to either its September 26 or September 28 orders. *See* O.R., Item 19.

This Court agrees with RNC and RPP that the Supreme Court's August 27, 2024 Order does not apply to this matter, **which relates to a Special Election that has already occurred, and not the 2024 General Election**. However, given that time is of the essence in any actions that may be required following issuance of this opinion, such as amending the Special Election vote count pursuant to the parties' Consent Order, the Court urges the parties to proceed expeditiously should they wish to appeal this decision.

Briefing Schedule, directed the parties to file their briefs on October 14, 2024, instead of October 15, 2024, and indicated the remainder of the Court's October 3, 2024 Order remained in full force and effect. The parties complied with the Court's orders and filed Statements of Issues and briefs as directed.

On October 10, 2024, the trial court issued a 2-page opinion pursuant to Pa.R.A.P. 1925(a),[17] setting forth an abbreviated version of the above facts and procedural history of this matter and noting that "the court's reasons for its decision [on the Petition] were fully stated on the record at the hearing and are reflected in the transcript" and that the court issued an order the next day "memorializing that decision." *See* 10/10/2024 Trial Court "1925a Order" at 1-2. Further, the court rejected the parties' arguments in the Joint Emergency Motion and observed that the order granting Designated Appellees' Petition on the merits "related to a special election that had already occurred and did not involve voting in the November 2024 election[.]" *Id.* at 2, n.1. The court also explained that it denied RNC and RPP's Motion to Dismiss because it was not identified or asserted at the hearing and was not properly filed as a motion in time for the court to consider it, and it was also untimely and procedurally defective. *Id.* at 2.

[17] This Court notes that the trial court's October 10, 2024 Pa.R.A.P. 1925(a) opinion is titled, "1925a Order," and that it is replete with typos, making it difficult to read. However, the Court can discern the trial court's reasoning, which appears in the September 25, 2024 hearing transcript and is based primarily on our decision in *BPEP II*.

II. PARTIES' & *AMICI CURIAE* ARGUMENTS

A. Parties' Arguments

1. Designated Appellant County Board

Contrary to its statement in its brief that it "takes no position on the issue" of whether the free and equal elections clause prohibits county boards of elections from rejecting mail ballots because of dating errors on the outer declaration envelope, the County Board nevertheless agrees with the trial court that not counting such ballots based on the meaningless dating provisions violates the free and equal elections clause. (County Board Brief (Br.) at 2, 6-7, 13.) It claims this constitutional issue remains unsettled, highlighting the "shifting" federal and relevant state litigation on the issue since 2020, including decisions of our Supreme Court in *In re Canvass 2020* and *Ball*, and our now-vacated decision in *BPEP II*, the "net effect of" which "strongly suggests that the Board would violate voters' constitutional rights if it were to refuse to count mail ballots with dating errors in the 2024 General Election." (*Id.* at 9-12.) Confusingly, however, the County Board seeks reversal of the trial court's September 26, 2024 order to avoid the scenario where the Board is (1) an outlier from other county boards on this issue, and (2) ordered to count mail ballots with dating errors in the Special Election but then is ordered to not count the same defective ballots weeks later in the General Election. (*Id.* at 13.)

It nevertheless urges this Court to address the constitutional issue now, asserting this Court has a statutory and jurisdictional obligation to resolve the issue's merits in the context of these direct statutory election appeals filed under Section 1407(a) of the Election Code, 25 P.S. § 3157(a), and claiming that *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is not a barrier to us doing so. (*Id.* at 14-15 (pointing out that these **appeals** do not involve a preliminary injunction entered without a

developed factual record regarding changes to voter identification (ID) laws, as was the case in *Purcell*).) The Board highlights that unlike in *Purcell*, here, there would be no disruption to an imminent election, i.e., the 2024 General Election, as any decision by this Court in these appeals would merely be ***"a vote-counting decision and not a change in the rules impacting the voting process or voter behavior."*** (*Id.* at 7, 14-15.) Further distinguishing this case from *Purcell*, the Board submits there is no risk of voter confusion or hardship on election administrators for either prior or future elections, because the September 17 Special Election already occurred, and, therefore, the only issue is whether the at-issue mail ballots should be included in final tally for the Special Election, "which is a normal post-election occurrence" contemplated by the Election Code and also our Supreme Court in *New PA Project Education Fund v. Schmidt* (Pa., No. 112 MM 2024, order filed Oct. 5, 2024) (*New PA Project*) (per curiam) (denying the same *BPEP II* petitioners' application for the exercise of King's Bench or extraordinary jurisdiction that sought review of whether disenfranchising voters based on the meaningless dating provisions violates the free and equal elections clause).[18] (*Id.* at 14-18 (further observing that *Purcell* places no constraints on state courts, and that the Supreme Court stated in *New PA Project* it would continue to exercise its appellate jurisdiction with respect to lower court decisions that have already come before it in the normal course).)

The County Board also points out that the facts here are straightforward and undisputed and that it does not use the handwritten date to determine a voter's qualifications or timeliness of ballots, or to detect fraud. Rather, the Board adds that it uses an automated sorting machine to recognize envelopes that fail to include handwritten signatures or secrecy envelopes but assesses handwritten dates

[18] Three minority statements were issued, which we summarize below.

manually, which is time-consuming. (*Id.* at 19-21.) Finally, the Board argues that resolution of this appeal also will not require invalidation of any part of Act 77, and even if it does, the Court has discretion on whether to apply Act 77's nonseverability provision. (*Id.* at 7-8, 21-24 (citing *Bonner v. Chapman*, 298 A.3d 153, 168-69 (Pa. Cmwlth. 2023), in which this Court decided Act 77's nonseverability provision was not triggered because the decision not to enforce the dating provisions did not strike those provisions from the statute, and asserting that, in any event, *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006), is on point as to nonseverability).)

2. Designated Appellants RNC & RPP

For their part, Designated Appellants RNC and RPP disagree with the County Board's position, arguing that several procedural defects require reversal of the trial court's order, namely that (1) Designated Appellees committed the same error as in *BPEP II* by failing to name the other 66 purportedly indispensable county boards in their Petition filed in the trial court; (2) additional factual development regarding the dating provisions is necessary; and (3) the trial court erred in retroactively changing election rules for the Special Election in violation of *Purcell* and without any factual development, regular briefing, or setting forth any reasoning in an opinion. (RNC & RPP's Br. at 53-56.) If the procedural defects are determined to be nonissues, RNC and RPP submit that *Purcell*'s holding, allegedly confirmed by our Supreme Court's citation thereto in *New PA Project*, forecloses invalidation of the dating provisions in these appeals during the ongoing 2024 General Election. (*Id.* at 10-12.) As to the merits of the constitutional and nonseverability issues, RNC and RPP largely repeat the same arguments in their brief to this Court as in their Motion to Dismiss filed in the trial court, which we do not repeat here for the sake of brevity.

(*See supra* pp. 10-11; *see also* RNC & RPP's Br. at 10-53.) They request that the trial court's order be reversed.

3. Designated Appellees Baxter & Kinniry

Designated Appellees respond to RNC and RPP's procedural arguments, largely agreeing with the County Board's assertions that there are no impediments to our review of these election appeals in our appellate jurisdiction. They specifically assert that the timing of the 2024 General Election does not compel reversal of the trial court's order, as *Purcell* does not apply here because it is a federal law equitable doctrine grounded in federalism and is specific to federal courts, not state courts; they thus disagree with RNC and RPP that *New PA Project* constitutes a sea change on this point. (Designated Appellees' Br. at 45-48.) They also suggest that application of a *Purcell*-type principle is out of place in the context of an appeal under Section 1407 of the Election Code, which actions can only arise when "county boards are in the throes of an election" given the time constraints attendant thereto in that section. (*Id.* at 47-48.) Designated Appellees further claim that the other 66 county boards need not have been named in this action, because these are appeals authorized by Section 1407 of the Election Code regarding the Special Election held in Philadelphia County only, and none of those county boards sought to intervene. (*Id.* at 23, 51-60.)

As to the merits of the constitutional issue, Designated Appellees repeat their arguments from their Petition, which we also do not repeat here for the sake of brevity. (*See supra* p. 9; *see also* O.R., Item 1 & Designated Appellees' Br. at 24-57.) All in all, they assert that "the Constitution . . . compels the same result on the merits" as our now-vacated decision in *BPEP II*. (Designated Appellees' Br. at 1, 31.) They finally assert that the relief they sought in the trial court does not implicate

Act 77's severability clause or the federal Elections Clause of the United States Constitution,[19] and they request that we affirm the trial court's order. (*Id.* at 53-60.)

B. ***Amici Curiae* Arguments**

The Department of State and the Secretary of the Commonwealth, Al Schmidt (collectively, Secretary), filed an *amicus* brief in support of Designated Appellees,[20] adding that, while he agrees with the Supreme Court's statement in *New PA Project* that it will not change election rules at this late stage of the game, the Supreme Court will nevertheless be confronted with this issue at some point specifically in relation to the 2024 General Election. (Sec'y's Br. at 8-9.)[21] **The Secretary submits that resolving the constitutional issue now would not be disruptive or affect voters in any way, but rather, it would make county boards' responsibilities easier on election day. The Secretary suggests that this case is an opportune one for resolving the question left open by the Supreme Court in *BPEP III*, and he requests that we affirm.** (*Id.* at 11-12.)

Thirty-four county board of elections' officials (*Amici* BOE Officials) filed a joint brief as *amici curiae*, similarly agreeing with Designated Appellees, and the County Board to an extent, and arguing that this Court's holding in *BPEP II* was correct on the merits. (*Amici* BOE Officials' Br. at 2-3.) They highlight this is especially so now given that nearly 70 "highly motivated electors in a low turnout Philadelphia special election" were disenfranchised by enforcement of the dating

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[19] U.S. Const. art. I, § 4, cl.1.

[20] The Secretary attached, as Exhibit A, his brief filed in *BPEP II*.

[21] The Secretary cites *Zimmerman v. Schmidt* (Pa. Cmwlth., No. 33 M.D. 2024, filed Aug. 23, 2024) (en banc), *vacated & remanded*, __ A.3d __ (Pa., No. 63 MAP 2024, order filed Sept. 25, 2024) (per curiam), in which the Supreme Court vacated our decision for lack of jurisdiction similar to its order in *BPEP III*, and remanded for this Court to dismiss the suit with prejudice, noting that it is better to address election-related questions before such a decision becomes outcome determinative. The merits of *Zimmerman* are otherwise not relevant for our purposes.

provisions. (*Id.* at 3, 6-7.) *Amici* BOE Officials add that, in their experience, such disenfranchisement will likely affect thousands of voters in the upcoming General Election and disproportionately affect older electors, like Designated Appellee Baxter in this case. (*Id.* at 3, 8-15.) They further claim, among other things, that the dating provisions divert *Amici* BOE Officials away from other pressing election administration duties. (*Id.* at 3-4, 15-19.) *Amici* BOE Officials depart from the County Board's position here by requesting that we affirm the trial court.

The Republican Leader of the Pennsylvania House of Representatives, Bryan Cutler; President Pro Tempore of the Pennsylvania State Senate, Kim Ward; and Majority Leader of the Pennsylvania Senate, Joe Pittman (collectively, *Amici* Republican Leaders), filed an *amici curiae* brief in support of RNC and RPP, essentially repeating the same arguments on the merits and in favor of reversal. *Amici* Republican Leaders add only that, in the alternative, this Court should remand for further proceedings to develop the record with complete advocacy and a legally sufficient Pa.R.A.P. 1925(a) opinion, which they claim is, at present, lacking. (*Amici* Republican Leaders' Br. at 4-8.)

III. DISCUSSION

Before reaching the merits of the free and equal elections clause issue, we first address our jurisdiction over these election appeals. The parties do not dispute that this Court has subject matter jurisdiction over the appeals under Section 762(a)(4)(i)(C) of the Judicial Code, 42 Pa.C.S. § 762(a)(4)(i)(C),[22] or that the

[22] In *Dayhoff v. Weaver*, 808 A.2d 1002, 1004-06 (Pa. Cmwlth. 2002), we considered an appeal from a court of common pleas' order that upheld a determination of a county board of elections, albeit with respect to two candidates who tied in an election for township supervisor. In addressing whether we or our Supreme Court had jurisdiction over the appeal, we acknowledged that Section 1407 of the Election Code, 25 P.S. § 3157, under which the instant Petition was filed in the trial court, does not provide for an appeal to this Court from a court of common pleas. *Id.*
(Footnote continued on next page…)

manner in which the appeals were brought was proper under Section 1407(a) of the Election Code, 25 P.S. § 3157(a). They instead disagree about whether *Purcell* forecloses, or even applies to, this Court's consideration of the constitutional issue of first impression presented by these appeals during the ongoing 2024 General Election, even though the appeals relate to the September 17 Special Election.

In *Purcell*, the United States (U.S.) Supreme Court considered a challenge of the State of Arizona and county officials from four counties to an interlocutory injunction issued by a two-judge motions panel of the United States Court of Appeals for the Ninth Circuit that enjoined operation of Arizona's voter ID requirements without any explanation or justification mere weeks before the 2006 general election. *Purcell*, 549 U.S. at 2-3. Noting that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls" and that "[a]s an election draws closer, that risk will increase[,]" as one of the possible reasons why the Ninth Circuit may have taken prompt action without providing any explanation therefor, the U.S. Supreme Court found those considerations, and others, were not controlling and that the Ninth Circuit erred in not giving deference to the District Court's denial of the injunction as a procedural matter. *Id.* at 4-5. The U.S. Supreme Court therefore vacated the Ninth Circuit's order, citing "the necessity for clear guidance to the State of Arizona" **given the impending election** and the inadequate time to address any factual issues in the case. *Id.* at 5-6.

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at 1005. However, we observed that Section 762(a)(4)(i)(C) of the Judicial Code, 42 Pa.C.S. § 762(a)(4)(i)(C), does "provide[] expressly that the Commonwealth Court shall have **exclusive** jurisdiction over appeals from the trial courts in cases involving elections or election procedures." *Id.* at 1006 (emphasis in original). This is such a case over which we have exclusive appellate jurisdiction.

We do not believe that the U.S. Supreme Court's vacatur of an Arizona federal court's interlocutory injunction halting implementation of an entire voter ID scheme established by proposition **mere weeks before a general election** is comparable to these cross-appeals involving a court of common pleas' reversal of a Pennsylvania county board's decision to reject mail ballots for failure to comply with our state Election Code's dating provisions at the expense of disenfranchising voters in violation of our Constitution **in a special election that has already occurred**. While the considerations specific to general elections expressed in *Purcell* may ring true in Pennsylvania in other contexts, such as in our Supreme Court's recent order in *New PA Project*,[23] we do not find that those statements foreclose our ability to decide the constitutional issue of first impression presented by these appeals, filed in our **exclusive appellate** jurisdiction, relating to whether certain votes should be counted **in that special election**.[24] *See* 42 Pa.C.S. § 762(a)(4)(i)(C). We highlight

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[23] We also reject RNC and RPP's assertion that the Supreme Court's citation to *Purcell* in *New PA Project*, in a footnote, was a wholesale adoption of "the *Purcell* principle" as it relates to Pennsylvania **special** elections, particularly ones that have already happened. *New PA Project* involved a request by the same *BPEP II* petitioners filed against the 67 county boards of elections, which asked our Supreme Court to exercise its King's Bench authority to decide whether disenfranchising voters based on the Election Code's meaningless dating provisions violates the free and equal elections clause. Notably, the petitioners' request in *New PA Project* was made in relation to the 2024 General Election, **and not as to the September 17, 2024 Special Election, which has already occurred**. We believe this distinguishes *New PA Project* from this case. Our conclusion in this regard is bolstered by our Supreme Court's recognition in *New PA Project* that it would still exercise its appellate role with respect to lower court decisions that already came before it in the ordinary course. *See New PA Project*, slip op. at 3, n.2 (citing *Genser v. Butler Cnty. Bd. of Elections* (Pa., Nos. 26 & 27 WAP 2024), and *Ctr. for Coalfield Justice v. Wash. Cnty. Bd. of Elections* (Pa., No. 28 WAP 2024)). This case too may reach the Supreme Court in the ordinary course. The Supreme Court has since decided *Genser*. *See Genser* (Pa., Nos. 26 & 27 WAP 2024, filed Oct. 23, 2024).

[24] This Court has previously observed that "a special election is separate and apart from a primary" or general election, and that "special election[] votes are considered separate and apart from any other votes cast as part of any other election." *In re Nom. Papers of Adams*, 648 A.2d

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that we must decide only whether the trial court erred in reversing the County Board's decision not to count the 69 date-disqualified mail ballots and directing that those ballots be counted; we are **not** being asked to make changes with respect to the impending 2024 General Election. *Purcell* is therefore distinguishable, and under Section 1407(a) of the Election Code and Section 762(a)(4)(i)(C) of the Judicial Code, Designated Appellants were entitled to appeal the trial court's order reversing the County Board's decision to this Court.[25] We therefore hold that we may decide the constitutional issue of first impression properly preserved and presented to us in our exclusive appellate jurisdiction.

Turning to the merits, we first observe that these appeals involve the important constitutional principle enshrined in the free and equal elections clause of article I, section 5 of the Pennsylvania Constitution that "[e]lections 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. Our Supreme Court has recognized that "[t]he broad text of this specific provision mandates clearly and unambiguously, and in the broadest possible terms, that **all** elections conducted in this Commonwealth must be free and equal. Stated another way, this clause was specifically intended to equalize the power of voters in our Commonwealth's election process." *Pa. Democratic Party*, 238 A.3d at 356 (quoting *League of Women Voters v. Cmwlth.*, 178 A.3d 737, 804, 812 (Pa. 2018) (emphasis in original)

1350, 1352 (Pa. Cmwlth. 1994) (citing Section 102(v) of the Election Code, 25 P.S. § 2702(v) (defining "special election" as "any election other than a regular general, municipal or primary election"), and *Munce v. O'Hara*, 16 A.2d 532, 533 (Pa. 1940)).

[25] On this same basis, we also reject any contention that the other 66 county boards of elections needed to be joined as parties for Designated Appellees to obtain the relief they sought from the trial court pertaining to the September 17, 2024 Special Election, which **only took place in one county of this Commonwealth, Philadelphia County**. The requested relief could not have been sought against any other county board in relation to that Special Election.

(brackets & internal quotes omitted)). Additionally, the Supreme Court has "observed that the purpose and objective of the Election Code, which contains Act 77, is '[t]o obtain freedom of choice, a fair election[,] and an honest election return[.]'" *Id.* (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)). We have also stated that "the purpose of the Election Code is to protect, not defeat, a citizen's vote." *Dayhoff v. Weaver*, 808 A.2d 1002, 1006 (Pa. Cmwlth. 2002) (internal quotations omitted).

In considering election-related matters generally, including where the fundamental right to vote is at stake, "we are mindful of the 'longstanding and overriding policy in this Commonwealth to protect the elective franchise.'" *Pa. Democratic Party*, 238 A.3d at 360-61 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)). "'[O]ur goal must be to enfranchise and not to disenfranchise [the electorate].'" *Id.* (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)). Our Supreme Court has indeed recognized that "[t]he disfranchisement of even one person validly exercising his right to vote is **an extremely serious matter**." *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) (emphasis added).

Our Supreme Court has further cautioned that the power to reject ballots based on minor irregularities "must be exercised **very sparingly** and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons**." *Appeal of Gallagher*, 41 A.2d 630, 632-33 (Pa. 1945) (emphasis added) (also observing that "[m]arking a ballot in voting is a matter not of precision engineering but of unmistakable registration of the voter's will in substantial conformity to statutory requirements"). Further, **"[e]very rationalization within the realm of common sense should aim at saving [a] ballot**

rather than voiding it[,]" *Appeal of Norwood*, 116 A.2d 552, 554-55 (Pa. 1955) (emphasis added), and, therefore, "[t]echnicalities should not be used to make the right of the voter insecure[,]" *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954) (further providing that "[w]here 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"). Considering these overarching principles and bearing in mind our limited standard of review,[26] we turn to the merits of the parties' arguments.

At issue is whether the trial court correctly reversed the County Board's decision not to count 69 undated and incorrectly dated mail ballots in the September 17, 2024 Special Election in accordance with the Election Code's meaningless dating provisions on the basis that the failure to count those ballots violates the free and equal elections clause of article I, section 5 of the Pennsylvania Constitution. The parties' arguments as to this issue all hinge to some extent on this Court's opinion and order in *BPEP II*, in which we considered the same free and equal elections clause claim as a matter of first impression in our original jurisdiction.

[26] This Court's review "in election contest cases is limited to [an] examination of the record to determine whether the trial court committed errors of law and whether the [trial court's] findings [a]re supported by adequate evidence." *Dayhoff*, 808 A.2d at 1005 n.4. In reviewing questions of law, our standard of review is *de novo*. *In re Benkoski*, 943 A.2d 212, 215 n.2 (Pa. 2007).

However, as the parties point out in their briefs, our Supreme Court vacated our *BPEP II* order in *BPEP III*,[27, 28] relied solely on jurisdictional grounds in doing so,

[27] On September 13, 2024, the Supreme Court vacated our *BPEP II* order on jurisdictional grounds in *BPEP III*, concluding that we lacked subject matter jurisdiction to consider the matter in the absence of all 67 county boards being named as parties, and because the Secretary's joinder was not sufficient to invoke our original jurisdiction. *BPEP III*, 322 A.3d at 222 (further denying the request for extraordinary jurisdiction). Justice Wecht filed a dissenting statement, in which Chief Justice Todd and Justice Donohue joined, offering his view that "[a] prompt and definitive ruling on the constitutional question presented in th[e] appeal is of paramount public importance inasmuch as it will affect the counting of ballots in the upcoming general election." *BPEP III*, 322 A.3d at 222-23 (Wecht, J., dissenting). Justice Wecht also expressed that he would have exercised the Court's King Bench authority over the dispute and ordered that the matter be submitted on briefs. *Id.* at 223. Thus, at least three Supreme Court Justices appeared to agree with this Court, at least as to the public import of the same constitutional question involved in the instant appeals.

Six days later, on September 19, 2024, the Supreme Court granted the intervenor/appellants' Emergency Application for Enforcement and/or Clarification and clarified its September 13 Order in *BPEP III*, explaining that the Secretary was not an indispensable party, and that the other named county boards did not vest this Court with original jurisdiction. *BPEP IV*, slip op. at 1-2. The Court further clarified it vacated our order for an additional independent jurisdictional reason, i.e., the failure of the petition for review to join all indispensable parties—the other 65 county boards of elections. *BPEP IV*, slip op. at 2. Because this jurisdictional defect could not be remedied, the Court directed that we dismiss the matter upon remand, which we did by Order of September 20, 2024. *Id.*, slip op. at 2-3.

[28] As noted above, in *New PA Project*, the Supreme Court rejected a third attempt to have the constitutional issue heard under its King's Bench authority before the 2024 General Election. In its Order denying the petitioners' requested relief, the Supreme Court stated that it "will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New PA Project*, slip op. at 3. The Court's order also cited *Purcell*, which we have already determined is not a bar to our consideration of the constitutional issue in the context of these appeals involving the Special Election. *Id.*, slip op. at 3, nn. 1-2.

Justice Brobson filed a concurring statement, in which Justice Mundy joined, opining that laches also warranted denial of the application, in that the petitioners waited over a year after *Ball* was issued and after multiple elections had been held to challenge the dating provisions, as interpreted to be mandatory in *Ball*, under the free and equal elections clause. *New PA Project*, slip op. at 3-4 (Brobson, J., concurring). He further observed that the Court's disposition of the application in *New PA Project* "should discourage all who look to the courts of the Commonwealth to change the rules in the middle of an ongoing election." *New PA Project*, slip op. at 5 (Brobson, J., concurring). He expressed a similar sentiment in another election case decided the same day, *Republican National Committee v. Schmidt* (Pa., 108 MM 2024, order filed Oct. 5, 2024) (*RNC*)

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and did not consider the merits or disapprove of our reasoning on the merits of the constitutional claim. We do not believe the Supreme Court's order precludes our analysis of that issue now in these appeals relating to the Special Election. The record reveals that our reasoning in *BPEP II* was central to the trial court's reasoning in reversing the County Board's decision not to count the 69 mail ballots at issue, and we see no reason to depart from that reasoning here. *See* N.T. at 3-22; *see also* 10/10/2024 Trial Court "1925a Order" at 1-2.

The trial court found that the legal landscape that exists after *BPEP II* and *III* is uncertain, and the parties agree this essentially puts us back to square one on the merits of this important constitutional question that has arisen during our primary, general, and now **special** elections in this Commonwealth since 2020, when Act 77 went into effect. The question is one of first impression, and the parties have not identified any cases in which any court has considered this issue aside from *BPEP II*. We are left to interpret the law in this area as it existed before we issued our decision in *BPEP II*, beginning with the plain text of the dating provisions.

The dating provisions provide that absentee and mail-in electors "shall . . . fill out, **date** and sign the declaration printed on" the second, or outer, envelope "on

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(per curiam), observing that deciding an issue regarding notice and cure issues "would . . . be highly disruptive to county election administration" given that the 2024 General Election is already underway. *RNC*, slip op. at 2 (Brobson, J., concurring).

Chief Justice Todd filed a dissenting statement in *New PA Project*, setting forth her opinion that the Court should exercise its King's Bench power and decide the issue of "grave importance" now, citing the possibility of disenfranchisement and potential post-election challenges related to the same. In Chief Justice Todd's view, both *Ball* and *BPEP II* and *III* "amply demonstrate continued uncertainty in this area of the law." *New PA Project*, slip op. at 3-4, n.2, 5 (Todd, C.J., dissenting). Justice Donohue issued a statement in support of denial, noting her view that the Court is not "standing on firm terrain" in the legal landscape surrounding the constitutional issue, consideration of which she characterized as "serious business," and observing that "[t]ime will tell if there is a future challenge, in the ordinary course, in a court of common pleas." *New PA Project*, slip op. at 3-4 (Donohue, J., statement in support of denial).

which is printed the form of the declaration of the elector," among other things. *See* 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). Designated Appellants RNC and RPP argue that the Supreme Court's decisions in *In re Canvass 2020*, *Pennsylvania Democratic Party*, and *Ball* require reversal of the trial court's order. We briefly address those cases before reaching the constitutional claim.

In *In re Canvass 2020*, 241 A.3d 1058, which involved five consolidated appeals, our Supreme Court addressed, in the context of the November 2020 General Election, whether the Election Code required county boards to disqualify mail ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, address, and/or the date, where no fraud or irregularity was alleged. *See id.* at 1061-62. The Court concluded that the Election Code did not require that county boards disqualify signed but undated mail ballot declarations, **reading the dating provisions' language as directory rather than mandatory.** *Id.* at 1076-77, 1079 **(noting the Court found that such defects, "while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters" and that "[h]aving found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals**" (emphasis added)). However, a majority of the Justices in *In re Canvass 2020* ultimately agreed that the failure to comply with the dating provisions would render noncompliant ballots invalid in any election after 2020. *See Ball*, 289 A.3d at 21-22 (reaffirming *In re Canvass 2020*'s majority's holding in this regard as a matter of statutory interpretation). As such, *In re Canvass 2020* is not helpful for our purposes.

In *Pennsylvania Democratic Party*, 238 A.3d 345, which notably was issued mere weeks before a hotly contested Presidential election and amid the novel

COVID-19 pandemic, our Supreme Court did not consider **any** issue regarding the Election Code's dating provisions specifically, let alone under the free and equal elections clause. Rather, *Pennsylvania Democratic Party* involved notice and opportunity cure procedures, which are **not** at issue in these appeals. RNC and RPP's reliance on this case is thus without merit.[29]

Most recently for our purposes, in *Ball*, 289 A.3d 1,[30] a majority of our Supreme Court weighed in on the interpretation of the dating provisions, recognizing

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[29] Designated Appellants RNC and RPP rely on this case for the proposition that the Supreme Court already rejected a challenge to the broader mail ballot declaration requirements, only one part of which is the dating provisions, under the free and equal elections clause. They point to the Supreme Court's consideration of whether the Constitution's free and equal elections clause required that county boards implement notice and opportunity to cure procedures for mail ballots containing minor defects, which is just one of the discrete issues that was before the Court in that case. *See Pa. Democratic Party*, 238 A.3d at 372-74. We reject these interpretations.

[30] For background purposes, we note that in *Ball*, the Supreme Court issued a per curiam Order on November 1, 2022, granting in part and denying in part the petitioners' request for injunctive and declaratory relief and ordering Pennsylvania county boards of elections to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 General Election that were contained in undated or incorrectly dated outer envelopes; further noting the Court was evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. § 10101(a)(2)(B) (i.e., the federal Materiality Provision); further directing the county boards to segregate and preserve any ballots contained in undated or incorrectly dated outer envelopes; and dismissing the individual voter petitioners from the case for lack of standing. The Court noted that opinions would follow, and that Chief Justice Todd and Justices Donohue and Wecht would find a violation of federal law, while Justices Dougherty, Mundy, and Brobson would find no violation of federal law. *See Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022) (per curiam).

On November 5, 2022, the Supreme Court issued a supplemental Order, clarifying that for purposes of the November 8, 2022 General Election, "incorrectly dated outer envelopes" are as follows: (1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022 (citing Sections 1302.1-D (added by Act 77), 1305-D (added by Act 77), 1302.1 (added by the Act of August 13, 1963, P.L. 707, and amended by Act 77), and 1305 (added by the Act of March 6, 1951, P.L. 3, and amended by Act 77), 25 P.S. §§ 3150.12a, 3150.15, 3146.2a(a), 3146.5(a)). *See Ball v. Chapman* (Pa., No. 102 MM 2022, suppl. order issued Nov. 5, 2022) (per curiam). Notably, this Order was issued by the Court **unanimously**.

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that "an undeniable majority [of that Court] already ha[d] determined that the Election Code's command is unambiguous and mandatory, and that undated ballots would **not** be counted in the wake of *In re* [] *Canvass* [*2020*]." *Ball*, 289 A.3d at 21-22 (noting that "[f]our Justices [in *In re Canvass 2020*] agreed that failure to comply with the date requirement would render a ballot invalid in any election after 2020") (emphasis in original). The *Ball* Court therefore reaffirmed the *In re Canvass 2020* majority's conclusion as a matter of statutory interpretation of the Election Code. *Id.* at 22. As for incorrectly dated mail ballots, which *In re Canvass* did not address, the Court rejected other state and federal courts' interpretation[31] that any date is "sufficient," reasoning that "[i]mplicit in the Election Code's textual command . . . is the understanding that the 'date' refers to the day upon which an elector signs the declaration." *Id.* The Court determined, however, that how county boards verify the date an elector provides is the day upon which he or she completed the declaration was, "in truth," a question beyond its purview. *Id.* at 23. Further, having issued guidance for the November 8, 2022 General Election in its November 5, 2022 supplemental Order,[32] the Court observed that "county boards of elections retain authority to evaluate the ballots that they receive in future elections—including those that fall within the date ranges derived from statutes indicating when it is possible to

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On February 23, 2023, the Court issued numerous opinions explaining the Court's rationale and/or agreement or disagreement with the Court's prior orders. *See Ball*, 289 A.3d 1.

[31] *See Chapman v. Berks Cnty. Bd. of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed Aug. 19, 2022) (Cohn Jubelirer, P.J.) (single-Judge op.), 2022 WL 4100998, at *18 (observing that the dating provisions say "date" but that the statute "does not specify which date"); and *Migliori v. Cohen*, 36 F.4th 153, 163 (3d Cir.) (observing that the county board of elections "counted ballots with obviously incorrect dates"), *vacated as moot*, 143 S. Ct. 297 (2022).

[32] It also clarified that its November 5, 2022 supplemental Order was intended to provide guidance and uniformity for the November 8, 2022 General Election, and that the date ranges included therein "were intended to capture the broadest discernible period of time within which an elector could have an absentee or mail-in ballot in hand, and thus could become able to 'fill out, date and sign' the declaration on the return envelope." *Ball*, 289 A.3d at 23.

send out mail-in and absentee ballots—for compliance with the Election Code." *Id.* This was the extent of the Supreme Court's interpretation of the dating provisions under state law in *Ball*.

With respect to whether the dating provisions violated the federal Materiality Provision, as to which the *Ball* Court was evenly divided[33] and regarding which it did not issue any order, we note, in relevant part, the Supreme Court's finding that "invalidating ballots received in return envelopes that do not comply with the [dating provisions] denies an individual the right of 'having such ballot counted and included in the appropriate totals of votes cast,' and therefore [] 'den[ies] the right of an individual to vote in any election.'" *Ball*, 289 A.3d at 25 (citing federal Materiality Provision). Further, recognizing that the interpretive rule against superfluities (i.e., that a statute should be read together so effect is given to all of its provisions and so none are rendered inoperative or superfluous) counseled against a reading of the Materiality Provision as including, in the term "voting,"[34] **all** steps involved in casting a ballot, which would render the Materiality Provision's term "other act requisite to voting" without meaning, the Court opined, as follows, in footnote 156:

> In the event that Congress' meaning in the phrase "other act requisite to voting" might be deemed ambiguous, we would reach the same result. In such a circumstance, **failure to comply with the [dating provisions] would not compel the discarding of votes in light of the**

[33] Three Supreme Court Justices at the time joined Part III(C) of *Ball* regarding the Materiality Provision, including Justice Wecht, Chief Justice Todd, and Justice Donohue.

[34] For context, we note the Materiality Provision provides, in relevant part, that "[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to **voting**, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." *See* 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

> **[f]ree and [e]qual [e]lections [c]lause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth.** *See* Pa. Const. art. I, § 5; [*Pa. Democratic Party*], 238 A.3d at 361.

Ball, 289 A.3d at 26-27, n.156 (emphasis added).

The precise issues that were before the Court in *Ball* were whether **the Election Code** required disqualification of undated and incorrectly dated absentee and mail-in ballots and whether failing to count mail ballots that do not comply with the dating provisions would violate the federal Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). Notably, the *Ball* Court did not decide the precise question raised in these appeals of whether the dating provisions' enforcement to reject undated and incorrectly dated but timely received absentee and mail-in ballots violates the free and equal elections clause. Nevertheless, the *Ball* Court recognized, albeit with respect to the federal Materiality Provision, that a free and equal elections clause challenge to the dating provisions may someday arise notwithstanding their unambiguous and mandatory command. We therefore reject RNC and RPP's contention that *Ball* settled the free and equal elections clause issue for purposes of these appeals.

Turning to the constitutional claim regarding the dating provisions, Designated Appellees argue that the failure to count their undated mail-in ballots in the Special Election violates the free and equal elections clause, and that the trial court was correct in so ruling. In considering this issue, we begin with the well-established principle that "'acts passed by the General Assembly are strongly presumed to be constitutional.'" *Cmwlth. v. Neiman*, 84 A.3d 603, 611 (Pa. 2013) (quoting *Pa. State Ass'n of Jury Comm'rs v. Cmwlth.*, 64 A.3d 611, 618 (Pa. 2013)). The Court is cognizant that "[t]he judiciary should act with restraint, in the election

arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair and efficient administration of public elections in Pennsylvania." *In re Clymer*, __ A.3d __ (Pa. Cmwlth., No. 376 M.D. 2024, filed Aug. 23, 2024) (three-Judge panel op.) (citing *Green Party of Pa. v. Dep't of State Bureau of Comm'ns, Elections & Legislation*, 168 A.3d 123, 130 (Pa. 2017) (quoting *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014))), slip op. at 24-25. However, **"[w]hile deference is generally due the legislature, we are mindful that the judiciary may not abdicate its responsibility to ensure that government functions within the bounds of constitutional prescription under the guise of its deference to a coequal branch of government**." *Mixon v. Cmwlth.*, 759 A.2d 442, 447 (Pa. Cmwlth. 2000) (emphasis added).

The free and equal elections clause is at the heart of these appeals, which provides that "[e]lections 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; *Applewhite v. Cmwlth.*, 54 A.3d 1, 3 (Pa. 2012); *see also League of Women Voters*, 178 A.3d at 803. Our Supreme Court has observed that

> [t]he broad text of the first clause of this provision mandates clearly and unambiguously, and in the broadest possible terms, that **all** elections conducted in this Commonwealth must be "free and equal." In accordance with the plain and expansive sweep of the words "free and equal," we view them 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 of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government. Thus, [a]rticle I, [s]ection 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way,

> the actual and plain language of [s]ection 5 mandates that all voters have an equal opportunity to translate their votes into representation.

Id. at 804 (emphasis in original). Furthermore, in recognizing that it "has infrequently relied on this provision to strike down acts of the legislature pertaining to the conduct of elections, the qualifications of voters to participate therein, or the creation of electoral districts, [the Supreme Court noted its] view as to what constraints [a]rticle I, [s]ection 5 places on the legislature in these areas has been consistent over the years." *League of Women Voters*, 178 A.3d at 809.

In describing such constraints, the Supreme Court first cited *Patterson v. Barlow*, 60 Pa. 54, 75 (1869),[35] for the proposition that "while our Constitution gives to the General Assembly the power to promulgate laws governing elections, those enactments are nonetheless subject to the requirements of the [f]ree and [e]qual [e]lections clause . . . , and hence may be invalidated by our Court 'in a case of plain, palpable[,] and clear abuse of the power which actually infringes the rights of the electors'"; therefore, "any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of 'free and equal' elections afforded by [a]rticle I, [s]ection 5."[36] *League of Women Voters*, 178 A.3d at 809-10 (quoting *Patterson*, 60 Pa. at 75).

Next, citing its decision in *Winston*, 91 A. 520, which involved an unsuccessful challenge under the free and equal elections clause to an act of the

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[35] *Patterson v. Barlow*, 60 Pa. 54, 74-75 (1869), involved a challenge to an act of the legislature that established eligibility qualifications for electors to vote in all elections held in Philadelphia, and it specified the manner in which those elections were to be conducted.

[36] *League of Women Voters*, 178 A.3d 737, involved a constitutional challenge to Pennsylvania's 2011 congressional redistricting plan. The Court's holding is not particularly relevant for purposes of these appeals.

legislature that set standards regulating the nominations and elections for judges and elective offices in the City of Philadelphia, the Supreme Court noted it nevertheless prescribed in that case that elections shall be "free and equal" within the meaning of the Constitution

> when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; **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; and when no constitutional right of the qualified elector is subverted or denied him.

League of Women Voters, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523 (emphasis added)); *see also Banfield*, 922 A.2d 36, 48 (Pa. Cmwlth. 2007) (citing same standard).

It is undisputed that the fundamental right to vote guaranteed by our Constitution is at issue in these appeals. *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (observing that "the right to vote is fundamental and 'pervasive of other basic civil and political rights'") (citing *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)); *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (holding that, "where the fundamental right to vote is at issue, a strong state interest must be demonstrated"). However, the parties disagree about the applicable level of judicial review to be applied to the dating provisions' restriction on that right.[37]

[37] RNC and RPP claim that our Supreme Court recently reaffirmed that strict scrutiny does not apply and that mandatory ballot-casting rules only violate the free and equal elections clause if they deny the franchise itself or make it so difficult to vote so as to amount to a denial in *Walsh*. The *Walsh* Court held, *inter alia*, that a provisional ballot should not be counted because the envelope was unsigned, relying on the unambiguous language of the Election Code provision providing that such unsigned provisional ballot shall not be counted. It also rejected a free and equal elections clause challenge because the county board made no showing that a voter having to
(Footnote continued on next page…)

Because it is instructive, we return to *Pennsylvania Democratic Party*, in which our Supreme Court set forth the proper standards to be considered in evaluating whether state election regulations violate the Constitution. *See Pa. Democratic Party*, 238 A.3d at 384-85:

> 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)].

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sign the outer envelope of a provisional ballot denied the franchise or made it so difficult so as to amount to a denial. *Walsh* is readily distinguishable because, among other reasons, it involved provisional ballots, which are not at issue here. We therefore reject RNC and RPP's argument in that regard.

(Emphasis added.)[38]

Here, Designated Appellees argue that the dating provisions' restriction on their fundamental right to vote violates our Constitution, such that the restriction must be evaluated under strict scrutiny. We agree and conclude that the dating provisions impose a significant burden on Designated Appellees' constitutional right to vote, in that those provisions restrict the right to have one's vote counted in the Special Election to only those voters who **correctly** handwrite the date on their mail ballots and effectively deny the right to all other qualified electors who sought to exercise the franchise by mail in a timely manner but made minor mistakes or omissions regarding the handwritten date on their mail ballots' declarations. Accordingly, we hold that strict scrutiny applies to the dating provisions' restriction on that fundamental right, such that the government bears the heavy burden of proving that the law in question is "narrowly drawn to advance a state interest of compelling importance." *Pa. Democratic Party*, 238 A.3d at 385.

We also agree with Designated Appellees that the dating provisions cannot survive strict scrutiny, as they serve no compelling government interest. As the undisputed factual findings underlying the trial court's order illustrate, thousands of Pennsylvania voters have been disenfranchised by the County Board's rejection of their mail ballots due to missing or incorrect dates on their ballot envelopes, including Designated Appellees and the 67 other qualified voters who were disenfranchised as recently as September 21, 2024, the date the County Board voted

[38] *See also In re Clymer*, __ A.3d __ (Pa. Cmwlth., No. 376 M.D. 2024, filed Aug. 23, 2024) (three-Judge panel op.) (setting forth the same standards), slip op. at 24-28; *Appeal of Norwood*, 116 A.2d at 555; *Petition of Berg*, 712 A.2d 340, 341-42 (Pa. Cmwlth. 1998) (setting forth the same standards); *Applewhite v. Cmwlth.* (Pa. Cmwlth., No. 330 M.D. 2012, filed Jan. 17, 2014) (McGinley, J.) (single-Judge op.), 2014 WL 184988, at *20-21 (analyzing former voter ID law under strict scrutiny).

not to count their ballots in the September 17, 2024 Special Election. *See* O.R., Item 1, Pet., ¶¶ 5-6, 35-36 & Ex. 3, 37-40. The trial court also found that the date on the outer mail ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud. *Id.* ¶ 39. We further observe the trial court's findings that all 69 mail ballots at issue were timely submitted to the County Board by 8:00 p.m. on the day of the Special Election and timestamped with the date and time they were so received. *See* O.R., Item 1, Pet. ¶¶ 11, 14-18, 20-22, 41-43 & Exs. 1-2 (Baxter & Kinniry Decls.); H.T. at 5, 8-9, 12, 21. It is apparent that the trial court determined, as we did in *BPEP II* under similar factual circumstances, that the dating provisions are virtually meaningless and, thus, serve no compelling government interest.

We 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. *See League of Women Voters*, 178 A.3d at 809-10; *Banfield*, 110 A.3d at 176 (emphasis added); *Patterson*, 60 Pa. at 75. 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 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

whole genius of our electoral machinery." *Appeal of James*, 105 A.2d at 66. Simply put, the "practical" regulation of requiring voters to date their mail ballot declarations "obstructs and hampers the independent voter" and places voters on unequal playing fields where voters timely submit their mail ballots, but one voter may inadvertently include an "incorrect" date, or a birthdate, or forgets to include the date altogether, and another may include the date on which they filled out the declaration. *Oughton v. Black*, 61 A. 346, 349 (Pa. 1905) (Dean, J., dissenting). Other voters' ballots may not be counted for unknown reasons.

While this Court is fully cognizant that the General Assembly is the entity tasked with effectuating "free and equal" elections vis-à-vis reasonable regulations directing the manner and method of voting, "when the effect of a restriction or a regulation is to debar a large section of intelli[gent] voters from exercising their choice, the Constitution is certainly violated in spirit, if not in letter." *See Oughton*, 61 A. at 349-50 (Dean, J., dissenting); *see also Ball*, 289 A.3d at 25; *In re Canvass 2020*, 241 A.3d at 1076-77, 1079.

Because the refusal to count the 69 undated and incorrectly dated but timely received mail ballots submitted by otherwise eligible voters in the Special Election because of meaningless dating errors violates the fundamental right to vote recognized in and guaranteed by the free and equal elections clause of the Pennsylvania Constitution, we hold that the trial court, faced with the above undisputed facts, did not err in reversing the County Board's decision not to count those ballots and directing the County Board to count them in the September 17, 2024 Special Election.

As a final matter, we address whether our holding triggers Act 77's nonseverability provision, which the trial court did not address. Act 77's

nonseverability provision is found in Section 11 of the Act, which provides, in relevant part: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act **or its application to any person or circumstance is held invalid**, the remaining provisions or applications of this act are void."[39] (Emphasis added.) In *Stilp*, 905 A.2d at 970, our Supreme Court recognized that Section 1925 of the Statutory Construction Act of 1972 (Statutory Construction Act), 1 Pa.C.S. § 1925,[40] established a presumption of severability applicable to all statutes which "is not merely boilerplate" and "does not mandate severance in all instances, but only in those circumstances where a statute can stand alone absent the invalid provision." It also "sets forth a specific, cogent standard, one which both emphasizes the logical and essential interrelationship of the void and valid provisions, and also recognizes the essential role of the Judiciary in undertaking the required analysis." *Id.* Furthermore, because severability "has its roots in a jurisprudential doctrine . . . , the courts have not treated legislative declarations that a statute is severable, or nonseverable, as 'inexorable commands,' but rather have viewed such statements as providing a rule of construction." *Id.* at 972. Considering the substantive standard in Section 1925 of the Statutory Construction Act and the above principles, and the fact we are not asked in these

[39] For our purposes, we are concerned only with Sections 6 and 8 of Section 11 of Act 77, which comprise the dating provisions.

[40] It provides: "The provisions of every statute shall be severable. **If any provision of any statute or the application thereof to** any person **or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby**, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." 1 Pa.C.S. § 1925 (emphasis added).

appeals to declare the dating provisions unconstitutional or otherwise strike them from Act 77, we decline to treat Act 77's nonseverability as an "inexorable command" requiring that the entirety of Act 77 be declared void. Rather, we find that the other provisions of Act 77, which enacted a comprehensive scheme of no-excuse mail-in voting that has since been upheld in full as a constitutional exercise of our General Assembly's legislative authority to create universal mail-in voting[41] will not be affected by our ultimate conclusion regarding the unconstitutional **application** of the dating provisions to the 69 voters **in the Special Election**.[42] For these reasons, we find in our judicial discretion that the nonseverability clause is ineffective, and, accordingly, we will not enforce it under the circumstances of this case. *See Stilp*, 905 A.2d at 977-81 (holding that nearly identical nonseverability provision was "ineffective and cannot be permitted to dictate [the Court's] analysis" and that "enforcement of the clause would intrude upon the independence of the Judiciary and impair the judicial function").

IV. CONCLUSION

These appeals have placed us in the position of having to decide a constitutional issue of first impression regarding whether the application of certain provisions of our Election Code, held to be unambiguous and mandatory but found to be otherwise meaningless, violates the free and equal elections clause of our

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[41] *See McLinko v. Department of State*, 279 A.3d 539, 582 (Pa. 2022).

[42] *See Stilp*, 905 A.2d at 973; *see also Pa. Fed'n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 754 (Pa. 1984). We observe that nothing in the otherwise valid provisions of Act 77 is "so essentially and inseparably connected with" the dating provisions, nor can we say that the remaining valid provisions of Act 77, "standing alone, are incomplete [or] are incapable of being executed in accordance with the legislative intent" of that Act. *See* 1 Pa.C.S. § 1925. We therefore see no reason to interfere with this comprehensive scheme enacted and amended multiple times by our Legislature since its inception in 2019, which allows voters of this Commonwealth to confidently vote from the comfort of their own homes.

Constitution. Under the circumstances of these appeals, and for the reasons stated above, we hold that the trial court did not err in ordering the County Board to count the 69 undated and incorrectly dated absentee and mail-in ballots cast in the September 17, 2024 Special Election for the 195th and 201st Legislative Districts on the basis that not counting those ballots violates the free and equal elections clause of the Pennsylvania Constitution. *See In re Canvass 2020*, 241 A.3d at 1076-77, 1079 (finding that defects in form of undated mail ballots, "while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement . . . of Pennsylvania voters" and that "[h]aving found no compelling reasons to do so," it **"decline[d] to intercede in the counting of the votes at issue in th[o]se appeals"** (emphasis added)). We also conclude that our narrow holding does not trigger Act 77's nonseverability provision.

Accordingly, we affirm.

/s/ *Ellen Ceisler*
ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry	:	**CASES CONSOLIDATED**
	:	
v.	:	Trial Ct. No. 2024 No. 02481
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
	:	
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024
	:	
Brian T. Baxter and Susan T. Kinniry	:	
	:	
v.	:	
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024
	:	

O R D E R

AND NOW, this 30th day of October, 2024, the Court of Common Pleas of Philadelphia County's (trial court) September 26 and September 28, 2024 orders are **AFFIRMED**. The Philadelphia County Board of Elections is **ORDERED** to count the undated mail-in ballots cast by Designated Appellees Brian T. Baxter and Susan T. Kinniry, and the absentee and mail-in ballots cast by the other 67 qualified electors whose ballots were rejected due to outer envelope dating errors, in the September 17, 2024 Special Election in the 195th and 201st Legislative Districts in

Philadelphia County, and take any other steps necessary in accordance with the parties' Consent Order of Court entered by the trial court on September 25, 2024.

/s/ *Ellen Ceisler*
ELLEN CEISLER, Judge

Order Exit
10/30/2024

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry	:	**CASES CONSOLIDATED**
	:	
v.	:	Trial Ct. No. 2024 No. 02481
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024
Brian T. Baxter and Susan T. Kinniry	:	
	:	
v.	:	
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024
	:	Submitted: October 15, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: October 30, 2024

This Court once again has unnecessarily hurried to change the mail-in voting rules in Pennsylvania, this time mere days before the consummation of a hotly

contested general election. The ballots at issue in this appeal were cast in an *uncontested* special election in Philadelphia County, and, although important in their own right, those ballots could not and will not change the outcome. Nevertheless, the Court of Common Pleas of Philadelphia County (trial court), and now this Court, have accepted the invitation of Brian T. Baxter and Susan T. Kinniry (Designated Appellees) to vitiate as unconstitutional the enforceability of the requirements in Sections 1306 and 1306-D of the Pennsylvania Election Code (Election Code)[1] that mail voters date the declarations on the envelopes enclosing their ballots (Declaration Dating Provisions). There simply was and is no reason to decide this question now, and the Majority certainly has not done so in ordinary course. Both the trial court and this Court should have declined to issue rushed and novel constitutional rulings that surely will confuse the expectations of both voters and county boards of elections alike. The rulings could and should have waited.

Further, and even to the extent that we could[2] or should rule on the merits of this appeal now, the Majority's decision suffers fatally from the same errors

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[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591. Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3, and was amended by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). Section 1306 applies to votes cast by absentee electors and pertinently requires that they fill out, sign, and date the declaration on the outer envelope enclosing their ballots. 25 P.S. § 3146.6(a). Section 1306-D was added to the Election Code by Act 77 and includes the same language as Section 1306 with respect to votes cast by mail-in electors. 25 P.S. § 3150.16(a). For ease of discussion, I refer herein to both absentee and mail-in voting as "mail" voting.

[2] I agree with Judge Wolf's conclusion in his dissenting opinion that the Majority did not adequately address the question of whether this Court should have transferred this appeal directly to the Supreme Court for consideration pursuant to Section 722(7) of the Judicial Code, 42 Pa. C.S. § 722(7). Section 722(7) provides, in pertinent part, that the Supreme Court shall have exclusive jurisdiction over any "matters where the court of common pleas has held invalid as repugnant to the . . . [c]onstitution of this Commonwealth . . . any provision of . . . any statute of[] this Commonwealth[.]" *Id.* Here, although the trial court's order directs the counting of the

(Footnote continued on next page…)

that beset the now-vacated majority decision in *Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, filed August 30, 2024) (*BPEP II*), *vacated*, 322 A.3d 221 (Pa. 2024). I discussed at length in my dissenting opinion in *BPEP II*, and reiterate again here, that the Majority devises out of whole cloth a strict scrutiny standard that it wields to preclude the enforcement of generic, universally applicable ballot-casting requirements that do not "disenfranchise" any voters or burden or affect their "right" to vote to any degree.

Wrong decisions issued at the wrong time are doubly threatening to the integrity of Pennsylvania's elections and the public's confidence in them. Because the Majority here countenances, nay, orders, a substantial change to voting rules at the eleventh hour and on specious grounds, I must respectfully dissent.

I. The Majority Changes the Rules For the Upcoming General Election.

Designated Appellants Republican National Committee and Republican Party of Pennsylvania argue, and I agree, that the Pennsylvania Supreme Court only a few weeks ago ruled that it would "neither impose nor countenance substantial alternations to existing laws and procedures during the pendency of an ongoing election." *New PA Project Education Fund, NAACP v. Schmidt* (Pa., No. 112 MM 2024, filed October 5, 2024), slip op. at 1. Citing to both *Purcell v.*

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contested mail ballots on the ground that to do otherwise would violate the free and equal elections clause, the trial court did not invalidate the Declaration Dating Provisions on their face. The Supreme Court nevertheless appears to have accepted jurisdiction under Section 722(7) to address as-applied constitutional rulings, *see, e.g.*, *Department of Transportation, Bureau of Driver Licensing v. Hettich*, 669 A.2d 323 (Pa. 1995), and I agree with Judge Wolf that a strong argument can be made that transfer was appropriate here. Nevertheless, given the thin record, the curt analysis below, and no express holding from the trial court as to the Provisions' validity, I leave the ultimate question of this Court's jurisdiction to our Supreme Court for a final determination. In the event that the Supreme Court determines that we do have jurisdiction, I proceed below to analyze the issues in this case.

Gonzalez, 549 U.S. 1, 4-5 (2006), and *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016), the High Court relied on the *Purcell*[3] principle, laches, and/or common sense (an increasingly scarce quality in our election law jurisprudence) to deny an application asking the Court to exercise King's Bench or extraordinary jurisdiction to invalidate under the free and equal elections clause[4] the enforceability of the same

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[3] *Purcell* involved an Arizona election law that arguably discriminated against some voters because it required proof of citizenship to cast an in-person ballot on election day. Voting rights groups challenged the law, seeking to enjoin its implementation two years after it was approved but only months before the next election. They brought suit in federal district court, which summarily denied the motion. 549 U.S. at 2-3. On appeal, a two-judge motions panel of the Ninth Circuit Court of Appeals granted an injunction pending appeal, which had the effect of reversing the decision below and precluding enforcement of the law. In a *per curium* opinion, the United States Supreme Court vacated the Ninth Circuit's order just days before the 2006 election, once again restoring the status quo. *Id.* at *6.* In vacating the Ninth Circuit's order, the Supreme Court stated:

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So the Court of Appeals may have deemed this consideration to be grounds for prompt action. Furthermore, it might have given some weight to the possibility that the nonprevailing parties would want to seek *en banc* review. . . . These considerations, however, cannot be controlling here. It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.

Id. at 5. Finally, the Court concluded that, "[g]iven the imminence of the election and the inadequate time to resolve the factual issues, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id.* at 5-6.

[4] "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.

Declaration Dating Provisions at issue in both *BPEP II* and this case. *New PA Project*, slip op. at 1. Quite obviously, then, the Court determined that precluding as unconstitutional the enforceability of the Declaration Dating Provisions was a substantial change to the election rules that it would neither make itself nor permit in the lower courts. It went on to note that it would nevertheless "continue to exercise [its] appellate role with respect to lower court decisions that *have already come before this Court in the ordinary course*," referencing the appeals it already had granted in *Genser v. Butler County Board of Elections*, ___ A.3d ___ (Pa., No. 26 & 27 WAP 2024, filed October 24, 2024), and *Center for Coalfield Justice v. Washington County Board of Elections* (Pa., No. 28 WAP 2024) (emphasis added).

Justice Donohue concurred, noting that both *Genser* and *Center for Coalfield Justice* were pending in that Court and could impact the determination of whether enforcement of the Declaration Dating Provisions violates the free and equal elections clause. *Id.* (Donohue, J., concurring), slip op. at 3-4. She further noted that "[t]ime will tell if there is a future challenge, *in the ordinary course*, in a court of common pleas." (emphasis added). *Id.*, slip op. at 4. Justice Brobson also concurred, stressing that the petitioners in *New PA Project* had delayed challenging the Declaration Dating Provisions until the last minute, which precluded the development of a record on the question. They accordingly were barred by the equitable doctrine of laches from seeking the exercise of King's Bench jurisdiction. *New PA Project* (Brobson, J., concurring), slip op. at 3-4. *See also id.*, slip op. at 5 ("This Court's disposition of the King's Bench applications in this matter and in [*Republican National Committee v. Schmidt* (Pa., No. 108 MM 2024, filed October 5, 2024),] should discourage all who look to the courts of the Commonwealth to change the rules in the middle of an ongoing election.").

The Supreme Court's pronouncements straightforwardly apply in this case to preclude the Majority's hasty ruling. The Majority today affords the exact relief that the Supreme Court refused to consider or afford in *New PA Project* precisely because it changes the rules in the middle of a general election. Not only does the Majority's decision change how election boards will count mail ballots with undated or misdated declarations, but it also changes the voting rules after thousands, if not millions, of mail ballots already have been completed and cast by Pennsylvania voters. Many, if not all, counties have procedures in place to notify mail voters if their declarations are undated or misdated and afford them the ability to either request a new mail ballot or vote by provisional ballot. *See Genser*; *Center for Coalfield Justice v. Washington County Board of Elections* (Pa. Cmwlth., No. 1172 C.D. 2024, filed September 24, 2023). What happens to the ballots already cast with undated or misdated declarations? Are they now valid? What do county boards of elections do with replacement mail ballots that have been cast with corrected or filled-in declaration dates? Are the replacement ballots counted, are the original, defective ballots counted, or both? And what about the voters who, due to the defects in the declarations on their mail ballots, have now elected to go to their polling place on election day and cast a provisional ballot, which they now unquestionably may do under the Election Code. *See Genser*. May they do that? Must they do that? Will their prior, defective ballots now be counted?

The Majority fails to consider or sidesteps entirely all of these questions and summarily concludes that *New PA Project* and the *Purcell* do not apply in this case because this case comes to us in our appellate jurisdiction and concerns ballots cast in a now-completed and uncontested special election. But that precisely is the point. The ballots at issue in this appeal, whether or not counted, cannot change the

outcome of the special election. We could rule on these issues next month, next year, or in five years, and the outcome for the special election would be the same in each instance. The ***only*** reason that either the trial court or the Majority would rule on this question now ***is precisely to change the rules for the already underway general election.*** The Majority at best fails to consider the weight of the principles underlying *New PA Project* and *Purcell*, and at worst refuses to comply with a clear and unequivocal directive of our Supreme Court.

Finally, the Supreme Court's recent decision in *Genser* does not compel a different conclusion. The Supreme Court in *New PA Project* identified *Genser* as one of two cases that "already had come before [that] Court in ordinary course." *New PA Project*, slip op. at 1 n.2. *Genser* involved the question of whether voters whose defective mail ballots are received but not counted by a county board of elections may still go to their polling place on election day and cast a provisional ballot. The majority in *Genser*, interpreting the pertinent provisions of Sections 1210 and 1306-D of the Election Code, 25 P.S. §§ 3050, 3150.16, concluded that they may. *See Genser*, ___ A.3d at ___ , slip op. at 44-45. The Court in *Genser* did not change any voting rules or strike any provisions from the Election Code, but, rather, interpreted and enforced them consistently with its prior precedents (and with what appears to be standard practice in most, if not all, counties in the Commonwealth).[5]

[5] Notably, the Supreme Court in *Genser* reiterated that defective mail ballots, including those with undated or misdated declarations, must not be counted because the failure to follow the rules for mail voting nullifies the mail ballot. ___ A.3d at ___ , slip op. at 33 & n.29, 44 (citing, in part, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (*Pennsylvania Democratic Party*)).

In sum, given the timing of this appeal and the Supreme Court's clear directive in *New PA Project*, I would vacate the trial court's order and remand for the development of an adequate record and the issuance of a new decision with adequate reasoning after the completion of the 2024 General Election.

II. Enforcement of the Declaration Dating Provisions does not violate the free and equal elections clause.

On the merits, the Majority labors under the same errors that were present in *BPEP II*. First, and although this point ultimately is irrelevant to the proper analysis of a free and equal elections clause challenge, it is far from undisputed here that the Declaration Dating Provisions serve no purpose. The Majority references other court decisions and the stipulated facts below to assume throughout its opinion that the dating provisions are "meaningless." *See Baxter v. Philadelphia Board of Elections* (Pa. Cmwlth., Nos. 1305 & 1309 C.D. 2024, filed October 30, 2024) (MO), slip op. at 4-5. But chanting that word over and over again does not make it reality. Only the operative facts as set forth in the affidavits of Designated Appellees were stipulated in the trial court. *See* Notes of Testimony (N.T.), 9/25/24, at 5-6. Contrary to what the Majority seems to assume, many of the allegations in Designated Appellees' petition for review in the trial court remain disputed, including the purpose of the Declaration Dating Provisions. The record from the trial court is scant, and the Majority's tacit assumption throughout its opinion that the General Assembly wrote meaningless provisions into the Election Code is unwarranted and forced. *See also BPEP II*, slip op. at 32-35 (McCullough J., dissenting).

Second, the Majority here once again concludes that the Declaration Dating Provisions create two classes of voters—those who comply with the Provisions and those who do not. The Majority then concludes that not counting

ballots accompanied by misdated and undated declarations disenfranchises those voters and significantly burdens their right to vote, all in violation of the free and equal elections clause. (MO, slip op. at 35-39.) The Majority accomplishes this by applying "strict scrutiny," a standard typically reserved for challenges to laws that either apply differently to different classes of people or restrict or eliminate altogether the *exercise* of a fundamental right. To such challenges, the Pennsylvania Supreme Court applied such scrutiny in *Pennsylvania Democratic Party*. 238 A.3d at 380, 384-85. It did not, however, apply strict scrutiny or anything like it to the free and equal elections clause challenges that were before it. *Id.* at 372-74.

As I illustrated at length in my dissent in *BPEP II*, the Pennsylvania Supreme Court does not apply and has never applied strict scrutiny in these kinds of cases where facially nonburdensome and neutral ballot-casting rules result in the disqualification of non-compliant ballots. *See BPEP II*, slip op. at 41-48 (McCullough, J., dissenting). The reason for this is patent: if I cast a mail ballot and fail or refuse to follow the rules for doing so, I have not been "disenfranchised" because my *right to vote* remains unaffected, unabridged, and intact. *See Disenfranchise*, Black's Law Dictionary (12th ed. 2024) (defining "disenfranchise" as "depriv[ing] (someone) of a right, esp[ecially] the right to vote; to prevent (a person or group of people) from having the right to vote"). Instead, my *ballot* is disqualified because I did not follow the rules. *Genser*; *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pennsylvania Democratic Party*. That is not disenfranchisement; that is the rule of law.

Just weeks ago, in *In re Canvass of Provisional Ballots in the 2024 Primary Election*, 322 A.3d 900 (Pa. 2024) (*Walsh*), Justice Mundy, writing for our Supreme Court, reaffirmed that strict scrutiny does not apply to free and equal

elections clause challenges to neutral, universally-applicable ballot-casting rules. In *Walsh*, the Court considered, *inter alia*, whether the Luzerne County Board of Elections should be required to count a provisional ballot cast by a voter who did not sign the outer ballot envelope as Section 1210 of the Election Code requires. The board contended that, under the free and equal elections clause, the electoral process must be kept open and unrestricted to the greatest degree possible and that voting regulations are constitutionally suspect if they "deny the franchise itself, or make it so difficult as to amount to a denial." 322 A.3d at 905 (citation omitted). In rejecting this argument, the Court did not apply a strict scrutiny analysis and was not persuaded that the constitution required it to ignore clear statutory ballot requirements. *Id.* at 907-09. In fact, the Court did not mention the "scrutiny" analysis at all, further underscoring my point that it does not apply to free and equal elections clause challenges.

Justice Wecht wrote separately in *Walsh* to emphasize that the "Election Code really means what it says" and that its plain statutory language cannot not be disregarded by the courts in order to count non-compliant votes. *Id.* at 913 (Wecht, J., concurring). Justice Wecht implored litigants to redirect their pleadings challenging voting requirements from the judiciary to the General Assembly and Governor, who are charged with drafting and approving the legal prerequisites to having a ballot count. *Id.* at 915. With respect to the free and equal elections clause, Justice Wecht explained:

> Within the bounds of constitutional protections, the legislature is free to impose technicalities, and the courts are bound to apply them. Although the Election Code will be interpreted "with unstinting fidelity to its terms," considerations under the [c]onstitution's [f]ree and [e]qual [e]lection [c]lause may moderate its enforcement in particular cases. Arguments advanced under federal

> statutes, such as the Voting Rights Act, may also require additional considerations and analyses. *Neither the Pennsylvania Constitution nor federal law is implicated in this case.*

Id. at 920 (emphasis added).

Despite this recent and clear guidance from our Supreme Court, the Majority, as it must, gives short shrift to the *Walsh* decision and relegates its discussion to a footnote. (MO, slip op. at 35 n.37.) It simply ignores the fact that no "scrutiny" analysis is mentioned in *Walsh* and proceeds to apply it anyway. Moreover, although the Majority attempts to distinguish *Walsh* on the basis that it involved provisional ballots (and for other, unidentified reasons), the principle in *Walsh* controls perfectly well here, namely, that strict scrutiny in the traditional sense simply does not apply to free and equal elections clause challenges to neutral and nonburdensome ballot-casting rules.

III. The Majority's holding invalidates the entirety of Act 77.

Although the Majority's invalidation of the application of Act 77's provisions triggers Act 77's nonseverability clause (Section 11 of Act 77), the Majority nevertheless exercises its "discretion" to ignore the nonseverability clause and, once again, changes by judicial fiat how that legislation is to operate. I disagreed with the exact same missteps taken by the Majority in *BPEP II*, and my analysis there applies equally well here. *See BPEP II*, slip op. at 51-55 (McCullough, J., dissenting). Act 77, and the whole mail voting scheme it created, is now defunct.

IV. Conclusion.

This Court has rushed this decision on virtually no record and without any analysis from the trial court. The Majority's holding disrupts the rules applicable to the already-underway 2024 General Election and, in my view, directly

contradicts the Supreme Court's admonition in *New PA Project* that these decisions ought to be made after that election has concluded and on a developed record. I detailed at length in my dissent in *BPEP II* why the Declaration Dating Provisions do not disenfranchise anyone, do not burden the right to vote, and are not subject to strict scrutiny. I also detailed why the Majority's holding in *BPEP II* invalidating the enforcement of the Declaration Dating Provisions results in the wholesale invalidation of Act 77 and mail voting with it. Given the undeniable consequences of the Majority's holding today, I bid county boards of elections and Pennsylvania voters the best of luck in trying to decipher what they are supposed to do now.

The Election Code's rules in this regard are clear. We should have left them that way.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian T. Baxter and Susan T. Kinniry	:	**CASES CONSOLIDATED**
	:	
v.	:	Trial Ct. No. 2024 No. 02481
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Philadelphia County Board of Elections	:	No. 1305 C.D. 2024
Brian T. Baxter and Susan T. Kinniry	:	
	:	
v.	:	
	:	
Philadelphia Board of Elections, Republican National Committee, and Republican Party of Pennsylvania	:	
	:	
Appeal of: Republican National Committee and Republican Party of Pennsylvania	:	No. 1309 C.D. 2024
	:	Submitted: October 15, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

DISSENTING OPINION BY
JUDGE WOLF FILED: October 30, 2024

The Majority Opinion will risk causing confusion on the eve of the 2024 General Election and, therefore, I must dissent.

This appeal concerns a special election that is over. At issue are 69 undated and incorrectly dated absentee and mail-in ballots cast in a special election held on September 17, 2024, in Philadelphia County. The Philadelphia County Board of Elections' counting (or not counting) of those ballots will not impact the outcome of that election. Notwithstanding, this Court has forged on to "decide a constitutional issue of first impression regarding whether the application of certain provisions of our Election Code,[1] held to be unambiguous and mandatory but found to be otherwise meaningless, violates the free and equal elections clause of our Constitution." *Baxter v. Phila. Bd. of Elections* (Pa. Cmwlth., Nos. 1305, 1307 C.D. 2024, filed _____), slip op. at 41-42 (Maj. Op. at ___). Because this Court's decision is ill-timed, proceeding on an unnecessarily expedited track, has the potential to confuse the electorate, and deprives the Pennsylvania Supreme Court of a reasonable opportunity to review, I am left with no choice but to dissent.

I. Unnecessarily Expedited Track

The Majority Opinion states several times that its holding is limited to "the circumstances of these appeals." *See* Maj. Op. at 4, 41. Despite the disclaimer, the Majority, in no uncertain terms, concludes that any county board of elections' decision not to count undated or incorrectly dated mail-in and absentee ballots violates the free and equal elections clause of the Pennsylvania Constitution. *See* PA. CONST. art. I, § 5. This holding is not limited or "as applied." *See Clifton v. Allegheny Cnty.*, 969 A.2d 1197, 1222 (Pa. 2009) ("A statute is facially unconstitutional only where no set of circumstances exist under which the statute

[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

would be valid."). As of October 30, 2024, there is no set of circumstances in which a county board of elections' decision not to count undated or incorrected dated mail-in and absentee ballots will pass constitutional muster.

The expedited nature of this landmark decision caused the Majority to gloss over important procedural issues—some raised by the parties and some not. First and foremost, the Majority does not fully consider the threshold issue of whether this Court has appellate jurisdiction. Under Section 762 of the Judicial Code, this Court generally has exclusive appellate jurisdiction of election appeals from court of common pleas because they affect the "application, interpretation or enforcement of [a] . . . statute relating to elections." 42 Pa.C.S. § 762(a)(4)(i)(c); *see Dayhoff v. Weaver*, 808 A.2d 1002, 1004-06 (Pa. Cmwlth. 2002) (confirming that the Election Code does not alter this rule *in general*). The Majority states that general rule. *See* Maj. Op. at 20 n.22 (quoting *Dayhoff*).

But there is an exception that the Majority does not address. It is from the Judicial Code, not the Election Code. If a matter is "by [S]ection 722 [of the Judicial Code] . . . within the exclusive jurisdiction of the Supreme Court," this Court lacks appellate jurisdiction. 42 Pa.C.S. § 762(b). Section 722(7) of the Judicial Code gives our Supreme Court exclusive appellate jurisdiction over "[m]atters where the court of common pleas has held invalid as repugnant to . . . the Constitution of this Commonwealth, any . . . provision of . . . any statute of[] this Commonwealth." 42 Pa.C.S. § 722(7). In this case, the court of common pleas "determined that the refusal to count" certain mail-in ballots due to incorrect dating "violates the free and equal elections clause set forth in [A]rticle I, [S]ection 5 of the Pennsylvania Constitution." Maj. Op. at 3. This amounts to a holding of constitutional invalidity of a statute (specifically, the Election Code's dating

provision) that triggers exclusive Supreme Court review under Section 722(7) of the Judicial Code, and thus prohibits this Court's appellate jurisdiction. This could be true notwithstanding that the trial court did not expressly say it was declaring any part of the Election Code unconstitutional.[2]

Though the parties do not raise that jurisdictional question, we are obligated to ensure jurisdiction *sua sponte*. *See Commonwealth v. Blystone*, 119 A.3d 306, 311 (Pa. 2015); *see also Zimmerman v. Schmidt*, ___ A.3d ___ (Pa., No. 63 MAP 2024, filed Sept. 25, 2024) (per curiam order) (vacating this Court's decision for want of subject matter jurisdiction after this Court failed to consider the jurisdictional issue *sua sponte*). And although parties can waive jurisdictional defects and thus perfect appellate jurisdiction in any appellate court in our Unified Judicial System, we need not accept the waiver because we retain the authority to "otherwise order[]"—i.e., to transfer the matter to the court with proper appellate jurisdiction. 42 Pa.C.S. § 704 (waiver of jurisdictional objections); *see id.* § 5103(a) (transfer).

Thus, there is an open question about whether the Court should transfer this matter to the Supreme Court for it to exercise the exclusive appellate jurisdiction arguably committed to it in the Judicial Code.[3] The Majority does not address that

[2] The jurisdictional rule of Section 722(7) appears to apply regardless whether the underlying constitutional holding is facial or as applied. *See Commonwealth v. Torsilieri*, 316 A.3d 77, 97 (Pa. 2024) (describing earlier Supreme Court decision on direct appeal from common pleas court as an "as applied" matter (citing *Commonwealth v. Torsilieri*, 232 A.3d 567, 572 (Pa. 2020))). Debating whether the trial court found the dating provision itself unconstitutional, or only its application or enforcement unconstitutional, seems to be a distinction without a difference, at least for jurisdictional purposes.

[3] Indeed, this Court could have done so immediately, which would have given the Supreme Court more time to review—and if necessary, to correct—the trial court's decision here.

question.[4] Because the constitutional issues dealt with by the trial court will have such an immediate and potentially significant impact on Pennsylvania elections, and the immediate November 5th election in particular, I believe this matter should be before the Pennsylvania Supreme Court without our opinion.

Second, the Majority identifies a distinct procedural issue that some Designated Appellants here have raised: the failure to name or join the other 66 purportedly indispensable county boards in the appeal filed in the trial court. Maj. Op. at 17 (summarizing parties' arguments). Although that issue could implicate the trial court's jurisdiction, the Majority discusses it only in a footnote, without significant analysis or citation to caselaw. *See* Maj. Op. at 23 n.25. In this Commonwealth's decentralized election system, where elections are managed individually in each of the 67 counties, local election officials look to this Court's decisions for guidance on legal requirements for counting and not counting votes. It does not take a stretch of the imagination to anticipate that the Majority Opinion will have an effect on election officials throughout the Commonwealth, six days before the November 5th General Election. Regardless of the merits of the indispensability issue, it deserves explanation the Majority does not give.

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[4] In this case in particular, there are compelling reasons for us to exercise any discretion we have to transfer. The trial court's decision now stands. It has not been stayed, vacated, or otherwise disturbed. It binds the Philadelphia County Board of Elections to count the ballots at issue here in contravention of the Election Code, on the basis that not counting them would violate the Pennsylvania Constitution. As I explain further below, this Court's decision in this case will contribute to confusion affecting voter behavior across the Commonwealth, but for those same reasons, the trial court's decision already causes confusion in Philadelphia County. That is a more-than-usually compelling reason for us to promptly transfer this matter to the Supreme Court, which arguably has exclusive jurisdiction anyway under Section 722(7) and is best suited as the Commonwealth's supervisory court to clear the existing confusion. Of course, the Supreme Court, like this one, need not decide the merits right now. It could stay or vacate the decision below, or restrict its prospective effects. The point is that there is one court that is best situated—and arguably statutorily empowered—to do that, and it is not this Court.

II. Confusion to the Electorate & Impediment to Further High Court Review

Procedural issues aside, the Majority Opinion will have significant real-world ramifications. As recently as this month, our Supreme Court denied an application for the exercise of King's Bench jurisdiction to answer the precise question raised in the instant appeals, stating it "will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New PA Project Educ. Fund v. Schmidt* (Pa., No. 112 MM 2024, filed Oct. 5, 2024) (*New PA Project*); *see also Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

The Pennsylvania Supreme Court's *New PA Project* decision was issued 30 days before the November 5th General Election. We are now six days before said election. Despite the crystal-clear directive from our Supreme Court, this Court is now handing down a sweeping constitutional decision disposing of an issue of first impression to settle the counting of votes that will not impact the outcome of a past special election, but which will cause a significant sea change in the election processes effectuated by the county boards.

All this aside, I am most concerned with how this Court's decision may influence voter behavior. On October 23, 2024, the Supreme Court handed down a decision in *Genser v. Butler County Board of Elections*, ___ A.3d ___ (Pa., Nos. 26 & 27 WAP 2024, filed Oct. 23, 2024), making clear that certain errors which result

in mail-in and absentee ballots being voided may be addressed by provisional voting. Voters and election officials are bound by *Genser*. But now, this Court's last-minute decision calls into question voters' need to vote by provisional ballot if they suspect an issue with the date on their mail-in or absentee ballot. When word of the "*Baxter* decision" gets out, it may lead an elector or election official to believe that an undated or incorrectly dated ballot will be counted despite its defect, counseling away from appearing on election day to vote provisionally. And this may stand true. But this Court, an intermediate appellate court, will most likely not be the last to speak on the issue, and the timing of this intermediate appellate Court's decision puts the Pennsylvania Supreme Court in a near-impossible position. *See New PA Project*, slip op. at 5 (Brobson, J., concurring statement) ("This Court's disposition of the King's Bench applications in this matter [] should discourage all who look to the courts of the Commonwealth to change the rules in the middle of an ongoing election.").

One need not look any further than the facts of this case to see how this Court's decisions on vote counting influence voter behavior:

> Designated Appellee Kinniry additionally attested to the fact that she received an email from the County Board on August 27, 2024, informing her that her vote would not be counted if she did not take additional steps to fix her omission of the date. However, she did not attempt to fix her mail-in ballot because she read the news about this Court's decision in [*Black Political Empowerment Project v. Schmidt* (Pa. Cmwlth., No. 283 M.D. 2024, filed Aug. 30, 2024) (*en banc*), *vacated*, 322 A.3d 221 (Pa. 2024)], in which this Court held that it is unconstitutional for county boards of elections to reject mail ballots for noncompliance with the Election Code's dating provisions.

Maj. Op. at 6-7. The Majority Opinion will undoubtedly influence the behavior of voters and election officials across the Commonwealth and will do so in a timeframe that all but forecloses further appellate review from our High Court.

While I am cognizant that the issue here was presented to this Court via statutory appeal,[5] and not through a vehicle grounded in equity, *cf. New PA Project*, our Supreme Court's recent warnings and the *Purcell* principle remain applicable as the Majority announces a new procedure just days before an already hotly contested presidential election, absent any "powerful reason to do so." *Crookston*, 841 F.3d at 398.

For the reasons articulated above, this Court should have considered transferring the matter to the Pennsylvania Supreme Court under Section 722(7) of the Judicial Code, or at the very least should have refrained from deciding this case on the eve of the 2024 General Election, and on the heels of *Genser*.[6]

/s/Matthew S. Wolf

MATTHEW S. WOLF, Judge

[5] Section 1407(a) of the Election Code, 25 P.S. § 3157(a).

[6] Practically speaking, *Genser* encourages voting by provisional ballot as a fail-safe mechanism. Our decision here may discourage use of that fail-safe mechanism if a voter believes his or her ballot was undated or incorrectly dated. *See* discussion *supra* at 6-7. Setting forth a new ballot-counting rule now, without further appellate review, is the precise change to election procedures the Supreme Court has cautioned litigants from seeking, and Courts from handing out. *See New PA Project* (Brobson, J., concurring statement).

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

BRIAN T. BAXTER and SUSAN T. KINNIRY,	:	SEPTEMBER TERM, 2024
	:	NO. 02481
Petitioners,	:	
	:	ELECTION MATTER
v.	:	
	:	Control No. 24094566
PHILADELPHIA BOARD OF ELECTIONS,	:	
Respondent.	:	

ORDER

AND NOW, this 26th day of September, 2024, upon consideration of petitioners' Petition for Review in the Nature of a Statutory Appeal pursuant to 25 P.S.§ 3157 from respondent's decision on September 21, 2024, not to count petitioners' and sixty-seven other registered voters' mail-in ballots in the September 17, 2024 Special Election because the date written on the outer envelope was missing or incorrect, and after a hearing on the Petition at which petitioners and respondent stipulated to the operative facts underlying their dispute, it is **ORDERED** as follows:

1. The Petition is **GRANTED** and the September 21, 2024 decision of the Philadelphia Board of Elections in which it refused to count petitioners' and the sixty-seven other registered voters' mail-in ballots is **REVERSED**:
    a. Based on the stipulation and representations made on the record as set forth in the transcript of the hearing held on September 25, 2024, which is attached hereto as an exhibit; and

b. Because the refusal to count a ballot due to a voter's failure to "date . . . the declaration printed on [the outer] envelope" used to return his/her mail-in ballot, as directed in 25 P.S. §§ 3146.6(a) and 3150.16(a), violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania, which states that "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."

2. Respondent Board of Elections shall cause petitioners' and the sixty-seven other registered voters' date-disqualified mail-in ballots from the Special Election to be verified, counted if otherwise valid, and included in the results of the Special Election.

BY THE COURT:

CRUMLISH, III, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

BRIAN T. BAXTER and SUSAN T. KINNIRY,	:	SEPTEMBER TERM, 2024
	:	NO. 02481
Petitioners,	:	
	:	ELECTION MATTER
v.	:	
	:	Control No. 24095206
PHILADELPHIA BOARD OF ELECTIONS,	:	
Respondent,	:	
And	:	
REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,	:	
Intervenors.	:	

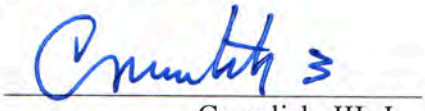
ORDER

AND NOW, this 27th day of September, 2024, upon consideration of Petition of Republican National Committee and Republican Party of Pennsylvania to Intervene in the above action (filed September 26,2024 the day after the hearing in the above matter) and the Joint Emergency Motion of Petitioners Baxter and Kinniry and Respondent Philadelphia Board of Elections wherein the parties do not oppose the Petition to Intervene, it is hereby **ORDERED** that the Petition to Intervene is **GRANTED**[1] and the Emergency Motion for Reconsideration and Clarification is **MOOT**.

[1] Intervenor disadvantaged under the time constraints of review, the court when counsel appeared at the hearing after it had already concluded and, for the first time, advised the court it had *already* filed a Petition to Intervene. Counsel advised the court that although a Petition "had been filed", before the hearing but, it could not provide the court any such any filing on the 25th.

It is further ordered and due consideration, that Intervenor's Motion to Dismiss is **DENIED**.

BY THE COURT:



Crumlish, III, J.

The court deferred considering Intervenors Petition in this matter and repeatedly consulted the docket for a filing, but no Petition was reflected on the record as of the time the court submitted its order and its order was entered on the docket at 4:38 p.m. on September 25. The docket thereafter revealed that Petitioner's filing was not made (despite representations to the court to the contrary) until 1:13 pm the following day after the hearing had been concluded. Petitioner's delay disadvantaged the court insofar as the court had no basis at the trial to review the Intervenor's Petition and issue a ruling until such filing was made of record and the delay further has caused inconvenience to the parties in obtaining finality in the court's ruling and necessitating further proceedings to dispose of the Petition to Intervene.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BRIAN T. BAXTER AND SUSAN T. KINNIRY	:	No. 76 EM 2024
v.	:	
PHILADELPHIA BOARD OF ELECTIONS, REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF PENNSYLVANIA	:	
PETITION OF: REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA	:	
BRIAN T. BAXTER AND SUSAN T. KINNIRY	:	No. 77 EM 2024
v.	:	
PHILADELPHIA BOARD OF ELECTIONS, REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF PENNSYLVANIA	:	
PETITION OF: REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA	:	

ORDER

PER CURIAM

AND NOW, this 1st day of November, 2024, the Emergency Application for Extraordinary Relief Pending Filing of Petition for Allowance of Appeal is **GRANTED** only

to the extent that the Commonwealth Court's decision docketed at 1305 C.D. 2024 and 1309 C.D. 2024 is stayed and shall not be applied to the November 5, 2024 General Election. This stay is entered without prejudice to the filing and due consideration on the merits of any petition for allowance of appeal that the parties may file or the disposition of an appeal should this Court grant such petition.

The Application for Leave to File Amicus Brief on Behalf of Restoring Integrity and Trust in Elections, Inc. and the Application for Leave to File Amicus Brief by Pennsylvania Department of State and Secretary of the Commonwealth Al Schmidt are **GRANTED**. The Proposed Intervenor-Respondents' Combined Application to Intervene and Response to the RNC's and RPP's Emergency Stay Application by the Democratic National Committee and Pennsylvania Democratic Party is **DENIED** as moot without prejudice to renew their request in connection with any forthcoming petition for allowance of appeal or appeal in the above-captioned matter.

Justice Donohue files a concurring statement in which Chief Justice Todd joins.

Justice Dougherty files a concurring statement.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BRIAN T. BAXTER AND SUSAN T. KINNIRY	:	No. 76 EM 2024
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CONCURRING STATEMENT

JUSTICE DONOHUE **FILED: November 1, 2024**

The decision and order of the Commonwealth Court was ill timed. Thus, I agree that the decision and order must be stayed until after the General Election on November 5, 2024. Although the decision was non precedential, the county boards of election might look to it for guidance in canvassing and pre-canvassing mail in ballots in the upcoming election thus disturbing the status quo.

I am much more temperate in my reaction than my esteemed colleague Justice Dougherty to the issuance of the Commonwealth Court's decision and the litigation strategy of various parties since the Primary of 2024. There is an election in this Commonwealth approximately every six months. Undoubtedly, the appellate resolution of cases filed after the completion of one election may bump up against the next election. That is the nature of our system. I certainly would not berate interested parties, the courts of common pleas, and the intermediate appellate court for considering matters arising under the Election Code because the litigation process might take longer than some undefined, comfortable period of time before the next election.

If it is our judgment in any given case that a definitive resolution must await the completion of the next election, then, as in this case, we can take corrective action. In my view, chastising both interested parties for bringing challenges to the application of the Election Code in a completed election and the courts of common pleas and intermediate appellate court for deciding such cases is unwarranted and blind to the recurring nature of election cycles in our Commonwealth.

Chief Justice Todd joins this concurring statement.

IN THE SUPREME COURT OF PENNSYLVANIA
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CONCURRING STATEMENT

JUSTICE DOUGHERTY **FILED: November 1, 2024**

"This Court will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election."[1] We said those carefully chosen words only weeks ago. Yet they apparently were not heard in the Commonwealth Court, the very court where the bulk of election litigation unfolds. Today's order, which I join, rights the ship. And it sends a loud message to all courts in this Commonwealth: in declaring we would not countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election, we said what we meant and meant what we said.

As I have previously observed, "election litigation has exploded in recent years." *Ball v. Chapman*, 289 A.3d 1, 32 (Pa. 2023) (Dougherty, J., concurring and dissenting). Of particular concern are those cases that seek to change election rules shortly before or during an election. Regrettably, this election season has seen its fair share of litigants who have sought to do exactly that. Even more unfortunate, lower courts repeatedly have taken the bait. Take three examples.

First is *Black Political Empowerment Project v. Schmidt*, 283 MD 2024 ("*BPEP I*"). Nearly two years ago, "[a]s a matter of statutory interpretation of our Election Code," we clarified that the "failure to comply with the date requirement [for absentee and mail-in ballots under 25 P.S. §§3146.6(a) and 3150.16(a)] would render a ballot invalid in any election after 2020." *Ball*, 289 A.3d at 22. Unsatisfied with that result, in May of this year the petitioners in *BPEP I* filed in the Commonwealth Court a petition for review challenging the constitutionality of the statutes we interpreted in *Ball*. They explained that although "the date requirement has [ ] survived previous court challenges, none of the lawsuits thus far have tested the date requirement under" Article, I, Section 5 of the Pennsylvania

[1] *New PA Project Educ. Fund v. Schmidt*, 112 MM 2024, 2024 WL 4410884, at *1 (Pa. Oct. 5, 2024) (citation omitted).

Constitution. *BPEP I*, Petition for Review, 5/28/24, at ¶6.[2] Following an expedited litigation schedule, a majority of an *en banc* panel found merit in petitioners' claim and "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[.]" *BPEP I*, 2024 WL 4002321, at *39 (Pa. Cmwlth. Ct. Aug. 30, 2024) (*en banc*) (emphasis omitted).[3] As a result, it "permanently enjoined [respondents] from strictly enforcing the dating provisions of the Election Code[.]" *Id*. (emphasis omitted).[4] In other words, with only 67 days left before

[2] Article I, Section 5 provides that "[e]lections 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.

[3] The petition for review in *BPEP I* was filed on May 28, 2024. A petition for preliminary injunction was filed the next day. Three days after that, in a *per curiam* order, the Commonwealth Court set a conference hearing for June 10, 2024. That unsigned order directed the parties to "be prepared to discuss deadlines for the filing of responsive pleadings, stipulations, [and] the filing and briefing of applications for summary relief," such that oral argument could be held "between July 29 and August 13, 2024." *BPEP I*, Order, 5/31/24, at 1 (*per curiam*). A flurry of intervention requests preceded the conference hearing. Afterwards, the Honorable Ellen Ceisler granted some of those requests and set a tight, unified briefing schedule. In doing so she explained "there are no outstanding questions of fact, nor factual stipulations required, and that . . . disposing of this matter via cross-applications for summary relief was the most expeditious means of resolving the legal issues in dispute." *BPEP I*, Order, 6/10/24, at 2. Judge Ceisler also noted the "[p]etitioners have further agreed" — apparently meaning at her suggestion — "to convert their Application for Special Relief in the Nature of a Preliminary Injunction to an application for summary relief in order to expedite this matter." *Id*. Three days after briefing was completed, oral argument was scheduled for August 1, 2024, before the *en banc* panel. It was reported in the press shortly after argument that the "court said it would . . . issue its opinion as quickly as it can." *See* Paula Reed Ward, *Pa. Appeals Court Hears Arguments About Misdated Mail-in Ballots* (Aug. 1, 2024, 5:48 PM), https://triblive.com/local/regional/pa-appeals-court-hears-arguments-about-misdated-mail-in-ballots/. It did so on August 30, 2024; the divided *en banc* panel filed 150-pages' worth of unpublished opinions, with the majority, in an opinion authored by Judge Ceisler, resolving a novel constitutional issue in petitioners' favor.

[4] The majority "decline[d] to strike Act 77 in its entirety as a consequence of [its] holding[,]" notwithstanding the nonseverability provision included in this bipartisan compromise legislation. *BPEP I*, 2024 WL 4002321, at *38. *See* Act 77 §11 ("Sections 1, 2, 3, 3.2, 4, (continued…)

the 2024 General Election, the *en banc* majority upended the *status quo* that had existed for years in this Commonwealth by enjoining respondents from enforcing the Election Code, leaving us with even less time on direct appeal to determine whether the majority got it right or wrong, either in whole or in part.

After the case arrived on our doorstep, it didn't take long to realize the *en banc* majority, in its rush to resolve the merits, failed to adequately assess whether it possessed subject matter jurisdiction over the case in the first place. So we were left with no choice but to vacate the Commonwealth Court's order for want of jurisdiction. *See Black Political Empowerment Project v. Schmidt*, 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 13, 2024) (*per curiam*) ("*BPEP II*").[5] Thereafter, the petitioners from *BPEP I*, traveling under an updated case caption following the addition of a new party, inexplicably waited twelve days before asking this Court to credit their own delay and the fact that "time before Election Day [is] growing short" as justification for invoking our sparingly used King's Bench authority to decide the same issue. Application for King's Bench Jurisdiction, 112 MM 2024, 9/25/24, at 3; *see id*. at 31 ("It is critical that the Court exercise its King's Bench power **now**.") (emphasis in original).[6] We declined the request. As noted at the outset,

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5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.").

[5] Notwithstanding our unambiguous order indicating the Commonwealth Court lacked subject matter jurisdiction, the lower court subsequently scheduled a conference, *sua sponte*, and directed the parties to "be prepared to discuss advancing further proceedings in this matter on an expedited basis." *BPEP I*, Order, 9/16/24, at 1 (*per curiam*). This prompted respondents to seek further relief from us, which we granted. *See BPEP II*, Order, 9/19/24, at 2-3 (*per curiam*) (directing lower court to "dismiss the matter upon remand in accordance with this Court's September 13, 2024, Order"). The lower court complied with our directive the following day.

[6] Importantly, when *BPEP I* was before us on direct appeal, petitioners did not ask us to exercise King's Bench jurisdiction. They merely suggested that if we had "any remaining doubts as to the original subject matter jurisdiction of the Commonwealth Court" we "can, (continued…)

in doing so we explained "[t]his Court will neither impose nor countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New PA Project*, 2024 WL 4410884, at *1.

Next up was *Republican Nat'l Comm. v. Schmidt*, 108 MM 2024, 2024 WL 4406909 (Pa. Oct. 5, 2024) (*per curiam*), decided the same day as *New PA Project*. As concisely detailed by the Court's *per curiam* order in that matter,

> [i]n September 2022, approximately two months before the General Election, [p]etitioners filed a petition for review in the Commonwealth Court's original jurisdiction against the acting Secretary of the Commonwealth and all sixty-seven County Boards. In that case, as [in their 2024 application for King's Bench jurisdiction], they challenged the implementation of county-level notice and cure procedures for defective absentee and mail-in ballots. Ultimately, the Commonwealth Court dismissed the action, concluding that it lacked jurisdiction over Petitioners' claims. *Republican Nat'l Comm. v. Schmidt* (Pa. Cmwlth., No. 447 M.D. 2022 at 28, filed March 23, 2023) (unreported decision) (concluding that "jurisdiction for an action challenging a [c]ounty [b]oard's development and implementation of notice and cure procedures properly lies in the respective [c]ounty's court of common pleas.").

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and should, reach the merits of the dispute by exercising . . . extraordinary jurisdiction pursuant to 42 Pa.C.S. §726, because this case presents an issue of immediate public importance." Petitioners' Brief, 68 MAP 2024, at 45. But an exercise of our King's Bench authority is different from an assumption of extraordinary jurisdiction under Section 726. *See In re Bruno*, 101 A.3d 635, 676 (Pa. 2014) ("It bears reiteration that the Court's King's Bench authority and jurisdiction encompass, supplement, and transcend the other powers and jurisdiction enumerated in the 1968 Constitution and the Judicial Code."); *In re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997) ("the two are not identical"). Our power under King's Bench is far broader and affords more flexibility than an exercise of extraordinary jurisdiction. *See Ball*, 289 A.3d at 32 (Dougherty, J., concurring and dissenting) ("normal justiciability concerns simply do not exist when we consider a case under our sweeping King's Bench authority"), *citing, e.g.*, *In re Bruno*, 101 A.3d at 669 ("King's Bench authority is not limited by prescribed forms of procedure . . .; the Court may employ any type of process or procedure necessary for the circumstances."); *see also In re Dauphin Cty. Fourth Investigating Grand Jury*, 943 A.2d 929, 933 n.3 (Pa. 2007) (explaining King's Bench jurisdiction, unlike extraordinary jurisdiction, "allows the Court to exercise power of general superintendency over inferior tribunals even when no matter is pending before a lower court") (internal quotation marks and citation omitted). Litigants would do well to remember the distinctions between the two forms of jurisdiction when asking this Court to exercise one form over the other.

Id. at *1 n.1. Rather than raise their claims anew in the proper forum, petitioners in *RNC* did nothing for more than a year and a half. In fact, it was not until September 18, 2024 — more than 18 months after their 2022 suit was dismissed and only 48 days prior to the 2024 General Election — that they filed their application for King's Bench jurisdiction. That was the opposite of due diligence, and we acknowledged this by stating "King's Bench jurisdiction will not be exercised where, as here, the alleged need for timely intervention is created by [p]etitioners' own failure to proceed expeditiously and thus, the need for timely intervention has not been demonstrated." *Id*. at *1. Also important, however, was Justice Brobson's observation in concurrence that "the 2024 General Election is underway" and "[d]eciding these questions at this point would . . . be highly disruptive to county election administration." *Id*. at *2 (Brobson, J., concurring).

Now consider this case. On September 23, 2024, Brian Baxter and Susan Kinniry ("electors"), who "are represented by the same counsel as" the petitioners in *BPEP I* and *New PA Project*, Application for Extraordinary Relief, 10/31/24, at 7, filed in the Philadelphia Court of Common Pleas a petition for review in the nature of a statutory appeal. Electors challenged the decision of the Philadelphia Board of Elections ("Board") to not count their mail-in ballots for an (uncontested) Special Election held on September 17, 2024. Like the petitioners in *BPEP I* and *New PA Project*, electors argued the "Board's decision to refuse to count [their] votes violates art. I, §5 of the Pennsylvania Constitution." Petition for Review, 9/23/24, at ¶8. The trial court agreed following a brief hearing held only two days later. *See* N.T. Hearing, 9/25/24, at 18 ("I do believe [electors] made out a claim for Article I, Section 5 relief under the Pennsylvania Constitution which always prevails over a conflict in the statutory language[.]"); Trial Ct. Order, 9/26/24, at 1 (concluding "the refusal to count a ballot due to a voter's failure to 'date . . . the declaration printed on [the outer] envelope' used to return his/her mail-in ballot, as directed in 26 P.S.

[§]3146.6(A), violates art. I, [§]5 of the Constitution"). Three days after that, the court granted a request to intervene by the Republican National Committee and the Republican Party of Pennsylvania (collectively, "intervenors"), and denied their motion to dismiss electors' petition for relief. The Board then appealed the trial court's decision on October 1, 2024, and intervenors cross-appealed on October 3, 2024.

Recall that we filed our order in *New PA Project* on Saturday, October 5, 2024. The following Monday, October 7th, electors in this case filed in the Commonwealth Court an application to expedite briefing. According to electors, our order in *New PA Project* supposedly "left open the possibility of deciding election cases in [our] 'appellate role with respect to lower court decisions' that arise 'in the ordinary course.'" Application for Expedited Briefing Schedule, 10/7/24, at ¶3 (citation omitted). But electors misleadingly truncated our statement. The full sentence provides as follows: "[W]e will continue to exercise our appellate role with respect to lower court decisions **that have already come before this Court** in the ordinary course." *New PA Project Educ. Fund*, 2024 WL 4410884, at *1 n.2 (emphasis added; citations omitted). The use of past tense in that sentence was neither a coincidence nor unimportant. While we left open the possibility of deciding cases that had already made their way to this Court through the conventional appellate process, this carve-out did not extend to cases pending before the lower courts like this one.

Further, electors argued "[e]xpedited resolution of this matter in advance of the November 5 general election is necessary to guide Philadelphia and other county boards of elections as to the treatment of undated or misdated mail-in and absentee ballots, and to ensure that such ballots are not rejected on unconstitutional grounds." Application for Expedited Briefing Schedule, 10/7/24, at ¶4. Intervenors opposed electors' request for "**additional** expedition on top of the expedited schedule the [c]ourt has already adopted

for these appeals." Intervenors' Opposition to Expedited Briefing, 10/8/24, at 2 (emphasis in original). They explained this Court's October 5th order "could not have been clearer" that we "will not 'countenance' changes to the date requirement during the 2024 General Election." *Id*. at 2-3. Later that day, the Commonwealth Court granted electors' application to expedite in part, ordering the parties to file simultaneous briefs on the merits by October 14, 2024.

Sixteen days after the briefing was completed, and with only six days until the 2024 General Election, a majority of the Commonwealth Court *en banc* affirmed the trial court's order in an unpublished opinion authored by Judge Ceisler. *Baxter v. Philadelphia Bd. of Elections*, 1305 & 1309 CD 2024, 2024 WL 4614689 (Pa. Cmwlth. Ct. Oct. 30, 2024).[7] On the merits, the majority essentially re-adopted its earlier, now-vacated analysis from *BPEP I*. But first it discussed the propriety of deciding the appeal. Notably, the majority rejected intervenors' reliance on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*). It concluded this Court's citation to *Purcell* in our October 5th order was not "a wholesale adoption of 'the *Purcell* principle' as it relates to Pennsylvania **special** elections, particularly ones that have already happened." *Baxter*, 2024 WL 4614689 at *10 n.23 (emphasis in original); *id*. at *10 ("we do not find that [*Purcell*] foreclose[s] our ability to decide the constitutional issue of first impression presented by these appeals, filed in our **exclusive appellate** jurisdiction, relating to whether certain votes should be counted **in that special election**") (emphasis in original). As support for its position that "this distinguishes *New PA Project* from this case[,]" the panel cited our additional statement in the order that we would "still exercise [our] appellate role with respect to lower court decisions that already came before [us] in the ordinary course." *Id*. at *10 n.23. The

[7] President Judge Renée Cohn Jubelirer and Judge Michael H. Wojcik joined the majority opinion.

majority reasoned: "This case too may reach the Supreme Court in the ordinary course." *Id*. Of course, like electors, *see supra*, the majority swept over the critical caveat that such cases must "**have already come before this Court** in the ordinary course." *New PA Project*, 2024 WL 4410884, at *1 n.2 (emphasis added). Moreover, with respect to our declaration that we will not "countenance substantial alterations to existing laws and procedures during the pendency of an ongoing election," the majority reiterated it was only resolving a direct appeal from a special election that had already occurred, and it was "**not** being asked to make changes with respect to the impending General Election[.]" *Baxter*, 2024 WL 4614689 at *10 (emphasis in original).

Two judges dissented. Judge Patricia A. McCullough forcefully argued the majority "once again has unnecessarily hurried to change the mail-in voting rules in Pennsylvania, this time mere days before the consummation of a hotly contested general election." *Id*. at *19 (McCullough, J., dissenting). She explained this Court's pronouncements in *New PA Project*

> straightforwardly apply in this case to preclude the Majority's hasty ruling. The Majority today affords the exact relief that the Supreme Court refused to consider or afford in *New PA Project* precisely because it changes the rules in the middle of a general election. Not only does the Majority's decision change how election boards will count mail ballots with undated or misdated declarations, but it also changes the voting rules after thousands, if not millions, of mail ballots already have been completed and cast by Pennsylvania voters. Many, if not all, counties have procedures in place to notify mail voters if their declarations are undated or misdated and afford them the ability to either request a new mail ballot or vote by provisional ballot. *See Genser*[*v. Butler Cty. Bd. of Elections*, ___ A.3d ___, 2024 WL 4553285 (Pa. Oct. 23, 2024)]; *Center for Coalfield Justice v. Washington County Board of Elections* (Pa. Cmwlth., No. 1172 C.D. 2024, filed September 24, 2023). What happens to the ballots already cast with undated or misdated declarations? Are they now valid? What do county boards of elections do with replacement mail ballots that have been cast with corrected or filled-in declaration dates? Are the replacement ballots counted, are the original, defective ballots counted, or both? And what about the voters who, due to the defects in the declarations on their mail ballots, have now elected to go to their polling place on election day and

> cast a provisional ballot, which they now unquestionably may do under the Election Code. *See Genser*. May they do that? Must they do that? Will their prior, defective ballots now be counted?

Id. at *21.

Judge Wolf's dissent was similar. He explained the majority's decision was "ill-timed, proceed[ed] on an unnecessarily expedited track, has the potential to confuse the electorate, and deprives the Pennsylvania Supreme Court of a **reasonable** opportunity to review[.]" *Id*. at *24 (Wolf, J., dissenting) (emphasis in original). He faulted the majority for ignoring our "crystal-clear directive" in *New PA Project* by "handing down a sweeping constitutional decision disposing of an issue of first impression to settle the counting of votes that will not impact the outcome of a past special election, but which will cause a significant sea change in the election processes effectuated by the county boards." *Id*. at *26. He also noted his concern

> with how [the majority]'s decision may influence voter behavior. On October 23, 2024, the Supreme Court handed down a decision in *Genser* . . ., making clear that certain errors which result in mail-in and absentee ballots being voided may be addressed by provisional voting. Voters and election officials are bound by *Genser*. But now, th[e majority]'s last-minute decision calls into question voters' need to vote by provisional ballot if they suspect an issue with the date on their mail-in or absentee ballot. When word of the "*Baxter* decision" gets out, it may lead an elector or election official to believe that an undated or incorrectly dated ballot will be counted despite its defect, counseling away from appearing on election day to vote provisionally. And this may stand true. But this [c]ourt, an intermediate appellate court, will most likely not be the last to speak on the issue, and the timing of this intermediate appellate [c]ourt's decision puts the Pennsylvania Supreme Court in a near-impossible position.

Id. Indeed, Judge Wolf observed "[o]ne need not look any further than the facts of this case to see how" the majority's decision could impact voter behavior:

> Designated Appellee Kinniry additionally attested to the fact that she received an email from the County Board on August 27, 2024, informing her that her vote would not be counted if she did not take additional steps to fix her omission of the date. However, she did not attempt to fix her mail-in ballot because she read the news about this [c]ourt's decision in [*BPEP I*)], in which this [c]ourt held that it is unconstitutional for county boards of

> elections to reject mail ballots for noncompliance with the Election Code's dating provisions.

Id., *quoting id.* at *3 (majority opinion). In sum, Judge Wolf believed the majority's opinion "will undoubtedly influence the behavior of voters and election officials across the Commonwealth [in the 2024 General Election] and will do so in a timeframe that all but forecloses further appellate review from our High Court." *Id*.

Today, this Court stays the *en banc* majority's decision pending the timely filing and subsequent disposition of a petition for allowance of appeal by intervenors. Although the Court's *per curiam* order does not directly invoke our order in *New PA Project*, that earlier ruling plainly undergirds the decision at least in part and certainly motivates my joinder herein. Indeed, it cannot be denied that the majority below issued a disruptive holding that, in effect, changes the game from the prevailing *status quo* on the very eve of the election, long after mail ballots have been shipped and returned, and guidance has been issued to voters, boards of elections, and election workers concerning the handling of undated and misdated ballots.

There are several lessons to be drawn from our resolution of these three cases over the past month. First, the simple fact that a litigant has identified a significant and colorable legal issue that has potential to impact an upcoming election does not mean courts should suspend the normal and orderly administration of the judicial process to fully resolve it prior to the election. *See e.g.*, *Kelly v. Commonwealth*, 240 A.3d 1255, 1263 (Pa. 2020) (Saylor, C.J., concurring and dissenting) ("I believe that, to the extent possible, we should apply more ordinary and orderly methods of judicial consideration, since far too much nuance is lost by treating every election matter as exigent and worthy of this Court's immediate resolution."). Sometimes, an election lawsuit is just filed too late to be resolved in a proper and timely manner. In that situation, there may be no choice other than to apply any resulting decision prospectively. Or, where jurisdiction is

discretionary, it may mean denying review altogether and awaiting a more suitable vehicle to address the matter in the future. That was the case in *New PA Project* and *RNC*. Litigants should recognize the serious risk they take by waiting too long to file an election-related lawsuit, or by filing it too close to an election.

Second, it is important to recognize timing is not the only factor at play. The other primary consideration is whether granting the requested relief would lead to substantial alterations to existing laws and procedures during the pendency of an ongoing election. *See Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will — laches, the *Purcell* principle, or common sense — the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.").[8] The petitioners in *New PA Project* and *RNC* both sought to have us do exactly that via King's Bench, even though mail-in voting had already started. The Court recognized as much and rightly declined both invitations. Likewise here, the *en banc* majority's opinion runs a very real risk of disturbing the rapidly approaching General Election, as detailed by Judges McCullough and Wolf in their dissents. That reality is perhaps best captured by a headline appearing in Pennsylvania's largest newspaper only hours after the majority issued its decision: "A

[8] The rule in the federal system is that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election," and the United States Supreme Court "has often stayed lower federal court injunctions that contravened that principle." *Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh, J., concurring). "That principle — known as the *Purcell* principle [because it derives from *Purcell v. Gonzalez*, *supra*] — reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id*. at 880-81. To the extent the majority below endeavored to explain why *Purcell* does not control here, it missed the mark. Our order did not purport to rigidly adopt the *Purcell* principle on its own terms, whatever those may be. We instead quoted Judge Sutton's line from *Crookston*, which persuasively explains that it doesn't matter whether you call it the *Purcell* principle, laches, or common sense — the fundamental concept is that courts should "not disrupt imminent elections absent a powerful reason for doing so." 841 F.3d at 398.

new ruling on undated ballots in Pennsylvania has injected confusion and uncertainty into the final days of 2024 campaign."[9]

This leads to my third and last point. Although this Court has yet to settle on the precise contours of the important principle endorsed by our October 5th order in *New PA Project*, the takeaway is that courts in this Commonwealth should henceforth refrain from granting relief in election cases where it would result in "substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New PA Project*, 2024 WL 4410884, at *1. Admittedly, a "substantial alteration" is a somewhat nebulous term at present; and given the realities of mail-in and absentee voting, there may be some grey area in precisely defining "the pendency of an ongoing election." Nevertheless, until this Court provides more specific guidance in those regards, lower courts would be wise to err on the side of caution. If granting relief to a party would upend the *status quo* and there likely will be insufficient time for the case to fully work itself through the normal appellate process (including in this Court) before the election, the best practice is to stay the ruling pending appeal.[10] This limits the potential for chaos and uncertainty and allows time for this Court to adequately assess whether the decision below should remain stayed

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[9] https://www.inquirer.com/politics/election/undated-ballots-pennsylvania-ruling-commonwealth-court-20241030.html

[10] The "normal appellate process" certainly does not include deciding a case six days before an election and then "urg[ing] the parties to proceed expeditiously should they wish to appeal" to this Court. *Baxter*, 2024 WL 4614689, at *6 n.16. Obviously, the parties here were destined to appeal any adverse ruling, and there's never been any doubt that this Court will have the final say on this issue. So what exactly did the *en banc* majority expect us to do with the five days left between the filing of intervenors' appeal and the 2024 General Election? Surely they did not seriously expect us, in such a short period, to devote proper attention and resources to resolve the novel constitutional issue involved, nor could they have reasonably believed that such rushed consideration of this highly important question was in any way advisable.

until this Court has a chance to address the merits of the case, or whether it is otherwise appropriate to put it into immediate effect.

In closing, I join the Court's *per curiam* order because the majority below plainly violated the spirit, if not the letter, of the eminently sensible and long-overdue principle endorsed in *New PA Project*. To reiterate the point once more: we said what we meant, and we meant what we said. Moving forward, lower courts should think twice — maybe even three times — before granting relief that could arguably be construed as imposing "substantial alterations to existing laws and procedures during the pendency of an ongoing election." *New PA Project Educ. Fund*, 2024 WL 4410884, at *1.[11]

[11] I recognize this Court's order in *New PA Project* technically is a non-binding *per curiam* order. I respectfully suggest it may be appropriate for this Court at some future point to invoke our King's Bench authority — *sua sponte* or otherwise — to more firmly establish the principles espoused in that order, thereby providing clarity to all lower courts in this Commonwealth regarding how they should approach future election cases.