

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

Nos. 395 EAL 2024 & 396 EAL 2024

BRIAN T. BAXTER and SUSAN T. KINNIRY

Respondents,

v.

PHILADELPHIA BOARD OF ELECTIONS,

Respondent,

**REPUBLICAN NATIONAL COMMITTEE; AND REPUBLICAN PARTY
OF PENNSYLVANIA,**

Intervenor-Petitioners.

**BRIEF OF *AMICI CURIAE* REPUBLICAN LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES BRYAN CUTLER,
PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE KIM
WARD AND MAJORITY LEADER OF THE PENNSYLVANIA SENATE
JOE PITTMAN IN SUPPORT OF INTERVENOR-PETITIONERS**

CHALMERS, ADAMS, BACKER &

KAUFMAN, LLC

Zachary M. Wallen

Pa. ID No. 309176

301 South Hills Village Drive

No. LL200-420

Pittsburgh, PA 15241

(412) 200-0842

(412) 235-5001 (facsimile)

zwallen@chalmersadams.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. This Case Involves the Constitutionality of a Statute of the Commonwealth.....	4
A. The Dating Requirement is Valid Because it Does Not “Clearly, Palpably and Plainly” Violate the Constitution.....	4
B. The Commonwealth Court Erred by Employing Strict Scrutiny Review to a Neutral, Universally-Applicable Rule.....	5
C. The Dating Requirement Does Not Violate the Free and Equal Elections Clause Because it Applies to All Voters Equally and Does Not Make Voting So Difficult as to Amount to a Denial.	10
II. The Question Presented in This Case Is One of First Impression.....	15
III. The Holding of the Commonwealth Court Conflicts with a Holding of This Court on the Same Legal Question.....	16
IV. The Question Presented in this Case Is One of Such Substantial Public Importance as to Require Prompt and Definitive Resolution by This Court.	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Ball v. Chapman</i> , 289 A.3d 1 (Pa. 2022)	15, 17
<i>Baxter v. Phila. Bd. of Elections</i> , Nos. 1305 & 1309 C.D. 2024 2024 Pa. Commw. Unpub. LEXIS 582 (Pa. Commw. Ct. Oct. 30, 2024).....	<i>passim</i>
<i>Black Pol. Empowerment Project v. Schmidt</i> , 283 M.D. 2024 2024 Pa. Commw. Unpub. LEXIS 464 (Pa. Commw. Ct. Aug. 30, 2024).....	5, 8, 14, 15
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	10
<i>Bush v. Gore</i> , 531 U.S. 987 (2000).....	18
<i>Cavanaugh v. Shaeffer</i> . 444 A.2d 1308 (Pa. Commw. Ct. 1982).....	7
<i>City Council of Bethlehem v. Marcincin</i> , 515 A.2d 1320 (Pa. 1986).....	14
<i>Commonwealth ex rel. Jones v. King</i> , 5 Pa. D.&C. 515, (Dauphin Co. C.C.P. 1924)	15
<i>Gray v. Sanders</i> , 372 U.S. 368 (1963).....	18
<i>In re Canvass of Absentee & Mail-in Ballots</i> , 241 A.3d 1058 (Pa. 2020)	4
<i>In re General Election-1985</i> , 531 A.2d 836 (Pa. Commw. Ct. 1987)	12
<i>In re New Britain Borough Sch. Dist.</i> , 145 A. 597 (Pa. 1929).....	12
<i>In re Nomination of Berg</i> , 712 A.2d 340 (Pa. Commw. Ct. 1998)	7
<i>In re Nomination of Berg</i> , 713 A.2d 1106 (Pa. 1998).....	7, 9, 10
<i>In re Walsh</i> , 322 A.3d 900 (Pa. 2024).....	5, 9, 16

<i>League of Women Voters of Pa. v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	<i>passim</i>
<i>Migliori v. Lehigh Cnty. Bd. of Elections</i> , No. 5:22-cv-00397, 2022 U.S. Dist. LEXIS 46352 (E.D. Pa. Mar. 16, 2022).....	6, 7
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020).....	<i>passim</i>
<i>Pa. State Conference of the NAACP Branches v. Schmidt</i> , 97 F.4th 120 (3d. Cir. 2024)	13
<i>Purple Orchid v. Pa. State Police</i> , 813 A.2d 801 (Pa. 2002).....	4, 5, 16
<i>Ritter v. Migliori</i> , 142 S.Ct. 1824 (2022).....	11, 12, 13
<i>Shankey v. Staisey</i> , 257 A.2d 897 (Pa. 1969).....	14, 15
<i>Shoemaker v. Lawrence</i> , 31 Pa. D.&C. 681 (Dauphin Co. C.C.P. 1938)	12
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914)	8, 10
<i>Working Families Party v. Commonwealth</i> , 169 A.3d 1247 (Pa. Commw. Ct. 2017).....	6, 14, 16
<i>Working Families Party v. Commonwealth</i> , 209 A.3d 270 (Pa. 2019).....	7

Constitutional and Statutory Provisions

U.S. Constitution amend XIV, Section 1	18
Pa. Constitution Art. I, Section 5	<i>passim</i>
Pa. Constitution Art. VII, Section 6	17, 18
25 P.S. §§ 3146.6(a)	2, 18
25 P.S. §§ 3150.16(a)	2, 18

Other Authorities

Act of October 31, 2019, P.L. 552, No. 77 (Act 77).....3

Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania: Exhibiting The Derivation and History of Its Several Provisions* (1883).....10

Pa.R.A.P. 1114..... 3, 15, 17, 19

STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici Curiae, Republican Leader of the Pennsylvania House of Representatives Bryan Cutler, President Pro Tempore of the Pennsylvania Senate Kim Ward, and Majority Leader of the Pennsylvania Senate Joe Pittman (“*Amici Curiae*”) hereby file this *amici curiae* brief pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(1)(ii) in support of Petitioners Republican National Committee and Republican Party of Pennsylvania (“Intervenor-Petitioners”).

This case concerns the constitutionality of election laws enacted by the Pennsylvania General Assembly (the “General Assembly”), including the *Amici Curiae*. *Amici Curiae* possess a strong legal interest in protecting their exclusive authority, as legislators in the General Assembly, to enact—or repeal—legislation concerning the administration of elections in Pennsylvania, a role which the Individual Respondents persuaded the courts below to usurp and which *Amici Curiae* pray this Court will restore. Accordingly, *Amici Curiae* file this *amici curiae* brief to bring issues to this Court’s attention about which they possess both a heightened interest and unique viewpoint.

¹ No party’s counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case is the latest in a seemingly never-ending attempts by litigants—in this case, Respondents Brian Baxter and Susan Kinniry (“Individual Respondents”)—to overturn the straightforward legal requirements found in 25 P.S. §§ 3146.6(a) and 3150.16(a) (“Dating Requirement”) that absentee and mail-in voters date their ballot declaration.

Here, Individual Respondents seek to invalidate the Dating Requirement under Article I, Section 5 of the Pennsylvania Constitution (“Free and Equal Elections Clause”). As with all the prior challenges to the Dating Requirement, this one, too, should fail, and this Court should grant review to uphold the Dating Requirement.

There are ample reasons to grant review. First, the case involves a constitutional challenge to a Commonwealth statute. In addition, the court below wrongly applied a strict scrutiny standard, even though there is no evidence that the Dating Requirement imposes a “severe” burden on voting and despite this Court repeatedly (and recently) declining to apply strict scrutiny to Free and Equal Elections Clause challenges. Moreover, every prior case finding a violation of the Free and Equal Elections Clause implicated the *right* to vote, whereas the Dating Requirement is merely one of many ballot-casting rules voters must follow, and which apply to *all* voters without discrimination.

Additionally, this Court should grant review because the case presents a question of first impression, because the Commonwealth Court’s holding conflicts with holdings of this Court, and because the decision below requires prompt and definitive resolution by this Court in order to avoid subjecting different counties to different ballot-counting rules in the next election.

ARGUMENT

Pursuant to Pennsylvania Rule of Appellate Procedure 1114, an appeal from a decision by the Commonwealth Court is a matter of “sound judicial discretion”, and may be granted for any of several specific reasons, including for a question “involving the constitutionality of a statute of the Commonwealth” or that is “one of first impression,” when the decision “conflicts with a holding of” this Court, and if “the question presented is one of such substantial public importance as to require prompt and definitive resolution” by this Court. Pa.R.A.P. 1114.² As discussed below, all of these situations apply, any one of which necessitate this Court to exercise its “sound judicial discretion” to review the prior decision of the Commonwealth Court. *Id.*

² Arguably, the final Rule 1114 standard, that the lower court has “so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of” this Court’s supervisory authority, applies as well. The courts below decided this case without developing a factual record, and did not fully develop and consider the issue of Act 77’s nonseverability clause.

I. This Case Involves the Constitutionality of a Statute of the Commonwealth.

The Commonwealth Court recognized that it “ha[d] to decide a constitutional issue,” ultimately affirming the trial court’s order on the grounds that the Dating Requirement “violates the free and equal elections clause of the Pennsylvania Constitution.” *Baxter v. Phila. Bd. of Elections*, Nos. 1305 & 1309 C.D. 2024, 2024 Pa. Commw. Unpub. LEXIS 582 at *55 (Pa. Commw. Ct. Oct. 30, 2024) (“*Baxter*”) (citing *In re Canvass of Absentee & Mail-in Ballots*, 241 A.3d 1058, 1076-77, 1079 (Pa. 2020)). Yet the Commonwealth Court applied incorrect constitutional analysis at nearly every turn—ignoring Individual Respondents’ “heavy burden” of showing unconstitutionality, devising a strict scrutiny standard “out of whole cloth,” and taking view of the Free and Equal Elections Clause unsupported by this Court’s jurisprudence. However, the Dating Requirement *is* constitutional and review by this Court is warranted to correct the Commonwealth Court’s faulty constitutional analysis.

A. The Dating Requirement is Valid Because It Does Not “Clearly, Palpably and Plainly” Violate the Constitution.

“It is well settled that a statute is presumed to be constitutional and will not be declared unconstitutional unless it *clearly, palpably and plainly violates the constitution.*” *Purple Orchid v. Pa. State Police*, 813 A.2d 801, 805 (Pa. 2002) (emphasis added) (internal citations omitted). Because of this high standard, “the

party challenging the constitutionality of a statute has a heavy burden of persuasion.” *Id.* For the reasons discussed below, the Dating Requirement *is* constitutional, and the trial court and the Commonwealth Court erred by not requiring Individual Respondents to meet their “heavy burden” of showing that the Dating Requirement “clearly, palpably and plainly violate[] the constitution.” *Id.*

B. The Commonwealth Court Erred by Employing Strict Scrutiny Review to a Neutral, Universally-Applicable Rule.

The Commonwealth Court claimed, as it did in its since-vacated decision in *Black Pol. Empowerment Project v. Schmidt* (“BPEP”), 283 M.D. 2024, 2024 Pa. Commw. Unpub. LEXIS 464 (Pa. Commw. Ct. Aug. 30, 2024), *vacated*, No. 68 MAP 2024, 2024 Pa. LEXIS 1348 (Sep. 13, 2024), that the Dating Requirement for absentee and mail-in ballots is subject to strict scrutiny review. *Baxter*, at *48-49. But this standard was “devise[d] out of whole cloth” by the court below (*id.* at *57 (McCullough, J., dissenting)), which declared the Dating Requirement to be a “significant” burden on the right to vote without any further analysis. *Id.* at *48 (majority opinion). In applying this strict scrutiny review, the Commonwealth Court ignored this Court’s recent holding in *In re Walsh*, 322 A.3d 900 (Pa. 2024), which “reaffirmed that strict scrutiny does not apply to free and equal elections clause challenges to neutral, universally-applicable ballot-casting rules.” *Baxter*, at *66 (McCullough, J., dissenting).

1. The Dating Requirement is Not a “Severe” (or “Significant”) Burden.

The decision below relies on the rule promulgated in *Pa. Democratic Party v. Boockvar* that strict scrutiny applies “[w]here a state election regulation imposes a ‘severe’ burden on a plaintiff’s right to vote.” *Baxter*, at *36 (majority opinion) (quoting *Pa. Democratic Party*, 238 A.3d 345, 385 (Pa. 2020)); accord *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1257 n. 22 (Pa. Commw. Ct. 2017) (“Only where a law imposes a severe burden on the right to vote is it subject to strict scrutiny.” (internal citation omitted)), *aff’d*, 209 A.3d 270, 282 (Pa. 2019). After quoting *Pa. Democratic Party*, the Commonwealth Court summarily concluded that the Dating Requirement “impose[s] a significant burden on [Individual Respondents’] constitutional right to vote” *Baxter*, at *48. But the Dating Requirement is neither “severe” nor “significant,” nor does the Commonwealth Court even attempt to explain why it would be. Indeed, throughout the court’s majority opinion, the words “severe” and “significant” each only occur once—when quoting *Boockvar* and when summarily declaring that the Dating Requirement’s putative *burden* is “significant.”

Far from being a “severe” or “significant” burden on the right to vote, writing the date on the ballot envelope is one of the easiest steps in the entire voting process. Indeed, when evaluating this very issue, the U.S. District Court for the Eastern District of Pennsylvania “conclude[d] that the burden imposed by the handwritten

date requirement is slight” *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 U.S. Dist. LEXIS 46352, at *24 (E.D. Pa. Mar. 16, 2022) (rejecting a strict scrutiny standard and considering only whether Pennsylvania has “important regulatory interests . . . to justify the restrictions”).³

The Dating Requirement is far less burdensome than other challenged election procedures that were not subject to strict scrutiny. In *In re Nomination of Berg*, 712 A.2d 340 (Pa. Commw. Ct. 1998), *aff’d*, 713 A.2d 1106 (Pa. 1998), a petitioner challenged Pennsylvania’s requirement that prospective gubernatorial candidates obtain 100 signatures from ten counties on their nominating petition. A similar requirement for state Supreme Court candidates was challenged in *Cavanaugh v. Shaeffer*, 444 A.2d 1308 (Pa. Commw. Ct. 1982), *aff’d* 444 A.2d 1165 (Pa. 1982). In both cases, the courts concluded that the ballot access requirement did not have a “real and appreciable impact” on the right to vote and therefore applied the rational basis test, rather than strict scrutiny. *Berg*, 713 A.2d at 1109 (*quoting Cavanaugh*, 444 A.2d at 1311). Surely the act of writing a date on an envelope is a less severe burden than collecting signatures from dozens of voters in multiple different counties.

³ While this district court’s decision was overruled on other grounds, this portion of the decision (declining to apply strict scrutiny) was not appealed to the Third Circuit. *See Migliori v. Lehigh Cty. Bd. of Elections*, No. 22-1499, Appellant’s Brief (ECF # 32) (filed March 29, 2022).

The Commonwealth Court wrongly applied the strict scrutiny standard because the Dating Requirement is not a “severe” or “significant” burden on the right to vote.

2. Strict Scrutiny Does Not Apply to Free and Equal Elections Clause Challenges.

The Commonwealth Court further erred by applying strict scrutiny review to a challenge under the Free and Equal Elections Clause when this 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.” *Baxter*, at *65 (McCullough, J., dissenting); *see also BPEP*, at *134 (McCullough, J., dissenting).

In *League of Women Voters of Pa. v. Commonwealth* (“*LWV*”), this Court held that it considers claims under the Free and Equal Elections Clause as “distinct” from those brought under the U.S. Constitution, “adjudicat[ing] them separately, utilizing the relevant Pennsylvania and federal standards.” 178 A.3d 737, 812 (Pa. 2018). In considering Free and Equal Elections Clause cases, this Court “applie[s] the interpretation . . . set forth in *Winston*,” while Fourteenth Amendment cases “utilize[] the test for an equal protection clause violation [by] examin[ing] whether [a] statute serve[s] to impermissibly classify voters without a reasonable basis to do so.” *Id.*

This Court followed this distinction four years ago in *Pa. Democratic Party*, when it “conducted no independent [strict scrutiny] analysis under the [Free and

Equal Elections] Clause[.]” *BPEP*, at *134 (McCullough, J., dissenting) (citing *Pa. Democratic Party*, 283 A.3d at 386 n.35). And just three months ago in *Walsh*, this Court “reaffirmed that strict scrutiny does not apply to free and equal elections clause challenges to neutral, universally-applicable ballot-casting rules.” *Baxter*, at *66 (McCullough, J., dissenting). In *Walsh*, the Court “did not apply a strict scrutiny analysis” or even “mention the ‘scrutiny’ analysis at all, further underscoring . . . that it does not apply to free and equal elections clause challenges.” *Id.* at *67 (citing *Walsh*, 322 A.3d at 907-09).

Thus, the Commonwealth Court further erred by applying strict scrutiny review to a Free and Equal Elections Clause challenge, particularly since this Court already indicated such challenges should be analyzed separately and recently declined to apply strict scrutiny in a similar case.

3. Applying Strict Scrutiny to the Dating Requirement Would Hinder the Equitable and Efficient Operation of Pennsylvania’s Elections.

Strict scrutiny is not only the incorrect standard as a matter of law but is wildly impractical and would make it difficult for the General Assembly to ensure that Commonwealth elections are operated equitably and efficiently. The United States Supreme Court and this Court have both cautioned that “subjecting **every** voting regulation to strict scrutiny and requiring that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure

that elections are operated equitably and efficiently.” *Berg*, 713 A.2d at 1109 (emphasis added) (cleaned up) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

C. The Dating Requirement Does Not Violate the Free and Equal Elections Clause Because It Applies to All Voters Equally and Does Not Make Voting So Difficult as to Amount to a Denial.

This Court’s Free and Equal Elections Clause jurisprudence reflects a history of intent to exclude discrimination, not only between electors, but between different places in the state. *See* Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania: Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883). In an early case applying the provision, this Court summarized that:

[E]lections are 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 every other voter; when each voter under the law has the same 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.

Winston v. Moore, 91 A. 520, 523 (Pa. 1914). More recently, this Court explained that “the actual and plain language of” the Free and Equal Protection Clause “mandates that all voters have an equal opportunity to translate their votes into representation.” *LWV*, 178 A.3d at 804.

When confronted with challenges to the constitutionality of election statutes under the Free and Equal Elections Clause, this Court has not applied a strict scrutiny standard, as discussed in Part I.B.2 *supra*. Instead, the Court has asked whether the challenged restriction impairs anyone’s *right* to vote (or makes voting so difficult as to amount to a denial), and whether it applies to all voters equally. Contrary to the Commonwealth Court’s conclusion, the Dating Requirement does neither. It is a minor procedural requirement that does not prevent any eligible voter from casting one’s ballot or having one’s vote counted if the voter complies with it. The requirement applies equally to all absentee and mail-in voters, without discriminating against any particular group/class of voters.

1. The Dating Requirement Does Not Impair Anyone’s *Right* to Vote or Make Voting So Difficult as to Amount to a Denial.

The Free and Equal Elections Clause “strike[s] . . . at all regulations of law which shall impair the *right* of suffrage,” and only when legal voters are “denied the *right* to vote, the election is not free and equal.” *LWV*, 178 A.3d at 809, 813 n.71 (emphasis added) (internal citations omitted). But “[e]ven 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., dissenting) (emphasis added). The Dating Requirement is a simple voting rule that helps ensure the orderly conduct of elections, and voters failing to follow the rule are not denied their *right* to vote.

Past decisions of Pennsylvania courts illustrate this distinction. For example, election deadlines were extended when a natural disaster or emergency threatened to functionally deny voters their right to vote for reasons outside of their control. *See Pa. Democratic Party*, 238 A.3d at 371 (COVID-19 pandemic); *In re General Election-1985*, 531 A.2d 836, 838-39 (Pa. Commw. Ct. 1987) (flooding).

The Free and Equal Elections Clause was also implicated when voting districts were structured in ways that denied certain Pennsylvanians their *right* to vote, such as when a newly-created school district overlapped with the boundaries of two existing school districts, depriving residents of the two preexisting school districts “of their *right* to vote for school directors” in the new district (*In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929) (emphasis added)), when a redistricting plan excluded ten municipalities from any legislative district, denying voters in those communities “the *right* to vote for a representative in the General Assembly,” *Shoemaker v. Lawrence*, 31 Pa. D.&C. 681, 686 (Dauphin Co. C.C.P. 1938) (emphasis added), or when this Court determined a more recent redistricting plan “undermine[d] voters’ ability to exercise their *right* to vote in free and ‘equal’ elections,” *LWV*, 178 A.3d at 821.

While those cases involved an abridgement of the *right* to vote, the Dating Requirement does not deprive any Pennsylvanian of the *right* to cast his/her ballot (or make voting so difficult as to amount to a denial). *See Ritter*, 142 S.Ct. at 1825

(“When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot.”); *Pa. State Conference of the NAACP Branches v. Schmidt*, 97 F.4th 120, 133-35 (3d. Cir. 2024) (“[I]ndividuals are not ‘denied’ the ‘right to vote’ if non-compliant ballots [lacking a date] are not counted. . . . [W]e know no authority that the ‘right to vote’ encompasses the right to have a ballot counted that is defective under state law.”), *petition for cert. filed*, No. 24-363 (Sep. 27, 2024); *see also Baxter*, at *65-66 (McCullough, J., dissenting) (“[I]f 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. Instead, my ballot is disqualified because I did not follow the rules. That is not disenfranchisement; that is the rule of law.” (citations omitted)).

Instead, the Dating Requirement is an exceptionally easy step to complete that does not impose any significant additional burden on voters beyond other steps they must already take to complete and return their ballot. Voters must already fill out and sign the declaration on the envelope, which includes other attestations and identifying information. The simple step of writing the date on the envelope does not meaningfully increase the burden or complexity of the process. Because the Dating Requirement neither denies Pennsylvanians their right to vote nor renders

voting so difficult as to effectively impair the right, it does not violate the Free and Equal Elections Clause.

2. The Dating Requirement Applies Equally to All Voters, Without Discrimination.

The Free and Equal Elections Clause also means that “[e]ach and every Pennsylvania voter must have the *same* free and equal *opportunity* to select his or her representatives.” *LWV*, 178 A.3d at 814 (first emphasis added). The Dating Requirement applies to all voters equally—neither benefiting nor hindering any group, and certainly not discriminating against any voter “on the basis of his or her particular beliefs or view” as prescribed by the Free and Equal Elections Clause. *LWV*, 178 A.3d at 809.

Contrastingly, the Dating Requirement is “facially neutral because [it] require[s] all mail-in and absentee voters, regardless of their age, race, sex, religion, or creed, to place a date next to the signature on their ballot declaration.” *BPEP*, at *109 (McCullough, J., dissenting). But such neutral rules applying equally to all voters do not violate the Free and Equal Elections Clause. *See, e.g., Working Families Party*, 209 A.3d at 282 (upholding Pennsylvania’s “anti-fusion” statutes because minority party supporters had “the same right as every other voter”); *City Council of Bethlehem v. Marcincin*, 515 A.2d 1320, 1324 (Pa. 1986) (upholding term limits ordinance because it “neither ‘denies the franchise’ to the electors nor dilutes the vote of any segment of the constituency”); *Shankey v. Staisey*, 257 A.2d 897, 899

(Pa. 1969) (upholding a ballot access statute because “minority party candidates and their supporters” had to “secure the same showing of public support before being put on the ballot as required by a majority party candidate”); *Commonwealth ex rel. Jones v. King*, 5 Pa. D.&C. 515, 518 (Dauphin Co. C.C.P. 1924) (upholding a ballot access law because “[e]very voter is treated alike”).

In sum, the Commonwealth Court committed numerous errors in its constitutional analysis of the Dating Requirement, and therefore review by this Court is warranted to correct these manifest errors.

II. The Question Presented in This Case Is One of First Impression.

The constitutionality of the Dating Requirement under the Free and Equal Elections Clause is a matter of first impression for this Court, just as it was for the Commonwealth Court below. *See, e.g., Baxter*, at *36 (majority opinion) (“The question is one of first impression[.]”). Indeed, none of the parties have “identified any cases in which any court has considered this issue aside from *BPEP*[.]” *Id.* Because this case presents a question of first impression,⁴ allowance of this appeal is appropriate under Pa.R.A.P. 1114(b)(3).

⁴ As discussed in Part III, *infra*, this Court has considered questions nearly identical to the ones presented in this case several times, particularly in *Pa. Democratic Party*, 238 A.3d 345, and *Ball v. Chapman*, 289 A.3d 1 (Pa. 2022). Tautologically, the more distinct those cases are from this one, the more clearly this case presents questions of first impression; and conversely, if this case is not one of first impression, then it is even more clear that the decision below is in conflict with the prior holdings of this Court.

III. The Holding of the Commonwealth Court Conflicts with a Holding of This Court on the Same Legal Question.

The opinion of the Commonwealth Court below conflicts with holdings of this Court. First, as discussed in Part I.A, *infra*, “a statute is presumed to be constitutional and will not be declared unconstitutional unless it *clearly, palpably and plainly violates the constitution.*” *Purple Orchid*, 813 A.2d at 805 (internal citations omitted) (emphasis added). But the Commonwealth Court’s holding erred by failing to even assert (much less demonstrate) that the Dating Requirement is clearly, palpably and plainly unconstitutional.

Second, strict scrutiny only applies to election regulations that “impose[] a ‘severe’ burden on a plaintiff’s right to vote.” *Pa. Democratic Party*, 238 A.3d at 385 (emphasis added); *accord Working Families Party*, 169 A.3d at 1257 n.22 (“Only where a law imposes a *severe* burden on the right to vote is it subject to strict scrutiny.” (emphasis added) (citation omitted)). Yet, as discussed in Part I.B.1 *supra*, the Commonwealth Court held that strict scrutiny applies to the Dating Requirement despite making no attempt to explain how such Requirement imposes a “significant” burden on the right to vote. *Cf. Baxter*, at *48 (majority opinion). Furthermore, by applying strict scrutiny to a Free and Equal Elections Clause case at all, the decision below is inconsistent with this Court’s jurisprudence, including its recently issued opinion in *Walsh*, which declined to apply any form of strict scrutiny.

Lastly, the Commonwealth Court’s holding is in even more direct conflict with *Pa. Democratic Party*, which upheld the *entire* set of ballot declaration requirements (including the date) for mail-in ballots against a Free and Equal Elections Clause challenge (238 A.3d at 374) and *Ball v. Chapman*, which upheld the Dating Requirement as “unambiguous and mandatory.” 289 A.3d 1, 22 (Pa. 2022).

Because the holdings of the Commonwealth Court either implicitly (by ignoring) or explicitly contradicts with several holdings of this Court on the same legal questions, review is warranted pursuant to Pa.R.A.P. 1114(b)(2).

IV. The Question Presented in this Case Is of Such Public Importance as to Require Prompt and Definitive Resolution by This Court.

In addition to the novel and constitutional questions presented by this case, and the need to correct the manifest errors below, this Court should grant review because “prompt and definitive resolution” is required of this Court to ensure that the same election procedures will apply to all 67 of Pennsylvania’s counties before the next election. Pa.R.A.P. 1114(b)(4). If left in place, the Commonwealth Court’s decision would create wildly different rules for Philadelphia versus the rest of the Commonwealth. *Compare* Order, *Baxter*, at *1 (Oct. 30, 2024) (“The Philadelphia County Board of Elections is ORDERED to count the undated mail-in ballots”) *with* *Ball*, 289 A.3d at 23 (“[O]ur Election Code requires the disqualification of ballots that arrive in undated or incorrectly dated return envelopes”). This divergence in counting would create a situation that plainly violates article VII,

section 6 of the Pennsylvania Constitution, which mandates that “[a]ll laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State”⁵

This outcome—far from satisfying the Free and Equal Elections Clause—would actually violate it. As discussed above, this Clause “mandates that all voters have an *equal opportunity* to translate their votes into representation.” *LWV*, 178 A.3d at 804. Under the Election Code, properly applied, all electors are treated equally and subject to the same rules *ex ante*, which give each eligible elector an *equal opportunity* to vote by simply following the mail-in ballot voting procedures set forth in 25 P.S. § 3146.6(a) and 25 P.S. § 3150.16(a).

However, the decision below, if not reviewed by this Court, would lead to violations of the Free and Equal Elections Clause by county boards of elections, because under the Commonwealth Court’s order, electors such as Individual Respondents would be subject to one set of rules, while electors in other parts of the Commonwealth another. This approach would actually deprive similarly-situated electors from having an equal opportunity to cast a valid vote, in contravention of the Free and Equal Elections Clause. Such a result would also create federal constitutional issues under the Fourteenth Amendment. *See, e.g., Gray v. Sanders*, 372 U.S. 368, 380 (1963); *see also Bush v. Gore*, 531 U.S. 98, 106-07 (2000).

⁵ This provision does provide for certain exceptions not applicable here.

To avoid unending litigation in other counties and the constitutional challenges that would follow if the decision below is allowed to stand without modification, this Court should grant review under Rule 1114(b)(4) if for no other reason than to promptly and definitively ensure a uniform set of election procedures applies before Pennsylvania's next elections.

CONCLUSION

For any or all of the foregoing reasons, review by this Court is warranted. Accordingly, *Amici Curiae* respectfully request that this Court exercise its "sound judicial discretion" and grant Intervenor-Petitioners' Petition for Allowance of Appeal.

Dated: November 12, 2024

Respectfully submitted,

/s/ Zachary M. Wallen

Zachary M. Wallen

Pa. ID No. 309176

CHALMERS, ADAMS, BACKER &

KAUFMAN, LLC

301 South Hills Village Drive

Suite LL200-420

Pittsburgh, PA 15241

(412) 200-0842

(412) 235-5001 (facsimile)

zwallen@chalmersadams.com

Counsel for Amici Curiae

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Amicus Curiae Brief contains 4,440 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby 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.

/s/ Zachary M. Wallen

Counsel for Amici Curiae