

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

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395 EAL 2024 and 396 EAL 2024

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**BRIAN BAXTER and SUSAN KINNIRY,**  
*Respondents,*

v.

**PHILADELPHIA BOARD OF ELECTIONS,**  
*Respondent,*

**REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY  
OF PENNSYLVANIA,**  
*Intervenor-Petitioners,*

**PENNSYLVANIA DEMOCRATIC PARTY,**  
*Proposed Intervenor-Respondent.*

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**APPLICATION TO INTERVENE  
OF PROPOSED INTERVENOR-RESPONDENT AND  
PROPOSED ANSWER TO PETITION FOR ALLOWANCE OF APPEAL**

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The Pennsylvania Democratic Party (“PDP” or “Proposed Intervenor-Respondent”) files this renewed<sup>1</sup> application to intervene as respondent in this application for allowance of appeal of the petitioners, the Republican National Committee (“RNC”) and the Republican Party of Pennsylvania (“RPP”) and asks the Court to accept its attached Answer to the Petition for Allowance of Appeal (Attachment A).

## **INTRODUCTION**

This case presents a question of “substantial public importance.” 210 Pa. Code R. 1114(4). That question is whether the Pennsylvania Constitution’s Free and Equal Elections Clause, art. I, §5, prohibits county boards of elections from refusing to count eligible voters’ timely received mail ballots solely because a voter did not correctly date the ballot-return envelope—a date that serves no purpose because a ballot’s timeliness is determined by when county officials scan it upon receipt.

The Court should grant the application to intervene of the PDP because it meets the qualifications for mandatory or discretionary intervention. The PDP’s interests are substantial, direct, and immediate given its role and interest in ensuring that its members can vote to elect Democratic representatives without risk of needless ballot disqualification under the date requirement at issue. The substantial, direct, and

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<sup>1</sup> The Court’s November 1, 2024 Order Denied Proposed Intervenors’ Application to Intervene as moot without prejudice to renew their request in connection with the present petition for allowance of appeal.

immediate interests of the PDP also confer standing on it because it could have been included as an original party to the case, justifying intervention.

## **ARGUMENT**

### **I. THE PDP’S APPLICATION TO INTERVENE SHOULD BE GRANTED AND ITS ANSWER TO THE APPLICATION ACCEPTED**

The PDP is entitled to intervene because this case will affect its legally enforceable interests, and it could have joined as an original party with standing to litigate. *See* Pa.R.C.P. 2327(3)-(4). No ground for denying intervention exists. None of the existing parties adequately represent the PDP’s interests; its intervention is timely and would not unduly delay this litigation; and its claims are “in subordination to and in recognition of the propriety of the action.” Pa.R.C.P. 2329. Accordingly, intervention is mandatory, not discretionary. *See id.* Even if any grounds to deny intervention were present, discretionary intervention would be warranted because the PDP has an important and unrepresented perspective on this significant matter. *See Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

#### **A. The PDP Has A Legally Enforceable, Particularized Interest In This Matter, Conferring Standing And Confirming That It Could Have Brought This Action Itself.**

This litigation will significantly affect the PDP’s legally enforceable interests in ensuring that its members can vote to elect Democratic representatives without risk of needless ballot disqualification under the date requirement. Because these

interests are “substantial, direct, and immediate,” *Markham v. Wolf*, 136 A.3d 134, 139 (Pa. 2016), they also confer standing on the PDP because the organization could have been an original party here.

The PDP dedicates significant resources toward educating Pennsylvania Democratic voters on how to vote by mail, which diverts PDP resources from affirmative election efforts. *See* Declaration of Mitch Kates ¶¶17-26 (“Kates Decl.”) (Attachment B). The PDP has a significant interest in not continuing to divert resources to address the date requirement at the expense of other priorities. *Id.* ¶¶26, 28.

The PDP also has a substantial interest in protecting the rights of its members to have their votes counted. These members include individuals qualified to vote in every county in Pennsylvania whose ballots are discarded by enforcement of the date requirement. Kates Decl. ¶27. The PDP’s membership also includes candidates for offices in every county in Pennsylvania. The disqualification of eligible mail ballots under the date requirement threatens the electoral prospects of those candidates, thus impeding the PDP’s organizational mission. In recognition of the PDP’s substantial interests in litigation affecting the electoral rights of Democratic voters and candidates, courts routinely grant intervention to the PDP in similar circumstances. *See, e.g., BPEP v. Schmidt*, 2024 WL 4002321, at \*3 (Pa. Commw. Ct. Aug. 30, 2024) (en banc), *vacated*, 322 A.3d 221 (Pa. 2024); Order Granting Motion To Proceed As

Intervenor, *Pennsylvania State Conference of NAACP Branches v. Northampton County Board of Elections*, No. 23-03166 (3d Cir. Jan. 3, 2024).

**B. No Valid Grounds Exist To Support Denial Of Intervention.**

None of Rule 2329’s three grounds for denying intervention applies.

*First*, no party in this litigation shares the PDP’s interests. The individual voter-respondents seek to have their own ballots counted, but they do not share the interests of the PDP, which is a partisan organization that mounts political campaigns and educates and mobilizes Democratic voters. The Republican petitioners clearly do not represent the PDP’s interests, because they have consistently sought to disenfranchise mail voters—including the PDP’s constituents—who mistakenly violate the purposeless date requirement.

*Second*, this intervention motion is timely and granting the PDP intervention will not delay the timely advancement of the action, prejudice the adjudication of any rights or otherwise harm the parties. Pa.R.C.P. 2329(3). The PDP’s intervention will not delay the resolution of this litigation. It merely seeks clarity on the rules for any upcoming election given that the November 2024 election has now passed. Additionally, the PDP is eager to participate with the other parties in an appeal process that will permit a normal briefing schedule and oral argument.

*Third*, this intervention motion is “in subordination to and in recognition of the propriety of the action.” Pa.R.C.P. 2329. Although the meaning of this language

is unclear and relatively little interpretive case law interprets it, no rationale would support refusal of this application under this provision. The PDP does not contest that the Court would have personal jurisdiction over it if the Court grants intervention. *Cf. Bannard v. New York State Natural Gas Corp.*, 172 A.2d 306, 313 (Pa. 1961). The PDP agrees to take the facts and procedural history of this case as it finds it, and does not question the propriety of the proceedings to date. *Cf. Tremont Township School District v. West Anthracite Coal Co.*, 113 A.2d 234, 237 (Pa. 1955).

**C. Alternatively, Permissive Intervention Is Warranted.**

Even if Rule 2329 were to allow for denial of intervention, “the court [has] the discretion” to permit intervention “where the petitioner falls within one of the classes enumerated in Rule 2327.” *Larock*, 740 A.2d at 313. The PDP falls into two of these classes—a judgment in this case will affect its legally enforceable interests, and it could have joined as original parties to this action. This Court thus can and should grant intervention on a discretionary basis because of the PDP’s important perspective on this significant issue of public concern.

**CONCLUSION**

For these reasons, the PDP asks this Court to grant its application to intervene and to docket its Answer to the Application to Intervene.

November 22, 2024

Respectfully submitted,

/s/ Clifford B. Levine

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## CERTIFICATE OF COMPLIANCE

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/ Clifford B. Levine  
CLIFFORD B. LEVINE



**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing was served on all counsel of record on November 22, 2024 by this Court's electronic filing system.

*/s/ Clifford B. Levine* \_\_\_\_\_  
CLIFFORD B. LEVINE

**IN THE SUPREME COURT OF PENNSYLVANIA**

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*Respondents,*

v.

PHILADELPHIA BOARD OF ELECTIONS,  
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REPUBLICAN PARTY OF PENNSYLVANIA,  
*Intervenor-Petitioners,*

PENNSYLVANIA DEMOCRATIC PARTY,  
*Proposed Intervenor-Respondent.*

No. 77 EM 2024

**[PROPOSED] ORDER GRANTING THE APPLICATION TO INTERVENE  
OF THE PENNSYLVANIA DEMOCRATIC PARTY**

AND NOW, this \_ day of \_\_\_\_\_, 2024, and upon consideration of the application to intervene filed by the Pennsylvania Democratic Party (“PDP”), it is hereby ORDERED that the application is GRANTED. The Court DIRECTS the Prothonotary to enter the PDP on the docket in this matter as intervenor-respondent, and to DOCKET their application and related materials.

BY THE COURT:

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# **ATTACHMENT A**

**IN THE SUPREME COURT OF PENNSYLVANIA  
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**PENNSYLVANIA DEMOCRATIC PARTY,**  
*Proposed Intervenor-Respondent.*

---

**ANSWER OF THE PROPOSED INTERVENOR-RESPONDENT,  
THE PENNSYLVANIA DEMOCRATIC PARTY,  
TO THE PETITION FOR ALLOWANCE OF APPEAL**

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## INTRODUCTION

Under the Pennsylvania Election Code, those who choose to vote by mail ballot<sup>1</sup> are required to complete several steps. One requirement is to handwrite a date on the outer envelope in which the voter’s mail ballot is submitted. The date the voter writes on the envelope may or may not be the date on which the voter completed the ballot. None of the Commonwealth’s 67 county boards of elections use the handwritten date to measure the timeliness of a mail ballot—timeliness is determined when the ballot is scanned into the mail-ballot tracking system. Boards of elections do not use the handwritten date to measure or determine the voter’s eligibility—eligibility is verified before a mail ballot is even sent to a voter. The Commonwealth’s 67 county boards of elections thus do not use the handwritten date for any purpose.

The date requirement serves no cognizable state interest, let alone a compelling state interest. Nevertheless, application of the archaic handwritten date requirement results in the disqualification of otherwise valid ballots of eligible Pennsylvania voters in each election cycle. Although the enforceability of this requirement has become an issue of significant importance in this Commonwealth, this Court has never considered whether the handwritten date requirement violates the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, §5. This question is ripe for the Court’s review.

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<sup>1</sup> This brief uses “mail ballot” to mean both mail and absentee ballots unless otherwise indicated.



Because the Commonwealth is between election cycles, the Court now has the opportunity to revisit its prior decisions regarding the statutory interpretation of the handwritten date requirement to determine whether the requirement should be interpreted to protect the franchise, consistent with the decades-long jurisprudence of this Court’s interpretation of the Election Code.

Because of the significance of these questions, the Pennsylvania Democratic Party (“PDP”) agrees with Intervenor-Petitioners Republican National Committee (“RNC”) and Republican Party of Pennsylvania (“RPP”) that the Court should grant the Petition for Allowance of Appeal (the “Petition”). The PDP rejects, however, the substantive positions of the RNC and RPP. The PDP respectfully asks the Court to grant allowance of appeal; to address a neutral set of questions regarding the application and interpretation of the handwritten date requirement in the Election Code; and to follow the normal processes and schedule of an appeal, with full briefing and oral argument.

Now is the opportune time for the Court to address the unconstitutional application of the handwritten date requirement, and no procedural barriers exist to doing so.<sup>2</sup> The November 5, 2024 General Election is over, the

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<sup>2</sup> The arguments of the RNC and the RPP to the contrary are baseless. Unlike *BPEP, Black Political Empowerment Project, et al. v. Schmidt, et al.* (“*BPEP*”), No. 283 M.D. 2024, 2024 WL 4002321 (Pa. Commw. Ct. Aug. 30, 2024), *vacated on other grounds*, No. 68 MAP 2024 (Pa. Sept. 13, 2024), this is a statutory appeal by two voters under section 3157 of the Election Code from a decision of the Philadelphia Board of Elections in the context of a Special Election that was held exclusively in that county. The other 67 county boards of elections are not indispensable parties to this suit. *See e.g., Genser v. Butler Cnty. Bd. of Elections*, No. 26 WAP 2024, 2024 WL 4553285, at \*3 (Pa. Oct. 23, 2024) (section 3157 appeal that only involved Butler County Board of Elections). Additionally, the

Commonwealth is between election cycles, and this litigation would not disrupt any county board of elections' administrative duties.

### **OPINION BELOW**

This is an appeal from the Commonwealth Court majority opinion authored by Judge Ceisler and joined by Judge Jubelirer and Judge Wojcik on October 30, 2024. Judge Wolf and Judge McCullough dissented and filed separate opinions. Copies of the opinions from the Commonwealth Court are attached to the RNC's and RPP's Petition at Appendix A.

The Court of Common Pleas orders that the Commonwealth Court affirmed are also attached to the RNC's and RPP's Petition at Appendix B.

### **ORDER IN QUESTION**

The text of the Commonwealth Court's Order subject to the RNC's and RPP's Petition 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.

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Commonwealth Court had jurisdiction under 42 Pa. C.S. § 762(a)(4)(i)(C), and the RNC and RPP waived any jurisdictional defects in the Commonwealth Court by filing their appeal directly in that Court and not thereafter raising any objections on jurisdictional grounds. *See* 42 Pa. C.S. § 704; Pa. R.A.P. 741; *Com. v. Faust*, 702 A.2d 598, 600 n.1 (Pa. Commw. Ct. 1997), *appeal denied* 790 A.2d 1018 (Pa. 2001).

## **COUNTER-STATEMENT OF QUESTIONS FOR REVIEW**

1. Where the Commonwealth is between election cycles, whether the Court should determine if application of the handwritten date requirement in 25 P.S. § 3146.6(a) and 25 P.S. § 3150.16(a) violates the Free and Equal Elections Clause of the Pennsylvania Constitution because it is a significant issue of first impression?

**Suggested Answer: Yes.**

2. Whether the Court should reconsider its decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023) and determine that the use of the word “shall” in the context of the handwritten date requirement is directory and not mandatory, consistent with decades-long jurisprudence promoting the enfranchisement of voters?

**Suggested Answer: Yes.**

## **COUNTER-STATEMENT OF THE CASE**

### **I. FACTUAL BACKGROUND**

The parties below stipulated to the following facts contained in the Respondents’ Petition for Review in the Nature of a Statutory Appeal (the “Petition”) and the Declarations attached to the Petition, and they are undisputed. See Transcript of Petition Hearing at 5-6, 20, *Baxter et al., v. Phila Bd. of Elections*, No. 240902481 (Sept. 25, 2024).

## **A. Voting By Mail In Pennsylvania**

In 2019, Pennsylvania enacted new mail-in voting provisions, which extended the option to vote by mail to any registered voter (as opposed to only “absentee” voters). Pet. ¶ 26. A voter seeking to vote by mail must submit an application that requires all the information necessary for county boards of election to verify their eligibility to vote in Pennsylvania. Pet. ¶ 27. After the application is submitted, the county board of elections confirms the applicant’s qualifications to vote. Pet. ¶ 28. Once confirmed, the county board sends the voter a mail ballot package, which consists of the ballot, a “secrecy envelope,” and a pre-addressed outer return envelope, on which a voter declaration form is printed. Pet. ¶ 29.

Once the voter receives the ballot, they must mark the ballot, put the ballot inside the secrecy envelope, and then place the secrecy envelope in the pre-addressed outer return envelope. Pet. ¶ 32. The Election Code provides that the voter “shall . . . fill out, date and sign the declaration” printed on the outer return envelope before returning the mail ballot package back to the county board (the “Handwritten Date Requirement”). Pet. ¶ 31 (citing 25 P.S. §§ 3146.6(a), 3150.16(a)).

Poll books kept by the county indicate which voters have requested mail ballots and which have returned them. Pet. ¶ 29. A mail ballot is timely so long as the voter returns it to the county board of elections by 8 p.m. on Election Day. Pet. ¶ 33. Upon receipt of a mail ballot, county boards of elections

confirm its timeliness by stamping the outer return envelope with the date of receipt and logging it in the Department of State's Statewide Uniform Registry of Electors ("SURE") system, which is a statewide database the counties use to generate their poll books. Pet. ¶ 34. Each timely ballot is then verified pursuant to 25 P.S. § 3146.8(g)(3). *Id.*

**B. The Handwritten Date Requirement Serves No Purpose.**

For years, application of the Handwritten Date Requirement has resulted in the arbitrary and baseless disenfranchisement of otherwise eligible Pennsylvania voters. For example, in 2022, over 10,000 timely absentee and mail-in ballots were rejected because of the dating provision. Pet. ¶ 38. In the 2024 primary election, more than 4,000 mail ballots across the Commonwealth were marked cancelled in the SURE system due to a missing or incorrect handwritten date. Pet. ¶ 36, Ex. 3.

The Handwritten Date Requirement serves no purpose. Pet. ¶ 39. Federal and state lawsuits raising statutory challenges have conclusively established that the Handwritten Date Requirement is a meaningless vestige of the past, which is not necessary to establish voter eligibility or to determine the timeliness of a mail ballot. *Id.*; see *Pa. State Conf. of NAACP v. Schmidt* ("NAACP I"), 703 F. Supp. 3d 632, 668 (W.D. Pa. 2023), *rev'd on other grounds*, 97 F.4th 120 (3d Cir. 2024) ("County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return

Envelope for any purpose” related to determining a voter’s age, citizenship, county or duration of residence, felony status, or “timeliness of receipt”); *Pa. State Conf. of NAACP Branches v. Schmidt* (“*NAACP I*”), 97 F.4th 120, 125, 127, 129 (3d Cir. 2024) (agreeing the handwritten date plays no role in determining a ballot’s timeliness or voter qualifications or in detecting fraud); *see also, e.g., Black Political Empowerment Project, et al. v. Schmidt, et al.* (“*BPEP*”), No. 283 M.D. 2024, 2024 WL 4002321 at \*32 (Pa. Commw. Ct. Aug. 30, 2024), *vacated on other grounds*, No. 68 MAP 2024 (Pa. Sept. 13, 2024) (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud.”). The Third Circuit reached this conclusion in *NAACP I* and *NAACP II* after participation of all 67 county boards of election and consideration of a complete record after discovery.<sup>3</sup> Pet. ¶ 39 n. 13.

In practice, a voter whose mail ballot is timely received could only have signed the voter declaration form in between the date the county board of elections sent the ballot and the deadline on Election Day. Pet. ¶ 40. Ballots

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<sup>3</sup> The RNC and RPP ask the Court to grant review and reverse on the basis that the Commonwealth Court and the trial court erred in not allowing further factual development here, but those parties agreed that the facts were undisputed on the record during the hearing before the same trial court. *See* Transcript of Petition Hearing at 20, *Baxter et al., v. Phila Bd. of Elections*, No. 240902481 (Sept. 25, 2024). A complete factual record was considered in *NAACP I* and *NAACP II* on whether the Handwritten Date Requirement serves any purpose, and essentially identical parties should not be required to engage in the same discovery to create a “record” concerning established facts.

received after 8:00 p.m. on Election Day are not counted regardless of the date on the voter's outer envelope. *Id.* (citing *NAACP I*, 703 F. Supp. 3d at 679).

**C. The Philadelphia Board of Elections Timely Received Respondents' Mail Ballots, But They Were Not Counted.**

Respondents are qualified voters registered to vote in Pennsylvania. Pet. ¶ 41. Ahead of a Special Election held in Philadelphia County on September 17, 2024, Respondents validly applied for, received, and timely submitted their mail ballots to the county board. Pet. ¶ 42. However, Respondents forgot to handwrite a date on the outer declaration envelope of their mail ballot and did not correct the error prior to Election Day. Pet. ¶¶ 41-44. At a public meeting on September 21, 2024 held by the Philadelphia County Board of Elections (the "Board"), the Board voted 2-1 not to count mail ballots that had arrived in undated declaration envelopes for the Special Election, including those of Respondents. Pet. ¶¶ 45-54.

**II. PROCEDURAL BACKGROUND**

This case arises from the decision of the Board not to count the mail ballots of the Respondents and 67 other voters in the Special Election held on September 17, 2024 because of their failure to comply with the Handwritten Date Requirement.

Respondents challenged the Board's decision by filing a Petition for Review in the Nature of Statutory Appeal pursuant to 25 P.S. § 3157. On September 25, 2024, the trial court conducted a hearing on the petition and with

its September 26 decision, it granted the petition and reversed the Board's decision not to count Respondents' votes. The court concluded that the Board's refusal to count the ballots because of the absence of a handwritten date violates the Free and Equal Election Clause. Sept. 26 Order, No. 02481, at ¶ 1(b).

The Board appealed the trial court's decision to the Commonwealth Court to confirm its obligation, as a matter of Pennsylvania law, to count the undated and misdated ballots. *See* Oct. 1 Notice of Appeal of Phila. Bd. of Elections. The RNC and RPP also appealed directly to the Commonwealth Court. *See* Oct. 3 Notice of Appeal of RNC and RPP.

On October 30, 2024, the Commonwealth Court issued an opinion affirming the trial court's ruling that directed that mail ballots with a defective handwritten date be counted in the Special Election held on September 17, 2024 because application of the handwritten date rule would violate the Free and Equal Elections Clause. Oct. 30 Maj. Op., No. 1305 C.D. 2024, at 1–2.

On October 31, 2024, the RNC and RPP filed an Emergency Application for Extraordinary Relief to this Court pending Application for Allowance of Appeal, seeking to stay the application of the Commonwealth Court's decision in the November 5, 2024 General Election. *See* Oct. 31 Emergency App. Of RNC and RPP. The PDP moved to intervene and opposed that application. On November 1, 2024, the Court granted the RNC and RPP's Emergency Application for Extraordinary Relief and stayed the application of the Commonwealth Court's decision. *See* Nov. 1 Order, No. 77 EM 2024, at 2.



The Court also denied the PDP’s petition to intervene as moot without prejudice, so that the PDP could renew its request in connection with the present Petition. *Id.*

### **REASONS FOR ALLOWANCE OF APPEAL**

The Court should accept this appeal in the normal course and address the question of whether the application of the Handwritten Date Requirement violates the Free and Equal Elections Clause because it is a question of first impression and is “one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court.” Pa. R.A.P. 1114(b)(3), (4). The Court should likewise accept this appeal and reconsider its decision *Ball v. Chapman* regarding the statutory interpretation of the Handwritten Date Requirement because that is also a question of substantial public importance consistent with decades-long jurisprudence in this Court that promotes and protects the right to vote in Pennsylvania.

#### **I. THE COURT SHOULD DECIDE WHETHER APPLICATION OF THE HANDWRITTEN DATE REQUIREMENT VIOLATES THE FREE AND EQUAL ELECTIONS CLAUSE.**

The PDP agrees that the Court should accept this appeal now, but should address the questions that the PDP presents. The PDP asks the Court to decide whether application of the Handwritten Date Requirement violates the Free and Equal Elections Clause. Now is the opportune time for the Court to address this question because (1) it is a question of first impression; (2) it is a question of

substantial importance; and (3) the Commonwealth is between election cycles, which should alleviate any concerns that this will create “substantial alterations” to existing laws during the pendency of an election.

**A. Whether The Handwritten Date Requirement Violates The Free And Equal Elections Clause Is An Issue Of First Impression.**

The Court should accept this appeal because it involves a question of first impression. Pa. R.A.P. 1114(b)(3). This Court has never resolved the question of whether application of the Handwritten Date Requirement to disqualify otherwise valid mail ballots violates the Free and Equal Elections Clause.

In *Pennsylvania Democratic Party v. Boockvar* (“*Boockvar*”) this Court addressed whether the Free and Equal Elections Clause requires counties to notify voters who made a mistake completing their ballots and to provide an opportunity for them to cure these mistakes. 238 A.3d 345, 373 (Pa. 2020). The Court concluded that the Clause does not do so and explained that the challenger there (the PDP) was thus “not entitled to the relief it seeks.” *Id.* at 374. That is an entirely different question than whether discarding undated or misdated ballots violates the Pennsylvania Constitution. *Boockvar* did not address this question, and certainly never “held” that strict enforcement of the meaningless date requirement complies with the Free and Equal Elections Clause.

This Court also never resolved this question in *Ball v. Chapman*. In that case, the Court held, purely as a matter of statutory interpretation, that the

Election Code “require[s] the disqualification of ballots that arrive in undated or incorrectly dated return envelopes.” *Ball*, 289 A.3d at 23. The Court made no holding about the Free and Equal Elections Clause—although three members of the then-six-member Court suggested in dicta that enforcement of the date requirement *would violate the Clause*. *Id.* at 27 n.156 (Wecht, J., joined by Todd, C.J., and Donohue, J.).

Finally, the Court did not resolve this issue through its Order that reversed the Commonwealth Court’s decision in *BPEP*. *Black Pol. Empowerment Project v. Schmidt*, 322 A.3d 221 (Mem) (Pa. 2024). The Court’s decision in *BPEP* was premised on procedural issues not present here. *Id.* at 222. In fact, Justice Wecht stated that, even notwithstanding any procedural considerations, the matter should have been submitted on the briefs so that the Court could issue a “prompt and definitive ruling on the constitutional question . . . of paramount public importance” presented in *BPEP* and now this case. *Id.* at 223 (Wecht, J., dissenting).

**B. The Issue Before The Court Is Of Substantial Public Importance.**

Justice Wecht’s statement in *BPEP* underscores that the question before the Court is not only one of first impression, but substantial public importance. Pa. R.A.P. 1114(b)(3), (4). As explained, the application of the Handwritten Date Requirement has disqualified thousands of votes by otherwise eligible Pennsylvania voters in recent elections. Because of the clear implication that

the application of this requirement violates the Free and Equal Elections Clause, the Court should accept this appeal and permit full briefing and oral argument on these important issues.

Now is the opportune time for the Court to decide this question. As Justice Brobson recently explained, questions arising under the Election Code relating to the Free and Equal Elections Clause should be brought in a “timely fashion.” *See Republican Nat’l Comm. v. Schmidt*, No. 108 MM 2024, 2024 WL 4406909, at \*2 (Pa. Oct. 5, 2024). This appeal is timely. The Court has already held that this litigation will have no effect on the November 5, 2024 General Election, and the Commonwealth is otherwise between election cycles. This appeal presents no risk that a decision flowing from it would be “highly disruptive to county election administration,” or disruptive at all. *Id.* To the contrary, the Court’s resolution of the issues on appeal would lessen confusion in future elections and ensure that all eligible ballots cast by Pennsylvania voters are counted.

## **II. THE COURT SHOULD RECONSIDER ITS DECISION IN *BALL V. CHAPMAN*.**

This appeal also presents the opportunity for the Court to reconsider its decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023). There, the Court held that any mail ballot that did not comply with the Handwritten Date Requirement must result in disqualification of the ballot as a matter of statutory interpretation. The Court’s decision was premised on the Election Code’s use

of the word “shall,” relying on the characterization of that word in *In re 2020 Canvass* as “mandatory.” See 289 A.3d at 21-22 (citing *In re 2020 Canvass*, 241 A.3d 1058, 1086-87 (Pa. 2020) (Wecht, J., concurring and dissenting)).<sup>4</sup>

The application of *Ball* has similarly led to the disenfranchisement of Pennsylvania voters and raises a substantial issue of public importance, particularly in view of this Court’s election jurisprudence over the last century.

Pennsylvanians have a constitutionally guaranteed right to vote in elections that are “free and equal.” Pa. Const., art. I, § 5; *see also* Pa. Const. art. I, § 26; Pa. Const., art. VII, § 1. Under the Constitution, “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. The Free and Equal Elections Clause is written in the “broadest possible terms” and guarantees not only the opportunity to participate in the electoral process on equal terms, but also that “all aspects of the electoral process, to the greatest degree possible, be kept open and unre-

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<sup>4</sup> In *In re 2020 Canvass*, three justices suggested in a partial dissent that the Handwritten Date Requirement serves three purposes: (1) it is proof of when the elector “actually executed the ballot in full”; (2) it establishes a “point a time” from which the voter’s eligibility to cast the ballot can be measured; and (3) it ensures the voter completed the ballot within the “proper timeframe” and prevents the tabulation of “potentially fraudulent back-dated votes.” 241 A.3d at 1090-91 (op. of Dougherty, J.). In a partial concurrence and partial dissent in *Ball*, Justice Brobson, joined by Justice Mundy, recognized that the Handwritten Date Requirement has no “bearing on determining voter qualification at all” because the qualification is established before the mail-in ballot is sent to the elector through other processes in the Code. 289 A.3d at 39. Further, the justices in *In re 2020 Canvass* did not have the benefit of the substantial record created in *NAACP I* and *NAACP II* at that time, which demonstrated that none of the three purposes identified is a legitimate interest that the date requirement actually serves. See Pet. ¶¶ 37, 39-40 (citing *NAACP I* and *NAACP II*).

stricted to the voters of our Commonwealth.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

To keep the electoral process in the Commonwealth as “open and unrestricted” as possible, any regulation that impairs (or outright denies) the right of suffrage, but furthers no interest in ensuring proper and honest election processes, imposes unreasonable, and thus unconstitutional burdens. *E.g.*, *Independence Party Nomination*, 57 A. 344, 345 (Pa. 1904) (“[The right of suffrage] cannot be denied, qualified, or restricted, and is only subject to such regulation as to the manner of exercise as is necessary for the peaceable and orderly exercise of the same right in other electors.”); *see also Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015) (“[T]he state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.”); *In re Recount of Ballots Cast in Gen. Election on Nov. 6, 1973*, 325 A.2d 303, 308 (Pa. 1974) (“Unreasonable impairment or unnecessary restrictions upon [the right of suffrage] cannot be tolerated.”).

For over a century, Pennsylvania election statutes have been evaluated against this standard, with this Court and other Pennsylvania courts routinely holding that voting rules cannot be enforced when they deny an elector their right to vote but further no other protectible interest. *See Clifford B. Levine & Jacob S. Finkel, Shall Your Vote Be Counted?: Evaluating Whether Election Code Provisions Are Directory or Mandatory*, 82 U. Pitt. L. Rev. 525, 546

(2021) (surveying and collecting Pennsylvania appellate decisions). This Court has been steadfast in protecting the right to vote in these cases even in the face of what has been termed “mandatory” statutory language.<sup>5</sup> In each of its decisions, this Court has explained that (notwithstanding that statutory text) non-compliance with unambiguous voting rules cannot be used to impair the right of suffrage if the voting rule is divorced from any election-related purpose. *See Norwood, Gallagher, In re Luzerne, In re Recount.*

The Court should accept this appeal and reconsider the substantial question of public importance addressed in *Ball v. Chapman*, i.e., whether use of the word “shall” in connection with the Handwritten Date Requirement should be interpreted in a mandatory or directory fashion. The past century of the Court’s jurisprudence interpreting election statutes in the context of the Free and Equal Elections Clause and the now undisputed fact that the date requirement serves no purpose justifies the Court’s reconsideration in this appeal. The statutory construction principles that have guided the Court’s prior decisions remain unaltered over the past century and should compel the same

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<sup>5</sup> *See, e.g., Appeal of Norwood*, 116 A.2d 552 (Pa. 1955) (holding that ballot marked with a “√” should be counted despite statute’s language that any ballot without an (x) in the space provided “shall” not be counted); *Appeal of Gallagher*, 41 A.2d 630, 631-32 (Pa. 1945) (holding that ballot could be counted with stray mark stating “no good” next to disfavored candidate despite Election Code’s clear instruction that the ballot must be rejected, reasoning that ballots should not be rejected for “minor irregularities” absent “compelling reasons”); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (allowing ballot marked in red ink in direct violation of Election Code’s language requiring blue or black ink); *In re Recount*, 325 A.2d 303, 308 (Pa. 1974) (refusing to reject ballots with pre-printed number despite Election Code provision’s language that such ballots “shall” be void and “shall” not be counted).

result as in *Norwood*, *Gallagher*, *In re Luzerne*, and *In re Recount*.<sup>6</sup> Moreover, the Commonwealth is between election cycles, so this is the best time to consider the question.

### **CONCLUSION**

The Court should accept this appeal, allowing briefing and oral argument in the ordinary course, and then affirm the Commonwealth Court's judgment.

November 22, 2024

Respectfully submitted,

/s/ Clifford B. Levine

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<sup>6</sup> The Statutory Construction Act enacted in 1972 was a recodification of existing statutory construction law, including the Statutory Construction Act of 1937. *See PPG Industries, Inc. v. Commonwealth*, 790 A.2d 261, 267 (Pa. 2001).



## CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 4,372 words within the meaning of Pa. R.A.P. § 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further 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/ Clifford B. Levine

## **CERTIFICATE OF SERVICE**

On November 22, 2024, I caused the foregoing to be electronically filed and to be served via the Court's electronic filing system on counsel of record for each party listed on the docket.

/s/ Clifford B. Levine

# **ATTACHMENT B**

**IN THE SUPREME COURT OF PENNSYLVANIA**

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395 EAL and 396 EAL 2024

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**BRIAN BAXTER and SUSAN KINNIRY,**  
*Respondents,*

v.

**PHILADELPHIA BOARD OF ELECTIONS,**  
*Respondent,*

**REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY  
OF PENNSYLVANIA,**  
*Intervenor-Petitioners,*

**PENNSYLVANIA DEMOCRATIC PARTY,**  
*Proposed Intervenor-Respondent.*

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**DECLARATION OF MITCH KATES**

I, Mitch Kates, hereby declare and state upon personal knowledge, as follows:

**Professional Experience and Responsibilities**

1. I currently serve as the Executive Director of the Pennsylvania Democratic Party (“PDP) and I have held that position since September, 2023.
2. Before serving as the Executive Director of the PDP, I was Political Director of the PDP, starting in that role in December, 2015.
3. As Executive Director of the PDP, I work with PDP officers and oversee the administration of the State Democratic Committee and state party activities, including the endorsement of statewide candidates.
4. I also help to oversee the operation of the Coordinated Campaign, the program that links all Democratic candidates on the ballot and conducts political, digital communications and field activities for all Democratic candidates running in an election cycle.

5. I supervise campaign expenditures to help county-level parties and candidates, including mail programs.

### **The PDP, Generally**

6. The PDP is the official state affiliate of the Democratic National Committee (“DNC”).

7. In practice, nothing in the PDP’s bylaws can contradict anything in the DNC bylaws (with the exception of primary endorsements in certain states). The PDP oversees 67 subsidiary county committees, whose bylaws, in turn, cannot contradict anything in the PDP bylaws.

8. Mail and absentee voting have been critical to the Pennsylvania strategy of the PDP since universal no-excuse voting was introduced in 2019 with Pennsylvania’s Act 77.

9. The PDP communicates with Pennsylvania voters concerning the timing of and how to participate in upcoming elections; encourages them to participate in the selection of the party’s nominees; and encourages them to support the party’s nominees during the general election.

10. The PDP represents the interest of Democratic voters in Pennsylvania by providing campaign resources, logistical support and coordination with other candidates. The number of Democratic candidates varies by year and cycle.

11. In 2024, the PDP represents the interests of the Democratic nominees for the President and Vice President, United States Senator, three statewide offices, 25 state Senate seats and virtually all of the 203 state House seats.

### **Increasing the Availability of Mail Voting Raises and, in Pennsylvania, Has Raised Voter Participation**

12. The PDP has the goal of universal voter participation. That means that it takes steps to facilitate safe, secure and convenient voting so that any eligible voter may exercise their right to vote. In our experience, allowing any qualified voter to vote by mail increases participation.

13. Using two recent state-run Democratic primaries as examples—one prior to no-excuse mail-in voting under Act 77 and one after Act 77 took effect—illustrates the point. In 2019, before Act 77 took effect, the Democratic primary participation was approximately 835,000. In 2021, by contrast, in a primary with similar offices, the turnout was over 1.1 million, a 32% increase. I believe that Act 77 is one of the principal reasons for this increase in voter

participation. Typically, participation in municipal primaries is lower than participation in presidential primaries and one of the PDP's goals is to increase participation in all elections, including municipal elections.

14. For the 2024 general election, roughly 2.2 million voters have requested mail ballots. Of these voters, roughly 54.7% are registered Democrats.

15. As of October 4, 2021, over 700,000 voters had requested to be placed on the "permanent" vote by mail application list for 2021, which allows them to receive a mail-in ballot automatically for both elections this year. Of these voters, roughly 72% or 500,000 are registered Democrats. According to the Department of State, nearly 1.4 million voters have exercised this option in 2020 and 2021, combined.

16. According the Secretary of the Commonwealth, over 2.2 million voters have applied to vote by mail in the 2024 General Election.

### **PDP Made Changes in Reliance on Act 77**

17. Consistent with its goal to elect Democrats to public office, the PDP examined Act 77 after its enactment and formulated its election strategy based on the provisions of the new law. The passage of Act 77 caused the PDP to make significant changes to our strategy. After its passage, the PDP gradually shifted its approach in response to changes on the ground and the courts' interpretation of Act 77.

18. In particular, as a result of Act 77, the PDP invested vastly more resources than before in a robust set of programs, including digital outreach, communications, field and get-out-the-vote ("GOTV") that both encourage our voters to vote by mail and support their efforts to do so.

19. These programs require the investment of an enormous amount of time, money and effort. For example, our digital and communications teams educated voters on 1) the availability of mail voting for all qualified voters; and 2) how to vote by mail in accordance with the requirements of the law. These efforts are conducted by mail and online.

20. Our field efforts have similarly shifted to conducting substantial voter contact around voting by mail.

21. Finally, the PDP's GOTV program has fundamentally changed. Before Act 77, we conducted that program only in the four days preceding any election. Now, we work the entire month before the election, from when voters first receive their mail-in ballots to the receipt deadline for ballots. This vast

expansion in the scope of the GOTV program has required wholesale revisions in the allocation of our resources.

22. We have made far-reaching changes to how we operate as a result of Act 77 and we have expended significant resources to do so.

23. PDP has a interest in preserving the confidence and trust it has built with voters over the election cycles since Act 77 have been in effect.

24. Specifically, many voters did not vote until they realized the simplicity of voting by mail. Many voters took advantage of the safety of voting by mail during the pandemic. The PDP put significant resources into educating and convincing these voters than mail-in voting is safe, secure and effective through digital advertising, social media, media interviews and online events.

25. Disqualifying votes of registered voters can create distrust in the process and discourage voters from voting.

26. The PDP would be required to invest resources in educating voters and in overcoming heightened voter confusion if votes are disqualified for technical defects.

**Interests of the PDP Implicated Where County Boards Reject Mail Ballots Based on Missing or Incorrect Handwritten Dates**

27. The PDP represents the interests of voters in every county of Pennsylvania, including Philadelphia County, who vote for Democratic candidates for all positions on the ballot.

28. Any requirement to reject otherwise valid mail ballots based on missing or incorrect handwritten dates actively disenfranchises PDP constituents and impairs the mission of the PDP to elect Democratic candidates to office and to enact policies that support Democratic ideals and goals.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'Mitch Kates', with a long horizontal stroke extending to the left.

Date: November 22, 2024

Mitch Kates