

IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 395 EAL 2024 & 396 EAL 2024

BRIAN BAXTER AND SUSAN KINNIRY,

Respondents,

v.

PHILADELPHIA BOARD OF ELECTIONS,

Respondent,

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Petitioners.

**VOTER RESPONDENTS' ANSWER TO INTERVENOR-PETITIONERS'
PETITION FOR ALLOWANCE OF APPEAL**

Mary M. McKenzie (No. 47434)
Benjamin Geffen (No. 310134)
Claudia De Palma (No. 320136)
Olivia Mania (No. 336161)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
(267) 546-1319
mmckenzie@pubintl.org
bgeffen@pubintl.org
cdepalma@pubintl.org
omania@pubintl.org

Stephen Loney (No. 202535)
Witold J. Walczak (No. 62976)
Marian K. Schneider (No. 50337)
Kate I. Steiker-Ginzberg (No. 332236)
Kirsten M. Hanlon (No. 336365)
AMERICAN CIVIL LIBERTIES UNION OF
PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
(215) 592-1513
sloney@aclupa.org
vwalczak@aclupa.org
mschneider@aclupa.org
ksteiker-ginzberg@aclupa.org
khanlon@aclupa.org

Additional counsel on next page

John A. Freedman*
Elisabeth S. Theodore*
Daniel Yablon*
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
elisabeth.theodore@arnoldporter.com
daniel.yablon@arnoldporter.com

Ari J. Savitzky*
Sophia Lin Lakin*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
asavitzky@aclu.org
slakin@aclu.org

* *Pro hac vice* applications
to be filed

Counsel for Voter Respondents

TABLE OF CONTENTS

	Page
REVIEW SHOULD BE GRANTED ON THE CORE MERITS QUESTION	1
REVIEW SHOULD OTHERWISE BE DENIED	3
1) There is no need or mechanism to join other county boards of elections in an appeal from a county board of elections under 25 P.S. § 3157.....	4
2) 42 Pa.C.S. § 722(7) does not apply here, and Republican Intervenors’ argument that it does was waived.....	7
3) Further factual development is neither necessary nor appropriate.....	9
4) The Court should not entertain Republican Intervenors’ imagined “ballot-casting rules” exception to the Free and Equal Elections Clause.	13
5) Pennsylvania courts’ decisions in connection with a state election cannot implicate the Electors and Elections Clauses of the U.S. Constitution....	15
6) This Court has already rejected Republican Intervenors’ misguided nonseverability argument.	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Applewhite v. Commonwealth</i> , No. 330 MD 2012, 2012 WL 4497211 (Pa. Cmwlth. Oct. 2, 2012)	14
<i>Baxter v. Phila. Bd. of Elections</i> , No. 1305 CD 2024, 2024 WL 4614689 (Pa. Cmwlth. Oct. 30, 2024)	7, 8
<i>Black Political Empowerment Project, et al. v. Schmidt, et al.</i> , 322 A.3d 221 (Pa. 2024)	6, 12
<i>In re Canvass of Absentee & Mail-In Ballots of Nov.3, 2020 Gen. Election</i> , 241 A.3d 1058 (Pa. 2020)	17
<i>In re: Canvass of Absentee and Mail-In Ballots of Nov. 5, 2024 Election</i> , No. 241101877 (C.C.P. Phila.) (filed Nov. 15, 2024)	5
<i>Chapman v. Berks Cnty. Bd. of Elections</i> , No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Cmwlth. Aug. 19, 2022)	12
<i>Genser v. Butler Cnty. Bd. of Elections</i> , __ A.3d __, No. 26 WAP 2024, 2024 WL 4553285 (Pa. Oct. 23, 2024)	5
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	14, 15
<i>McCormick, et al. v. Bucks Cnty. Bd. of Elecs.</i> , No. 2024-7228 (C.C.P. Bucks) (filed Nov. 13, 2024)	5
<i>Migliori v. Cohen</i> , 36 F.4th 153 (3d Cir. 2022), <i>vacated as moot</i> , 143 S. Ct. 297 (2022)	12
<i>Moore v. Harper</i> , 600 U.S. 1 (2023)	15, 16
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020), <i>cert. denied</i> , 141 S. Ct. 732 (2021)	14, 17

<i>Pa. State Conf. of NAACP v. Schmidt</i> 703 F. Supp. 3d 632 (W.D. Pa. 2023).....	11, 12
<i>Pa. State Conf. of NAACP v. Sec’y Commonwealth of Pa.</i> 97 F.4th 120 (3d Cir. 2024)	11
<i>Stilp v. Commonwealth,</i> 905 A.2d 918 (Pa. 2006).....	17, 18
Statutes	
25 P.S. § 3157	<i>passim</i>
1 Pa.C.S. § 1925	17
42 Pa.C.S. § 704.....	8
42 Pa.C.S. § 722(7)	7, 8
Other Authorities	
Pa. R.A.P. 1114(b)(5).....	3
PA. CONST. art. I, sec. 5.....	<i>passim</i>

Respondents Brian Baxter and Susan Kinniry (“Voter Respondents”), submit this Answer to the Petition for Allowance of Appeal filed by the Intervenor-Petitioners Republican National Committee and the Republican Party of Pennsylvania (“Republican Intervenors”).

REVIEW SHOULD BE GRANTED ON THE CORE MERITS QUESTION

The Court should grant only limited review to affirm the Commonwealth Court’s decision on the sole question that warrants this Court’s review:

Did the Commonwealth Court correctly hold that enforcement of a purposeless envelope-dating provision to disenfranchise voters violates the fundamental right to vote guaranteed by the Pennsylvania Constitution’s Free and Equal Elections Clause?

While the Commonwealth Court has now correctly decided this question in voters’ favor—twice—this Court has yet to decide the core question passed upon below. Meanwhile, in every election, thousands of qualified voters have their ballots disqualified based on an utterly meaningless mistake in filling out the date on the mail ballot envelope.

Most recently, thousands of Pennsylvania voters were disenfranchised on this basis in the November 2024 General Election. And clumsy attempts to comply with court orders directing the rejection of mail ballots received in “incorrectly” dated envelopes continue to yield absurd results. For example, the York County Board of

Elections inexplicably set aside mail ballots from qualified voters who plainly wrote the full date on their completed mail ballot envelope submissions. To demonstrate the point, the below images are taken from the date fields of rejected York County mail ballot envelopes:

Today's date here (REQUIRED)						
10	12	24	2	0	2	4
Month		Day	Year			

Today's date here (REQUIRED)						
10	14	24	2	0	2	4
Month		Day	Year			

Today's date here (REQUIRED)						
28	10	2	0	2	4	
Month		Day	Year			

Today's date here (REQUIRED)						
10	2		2	0	2	4
Month		Day	Year			

Each of the voters who submitted ballots in these envelopes were disenfranchised because the digits they wrote into the date line on the envelope form did not align with the preprinted “month” and “day” fields.¹

Absent direction from this Court, this untenable disenfranchisement will continue. In the next election, and the ones after that, voters will continue to raise this question, relying on the procedures set forth in state law: Does our Commonwealth’s fundamental guarantee of rights truly allow my vote to be rejected

¹ Representatives for all candidates and both political parties had agreed on the record that these voters had sufficiently filled out, signed, and dated their mail ballot envelopes, and that they should be accepted. The York County Board of Elections nevertheless voted on November 15, 2024, to set aside their ballots, further highlighting the confusion caused by officials’ attempts to strictly enforce the pointless envelope-dating requirement.

for an utterly inconsequential paperwork mistake? Or is the right to vote in this Commonwealth made of sterner stuff?

While this case arises in the context of a single-county election challenge under 25 P.S. § 3157, it is important for the Court to take this opportunity—before the issue arises again in the next election—to decide the underlying constitutional question and announce a rule that will guide election officials going forward. Voter Respondents thus agree with Republican Intervenors’ Petition inasmuch as the merits issue addressed by the Commonwealth Court’s decision below “is inarguably ‘one of such substantial public importance as to require prompt and definitive resolution by’ this Court.” Pet. 12 (quoting Pa. R.A.P. 1114(b)(5)). This Court should take up that sole issue as formulated above and affirm the decision below.

REVIEW SHOULD OTHERWISE BE DENIED

Republican Intervenors’ request for review on various other, misguided questions should be denied. The Court should not take up such unworthy side-issues, which in addition to being meritless, would distract from or delay resolution of the important question presented under Article I, section 5 of the Pennsylvania Constitution set forth above. This Court should accordingly deny review of the Commonwealth Court majority’s rulings on each of the questions raised in the Petition for Allowance of Appeal.

1) There is no need or mechanism to join other county boards of elections in an appeal from a county board of elections under 25 P.S. § 3157.

Republican Intervenors’ first proposed question reflects a fundamental misunderstanding of how statutory election appeals work in Pennsylvania. They present no basis for their assertion that the Commonwealth Court “lacked jurisdiction” because all 67 county boards of elections were not joined in a statutory appeal of a determination by the Philadelphia County Board of Elections (“the Board”) to count votes in a local special election. Pet. 5. Nor could they because the Election Code simply does not work that way.

Section 3157 appeals do not proceed in a way that requires, or even allows for, joinder of county boards other than the one whose immediate decision is being challenged. This statutory appeals process is designed to adjudicate election challenges quickly after Election Day, providing a right of action to “[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election” to file suit within two days in that county’s court of common pleas. 25 P.S. §§ 3157(a), (b). Practice under this rule is uniformly consistent, as is evident from the Section 3157 appeals taken after every election, including after the November 5, 2024 General Election. In none of those appeals did any petitioner attempt to name all 67 county boards of election as respondents—including in the Section 3157 petitions *filed by Republican Intervenors themselves*, in which they have consistently sued a single county board,

not all 67 county boards.² No wonder Republican Intervenors are unable to cite any examples where Section 3157 appeals have proceeded in the ungainly manner they now suggest is required.

The analysis is not changed by the parties’ respective requests that the Court decide this case in a way that will announce a rule of constitutional law to be followed by election officials going forward. It often happens that a Section 3157 appeal from the decision of a single county board of elections results in a precedent-setting decision that other county boards must then follow. The prospect of having to follow precedent does not make every county board an “indispensable party” in every Section 3157 appeal arising in every other county. This Court’s recent precedent-setting decision affirming the Commonwealth Court in *Genser v. Butler Cnty. Bd. of Elections*, __ A.3d __, No. 26 WAP 2024, 2024 WL 4553285, at *3 (Pa. Oct. 23, 2024), perfectly illustrates the point. There, as here, individual voters aggrieved by a decision of their home county board filed a Section 3157 appeal from

² For example, Republican Intervenors filed § 3157 challenges to decisions of the Philadelphia and Bucks County Boards of Elections to count mail ballots with envelope-dating issues in the November 2024 General Election. They did so in two separate challenges raising the same issue presented here—one naming only the Philadelphia County Board in the Philadelphia Court of Common Pleas, and one naming only the Bucks County Board in the Bucks County Court of Common Pleas—without joining any other county board to either case. *See In re: Canvass of Absentee and Mail-In Ballots of Nov. 5, 2024 Election*, No. 241101877 (C.C.P. Phila.) (filed Nov. 15, 2024); *McCormick, et al. v. Bucks Cnty. Bd. of Elecs.*, No. 2024-7228 (C.C.P. Bucks) (filed Nov. 13, 2024). They, like Voter Respondents here, followed the correct procedure under § 3157. Their suggestion here that Voter Respondents were somehow required to join all 67 counties is both disingenuous and unserious.

that board's decision not to count their ballots. There, as here, no county board other than the named respondent was involved in the decision to reject the voter-petitioners' ballots. And there, as here, the Commonwealth Court correctly exercised jurisdiction over a subsequent appeal involving the single-county issue without any need to join other counties.

Nor does this Court's *per curiam* order vacating the Commonwealth Court's opinion in *Black Political Empowerment Project, et al. v. Schmidt, et al.* ("B-PEP"), 322 A.3d 221 (Pa. 2024), require joinder of all 67 counties in the context of a direct appeal. The Court did not rule, as Republican Intervenors suggest, that all county boards of elections must be joined in *any* case involving the envelope-dating provision. If that were the rule, Republican Intervenors would have to have joined all 67 counties in the Section 3157 appeals they filed last week involving the same issue. *See* n.2, *supra*. B-PEP was an original action instituted in the Commonwealth Court, seeking prospective relief; it did not involve a post-election-day Section 3157 statutory appeal originating in a county court of common pleas.

Within the context of this Section 3157 election appeal, the Commonwealth Court correctly rejected the notion that every county must be joined in a statutory challenge to one county board's decision:

[W]e 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.

Baxter v. Phila. Bd. of Elections, No. 1305 CD 2024, 2024 WL 4614689 at *10 n.25 (Pa. Cmwlth. Oct. 30, 2024).

Again, Republican Intervenors have failed to identify a single instance of additional counties being joined in a direct election appeal of a particular county board of elections decision under Section 3157. This Court should decline Republican Intervenors' invitation to take up this legally groundless issue, as it is neither substantial nor of public importance.

2) 42 Pa.C.S. § 722(7) does not apply here, and Republican Intervenors' argument that it does was waived.

Republican Intervenors appealed a Court of Common Pleas decision to the Commonwealth Court. They may not now be heard to argue that the Commonwealth Court was the wrong court to hear their own appeal. Pet. 15-17. Their newfound argument under 42 Pa.C.S. § 722(7) is both facially meritless and waived.

First, the Court of Common Pleas did not hold "invalid as repugnant to the Constitution...any statute." 42 Pa.C.S. § 722(7). Rather, the Court of Common Pleas held that "the Board's decision to reject [Voters'] ballot[s] for failure to affix the date deprived them of their Pennsylvania Constitutional right to vote." R0042-

R0043 (10/10/24 1925(a) Order).³ Nor did Voter Respondents' Petition seek an order invalidating any statutory provision. No Court has prohibited anyone from asking voters to date the envelope form—the issue is refusing to count voters' ballots when they make some mistake in their compliance. Because no statute was held invalid in reaching the holding below, the lower court's decision did not trigger this Court's exclusive appellate jurisdiction under § 722(7).

In any event, Republican Intervenors waived this argument by lodging their appeal from the Court of Common Pleas in the Commonwealth Court, rather than directly in this Court. As Judge Wolf acknowledged below, “parties can waive jurisdictional defects and thus perfect appellate jurisdiction.” *Baxter*, 2024 WL 4614689, at *25 (Wolf, J., dissenting) (citing 42 Pa.C.S. § 704). There was no jurisdictional defect here, but even if there had been one, any defect was waived by Republican Intervenors' filing of their appeal in the Commonwealth Court instead of filing directly in this Court.

This Court should thus reject the Republican Intervenors' assertion, made only after they got an unfavorable result, that the court where *they* chose to appeal lacked appellate jurisdiction, and deny review of any question based on that premise.

³ References herein to page numbers R0001-R0188 refer to the Appendix submitted by Voter Respondents below to the Commonwealth Court with their merits brief. For the Court's convenience, Voter Respondents submit a true and correct copy of that Appendix to this Answer.

3) Further factual development is neither necessary nor appropriate.

Having waived their opportunity to develop the record in the Court of Common Pleas, Republican Intervenors cannot now claim this choice as a grounds for this Court to grant review, let alone reverse.⁴ Republican Intervenors did not seek to develop the record below and declined to raise any purported factual disputes when given the opportunity to do so in the trial court. At the hearing conducted pursuant to Section 3157, the Board agreed that all facts set forth in the Voter Respondents’ Petition for Review and supporting declarations are undisputed. *See* R0046 (9/25/24 Tr.) at 5:6-6:7; *see also* R0038 (9/26/24 Order) (noting that “petitioners and respondent stipulated to the operative facts underlying their dispute”). Counsel for Republican Intervenors did not raise any purported fact disputes. *See* R0049 at 20:2-21.

This is not surprising: The stipulated and uncontested facts have been established time and time again in prior litigation in which Republican Intervenors themselves participated. Even now, Republican Intervenors identify no facts in the

⁴ Republican Intervenors’ assertion that “the absent 66 county boards” were not permitted to develop a factual record, Pet. 17, is even further afield. As established *supra*, no county board other than the Philadelphia Board of Elections would have even been a proper party in this Section 3157 appeal. Nor did any other county board seek permission—through intervention, *amicus* submissions or otherwise—to participate in this case. Nor do Republican Intervenors ever say what if any facts the “absent county boards,” all of which *did* participate in prior litigation involving the envelope-dating provision, might dispute or deny. Nor do Republican Intervenors ever explain by what right they may speak for non-party county governments on any issue. Their arguments on this score are so far off base that they warrant no further discussion in the body of this Answer.

voters' declarations they would deny or dispute. The core issue here is thus ripe for decision without the need to waste time relitigating imagined factual matters—and any contrary argument was waived below and accordingly presents no grounds for review. Moreover, as to the facts they belatedly want to explore, Republican Intervenors provide no reason to think such exploration could yield any new facts that would be relevant to the constitutional question presented.

First, Republican Intervenors state that they want to depose Voter Respondents about “why they did not comply with the date requirement.” Pet. 18. In addition to their failure to raise this issue in the trial court, Republican Intervenors do not explain how the voters' reasons for missing the envelope date would be relevant. Both Voter Respondents attested in their declarations that the mistakes they made in writing a date on the return envelope were inadvertent. *See* R0024 (Baxter Decl.) at ¶10; R0028 (Kinniry Decl.) at ¶10.

Second, any attempt to relitigate the purported government interests supporting an envelope-dating requirement would be a waste of time given the relevant county board's admissions in this case and the robust factual development of that issue in prior cases involving Republican Intervenors and all 67 county boards. The county board respondent in this case admits that it has no use for the voter-written envelope date. As the Board stipulated, “[t]he date written on the envelope serves no purpose. In particular, it is not used to establish whether the mail

ballot was submitted on time.” R0011-16 (Pet. For Review) at ¶¶ 39, 61. In addition, the General Assembly indisputably had *no* state interest in mind when including the phrase “shall...date” in Act 77. As the legislature’s Republican Party leadership has acknowledged, the General Assembly adopted outdated absentee-ballot language wholesale “to minimize the complexities of legislative drafting,” R0122 (6/24/24 Br. of *Amici Curiae* Bryan Cutler, et al.), *not* because it made any determination that the voter-written date served some purpose in administering the mail ballot process. And Republican Intervenors’ arguments ignore that there was already full fact and expert discovery aimed at discerning what, if any, use any county or state election official has for the voter-written date on return envelopes in *Pa. State Conf. of NAACP v. Schmidt*, No. 22 Civ. 339 (W.D. Pa.).

In *NAACP*, after full factual development, neither Republican Intervenors nor any county board could identify a purpose for the envelope-dating provision, and the federal court found it beyond dispute that the envelope-dating provision is “wholly irrelevant” in determining when the voter filled out the ballot or whether the ballot was received on time. *Pa. State Conf. of NAACP v. Schmidt* (“*NAACP I*”), 703 F. Supp. 3d 632, 678-79 (W.D. Pa. 2023), *rev’d on other grounds*, 97 F.4th 120 (3d Cir. 2024). On appeal, a Third Circuit panel unanimously agreed that the envelope-dating rule “serves little apparent purpose.” *Pa. State Conf. of NAACP v. Sec’y*

Commonwealth of Pa. (“NAACP II”), 97 F.4th 120, 125 (3d Cir. 2024).⁵ This is consistent with the holdings of *every other court* to have considered the purported government interests in enforcing the envelope-dating provision since 2021. *See, e.g., Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022) (concluding that enforcement of envelope-dating provision violated federal law), *vacated as moot*, 143 S. Ct. 297 (2022), *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *12-29 (Pa. Cmwlth. Aug. 19, 2022) (same); *B-PEP*, No. 283 M.D. 2024, 2024 WL 4002321, at *32 (Pa. Cmwlth. Aug. 30, 2024), *vacated on other grounds*, 322 A.3d 221 (Pa. 2024). All of this makes sense because, as the Commonwealth has explained in briefing in prior cases, the envelope-dating provision is merely vestigial—a holdover from a brief period many decades ago when absentee ballots were permitted to be received after Election Day under an old version of the Election Code. *See, e.g., B-PEP*, 2024 WL 4453981, at *24-29 (Sec’y of Commw. Br., detailing the legislative origins of this language in the absentee and mail voting provisions of the Election Code).

⁵ Republican Intervenors now argue, for the first time on appeal to this Court, that the factual conclusions in *NAACP I* somehow have less force here because they were reached in the context of a case about the federal Materiality Provision. This is nonsense. Discovery in that case—both on the Materiality issue and on the plaintiffs’ federal constitutional claim under the Equal Protection Clause—focused on the uses of, and state interests advanced by, the envelope-dating provision. Republican Intervenors had exactly the same incentive to ask the same questions of county boards in *NAACP* to argue that handwritten envelope dates are “material” under federal law as they would to argue that they are constitutional under the Free and Equal Elections Clause.

Republican Intervenors want to continue their quixotic search for some basis supporting the hypothetical purposes that they (and they alone) insist might be served by enforcing the envelope-dating provision to disenfranchise voters. *See* Pet. 28-30. But their previous, extensive efforts yielded no such facts, and it is impossible to conceive how further fishing could yield any basis to dispute the Board’s admissions that it does not use the voter-written date for any purpose other than to set aside noncompliant mail ballot submissions. Meanwhile, as the example from York County in the November 2024 General Election noted above shows, *supra* at 2, there is every reason to think that the same absurd and purposeless disenfranchisement will happen again and again in every election. Especially given their waiver of the issue below, the record is set for decision, and this Court should not entertain a belated request to reopen the record.

4) The Court should not entertain Republican Intervenors’ imagined “ballot-casting rules” exception to the Free and Equal Elections Clause.

Ignoring the text of the Free and Equal Elections Clause, its history, and caselaw applying its robust protections, Republican Intervenors continue to allude to an imagined carveout for a so-called “neutral ballot-casting rule.” Pet. 6. Their arguments assume a category of “ballot-casting” rules that does not exist. The idea of a legally distinct class of “ballot-casting” rules is not grounded in the Election Code or mentioned anywhere in 250 years of Pennsylvania precedent—and accordingly presents no proper grounds for this Court to review the decision below.

Creating a new, categorical “ballot-casting” exemption from the Free and Equal Elections Clause would require the Court to overturn longstanding jurisprudence applying the Clause’s protections to “all aspects of the electoral process” in a “broad and robust” manner. *League of Women Voters v. Commonwealth* (“*LWV*”), 178 A.3d 737, 804, 814 (Pa. 2018). This concept would have no application here in any event, as this case involves not a ballot-*casting* rule about how to fill out the ballot, but a ballot-*counting* or ballot-*canvassing* rule—*i.e.*, whether the board of elections is required to canvass voters’ ballots. Voter Respondents have never argued that the mere inclusion of a line for voters to handwrite the date on the return envelope form is itself unconstitutional.

Meanwhile, Republican Intervenors’ assertion that Pennsylvania courts have never applied the Clause to a “ballot-casting rule,” Pet. 6, ignores the Pennsylvania courts’ history of protecting the right to vote against unwarranted restrictions. For example, this Court applied the Clause to the mail-ballot-receipt deadline—clearly a “ballot-casting” rule—during the November 2020 election. *Pa. Democratic Party v. Boockvar* (“*PDP*”), 238 A.3d 345, 371-72 (Pa. 2020), *cert. denied*, 141 S. Ct. 732 (2021). In addition, the Commonwealth Court, following remand instructions from this Court, previously applied the Clause to invalidate a statute requiring people casting ballots in person to show photo identification. *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 WL 4497211, at *6 (Pa. Cmwlth. Oct. 2, 2012).

The Commonwealth Court thus correctly rejected Republican Intervenors' invitation to neuter the Free and Equal Elections Clause and thereby abandon this Commonwealth's traditions and a century of jurisprudence. This Court should not take their invitation to entertain such a radical approach on appeal.

5) Pennsylvania courts' decisions in connection with a state election cannot implicate the Electors and Elections Clauses of the U.S. Constitution.

The Commonwealth Court's decision relates to a special election to the state legislature. Accordingly, whatever restrictions the federal Elections Clause and Electors Clause might impose on state courts in the context of regulating federal elections, those Clauses categorically do not apply to the decision at issue here. The Elections Clause expressly applies only to regulations governing the "Times, Places and Manner of holding Elections *for Senators and Representatives....*" U.S. Const. art. 1, § 4 (emphasis added). The special election at issue here did not include any race for federal Senators or Representatives.

And even if it did, the Republican Intervenors' arguments, Pet. 34-35, are directly foreclosed by the decision in *Moore v. Harper*, 600 U.S. 1 (2023). There, the Court reached exactly the opposite conclusion from the one Republican Intervenors advance, concluding that "state courts are the appropriate tribunals ... for the decision of questions arising under their local law, whether statutory or otherwise." *Id.* at 34. This Court also rejected the same Elections Clause argument in *LWV*, 178 A.3d at 811. A Pennsylvania court's application of state constitutional

principles to the administration of the Pennsylvania Election Code is at the heart of state courts' responsibilities as set forth in *Moore*, and presents no viable issue for review based on the Elections or Electors Clauses.

6) This Court has already rejected Republican Intervenors' misguided nonseverability argument.

Finally, Republican Intervenors argue that the Commonwealth Court's decision as to enforceability of the envelope-dating provision to disenfranchise voters would require invalidating Act 77, thus striking "no-excuse" mail voting from the Election Code in its entirety. Pet. 35-38. This argument continues to misconstrue the relief sought by Voter Respondents, who do not seek to strike or sever any provision from Act 77. Specifically, a ruling that the Pennsylvania Constitution requires counting Voter Respondents' ballots, such that they are not disenfranchised as a consequence of non-compliance with the obsolete envelope-dating provision, does not invalidate any provision of Act 77.

To affirm, this Court need not invalidate or excise "shall...date" from the relevant sections of the Election Code. Voter Respondents do not seek an order barring voters from being directed to date mail ballot declaration forms, or barring continued inclusion of a date field next to the signature line. Including a date line on mail ballot return envelopes and asking voters to fill it out is not the problem; disenfranchising voters when they make a meaningless error in filling it out is. *See*

In re Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020) (citing *PDP*, 238 A.3d at 378).

Moreover, even a holding that the envelope-dating provision or its application is invalid would not require the Court to invalidate all of Act 77. *See Stilp v. Commonwealth*, 905 A.2d 918, 970-981 (Pa. 2006) (declining to enforce identical nonseverability provision and noting significant “separation of powers concerns”). *Stilp* is controlling and conclusive. There, this Court declined to enforce a “boilerplate” nonseverability provision that is *literally identical* to the one in Act 77, instead giving effect to the terms of the binding rules of statutory construction, 1 Pa.C.S. § 1925 (“The provisions of every statute shall be severable”). *Stilp*, 905 A.2d at 979-81. The Court ultimately severed the provision of the legislation at issue that “plainly and palpably violate[d]...the Pennsylvania Constitution” from “the otherwise-constitutionally valid remainder of [the legislation].” *Id.* at 980-81 (footnote omitted).

Likewise, the application of Act 77’s identical nonseverability provision is neither required nor sensible here. The indisputable facts are that the envelope-dating provision is a vestige of a long-ago overhauled absentee voting process, its application to modern absentee and mail-in voting serves no legislative purpose, it benefits nobody, and it results in a constitutionally intolerable ratio of rejected ballots (here, 1.4% of all mail ballots). Accordingly, even an order striking the date

provision from the text of Act 77—relief that, to be clear, Appellees *do not seek*—would not require the rest of Act 77 to be disturbed.

The relief ordered by the court below vindicates Act 77’s larger aims to expand mail ballot voting to all and harmonizes that aim with the requirements of the Free and Equal Elections Clause. This Court need not entertain an alarmist nonseverability argument that would require reversal of *Stilp*.

CONCLUSION

Republican Intervenors’ questions presented distract from the core issue, which unlike all the others is plainly worthy of review: Does the Pennsylvania Constitution require that the Voter Respondents’ ballots be counted?

In election after election, counties are rejecting the votes of qualified Pennsylvania voters because of an utterly meaningless error in handwriting a date on the mail ballot envelope. The courts below correctly held that this unjustifiable diminution of the fundamental right to vote violates the Free and Equal Elections Clause. No Pennsylvania court has ever held otherwise. This appeal—properly arising in the ordinary course pursuant to 25 P.S. § 3157 from a Philadelphia-only special election—presents that extremely important question for decision.

Voter Respondents respectfully request that this Court provide a definitive answer before more voters are unconstitutionally disenfranchised. The Court should

grant review only of this core issue of extraordinary importance and deny Republican Intervenors' Petition in all other respects.

Dated: November 22, 2024

Respectfully submitted,

Mary M. Mckenzie (No. 47434)
Benjamin Geffen (No. 310134)
Claudia De Palma (No. 320136)
Olivia Mania (No. 336161)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
(267) 546-1319
mmckenzie@pubintl.org
bgeffen@pubintl.org
cdepalma@pubintl.org
omania@pubintl.org

John A. Freedman*
Elisabeth S. Theodore*
Daniel Yablon*
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
elisabeth.theodore@arnoldporter.com
daniel.yablon@arnoldporter.com

**Pro hac vice* to be filed

Stephen A. Loney
Stephen A. Loney (No. 202535)
Witold J. Walczak (No. 62976)
Marian K. Schneider (No. 50337)
Kate Steiker-Ginzberg (No. 332236)
Kirsten M. Hanlon (No. 336365)
ACLU OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
215-592-1513
sloney@aclupa.org
mschneider@aclupa.org
vwalczak@aclupa.org
ksteiker-ginzberg@aclupa.org
khanlon@aclupa.org

Ari J. Savitzky*
Sophia Lin Lakin*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500
asavitzky@aclu.org
slakin@aclu.org

Counsel for Voter-Respondents

CERTIFICATE OF COMPLIANCE

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

/s/ Stephen Loney

CERTIFICATION OF WORD COUNT

I hereby certify, pursuant to Pa.R.A.P. 1116 that this Answer does not exceed 9,000 words. As this Answer does not exceed 20 pages, it is deemed to meet the 9,000 word limit pursuant to Pa.R.A.P. 116(c). Furthermore, the automated word count feature of the word processing program used to produce this Answer reflects that it contains 4,451 words, exclusive of the supplementary matter.

/s/ Stephen Loney _____