

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 1 EAP 2025, 2 EAP 2025

BRIAN T. BAXTER AND SUSAN T. KINNIRY

Appellees,

v.

PHILADELPHIA BOARD OF ELECTIONS, REPUBLICAN
NATIONAL COMMITTEE, REPUBLICAN PARTY OF
PENNSYLVANIA

Appellants.

BRIEF OF AMICUS CURIAE CENTER FOR ELECTION
CONFIDENCE, INC.

WALTER S. ZIMOLONG, ESQUIRE
Pennsylvania Bar No. 89151
DANIEL J. BITONTI, ESQUIRE
Pennsylvania Bar No. 88452
ZIMOLONG, LLC
353 W. Lancaster Avenue, Suite 300
Wayne, PA 19087
(215) 665-0842
wally@zimolonglaw.com

*Counsel for Amicus Curiae
Center for Election Confidence, Inc.*

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORITIES</u>	ii
<u>INTEREST OF AMICUS CURIAE</u>	iv
<u>ARGUMENT</u>	1
<u>I. THE PROPER HISTORY OF THE “FREE AND EQUAL ELECTIONS” CLAUSE.</u>	1
<u>A. “Free” means free from coercion, duress, or restraint.</u>	2
<u>B. Equal means on equal strength and on equal terms with other voters.</u>	4
<u>II. THE COMMONWEALTH COURT MISCONSTRUES THIS COURT’S PRECEDENT.</u>	9
<u>CONCLUSION</u>	11
<u>CERTIFICATE OF COMPLIANCE</u>	13
<u>CERTIFICATE OF COMPLIANCE WITH RULE 127</u>	14
<u>CERTIFICATE OF SERVICE</u>	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ball v. Chapman</i> , 289 A.3d 1 (Pa. 2023)	1
<i>Baxter v. Philadelphia Bd. of Elections</i> , 2024 WL 4614689 (Pa. Commw. Ct. 2024)	1, 11
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	11
<i>Commonwealth ex rel. McCormick v. Reeder</i> , 33 A. 67 (Pa. 1895)	2, 7
<i>De Walt v. Bartley</i> , 24 A. 185 (Pa. 1892)	2
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	4, 7, 9, 10
<i>Oughton v. Black</i> , 61 A. 346 (Pa. 1905)	2, 7
<i>Patterson v. Barlow</i> , 60 Pa. 54 (1869)	2, 6
<i>Shankey v. Staisey</i> , 257 A.2d 897 (Pa. 1969)	7
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	5
<i>Working Families Party v. Commonwealth</i> , 209 A.3d 270 (Pa. 2019)	7

Winston v. Moore,
91 A. 520 (Pa. 1914) 7

Statutes

Article I, Section 5 of the Pennsylvania Constitution 1, 2
25 P.S. § 3146.6(a).....1
25 P.S. § 3150.16(a).....1

Other Authorities

James Wilson's Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts,
85 Alb. L. Rev. 799 (2022)..... 5

INTEREST OF AMICUS CURIAE

Center for Election Confidence, Inc. (“CEC”), is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all citizens can vote freely within an election system of reasonable procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election procedures and outcomes. To accomplish this, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law, voting rights and election integrity and files *amicus* briefs in cases where its expertise and national perspective may illuminate the issues under consideration.

For example, CEC (previously known as Lawyers Democracy Fund) participated as amicus curiae in the U.S. Supreme Court in *Ritter v. Migliori*, 143 S. Ct. 297 (2022). In *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), CEC advocated that the Supreme Court of Pennsylvania respect the General Assembly’s policy judgments and enforce the signature and date

requirement for absentee ballots. Both courts ruled in favor of the positions advocated by CEC.

No one other than the amicus curiae, its members, or its counsel authored any part of this brief, or financed the preparation of this brief.

ARGUMENT

Sections 1306 and 1306-D of the Pennsylvania Election Code (the “Election Code”), 25 P.S. §§ 3146.6(a) and 3150.16(a), unambiguously requires a voter to correctly date their absentee or mailed-in ballot for it to be counted. This Court, in *Ball v. Chapman*, 289 A.3d 1, 21 (Pa. 2023), affirmed that, pursuant to this legislative mandate, incorrectly dated or undated ballots shall not be counted. However, the Commonwealth Court ignored the Election Code and this Court’s precedent in ruling that this straightforward requirement nonetheless violates the “free and equal elections” clause of Article I, Section 5 of the Pennsylvania Constitution. *Baxter v. Philadelphia Bd. of Elections*, No. 1305 C.D. 2024, 2024 WL 4614689, at *2 (Pa. Commw. Ct. 2024). The Commonwealth Court’s decision is based on a flawed understanding of the history of the free and equal elections clause.

This Court should reverse.

I. THE PROPER HISTORY OF THE “FREE AND EQUAL ELECTIONS” CLAUSE.

The Pennsylvania Constitution enshrines the principle of “free and equal elections” in Article I, Section 5, stating:

Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Pa. Const. art. I, § 5.

This constitutional proclamation for “free and equal” elections has endured through every subsequent iteration of the Constitution, with only a minor addition in 1874 reinforcing its protection against forceful interference with the right of suffrage.

A. “Free” means free from coercion, duress, or restraint.

For over a century, this Court has consistently said that the fundamental guarantee that elections be “free” means a vote is cast without coercion or duress and is free from restraint. *Patterson v. Barlow*, 60 Pa. 54, 73 (1869) (defining “free” as “without unlawful obstruction, intimidation or corruption.”); *Commonwealth ex rel. McCormick v. Reeder*, 33 A. 67, 68 (Pa. 1895) (holding that free means free freedom from physical restraint); *De Walt v. Bartley*, 24 A. 185 (Pa. 1892) (stressing that free means the absence of “coercion of every description.”); *Oughton v. Black*, 61 A. 346, 347 (Pa. 1905) (further describing “free” as the “freedom of the elector to deposit his vote as the expression of his own unfettered will.”)

The Election Code’s dating requirement for mailed-in and absentee ballots unequivocally aligns with the “free” elections mandate of our Constitution. This simple procedural step does not impede voters’ autonomy nor constrains their electoral choices. And it imposes no physical restraint on any electoral process. It merely asks electors to perform a simple and routine task—one they likely undertake daily. This minimal effort hardly rises to the level of coercion or restraint that would render an election less “free.” Indeed, the rather *de minimums* dating requirement pales in comparison to other electoral requirements, such as, voter registration deadlines or in-person voting hours.

Far from restricting freedom, the dating requirement enhances it. It deters potential fraud, improves ballot tracking, promotes accurate record-keeping, and bolsters public confidence in the electoral process. For instance, the dating requirement allows election officials to quickly identify and reject ballots received after the statutory deadline, preventing the inclusion of untimely votes. Moreover, if discrepancies arise during an recount or audit, the date on the ballot can assist in tracing the ballot’s path, verifying its authenticity, and determining if it should be counted. This confidence is the bedrock of a truly free election, where

citizens can trust that their voices are heard and their votes counted accurately and fairly.

Sections 1306 and 1306-D of the Pennsylvania Election Code therefore not only comply with the constitutional mandate for “free” elections but actively support it. The lower court’s ruling, if allowed to stand, would paradoxically undermine the very freedom it purports to protect by introducing unnecessary uncertainty into our electoral process.

B. Equal means on equal strength and on equal terms with other voters.

But what of the term “equal?” As this Court has consistently affirmed, “[t]he Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). Future United States Supreme Court Justice James Wilson, who voted on the adoption of article I, section 5 in 1790, offers the following understanding of the term:

[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (quoting 2 *The Works of James Wilson* (Andrews ed. 1896), 15).

Wilson’s interpretation, echoed in subsequent jurisprudence, unequivocally establishes that “equal” elections ensure each elector’s vote carries equal weight, preventing dilution. He asserted that “the sentiments of the representatives should have the ‘same weight and influence’ on the resulting governmental actions as if their constituents had expressed them personally.” Brett Graham, *James Wilson's Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts*, 85 *Alb. L. Rev.* 799, 808–09 (2022). Justice Wilson’s understanding of the term “equal” to mean equal strength and non-dilution is evidenced by the Supreme Court’s reliance on Wilson’s words in its landmark *Wesberry* decision. Justice Wilson’s understanding of the term “equal” thus provides a polestar in assessing whether an election regulation, like the ballot dating requirement, violates the constitutional guarantee that elections be “equal.”

This Court’s precedent has consistently reflected Justice Wilson’s understanding of the meaning of “equal” elections. In *Patterson*, this Court rejected a challenge to the “Registry Act,” which regulated voter

registration in the city of Philadelphia, based on the free and equal elections clause and upheld the General Assembly's authority to regulate elections. *Patterson*, 60 Pa. 54. There, this Court posed a pivotal question: "How shall elections to be made equal?" *Id.* at 75. This Court's answer - remarkably prescient of the Supreme Court's *Wesberry* decision a century - was that equality is achieved "[c]learly by laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id.* Crucially, this Court rejected challenges under the free and equal elections clause based on individual difficulties experienced in the process of voting stating that "[i]ndividuals may experience difficulties, and some may even lose their suffrages by the imperfection of the system; but it is no ground to pronounce a law unconstitutional." *Id.* at 76.

In *Commonwealth ex rel. McCormick*, 33 A. at 68, this Court refined its definition of "equal" to encompass equal application of election laws such that "every voter shall have the same right as every other voter."

Thereafter, this Court has consistently upheld election regulations when they apply equally to all voters and do not dilute a vote. *Oughton*, 61 A. at 348 (upholding a law allowing straight party voting because “this is a right given to every elector, and therefore is an equal one.”); *Winston v. Moore*, 91 A. 520 (Pa. 1914) (holding that a method for determining names of judicial candidates who would appear on general election ballot did not violate the free and equal elections clause because “it denies no qualified elector the right to vote [and] treats all voters alike.”); *Shankey v. Staisey*, 257 A.2d 897, 899 (Pa. 1969) (validating a provision requiring write-in candidates to meet a minimum threshold because it “require[ed] every candidate who desires to appear on the general electoral ballot to have satisfied the same condition.”); *League of Women Voters*, 178 A.3d 737 (holding that Pennsylvania’s 2011 redistricting plan violated the free and equal elections clause because the district were apportioned in a manner that diluted an elector’s vote); *Working Fams. Party v. Commonwealth*, 209 A.3d 270, 281 (Pa. 2019) (upholding a ban on cross-nomination of candidates because it “applied equally and did not threaten to dilute any elector’s vote.”)

In sum, this Court’s consistent line of precedent demonstrates that election regulations do not violate the free and fair elections clause where that are uniformly applied and when they do not dilute the strength of an individual’s vote. Neither condition exists here. The dating requirement is uniformly applied as all Pennsylvania voters are subjected to the same, easily satisfied condition for having their ballots counted. The dating requirement also does not dilute any votes. Vote dilution occurs when an election law systematically devalues the votes of a particular group of citizens compared to others. The dating requirement, however, does not create any such systemic disparity. Every voter is subject to the same requirement, and every voter has the same ability to comply.

The “equal” elections clause, as understood in its historical context and interpreted by this Court, mandates equal opportunity to participate in the electoral process, not a guarantee of identical outcomes for all voters regardless of their compliance with neutral election rules. Thus, the Election Code’s dating requirement aligns perfectly with the historical understanding of the meaning of “equal” elections. Therefore, the Court should correct the flawed ruling of the Commonwealth Court.

II. THE COMMONWEALTH COURT MISCONSTRUES THIS COURT'S PRECEDENT.

The Commonwealth Court erred in holding that the text and tradition of the free and equal election clause support its conclusion that the Election Code's dating requirement violated the free and fair elections clause. It did so by misconstruing this Court's holding in *League of Women Voters*. Contrary to the lower court's interpretation, this Court's holding in *League of Women Voters* adheres faithfully to the text and history the free and equal elections clause.

In *League of Women Voters*, this Court conducted a thorough examination of the free and equal election clause's history and reached the correct understanding of the clause based on that history. First, the clause mandates that elections remain free and, therefore, "open and unrestricted." *League of Woman Voters*, 178 A.3d at 804. Second, it requires that voters have a "right to equal participation in the electoral process," and ensures that "all voters have an equal opportunity to translate their votes into representation." *Id.* Third, the clause safeguards electors' "equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *Id.* at 814.

Notably, while the Court did not reference Justice Wilson in its opinion, its conclusion in *League of Women Voters* nonetheless mirrors his original explanation of the free and equal election clause's intent:

The overarching objective of this provision of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens.

Id. at 817.

Thus, *League of Women Voters* aligns perfectly with the text and history of the free and equal elections clause, including its original 1790 meaning and this Court's prior precedent. The Commonwealth Court failed to properly consider each of these conclusions and failed to apply this Court's understanding of the meaning of the free and equal election's clause.

Moreover, the Commonwealth Court compounded its error by conflating this Court's holding with the inapplicable federal standard established in *Burdick v. Takushi*, 504 U.S. 428 (1992). The *Burdick* test, designed for challenges under the First and Fourteenth Amendments to the United States Constitution, has no place in analyzing claims under Pennsylvania's free and equal elections clause. By applying *Burdick's* scrutiny

framework to a state constitutional claim, the lower court fundamentally misunderstood the nature of the challenge before it.

The Commonwealth Court's misapplication of *Burdick* led it to erroneously conclude that the Election Code's dating requirement imposed a severe restriction on an elector's right to vote, subjecting it to strict scrutiny. *Baxter*, 2024 WL 4614689. This conclusion not only misapplies federal constitutional standards to a state constitutional question, but it also ignores this Court's longstanding precedent on the free and equal elections clause.

Accordingly, this Court should overturn the Commonwealth's misguided ruling to preserve the proper interpretation and application of the free and equal elections clause.

CONCLUSION

This Court has consistently interpreted the free and equal elections clause to protect against vote dilution and ensure equal opportunity for all voters. The Commonwealth Court's ruling strays from this historical understanding. If not reversed, it would open the floodgates to challenges against any and all election regulations, potentially compromising the security and reliability of our elections.

Moreover, the Commonwealth Court's decision risks eroding public confidence in the electoral system. By invalidating a simple and longstanding requirement like ballot dating, the ruling sends a message that even basic election rules are subject to arbitrary judicial intervention. This could lead to increased voter skepticism and decreased participation in the democratic process.

Therefore, this Court should reverse the Commonwealth Court's decision.

Respectfully submitted,

Date: February 26, 2025

/s/ Walter S. Zimolong
WALTER S. ZIMOLONG III
Pennsylvania Bar No. 89151
DANIEL J. BITONTI
Pennsylvania Bar No. 88452
ZIMOLONG, LLC
353 West Lancaster Avenue,
Suite 300
Wayne, Pennsylvania 19087
(215) 665-0842
wally@zimolonglaw.com

*Counsel for Amicis Curiae
Center for Election Confidence,
Inc.*

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 2162cwords and complies with the word count limit under Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(a)(1).

Respectfully submitted,

Dated: February 26, 2025

/s/Walter S. Zimolong
Walter S. Zimolong, III, Esquire
ZIMOLONG LLC
wally@zimolonglaw.com
353 West Lancaster Avenue,
Suite 300
Wayne, PA 19087
(215) 665-0842

CERTIFICATE OF COMPLIANCE WITH RULE 127

I certify that this document does not contain any confidential information or documents and 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 mandate filing confidential information and documents differently from non-confidential information and documents.

Respectfully submitted,

Dated: February 26, 2025

/s/Walter S. Zimolong
Walter S. Zimolong, III, Esquire
ZIMOLONG LLC
wally@zimolonglaw.com
353 West Lancaster Avenue,
Suite 300
Wayne, PA 19087
(215) 665-0842

CERTIFICATE OF SERVICE

I certify that on February 26, 2025, I have served via PAC file a true and correct copy of this document on all counsel of record.

Respectfully submitted,

Dated: February 26, 2025

/s/Walter S. Zimolong
Walter S. Zimolong, III, Esquire
ZIMOLONG LLC
wally@zimolonglaw.com
james@zimolonglaw.com
353 West Lancaster Avenue,
Suite 300
Wayne, PA 19087
(215) 665-0842