Received 2/21/2025 2:53:47 PM Supreme Court Eastern District

Filed 2/21/2025 2:53:00 PM Supreme Court Eastern District
1 EAP 2025

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 1 EAP 2025, 2 EAP 2025 (consolidated)

BRIAN T. BAXTER and SUSAN T. KINNIRY,

v.

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

APPEAL OF: REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA,

---

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS *AMICUS CURIAE*

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT ENTERED ON OCTOBER 30, 2024 AT NO. 1305 C.D. 2024, 1309 C.D. 2024, AFFIRMING THE ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY ENTERED ON SEPTEMBER 21, 2024 AT NO. 2024 NO. 02481

DAVID W. SUNDAY, JR.
Attorney General

BY: SEAN A. KIRKPATRICK
Chief Deputy Attorney General
Chief, Appellate Litigation Section

BRETT GRAHAM
Deputy Attorney General

DANIEL B. MULLEN
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 705-2331
FAX: (717) 772-4526

DATE: February 21, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions and Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Commonwealth of Pennsylvania, represented by its chief law officer, the Attorney General. PA. CONST. art. IV § 4.1. The Attorney General has a profound and continuing interest in defending the constitutionality of Pennsylvania's laws and in the orderly and predictable application of the Election Code. How this Court interprets the Free and Equal Elections Clause of Pennsylvania's Constitution here will inform and guide election administration in the future. For these reasons, the Attorney General has a substantial interest in the outcome of this case.

No person or entity other than the amicus paid, in whole or in part, for the preparation of this brief or authored this brief, in whole or in part.

INTRODUCTION

Pennsylvania's Election Code requires that mail-in and absentee voters "fill out, date and sign" a pre-printed declaration on the envelope in which their ballot travels to a county board of elections. 25 P.S. §§ 3146.6(a); 3150.16(a).[1] This provision—the declaration requirement—is neutral, generally applicable, and consistent with all voters having the opportunity to cast a ballot for their chosen candidates. Therefore, it does not violate Pennsylvania's Constitution.

Pennsylvania's Constitution guarantees that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5 ("Free and Equal Elections Clause"). As this Court has recognized, the Constitution "leaves the task of effectuating that mandate to the legislature." *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (citation omitted).

The Commonwealth Court's misreading of the Free and Equal Elections Clause transforms it from a shield that protects the voting public from antidemocratic election practices into a sword that courts must wield to save individual voters from ballot-casting errors. But the Pennsylvania Constitution does not require infantilizing voters, protecting them from their own mistakes or inattentiveness.

[1] Voters unable to complete this declaration on their own because of illness or infirmity may have another person assist them. *See id.* §§ 3146.6(a)(1); 3150.16(a.1).

Rather, as long as all voters are given the same *opportunity* to cast a valid ballot, the Constitution is satisfied.

The courts of this Commonwealth have never wielded the Free and Equal Elections Clause's broad, structural guarantee to examine the particularities of how the Legislature achieves its goal of administering safe and fair elections. Doing so now risks diluting the Clause's constitutional import and muddying its attendant case law with judicial second-guessing of democratically-enacted policy choices.

SUMMARY OF ARGUMENT

The crux of this case is the notion that enforcing a facially-neutral and generally-applicable provision of the Election Code violates the constitutional guarantee that elections "be free and equal." PA. CONST. art. I, § 5. The Election Code requires Pennsylvania voters to do nothing more than sign and *date* the envelope in which they submit a mail-in or absentee ballot to their county board of elections. Various statutes contain similar requirements,[2] and completing the ordinary elements of an official declaration in no way burdens the franchise.

Two fundamental errors explain the Commonwealth Court's mistaken conclusion below. *First*, the majority reasoned in part from cases addressing *ambiguous* Election Code provisions as a matter of *statutory construction* and thus strayed from the principles that animate the Free and Equal Elections Clause. It was convinced to apply strict scrutiny to a neutral, generally applicable ballot-casting rule,[3] and to conclude that a *de minimis* act such as writing the date on an envelope

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

[3] *Cf. Banfield v. Cortes*, 110 A.3d 155, 177 (Pa. 2015) ("It is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems … [and] so long as their choice is reasonable and neutral, it is free from judicial second guessing.") (quoting *Weber v. Shelley*, 347 F.3d 1101, 1106–7 (9th Cir. 2003)) (cleaned up).

is burdensome. *Second*, the Commonwealth Court erroneously grafted a materiality provision onto the Free and Equal Elections Clause. In other words, shaded by recent litigation involving the federal Civil Rights Act of 1964,[4] the majority below artificially narrowed its evaluation of valid government interests that support the dating component's constitutionality.

The text and history of the Free and Equal Elections Clause make clear that its guarantee is concerned with access, proportionality, and equality of opportunity. The Clause is not a shortcut to questioning the wisdom of every jot and tittle of the Election Code. This appeal squarely presents the opportunity to rebuke that misreading of a foundational constitutional promise. This Court should address the analytical errors below and reverse, making clear that the Free and Equal Elections Clause does not save voters from the consequences of failing to follow simple instructions.

[4] *Pa. State Conf. of NAACP v. Schmidt*, 97 F.4th 120, 133 (3d Cir. 2024) (rejecting federal challenge because "Pennsylvania's date requirement, regardless what we may think of it, does not cross over to a determination of who is qualified to vote, and the Materiality Provision likewise does not cross over to how a State regulates its vote-casting process"), *cert. denied*, No. 24–363, ___ S. Ct. __ (Jan. 21, 2025).

ARGUMENT

I. ENFORCING THE DATING COMPONENT OF ACT 77'S DECLARATION REQUIREMENT DOES NOT VIOLATE THE FREE AND EQUAL ELECTIONS CLAUSE

The Election Code commands that to vote by mail-in or absentee ballot, the elector must—among many other requirements—"fill out, date and sign the declaration printed on [the outer return] envelope." 25 P.S. §§ 3146.6(a), 3150.16(a). The failure to do so invalidates that elector's ballot. *See Ball v. Chapman*, 289 A.3d 1, 22–23 (Pa. 2023). And this mandatory, unambiguous statutory requirement "carries with it a strong presumption of constitutionality, which will not be overcome unless the legislation is 'clearly, palpably and plainly' in violation of the Constitution." *Commonwealth v. Torsilieri*, 316 A.3d 77, 86 (Pa. 2024); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 809 (Pa. 2018).

The trial court, with minimal analysis, ruled that enforcement of the dating component violated the Free and Equal Elections Clause.[5] The Commonwealth

[5] Though the difference between *undated* and *incorrectly dated* ballots has been the subject of some discussion by this Court, *see Ball*, 289 A.3d at 22–23; *id.* at 30–31 (Donohue, J., concurring in part), only the former category is implicated in this appeal. *See* Cmwlth. Ct. Op. at 6 ("Designated Appellees' *undated* mail-in ballots were set aside and not counted.") (emphasis added).

The Attorney General is acutely aware that county boards can and do arrive at different conclusions regarding what constitutes an *incorrect* date. For example, in 2022, while 18 counties set aside votes that used the European dating convention (*e.g.*, 31/10/2024 as opposed to 10/31/2024), at least 30 counties accounted for that difference and deemed declarations dates in that format "sufficient." *See Pa. State*

Court then affirmed. *See* Cmwlth. Ct. Op. at 4. As we discuss next, this holding is at odds with the genesis of that Clause; inconsistent with the traditional analytical framework for evaluating neutral, non-burdensome ballot-casting rules; and heedless of the valid government interests the dating component serves.

A. The History of the Free and Equal Elections Clause Demonstrates That It Concerns Only Access and Proportionality

The Commonwealth's first constitution, enacted in 1776, provided that "all elections ought to be free; and that all free men having a sufficient evident, common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." *See* PA. CONST. of 1776, art. I § 7. When Pennsylvanians met in 1790 to revise that charter—which vested near-plenary power in a unicameral legislature—they also made an important change to the above-quoted provision. In language that persists to this day, the new clause simply commands: "[t]hat elections shall be free and equal[.]" *See* PA. CONST. of 1790, art. IX § 5.

Several factors strongly suggest that an enormously influential (if often overlooked) Founding Father—James Wilson—was responsible for this change. *See* Brett Graham, *"Free and Equal": James Wilson's Elections Clause and its*

Conf. of NAACP, 703 F. Supp. 3d at 681–82; 25 P.S. § 3146.8(g)(3). While any number of reasonable disputes may arise about whether a date is sufficient, *see Ball*, 289 A.3d at 30 (Donohue, J., concurring in part), such disputes should be resolved from the bottom up, not from the top down. A ruling from this Court that the dating component of Act 77's declaration is facially constitutional would not preclude future as-applied determinations regarding incorrectly dated ballots.

Implications for Fighting Partisan Gerrymandering in State Courts, 84 ALB. L. REV. 799, 805–10 (2022). Wilson sat on the committee that drafted the 1790 Constitution and his contemporaneous *Law Lectures* (delivered between 1790 and 1792) carefully examined the new charter. *Id.* Two distinct passages therein offer a compelling starting point for understanding the phrase "free and equal" in the context of elections today.

First, Wilson writes:

> The constitution … of Pennsylvania rest[s] solely, and in all [its] parts, on the great democratical principle of a representation of the people; in other words, of the moral person, known by the name of the state. This great principle necessarily draws along with it the consideration of another principle equally great—the **principle of free and equal elections**.

2 COLLECTED WORKS OF JAMES WILSON 63 (Mark D. Hall & Kermit L. Hall eds. 2007) (emphasis added) (hereinafter, Vol. 2 Collected Works).

Second, Wilson explains:

> To the legitimate energy and weight of true representation, two things are essentially necessary. [1.] That the representatives should express the same sentiments, which the represented, if possessed of equal information, would express. [2.] That the sentiments of the representatives, thus expressed, should have the same weight and influence, as the sentiments of the constituents would have, if expressed personally.

Id. at 66–67 (emphases added). In service of the first principle, "all elections ought to be **free**," such that a voter is "under no external bias" when they choose a representative, who will in turn "speak and act" for the voter's interests. *Id.*

(emphasis added). In service of the second principle, "all elections ought to be **equal**," meaning that "a given number of citizens in one part of the state" will "choose as many representatives as are chosen by the same number of citizens, in another part of the state," and "the proportion of the representatives and the constituents … remain[s] invariably the same." *Id.* (emphasis added).

As this Court expounded in *League of Women Voters*, the immediate political "backdrop" of this constitutional change was "intense and seemingly unending regional, ideological, and sectarian strife." 178 A.3d at 805–06, 808. This conflict was epitomized by a bitter dispute over the under- and over-representation of various groups as the Commonwealth's population began moving west. *See id.*

Given this genesis, it is unsurprising that later constitutional drafters conceived of the Clause in the same way that Wilson did: as a provision aimed at (1) protecting access and (2) ensuring proportionality. When Pennsylvanians convened again in 1873 to revise their Constitution, one delegate summarized the meaning of the words "free and equal" as addressing "not only … privacy and partiality in popular elections, but also … corruption, compulsion, and other undue influences by which elections may be assailed." *Id.* at 809 (quoting Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania, Exhibiting the Derivation and History of its Several Provisions*, Article I at 10 (1883)). The Clause's language struck at regulations "which shall *impair* the right of suffrage," at

limitations on electoral eligibility "unproclaimed by the Constitution," and at "invidious discriminations" between classes of electors or "different sections or places in the State." *Id.*

Together, these historical touchstones reveal that the Free and Equal Elections Clause is not an avenue to examine the effects of neutral ballot-casting rules—it serves a much broader and higher purpose. The Clause is a structural guarantee focused on keeping the "original fountain" of democracy free from "poison." *See* Vol. 2 Collected Works at 63. It aims to ensure that every voter has the *opportunity* to participate in their duly elected government. *See Oughton v. Black*, 61 A. 346, 348 (Pa. 1905). And it therefore has little to say with respect to the merits, function, or purpose of particular election practices—unless and until those rules threaten access or proportionality.

B. The Dating Component is Akin to Other Election Practices Found to Comply with the Free and Equal Elections Clause

The Free and Equal Elections Clause has chiefly been invoked to invalidate legislation upon finding a "plain, palpable and clear abuse of the [legislative] power which actually infringes the *rights* of the electors." *League of Women Voters*, 178 A.3d at 809 (emphasis added) (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)); *see also Winston v. Moore*, 91 A. 520, 523 (Pa. 1914) ("[N]othing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government[.]"). The laws and

circumstances that have been found to violate the Free and Equal Elections Clause are, indeed, few and far between. For example:

- A partisan gerrymandering scheme *diluted the votes* of large swaths of citizens throughout the Commonwealth, depriving them of their right to freely choose their elected officials, *see League of Women Voters*, 178 A.3d at 814;

- Mail-in ballot deadlines threatened to deny thousands of voters the *opportunity to cast ballots* through no fault of their own due to the unforeseen strains of a global pandemic, *see Boockvar*, 238 A.3d at 370–71;

- Failure to ensure liberal access to identification cards consistent with a new law meant that hundreds of thousands of voters would not have the *opportunity to cast ballots* in the 2012 Election, *see Applewhite v. Commonwealth*, 54 A.3d 1, 5 (Pa. 2012) (*per curiam*); and

- Creation of a new borough and school district (which "had not been approved") from two existing townships resulted in all voters therein being *functionally unable* to choose representatives "on a body which would decide how their tax monies were spent." *League of Women Voters*, 178 A.3d at 810 (summarizing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

By contrast, this Court rejected Free and Equal Elections Clause challenges to:

- A ballot-casting rule that required voters supporting a minority party candidate to write-in a name, while voters supporting a majority party candidate could check a box, *see De Walt v. Bartley*, 24 A. 185, 187 (Pa. 1892);

- A ballot-casting rule that allowed for straight-ticket voting for major political parties, but not minor parties, *see Oughton*, 61 A. at 347–48;

- A primary vote threshold that applied to write-in candidates, *see Shankey v. Staisey*, 257 A.2d 897, 899 (Pa. 1969); and

- A statute that limited the number of names to be printed on an official ballot to two, *i.e.*, those that received the most votes in a primary, *see Winston*, 91 A. at 523.

In the former category of cases, this Court strove to ensure that all voters had "the same free and equal *opportunity* to select [their] representatives." *League of Women Voters*, 178 A.3d at 814 (emphasis in original). The challenged laws in each of those cases hindered elector *access* and thus violated the Free and Equal Elections Clause. In the latter category, this Court was satisfied that the challengers had "the same right as any other voter," *Winston*, 91 A. at 523; that all political actors had to satisfy the "same condition[s]" to participate in the electoral process, *Shankey*, 257 A.2d at 899; and that "the *manner*" of making one's democratic choice did not "interfere with the freedom and equality of elections[.]" *Oughton*, 61 A. at 347. Those election rules, therefore, did not violate the Clause.

The dating component of Act 77's declaration requirement fits comfortably among those provisions that have been upheld as consistent with the Free and Equal Elections Clause. All Pennsylvanians who vote by mail are given the same opportunity to follow the same simple instructions: "fill out, date and sign" a pre-printed declaration on their ballot-return envelope. 25 P.S. § 3146.6(a). In doing so, they verify that they are "qualified to vote" and have not "already voted" in the election. 25 P.S. § 3146.4. Voters whose ballots are rejected for failing to comply

with that straightforward instruction are not deprived of the equal opportunity to cast a ballot.

C. The Commonwealth Court Erred in Several Respects

In order to understand the Commonwealth Court's errors, it is first necessary to briefly outline various recent legal challenges to the dating component of Act 77's declaration requirement. As will be explained *infra*, the hodgepodge of legal standards at play culminated in a novel and uncomfortable application of the Free and Equal Elections Clause.

Three years ago, this Court held the declaration requirement to be mandatory as a matter of statutory construction, such that failure to comply will result in a ballot not being counted. *Ball*, 289 A.3d at 20. In both that case and related federal litigation, the decision of some county boards of elections to not count undated and incorrectly dated ballots was evaluated for compliance with the materiality provision of the Civil Rights Act. *See* 52 U.S.C. § 10101(a)(2)(B). While this Court divided evenly on that question, *see Ball*, 289 A.3d at 9, federal courts have subsequently determined that enforcing the dating component of the declaration requirement does not violate the materiality provision.[6]

[6] *See Pa. State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632 (W.D. Pa. 2023), *rev'd*, 97 F.4th 120, 133 (3d Cir. 2024), *cert. denied*, No. 24–363, ___ S. Ct. __ (Jan. 21, 2025); *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022).

Then, in the run-up to the 2024 General Election, the Commonwealth Court determined that not counting noncompliant mail-in ballots violated *neither* principles of statutory construction *nor* federal law—but the Free and Equal Election Clause of the Pennsylvania Constitution. *See Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321 (Pa. Cmwlth. Aug. 30, 2024) (en banc) (*BPEP*). The Commonwealth Court declared "the Election Code's dating provisions … invalid and unconstitutional" under the Clause. *Id.* at *39.

As one Justice noted, "the *en banc* majority [in *BPEP*], in its rush to resolve the merits, failed to adequately assess whether it possessed subject matter jurisdiction over the case in the first place." *Baxter v. Philadelphia Bd. of Elections*, 325 A.3d 645, 648 (Pa. 2024) (*per curiam*) (Dougherty, J., concurring). Finding that the Commonwealth Court lacked jurisdiction, this Court vacated that holding. *Black Political Empowerment Project v. Schmidt*, No. 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 4, 2024) (*per curiam*). This Court shortly thereafter denied an application for the exercise of King's Bench or Extraordinary Jurisdiction regarding the same issue. *New PA Project Educ. Fund v. Schmidt*, 327 A.3d 188, 189 (Pa. Oct. 5, 2024) (*per curiam*).

Undaunted, the Commonwealth Court found another case in which to address the question—this one. Expediating the appeal again, the Commonwealth Court declared—less than a week before the General Election—that the dating component

violated the Free and Equal Elections Clause on the same rushed reasoning as it did in *BPEP*. Cmwlth. Ct. Op. at 41–42. It did so despite the fact that the dating component "treats all voters alike" and neither "subvert[s]" nor "denie[s]" the right of a qualified elector to cast a ballot. *Id.* at 35 (quoting *Winston*, 91 A. at 523).[7] The majority below therefore directed the Philadelphia Board of Elections to count 69 ballots cast in a special election held on September 17, 2024. By their own accounts, these voters failed to include a handwritten date because of some combination of forgetfulness and reliance upon the Commonwealth Court's vacated decision in *BPEP*.[8] Respectfully, the analysis supporting the holding that these votes must be counted is deeply flawed.

[7] This Court wisely stayed that decision, so as to not cause confusion during the 2024 General Election. *Baxter*, 325 A.3d at 645.

[8] *See* Cmwlth. Ct. Op. at 6–7 ("Kinniry … did not attempt to fix her mail-in ballot because she read the news about this [c]ourt's decision in [*BPEP*]. … [and] Baxter … attested that his old age and increasing forgetfulness likely contributed to his failure to date his mail-in ballot.").

1. Statutory construction cases are not relevant to the constitutional question at issue.

The Commonwealth Court reasoned in part from a series of cases standing for the broad proposition that the Election Code, as a matter of statutory construction, should be construed liberally in favor of the right to vote. *See, e.g.*, Cmwlth. Ct. Op. at 24–25 (citing, *inter alia*, *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004), *In re Luzerne Cnty. Return Bd. (Appeal of Weiskerger)*, 290 A.2d 108, 109 (Pa. 1972), *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964); *Appeal of Gallagher*, 41 A.2d 630 (Pa. 1945), *Appeal of Norwood*, 116 A.2d 552 (Pa. 1955); *Appeal of James*, 105 A.2d 65 (Pa. 1954)). But those cases dealt with purportedly ambiguous provisions or applications of the Election Code.[9] And critically, not a single one of those cases even *referenced*—let alone analyzed—the text of the Free and Equal Elections Clause or any precedent interpreting it. This omission is not accidental. Rather, the fact that those cases contained *no* references to the Clause reflects that the constitutional question was either not presented or unnecessary to resolve. Accordingly, cases like *Shambach*, *Wesikerger*, *Perles*,

[9] *See Shambach*, 845 A.2d at 801–2 (interpreting "the name of any person or persons whose name is not printed on the ballot"); *Weiskerger*, 290 A.2d at 109 (discerning consequence of marking ballot in red ink); *Perles*, 202 A.2d at 540 (reasoning from ambiguity about eliminating invalid ballots "mingled with" unchallenged votes); *Gallagher*, 41 A.2d at 631–32 (discussing standard for whether ballot is "capable of identification"); *Norwood*, 116 A.2d at 549–50 (same); *James*, 105 A.2d at 65–66 (discussing sufficiency of indication of voter intent).

Gallagher, *Norwood*, and *James*, *supra*, shed no light on the Free and Equal Elections Clause question implicated here.

As a matter of statutory construction, the law is clear that mandatory, *unambiguous* provisions in the Election Code—including the dating component of Act 77's declaration requirement—must be enforced. *See Ball*, 289 A.3d at 20; *id.* at 28–29 (Donohue, J., concurring). And as this Court recently stated, where the language in the Election Code is unambiguous, there is "no room for application of the concept that technicalities should not be used to make the right of the voter insecure, or the interpretive principle that the Election Code is subject to a liberal construction in favor of the right to vote." *In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900, 907 (Pa. 2024) (cleaned up). That concept is only relevant "where there is some *uncertainty* about what the Election Code requires." *Id.* (emphasis added). Because the declaration requirement is unambiguous, principles of liberal construction are of no moment to the *constitutional* analysis of Act 77's statutory mandate.

2. Strict scrutiny does not apply to the dating component.

Consistent with the foregoing historical understanding of the Free and Equal Elections Clause, *see supra* I.A, our courts have never wielded it to micromanage the way the General Assembly regulates the election process. *See Boockvar*, 238 A.3d at 374 (reasoning that the Constitution "leaves the task of effectuating [the

Clause's] mandate to the Legislature"); *McClinko v. Dep't of State*, 279 A.3d 539, 543 (Pa. 2022) ("the power to regulate elections is a legislative one") (quoting *Winston*, 91 A. at 522–23). It makes sense, then, as one of the dissenters below acknowledged, that this Court "does not apply and has never applied strict scrutiny" to neutral, non-burdensome ballot-casting rules. Cmwlth. Ct. Op. at PAM-9 (McCullough, J., dissenting) (citing *BPEP*, 2024 WL 4002321 at *57–59 (McCullough, J., dissenting)).

The Commonwealth Court, however, analyzed the date component under strict scrutiny, reasoning that the right to vote is fundamental and pervasive of other rights. Cmwlth. Ct. Op. at 35. And, the majority held, because enforcement of the date component imposes a "**severe**" burden on the exercise of the franchise, it must be "**narrowly drawn to advance a state interest of compelling importance**." Cmwlth. Ct. Op. at 36–38 (emphases in original) (quoting *Boockvar*, 238 A.3d at 384–85 (internal quotations omitted)). The burden is severe, it reasoned, because "[it] restrict[s] the right to have one's vote counted ... to only those voters who **correctly** handwrite the date on their mail ballots." *Id.* at 37 (emphasis in original).

That reasoning is perplexing in two respects. *First*, it is unclear that tiers of scrutiny should frame a Free and Equal Elections Clause analysis at all. Indeed, this Court has advised that "a separate analysis" is warranted when both federal equal protection and Free and Equal Elections claims are present, depending on the claims

at issue. *See id.* at 812 ("our Court entertains as distinct claims brought under the Free and Equal Elections Clause of our Constitution and the federal Equal Protection Clause, and we adjudicate them separately."); *Banfield*, 110 A.3d at 176–77 (acknowledging and declining to adopt the argument that all election regulations must satisfy strict scrutiny). After all, the federal Constitution "does not contain, nor has it ever contained" an analogous provision. *League of Women Voters*, 178 A.3d at 804.[10]

Second, even assuming *arguendo* that tiers of scrutiny apply, it has long been recognized that "[e]very law regulating election processes imposes some kind of burden upon a voter," such that a law will be subject to strict scrutiny "[o]nly where [it] imposes a *severe* burden." *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1257 n.22 (Pa. Cmwlth. 2017) (emphasis added), *aff'd*, 209 A.3d 270 (Pa. 2019). Here, the Commonwealth Court applied strict scrutiny where no severe burden exists.

[10] As the dissent in *BPEP* observed, while this Court conducted a scrutiny analysis in *Boockvar*, it did so explicitly in the context of claims pursuant to the First and Fourteenth Amendments to the federal Constitution. *See BPEP*, 2024 WL 4002321, at *58 (McCullough, J., dissenting) (discussing *Boockvar*, 238 A.3d at 353, 380). Because it had not been suggested that the Free and Equal Elections Clause offers "greater protection under the circumstances presented" than those federal provisions, the Court treated them as "co-extensive" for purposes of review. *Boockvar*, 238 A.3d at 386 n.35.

The majority below fell into the trap of subjecting "every voting regulation to strict scrutiny," and tying "the hands of [the state] seeking to assure that elections are operated equitably and efficiently." *Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998). This Court has been clear: while the right to vote is fundamental, "the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner." *Banfield*, 110 A.3d at 176–77 (citing *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999); *In re Nader*, 905 A.2d 450, 459 (Pa. 2006)).[11] And the judiciary will not declare an election law an invalid exercise of the legislative power simply "because it may prove to be unwise, or of doubtful expediency, or …. may not be effective in correcting the evils intended to be remedied[.]" *Winston*, 91 A. at 522.

The Commonwealth Court should have begun by assessing how—if at all—dating an envelope burdens a Pennsylvania voter participating in an election. It did not. If it had, the majority would have arrived at the inescapable conclusion that simply dating an envelope is precisely the type of reasonable, non-discriminatory

[11] Indeed, the majority below seemed to acknowledge as much, if only in passing. *See* Cmwlth. Ct. Op. at 32–33 (noting that "[t]he judiciary should act with restraint, in the election arena, subject to express statutory directives" and that the "General Assembly may require such practices as it may deem necessary to the orderly, fair and efficient administration of public elections in Pennsylvania.") (quoting *In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014)).

regulation that the General Assembly may promulgate to ensure orderly and efficient elections. *See Banfield*, 110 A.3d at 176–77.

It is entirely unremarkable that noncompliance with the Election Code will inevitably create two classes of voters (those who comply and those who do not), and lead to the invalidation of noncompliant ballots. *See In re Scroggin*, 237 A.3d 1006, 1018 (Pa. 2020) ("It is well settled that the 'so-called technicalities of the Election Code' must be strictly enforced.") (quoting *Appeal of Pierce*, 843 A.2d 843 A.2d 1223, 1234 (Pa. 2004)).[12] Given the ease of dating an envelope—the antithesis of a "severe" burden—the applicable level of scrutiny here would be, at most, rational basis.

3. Framed correctly, the dating component is not "meaningless"

Separately, the Commonwealth Court was led astray insofar as it relied upon representations that the dating component is "meaningless." *See* Cmwlth. Ct. Op. at 39–40. That determination might have been relevant in addressing Act 77's compliance with the federal Civil Rights Act—a challenge the federal courts ultimately rejected. *See Pa. State Conf. of NAACP*, 97 F.4th at 133. But centering

[12] *Compare* Cmwlth. Ct. Op. at 39 (reasoning that the Constitution had been "certainly violated *in spirit, if not in letter*.") (emphasis added) (quoting *Oughton*, 61 A. at 349–50 (Dean, J., dissenting)), *with Ball*, 289 A.3d at 26 (Wecht, J., for an equally divided court) ("The text is the law, and it is the text that must be observed.") (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (Amy Gutmann ed., 1997)).

notions of materiality and "meaninglessness" in the context of a Free and Equal Elections Clause challenge is erroneous for at least two reasons.

First, the federal law perspective shifted the majority's focus away from the broader statutory context of the declaration requirement and towards an isolated word—"date"—in disregard of how courts ordinarily read statutes. Courts ordinarily do "not interpret statutory words in isolation" but instead "read them with reference to the context in which they appear." *A.S. v. Pa. State Police*, 143 A.3d 896, 905–06 (Pa. 2016) (internal quotations omitted). The federal materiality provision may allow for a surgical dissection of balloting rules to determine if any "error or omission is not material in determining whether [an] individual is qualified … to vote." *See* 52 U.S.C. § 10101(a)(2)(B). But assessing whether a given statute complies with the Pennsylvania Constitution requires a broader, contextual view. What the Commonwealth Court termed a dating "requirement" is, in truth, no more than a *component* of the larger *declaration* requirement that voters "fill out, date and sign" a pre-printed declaration on their ballot return envelope. *See* 25 P.S. §§ 3146.6(a); 3150.16(a).

Second, the Commonwealth Court allowed determinations from recent federal litigation regarding the materiality provision to drive its evaluation of government interests that might support the dating component. In *Ball* and *NAACP*, courts weighed whether an omitted or incorrect date played any role in assessing a voter's

qualifications to cast a ballot. *See Ball*, 289 A.3d at 28; *NAACP*, 703 F. Supp. 3d at 669. But assuming that tiers of scrutiny apply here, *cf. supra* I.B(2), the appropriate standard for a non-burdensome, neutral, generally applicable ballot-casting rule would be rational basis review—which is far less demanding. *See Banfield*, 110 A.3d at 177; *Boockvar*, 238 A.3d at 385 ("Where … [a] law does not regulate a suspect classification … or burden a fundamental constitutional right … the state need only provide a rational basis for its imposition."). Rational basis review asks whether any "reasonably conceivable state of facts … could provide a rational basis for [the] statute," and it does not require the General Assembly to have expressly stated the provision's purpose or grounded its judgment in evidence or empirical data. *See Crawford v. Commonwealth*, 277 A.3d 649, 674 (Pa. Cmwlth. 2022), *aff'd*, 326 A.3d 850 (Pa. 2024). In the words of this Court, "[i]f some legitimate reason exists, the provision cannot be struck down, even if its soundness or wisdom might be deemed questionable." *Sadler v. WCAB (Phila. Coca-Cola Co.)*, 244 A.3d 1208, 1216 (Pa. 2021).

Several conceivable purposes exist for the date component of the declaration requirement. As one jurist observed, dates on outer return envelopes would be critical to the work of county boards if the SURE system were to, "despite its name … [,] fail or freeze, or just run out of funding down the road." *See Migliori*, 36 F.4th at 165 (Matey, J., concurring). A handwritten date ensures that if election officials

are unable to rely on technological advancements because of a natural disaster or other unforeseen emergency, they can still swiftly and faithfully determine which ballots comply with the Election Code the old-fashioned way.

To wit, in the event that disruptions to the mail itself resulted in (i) ballots going missing or (ii) a wide discrepancy between when a ballot is completed and when it is received, the handwritten date would provide valuable information to Commonwealth officials investigating the situation or evaluating improvements to election infrastructure. It is well within the legislative prerogative to factor into its enactments the potential fallibility of "Plan A," ensuring the orderly administration of all elections.[13] The General Assembly need not assume—as Baxter and Kinniry apparently do—that elections will always be conducted without incident.

The Commonwealth Court erroneously grafted a materiality provision onto the Free and Equal Elections Clause. As discussed, the evaluation of government interests has little relevance when the Free and Equal Elections Clause is properly understood. But if it did, the dating component of the declaration requirement would satisfy rational basis review.

* * *

[13] In this sense, describing a handwritten date as "meaningless" in light of existing election protocols is akin to describing a seatbelt as "meaningless" in light of a consistent record of safe driving. And yet, safe drivers still wear seatbelts.

When the General Assembly decided to expand no-excuse mail-in voting through Act 77, the people's elected representatives determined that it was important for voters to include a signature and date when they affirmed that they were "qualified at vote" and had not "already voted" in the election. *See NAACP*, 703 F. Supp. 3d at 666 (reproducing outer return envelope). Act 77 affords all voters the same rights, opportunities, and easy-to-follow responsibilities when casting ballots for their chosen candidates. That is all that the Free and Equal Elections Clause requires. The dating component does not present an impediment to access or proportionality. Thus, this Court is presented with a ballot-casting rule that neither "den[ies] the franchise itself, [n]or makes it *so difficult* as to amount to a denial[.]" *Winston*, 91 A. at 523 (emphasis added).

In this case, compliance with the Election Code's instructions was in no way difficult. Taking Baxter and Kinniry at their word, they simply made a "mistake;" they "forgot to include the date." *See* Petition, Ex. 1, Decl. of Brian T. Baxter ¶ 11; *id.*, Ex. 2, Decl. of Susan T. Kinniry ¶¶ 10, 13. The Commonwealth Court overlooked these fatal admissions and allowed distinct legal questions to drive its Free and Equal Elections Clause analysis. Its conclusion should be reversed.[14]

[14] As this Court recognized in granting *allocatur* and phrasing the questions on appeal, Act 77's non-severability provision being "activate[d]" depends upon a finding that the dating component violates the Free and Equal Elections Clause. Because it does not, *see supra*, this Court need not reach the second question.

CONCLUSION

The Court should reverse the judgment of the Commonwealth Court.

Respectfully submitted,

DAVID W. SUNDAY, JR.
Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 705-2331
FAX: (717) 772-4526

Date: February 21, 2025

By: */s/ Sean A. Kirkpatrick*
SEAN A. KIRKPATRICK
Chief Deputy Attorney General
Chief, Appellate Litigation Section

BRETT GRAHAM
Deputy Attorney General

DANIEL B. MULLEN
Senior Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 5,952 words within the meaning of Pa.R.App.Proc. 531(b)(3); 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/ Sean A. Kirkpatrick
SEAN A. KIRKPATRICK
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I, Sean A. Kirkpatrick, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief for the Commonwealth of Pennsylvania as *Amicus Curiae* by electronic service to all counsel of record.

/s/ Sean A. Kirkpatrick
SEAN A. KIRKPATRICK
Chief Deputy Attorney General

Date: February 21, 2025