Received 3/21/2025 4:39:13 PM Supreme Court Eastern District

Filed 3/21/2025 4:39:00 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,
Respondents/Appellees

v.

PHILADELPHIA BOARD OF ELECTIONS,
Respondent/Appellee

REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA,
Intervenors/Appellants

APPEAL FROM THE OCTOBER 30, 2024 MEMORANDUM OPINION AND ORDER OF THE COMMONWEALTH COURT IN CONSOLIDATED CASE NOS. 1305 C.D. 2024 & 1309 C.D. 2024, AFFIRMING THE SEPTEMBER 26, 2024 AND SEPTEMBER 27, 2024 ORDERS OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY IN CASE NO. 2024-02481

Brief of Former Pennsylvania Public Officials as Amici Curiae in Support of Appellees

---

John Brent Hill (Bar No. 328340)
john@statesunited.org
Christine P. Sun*
christine@statesunited.org
Marina Eisner*
marina@statesunited.org
States United Democracy Center
1101 17th St. NW, Suite 250
Washington, DC 20036
(202) 999-9305
Attorneys for Amici Curiae
* Participating as counsel for Amici Curiae pursuant to 204 Pa. Code § 81.502(a)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Amici are the following former Pennsylvania public officials who have wide-ranging experience with elections and Pennsylvania election law. Amici's expertise includes both the practical application of Pennsylvania's election laws and procedures as well as understanding the interplay of those laws and procedures with the guarantees of the Pennsylvania Constitution's Free and Equal Elections Clause.

Former Secretaries of the Commonwealth – the Secretary of the Commonwealth is the top election official in Pennsylvania and leads the Pennsylvania Department of State. The Department of State is responsible for ensuring the integrity of the electoral process and strengthening democracy in Pennsylvania, by overseeing free, fair, and accurate elections while performing public outreach to improve voter education and participation.

- *Kathy Boockvar* – Kathy Boockvar served as the Secretary of the Commonwealth from 2019 until 2021, and before that as Senior Advisor on election security to Governor Tom Wolf. She was also co-chair of the National Association of Secretaries of State (NASS)'s Elections Committee from 2019-2020, and a NASS Representative on the Election Infrastructure Subsector Government Coordinating Council (EIS-GCC). During her tenure, Boockvar co-chaired Pennsylvania's Inter-Agency Election Security and Preparedness Workgroup. In prior years, Boockvar served as a poll worker and as a voting-rights attorney for a national civil rights organization.

- *Leigh M. Chapman* – Leigh M. Chapman served as the acting Secretary of the Commonwealth from January 2022 until January 2023. Between 2010 and 2022 she held numerous positions in the election administration space, including serving as the Policy

Director for the Pennsylvania Department of State from July 2015 until May 2017.

- *Veronica DeGraffenreid* – Veronica DeGraffenreid served as the acting Secretary of the Commonwealth from February 2021 until January 2022. Prior to that, she spent six years as the director of election operations for the North Carolina State Board of Elections and also previously served a special litigation legal assistant with the North Carolina Department of Justice for nearly eight years, specializing in redistricting and election-related litigation.

Former Attorney General – The Attorney General is Pennsylvania's top law enforcement official, with a wide range of responsibilities to protect and serve the citizens and agencies of the Commonwealth, including the Department of State.

- *Walter W. Cohen* – Walter W. Cohen served as Attorney General in 1995. Prior to that, he served as the First Deputy Attorney General from 1989 until 1995. He was also the Secretary of Public Welfare from 1983 until 1987 and was the Pennsylvania State Consumer Advocate from 1979 until 1983.

Former General Counsel to the Commonwealth – Pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-301, the General Counsel is appointed by the Governor to provide legal advice and representation to each executive agency, including the Department of State, and certain independent agencies. Thus, the General Counsel and their appointed deputy general counsel and assistant counsel supply day-to-day legal services to the Secretary of State and staff within the Bureau of Elections, who are responsible for the administration and oversight of elections in the Commonwealth. This legal advice encompasses interpretations and applications of the Pennsylvania Election Code and Pennsylvania Constitution.

- *Barbara Adams* – Barbara Adams served as General Counsel of the Commonwealth of Pennsylvania from June 2005 until January 2011.

- *Gregory Schwab* – Gregory Schwab served as General Counsel of the Commonwealth of Pennsylvania from October 2019 until

January 2023. He also served as a deputy general counsel and chief counsel in the Office of General Counsel from April 2015 until October 2019.

INTRODUCTION

Amici are former Commonwealth officials—Secretaries of the Commonwealth, an Attorney General, and General Counsel of the Commonwealth—who have served on the front lines in maintaining a "healthy representative democracy" in Pennsylvania. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018). In their various roles, Amici have been guided by the Pennsylvania Constitution's Free and Equal Elections Clause, Pa. Const. art. I, § 5, which is a lodestar for those charged with ensuring that "all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth." *League of Women Voters*, 178 A.3d at 804. As a result, no one is more aware than Amici that, for elections to be free and equal, they must be "conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *Id.*

The Free and Equal Elections Clause's origins date back to the Constitution of 1776; it has no federal counterpart. *See id.* at 806-07, 812. The Clause, then, has a singular role as a "bulwark" protecting

Pennsylvania's democratic institutions. *Id.* at 814. Given that, this Court has appropriately embraced a "broad and robust" understanding of what it means for elections to be free and equal. *Id.*

For 155 years, the Court has applied the Free and Equal Elections Clause by weighing whether the "necessity" for an election law is sufficient to excuse that law's burdens on Pennsylvanians' ability to have their votes counted. *Patterson v. Barlow*, 60 Pa. 54, 78 (1869). Further, election laws may not burden the right to vote if it is "possible to reach the end desired" through less onerous means. *In re New Britain Borough School District*, 145 A. 597, 599 (Pa. 1929) ("*In re New Britain*"). Because when election laws arbitrarily or needlessly burden the right to vote, "voters do not have an equal opportunity to translate their votes into representation," which is the "antithesis" of the Free and Equal Elections Clause's guarantees. *League of Women Voters*, 178 A.3d at 814.

This Court's approach in applying the Clause—perhaps best described as "functionalist" given its weighing of the need for an election law against the resulting burdens—ensures that courts and election administrators can deliver *in practice* on the Constitution's

promise of free and equal elections. The functionalist approach uses a sober, fact-based understanding of how elections work and shuns the convolutions and rigidity urged by Appellants.

Given Amici's experience, they have seen firsthand the effects that the protections of the Free and Equal Elections Clause have on real life voters and election administrators. When election laws and procedures are consistent with the Free and Equal Elections Clause by imposing only necessary limitations on the right to vote, voter participation and confidence increase, and elections are conducted more efficiently. But Amici also have witnessed and been forced to respond to election laws and procedures that erect meaningless hurdles to voting and serve only to arbitrarily disenfranchise qualified voters making good faith efforts to have their voices heard. Laws imposing such burdens have consequences that sweep far beyond individual affected voters: They erode the *entire electorate*'s trust in elections and their outcomes, and they force election administrators to waste precious time and resources undertaking unnecessary and sometimes—as in this case—fruitless tasks.

Here, in reviewing the constitutionality of Pennsylvania's prohibition on counting undated and incorrectly dated absentee and mail-in ballots ("mail ballots"), *see* 25 P.S. §§ 3146.6(a), 3150.16 (the "dating provisions"), the Court should reaffirm the vitality and practical potency of the Free and Equal Elections Clause by applying the functionalist approach the Court has used for more than a century and a half.

The dating provisions are not necessary in any way, as court after court has concluded. Handwritten dates on ballot envelopes are irrelevant to assessing a ballot's timeliness, voters already take other steps that ensure the solemnity of ballots, and counties do not rely on the handwritten dates to identify voter fraud. Enforcing the dating provisions to reject mail ballots has only one effect: needlessly disenfranchising Pennsylvanians. Once and for all, the Court should put an end to this disenfranchisement by holding that the Free and Equal Elections Clause of the Pennsylvania Constitution prohibits rejecting mail ballots that do not satisfy the dating provisions.

ARGUMENT

In this brief, Amici demonstrate that, for as long as the Court has applied the Free and Equal Elections Clause, it has used a functionalist approach to determine whether election laws and procedures violate the Pennsylvania Constitution, by assessing the necessity for the law and the law's resulting burden on the right to translate votes into representation. Because the Free and Equal Elections Clause is as salient today as it ever was (if not more so), the Court should apply its tried-and-true functionalist approach here as well.

155 years of precedent support concluding that enforcement of the dating provisions violates the Free and Equal Elections Clause of the Pennsylvania Constitution. It is inescapable that enforcement of the dating provisions is a burden on the proper administration of elections, serves no necessary purpose, and has resulted in the disenfranchisement of thousands of Pennsylvanians. And by "examin[ing] the law of [Pennsylvania] as it existed prior to" this case, the Court will put to bed Appellants' warning about the Court "transgress[ing] the ordinary bounds of judicial review" in violation of the Elections Clause of the U.S. Constitution. *Moore v. Harper*, 600 U.S.

1, 39 (2023) (Kavanaugh J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 114 (2000) (Rehnquist, C. J., concurring)); *id.* at 36 (Majority Op.).

Appellants, for their part, ignore this Court's past practice in an attempt to squeeze a novel, far more restrictive bright line rule from the Court's Free and Equal Elections Clause decisions. But Appellants' reading of these cases cannot be squared with the Court's past analysis or its robust interpretation of the Free and Equal Clause's protections.

I. This Court Has Long Applied a Functionalist Approach when Reviewing Pennsylvania Election Laws under the Free and Equal Elections Clause.

When Amici served in their roles, they were part of a chain of public servants reaching back centuries to the Framers' enactment of the Free and Equal Elections Clause itself. In all aspects of their work, Amici respected and incorporated a deep historical understanding of Pennsylvania's commitment to free and equal elections.

This Court's first major decision considering the Free and Equal Elections Clause was *Patterson v. Barlow*. There, the Court reviewed the Registry Law of 1869, which imposed more demanding voter qualification procedures on Philadelphians than on those in the rest of the Commonwealth, including payment of a "special election tax" of 50

cents per voter. 60 Pa. at 66 (quoting bill in equity). As a *general matter*, the Court observed that any election law may cause voters difficulties or even make their votes uncountable, but courts should not declare a law unconstitutional "unless it is a clear and palpable abuse of the power in its exercise." *Id.* at 76. To determine *in practice* whether the Registry Law was a clear and palpable abuse of power, the Court asked in *Patterson*: "*is there a necessity* for local legislation requiring provisions adapted to the city of Philadelphia, not suitable to other parts of the state?" *Id.* at 78 (emphasis added). The Court examined the "exigen[t]…circumstances" that made the law "necessary," *id.* at 79,[1] and held that the law was constitutional because the "necessity" to address Philadelphia-specific circumstances and incidences of fraud justified its burdens, *i.e.*, its "demands" that certain voters exercise "a greater vigilance to secure their suffrage." *Id.* at 82.[2]

---

[1] "If the prevalence of fraud, corruption, or force in the city makes the law more rigid and exacting in order to determine the rights of the lawful electors, it may be a hardship; but it is not caused by the law, but by the crimes which *make the law necessary for their protection*." (emphasis added).

[2] "True, the [law] demands of single men, clerks, journeymen and transient boarders, a greater vigilance to secure their suffrage. But the demand is not imposed by the law, *but by the necessity which required it*, in order to protect them and all other honest electors from being supplanted by fraudulent voters. What clause of the Constitution forbids this power to be exercised according to the exigency of the circumstances?" (emphasis added).

Thus, with *Patterson,* the Court first established that whether a particular election law clearly and palpably violates the Free and Equal Elections Clause turns on whether the "necessity" for the law outweighs the law's burdens on voters' ability to successfully vote.[3]

Soon after *Patterson*, the Court again utilized a functionalist approach to apply the Free and Equal Elections Clause in *DeWalt v. Bartley*, 146 Pa. 529 (1892). There, the Court reviewed a statute that primarily provided for ballot secrecy, as well as imposing certain limitations on the candidate nomination process and rules for polling places. *See id.* at 540-42. To decide whether the provision was valid under the Free and Equal Elections Clause, the Court emphasized the at-issue law's reasonableness and necessity: "The provision referred to is but a regulation, and we think a *reasonable one*, in regard to the printing of tickets. The use of official ballots renders it *absolutely necessary* to make some regulations . . . to ascertain what names shall be printed on the ballot." *Id.* at 543 (emphasis added). The Court

[3] It is also important to note that the outlook of the *Patterson* Court on urban voters is a relic from a different time. *See supra* nn. 1 & 2. If the Court were to consider a law identical to the Registry Law of 1869 today using the same functionalist approach that it has honed since *Patterson*, Amici believe the Court likely would reach the opposite result.

evaluated how the law "regulated" voting but still "carefully preserve[d] the right of every citizen to vote for any candidate whose name is not on the official ballot, and this [wa]s done in a manner which d[id] not impose any *unnecessary inconvenience upon the voter*." *Id.* (emphasis added). Based on that analysis, the Court upheld the provision because it did not go further than needed.

In another key Free and Equal Elections Clause decision, *Winston v. Moore*, 91 A. 520 (Pa. 1914), the Court again applied a similar functionalist approach. The law at issue in *Winston* provided for non-partisan nominations and elections in cities of the second class and imposed other restrictions on candidates' ballot access in those cities. *See id.* (quoting statement of case). Describing the Free and Equal Elections Clause "in a general way," the Court detailed the practical and expansive import it has for voters. Elections are free and equal when they are:

> public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Id. at 523.

And just as it had in *Patterson*, the Court in *Winston* evaluated the specific election procedures in practice. It found that the law at issue was necessary because "there must of necessity be a limit to the number of names printed thereon, else such a ballot would mean nothing," *id.* at 522, and the Court also made clear that it was upholding the law because it was not "restrictive in its operation." *Id.* The Court found that "[t]he rights of the voter are only incidentally involved . . . . The effect upon the rights of the individual voter was practically the same under the old law as it is under the new act." *Id.* at 523. Clearly applying a functional approach, the Court at bottom held the need for the law outweighed the very limited burden on voting.

Fifteen years later, in *In re New Britain*, the Court again applied the Free and Equal Elections Clause, but this time it struck down legislation that would have created new election districts but affected certain Pennsylvanians' ability to vote for the school director of their choice. 145 A. at 599. Citing to *Patterson*, the Court recognized that the Legislature "may pass statutes fixing the manner in which elections shall be conducted." *Id.* at 598-99. But the Court also cautioned that the

Free and Equal Elections Clause sets boundaries on the Legislature's authority: the right to vote "cannot be denied, qualified or restricted, and *is only subject to such regulation as to the manner of exercise, as is necessary for the peaceable and orderly exercise of the same right in other electors*." *Id.* at 598 (emphasis added) (citation omitted).

Again applying a functionalist approach, the Court in *In re New Britain* determined that the newly created districts violated the Free and Equal Elections Clause because they imposed unnecessary burdens on voting. The Court agreed that the purpose of the at issue law was "meritorious," yet it concluded that the law *unnecessarily* disenfranchised voters in school district elections so it was unconstitutional: "It *would have been possible* to reach the end desired by providing for special elections by all those within the territory affected, so that all taxpayers would possess an equal right of suffrage." *Id.* at 599 (emphasis added). In sum, the Court in *In re New Britain* applied a similar approach as it had in *Patterson, DeWalt*, and *Winston*, but for the first time the Court determined that an election provision violated the Free and Equal Elections Clause because of its unnecessary disenfranchising effect.

In modern cases, the Court has continued using a similar functionalist approach. Less than ten years ago, in *League of Women Voters v. Commonwealth*, the Court rejected arguments that districts with a partisan skew were necessary "to account for Pennsylvania's political geography, to protect incumbent congresspersons, or to establish [a] majority-African American district." 178 A.3d at 820. Rather, the Court held that accepting such maps would unreasonably burden Pennsylvanians' right to *effectively* vote because, even though affected voters could still cast a ballot, "the non-favored party's votes are diluted" by gerrymandered districts and thus all voters do "not have an equal opportunity to translate their votes into representation." *Id.* at 814.

Boiled down, *League of Women Voters* concluded that partisan gerrymandering violates the Free and Equal Elections Clause because it places too great a burden on the right to have votes counted, regardless of the justification. The Court stressed that the Clause's protections embody the "Commonwealth's commitment to neutralizing factors which unfairly impede or dilute individuals' rights to select their representatives" and "guard[] against the risk of unfairly rendering

votes nugatory." *Id.* And vote dilution, the Court emphasized, is "the antithesis of a healthy representative democracy" and directly contrary to the Free and Equal Elections Clause. *Id.*

Lastly, in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), the Court again used a functionalist approach in applying the Free and Equal Elections Clause to two separate statutory provisions.[4] *First*, the Court held that the Free and Equal Elections Clause required extending the deadline for receiving mail ballots during the COVID-19 pandemic. *See id.* at 362-72. The Court recognized that it is necessary for the Legislature to impose limits on when county boards of elections can receive ballots to permit ballot processing. *See id.* at 370. But the Court also determined that accommodating for mail delivery delays and increased mail ballot volume was warranted, because burdens caused by the COVID-19 pandemic were a

[4] The Court in *Pennsylvania Democratic Party* also considered whether the Free and Equal Elections Clause imposed a mandatory obligation on county boards of election to "contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them with an opportunity to cure those defects." *Id.* at 372. Because this challenge was not to a provision of the Election Code and rather the claim sought to create a *new obligation* that did not arise from the text of an election law, *see id.* at 374, the Court's Free and Equal Elections Clause analysis is not instructive in determining how courts should review existing laws.

countervailing consideration akin to the effects of a natural disaster, and as a result "necessitated" delaying the deadline for ballots to be submitted. *Id.* The Court held that, under the Free and Equal Elections Clause, the likelihood of "the disenfranchisement of voters" created by COVID-19 pandemic-related burdens outweighed the Legislature's general interest in setting the timeline for returning mail ballots, and so the ballot return deadline was unconstitutional as applied. *Id.* at 371. Thus, as in *League of Women Voters*, the Court's functional approach recognized that the Free and Equal Elections Clause's protections span beyond the *opportunity* to vote, and also encompass the right to have one's vote *counted*.

Second, the Court in *Pennsylvania Democratic Party* also held that the Election Code's requirement that all mail ballots be submitted using a secrecy envelope did not violate the Free and Equal Elections Clause. *See id.* at 376-380. Although the Court did not spend considerable time discussing the petitioners' Free and Equal Elections Clause claim, the Court's analysis nonetheless displays a functionalist approach. The Court recognized the petitioners' argument that enforcing the secrecy envelope requirement would disenfranchise some

voters. *See id.* at 376 (describing petitioners' Free and Equal Elections Clause arguments and stating "the Secretary concludes that no voter should be disenfranchised for failing to place his or her mail-in ballot in the secrecy envelope before returning it to the Boards"). But the Court concluded the disenfranchisement of some mail voters did not violate the Constitution because it was outweighed by the need to ensure the ballot secrecy of *all* mail voters: "ballot confidentiality up to a certain point in the process is so essential as to require disqualification." *Id.* at 379-80.[5]

* * *

[5] Appellants place significant emphasis on the Court's recent decision in *In re Canvass of Provisional Ballots in 2024 Primary Election*, 322 A.3d 900 (Pa. 2024) ("Walsh"). The Court's discussion of the Free and Equal Elections Clause in *Walsh* spanned only two sentences, *see id.* at 909, and cannot bear the weight Appellants place on it. In *Walsh*, the Court merely held that the Luzerne County Board of Elections had not carried its burden to establish a Free and Equal Elections Clause violation. *See id.* (rejecting Free and Equal Elections Clause argument because "the Board does not indicate how a statute that requires an elector voting by provisional ballot to sign the ballot's outer envelope denies the franchise or makes it so difficult as to amount to a denial"). That is unsurprising, because the Board made only passing reference to the Court's general statements about the Free and Equal Elections Clause in one paragraph of its lone brief. *See* Br. of Appellee Luzerne County Board of Elections at 16, *In Re: Canvass of Provisional Ballots in the 2024 Primary Election*, No. 55 MAP 2024 (Pa. July 31, 2024). The Board did not engage in any legal analysis or application of the Clause to the at issue statute, let alone employ the sort of functionalist approach described above. *Id.*

Across *Patterson*, *DeWalt*, *Winston*, *In re New Britain*, *League of Women Voters*, and *Pennsylvania Democratic Party*, the touchstone of the Court's Free and Equal Elections Clause analysis has been a functionalist approach that weighs the needs for election laws regulating the right to successfully vote against the burdens resulting from those laws. This approach is consonant with the "plain and expansive sweep" of the Free and Equal Elections Clause's plain text, *League of Women Voters*, 178 A.3d at 804, and with the Court's command that the Clause be given its "broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an 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.[6]

For Amici, understanding and applying the Free and Equal Elections Clause has been hugely consequential. Day-in and day-out,

[6] The Court's precedents applying the Free and Equal Elections Clause demonstrate that, although not always phrased in terms of strict scrutiny—the label that the Commonwealth Court below used to describe its analysis, *see Baxter v. Philadelphia Bd. of Elections*, Nos. 1305 C.D. 2024, 1309 C.D. 2024, 2024 WL 4614689, *16-17 (Pa. Commw. Ct. Oct. 30, 2024) (unpublished disposition)—the Court has long used an approach that examines the extent of an election law's burden on the right to vote and weighs that burden against whether the at issue law is necessary to advance a state interest.

they were among those ensuring that "our form of government" could "operate as intended." *Id.* And in so doing, nothing is more illustrative of the obligations of Amici's offices than the sweeping guarantee of the Free and Equal Elections Clause, the keystone on which Pennsylvania's system of elections and democracy is constructed.

II. Enforcing the Dating Provisions to Reject Ballots Violates the Free and Equal Elections Clause.

As former public officials who are deeply familiar with Pennsylvania elections and election law, Amici personally know that there is no Commonwealth interest that makes enforcing the dating provisions a necessity. The negative effects of rejecting ballots that violate the dating provisions, however, are substantial. In every election, Pennsylvanians are disenfranchised because they failed to date or misdated their mail ballot. Under the Court's well-established functionalist approach to applying the Free and Equal Elections Clause, enforcing the dating provisions is therefore clearly unconstitutional.

A. Enforcing the Dating Provisions Disenfranchises Voters.

Enforcing the dating provisions to disqualify undated and misdated mail ballots has caused and will continue to cause the disenfranchisement of Pennsylvanians. In the 2022 general election,

"10,000 timely-received ballots were not counted because they did not comply with" the dating provisions. *Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, 97 F.4th 120, 139 (3d Cir. 2024) (Shwartz J., dissenting), *cert. denied sub nom. PA Conf. of NAACP v. Schmidt*, No. 24-363, 2025 WL 247452 (U.S. Jan. 21, 2025). In the 2024 presidential election, counties rejected 4,700 mail ballots—23% of all rejected mail ballots—because the date was incorrect or missing.[7] It is irrefutable, then, that enforcement of the dating provisions "render[s] votes nugatory" and thus implicates the protections of the Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 814.

B. It Is Not "Necessary" to Enforce the Dating Provisions to Protect any Commonwealth Interest.

No Commonwealth interest makes it "necessary" to discard ballots that do not satisfy the dating provisions, meaning such enforcement of

[7] Associated Press, *Pennsylvania Elections Chief Touts Progress in Reducing Mail Ballot Rejection Rate*, U.S. News & World Reports (Jan. 31, 2025), https://www.usnews.com/news/best-states/pennsylvania/articles/2025-01-31/pennsylvania-elections-chief-touts-progress-in-reducing-mail-ballot-rejection-rate; *Shapiro Administration Announces 57% Decrease in Mail Ballots Rejected in 2024 General Election*, Pennsylvania Department of State (Jan. 24, 2025), https://www.pa.gov/agencies/dos/newsroom/shapiro-administration-announces-57--decrease-in-mail-ballots-re.html.

the provisions violates the Free and Equal Elections Clause. *In re New Britain*, 145 A. at 598 (citation omitted). Here, the Commonwealth Court below determined, based on the trial court's "*undisputed* factual findings," that "the date on the outer mail ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud." *Baxter*, 2024 WL 4614689, at *17 (emphasis added). Numerous other courts have reached the same or a similar conclusion. *See*, *e.g.*, *Pennsylvania State Conf. of NAACP Branches*, 97 F.4th at 125 ("The date requirement, it turns out, serves little apparent purpose.").[8]

There also is nothing sinister about the ballots that violate the dating provisions. Rather, voters who signed the declaration on the outer ballot envelope merely:

> omitted the date, wrote an incomplete date, or recorded an incorrect date below their signatures. Examples of erroneous dates include dates that only had the month and day but no year, or with a month and year but no day, dates that listed a year in the past or in the future, dates that were likely the

[8] *See also Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022) ("Upon receipt, the [county board] timestamped the ballots, rendering whatever date was written on the ballot superfluous and meaningless. It was not entered as the official date received in the SURE system, nor used for any other purpose."), *cert. granted, judgment vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *20 (Pa. Commw. Ct. Aug. 19, 2022) (Cohn Jubelirer, P.J.) ("[T]he parties have not identified a specific purpose served by dating the declaration on the return envelope, and the Court cannot discern any.").

> voter's birth date, and dates written using the European style of day/month/year.

Id. at 139, n. 2 (Shwartz, J., dissenting); *see also Pennsylvania State Conf. of NAACP v. Schmidt*, 703 F. Supp. 3d 632, 681 (W.D. Pa. 2023), *rev'd and remanded sub nom. Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania*, 97 F.4th 120 (3d Cir. 2024). As other courts have recognized, affected voters have primarily been elderly. *See*, *e.g.*, *Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024, 2024 WL 4002321, at *16, *26 (Pa. Commw. Ct. Aug. 30, 2024) (unpublished disposition), *vacated on other grounds*, No. 68 MAP 2024 (Pa. Sept. 13, 2024).

Although Appellants attempt to identify a few potential needs for enforcing the dating provisions, none holds water—as Amici know firsthand.

First, Appellants argue that compliance with the dating provisions is necessary to ensure a ballot's timeliness because the handwritten date provides "proof of when the elector actually executed the ballot in full." Br. of Appellants at 41 (cleaned up). But the date on which a voter *executes* a mail ballot is irrelevant to whether a ballot is timely—the

only thing that matters is whether the county *receives* the ballot before 8:00 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c).

As Appellants concede, county officials do not use the handwritten date to confirm when they receive a mail ballot because they "are required to timestamp a ballot and scan the barcode into the Statewide Uniform Registry of Electors ('SURE') upon receipt." Br. of Appellants at 42. In other words, the handwritten date on the ballot declaration is unnecessary because county boards use the timestamped date on the face of the ballot envelope and/or the SURE system to identify whether a ballot was timely received. *See Baxter*, 2024 WL 4614689, at *17 ("[T]he date on the outer mail ballot envelopes is not used to determine the timeliness of a ballot."); *Pennsylvania State Conf. of NAACP Branches*, 97 F.4th at 127 ("[T]he date on the declaration plays no role in determining a ballot's timeliness. That is established both by a receipt stamp placed on the envelope by the county board and separately through scanning of the unique barcode on the envelope.").

Further, although Appellants contend that a "handwritten date serves as a useful backstop" for ensuring that ballots were timely received, Br. of Appellants at 42, this too misses the mark. To start, in

Amici's experience, county officials likely would only rely on a handwritten date if they failed to *both* timestamp the ballot *and* enter it into the SURE system. And even then, because "[t]he Postal Service's policy is to postmark all ballots mailed by voters,"[9] a ballot envelope's postmark—*not* its handwritten date—would provide a better estimation of when the ballot was received by the County. Because the Commonwealth already can "reach the end desired"—making sure county boards only count ballots received by 8:00 p.m. on Election Day—without using the superfluous voter-provided handwritten date, enforcing the dating provisions is not "necessary" to confirm a ballot's timeliness. *In re New Britain*, 145 A. at 598-99.

Second, Appellants assert that enforcing the dating provisions "serves the Commonwealth's interest in solemnity, *i.e.*, in ensuring that voters 'contemplate their choices[.]'" Br. of Appellants at 42. But this argument fails as well: the Election Code already imposes obligations—like requirements that applicants for mail ballots provide proof of identification, *see* 25 P.S. §§ 3146.2(e)(1)-(2), 3150.12b(a), and

[9] *Election Mail: FAQs for Domestic, Nonmilitary Voters*, United States Postal Service, https://about.usps.com/what/government-services/election-mail/ (last visited March 19, 2025).

requirements that voters sign mail ballots, *see* 25 P.S. §§ 3146.6(a), 3150.16—which protect any interest in voter solemnity. Once again, the dating provisions are redundant and certainly unnecessary.

Third and finally, Appellants assert that enforcing the dating provisions is necessary to advance "the Commonwealth's interests in deterring and detecting voter fraud and protecting the integrity and reliability of the electoral process." Br. of Appellants at 43 (cleaned up). But in practice, the dating provisions are not used to prevent any exceedingly rare instance of voter fraud. Multiple courts, including the Court of Common Pleas and Commonwealth Court here, have concluded that, as a matter of fact, counties do not use mail ballots' handwritten dates to identify fraud. *See Baxter*, 2024 WL 4614689, at *17 ("[T]he date on the outer mail ballot envelopes is not used to determine . . . fraud.").[10] Even if a mail ballot was submitted on behalf of a deceased

[10] *See also Black Pol. Empowerment Project*, 2024 WL 4002321 at *32 ("As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine . . . fraud."); *Berks Cnty. Bd. of Elections*, 2022 WL 4100998, at *21 ("While the Boards posit that the date on the declaration is intended to deter fraud, the Court is unpersuaded."); *Pennsylvania State Conf. of NAACP Branches*, 97 F.4th at 140-41 (Shwartz, J., dissenting) ("[T]he date on the envelope is not used to (1) evaluate a voter's statutory qualifications to vote, (2) determine the ballot's timeliness, or (3) confirm that the voter did not die before Election Day or to otherwise detect fraud.").

voter, in the experience of the Amici who served as Secretary of the Commonwealth, election officials have practices they follow to protect against improperly counting the mail ballots of deceased voters, independent of using a mail ballot's handwritten date. *See* 25 P.S. § 3146.8(d),[11] 25 Pa.C.S.A. § 1505;[12] *see also Berks Cnty. Bd. of Elections*, 2022 WL 4100998, at *21 fn. 14 (stating that ballot of deceased voter was "separated by the chief clerk because the scan of the return envelope revealed, through the SURE system, that the elector was deceased"). The dating provisions are superfluous with respect to fraud detection.

Simply put, none of the interests identified by Appellants make enforcing the dating provisions a necessity. And because doing so disenfranchises voters, the Court should hold enforcing the dating provisions violates the Free and Equal Elections Clause.

---

[11] "Whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act has died prior to the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected by the canvassers but the counting of the ballot of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election."

[12] "A commission shall cancel the registration of a registered elector reported dead by the Department of Health."

III. Appellants' Proposed Approach Would Eviscerate the Force of the Free and Equal Elections Clause.

Appellants opt to cherry-pick from the Court's *general statements* about the Clause and the *types of election laws* that the Court has found were and were not free and equal, to manufacture a new, "narrow" interpretation of the Free and Equal Elections Clause. Br. of Appellants at 26.[13] The approach espoused by Appellants (and their Amici) does not withstand scrutiny. For 155 years, the Court has repeatedly applied the Free and Equal Elections Clause by considering an election law's necessity as well as its effects on Pennsylvanians' ability to successfully exercise their right to vote. *See supra* Section I. The Court has never, however, confined application of the Free and Equal Elections Clause to only the categories of laws identified by Appellants (or any category of laws for that matter).

[13] According to Appellants, the Free and Equal Elections Clause is limited to "three functions": it (1) "prohibits arbitrary voter-qualification rules that disqualify classes of citizens from voting;" (2) "prohibits intentional discrimination against voters based on socioeconomic status, where they reside, or religious and political beliefs;" and (3) "prohibits regulations that make it so difficult to vote as to amount to a denial of the franchise." *Id.* at 24-25 (cleaned up); *see also, e.g.*, Br. for the Commonwealth of Pennsylvania as Amicus Curiae at 7-13 (stating the Free and Equal Elections Clause limits laws hindering "elector *access*" but not "the *manner*" of voting).

The issues with Appellants' proposed narrow approach are not merely academic. Appellants' toothless interpretation of the Free and Equal Elections Clause would effectively destroy a key bulwark of the democratic process that Amici helped defend during their decades of public service. Indeed, given their expertise, Amici easily can imagine election laws that demonstrate the practical danger of Appellants' proffered approach for applying the Free and Equal Elections Clause, particularly when compared to the Court's longstanding functionalist approach.

Consider, for example, hypothetical laws requiring discarding mail ballots not signed in green ink or mandating that in-person voters wait 10 minutes after checking into their polling place but before casting their vote. Such neutral, generally applicable ballot-casting rules—inconvenient as they would be—would pass muster under Appellants' proposed "narrow" approach to applying the Constitution, because the hypothetical laws do not contravene any of Appellants' imagined "three functions" served by the Free and Equal Elections Clause. *See* Br. of Appellants at 24, 26. The only function Appellants identify that is even arguably implicated by such laws is a prohibition

on regulations that make it so difficult to vote as to amount to a denial. *Id*. at 25-26. But since all voters physically *could* satisfy each hypothetical requirement, both would survive review under Appellants' view of the Free and Equal Elections Clause.

The Court's well-established functionalist approach, on the other hand, would require balancing the necessity for such rules—there is none—against their effect on voters—certainly some voters would be deterred from voting or unable to successfully vote as a result of enforcing the hypothetical restrictions. Given the needlessness of such hypothetical rules, the functionalist approach would almost surely result in their invalidation under the Free and Equal Elections Clause.[14]

This case presents the Court with a clear choice about how elections will be administered in the future. If the Court adopts Appellants' new narrow approach, the Court will sanction *both* the unnecessary hurdle of correctly dating one's mail ballot *and* likely the

[14] The result from applying the functionalist approach also would be consistent with this Court's past practice. In *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108 (1972), the Court already invalidated a reading of the Election Code that would have disqualified ballots unless they were signed in blue or black ink, although the Court did so without explicitly invoking the Free and Equal Elections Clause. *See id.* at 109.

future imposition of countless other similar barriers, potentially ushering in a regime of "voting by obstacle course" and guaranteeing the death by a thousand cuts of the Free and Equal Elections Clause. But if the Court follows its longstanding functionalist approach, free and equal elections in Pennsylvania will endure.

CONCLUSION

Enforcing the dating provisions has had the undeniable effect of "rendering votes nugatory." *League of Women Voters*, 178 A.3d at 814. The only question, therefore, is whether it does so "unfairly." *Id.* The answer is a resounding "yes." As shown above, the dating provisions are not "necessary" to serve any Commonwealth interest. *In re New Britain*, 145 A. at 598 (citation omitted). And to the extent the dating provisions could even conceivably serve some nominal purpose, the Election Code already "reach[es] the end desired" through other means. *Id.* at 599.

As a result, pursuant to 155 years of this Court's precedents analyzing Free and Equal Elections Clause claims using a functionalist approach, the Court should hold that enforcing the dating provisions of 25 P.S. §§ 3146.6(a) and 3150.16 to disqualify votes violates the Pennsylvania Constitution.

Respectfully submitted,

Date: March 21, 2025

/s/ *John B. Hill*

John Brent Hill (Bar No. 328340)
john@statesunited.org
Christine P. Sun*
christine@statesunited.org
Marina Eisner*
marina@statesunited.org
States United Democracy Center
1101 17th St. NW
Suite 250
Washington, DC 20036
(202) 999-9305
Attorneys for Amici Curiae

* Participating as counsel for Amici Curiae pursuant to 204 Pa. Code § 81.502(a)

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,683 words and complies with the requirements of Pa. R. App. Proc. 531(b)(3) and 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/ John B. Hill
John B. Hill

CERTIFICATE OF SERVICE

I, John B. Hill, do hereby certify that I have this day served the foregoing Brief for the Commonwealth of Pennsylvania as Amicus Curiae by electronic service via PACFile to all counsel of record.

Date: March 21, 2025

/s/ John B. Hill
John B. Hill

Received 3/25/2025 12:00:37 PM Supreme Court Eastern District

Filed 3/25/2025 12:00:00 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,
Respondents/Appellees

v.

PHILADELPHIA BOARD OF ELECTIONS,
Respondent/Appellee

REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA,
Intervenors/Appellants

APPEAL FROM THE OCTOBER 30, 2024 MEMORANDUM OPINION AND ORDER OF THE COMMONWEALTH COURT IN CONSOLIDATED CASE NOS. 1305 C.D. 2024 & 1309 C.D. 2024, AFFIRMING THE SEPTEMBER 26, 2024 AND SEPTEMBER 27, 2024 ORDERS OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY IN CASE NO. 2024-02481

Revised Statement of Interest of Pennsylvania Public Officials as Amici Curiae in Support of Appellees

---

Christine P. Sun*
christine@statesunited.org
Marina Eisner*
marina@statesunited.org
States United Democracy Center
1101 17th St. NW, Suite 250
Washington, DC 20036
(202) 999-9305
Attorneys for Amici Curiae
* Participating as counsel for Amici Curiae pursuant to 204 Pa. Code § 81.502(a)

INTEREST OF AMICI CURIAE[1]

Amici are the following former Pennsylvania public officials who have wide-ranging experience with elections and Pennsylvania election law. Amici's expertise includes both the practical application of Pennsylvania's election laws and procedures as well as understanding the interplay of those laws and procedures with the guarantees of the Pennsylvania Constitution's Free and Equal Elections Clause.

Former Secretaries of the Commonwealth – the Secretary of the Commonwealth is the top election official in Pennsylvania and leads the Pennsylvania Department of State. The Department of State is responsible for ensuring the integrity of the electoral process and strengthening democracy in Pennsylvania, by overseeing free, fair, and accurate elections while performing public outreach to improve voter education and participation.

- *Kathy Boockvar* – Kathy Boockvar served as the Secretary of the Commonwealth from 2019 until 2021, and before that as Senior Advisor on election security to Governor Tom Wolf. She was also co-chair of the National Association of Secretaries of State (NASS)'s Elections Committee from 2019-2020, and a NASS Representative on the Election Infrastructure Subsector Government Coordinating Council (EIS-GCC). During her tenure, Boockvar co-chaired Pennsylvania's Inter-Agency Election Security and Preparedness Workgroup. In prior years, Boockvar served as a poll worker and as a voting-rights attorney for a national civil rights organization.

[1] Pursuant to 210 Pa. Code § 531, no person or entity, other than Amici or their counsel authored this brief in whole or in part, and no person or entity, other than Amici or their counsel, made a monetary contribution, in whole or in part, for the preparation or submission of this brief.

- *Leigh M. Chapman* – Leigh M. Chapman served as the acting Secretary of the Commonwealth from January 2022 until January 2023. Between 2010 and 2022 she held numerous positions in the election administration space, including serving as the Policy Director for the Pennsylvania Department of State from July 2015 until May 2017.

- *Veronica DeGraffenreid* – Veronica DeGraffenreid served as the acting Secretary of the Commonwealth from February 2021 until January 2022. Prior to that, she spent six years as the director of election operations for the North Carolina State Board of Elections and also previously served a special litigation legal assistant with the North Carolina Department of Justice for nearly eight years, specializing in redistricting and election-related litigation.

Former Attorney General – The Attorney General is Pennsylvania's top law enforcement official, with a wide range of responsibilities to protect and serve the citizens and agencies of the Commonwealth, including the Department of State.

- *Walter W. Cohen* – Walter W. Cohen served as Attorney General in 1995. Prior to that, he served as the First Deputy Attorney General from 1989 until 1995. He was also the Secretary of Public Welfare from 1983 until 1987 and was the Pennsylvania State Consumer Advocate from 1979 until 1983.

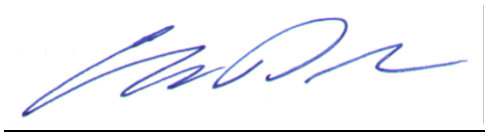
Former General Counsel to the Commonwealth – Pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-301, the General Counsel is appointed by the Governor to provide legal advice and representation to each executive agency, including the Department of State, and certain independent agencies. Thus, the General Counsel and their appointed deputy general counsel and assistant counsel supply day-to-day legal services to the Secretary of State and staff within the Bureau of Elections, who are responsible for the administration and oversight of elections in the Commonwealth. This legal advice encompasses interpretations and applications of the Pennsylvania Election Code and Pennsylvania Constitution.

- *Barbara Adams* – Barbara Adams served as General Counsel of the Commonwealth of Pennsylvania from June 2005 until January 2011.

- *Gregory Schwab* – Gregory Schwab served as General Counsel of the Commonwealth of Pennsylvania from October 2019 until January 2023. He also served as a deputy general counsel and chief counsel in the Office of General Counsel from April 2015 until October 2019.

Respectfully submitted,

Date: March 25, 2025



Christine P. Sun*
christine@statesunited.org
States United Democracy Center
1101 17th St. NW
Suite 250
Washington, DC 20036
(202) 999-9305

Marina Eisner*
marina@statesunited.org
States United Democracy Center
1101 17th St. NW
Suite 250
Washington, DC 20036
(202) 999-9305
Attorneys for Amici Curiae

* Participating as counsel for Amici Curiae pursuant to 204 Pa. Code § 81.502(a)

CERTIFICATE OF COMPLIANCE

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

/s/ John B. Hill
John B. Hill

CERTIFICATE OF SERVICE

I, John Hill, do hereby certify that I have this day served the foregoing Revised Statement of Interest by electronic service via PACFile to all counsel of record.

Date: March 25, 2025

/s/ John Hill
John Hill