

SUPREME COURT OF PENNSYLVANIA

NOS. 1 EAP 2025, 2 EAP 2025

BRIAN T. BAXTER AND SUSAN T. KINNIRY,

Appellees,

v.

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

Appellants.

**BRIEF OF *AMICI CURIAE* THE COMMITTEE OF SEVENTY AND THE
LEAGUE OF WOMEN VOTERS PENNSYLVANIA IN SUPPORT OF
BRIAN T. BAXTER AND SUSAN T. KINNIRY**

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INTERESTS OF AMICI CURIAE¹

I. The Committee of Seventy

The Committee of Seventy (“Seventy”) is a non-partisan civic leadership organization that advances representative, ethical, and effective government in Philadelphia and Pennsylvania through citizen engagement and public policy advocacy. Seventy was established in 1904 with the goals of improving voting, getting more competent and honest people into government, fighting corruption, and keeping people informed and involved in government. One hundred and twenty years later, Seventy continues to focus on public integrity, governmental transparency and effectiveness, and free, fair, secure, and well-run elections.

During 2024, Seventy devoted significant staff time and financial resources to voter education, including educating voters on the need to avoid disenfranchisement by signing and dating each mail-in ballot, despite the fact that the voter’s written date would serve no purpose in the voting process. But for the voter written dating requirement, Seventy would have been able to devote greater resources to voter education generally.

Seventy participates in litigation only when it is the most effective way to advance its non-partisan, good-government objectives. Such is the case here. The

¹ No party’s counsel authored this brief in whole or part. No party, party’s counsel, or person other than Seventy or the League, its members, or its counsel provided money for the preparation or submission of this brief.

central issue before the Court is whether Pennsylvania’s constitutional right to free and equal elections protects eligible voters who seek to have their ballots counted notwithstanding immaterial paperwork mistakes. Seventy has an interest in this issue because strong representative government exists when the processes through which Pennsylvanians choose public officials are open, free, consistent, fair, and secure. This means allowing all eligible voters to cast ballots, and it means counting every vote.

II. The League of Women Voters of Pennsylvania

The League of Women Voters of Pennsylvania (the “LWVPA”) is a nonpartisan statewide non-profit formed in 1920 following the passage of the 19th Amendment to the U.S. Constitution that granted many women the right to vote. The League of Women Voters continued to celebrate and believe that women have fought for and deserve a voice at the ballot box and in our government. The LWVPA and its members are dedicated to helping the people of Pennsylvania exercise their right to vote, as protected by the law. The LWVPA encourages informed and active participation in government and works to increase understanding and influence of public policy issues through education and advocacy. A predominantly volunteer organization, the LWVPA has 31 member chapters and one Inter-League Organization operating in 29 counties around the Commonwealth. The LWVPA’s

more than 2,500 individual members are registered voters who regularly vote in state and federal elections, including by mail.

The issues before the Court in this case overlap significantly with the LWVPA's missions, including voter registration, education, and get-out-the-vote drives. A perfect illustration of this can be found in the LWVPA's experience following this Court's November 1, 2022 decision in *Ball v. Chapman*, No. 102 MM 2022. As a consequence of this Court's decision in *Ball*, election officials were required to set aside—and not count—votes received in mail ballot envelopes when the envelopes were missing a meaningless voter-written date or showed a date that the board of elections determined to be “incorrect.” That development caused the LWVPA, just before Election Day in 2022, to redirect its limited resources, including staff and volunteer time, to efforts to inform voters of the mail-ballot requirement and educate them about how to avoid disenfranchisement. Again in 2024, LWVPA devoted substantial staff and resources to voter education and outreach efforts dedicated to preventing disenfranchisement due to the meaningless voter-written date requirement.

But for application of the voter-written date requirement, the LWVPA's time and resources would be available for other election protection and “get-out-the-vote” efforts and helping voters navigate the voting process. Absent the relief requested in this case, the LWVPA it will need to again divert its staff and resources to voter

education and outreach efforts dedicated to preventing disenfranchisement due to the meaningless voter-written date requirement.

SUMMARY OF ARGUMENT

This case involves the handwritten date on the outer return envelope submitted by Philadelphia mail-ballot voters. It is undisputed that the handwritten date serves no purpose whatsoever. The Philadelphia Board of Elections (the “Board”) concedes that the voter-written date is literally meaningless: the voter simply needs to write a date representing a day sometime between when they received the ballot and when they mail the ballot. The date need not reflect when the voter filled out the ballot. It has no bearing on whether a ballot is considered timely cast.

Yet when a voter makes a mistake by, for example, forgetting to write the date, writing the date in the wrong format, or filling in a date of birth, election officials may reject that eligible voter’s otherwise valid ballot. Errors or omissions with respect to the handwritten date resulted in more than 4,500 Pennsylvania voters’ ballots being rejected and not counted in the 2024 election. *See Commonwealth of Pennsylvania, Shapiro Administration Announces 57% Decrease in Mail Ballots Rejected in 2024 General Election* (Jan. 24, 2025), <https://www.pa.gov/agencies/dos/newsroom/shapiro-administration-announces-57--decrease-in-mail-ballots-re.html>. Envelope dating errors were the single most common reason why timely mail ballots were rejected. *Id.* (23% of mail ballots

rejected for “incorrect or missing date”). In other words, four thousand, five hundred Pennsylvania voters who had requested a mail ballot, completed it, and returned it on time to their election officials, nonetheless had their ballots rejected and not counted based on a meaningless mistake.

The Court of Common Pleas and the Commonwealth Court each held that a voter’s fundamental right to vote, enshrined in the Pennsylvania Constitutions’ Free and Equal Elections Clause, PA. CONST. art. I § 5, is violated when their timely ballot is rejected based on a failure to write a date the outer envelope. The Court of Common Pleas directed the Board to verify, count, and include in the results of the Special Elections otherwise valid mail ballots cast by Respondents and 67 other registered voters, notwithstanding immaterial voter-written date errors or omissions that had previously disqualified those ballots. On appeal, the Commonwealth Court agreed that the Board violated the Free and Equal Elections Clause by not counting 69 incorrectly dated or undated mail ballots based on the pointless dating provision. It affirmed the decision of the Court of Common Pleas directing that otherwise valid ballots must be counted notwithstanding immaterial paperwork issues with respect to the handwritten date on the outer return envelope. The Commonwealth Court also correctly held that Act 77’s nonseverability provision was not applicable.

This Court should affirm the Commonwealth Court because enforcing the meaningless envelope-dating provision to disenfranchise Pennsylvania voters

violates the Free and Equal Elections Clause, and the Court can sever the provision from the Act without issue. Reversing would undermine civic engagement and political participation. Thousands of Pennsylvania voters—Republicans, Democrats, Independents, and unaffiliated voters alike—would have their ballots canceled in upcoming elections because of irrelevant paperwork issues. Election officials would face unnecessary burdens. Reversal would leave room for nonuniformity in election administration and create purposeless traps for unwary voters. Voting rights groups would again devote precious resources to publicizing traps and educating voters to avoid traps. Such “legal traps” engender distrust in the fairness and integrity of our elections.

Voting issues such as these go to the heart of American democracy and are exceptionally important to Pennsylvania’s voters, election officials, and electoral process. Every citizen, regardless of political persuasion, has the free and equal right to vote. That right encompasses not just the opportunity to request, complete, and submit a ballot, but the ability to have that ballot *counted*. Allowing the voter-written date requirement to reject and not count votes is not fair.

This Court should affirm based on the Commonwealth Court’s reasoning.

ARGUMENT

I. The Court Should Affirm Because Disenfranchising Eligible Voters Who Submit An Otherwise Valid Ballot Due To An Immaterial Envelope-Dating Mistakes Violates the Free and Equal Elections Clause of the Pennsylvania Constitution.

Disenfranchising eligible voters who submit an otherwise valid ballot due to immaterial date mistakes or omissions violates the right to vote enshrined in the Pennsylvania Constitution.

Article I, section 5 declares, “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. This clause, known as the “Free and Equal Elections Clause,” protects a voter’s equal opportunity to participate in elections. It ensures that “each voter under the law has the right to cast [his or her] ballot and have it honestly counted[.]” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914) (alteration added). It applies to all aspects of the electoral process—including ballot casting measures—and “strike[s] ... at *all* regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise[.]” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 809 (2018) (emphasis and alteration added).

The voter-written date requirement is precisely such a regulation that must be stricken by our Pennsylvania Constitution. No doubt the requirement “impair[s] the right of suffrage.” Indeed, there is no current justification for the requirement, but

it nonetheless has heavy consequences: it disenfranchises voters. It is not used to determine whether the ballot was completed at an appropriate time or returned to the Board before Election Day. Nor is it used to determine whether the voter was eligible or to guard against fraud. Rather, the voter-written date requirement furthers no legitimate government purpose. The voter needs only to write a date representin]g any day between when they received the ballot and when they mailed the completed ballot to the Board. The voter-written date requirement serves no affirmative purpose whatsoever; it only serves to trap the unwary voter. Only if there is an error or omission is the date used in any way. It is most consequential of uses. It is only used to reject an otherwise timely ballot. If election officials do not use the date (or lack thereof) to reject and cancel a ballot, they ignore it.

If anyone should be able to articulate some justification for a paperwork requirement that puts voters at jeopardy of having their vote not counted, it should be the Board. The Board has jurisdiction over “the conduct of primaries and elections” in Philadelphia, 1937 Act 320, P.L.1333, including enforcement of the voter-written date requirement. But the Board concedes that the date is utterly useless and stipulated that the date “*serves no purpose.*” Appellee’s Br. at 2 (emphasis added); R0046, at 5:6–6:7 (stipulating to factual record); *see also* R0011, ¶ 39 (“The date written on the envelope *serves no purpose.* In particular, it is not used to establish whether the mail ballot was submitted on time.” (emphasis added)).

Courts across the Commonwealth have confirmed the same. In case after case, courts have found that the voter-written date is meaningless and unnecessary to establish voter eligibility or ballot timeliness. *See, e.g., Black Political Empowerment Project, et al. v. Schmidt, et al.* (“*B-PEP*”), No. 283 M.D. 2024, 2024 WL 4002321, at *32 (Pa. Commw. Ct. Aug. 30, 2024), *vacated on other grounds*, No. 68 MAP 2024, 322 A.3d 221 (Pa. Sept. 13, 2024) (“As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud.”); *see also Pa. State Conf. of NAACP v. Schmidt* (“*NAACP I*”), 703 F. Supp. 3d 632, 668 (W.D. Pa. 2023), *rev’d on other grounds*, 97 F.4th 120 (3d Cir. 2024) (“County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return Envelope for any purpose[.]”); *Pa. State Conf. of NAACP Branches v. Schmidt* (“*NAACP II*”), 97 F.4th 120, 125, 127, 129 (3d Cir. 2024) (agreeing the handwritten date plays no role determining a ballot’s timeliness or voter qualifications, or detecting fraud).

Even before this case, the Commonwealth Court recognized that the envelope-dating provision was unconstitutional. In *B-PEP*, the Commonwealth Court held that the “dating provisions impose a significant burden on one’s constitutional right to vote” because “only those voters who correctly handwrite the date on their mail ballots” have their ballots counted, “effectively deny[ing] the right to all other

qualified electors who seek to exercise the franchise by mail in a timely manner but make minor mistakes regarding the handwritten date on their mail ballots' declarations." 2024 WL 4002321, at *32 (alteration added). Because "counsel for the Secretary [of the Commonwealth] confirmed that none of the county boards of elections use the handwritten date for any purpose," the Commonwealth Court held that "[i]t is therefore apparent that the dating provisions are virtually meaningless and, thus, serve no compelling government interest." *Id.* at *32-33 (alteration added and citation omitted). This Court vacated the Commonwealth Court's decision in *B-PEP*, but only on procedural grounds. *See Black Political Empowerment Project, et al. v. Schmidt ("B-PEP-II")*, 322 A.3d 221 (Pa. 2024).

The reasoning in *B-PEP* is entirely consistent with the plurality opinion in *Ball v. Chapman*, which acknowledged that the "failure to comply with the date requirement would *not compel the discarding of votes in light of the Free and Equal Elections Clause*, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth." 289 A.3d 1, 27 n.156 (Pa. 2023) (emphasis added and citation omitted).

This Court has rejected challenges to voting requirements and regulations under the Fair and Equal Elections Clause when *legitimate* governmental interests are found, such as verifying voter identity or ensuring secrecy of an elector's party

affiliation. In *In re Canvass of Provisional Ballots in 2024 Primary Election*, for example, this Court affirmed the requirement that a voter sign his provisional ballot because the Board must compare the outer envelope's signature with the signature on the elector's registration form to assess each provisional ballot's genuineness. 322 A.3d 900, 907 (Pa. 2024). The signature requirement there was far from "meaningless"; it actually guarded against voter fraud. Similarly, in *Genser v. Butler County Board of Elections*, this Court held that a missing secrecy envelope is more than a "mere minor irregularity" because it ensures that, when the mail-in ballot is counted, it is not "readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted." 325 A.3d 458, 478 (Pa. 2024) (internal quotation marks omitted). The *Genser* Court distinguished the secrecy requirement from minor irregularities like filling out the ballot in the wrong color of ink or writing in a name already on the ballot. *Id.* Such minor irregularities, involving ink color or redundancy, are similar in magnitude to voter-written mistakes or omissions. Voter-written date errors do not implicate any interest, let alone the important secret ballot interest at stake in the "naked ballot" case. *Id.*

There is no legitimate interests here to justify the disenfranchisement of an eligible voter who submits a timely ballot but errs in completing the meaningless voter-written date block. The date is not used to determine ballot arrival by the statutory deadline. *See, e.g., NAACP II*, 97 F.4th at 129 (the handwritten date is not

“used to determine the ballot’s timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties’ timestamping and scanning procedures serve to verify that. Indeed, *not one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 election.*” (emphasis added); *see also NAACP I*, 703 F. Supp. 3d at 679 (“Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope[.]”). It does not protect against voter fraud. *B-PEP*, 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 the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud.”). It does not support the government and citizens’ interests in solemnity; the signature requirement, along with voter attestations, fulfill this interest already.

In the absence of any use of or reason for enforcement of the date provision—other than the illegitimate disenfranchisement of eligible voters who cast timely ballots—this Court should affirm and thereby ensure that all Pennsylvanians who chose to vote by mail will not have their right to a free and equal election abridged.

II. The Outer-Envelope Dating Provision Is Severable from Act 77.

This Court can hold that the outer-envelope dating provision is not enforceable through the disenfranchisement of noncompliant voters without

invalidating Act 77 or undoing Pennsylvania’s vote-by-mail system. A nonseverability clause is not “triggered by a judicial interpretation of a statutory provision that did not declare the *provision* invalid” rather than its enforcement. *Bonner v. Chapman*, 298 A.3d 153, 168–69 (Pa. Commw. Ct. 2023). Here, the Commonwealth Court was not asked to—and did not—“declare the dating provisions unconstitutional or otherwise strike them from Act 77.” A41. Instead, it correctly held that Act 77’s nonseverability clause was not implicated because “the other provisions of Act 77 ... will not be affected by [its] ultimate conclusion regarding the unconstitutional *application* of the dating provisions[.]” *Id.* This Court should do the same.

Even then, this Court has routinely declined to apply nonseverability provisions and instead given effect to binding statutory construction rules stating that “[t]he provisions of every statute shall be severable.” 1 Pa. C.S. § 1925 (1972); *see, e.g., Stilp v. Commonwealth*, 905 A.2d 918, 970–81 (Pa. 2006) (refusing to enforce an identical nonseverability provision on separation-of-powers grounds because the court “has never deemed nonseverability clauses to be controlling in all circumstances”).

The nonseverability provision of Act 77 is not implicated here. In passing Act 77, in 2019, the General Assembly intended to provide for expanded mail voting by qualified electors. The outer-envelope date requirement in section 3146.8(g) is a

relic from prior voting legislation. Initially added in 1963, the date requirement was originally used to determine timeliness of mail ballots, as the canvassing provision of the act required boards of elections set aside ballots dated after Election Day. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, §§ 1306, 1308(c). In the last century, automation and modernization changes led to making “date of receipt” the sole determinant of ballot timeliness. Nonetheless, the vestigial outer-envelope dating requirement made its way into Act 77. *Cf.* R0122 (6/24/24 Br. of Amici Curiae Bryan Cutler, et al.) (noting that the General Assembly adopted the old absentee-ballot language in entirety “to minimize the complexities of legislative drafting” in creating the new no-excuse regime). Applying the nonseverability provision to invalidate all of Act 77 because the legislature chose to carry-over absentee-ballot instructions for ease of drafting clearly runs counter to the General Assembly’s intent to increase no-excuse mail voting. Throwing out an entire statute, due to a nonseverability provision, because of an unconstitutional application of a vestigial and irrelevant dating provision, would be nonsensical.

III. Affirming Would Promote Good Government, Public Confidence in the Voting Process, and Democracy.

Voting issues such as these go to the heart of American democracy and are exceptionally important to Pennsylvania’s voters, election officials, and electoral process. *See Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999) (recognizing, under Pennsylvania law, the right of suffrage as “fundamental” and “pervasive of other

basic civil and political rights”) (citation omitted). Every citizen, regardless of political persuasion, has a strong interest in exercising the right to vote. That right encompasses not just the opportunity to submit a ballot, but the ability to have that ballot counted. At the core of our democracy is the right to suffrage for all eligible voters—“the most treasured prerogative of citizenship.” *Norwood Election Contest Case*, 116 A.2d 552, 553 (Pa. 1955).

Voters should not have to worry that a mistake involving a meaningless paperwork requirement regarding the outer envelope of their ballot, may deprive them of their most sacred right as citizens. Reversing in this case would mean that the voices of thousands of citizens will be ignored for no good reason.

According to the Pennsylvania Department of State, roughly 4,503 timely mail ballots in the 2024 general election were rejected because an elector’s date block was incorrect or left blank. This marked an “improvement” over prior elections, as in 2022 more than 10,000 timely ballots were rejected because of such dating issues. The “improvement” followed the Commonwealth’s redesign of the envelopes to try to reduce the number of voters ensnared by the date trap, as well as massive voter education initiatives deployed by the Commonwealth, Seventy and the LWVPA, and other voting rights advocate organizations. Despite the initiatives, thousands of Pennsylvania voters still were excluded from participation in our democracy, their votes were rejected and not counted due to a meaningless

paperwork issue. The time, money, and resources spent by nonprofit and governmental organizations to educate voters and correct mistakes was a high cost. Many were still disenfranchised for failing to correctly fill in a meaningless date.

Allowing the handwritten date requirement to cancel votes erodes public confidence in the voting process and harms our democracy. Reversing here would open the door to variable and unfair practices across the Commonwealth because its 67 counties will take different approaches to enforcing the handwritten date requirement. The enforcement of the dating provision has resulted in the arbitrary and baseless rejection of thousands of timely ballots. “[C]ounty boards having to confirm whether dates are correct or incorrect burdens the county boards and results in unequal treatment of mail ballots across the Commonwealth, as no two county boards approach this endeavor the same way, and ... ensuring consistency across the boards is difficult.” *B-PEP*, 2024 WL 4002321, at *33 nn.56-59 (collecting voter declarations that show disparities between counties); *see also NAACP I*, 703 F. Supp. 3d at 680 (finding the record “replete with evidence that the county boards’ application of the [date requirement] in the November 2022 general election created inconsistencies across the Commonwealth in the way ‘correctly dated’ and ‘incorrectly dated’ ballots were rejected or counted by different counties”) (alteration added).

Reversal also invites risk of additional paperwork requirements that burden election officials and serve as traps for unwary voters. *See B-PEP*, 2024 WL 4002321, at *33. As a result, the Secretary of the Commonwealth urged the court in this case to resolve this constitutional issue because “it would make county boards’ responsibilities easier on election day.” A19.

“Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Unfortunately, polling suggests that more than a third of Americans lack confidence that votes will be accurately cast and counted in elections. Pew Research Center, *Harris, Trump Voters Differ Over Election Security, Vote Counts, and Hacking Concerns* (Oct. 24, 2024). And only “about six-in-ten voters (61%) said they were confident absentee and mail-in ballots would be counted accurately in November [2024.]” *Id.* (cleaned up). Disenfranchising eligible voters who should have their votes counted further erodes belief in Pennsylvania’s elections. The Court should affirm the lower court’s decision so Pennsylvania voters can regain trust in the system.

CONCLUSION

For these reasons, Seventy and the LWVPA in their roles as *Amici* respectfully urge this Court to affirm the Commonwealth Court’s ruling and to protect the sacred

right of Pennsylvania citizens to participate in free and fair elections in the Commonwealth.

Dated: March 31, 2025

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CERTIFICATES OF COMPLIANCE

1. I certify that the document complies with the word limit of Pa. R.A.P. 531(b)(3) because, excluding the parts of the document exempted by Pa. R.A.P. 2135(b), this document contains 3,881 words.

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

Dated: March 31, 2025

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