

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

Docket Nos. 1 EAP 2025, 2 EAP 2025

**BRIAN T. BAXTER and SUSAN T. KINNIRY,
*Appellees,***

v.

**PHILADELPHIA BOARD OF ELECTIONS,
*Appellees.***

**APPEAL OF REPUBLICAN NATIONAL COMMITTEE and
REPUBLICAN PARTY OF PENNSYLVANIA,
*Appellants.***

**Appeal from the Order entered October 30, 2024 of the
Commonwealth Court of Pennsylvania, Nos. 1305 C.D. 2024,
1309 C.D. 2024, affirming the Court of Common Pleas of
Philadelphia County, No. 240902481**

**BRIEF OF VET VOICE FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Vet Voice is a nonprofit, non-partisan organization dedicated to empowering active-duty servicemembers, veterans, and military family members to become civic leaders and policy advocates across the country. Part of Vet Voice's mission is to increase voter participation among military voters, veterans, and their families. Over the last four years, Vet Voice has built a first-of-its-kind voter file of hundreds of thousands of identified military voters in all fifty states, including Pennsylvania. Vet Voice mobilizes, educates, and turns out those military voters in substantial numbers. It currently has more than 144,000 subscribers in Pennsylvania and, in 2024, communicated with 56,000 veterans and members of military families in the Commonwealth to encourage them to vote. In 2026, Vet Voice hopes to expand this outreach and plans to contact at least 620,000 households in Pennsylvania.

Vet Voice recognizes that many active-duty servicemembers and their families—especially those stationed away from their homes during elections—are at risk of having their ballots rejected by Pennsylvania's date requirement for absentee and mail-in ballots. Vet Voice therefore has an interest in ensuring that military and other absentee or mail-in voters are not disenfranchised due to application of the date requirement—and, more

broadly, ensuring that the Pennsylvania Constitution's Free and Equal Elections Clause is interpreted robustly to protect the franchise for military voters and their families.

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), no person or entity other than the amicus curiae or its counsel (i) paid in whole or in part for the preparation of the amicus curiae brief or (ii) authored in whole or in part the amicus curiae brief.

INTRODUCTION

Every election, thousands of Pennsylvanians serving in the armed forces cast their votes by absentee or mail-in ballot. With postings outside of their precincts or even overseas, servicemembers and their families often face unique challenges when casting their votes—not only geographically, but practically as well. Servicemembers in training might have little free time to exercise the franchise by filling out and mailing their ballots, and the pressures on those serving abroad and in combat zones are, of course, even more significant. As a consequence of these stresses and limitations, military voters who use absentee or mail-in ballots are at particular risk of minor, immaterial oversights—such as, for example, neglecting to date the declaration on a ballot envelope.

At the same time, it is especially important that the men and women serving their country at home and abroad can participate in the democratic system they risk their lives to defend. Both Congress and the Commonwealth have recognized the importance of supporting the franchise for military voters by enacting legislation to ensure that active-duty servicemembers and their families can vote by mail. See Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), Pub. L. No. 99-410, 52 U.S.C. §§ 20301–20311 (1986); Uniform Military and Overseas Voters Act (“UMOVA”), 25 Pa. C.S. §§ 3501–3519 (extending UOCAVA to state and local elections). Indeed, Pennsylvania’s UMOVA provides that “[a] voter’s mistake or omission in the completion of a document under this chapter” does not “invalidate a document . . . as long as the mistake or omission does not prevent determining whether a covered voter is eligible to vote.” 25 Pa. C.S. § 3515(a). But some have disputed whether this provision exempts UMOVA voters from the date requirement¹—and, as a practical matter, it is unclear how the exemption would be applied to military voters who vote using ordinary absentee or mail-in ballots. As such, even though Pennsylvania law

¹ Indeed, this was the position taken by Appellants in federal litigation challenging the date requirement. See Memorandum in Support of Intervenor-Defendants’ Motion for Summary Judgment at 17–21, *Pa. State Conference of NAACP v. Schmidt*, No. 1:22-cv-00339 (W.D. Pa. filed Apr. 21, 2023), ECF No. 271.

recognizes that military voters should be afforded special treatment, the date requirement nevertheless serves to frustrate their ability to vote by mail. And given that it's well established that the date requirement serves no purpose—it is not used to determine if a voter is eligible or if their ballot is timely returned—this obstacle is indefensible, and the rejection of absentee and mail-in ballots cast by military voters on this basis cannot be justified.

But it doesn't have to be this way. The U.S. Supreme Court has long proclaimed that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Though federal law has not remedied the disenfranchisement created by the date requirement,² the U.S. Constitution merely provides the floor for voting rights, not the ceiling. The *Pennsylvania* Constitution can and does

² Challenges to the date requirement under federal law have been met with a decidedly twisty path through the courts, including this one. See, e.g., *Migliori v. Cohen*, 36 F.4th 153, 162–64 (3d Cir.) (date requirement violated Materiality Provision of federal Civil Rights Act), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); *Ball v. Chapman*, 289 A.3d 1, 8 (Pa. 2023) (evenly divided on whether date requirement violated Materiality Provision); *Pa. State Conference of NAACP Branches v. Sec’y Com. of Pa.*, 97 F.4th 120, 125 (3d Cir. 2024) (Materiality Provision does not apply to requirements for casting ballots), *cert. denied*, No. 24-363, 2025 WL 247452 (U.S. Jan. 21, 2025).

safeguard the right to vote above and beyond the protections afforded by federal law, reflecting the fact that, unlike the U.S. Constitution, Pennsylvania's expressly grants the right to vote. Article I, Section 5 of the Pennsylvania Constitution declares 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 to suffrage." As this Court has recognized, the "plain and expansive sweep" of this clause indicates that "all aspects of the electoral process, to the greatest degree possible, [must] be kept open and unrestricted to the voters of our Commonwealth." *League of Women Voters of Pa. v. Com.*, 178 A.3d 737, 804 (Pa. 2018).

The robust protections guaranteed by the Free and Equal Elections Clause should apply here. The date requirement is a curious remnant of previous versions of the Election Code, and courts have routinely concluded that it serves no purpose and is not used to assess either voter eligibility or the timeliness of ballot submission. *E.g.*, *Pa. State Conference of NAACP Branches*, 97 F.4th at 125 ("The date requirement, it turns out, serves little apparent purpose. It is not used to confirm timely receipt of the ballot or to determine when the voter completed it."). Nonetheless, this vestigial provision disenfranchises voters again and again, rendering the electoral process one that does not foster participation "to the greatest degree

possible.” Instead, during every election, qualified voters—including in particular Pennsylvanians serving their country out of state and overseas—risk losing their right to participate in the democratic process due to a simple and harmless oversight.

The Court now has the opportunity to finally put an end to this senseless disenfranchisement by giving full effect to the Commonwealth’s constitution and—finally—striking down the date requirement. A vigorous application of the Free and Equal Elections Clause is consistent with the Court’s previous rulings, the text of the Pennsylvania Constitution, and the Commonwealth’s storied tradition of active civic participation, and it will provide a strong foundation for protecting Pennsylvanians’ most fundamental political rights now and in the future.

ARGUMENT

I. The Free and Equal Elections Clause was designed to ensure fairness in who can vote and how elections are conducted.

The histories and texts of state constitutions reflect a fundamentally different set of priorities than those of their federal analogue. While the U.S. Constitution is focused primarily on limiting government action, carving out negative rights where necessary, state constitutions instead prioritize the affirmative protection of individual rights. And instead of emphasizing the importance of protecting the minority from the tyranny of the majority, state

constitutions place greater faith in the majority. See Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke L.J. 545, 561 (2023). Popular sovereignty is the cornerstone of state governance, placing stronger focus on voters as active participants in government and requiring strong protection for the franchise. See Joshua A. Douglas, *The Power of the Electorate Under State Constitutions*, 76 Fla. L. Rev. 1679, 1733 (2024).

Pennsylvania's 1776 Constitution in particular is famous for its groundbreaking commitment to direct democracy. See *League of Women Voters*, 178 A.3d at 802 (citing Ken Gormley et al., *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 3 (2004)). While the unbridled power of the 1776 Constitution's unicameral legislature ultimately proved unworkable, the animating spirit of a government directly and freely accountable to the People remained in Pennsylvania's revised 1790 Constitution and all future iterations of the document up to today, in large part through provisions like the Free and Equal Elections Clause.

The Free and Equal Elections Clause—particularly its focus on ensuring that elections be “equal”—reflects the Framers' concern with not only who can vote, but also ensuring that all votes are counted. The addition of “and equal” to the clause has been attributed to James Wilson, a signatory of both the Declaration of Independence and U.S. Constitution and an

inaugural Associate Justice of the U.S. Supreme Court. Brett Graham, “Free and Equal”: James Wilson’s Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts, 85 Alb. L. Rev. 799, 805–07 (2021). The seventh clause of the 1776 Declaration of Rights first provided that “all elections ought to be free; and that all free men having a sufficient evidence, common interest with, and attachment to the community, have a right to elect officers, or to be elected into one.” Pa. Const. of 1776 art. I, § 7. The 1790 text did away with the second half of the provision entirely, stressing instead that elections “shall be free *and equal*.” Pa. Const. of 1790 art. IX, § 5 (emphasis added). This addition was no accident: at the 1790 Convention, the clause withstood three amendments, one of which would have stripped out the “and equal” language and two of which would have redirected the clause to focus more on voter qualifications rather than how elections are conducted. Graham, *supra*, at 810–12. But the “free and equal” language persevered and has remained unchanged in the Commonwealth’s constitution to this day.

Wilson’s own writings provide insight into the intent and importance of this provision. He, like many Framers, understood sovereignty to rest in the People: “the goal of representation is to locate sovereignty in ‘the moral person, known by the name of the state.’” *Id.* at 812 (quoting 2 *Collected*

Works of James Wilson 833 (Mark D. Hall & Kermit L. Hall eds., 2007)); see also Patrick Peel, *The Populist Theory of the State in Early American Political Thought*, 71 *Pol. Res. Q.* 115, 115 (2018) (“For early Americans . . . , ‘the state’ was not a governmental power set against the people, but was a term for the people themselves, as an organizational unity.”). As one commentator has explained, this conception of “the state” as a reflection of the People requires that elections be free and equal—and that all votes can therein be counted: “Without the ability to freely cast a ballot, how could society cohere into that ‘moral person?’ Without the guarantee that elections are equal—in other words, that the ‘moral person’ formed from them is an accurate representation of the electorate—how could any state action be understood as legitimate?” Graham, *supra*, at 812.

The philosophical musings of James Wilson might seem far afield from the experience of a Pennsylvanian whose vote was thrown out due to a trivial ballot-envelope error in 2024. But recognizing the link between the Commonwealth’s democratic origins and the experience of voters today gives meaning and focus to the Free and Equal Elections Clause. Throwing out ballots merely because their envelopes lack handwritten dates—based on a requirement that, it has been established, is functionally immaterial—undermines the legitimacy of Pennsylvania’s elections. The act of counting

a ballot is not simply a matter of political calculus to determine who wins or loses a particular election. Instead, “by allowing individuals to vote, the polity includes them in the circle of full and equal citizens.” Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 Ind. L.J. 1289, 1316 (2011). And popular sovereignty itself hinges on each of those votes being counted.

II. The Free and Equal Elections Clause provides stronger protection for the right to vote than federal law—and must be applied as such.

Recent experience has shown that federal law alone cannot be relied on to safeguard the franchise. In recent years, federal courts have shown a tendency to be overly deferential to state legislatures in shaping election law—despite the fact that those in power often benefit from restricting access to the vote. See Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 26 Lewis & Clark L. Rev. 405, 407 (2022). Indeed, the litigation history of the date requirement illustrates this trend: while Pennsylvania voters sought relief from this disenfranchising rule up and down the federal judiciary, their claims were ultimately shrugged off on the basis of technicalities and limited readings of federal protections. See *supra* note 2.

As federal courts allow voting-rights protections to erode, there is a very real risk that state courts will do the same. Since the 1960s, American

constitutional law has suffered from a marked increase in “lockstepping”: the tendency of state courts to link the meaning of their constitutional provisions to analogous federal provisions. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 76 (2018). This tendency has become almost reflexive for state courts, with many deferring to federal interpretations without examination or explanation. See *id.* at 174. However, as Chief Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit previously explained, “[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way.” *Id.* This is especially true when state and federal rights are not rooted in similar text and instead overlap only in a “highly generalized guarantee.” *Id.*

By falling into the trap of lockstepping, state courts undermine not only their own power, but the entire structure of American federalism. As Professor G. Alan Tarr has written, “the system of dual constitutionalism was originated to create a ‘double security’ for rights, and that security would be lost if states abdicated their responsibility to interpret their declarations of rights.” G. Alan Tarr, *Understanding State Constitutions* 181 (1998). Much is made in constitutional law of the horizontal separation of powers among the

branches of the national government serving as checks and balances on one another, but the *vertical* separation of powers between the federal government and the states is equally important, providing “the soundest protection of liberty any people has known.” Sutton, *supra*, at 10. Deference to federal interpretation of rights strips away this double security—a particularly dangerous result where the right to vote is concerned, since that right underpins all others.

Significantly, there is no federal analogue to the Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 802. In fact, the U.S. Constitution is silent on the right to vote. See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 91–92 (2014). The Pennsylvania Constitution’s independent guarantee of the franchise thus merits particular attention and robust application. As this Court has noted, the original version of the Free and Equal Elections Clause was adopted over a full decade before the U.S. Constitution and served as a model for that document and numerous state constitutions. See *League of Women Voters*, 178 A.3d at 802. And rather than relying on federal law and federal interpretation, the Pennsylvania Constitution stands as a “wholly independent protector of the rights of the citizens of our Commonwealth.” *Id.*; see also *Com. v. Sell*, 470 A.2d 457, 467 (Pa. 1983) (“This Court has not

hesitated to interpret the Pennsylvania Constitution as affording greater protection to defendants than the federal Constitution.”); *Com. v. Edmunds*, 586 A.2d 887, 894–95 (Pa. 1991) (“Here in Pennsylvania, we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated.”). *But see League of Women Voters*, 178 A.3d at 802 (“Moreover, the Free and Equal Elections Clause has no federal counterpart, and, thus, our seminal comparative review standard described in *Commonwealth v. Edmunds*, *supra*, is not directly applicable.”).

The Court has already concluded that the Pennsylvania Constitution requires that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to voters of our Commonwealth.” *League of Women Voters*, 178 A.3d at 804. In other words, “the actual and plain language of [the Free and Equal Elections Clause] mandates that all voters have an equal opportunity to translate their votes into representation.” *Id.* And time and time again, Pennsylvania courts have found that the date requirement does not implicate a weighty government interest and instead disenfranchises otherwise-eligible voters based on a mere technicality. See, e.g., *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen.*

Election, 241 A.3d 1058, 1062 (Pa. 2020) (plurality opinion that date requirement does not implicate weighty interest); *Dave McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *14 (Pa. Cmwlth. June 2, 2022) (“Under the facts in this case . . . , the absence of a handwritten date on the exterior envelope could be considered a ‘minor irregularity’ without a compelling reason that justifies the disenfranchisement of otherwise eligible voters by not counting their timely received ballot.”). Disenfranchising otherwise-qualified voters on the basis of a minor irregularity is a quintessential example of an unnecessary electoral restriction. If the Free and Equal Elections Clause means anything, it must, at minimum, prevent disenfranchisement that serves no purpose other than to limit without justification the most fundamental of Pennsylvanians’ rights.

Nearly fifty years ago, Justice William Brennan wrote that “state courts no less than federal are and ought to be the guardians of our liberties.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977). His words have often gone unheeded by state courts, which have in the decades since resorted more and more to default lockstepping. This Court now has the opportunity to reverse this trend and serve as the guardian of Pennsylvanians’ liberties. To this end, the Free and Equal Elections Clause should be given its full effect

and be applied to protect Pennsylvania voters over and above the protections offered by the federal constitution. To do any less would be to ignore the unique text and history of the Commonwealth's constitution and shirk the responsibility of state courts to serve as the last and best protectors of individual rights.

CONCLUSION

Vet Voice is committed to ensuring that military voters and their family members can exercise their fundamental voting rights free from arbitrary and unjustified obstacles. Courts have repeatedly recognized that the date requirement—a seemingly minor procedural mandate that nevertheless disenfranchises thousands of voters each election cycle—constitutes just such a burden. Vet Voice respectfully requests that this Court affirm and, in so doing, finally put an end to the deleterious effects of the date requirement while reaffirming the Pennsylvania Constitution's expansive protections for the right to vote.

Dated: March 31, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with the word limitation of Pennsylvania Rule of Appellate Procedure 2135(a)(1) because this Brief contains 3,337 words, excluding the parts exempted by Rule 2135(b). This certificate is based upon the word count of the word processing system used to prepare this Brief.

Dated: March 31, 2025

/s/ Timothy J. Ford
Timothy J. Ford

CERTIFICATE OF COMPLIANCE

I 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.

Dated: March 31, 2025

/s/ Timothy J. Ford
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