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**IN THE SUPREME COURT OF PENNSYLVANIA**

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Nos. 1 EAP 2025 and 2 EAP 2025

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BRIAN T. BAXTER and SUSAN T. KINNIRY

Appellees,

v.

PHILADELPHIA COUNTY BOARD OF ELECTIONS,

Respondent,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY  
OF PENNSYLVANIA,

Appellants.

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**BRIEF OF RESPONDENT PHILADELPHIA  
COUNTY BOARD OF ELECTIONS**

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## INTRODUCTION<sup>1</sup>

The Philadelphia County Boards of Elections (the “Board”) is committed to protecting the fundamental right to vote through the fair and orderly administration of elections in Philadelphia. As the administrator of Philadelphia’s elections, the Board is responsible for canvassing and counting timely submitted absentee and mail-in ballots (collectively, “mail ballots”) cast by qualified voters in Philadelphia. The number of such ballots has increased significantly since 2019 when the General Assembly enacted Act 77 permitting universal mail-in voting throughout the Commonwealth. In recent election cycles, the Board has been required to set aside and disqualify thousands mail ballots as insufficient where voters did not correctly date the declaration on the outer return envelopes of their ballots.

This case involves a statutory appeal by two qualified voters who challenged the constitutionality of the Board’s decision to disqualify their timely mail ballots submitted in undated outer return envelopes. The voters argue that enforcing the Election Code in a manner that results in the disqualification of their otherwise valid ballots violates the Free and Equal Elections Clause in Article I, Section 5 of the

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<sup>1</sup> On March 31, 2025—the same day that this brief was submitted to the Court—the District Court for the Western District of Pennsylvania enjoined enforcement of the dating requirement on the ground that enforcement violates the U.S. Constitution. *Eakin v. Adams Cnty. Bd. of Elections*, No. 22-cv-340, Mar. 31, 2025 Op. (Dkt. No. 438) (W.D. Pa.). That ruling was based entirely on the U.S. Constitution and did not address the separate question of whether enforcement of the dating requirement violates the Free and Equal Election Clause of the Pennsylvania Constitution. *Id.* at 14-21, 14 n.6. We note this ruling at the outset, insofar as it may impact the instant case.

Pennsylvania Constitution—an open constitutional issue this Court has not yet resolved. Although the Board takes no position on the merits of that claim, it agrees with the fundamental premise that the dating provision serves no purpose in the Board’s administration of elections: the Board does not use the handwritten date on the outer return envelope of mail ballots to determine a voter’s qualifications, confirm the timeliness of the ballot, or uncover fraud.

The Board’s commitment to fair and orderly election administration also compels it to oppose the effort to invalidate Act 77 in its entirety. This broadside attack on Act 77—including its introduction of universal mail voting for all qualified voters in Pennsylvania—is as wrong as it is extreme. Declining to enforce the dating provision through disenfranchisement does not trigger the nonseverability provision of Act 77 for multiple reasons. And even if it did, that would not justify invalidating the entirety of Act 77. Nonseverability is not a poison pill that requires this Court to make a stark choice between applying the Free and Equal Elections Clause or completely invalidating Act 77.

### **STATEMENT OF THE QUESTIONS INVOLVED**

1. Did the Commonwealth Court err in barring enforcement of the Election Code’s mail-in and absentee ballot envelope dating requirements, *see* 25 P.S. §§ 3146.6(a), 3150.16, upon the rationale that those requirements violate the

“Free and Equal Elections Clause” found in Article I, Section 5 of the Pennsylvania Constitution?

**Suggested Answer:** The Board does not take a position on this question but agrees with the Commonwealth Court that the handwritten date provision serves no purpose. *See infra* Argument Section I.

2. If the Commonwealth Court did not so err, does its ruling activate the nonseverability clause included in Section 11 of the Act of October 31, 2019, Pub. L. 522, No. 77 (“Act 77”) (*see* 25 P.S. § 2602, Note), so as to require invalidation of the entirety of Act 77?

**Suggested Answer:** No.

## COUNTERSTATEMENT OF THE CASE

### I. Procedural History

On September 17, 2024, the Philadelphia County Board of Elections (the “Board”) held a Special Election to fill vacancies in the 195th and 201st Legislative Districts. Brian T. Baxter and Susan T. Kinniry (“Voters”) are two of the sixty-nine voters whose timely mail ballots were not counted in the Special Election. (R. 080a.)<sup>2</sup> Their ballots were rejected not because of fraud, untimeliness, or lack of qualifications, but as insufficient because there were handwritten dating errors on the outer declaration envelope. (*Id.*)

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<sup>2</sup> Citations to the reproduced record are noted as “(R. [page #].).”

The Board does not dispute—and has stipulated to—the following relevant facts in the Voters’ petition for review. (R. 078a.) Of the rejected ballots in the Special Election, twenty-three had no date, and forty-six had dates the Board considered incorrect. (R. 081a.) Still, every single one of these ballots, including the two cast by the Voters, arrived before the deadline. (R. 082a.) And every single voter who cast these ballots was otherwise qualified to vote in the Special Election. (*See* R. 081a-82a.)

On September 21, 2024, the Board convened at a public meeting to make sufficiency determinations about mail ballots with dating errors under 25 P.S. § 3146.8(g)(3). (R. 081a.) In comments made before voting on undated and incorrectly dated mail ballots, the Board acknowledged that the handwritten date serves no purpose in the administration of its elections. (R. 081a-082a.) Yet the Board voted 2-1 not to count mail ballots with dating errors after confirming it could not follow the Commonwealth Court’s decision in *Black Political Empowerment Project v. Schmidt* (“*B-PEP II*”)—which held unconstitutional the rejection of such ballots—because this Court had vacated that decision for lack of jurisdiction. (*Id.*); *Black Pol. Empowerment Project v. Schmidt*, 322 A.3d 221 (Mem), 2024 WL 4181592, at \*1 (Pa. Sept. 13, 2024).

The Voters filed a Petition for Review in the Nature of a Statutory Appeal in the Philadelphia Court of Common Pleas on September 23, 2024. (R. 076a, R. 082a.)

Their Petition challenged the Board’s September 21, 2024 sufficiency determinations about mail ballots, claiming that the Free and Equal Elections Clause prohibited the Board from rejecting ballots that lack a correct handwritten date on the outer return envelope. (R. 082a-083a.) Three days later, on September 26, 2024, the trial court granted the Petition for Review, holding that the Board’s “refusal to count a ballot due to a voter’s failure to date the declaration printed on the outer return envelope . . . violates” the Free and Equal Elections Clause. (R. 141-42a.) (quotations and brackets omitted). It thus ordered the Board to reverse its sufficiency determinations and count all ballots with dating errors “if otherwise valid.” (*Id.*)

The Board appealed to the Commonwealth Court. So did the Republican National Committee and Republican Party of Pennsylvania (collectively, “Republican Intervenors”), which had intervened in the case. The Commonwealth Court affirmed the trial court’s orders, holding that the Board’s sufficiency determination to invalidate a voter’s mail ballot based on the dating provision violated the Free and Equal Elections Clause. (R. 115a-118a.) The Commonwealth Court also held that its decision did not require it to invalidate all of Act 77 and strike down the comprehensive scheme of no excuse mail-in voting. (R. 115a.)

Republican Intervenors filed a petition for allowance of appeal in this Court on November 12, 2024, which the Court granted. (R. 007a-058a.) Although the Court agreed to hear the case, it narrowed its focus to two pivotal questions: whether

enforcing the date provision by disenfranchisement violates the Free and Equal Elections Clause and whether the Commonwealth Court’s ruling triggered the nonseverability clause in Act 77 so as to require invalidation of the entirety of Act 77. (R. 002a.)

## **II. Mail Voting Statutory Scheme in Pennsylvania**

Since 1969, the Pennsylvania Election Code has instructed voters who wish to vote by absentee ballot that they “shall”:

- “in secret[,]”
- “mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen,”
- “fold the ballot, enclose and securely seal the same in the [secrecy] envelope,”
- “fill out, date and sign the declaration printed on [the declaration] envelope[,]” and
- “send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election[.]”

25 P.S. § 3146.6(a).

This longstanding provision of the Election Code specifies no penalty for noncompliance with these steps. 25 P.S. § 3550. In 2019, when Act 77 amended the Election Code and expanded this framework to authorize all voters to vote by mail-

in ballot, it restated the identical procedural requirements from Section 3146.6(a) in exactly the same language. *Compare* 25 P.S. § 3150.16(a), *with* 25 P.S. § 3146.6(a). As before, Act 77 specified no penalty for noncompliance with its procedural requirements.

The penalty for noncompliance with mail ballot procedural requirements is governed by a “sufficiency” determination in a provision of the Election Code (25 P.S. § 3146.8) that was enacted in 1969. This provision permits absentee (and now mail) ballots to be counted where the voter is determined to be eligible and where the voter’s “declaration is sufficient.” 25 P.S. § 3146.8(e) (2018). By contrast, this section explicitly requires the rejection of: (1) ballots sent by voters who died before the polls opened (Section 3146.8(d)); (2) ballots received by the county board of elections after the designated deadline (Section 3146.8(g)(1)); and (3) ballots enclosed in a secrecy envelope bearing any marks or identifying symbols (Section 3146.8(g)(4)).

When Act 77 introduced universal mail-in ballots to Pennsylvania elections, it did not substantively change the “sufficiency” determination in Section 3146.8. It merely amended that provision of the Election Code to encompass both absentee *and* mail-in ballots. In addition, before Act 77, local district election boards canvassed absentee ballots at the polling place. *Id.* §§ 3146.8(a), (e) (2018). But Act 77 shifted that responsibility to the county boards of elections, which now canvass both

absentee and mail-in ballots. *Id.* § 3146.8(a), (g) (2019). Despite these procedural changes, Act 77 did not modify the Code’s directive that an absentee ballot—or the new mail-in ballot—be counted when the relevant board finds the “declaration is sufficient.” *Id.* § 3146.8(g)(3). To this day, “sufficien[cy]” is not statutorily defined. *See generally id.* § 3146.8.

### SUMMARY OF ARGUMENT

1. Although the Board takes no position on the merits of Republican Intervenors’ constitutional claims, the Board is uniquely situated to address the lack of any governmental interest in the date provision since the Board is the only party to this case that administers Pennsylvania elections. The Board does not use the handwritten date on the outer return envelope of a mail ballot to determine a voter’s qualifications, confirm the timeliness of the ballot, or detect fraud. Accordingly, the dating provision serves no purpose for the Board.

2. Republican Intervenors wrongly claim that this Court already resolved the date provision’s constitutionality under the Free and Equal Elections Clause in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), and *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023). Neither case did. *Pennsylvania Democratic Party* addressed notice-and-cure procedures, and *Ball* focused on statutory interpretation, leaving the constitutional question open.

3. The Court should reject Republican Intervenors’ invitation to invalidate all of Act 77. Nothing about this case triggers Act 77’s nonseverability provision. Republican Intervenors’ contrary argument misconstrues Pennsylvania law and mischaracterizes the constitutional question presented here. And even if their framing were right, this Court should exercise its discretion to decline enforcement of the nonseverability provision because enforcing it would raise grave separation-of-powers concerns and would result in an incomprehensible statutory scheme.

## ARGUMENT

### I. The Handwritten Date Provision Serves No Purpose.

The Board does not use a mail voter’s handwritten date for any purpose—not to determine if a voter is qualified, not to determine if a mail ballot is timely received, and not to detect fraud.<sup>3</sup> And there is no merit to the newfound claim that the handwritten date furthers a governmental interest in solemnity.

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<sup>3</sup> Courts that have repeatedly concluded that the handwritten date serves no administrative purpose. *See, e.g., Pa. State Conf. of NAACP v. Sec’y Commw. of Pa.* (“*NAACP II*”), 97 F.4th 120, 135 (3d Cir. 2024) (“[T]he date requirement ha[s] nothing to do with determining who may vote.”); *id.* at 129 (“[N]ot one county board used the date on the return envelope to determine whether a ballot was timely received in the November 2022 election.”); *Pa. State Conf. of NAACP v. Schmidt* (“*NAACP I*”), 703 F. Supp. 3d 632, 679 (W.D. Pa. 2023), *rev’d*, 97 F.4th 120 (3d Cir. 2024) (“Whether a mail ballot is timely, and therefore counted, is not determined by the date indicated by the voter on the outer return envelope, but instead by the time stamp and the SURE system scan indicating the date of its receipt by the county board.”); *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022) (noting that the handwritten date was rendered “superfluous” after it was received and time-stamped by the board of elections and “was not entered as the official date received in the SURE system, nor used for any other purpose”), *vacated sub nom., Ritter v. Migliori*, 143

In this case, all three Commissioners of the Board agreed that the undated ballots “should be counted” because the date is not used to determine timeliness, voter eligibility, voter qualifications, or fraud. (R. 082a.) The two Commissioners who opposed counting the undated ballots at issue here did so solely because this Court had previously interpreted the handwritten date requirement as mandatory. (*Id.*) The purported purposes of the date requirement offered by Republican Intervenors and *amici* buckle under scrutiny. They have no basis in the Election Code or the reality of how elections are administered in the Commonwealth.

**A. The handwritten date provision does not help determine voter eligibility.**

Each county board determines a voter’s eligibility without ever considering the handwritten date on a returned mail ballot envelope. To vote by mail, registered voters must apply to their county board of elections. 25 P.S. §§ 3146.2 (absentee ballots), 3150.12 (mail-in ballots). County boards review these applications and compare them to the voter registration database to determine eligibility. *Id.* §§ 3146.2b (absentee ballots), 3150.12b (mail-in ballots). Once eligibility is confirmed, the voter’s application is marked approved and can only be challenged on the grounds that the applicant “did not possess qualifications of an absentee

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S. Ct. 297 (2022); *Baxter v. Phila. Bd. of Elections*, 329 A.3d 483 (Table), 2024 WL 4614689, at \*17 (Pa. Cmwlth. Ct. Oct. 30, 2024) (noting that “the trial court determined, as we did in *BPEP II* under similar factual circumstances, that the dating provisions are virtually meaningless”).

elector” (for absentee voters) or “was not a qualified elector” (for mail-in voters). *Id.* §§ 3146.2b(a) (absentee voters), 3150.12b(a)(2) (mail-in voters). This process for determining voter eligibility is completed before ballot envelopes are mailed to voters, so any claim that the handwritten date on a returned ballot envelope is used to determine voter eligibility is inconsistent with actual election administration.

**B. The handwritten date provision does not help determine if a mail ballot was timely received.**

The Board does not—*and indeed cannot*—use the handwritten date to verify a mail ballot’s timeliness in any circumstance. Any suggestion to the contrary betrays a fundamental misunderstanding of both the Election Code and the practical mechanics of election administration.

An overview of the mail ballot process prescribed by the Election Code illustrates how a voter’s handwritten date cannot help a county board determine the timeliness of a mail ballot. Once the list of candidates for a particular election is finalized, county boards of election print and send mail ballots to voters who have successfully applied and been approved to receive one. *See* 25 P.S. §§ 3146.5, 3150.15. In other words, the mail ballot for a particular election does not exist (and therefore could not be completed by the voter) until it is printed in the weeks leading up to that election. When a ballot comes back from the voter before 8:00 p.m. on Election Day, the county board of elections stamps it with the date and time it arrived and logs it into Statewide Uniform Registry of Electors (SURE) system. 25 Pa. Cons.

Stat. § 1222 (establishing Pennsylvania’s SURE system to be implemented by regulations from the Department of State); *see* Appellants’ Br. 42 (citing *NAACP I*, 703 F. Supp. 3d at 665).

Only mail ballots that county boards receive before 8:00 p.m. on Election Day may be counted.<sup>4</sup> (R. 112a.) Ballots received after 8:00 p.m. on Election Day are physically segregated from timely received ballots and may not be counted, regardless of the date on the ballot’s declaration envelope. (R. 078a-079a.) Said simply: even if a voter writes a date from before Election Day, a county board cannot count that ballot unless it *received the ballot before 8:00 p.m.* on Election Day. Accordingly, the only way county boards can confirm that a mail ballot was received before 8:00 p.m. on Election Day is by physically separating or marking timely received ballots. This means that an incorrect handwritten date—or no date at all—does not matter when county boards determine if a ballot was timely received.

In sum, for all mail ballots that arrive before 8:00 p.m. on Election Day, the boards can be sure that any declaration was necessarily completed sometime between when the ballots were mailed to voters and 8:00 p.m. on Election Day—

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<sup>4</sup> An exception to this rule applies to “military-overseas” ballots, which must be *either* received by the county board of elections “not later than the close of the polls” *or* “submit[ted] . . . for mailing . . . not later than 11:59 p.m.” on the day before the election. 25 Pa. Cons. Stat. § 3509. If a ballot falls into the latter category, it “shall be counted if it is delivered by 5 p.m. on the seventh day following the election” to the county board of elections. *Id.* § 3511(a).

regardless of what date the voter wrote on the declaration. And for ballots received after 8:00 p.m., the handwritten date—even if it is “correct” and on or before Election Day—will not and cannot affect a board’s timeliness determination.

Both Republican Intervenors and the Commonwealth, as amicus, incorrectly state that if there were a hypothetical disruption to the SURE system, then the handwritten date would allow county boards of election to “determine which ballots comply with the Election Code the old-fashioned way.” (Br. for the Cmwlth. of Pa. as Amicus Curiae (“AG Amicus Br.”) at 23-24; Appellants’ Br. at 42 (alleging “the handwritten date serves as a useful backstop”).) That is not how it works. If the SURE system were to become inoperable somehow, county boards still would not and could not rely on the voter’s handwritten date to determine timeliness. That date shows only when the voter might have filled out the declaration on the mail ballot’s outer return envelope, not when the voter dropped the mail ballot in the mailbox or drop box, much less when the county board of elections actually received the mail ballot. To determine timeliness, county boards use physical separation and other methods like stamps to mark time of arrival. But a county board of elections does not, and cannot, rely on the handwritten date in determining if a ballot was timely received.

**C. The handwritten date provision does not advance solemnity.**

Republican Intervenors fare no better in claiming that the date provision serves the government’s interest in voter solemnity. (Appellants’ Br. at 42-43.) Republican Intervenors do not offer a shred of evidence that, when the legislature enacted the dating provision, it did so to increase “solemnity.” *Eakin*, Dkt. No. 438 at 20 (rejecting identical argument and concluding that “solemnity and voter confidence are nebulous and are unsupported by evidence”).

Republican Intervenors’ cited authority further reveals the lack of any purpose in the date provision. Half their authorities affirm the obvious—that written agreements are important for legal formalities—while saying nothing about dates. *See Davis v. G N Mortg. Corp.*, 244 F. Supp. 2d 950, 956 (N.D. Ill. 2003) (discussing legal formalities in the context of the parol evidence rule); *Thomas A. Armbruster, Inc. v. Barron*, 491 A.2d 882, 883 (Pa. Super. 1985) (discussing the requirement for a promise to pay the debt of another to be in writing); *Thatcher’s Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc.*, 636 A.2d 156, 161 (Pa. 1994) (discussing the absence of a written agreement of a promise not to open a pharmacy).

The other half discuss the purpose of requiring voters to handwrite or notarize a *signature*—not a date. *See Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (wet-signature requirement without a date requirement); *Vote.org v. Byrd*, 700 F. Supp. 3d 1047, 1055 (N.D. Fla. 2023) (wet-signature requirement without a date

requirement); *Howlette v. City of Richmond*, 485 F. Supp. 17, 23 (E.D. Va. 1978), *aff'd*, 580 F.2d 704 (4th Cir. 1978) (individual notarization requirement without a date requirement).

**D. The handwritten date provision does not prevent fraud.**

Republican Intervenors incorrectly urge that the date provision prevents election fraud if the voter dies before Election Day, citing to an isolated incident in Lancaster County. (Appellants' Br. at 44; *see also* Br. for Republican Leader of the Pa. House of Representatives Jesse Topper *et al.* as Amici Curiae Supporting Appellants ("Legislative Republican Amici Br.") at 24-25.) This is unfounded. *Eakin*, Dkt. No. 438 at 20 (rejecting identical argument and concluding that "fraud detection, while less ambiguous of an interest, is similarly unsupported by evidence of record in this case"). The critical question is whether the voter is alive on Election Day, not whether the voter was alive on the date on which the ballot was completed or mailed. When a county board knows a voter has died, it will not count the deceased's ballot—regardless of the date or lack thereof written on the return envelope.<sup>5</sup> The handwritten date thus does nothing to prevent election fraud. Indeed,

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<sup>5</sup> *See* Fact-Checking Pennsylvania Related Election Claims, Commonwealth of Pennsylvania, <https://www.pa.gov/agencies/vote/elections/fact-checking-pa-related-election-claims.html#accordion-78d6f7d7a2-item-9bff3406f0> (last accessed March 28, 2025) ("County elections officials regularly review data sources such as postal service change of address notices, state death records, and obituaries to check for voters who have moved or died. . . For example, county elections officials receive regular death notices from the state Department of Health.").

the Lancaster County ballot was flagged and excluded, not because of its handwritten date, but because the board knew that the voter had died by the time the ballot was received.<sup>6</sup> *Ball*, 289 A.3d at 16 n.77 (citing *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*21 n.14 (Pa. Cmwlth. Ct. Aug. 19, 2022) (noting that “the ballot at issue had already been separated by the chief clerk because the scan of the return envelope revealed, through the SURE system, that the elector was deceased”)); *see* (R. 220a.).

\* \* \*

Far from enhancing the integrity, reliability, or efficiency of elections, the date provision serves no purpose. As the Commonwealth Court correctly concluded, the date provision is “virtually meaningless.” (R. 112a.) Enforcement of the dating requirement also imposes a substantial and wholly unnecessary burden on the Board and other county boards of election, demanding labor-intensive and time-consuming manual review of each ballot envelope. The hardship of review is exacerbated by the

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<sup>6</sup> As in Lancaster County, potential fraud is indicated by the fact that the ballot is transmitted after the voter’s death—observable by either the postmark or the date the ballot is deposited and then collected from a drop box—not the handwritten date, which can easily be backdated. *See, e.g.*, (R. 220a (Police Criminal Complaint, Affidavit of Probable Cause (noting two-week time span between the voter’s death on April 14, 2022 and the Lancaster County Board of Election’s receipt of the mail ballot on April 28, 2022)); Pa. Dep’t of State, *Pennsylvania Absentee and Mail-in Ballot In-Person Return Guidance* at 7 (Sept. 25, 2023) (directing that “ballots shall be collected at the end of operating hours of each day that the receptacle is available for use”), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-Ballot-Return-Guidance-2.0.pdf>.

lack of clear standards or guidance defining what constitutes an “incorrect” date.<sup>7</sup> See AG Amicus Br. at 6 n.5 (“The Attorney General is acutely aware that county boards can and do arrive at different conclusions regarding what constitutes an *incorrect* date.”). The only effect of the handwritten date provision is that it currently forces county boards to reject timely ballots of otherwise qualified voters when making sufficiency determinations.

## **II. This Court Has Never Rejected a Free and Equal Elections Clause Challenge to Mandatory Enforcement of the Dating Requirement.**

Republican Intervenors want this Court to believe that this Free and Equal Elections Clause challenge to the enforcement of the date provision was neatly resolved by this Court’s prior decisions in *Pennsylvania Democratic Party v. Boockvar* and *Ball v. Chapman*. This misstates those cases. Neither case presented this constitutional question about the date provision or the record specifically supporting the constitutional arguments.

*Pennsylvania Democratic Party* addressed a narrow issue: whether the Free and Equal Elections Clause **required** county boards of election to create “notice and

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<sup>7</sup> To process the large volume of mail ballots, the Board relies on automated sorting machines to recognize when ballot envelopes are returned without handwritten signatures or without the internal secrecy envelope required by the Pennsylvania Election Code. (R. 090a-091a.) Because these machines cannot be configured to determine whether the handwritten date is “correct,” the Board must devote additional time and labor to manually inspect, identify, and set aside ballots that were timely received, are signed by the voter, and have an internal secrecy envelope, but have an “incorrect” handwritten date on the declaration envelope.

opportunity to cure” procedures for mail ballots. 238 A.3d 345, 374 (Pa. 2020). The Court’s answer was straightforward: it did not. *Id.* That was the full extent of the Court’s holding on that particular issue.

The Court did not decide in *Pennsylvania Democratic Party* that the “the entire declaration mandate is constitutional,” as Republican-Intervenors suggest. (Appellants’ Br. at 20.) In fact, *Pennsylvania Democratic Party* could not have settled the challenge to invalidating mail ballots with dating errors because, at that time, the mandatory nature of the date provision was unsettled. Just months later, a plurality of this Court held that the Election Code did not require boards of elections to disqualify mail ballots that lack a correctly handwritten date on the outer declaration envelope. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1061-62 (Pa. 2020). To suggest, as Republican Intervenors do, that *Pennsylvania Democratic Party* foretold and resolved a constitutional challenge to a rule not yet considered mandatory strains belief.

On top of that, *Pennsylvania Democratic Party* began in an appellate posture, with no evidence or discussion about whether the dating provision was mandatory, burdensome, or served any real purpose. Republican Intervenors’ attempt to collapse all ballot requirements into a single, undifferentiated “declaration mandate”—which they claim the Court “upheld”—is implausible. (Appellants’ Br. at 25, 30-31.) The *Pennsylvania Democratic Party* Court did not discuss the date provision as a

standalone requirement or even define with specificity the “minor facial defects” to which petitioners’ requested notice and cure procedure would apply. 238 A.3d at 372. Although Republican Intervenors attempt to piece together the Court’s words to argue that the Court found that it “resides in the General Assembly to decide . . . whether even ‘minor errors made in contravention of those requirements’ warrant rejection of the ballot,” this is a misreading of the Court’s opinion. (Appellants’ Br. at 20 (citing *Pa. Democratic Party*, 238 A.3d at 374).) Rather, the Court stated that “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk [of a ballot being rejected for minor errors] is one best suited for the Legislature.” 238 A.3d at 374 (emphasis added). Republican Intervenors’ overworked reading of *Pennsylvania Democratic Party* is incorrect.

*Ball v. Chapman* did not decide the Free and Equal Election Clause issue, either. In *Ball*, the Supreme Court clarified that that the rationale of the majority of justices in *In re 2020 Canvass*—that county boards of elections cannot count timely mail ballots submitted without a correct date as sufficient because the Election Code’s dating provision is mandatory—was binding precedent for elections after 2020. 289 A.3d at 21-22. Thus, *Ball* addressed the issue solely as a matter of statutory interpretation and *stare decisis* (i.e., the proper interpretation of *In re 2020*

*Canvass* and the federal Materiality Provision).<sup>8</sup> Justice Wecht’s opinion in *Ball* explicitly acknowledged the potential for a Free and Equal Elections Clause challenge, suggesting that ambiguities in the federal Materiality Provision should be resolved to enfranchise voters and to avoid potential constitutional violations. *Id.* at 26-27, 27 n.156. If, as Republican Intervenors claim, *Pennsylvania Democratic Party* and *Ball* had already settled the constitutionality of invalidating ballots based on the date requirement, there would have been no reason for Justice Wecht to suggest that invalidating mail ballots based on the date requirement violates the Free and Equal Elections Clause. For these reasons, the Court should reject Republican Intervenors’ argument that this Court has already foreclosed the constitutional question.

### **III. Declining to Enforce the Dating Provision Would Not Trigger Act 77’s Nonseverability Provision or Invalidate Act 77.**

The Commonwealth Court correctly rejected Republican Intervenors’ argument that Act 77 is “void” “if the date requirement is unconstitutional.” (Appellants’ Br. at 51-55; R. 113a-15a.) This Court should affirm. No matter how this Court decides the constitutional question presented, Act 77 remains valid and enforceable. There are at least three independent grounds on which this Court could

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<sup>8</sup> The Third Circuit has held that the Materiality Provision does not apply to sufficiency determinations for undated ballots because it applies only to voter registration. *NAACP II*, 97 F.4th at 139.

reach that conclusion—each of which provides a separate basis to affirm the Commonwealth Court and decline Republican Intervenors’ extreme invitation to invalidate Act 77.

*First*, Republican Intervenors’ nonseverability argument is based on an inaccurate and imprecise framing of the constitutional question before this Court. The question is not whether Act 77’s instruction to voters to date the declaration envelope is constitutional or unconstitutional. Regardless of this Court’s decision here, voters will be required to date their mail ballots under 25 P.S. §§ 3146.6(a) and 3150.16(a). This appeal instead concerns a county board’s sufficiency determination under 25 P.S. § 3146.8(g)(3)<sup>9</sup>—a provision of the Election Code enacted long before Act 77 (*see supra* Statement of the Case, Section II). And it is this provision that the Court acts on when reviewing county board decisions. For instance, in *Pennsylvania Democratic Party*, separate from addressing notice-and-

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<sup>9</sup> This provision relates to pre-canvassing and canvassing of absentee and mail-in ballots. It provides: “When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File,’ whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that ***the declaration is sufficient*** and the information contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’ verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.” 25 P.S. § 3146.8(g)(3) (emphasis added).

cure, the Court ruled that county boards cannot count mail-in and absentee ballots where the voter failed to enclose the ballot in the statutorily mandated secrecy envelope (so-called naked ballots). 238 A.3d at 380. The Court grounded its analysis on both the absentee and mail-in voting provisions of the Election Code— 25 P.S. § 3150.16(a) and 25 P.S. § 3146.6(a)—and the Election Code’s joint canvassing provision (25 P.S. § 3146.8), concluding that those provisions “must be read *in pari materia*.” *Pa. Democratic Party*, 238 A.3d at 378. Because Section 3146.8 explicitly required examination of the secrecy envelope, the Court held that county boards must reject naked ballots because the absence of a secrecy envelope rendered that examination impossible. *Id.* at 378, 380.

Thus, framed correctly, the question is whether county boards violate the Free and Equal Elections Clause when they decide to treat an undated or incorrectly dated mail-ballot declaration as an “[in]sufficient” declaration under Section 3146.8(g)(3). Because this case involves the constitutionality of a specific application of Section 3146.8(g)(3) and the sufficiency standard, which does not appear in Act 77, this case does not present this Court with an occasion to assess the validity of “any provision of [Act 77] or its application to any person or circumstance” within the meaning of the nonseverability clause. Act 77 § 11. This construction of the Election Code’s related but distinct provisions provides a straightforward basis for this Court to affirm the Commonwealth Court’s

conclusion that this case does not trigger Act 77's nonseverability clause or call into question the validity of Act 77.

*Second*, as a matter of statutory interpretation, Act 77's severability provision would not be triggered if this Court were to hold that a particular manner of *enforcement* of the dating provision violates the Pennsylvania Constitution. That provision provides: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance *is held invalid*, the remaining provisions or applications of this act are void." Act 77 § 11 (emphasis added). By its plain terms, the provision is triggered only by a request to "invalid[ate]" a specific "provision" of Act 77 "or its application to any person or circumstance." *Id.* But the Commonwealth Court correctly observed that this case does not involve a request "to declare the dating provisions unconstitutional or otherwise strike them from Act 77[.]" (R. 114a-15a.) As a result, the severability provision is not triggered, and there is no basis to conclude that "the remaining provisions or applications of [Act 77] are void." Act 77 § 11.

The Commonwealth Court's holding that the dating provision does not need to be invalidated or stricken from Act 77 to grant Petitioners relief is consistent with its prior holding in *Bonner v. Chapman*, 298 A.3d 153 (Pa. Cmwlth. Ct. 2023). In *Bonner*, as here, the issue was whether declining to enforce the dating provision

triggered Act 77’s nonseverability provision. *Id.* at 168-69. The Commonwealth Court determined that Act 77’s nonseverability provision was not triggered because a decision not to enforce the dating provision through disenfranchisement neither “struck the Dating Provisions from the Election Code” nor implied “that electors cannot or should not handwrite a date on the declaration in accordance with those provisions.” *Id.* at 168. Here, too, Act 77’s nonseverability provision is “not triggered” because “the Dating Provisions” will “remain part of the Election Code and continue to instruct electors to date the declaration on the return mailing envelope, which, as history has shown, a majority of electors will do.” *Id.* at 168-69.

*Finally*, even if this Court were to conclude that the nonseverability provision were triggered, such a conclusion would not justify invalidating Act 77 in its entirety—as the Commonwealth Court correctly concluded. Pennsylvania statutes are presumptively severable, and this Court has ample discretion to exercise its independent judgment with respect to how to interpret and apply Act 77’s nonseverability provision even where there is an explicit nonseverability provision within a statute. *See Stilp v. Commonwealth*, 905 A.2d 918, 970-75, 980 (Pa. 2006) (citing 1 Pa. Cons. Stat. § 1925).

In *Stilp*, this Court confronted a standardless nonseverability clause worded almost identically to the one found in Act 77<sup>10</sup> but still held that the statute was severable unless: (1) “the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining provisions without the void one”; or (2) “the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.” *Id.* at 970-74, 980-81 (quoting 1 Pa. Cons. Stat. § 1925). As *Stilp* explained, where a nonseverability clause “sets forth no standard for measuring nonseverability, but instead, simply purports to dictate to the courts how they must decide severability”—as is the case here—such provisions are not treated as “inexorable commands.” *Id.* at 972-73 (quoting *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664, 667 (Pa. 1964)). And a nonseverability provision improperly “intrude[s] upon the independence of the Judiciary and impair[s] the judicial function” where, as here, it “serv[es] an in terrorem function,” or operates “to guard against judicial review altogether by making the price of invalidation too great.” *Id.*

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<sup>10</sup> The provision in *Stilp* provided as follows: “The provisions of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” 905 A.2d at 970 (quoting Act 44 § 6). Likewise, the provision in this case provides, “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” Act 77 § 11.

at 979-80 (quoting Fred Kameny, *Are Inseverability Clauses Unconstitutional?*, 68 ALB. L. REV. 997, 1001 (2005)). Rather, standardless nonseverability provisions are treated merely as one indication of legislative intent to be considered in the broader severability analysis. *Id.* at 970-72.

As in *Stilp*, it would impair the judicial function if this Court were to strike down all of Act 77 simply because the Court determined that a particular manner of enforcement of one minor provision violates the Constitution on an as-applied basis. Indeed, interpreting Act 77’s boilerplate nonseverability provision in this sweeping manner would raise grave separation-of-powers concerns because the provision sets “no standard for measuring non-severability, but instead simply purports to dictate to the courts how they must decide severability.” *Pa. Democratic Party*, 238 A.3d at 397 n.4 (Donohue, J., concurring and dissenting) (quoting *Stilp*, 905 A.2d at 973).

Likewise, to strike all of Act 77—“an enormously popular piece of legislation on both sides of the aisle” that broadened access to Pennsylvania elections, *McLinko v. Dep’t of State*, 279 A.3d 539, 543 (Pa. 2022)—makes the price of invalidating minor provisions (like the handwritten date provision) “too great.” *Stilp*, 905 A.2d at 979. This Court itself recognized that even the mail voting provisions of Act 77 “are only a fraction of the scope of the Act.” *McLinko*, 279 A.3d at 543. Act 77 also “eliminated the option for straight-ticket voting; moved the voter registration deadline from thirty to fifteen days before an election; allocated funding to provide

for upgraded voting systems; and reorganized the pay structure for poll workers, along with other administrative changes.” *Id.*<sup>11</sup> All these provisions would be invalidated under Republican Intervenors’ nonseverability argument. For this reason, treating Act 77’s nonseverability provision as an “inexorable command” would improperly “employ[] [it] as a sword against the Judiciary . . . , rather than as a shield to ensure preservation of a legislative scheme or compromise.” *Stilp*, 905 A.2d at 978. These types of boilerplate, standardless nonseverability provisions led this Court in *Stilp* to admonish that it “has never deemed nonseverability clauses to be controlling in all circumstances.” *Id.* at 980.

Instead of adopting Republican Intervenors’ argument to invalidate all of Act 77, this Court should follow the same severability principles that it applied in *Stilp* where it required severance “in those circumstances where a statute can stand alone absent the invalid provisions.” *Id.* at 970. This “specific, cogent standard . . . emphasizes the logical and essential relationship of the void and valid provisions” and makes clear that the remainder of Act 77 is severable from the dating requirement. *See id.*<sup>12</sup>

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<sup>11</sup> *See* Act 77 § 3 (eliminating straight-ticket voting, changing requirements for nominating petitions, requiring that sample ballots be published online, and restricting when the boundaries of election districts can be changed); *id.* § 4 (adding 15 days to register to vote).

<sup>12</sup> Republican Intervenors argue that *Stilp* is distinguishable on separation-of-powers grounds because *Stilp* concerned judiciary compensation where nonseverability made the price of invalidation too great. (Appellants’ Br. at 53-54.) But *Stilp* was not limited to

Any suggestion that the statutory scheme cannot function—or that Act 77 would not have been enacted—without it falls flat because the handwritten dating provision serves no purpose (*see supra* Argument Section I). And there is no reason to believe that, without the dating provision, Act 77 would be incomplete or incapable of being executed in accordance with the intent of the General Assembly.<sup>13</sup> Indeed, without the dating provision, county boards could still enforce the numerous provisions of Act 77 that are unrelated to dating the outer envelopes of mail ballots, irrespective of whether the Act as a whole was, in the words of Republican Intervenors, “a politically difficult compromise.” (Appellants’ Br. at 51.)

Nor is there any indication that the dating requirement was part of a politically difficult compromise or “so essentially and inseparably connected with” the rest of Act 77. *See* 1 Pa. Cons. Stat. § 1925. In fact, the legislative history of Act 77 makes

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matters of judicial compensation, and Republican Intervenors’ argument here demonstrates “that a nonseverability provision is a legislative practice that, in certain instances, may be employed as a sword against the Judiciary or the Executive, rather than as a shield to ensure preservation of a legislative scheme or compromise.” *Stilp*, 905 A.2d at 978.

<sup>13</sup> That the mail-in ballot handwritten date provision itself was not considered “so essentially and inseparably connected with” the other provisions of Act 77 as to require nonseverability is perhaps best demonstrated by the fact that the identical provision for absentee ballots is not subject to any similar nonseverability provision. *See* 1 Pa. Cons. Stat. § 1925. There appears to be no reason why a handwritten date would be required for a mail-in ballot but not an absentee one. To the extent that this Court finds Act 77’s severability clause triggered because it is invalidating Act 77’s mail-in ballot dating provision, Section 3150.16(a), the handwritten date provision for absentee ballots would presumably also be invalid but absentee voting would remain.

no mention of the dating requirement. Act 77’s legislative history shows that several components of Act 77 were considered essential parts of the legislative compromise. *See, e.g.*, S. LEGIS. J. NO. 46, 203rd SESS. at 1000-02 (Pa. Oct. 29, 2019) (discussing how eliminating straight-ticket voting and the adequacy of election funding were key Republican concerns). The dating provision, by contrast, appears to have been a holdover from a previous version of the Election Code that was not discussed during Act 77’s passage. *See* H. LEGIS. J. NO. 64, 203rd SESS. at 1740 (Pa. Oct. 29, 2019) (“This bill maintains the same requirement for mail-in ballots that exists currently for absentee ballots.”); *see also* 25 P.S. § 3146.6(a)(1) (2018). There is simply no reason to believe that the General Assembly intended that “invalidation” of any word, phrase, or subclause of the Act would trigger invalidation of the entirety of Act 77—especially statutory requirements that serve no purpose but result in the disenfranchisement of otherwise qualified voters. *See* 1 Pa. Cons. Stat. § 1922(1) (in interpreting a statute, it should be presumed “[t]hat the General Assembly does not intend a result that is absurd[] . . . or unreasonable.”).

That conclusion is further reinforced by the fact that the Pennsylvania Legislature has amended Act 77 several times without including a similar nonseverability provision—as mentioned above.<sup>14</sup> If the General Assembly intended Act 77’s nonseverability provision to apply in the face of those subsequent

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<sup>14</sup> *See, e.g.*, Act of Mar. 27, 2020, Pub. L. 41, No. 12 (“Act No. 12 of 2020”).

amendments, it would have included nonseverability clauses in those later enactments. Accepting Republican Intervenors' nonseverability argument would, in effect, force this Court to parse each amendment to ascertain which parts of the Election Code would remain in effect after applying the nonseverability provision—a result plainly not contemplated by the General Assembly when it enacted Act 77. And even if this Court were to agree that all of Act 77 must be invalidated due to the nonseverability provision—and it should not reach that conclusion—the subsequent amendments would likely leave the remaining statutory scheme entirely incoherent. Subsequent amendments to the Election Code thus confirm that the General Assembly did not intend for all of Act 77 to be stricken over the enforceability of the dating requirement.

In sum, if the dating requirement is declared unconstitutional, this Court can and should conclude that Act 77's nonseverability provision is either inapplicable or unenforceable. In either event, this Court should not invalidate all of Act 77.

### **CONCLUSION**

Under the Election Code, the handwritten date provision serves no purpose. Furthermore, if this Court affirms the decision below on the merits of Appellees' constitutional claims, it should reject Republican Intervenors' request to strike all of Act 77.

Dated: March 31, 2025

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## CERTIFICATE OF COMPLIANCE

This filing complies with the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: March 31, 2025

/s/ Ilana H. Eisenstein

Ilana H. Eisenstein

## CERTIFICATE OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief of Respondent contains 7,574 words, exclusive of the supplementary matter as defined by Pa. R.A.P. 2135(b).

Dated: March 31, 2025

*/s/ Ilana H. Eisenstein*

Ilana H. Eisenstein

## CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2025, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: March 31, 2025

/s/ Ilana H. Eisenstein

Ilana H. Eisenstein