Received 3/31/2025 6:04:51 PM Supreme Court Eastern District

Filed 3/31/2025 6:04:00 PM Supreme Court Eastern District
1 EAP 2025

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NOS. 1 EAP 2025 & 2 EAP 2025

BRIAN T. BAXTER AND SUSAN T. KINNIRY,

Petitioners-Appellees,

v.

PHILADELPHIA COUNTY BOARD OF ELECTIONS

Respondent-Appellees,

v.

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA,

Intervenor-Appellants

Appeal of: Republican Party of Pennsylvania and Republican National Committee

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BRIEF OF APPELLEES

On Appeal from the Order of the Commonwealth Court of Pennsylvania, 1306 C.D 2024 & 1309 C.D. 2024, entered October 30, 2024.

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I. INTRODUCTION

The Free and Equal Elections Clause prohibits mass disenfranchisement through enforcement of procedural rules that serve no governmental purpose. This case involves one such rule. In every major election since 2020, thousands of Pennsylvania voters who submitted their mail ballots on time and signed a declaration attesting to their qualifications have been disenfranchised merely because they omitted a handwritten date, or wrote an "incorrect" date, on the outer mail-ballot envelope. Multiple federal courts have confirmed, based on a complete discovery record from the Commonwealth and all 67 counties, that this voter-written date serves no function. The hand-written date plays no role in establishing whether the voter is eligible or whether their ballot package arrived on time, and it is not used to detect fraud. The General Assembly did not even consider the reason, if any, for requiring this date when it adopted the relevant "no excuse" mail-voting provisions; it simply copied obsolete language as part of a wholesale transposition of earlier absentee-voting rules.

Intervenor-Appellants seek to avoid the uncontested fact that this hand-written date requirement serves no purpose except as a disenfranchising trap for thousands of voters in every major election. On the law, they posit a radically neutered version of the Free and Equal Elections Clause, one of the pillars of our constitutional edifice, which would contravene two centuries of jurisprudence and this

Commonwealth's traditions. Intervenor-Appellants propose a form of legislative deference so extreme that it would require this Court to abandon the traditional judicial role of examining whether enforcement of a pointless statutory requirement violates voters' fundamental constitutional rights. On each of these contentions, they could not be more wrong. "[T]he General Assembly's police power is not absolute … under our Constitution, the people have delegated general power to the General Assembly, with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution." *League of Women Voters v. Commonwealth* ("*LWV"*), 178 A.3d 737, 803 (Pa. 2018) (citing PA. CONST. art. I, § 25).

Intervenor-Appellants are also wrong when they repeatedly contend that this Court has already resolved the core question here. This is an issue of first impression for this Court, which it should resolve by affirming the Commonwealth Court's decision. Affirming would not cause radical changes to the way elections are run under the Election Code. It would not trigger any change to the vast run of election rules that, unlike the handwritten date requirement, have some practical purpose. Rather, affirming would end a cycle of unconstitutional mass disenfranchisement based on enforcement of the uniquely pointless handwritten date requirement. And doing so would not trigger the nonseverability clause in the 2019 act amending the Election Code , as that clause is inapplicable and, in any case, unenforceable here.

II. COUNTER-STATEMENT OF THE CASE

A. Form of Action and Procedural History

Intervenor-Appellants appeal from the Commonwealth Court's decision affirming the order of the Court of Common Pleas of Philadelphia County, which directed the Philadelphia Board of Elections (the "Board") to count mail ballots[1] submitted by Voter-Appellees and 67 similarly situated voters in a September 17, 2024 Special Election for the State House of Representatives.

Voter-Appellees Brian Baxter and Susan Kinniry are eligible registered Philadelphia County voters who submitted mail ballots in the September 2024 Special Election before the 8:00 p.m. Election Day deadline. Each of them signed the declaration printed on the outer return envelope, but mistakenly did not handwrite the date before submitting their mail ballots. Upon receipt of their mail ballot packages, the Board date-stamped the return envelopes. At a public meeting on September 21, 2024, the Board voted 2-1 to not count Voter-Appellees' ballots and those of similarly situated voters who had either omitted the date or wrote a date that the Board deemed "incorrect" on the return envelope.

Voter-Appellees timely challenged the Board's decision by filing a Petition for Review in the trial court pursuant to 25 P.S. § 3157. The verified Petition and

[1] Identical procedures govern how voters apply for, complete, and return absentee and mail-in ballots. This brief uses the term "mail ballots" to encompass both absentee and mail-in ballots.

attached declarations of Voter-Appellees detailed their qualifications and attempts to vote by mail in the September 2024 Special Election. *See* R. 001b-037b. The Petition also detailed the Pennsylvania mail ballot process, *see* R. 008b-010b, and alleged, based on admissions and findings in multiple prior lawsuits, that the date serves no purpose other than to disenfranchise eligible voters and disqualify ballots received on time, R. 010b-012b.

At a September 25, 2024 hearing, the Board agreed that the contents of the Petition and supporting declarations are undisputed. *See* R. 040b at 5:6-6:7; *see also* R. 141a. Counsel for Intervenor-Appellants appeared and did not raise any dispute with the facts in the Petition. *See* R. 043b at 20:2-21. The material facts (including that the dating requirement serves no purpose) are thus undisputed.[2]

Based on these facts, Judge James C. Crumlish III granted Voter-Appellees' Petition, ruling that the Board's decision to disqualify their mail ballots because of envelope-dating errors violated their fundamental right to vote. R. 141a-142a. On September 27, 2024, Judge Crumlish signed an order granting Intervenor-Appellants' motion to intervene, denying their motion to dismiss, and providing for final disposition of the § 3157 appeal. R. 139a-140a.

[2] Notwithstanding their assent to the factual record in the Court of Common Pleas, Intervenor-Appellants' Petition for Allowance of Appeal included a proposed Question for Review asking for a further "opportunity to develop the factual record[.]" (R. 019a; *see also* R. 031a-034a.) The Court appropriately denied review on that question.

The Board appealed to Commonwealth Court on October 1, 2024, and Intervenor-Appellants appealed on October 3, 2024. On October 30, 2024, after expedited briefing, the Commonwealth Court affirmed the trial court's ruling. R. 075a-138a. Judge Ceisler authored the majority opinion, which was joined by President Judge Cohn Jubelirer and Judge Wojcik. R. 075a-116a. Judges McCullough and Wolf dissented. R. 119a-138a.

On October 31, 2024, Intervenor-Appellants filed an Emergency Application for Extraordinary Relief in this Court seeking a stay or modification of the Commonwealth Court's order. The next day, in a *per curiam* order, this Court granted Intervenor-Appellants' application "only to the extent that the Commonwealth Court's decision…shall not be applied to the November 5, 2024 General Election." R. 057-58. Justice Donohue, joined by Chief Justice Todd, and Justice Dougherty issued concurring statements. *See* R. 059a-074a.

Missing or incorrect dates continued to be the leading reason for rejecting mail ballots submitted by 8:00 pm on Election Day, disenfranchising approximately 4,700 Pennsylvania voters in November 2024.[3] And clumsy attempts to apply the

[3] Mark Scolforo, *Pennsylvania Elections Chief Touts Progress In Reducing Mail Ballot Rejection Rate*, ASSOCIATED PRESS (Jan. 31, 2025), https://apnews.com/article/pennsylvania-mail-ballots-election-voting-f51bfba8910686eb0f63c15fb6757f20; *Shapiro Administration Announces 57% Decrease in Mail Ballots Rejected in 2024 General Election,* PA. DEP'T OF STATE (Jan. 24, 2025), https://www.pa.gov/agencies/dos/newsroom/shapiro-administration-announces-57--decrease-in-mail-ballots-re.html.

envelope-dating provisions continued to yield absurd results.[4]

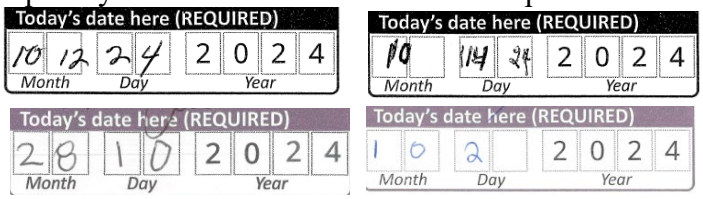
On November 12, 2024, Intervenor-Appellants filed a Petition for Allowance of Appeal. R. 007a-056a. On January 17, 2025, in a *per curiam* order, this Court granted that petition in part, limiting its review to two questions and denying review as to all remaining issues. R. 001a-002a. Justice Donohue, joined by Justice McCaffery, issued a concurring and dissenting statement. R. 003a-006a.

B. Factual Background

1. Voting by Mail in Pennsylvania

A voter seeking to vote by mail must complete an application that includes their name, address, and proof of identification and send it to their county board of elections. 25 P.S. §§ 3146.2, 3150.12; R. 008b-009b. This allows the county board to verify the voter's qualifications—namely, that they are at least 18 years old, have been a U.S. citizen for at least one month, have resided in the election district for at least 30 days, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301; R.008b-009b R0008-09, ¶ 27.

[4] For example, the York County Board of Elections set aside mail ballots from qualified voters who plainly wrote the full date on their completed mail-in ballots in the following formats:



The county board then assesses each applicant's qualifications by verifying their proof of identification and comparing the information on the application with the voter's record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4); R. 009b, ¶ 28. The county board's eligibility determinations are conclusive unless challenged prior to Election Day. *Id.* §§ 3146.2b(c), 3150.12b(a)(3); R. 009b, ¶ 28. After verifying the voter's identity and eligibility, the county board sends a mail-ballot package that contains a ballot, a secrecy envelope marked with the words "Official Election Ballot," and the pre-addressed return envelope containing a pre-printed voter declaration form. *Id.* §§ 3146.6(a), 3150.16(a); R. 009b, ¶ 29.

At "any time" after receiving their mail-ballot package, the voter marks the ballot, places it in the secrecy envelope and the return envelope, completes the declaration, and delivers the ballot, by mail or in person, to their county board. *Id.* §§ 3146.6(a), 3150.16(a); R. 009b, ¶ 30. The Election Code provides that the voter "shall…fill out, date and sign the declaration" printed on the outer envelope used to return the mail ballot. *See* 25 P.S. §§ 3146.6(a), 3150.16(a); R. 009b, ¶ 31.

The county board must receive an otherwise valid mail ballot by 8:00 p.m. on Election Day for it to count. 25 P.S. §§ 3146.6(c), 3150.16(c); R. 009b-010b, ¶ 33. Upon receipt of a mail ballot, county boards must stamp the return envelope with the date of receipt to confirm that it arrived before the deadline and log it in the Department of State's Statewide Uniform Registry of Electors ("SURE") system,

the statewide database that counties use to, among other purposes, generate poll books.[5] *See* R. 009b-010b, ¶ 33. Mail ballots that arrived on time are then verified pursuant to 25 P.S. § 3146.8(g), and any verified ballot submission that is not challenged is counted and included with the election results. *Id.*, § 3146.8(g)(4); R. 010b. ¶ 34.

2. Origins of the Envelope-Dating Provision

Long before the enactment of "no-excuse" mail voting for all Pennsylvania voters, the Election Code provided an absentee ballot option for certain subsets of voters. *See* 25 P.S. §§ 3146.1–3146.9; R. 008b, ¶ 26. In 1963, the General Assembly added to the absentee ballot provisions a requirement that the "elector shall…fill out, date and sign [a] declaration printed on" the outer envelope used to return absentee ballots. Act of Aug. 13, 1963, No. 379, P.L. 707, § 22, 1963 Pa. Laws 707, 739 (effective date Jan. 1, 1964). The General Assembly also amended the Code's canvassing provision to instruct county boards to review the handwritten date on the outer envelope and set aside ballots in envelopes bearing a date after the election. *Id.*, § 24, 1963 Pa. Laws at 743. Accordingly, in 1964, the handwritten envelope date

[5] *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, PA. DEP'T OF STATE, at 2-3 (Apr. 3, 2023), https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf.

was used as part of the sufficiency determination for absentee ballots received several days after Election Day.

However, in 1968, the Legislature updated the Election Code to make **date of receipt** the sole factor in determining timeliness of absentee ballots. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, §§ 1308(a) & (c). Because there was no longer any need to consider the date that the voter completed their ballot, the General Assembly also eliminated the requirement to set aside ballots based on the envelope date. *Id*. Thus, while the instruction to "fill out, date and sign" the envelope declaration remained at § 1306, the voter-written date was irrelevant starting in 1968, as the **only** date used to determine whether an absentee ballot is on time is the date of **receipt**.

In 2019, the General Assembly enacted Act 77, which provides all eligible voters the option of no-excuse mail voting. Act of Oct. 31, 2019, P.L. 552, No. 77, § 8; R. 008b, ¶ 26. The General Assembly largely copied the Code's absentee-ballot provisions in the new mail-ballot provisions, including the instruction to "fill out, date and sign" a declaration printed on the return envelope. *Compare* 25 P.S. § 3150.16(a) with § 3146.6(a).

As *amici* legislative leaders have acknowledged, the General Assembly drafted Act 77 by reusing the absentee-ballot language wholesale "to minimize the complexities of legislative drafting," R. 076b, **not** because the legislature thought the voter-written date served some purpose in election administration. Thus, the

legislative history of Act 77 contains no indication that the General Assembly gave any thought to whether the vestigial "shall…date" language should be enforced to disenfranchise mail-ballot voters for noncompliance.

3. Election Officials Confirm the Envelope-Dating Provision Serves No Governmental Purpose.

Voter-Appellees established below that "[t]he date written on the envelope serves no purpose. In particular, it is not used to establish whether the mail ballot was submitted on time." R. 011b, ¶ 39. The Board expressly stipulated to this fact. *See* R. 040b at 5:6-6:7. And throughout the numerous briefing stages in the Commonwealth Court and this Court, **not one** county board—or even any single commissioner from any county—has attempted to intervene, or to participate as *amicus*, to suggest that they have any use for the voter-written date other than checking for compliance to disenfranchise voters.[6]

Moreover, election officials in multiple prior lawsuits have confirmed that the handwritten date serves no purpose. In *Pennsylvania State Conference of NAACP v. Schmidt* ("*NAACP I*"), 703 F. Supp. 3d 632 (W.D. Pa. 2023) *rev'd on other grounds*, 97 F.4th 120 (3d Cir. 2024), all 67 county boards of elections provided evidence and

[6] The only views submitted by election officials who have any responsibility for, or experience in, administering elections have uniformly confirmed what prior courts held. In addition to the Board's stipulation, dozens of commissioners from other counties write as *amici*: "The Dating Provisions Serve No Government Interest and Only Burden Election Administration." 3/27/25 *Amici Curiae* Brief of County Officials at p. 6.

admissions that proved the antiquated envelope-dating provisions serve no purpose. Based on that comprehensive record, the *NAACP I* court found it beyond dispute that a handwritten date is "wholly irrelevant" in determining when the voter filled out the ballot or whether the ballot was received by 8:00 p.m. on Election Day. *Id*, at 678. As to the voter-written date's lack of relevance to timeliness:

> Irrespective of any date written on the outer Return Envelope's voter declaration, if a county board received and date-stamped a…mail ballot before 8:00 p.m. on Election Day, the ballot was deemed timely received under the Commonwealth's Election Code. On the other hand, if the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope…. 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.

Id. at 679. The undisputed record further "show[ed], and the parties either agree…or admit…" that county boards did not use the date "**for any purpose** related to determining a voter's age…, citizenship…, county or duration of residence…, felony status…, or timeliness of receipt." *Id.* at 676, 668 (emphasis added).

These findings were upheld on appeal. Although the Third Circuit reversed the grant of summary judgment based on its interpretation of the scope of the federal statute at issue, the full panel agreed based on the comprehensive record that "[t]he date requirement…serves little apparent purpose." *Pa. State Conf. of NAACP Branches v. Sec'y* ("*NAACP II"*), 97 F.4th 120, 125 (3d Cir. 2024); *see also id.* at 127 ("[T]he date on the declaration plays no role in determining a ballot's

timeliness."); *id.* at 129 ("Nor is [the handwritten date] 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."); *id.* at 139-40 (Shwartz, J., dissenting) ("the date on the envelope is not used to (1) evaluate a voter's statutory qualifications to vote, (2) determine the ballot's timeliness, or (3) confirm that the voter did not die before Election Day or to otherwise detect fraud"). Indeed, the district court recently granted summary judgment in a companion case, holding based on the same record that enforcing the date requirement violates the U.S. Constitution because there is "no evidence that the date requirement serves any state interest." Op., *Eakin v. Adams Cnty. Bd.* ("*Eakin* Op."), ECF No. 438 at 20, No. 22 Civ. 340 (W.D. Pa. Mar. 31 2025).

4. Previous Litigation over the Envelope-Dating Provisions

The envelope-dating provisions have been the subject of multiple litigations since 2020, as their enforcement means thousands of eligible Pennsylvania voters face disenfranchisement in every major election.[7]

Between 2020 and 2022, several courts construed the Election Code's envelope-dating provision. *See In re Canvass of Absentee and Mail-In Ballots of*

[7] In the 2022 general election, enforcement of the envelope-dating provision disenfranchised over 10,000 voters. *E.g.*, *NAACP II*, 97 F.4th at 139 (Shwartz, J. dissenting). Thousands more were disenfranchised for this reason in the 2023 municipal elections, and again in the 2024 presidential primary. *See* R. 033b-037b. Approximately 4,700 voters were disenfranchised for envelope-dating reasons in the 2024 general election. *See* Scolforo, *supra* note 3.

Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1062 (Pa. 2020), *cert. denied*, 141 S. Ct. 1451 (2021) ("*In re 2020*") (concluding date-disqualified mail ballots would be counted for the 2020 election only); *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 WL 16577 (Pa. Cmwlth. Jan. 3, 2022), *appeal denied*, 271 A.3d 1285 (Pa. 2022) (ruling that the statute prohibits counting ballots in undated envelopes). Additional courts considered whether the envelope-dating provision violated the Materiality Provision of the federal Civil Rights Act, also reaching different conclusions. *Compare Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022) (holding enforcement of envelope-dating provision violated federal law), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022), *and NAACP I*, 703 F. Supp. 3d 632 (same), *and Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *12-29 (Pa. Cmwlth. Aug. 19, 2022) (same), *and McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9-15 (Pa. Cmwlth. June 2, 2022) (same), *with Ball v. Chapman*, 289 A.3d 1, 33-34 (Pa. 2023) (deadlocking 3-to-3 as to application of the federal Materiality Provision)[8], *and NAACP II*, 97 F.4th 120 (concluding the Materiality Provision does

[8] While *Ball* was a statutory interpretation case, three of the six justices in that case acknowledged that "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." *Ball*, 289 A.3d at 27 n.156 (citing PA. CONST. art. I, § 5; *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020) ("*PDP*")).

not apply to mail ballot forms, without reaching merits of whether envelope date was "material").

However, the Commonwealth Court and the trial court below are the only courts to consider whether applying the envelope-dating provision to disenfranchise otherwise-eligible voters violates their fundamental rights under the Free and Equal Elections Clause. Both courts found that it does. *See* R. 113a ("[T]he refusal to count the 69 undated and incorrectly dated but timely received mail ballots submitted by otherwise eligible voters in the Special Election because of meaningless dating errors violates the fundamental right to vote recognized in and guaranteed by the free and equal elections clause of the Pennsylvania Constitution . . . ."); R. 142a (trial court opinion that "refusal to count a ballot due to a voter's failure to 'date...the declaration printed on [the outer] envelope' used to return his/her mail-in ballot…violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania....").

5. The September 2024 Special Election

On July 1, 2024, the Department of State issued a Mail Ballot Directive prescribing the text, content, shape, size, and form of the mail ballot declaration envelope, and mandating that counties prefill the year on the date field.[9] Voters

[9] *See Directive Concerning the Form of Absentee and Mail-in Ballot Materials*, v.2.0, PA. DEP'T OF STATE, 3-4, (July 1, 2024) [hereinafter DOS Mail Ballot Directive],

continued to make envelope-dating mistakes during the September 2024 Special Election. Even in a low-turnout election, strict enforcement of the envelope-dating provisions resulted in the rejection of dozens of mail ballots submitted by eligible Philadelphia voters before the statutory receipt deadline. With fewer than 5,000 mail ballots submitted in the Special Election, the 69 ballots disqualified for envelope-dating errors represented approximately 1.4% of mail ballots in the Special Election.

Voter-Appellees are two of the voters disenfranchised on this basis. Appellee Baxter is a qualified registered voter who lives in Philadelphia, votes in every election, and has been voting by mail for two years. *See* R. 023b-024b, ¶¶ 2-3, 6, 8. About one month before the Special Election, Mr. Baxter received a mail ballot from the Board. R. 024b, ¶ 9. He marked it, inserted it into the secrecy envelope, then inserted that into the outer return envelope. *Id.*, ¶ 10. He submitted the mail-ballot packet ahead of the September 17, 2024 Special Election for State Representative in the 195th State House District. *Id.*, ¶¶ 9-10. He thought he had filled out everything on the declaration envelope correctly when he submitted it. *Id.*, ¶ 10. However, Mr. Baxter later learned that he had neglected to include a date on his signed return envelope when preparing his mail-in ballot packet.[10]

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https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-Directive-Absentee-Mail-in-Ballot-Materials-v2.0.pdf.

[10] *See* Philadelphia Board of Elections, *List of Flawed Ballots, 2024 Special Election,* PHILADELPHIA CITY COMMISSIONERS (Sept. 15, 2024), https://vote.phila.gov/media/2024_Special_Election_Deficiency_List.pdf.

Appellee Kinniry is a qualified registered voter in Philadelphia who submitted a mail ballot in the September 17, 2024 Special Election. *See* R. 027b-028b, ¶¶ 2-3, 6, 9. Ms. Kinniry, an attorney for the Social Security Administration, tries to vote in every election and especially in off-cycle, low turnout elections to show that voters are engaged. *Id.*, ¶¶ 5-6, 15. Ms. Kinniry, who is a regular mail-ballot voter, received a mail ballot from the Board a few weeks before the September 2024 Special Election. *Id.*, ¶¶ 6, 8-9. She marked her ballot and inserted it into the secrecy envelope and thought she properly filled out the declaration after she had inserted everything else into the return envelope. *Id.*, ¶ 10. Ms. Kinniry later learned she had not dated her signed return envelope and thus her vote did not count. *Id.*, ¶ 12.

Meanwhile, Pennsylvania courts were adjudicating other cases involving the envelope-dating provision. On August 30, 2024, after Philadelphia voters had already begun returning mail ballots in the Special Election, the Commonwealth Court ruled in *B-PEP* that it is unconstitutional to enforce the envelope-dating provision to disqualify mail ballots. *See Black Pol. Empowerment Project v. Schmidt ("B-PEP I")*, No. 283 M.D. 2024, 2024 WL 4002321, at *35 (Pa. Cmwlth. Aug. 30, 2024), *vacated on procedural grounds*, *Black Pol. Empowerment Project v. Schmidt ("B-PEP II")*, No. 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 4, 2024).

The Board convened on September 21, 2024, to adjudicate contested mail ballots and make "sufficiency determinations" about mail ballot packets with

"flaws."[11] In light of the decision vacating the Commonwealth Court's ruling in *B-Pep*, The Board voted 2-1 to not count 23 mail ballots that had arrived in undated declaration envelopes, including those submitted by Voter-Appellees, and 46 mail ballots in envelopes that it concluded were "incorrectly dated." R. 014b, ¶¶ 51-52.

C. Brief Statement of the Determination Under Review

The Commonwealth Court affirmed the trial court's holding that rejecting mail ballots for failure to comply with the envelope-dating requirement violates the fundamental right to vote guaranteed by the Free and Equal Elections Clause. *See* R. 113a. The Commonwealth Court explained that this Court's decisions in *In re 2020, PDP,* and *Ball* did not address the constitutional question in this case, and therefore do not require reversal of the trial court's order. *See* R. 101a-106a. It recognized that rejecting votes for noncompliance with the dating provisions is a restriction on the fundamental right to vote that is subject to strict scrutiny, *see* R. 111a, and concluded that such rejections "cannot survive strict scrutiny, as they serve no compelling government interest" since the dating provisions "are virtually meaningless." R. 111a-112a. Finally, the Court held that Act 77's nonseverability clause should not be enforced under the circumstances of this case. *See* R. 113a-115a.

[11] *See* Philadelphia Board of Elections, *Agenda of the Philadelphia City Commissioners Return Board Meeting,* PHILADELPHIA CITY COMMISSIONERS, (Sept. 21, 2024), https://vote.phila.gov/media/Agenda_for_09_21_2024.pdf.

III. SUMMARY OF ARGUMENT

Enforcement of the obsolete envelope-dating provision to reject otherwise valid mail ballots violates Pennsylvanians' expansive constitutional right to vote under the Free and Equal Elections Clause, PA. CONST. art. I, § 5. The Clause, whose robust protections predate the U.S. Constitution, means not only that voters must have an equal opportunity to participate in elections, but also that "each voter under the law has the right to cast [their] ballot and have it honestly counted." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). The Clause "governs **all aspects** of the electoral process," *LWV*, 178 A.3d at 814 (emphasis added), including facially neutral rules for submitting mail ballots. Accordingly, unnecessary and unjustified disenfranchisement based on an indisputably meaningless and vestigial envelope-dating provision cannot continue.

This Court has long held restrictions on the fundamental right to vote must satisfy strict scrutiny. *See, e.g.*, *Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth.), *aff'd*, 713 A.2d 1106 (Pa. 1998). Intervenor-Appellants cannot meet the heavy burden under this standard. In fact, it is stipulated that this vestigial requirement, "serves no purpose." R. 011b-016b, ¶¶ 39, 61. As no party or *amicus* has advanced any compelling governmental interests, this Court can easily affirm the lower court's conclusion that enforcement of the envelope-dating provisions to disqualify voters' otherwise valid mail ballots fails strict scrutiny.

Indeed, under **any** level of constitutional scrutiny, disenfranchisement based on this irrelevant mistake is unjustified. While Intervenor-Appellants advance three theoretical purposes for the envelope-dating provisions, none of them is supported by the record, and each has been thoroughly debunked in prior litigation. As several courts have uniformly found, the voter-written date simply serves no governmental interest or practical function.

The Intervenor-Appellants' merits arguments are wrong and offer no basis to reverse the Commonwealth Court's decision.

First, there is no basis in Pennsylvania jurisprudence for the radical position that the Free and Equal Elections Clause is powerless against so-called "ballot-casting rules." This litigation-driven concept appears nowhere in the Election Code, nor does the phrase "ballot-casting rule" appear in any Pennsylvania judicial opinion prior to the one-judge dissent in *B-PEP I*. Intervenor-Appellants' proposed categorical limits on our Constitution's protection of fundamental rights are irreconcilable with text, history, and this Court's unequivocal mandate that the Free and Equal Elections Clause be "given the broadest interpretation, one which governs **all aspects** of the electoral process[.]" *LWV*, 178 A.3d at 814 (emphasis added).

Second, this Court has never before ruled on—much less rejected—arguments regarding the constitutionality of the envelope-dating provision under the Free and Equal Elections Clause. Contrary to Intervenor-Appellants' misreading of

prior decisions: (a) *Ball* turned entirely on statutory construction and did not include any analysis of the Free and Equal Elections Clause; (b) the portions of *PDP* on which they rely dealt only with the question of whether voters must be given "notice and an opportunity to cure" minor errors on mail ballot submissions, not the question of whether rejecting mail ballots for envelope-dating errors violates the fundamental right to vote; and (c) *Walsh* did not engage with, let alone answer, the constitutional question at issue here. Indeed, the requirement in *Walsh* presented the mirror image of this case: Technical requirements that actually serve a purpose (like a signature requirement used to confirm a provisional voter's identity) can be imposed consistent with our Constitution's strong voting protections; requirements that serve no discernable purpose except disenfranchising voters cannot.

Third, Intervenor-Appellants' reliance on other states' jurisprudence and inapposite federal cases to evade the capacious protection of the right to vote guaranteed by the Pennsylvania Constitution is both misguided and inaccurate.

Finally, Intervenor-Appellants' arguments based on Act 77's nonseverability provision fail. Appellees do not seek to invalidate any statutory provision. Moreover, the specific portions of the Election Code at issue here predate Act 77 and cannot be subject to that Act's nonseverability clause.

IV. ARGUMENT

A. Disenfranchising Voters for Noncompliance with Vestigial Envelope-Dating Provisions Is Unconstitutional.

1. The right to vote under the Free and Equal Elections Clause is paramount.

In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: "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. The Clause guarantees not only an equal opportunity to cast a ballot, but also that: "each voter under the law has the right to cast [their] ballot and have it honestly counted," *Winston*, 91 A. at 523; that "the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial," *id.*; and that "no constitutional right of the qualified elector is subverted....," *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523).

This Clause is uniquely broad in scope and powerful in its protective force. As this Court detailed in *LWV*, the right to vote in Pennsylvania emanates from a proud tradition that predates the country's founding and guarantees broader protections than the federal Constitution:

> Pennsylvania's Constitution, when adopted in 1776, was widely viewed as "the most radically democratic of all the early state constitutions." [] Indeed, our Constitution, which was adopted over a full decade before the United States Constitution, served as the foundation—the

> template—for the federal charter. [] Our autonomous state Constitution, rather than a "reaction" to federal constitutional jurisprudence, stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth.

LWV, 178 A.3d at 802 (quoting Ken Gormley, ed., *The Pennsylvania Constitution A Treatise on Rights and Liberties*, 3 (2004)). Our framers envisioned the right to vote as "that most central of democratic rights[.]" *Id.* at 741; *see also PDP*, 238 A.3d at 386-87 (Wecht, J. concurring) ("No right is more precious…. Other rights, even the most basic, are illusory if the right to vote is undermined.").

Accordingly, the "plain and expansive sweep of the words 'free and equal'" is "indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth...." *LWV*, 178 A.3d at 804. It "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." *Id.* at 809 (citation omitted).

2. Strict scrutiny applies to the envelope-dating restriction on the fundamental right to vote.

This Court has long held that the right to vote is fundamental. *See, e.g.*, *PDP*, 238 A.3d at 361 (employing a construction of the Election Code that "favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate[]"); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) ("the right to vote

is fundamental and 'pervasive of other basic civil and political rights'" (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999))).

Accordingly, restrictions on this fundamental right must be able to withstand a strict scrutiny analysis. *See, e.g.*, *Petition of Berg*, 712 A.2d at 342 ("It is well settled that laws which affect a fundamental right, such as the right to vote…, are subject to strict scrutiny").[12] The Commonwealth Court thus correctly held that enforcement of the envelope-dating provision to disenfranchise voters triggers strict scrutiny because it "impose[s] a significant burden on [] Appellees' constitutional right to vote, in that those provisions restrict the right to have one's vote counted in the Special Election to only those voters who **correctly** handwrite the date on their mail ballots and effectively deny the right to all other qualified electors who sought to exercise the franchise by mail in a timely manner but made minor mistakes or omissions regarding the handwritten date on their mail ballots' declarations." R. 111a (emphasis in original).

Intervenor-Appellants miss the mark in suggesting (Br., 3-4, 14, 28-31) that the burden imposed by enforcement of the envelope-dating provision is not sufficiently "difficult" to trigger strict scrutiny. Refusing to count a voter's ballot surely **does** impose a severe burden on that voter's fundamental right to vote, and

[12] While *Berg* declined to apply strict scrutiny, it expressly did so upon finding that the case did **not** involve denial of fundamental right to vote, and not because strict scrutiny does not apply when the right to vote is at issue. 712 A.2d at 342-44.

the severity of the denial here is underscored by the fact that the requirements at issue effectively filters thousands of voters out of participation in every election. *Cf. In re Canvass of Absentee Ballots of 1967 Gen. Election,* 245 A.2d 258, 262 (Pa. 1968) ("The disfranchisement of 5,506 citizens...would be unconscionable."). But this Court has never required a showing of severity for strict scrutiny to apply to the deprivation of a fundamental right. *See In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) ("[W]here the fundamental right to vote is at issue, a strong state interest must be demonstrated[]"), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016). Laws that "affect," "burden," "infringe upon," or "subvert" the fundamental right to vote may trigger such review, even absent a "severe" burden. *See, e.g.*, *Berg*, 712 A.2d at 342 ("It is well settled that laws which **affect** a fundamental right, such as the right to vote...are subject to strict scrutiny." (emphasis added)); *James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984) (where a "fundamental right has been **burdened**, another standard of review is applied: that of strict scrutiny" (emphasis added)); *see also Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Cmwlth. Ct. Jan. 17, 2014) (laws that "**infringe[] upon** qualified electors' right to vote" are analyzed "under strict scrutiny[]" (emphasis added)).

In addition, this Court has expressly recognized that the Free and Equal Elections Clause applies not only to regulations that "deny the franchise itself, or make it so difficult as to amount to a denial," but **also** where the "constitutional right

of the qualified elector is **subverted or denied**[.]" *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523) (emphases added); *cf.* PA. CONST. art. I, § 5 ("[N]o power, civil or military, shall at any time **interfere** to prevent the free exercise of the right of suffrage." (emphasis added)). Regardless what terminology one uses to describe the harsh result, denying or subverting or interfering with the right to have one's ballot "honestly counted," *Winston*, 91 A. at 523, because of a meaningless mistake is an "extremely serious matter" that triggers strict scrutiny. *Perles v. Cnty. Return Bd. of Northumberland Cnty*., 202 A.2d 538, 540 (Pa. 1964); *see also, e.g.*, *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) (the power to disqualify ballots based on minor irregularities "must be exercised **very sparingly** and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons**" (emphasis added)).

3. Enforcement of the vestigial envelope-dating provision fails strict scrutiny.

No party or *amicus* even attempts to argue that rejecting votes for noncompliance with the envelope-dating requirement could withstand strict scrutiny. Because it surely cannot. Under strict scrutiny, the party defending the challenged action must prove that it serves a compelling governmental interest. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also, e.g.*, *Appeal of Gallagher*, 41 A.2d at 632 (requiring "compelling reasons" to disqualify ballots based on minor irregularities); *In re Nader*, 858 A.2d at 1180 ("where a precious

freedom such as voting is involved, a compelling state interest must be demonstrated"). Here, the General Assembly did not have **any** state interest in mind when including the phrase "shall … date" in Act 77; it was a vestige of past Election Code provisions that no longer had any purpose by the time of the Act's passage.[13]

Intervenor-Appellants have not demonstrated how rejecting voters' ballots for noncompliance with a handwritten date requirement serves any interest, let alone a compelling one. The requirement is not used to determine timeliness of receipt or voter qualifications. Indeed, as the Board stipulated below, it serves no purpose. *See* R. 011b, ¶ 39. When given the opportunity to identify facts in dispute at the same hearing, Intervenor-Appellants could not do so and ultimately did not object at the hearing to the stipulation of facts pleaded in the Petition for Review. *See* R. 043b at 20:2-21.[14]

The Commonwealth Court thus correctly concluded that enforcing "the dating provisions cannot survive strict scrutiny, as they serve no compelling government interest." R. 111a. As no party or *amicus* here has since advanced any compelling

[13] As noted, *supra* 8-10, the General Assembly's inclusion of "shall…date" in Act 77 was not supported by any genuine legislative purpose or even consideration of whether the voter-written dates would serve a purpose in administering elections. The General Assembly merely copied this language over from another, outdated provision in the Election Code as a matter of drafting convenience. Whatever purpose the General Assembly had in requiring handwritten dates on absentee ballot envelopes in 1964 was eliminated by its 1968 amendments to the Election Code.

[14] This is consistent with the Intervenor-Appellants' agreement in *B-PEP I* that the factual record developed in *NAACP I* was not in dispute and could be considered by the Commonwealth Court in a subsequent case involving the same requirement. *See B-PEP I*, 2024 WL 4002321 at *3.

governmental interests, this Court should affirm the conclusion that enforcement of the envelope-dating provisions violates the Free and Equal Elections Clause.

4. Enforcement of the obsolete envelope-dating provisions to disenfranchise could not survive even lower levels of scrutiny.

Although Intervenor-Appellants do not contest that disenfranchising voters for failure to comply with the envelope-dating provision would not survive strict scrutiny, they continue to posit three debunked theoretical purposes for the envelope-dating provision. *See* Br., 41-45. Intervenor-Appellants failed to adduce evidence of these interests during the Section 3157 hearing, and in advancing them here, they ignore the admissions of the Board,[15] the admissions made by every other county board of elections in *NAACP*, and the undisturbed findings of multiple courts in *NAACP*, *Migliori*, *B-PEP*, and *Chapman*. Ultimately, none of these hypothesized purposes survives any level of constitutional scrutiny, and this Court should therefore affirm the result even if it applies a different level of scrutiny.

[15] The court below did not, as Intervenor-Appellants claim, ignore their arguments about supposed governmental interests. Rather, it correctly recognized an absence of dispute about the facts relevant to these arguments, as the Board here admitted "it does not use the handwritten date to determine a voter's qualifications or timeliness of ballots, or to detect fraud." R. 090a. Intervenor-Appellants did not dispute those facts when stipulated below, nor could they legitimately be disputed at this point. Based on the undisputed facts, the Commonwealth Court concluded (as many courts have before) that the handwritten envelope dates are "virtually meaningless and, thus, serve no compelling government interest." R. 112a. The problem for Intervenor-Appellants is not that the court below did not consider their arguments; it is that their arguments have proven, time and again, to be counterfactual.

First, since the 1968 change to the Election Code, there has never been an instance of the envelope-dating provision serving as a "useful backstop" for determining whether a ballot arrived by the statutory receipt deadline. Intervenor-Appellants' arguments on this point (Br., 42) rely on hypothetical, so-called "colorable" theories about how one might imagine a use for a voter-written date on the envelope. If they had evidence, Intervenor-Appellants should have produced it during the Section 3157 hearing. But no party in any case has been able to dispute the Third Circuit's conclusion that 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." *NAACP II*, 97 F.4th at 129.

Intervenor-Appellants' pure conjecture—that the handwritten date **might** be used to determine timeliness, **if** there were **both** a failure to timestamp **and** a failure of the SURE scanning procedure—is far too speculative to qualify as an important governmental interest. *Accord* 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5) (requiring boards to "maintain a record of...the date on which the elector's completed [absentee or mail-in] ballot is received by the county board"); *In re 2020,* 241 A.3d at 1077, 1086 n.40 ("The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superflous [sic]."); *Eakin* Op. at 18 ("That requiring a voter to handwrite a date

serves as a safeguard is a speculative assertion because, again, the RNC has failed to point this Court to any evidence regarding potential failures in the timestamp process or in the SURE system.").[16] The actual record—which was not available to the Court when it decided *In re 2020*—demonstrates that Intervenor-Appellants' supposed "colorable" theories are just fact-free speculation about how the date **could** be used under a totally different set of electoral rules. That cannot justify disenfranchising thousands.

Second, there is no authority, from Pennsylvania or anywhere else, for the assertion that the voter-written date serves some supposed interest in "solemnity."[17] This purported governmental interest could not even theoretically justify disenfranchising voters. *See In re 2020*, 241 A.3d at 1089 n.54 (Wecht, J.) ("It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require."). Whatever purported interest might exist in "solemnity" is accounted for

[16] To the extent that Intervenor-Appellants articulate a legitimate governmental interest in ensuring that only timely ballots are counted, the challenged practice—disenfranchising voters whose ballots were indisputably date-stamped to confirm receipt by the statutory deadline—is not even minimally related—much less narrowly tailored—to serving that interest, especially given that no election official consults the handwritten envelope dates to confirm timeliness.

[17] The cases Intervenor-Appellants continue to cite for this fabricated "solemnity" concern (Br., 42-43) are strikingly off-topic, as none other than the dissent below involved requirements to date or sign documents. Meanwhile, the **only** case they cite that mentions "solemnity," *Vote.org v. Callanen*, is a federal Materiality Provision case involving a wet **signature** requirement. 89 F.4th 459 (5th Cir. 2023). The court there did not mention a handwritten date requirement except to note that the **immateriality** of Pennsylvania's envelope date is "fairly obvious." *Id.* at 480, 493.

by the numerous other requirements for successfully submitting a mail ballot—including that the voter submit an application, that they submit and have their identification verified, and that they sign a declaration stating, "I am qualified to vote the enclosed ballot and I have not already voted in this election." DOS Mail Ballot Directive, *supra* note 9; *see* 25 P.S. §§ 3146.4, 3146.6, 3150.14, 3150.16. It is insulting to voters and inconsistent with the principles embodied by the Free and Equal Elections Clause to suggest that, after taking all these steps, omitting a handwritten date on a form on the envelope somehow negates the "solemnity" of voters' participation or suggests they did not adequately contemplate their actions. *See Eakin* Op. at 18 (dismissing the "nebulous contention" of solemnity, which is "based solely on supposition"). Disenfranchising voters who complete these steps for noncompliance with the superfluous date requirement does not bear a sufficient relationship to the stated goal of "solemnity" to justify loss of a vote.

Moreover, a missing or incorrect date commonly does **not** deprive a document of its legal effect. For example, with respect to declarations signed under penalty of perjury in accordance with federal law (28 U.S.C. § 1746), "the absence of a date … does not render [the declaration] invalid if extrinsic evidence could demonstrate the period when the document was signed." *Peters v. Lincoln Elec. Co*., 285 F.3d 456, 475-76 (6th Cir. 2002) (citation omitted). Here, the "period when the [envelope] was signed" is known, because mail ballots were sent to voters on a date certain and are

accepted by county boards only if received by 8:00 p.m. on Election Day. Intervenor-Appellants miss the point when they note (Br., 29 & n.4) **other** common forms that require both a signature and date. Of all the examples they cite, none involve the denial of a fundamental right if the signatory forgets to fill in the date field.

Third, the notion that the envelope-dating provision helps detect voter fraud has been thoroughly discredited since 2020. Again, Intervenor-Appellants did not present evidence during the Section 3157 hearing. In other litigation, when pressed, proponents of the envelope-date requirements have pointed to a single instance in the 2022 primary, when a mail ballot was submitted in Lancaster County with an envelope date twelve days after the voter had died. But as the undisputed record in *NAACP* shows, the Lancaster County Board of Elections did not consult the envelope date to detect any fraud. It had already learned of the death of the voter and had **already removed** her from the rolls long before it received the ballot. Thus, regardless of the handwritten date, the fraudulent ballot would not have counted, and the fraud was uncovered based on the ballot arriving so long after the voter's death. *See NAACP I*, 703 F. Supp. 3d at 679 n.39 ("[T]he county board's own Rule 30(b)(6) designee testified that the fraudulent ballot was first detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope."); *accord* 25 P.S. § 1505. And the district court recently reaffirmed, based on the same record, the absence of "any evidence demonstrating how this

requirement furthers th[e] purported interest" in fraud detection. *Eakin* Op. at 16; *see also id.* at 17 ("the Lancaster County Board admits that an outer envelope that is missing a hand-written date is no reason to suspect voter fraud").

This is consistent with this Court's determination that the envelope-dating provisions are not independently useful in determining whether a ballot was "fraudulently back-dated." *In re 2020*, 241 A.3d at 1077 (finding no danger of fraudulent backdating because ballots received after 8:00 p.m. on Election Day are not counted). Thus, to the extent that fraud prevention is a legitimate governmental interest, there is no basis to conclude that disenfranchising voters for missing or "incorrect" envelope dates relates to the stated purpose. Indeed, the record confirms that it does not. "Something that does not, in reality, exist cannot…be rationally related to a legitimate government interest." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, No. 587 M.D. 2014, 2023 WL 4285737, at *3-4 (Pa. Cmwlth. June 21, 2023).

The lack of **any** evidence of a *bona fide* governmental interest served by enforcing the envelope-dating provision—as admitted by the Board, not contested by Intervenor-Appellants during the Section 3157 hearing, and confirmed by full discovery in federal litigation—means disenfranchising thousands of voters on this basis cannot satisfy intermediate, or even rational basis, scrutiny. *Cf. Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1252 n.6 (Pa. 2016) (Wecht, J., concurring) ("Where stops the reason, there stops the rule.").

B. Intervenor-Appellants Offer No Other Basis for Reversal.

Unable to satisfy any constitutional standard, Intervenor-Appellants attempt to sidestep constitutional review altogether. Their position, in essence, is that the Constitution is not even "implicated" (Br., 13), even though this outdated procedural requirement is being applied to reject ballots by the thousands. Neither the text of the Constitution nor this Court's precedents support such a narrow view of the Free and Equal Elections Clause.

1. *Intervenor-Appellants' Proposed Limitations on the Right to Vote Cannot Be Reconciled with Text or History.*

Ignoring the text of the Free and Equal Elections Clause, its history, and binding precedent applying its robust protections, Intervenor-Appellants try to avoid constitutional review by seeking new limitations from the Clause's application. Each of these novel proposed carveouts must be rejected.

First, Intervenor-Appellants posit a sweeping exemption from the Clause's protections for all "ballot-casting rules." Br., 25-26. Such an exception does not exist and was properly rejected by the court below. *See* R. 107a-115a. It was also rejected by this Court in the denial of allocatur for Intervenor-Appellants' proposed question about "neutral ballot-casting rules."[18]

[18] The Court's grant of allocatur did **not** include review of Intervenor-Appellants' proposed question for review focused on whether the Free and Equal Elections Clause applies to so-called "neutral ballot-casting rules." R. 002a, R. 019a-020a. Intervenor-Appellants should not be

The entire concept of a separate "ballot-casting stage" or set of "ballot casting rules" that receive lesser scrutiny than other election regulations appears to have been invented by Intervenor-Appellants for litigation purposes in this and prior cases involving the envelope-dating provisions. *See NAACP II*, 97 F.4th at 129-135 (addressing Intervenor-Appellants' argument that the federal Materiality Provision does not cover a purported ballot-casting stage).[19] Indeed, the notion that some separate category of "ballot-casting" rules exists and is exempt from review cannot be squared with first principles, the Constitution, or the Election Code, and it appears nowhere in 250 years of Pennsylvania case law.

Intervenor-Appellants' claim (Br., 25) that Pennsylvania courts have never applied the Clause to a "ballot-casting rule" ignores this Court's history of protecting the right to vote against unwarranted restrictions. For example, the Clause applied to alter the mail-ballot-receipt deadline during the November 2020 election. *PDP,* 238 A.3d at 371-72. The fact that the Court ruled on a temporary basis does not alter the fact that it reviewed the validity of enforcing a supposed "ballot-casting rule" for

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permitted to go beyond the limited review granted and reassert a question about "ballot-casting rules" that this Court declined to review.

[19] If anything, the structure of the Election Code disproves the concept of a discrete "ballot-casting" stage that includes dating the return envelope. Based on a plain reading of the Code's mail ballot procedures, completion of the envelope declaration is not itself "ballot casting." The Code provides separate sets of rules that apply to the ballot on one hand and the envelope declaration on the other. *Compare* 25 P.S. § 3146.3(b) (concerning the form of ballots), *with id*. § 3146.4 (concerning the form of return envelope with voter declaration).

compliance with the Constitution—exactly what Intervenor-Appellants claim has never happened. There is more. This Court also affirmed a Commonwealth Court ruling that banning people released from prison within the previous five years from casting ballots violated the Clause. *Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Cmwlth. 2000) (*en banc*), *aff'd*, 783 A.2d 763 (Pa. 2001). And in *Applewhite v. Commonwealth*, the Commonwealth Court, following remand instructions from this Court, applied the Clause to invalidate a statute requiring people casting ballots in person to show photo identification. No. 330 MD 2012, 2012 WL 4497211, at *6 (Pa. Cmwlth. Oct. 2, 2012).

These decisions, all involving ostensible "ballot casting" rules, in turn built on a tradition of applying the Clause to invalidate statutes that barred certain categories of people **from casting ballots**. *See*, *e.g.*, *McCafferty v. Guyer*, 59 Pa. 109, 112 (Pa. 1868) (there is no "power of the legislature to disfranchise one to whom the Constitution has given the rights of an elector"); *Page v. Allen*, 58 Pa. 338, 353 (Pa. 1868) (enjoining enforcement of statute that added ten days to constitutional residency requirement for voting). It is therefore no surprise that every court to decide the question presented here has concluded that it is unconstitutional to disenfranchise voters based on the envelope-dating provisions.

In still other cases, where this Court did not directly take up the constitutionality of procedural "ballot-casting" requirements, it regularly invoked

the Free and Equal Elections Clause in determining that purposeless "shall" provisions in the Election Code were "merely directory," such that noncompliance did not result in needless disenfranchisement. *See*, *e.g.*, *In re Luzerne Cnty. Return Bd., Appeal of Weiskerger*, 290 A.2d 108, 109 (Pa. 1972) (interpreting "shall" language in the Code proscribing the use of specific ink colors as merely directory to prevent disenfranchisement); *Appeal of Norwood*, 116 A.2d 552, 553-555 (Pa. 1955) (ballot with a stray check mark counted despite Code provision that ballots "marked by any other mark than an (X)...shall be void"). Even in those cases, the Constitution animated the Court's statutory analysis:

> All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage.

Appeal of James, 105 A.2d 64, 65-66 (Pa. 1954). This Court thus has a long tradition of respecting the fundamental right to vote to ensure voters "are not to be disfranchised" based on "minor irregularities...except for compelling reasons." *Norwood*, 116 A.2d at 555. It has always read and applied "the words 'free and equal' as used in Article I, Section 5" as having "a broad and wide sweep…." *LWV*, 178 A.3d at 809.

Adopting Intervenor-Appellants' litigation-driven "ballot-casting" limitation on the Free and Equal Clause's protections would defy those principles. Indeed, Intervenor-Appellants' open-ended theory, if accepted, would render the Clause

impotent even against Jim Crow-style rules, like a requirement to write the voter's paternal grandfather's name on the return envelope, immunizing blatant infringements on the right to vote from scrutiny under the Pennsylvania Constitution, so long as they are written to require that all voters jump through the same hoops at the "ballot-casting" stage. The law is to the contrary: The Free and Equal Elections Clause applies to "all aspects of the electoral process," and in a "broad and robust" manner. *E.g.*, *LWV*, 178 A.3d at 804, 814.

Second, Intervenor-Appellants deploy selective, partial caselaw quotes to claim (*e.g.*, at 14) that voting rules are only subject to constitutional scrutiny when they "make it so difficult [to vote] as to amount to a denial" of the franchise. But as cases like *Berg* and *James* make clear, voting rules or practices that "affect" or "infringe upon" the right to vote must all be consistent with the Free and Equal Elections Clause's basic requirements. *See supra*, 22-25. Intervenor-Appellants repeat a partial quote from *Winston* (*e.g.*, Br., 4, 13-14, 22-24), but misleadingly omits critical language that the Clause extends to restrictions that "effectively" deny the right to vote **or** "deny the franchise itself" **or** "subvert[]" that right. *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523). Here, enforcement of the date provision actually **and** effectively denies voters the right to have their ballots included—or at least subverts the right. *Accord B-PEP I*, 2024 WL 4002321 at *36.

Whether it is conceptually difficult for any particular class of voters to write a "correct" date on the mail ballot envelope is not the point. The Free and Equal Clause broadly prohibits actions that "at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5. It is certainly implicated by a full-on denial of the right to have one's vote counted. *Winston*, 91 A. at 523. Intervenor-Appellants argue (Br., 33) that most voters were able to satisfy the date requirement, but the fact remains that Voter-Appellees actually had their votes rejected in the Special Election, as have thousands of other eligible voters who have been disenfranchised by the envelope-dating requirement in every election.[20]

Third, Intervenor-Appellants wrongly suggest (Br., 26) that the Clause protects "only" the opportunity to cast a vote in the election, not that every voter will successfully avail himself or herself of that opportunity. In other words: So long as voters can submit their mail ballots, the Constitution does not protect whether voters may have their ballots counted or rejected without a sufficient reason. But the Clause applies broadly, to "**all** aspects of the electoral process," requiring that they "be kept

[20] Intervenor-Appellants' only effort to deal with the five-year history of mass disenfranchisement is to point out that most people still vote in person, and that the Department of State attempted to make envelope-dating easier by printing four empty boxes for the month and day fields and pre-filling part the year field in the latest envelope forms. (Br., 34-35.) They do not deny—nor could they—that despite these changes in the form, over 4,000 voters were denied the franchise for missing or "incorrectly" filling those date fields in the November 2024 election, including the four York County voters who made the clearly inconsequential errors highlighted at n.4, *supra*. The inescapable conclusion is that a "constitutionally intolerable ratio" of ballots will continue to be rejected unless this Court puts an end to the unconstitutional practice. *PDP*, 238 A.3d at 389 (Wecht, J., concurring).

open and unrestricted to the voters of our Commonwealth...." *LWV*, 178 A.3d at 804 (emphasis added). Indeed, even the cases relied on most heavily by Intervenor-Appellants refute their crabbed version of the Free and Equal Clause's protections: The fundamental right to vote under the Pennsylvania Constitution extends beyond just the right to register or fill out a ballot, encompassing too "the right to cast [a] ballot **and have it honestly counted**." *Winston*, 91 A. at 523 (emphasis added). The date requirement obviously implicates that right.[21]

In making all of these arguments, Intervenor-Appellants lean heavily on the premise of deference to the General Assembly, except in cases of "gross abuse." Br., 17 (quoting *Winston*, 91 A. at 523). But what they seek is not just deference to reasoned legislative decisions—it is total immunity from any judicial review, even for rules that disenfranchise voters without serving **any** government interest. That is not the applicable rule: Whatever deference is due to legislative enactments, legislators and election officials have never been free to violate the Constitution. *Cf. LWV*, 178 A.3d at 803 (citing PA. CONST. art. I, § 25) ("Although plenary, the

[21] While Intervenor-Appellants dismiss as "nonsense" the idea that enforcing the dating requirement to reject votes denies the right to vote, (Br., 28), it is an idea that has been endorsed by every Pennsylvania court to have engaged with the constitutional claim at issue here—including two *en banc* panels of the Commonwealth Court in this case and *B-PEP*—as well as three of the six Justices who presided in *Ball*, who expressly found that rejecting a ballot based on non-compliance with the envelope-dating rule "denies the right of an individual to vote…." *Ball*, 289 A.3d at 25 (plurality opinion) (quoting 52 U.S.C. § 10101(a)(2)(B)). Additionally, four out of the six federal circuit judges considering the question under federal law in the *Migliori* and *NAACP* cases concluded likewise.

General Assembly's police power is not absolute…under our Constitution, the people have delegated general power to the General Assembly, with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution."); *In re 2020*, 241 A.3d at 1082 (Wecht, J., concurring and dissenting) (noting that the legislature may only "impose a requirement that appears to have a disenfranchising effect" to the "extent that steers clear of constitutional protections"); *Mixon*, 759 A.2d at 447 ("While deference is generally due the legislature, we are mindful that the judiciary may not abdicate its responsibility to ensure that government functions within the bounds of constitutional prescription." (citing *Pa. AFL–CIO v. Commonwealth,* 691 A.2d 1023 (Pa. Cmwlth. 1997))). And to the extent that the envelope-dating provisions can be read as a legislative mandate to filter out all ballots received in undated or misdated envelopes, it **is** a "gross abuse" to deprive thousands of Pennsylvanians of their fundamental right to vote without any legitimate governmental purpose.

The court below correctly rejected Intervenor-Appellants' invitation to neuter the Free and Equal Elections Clause and thereby abandon this Commonwealth's traditions and a century of jurisprudence. *See* R. 111a-113a.

2. *The Commonwealth Court's Reasoning Is Consistent with this Court's Prior Decisions.*

Intervenor-Appellants also misread this Court's prior decisions to argue that the question presented here was already decided. (Br., 18-22). But this Court has

not—in *Ball*, *PDP*, or any other case—resolved the constitutionality of enforcing the envelope-dating provision to disqualify otherwise valid mail ballots under the Free and Fair Elections Clause.

Ball involved no Free and Equal Elections Clause challenge; instead, the Court reaffirmed the **statutory interpretation** from *In re 2020*, holding that the "shall … date" requirement was mandatory rather than directive in nature. 289 A.3d at 20-23. And, contrary to Intervenor-Appellants' argument, the *Ball* plurality acknowledged that "failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause...." 289 A.3d at 27 n.156. That statement was the only mention of the Free and Equal Elections Clause in the Court's opinion.[22]

Nor does *PDP* foreclose Voter-Appellees' constitutional claim. Br., 25. The *PDP* petitioners raised no constitutional challenge to enforcement of the envelope-dating provision. They did not, as Intervenor-Appellants claim (Br., 25), raise a constitutional challenge to the remainder of the envelope "declaration mandate." The *PDP* petitioners claimed only that the Free and Equal Elections Clause affirmatively requires that voters be given "**notice and [an] opportunity to cure**" minor errors

[22] Intervenor-Appellants rely on a fleeting reference in the portion of the *Ball* opinion describing the parties' respective positions, noting an assertion in the Secretary's brief that the RNC's interpretation of the statute "could implicate the Free and Equal Elections Clause." Br., 17 (citing *Ball*, 289 A.3d at 16); *see also id.* at 20-21. There the Court was not analyzing any claim or defense under the Free and Equal Elections Clause.

before mail ballots were rejected. 238 A.3d at 373 (emphasis added). They did not seek a ruling on the antecedent question—namely, whether it is unconstitutional to enforce the "fill out, date and sign" language to reject otherwise valid ballots that are submitted on time. The Court thus decided only that "the Boards are not required to implement a 'notice and opportunity to cure' procedure" upon concluding that the petitioners there had "cited no constitutional or statutory basis" for imposing such a requirement on all counties. *Id.* at 374. This case raises an entirely different issue, which is much more straightforwardly susceptible to a Free and Equal Elections Clause claim. Voter-Appellees do not seek to impose any new administrative process on election authorities—they just want their votes to count.[23]

Had this Court's decision regarding notice-and-cure for mail ballots in *PDP* resolved the legality of disenfranchising voters for noncompliance with the envelope-dating provisions, it would have been unnecessary for this Court to separately address the envelope-dating provisions months later in the *In re 2020* case. Yet the Court evidently did not regard its own opinion in *PDP* as resolving all

[23] In support of their position that this Court considered and rejected a constitutional challenge to "the declaration mandate," Intervenor-Appellants point to the portion of the *PDP* opinion addressing Count III of the petition for review. (Br., 18-19 (citing 238 A.3d at 372-74).) Lest there be any doubt, the Court described the claim at issue in Count III: "Petitioner submits that when the Boards have knowledge of an incomplete or incorrectly completed ballot as well as the elector's contact information, the Boards should be required to notify the elector using the most expeditious means possible and provide the elector a chance to cure the facial defect." *PDP*, 238 A.3d at 372. The Court addressed this notice-and-cure claim as a matter of statutory construction; it did not analyze enforceability of the envelope-dating provision, or the declaration mandate more generally, under the Free and Equal Elections Clause.

legal questions surrounding the envelope-dating provision. For example, when casting the deciding vote in favor of counting ballots received in undated envelopes for the 2020 election, Justice Wecht based that decision on the lack of clarity that remained as of November 2020 (*i.e.*, **two months after** *PDP*), emphasizing: "In advance of the 2020 election, neither this Court nor the Commonwealth Court had occasion to issue a precedential ruling directly implicating the fill out, date and sign requirement." *In re 2020*, 241 A.3d at 1089 (Wecht, J., concurring and dissenting).

Finally, *In re Canvass of Provisional Ballots in 2024 Primary Election, Appeal of Walsh*, 322 A.3d 900 (Pa. 2024) did not engage with, much less reject, the constitutional analysis at issue here, again contrary to Intervenor-Appellants' assertions. Br., 23. *Walsh* involved a signature requirement—not a meaningless envelope dating requirement—in a separate section of the Election Code addressing provisional voting, which only comes into play where "there is any doubt about [the voter's] eligibility to vote." 322 A.3d at 905 (citing 25 P.S. § 3050(a.2)). The purpose of the signature requirement at issue in *Walsh*, identified in the statute itself, is to verify the provisional voter's *bona fides* by comparing the signature supplied on the envelope with the signature on the voter's registration. *See id.* at 905-06 (quoting 25 P.S. § 3050(a.4)).

In **that** context—where voters who had not been confirmed as qualified and eligible failed to sign a declaration that went to their eligibility—the Court simply

noted that the county board of elections had not indicated how the requirement denied the franchise. *Id.* at 909.[24] It did not engage in any constitutional analysis, much less one that would control the outcome where undisputedly qualified voters signed the declaration form and submitted their ballots on time. Unlike the parties in *Walsh*, Voter-Appellants here undeniably established that they were disenfranchised solely based on a pointless requirement, the enforcement of which has also been shown to be filtering out thousands of voters in every major election. R. 01b-021b.[25]

Affirming the decision below is entirely consistent with all of these cases.

3. *Intervenor-Appellants' Reliance on Law Extrinsic to the Pennsylvania Constitution Is Misplaced.*

In their search for supporting authority, Intervenor-Appellants reach for inapposite federal cases and cases from other states. Br., 45-50. The court below correctly did not follow this detour.

The federal cases Intervenor-Appellants cite (Br., 47-50) are irrelevant to this Court's analysis under the Pennsylvania Constitution. The Free and Equal Elections Clause, with its special purpose and unique history, requires "a separate analysis"

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[24] The constitutional issue was simply undeveloped in *Walsh*. *See* Brief for Appellee at 25, *Walsh*, 322 A.3d 900 (Pa. 2024) (No. 55 MAP 2024), 2024 WL 4453852 at *25, n.10 (noting that the "suggest[ion]" of a Free and Equal Elections Clause violation "was never raised below").

[25] In the months **after** *Walsh*, when deciding not to take up the constitutional issue presented here before the 2024 election, several members of this Court recognized that the underlying issue remains unresolved. *See Baxter v. Phila. Bd. of Elections*, 325 A.3d 645, 647 & n.3 (Pa. 2024) (Dougherty, J., concurring) (noting the "novel constitutional issue" presented); *New PA Project Educ. Fund v. Schmidt*, 327 A.3d 188, 190-91 (Pa. 2024) (Todd, C.J., dissenting).

from any federal constitutional claims. *See LWV*, 178 A.3d at 812. Moreover, even federal case law would not support the constitutionality of completely meaningless restrictions on voting. As the U.S. Supreme Court held in *Crawford v. Marion County Election Board* (a case on which Intervenor-Appellants heavily rely): "**However slight** that burden may appear…**it must be justified** by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. 181, 191 (2008) (emphasis added) (citation omitted).[26]

Intervenor-Appellants' also rely on constitutional decisions from other states (Br., 45-47) that are irrelevant to the protections afforded by Pennsylvania's Constitution. They cite no case that has rejected a claim that a similarly pointless restriction on mail ballots violates another state's free and equal elections clause. Instead, they again announce that they are "**aware of**" no cases "applying any other State's 'free and equal election' clause to invalidate a neutral ballot-casting rule." (Br., 46 (emphasis added).)

[26] The other federal cases cited by Intervenor-Appellants do not bolster their argument that "minor" voting regulations escape any level of review. In *McDonald v. Board of Election Commissioners*, for example, the Court reviewed the bases for a state's decision to deny the ability to vote by absentee ballot to "judicially incapacitated" individuals awaiting trial and concluded the policy was "reasonable." 394 U.S. 802, 809 (1969). The Court did not stop at the determination that this restriction did not "absolutely prohibit[]" voters "from exercising the franchise." *Id.* Similarly, in *Timmons v. Twin Cities Area New Party*, the Court applied a "less exacting review" (not no review) of the reasons underlying a restriction on voting that it deemed to be less "severe," but still required the state in that case to demonstrate an "**important** regulatory interest" to support the "lesser burdens…." 520 U.S. 351, 358 (1997) (emphasis added).

Not only do such cases exist; they have repeatedly been highlighted in the parties' prior briefing. For instance, the Kentucky Supreme Court held that, although a statute required each write-in voter to write the "name of his choice" on the ballot, the Kentucky Constitution required counting votes from 148 voters who wrote the candidate's initials instead. *McIntosh v. Helton*, 828 S.W.2d 364, 365-67 (Ky. 1992). Similar examples can be found in rulings from Missouri and Delaware.[27]

While other states may have similar clauses, none share "[o]ur Commonwealth's centuries-old and unique history [that] has influenced the evolution of the text of the Free and Equal Elections Clause, as well as [this] Court's interpretation of that provision." *LWV*, 178 A.3d at 804. This Commonwealth's singular charter guarantees the right to vote in expansive terms and a long line of this Court's cases have safeguarded that right from any and all unjustified burdens. Today, this Court should affirm and hold that our Constitution's fundamental guarantee protects the rights of Voters-Appellees and thousands of others from having their votes set aside without valid reason.

[27] *E.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) (invalidating a voter ID law under a state constitutional provision guaranteeing "that 'all elections shall be free and open'"); *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 799 (Del. Ch. 2017) (holding that family-focused events at polling places violated the Free and Equal Elections Clause because the events created congested parking lots and impeded elderly voters from reaching the polls).

C. Counting Voter-Appellees' Ballots Will Not Invalidate Act 77.

Intervenor-Appellants' nonseverability argument is premised on a misrepresentation of what this case is about. Voter-Appellees do not challenge inclusion of the phrase "shall…date" in the Election Code or the printing of a date field on the declaration envelope, nor do they challenge the instruction to fill in that field. Rather, they challenge the Board's decision not to count their mail ballots on the basis that they neglected to correctly fill in the date field.

This distinction is crucial. The statutory basis for the Board's challenged decision comes not from Act 77, but from application of portions of 25 P.S. § 3146.8(g). *See supra*, 6-8. That provision predates Act 77 by 55 years. Declaring that the Pennsylvania Constitution requires the counting of Voter-Appellees' votes thus does not implicate any provision or application **of Act 77** and cannot trigger Act 77's nonseverability provision. This Court can resolve the nonseverability question on that ground alone.

If, in the alternative, the Court believes the constitutionality of Act 77 is implicated, it should decline to apply Act 77's nonseverability provision for the reasons set forth in *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006).

1. The Court Below Did Not Invalidate any Provision of Act 77.

The requirement that a voter write the date on a mail-ballot declaration envelope appears at 25 P.S. §§ 3146.6(a) (absentee ballots) and 3150.16(a) (mail-in

ballots). Voter-Appellees do not challenge the constitutionality of those provisions. They challenge the constitutionality of boards enforcing the envelope-dating provisions to reject votes as a consequence for noncompliance where the dates serve no governmental interest.

The Board rejected Voter-Appellees' ballots pursuant to a different part of the Election Code: 25 P.S. § 3146.8(g)(3)-(4). The relevant provisions require county boards to have "verified the proof of identification," and be "**satisfied that the declaration is sufficient**," at which point satisfactory ballots "**shall be counted and included with the returns of the applicable election district**." *Id.* (emphases added).

In other words, this case is not about the constitutionality of the date requirement in Act 77, but about the constitutionality of the Board's approach to the sufficiency determination portion of § 3146.8(g), pursuant to which it rejected Voter-Appellees' mail-in ballots for noncompliance with 25 P.S. § 3150.16(a). *See* R. 010b-015b, ¶¶ 34, 45, 54. Under the Free and Equal Elections Clause, the Board should have been "satisfied that the declaration is sufficient" on voters' duly signed declaration envelopes submitted by 8:00pm on Election Day, despite any inconsequential failure to correctly fill in the date fields. 25 P.S. § 3146.8(g)(3).

Critically, the sufficiency language from § 3146.8(g)(3)-(4) predates Act 77. The original version appeared in the Election Code in 1951, when 25 P.S. § 1308

was amended to add "If the board is satisfied that the affidavit and jurat are sufficient…." Act of Mar. 6, 1951, P.L. 3, No. 1, § 11. In 1964, an amendatory statute took effect that replaced "affidavit and jurat" with "declaration." Act of Aug. 13, 1963, P.L. 707, No. 379, § 24. Although Act 77 modified many portions of the Election Code, including some other language in § 1308, "satisfied that the declaration is sufficient" and the other bolded language above was already present in the Election Code verbatim. Therefore, affirming the decision below that the Board's application of the "sufficiency determination" provision violates article I, § 5 would not trigger Act 77's nonseverability clause, because the relevant statutory language has been in the Election Code since long before the passage of Act 77. *See* Act 77 § 11 ("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.") (emphasis added).

Instead, severability here is governed by the Election Code's general rules of construction, which provide:

> The provisions of this act are severable, and if any article, section or clause of this act, or part thereof, is held to be unconstitutional, the decision shall not be construed to affect or invalidate any other provisions of this act, or the act as a whole. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included therein.

25 P.S. § 2603(a). Section 2603(a) makes plain that a ruling holding unconstitutional the Board's decision to reject Voter-Appellees' ballots will not affect other parts of

the Election Code, and certainly not the entirety of Act 77. The Court can affirm the severability finding below on this basis alone.

2. Even if Part of Act 77 Were Affected, the Court Could and Should Affirm Without Invalidating All of Act 77.

Even if the Court were to find that ordering Voter-Appellees' ballots counted must render part of Act 77 invalid, it would not require striking all of Act 77. Invalidating all of Act 77 based on a determination that the phrase "shall…date" is unconstitutional would conflict with the Statutory Construction Act, 1 Pa.C.S. § 1925 ("The provisions of every statute shall be severable"). When faced with a boilerplate nonseverability clause identical to the one contained in Act 77, this Court in *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006), gave effect to Section 1925 of the Statutory Construction Act. Intervenor-Appellants provide no reason to depart from that precedent, especially in light of the additional severability language of the Election Code.

Although "as a general matter, nonseverability provisions are constitutionally proper," "this Court has never deemed nonseverability clauses to be controlling in all circumstances." *Stilp*, 905 A.2d at 978, 980. As noted by the court below, legislative declarations that a statute is nonseverable are not treated as "'inexorable commands.'" R. 114a (quoting *Stilp*, 905 A.2d at 972). Pennsylvania courts regularly deem it appropriate to sever provisions in statutes containing similar nonseverability clauses where enforcement of the clause would "dictate the effect of a judicial

finding that a provision in an act is 'invalid.'" *Stilp*, 905 A.2d at 977. It is the province of the courts to determine constitutionality and to fashion legal and equitable relief. *Id.* at 970-81. Where enforcement of a nonseverability clause would "act[] as an incentive to engage in a less exacting constitutional inquiry" and "would intrude upon the independence of the Judiciary and impair the judicial function," the Court should not enforce the clause. *Id.* at 980. The same is true here.

Stilp involved a "boilerplate" nonseverability provision that was word-for-word identical to the one in Act 77. *Id.* at 973. The legislation at issue in *Stilp* adopted a comprehensive new compensation system governing all three branches of government. *Id.* at 973. The Court held that an unvouchered expense provision for members of the General Assembly included in the legislation "plainly and palpably violate[d]…the Pennsylvania Constitution" and severed it from "the otherwise-constitutionally valid remainder of [the legislation]." *Id.* at 980-81 (footnote omitted). In doing so, it declined to enforce the boilerplate nonseverability provision, instead giving effect to the terms of the binding rules of statutory construction and effectuating the independent judgment of the Judiciary under 1 Pa.C.S. § 1925. *Id.* at 979-81; *see also Pa. Fed'n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 753-754 (Pa. 1984) (declining to enforce more specific nonseverability clause).

Likewise, the application of Act 77's nonseverability provision is not required, nor would it be sensible to strike all of Act 77, because of the

unconstitutionality of a meaningless envelope-dating rule that was at most peripheral to the political compromise that enabled Act 77's passage. *Stilp* instructs the Court not to enforce a nonseverability provision where the overall purpose of the legislation at issue is not essentially and inseparably connected with the unconstitutional provision and where enforcement would infringe upon the Court's ability to conduct exacting judicial review. *Stilp*, 905 A.2d at 973, 980.

Here, the undisputed facts are that the envelope-dating provision is a vestige of long-since-meaningless absentee ballot provisions, its inclusion in Act 77 had no legislative purpose, it benefits nobody, and it results in a constitutionally intolerable ratio of rejected ballots. It could easily be severed from the rest of Act 77. There is no evidence to suggest that the envelope-dating provision was crucial to the compromise that led to Act 77's passage. To the contrary, invalidating the entire Act would effectively override both the mandate of 1 Pa.C.S. § 1925 and the General Assembly's intent to offer no-excuse mail voting to all eligible Pennsylvania voters.

Invoking the nonseverability clause raises the stakes of declaring a provision of Act 77 unconstitutional, creating an impermissible chilling effect on the judiciary's power to conduct exacting constitutional review. It would do precisely what this Court warned against in *Stilp*, serving "an in terrorem function" by "making the price of invalidation too great." 905 A.2d at 979 (quotation omitted). Millions of Pennsylvania voters rely on the mail-in voting option created by Act 77,

and millions of dollars in public funds allocated by the Act have been spent in the years since its passage. Moreover, invalidation of all of Act 77 would affect provisions that have nothing to do with voting by mail, such as provisions eliminating straight party ticket voting, moving the voter registration deadline from thirty to fifteen days before an election, allocating funding for the purchase of new voting equipment, and reorganizing the pay structure for poll workers. *See McLinko v. Dep't of State*, 279 A.3d 539, 543 (Pa. 2022). Invalidating the entire Act would needlessly nullify "years of careful [legislative] consideration and debate…on the reform and modernization of elections in Pennsylvania." *Id*.

Moreover, Intervenor-Appellants' arguments conveniently ignore a 2020 enactment that further amended the Election Code. Act of Mar. 27, 2020, P.L. 41, No. 12 ("Act 12"). Act 12 revised myriad portions of Act 77 that would become incomprehensible orphan provisions if Act 77 were erased from the Election Code. *E.g.*, Act 12 § 12.1 (revising wording of Election Code provisions introduced by Act 77 relating to mail-in voting). Act 12 also made numerous detailed technical adjustments to pre-Act 77 absentee voting laws to make them better align with mail-in voting procedures enabled by Act 77. *E.g.*, Act 12 § 9 (revising process for voters who applied for absentee ballot but ended up being available to vote in person on election day). There is no way to tell which of these changes the General Assembly would have made in the absence of the mail-in option. It would be hopeless to

unscramble the egg, because there is no way to honor the General Assembly's intent in Act 12 while obliterating Act 77. *See, e.g.*, *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 840 (Pa. 2017) ("[W]e will decline to sever when, after the void provisions are excised, the remainder of the statute is incapable of execution in accordance with the General Assembly's intent.").

The best, if not only, way to consider severability under the various substantive provisions of Acts 12 and 77 (now fully incorporated into the Election Code), is to give effect to the General Assembly's intent reflected in 25 P.S. § 2603 to make provisions of the Election Code severable. Ignoring that provision to completely invalidate Act 77 would be unreasonable, if not absurd, and it should be presumed that "the General Assembly does not intend a result that is absurd[]…or unreasonable." 1 Pa.C.S. § 1922(1).

Contrary to the Intervenor-Appellants' argument (Br., 54), separation-of-powers principles require this Court to apply general statutory construction principles favoring severability, not Section 11 of Act 77. Intervenor-Appellants suggest *Stilp*'s application is limited to scenarios in which the enactment in question directly impacts members of the judiciary. *See* Br., 53 (emphasizing that "[t]he statute at issue in *Stilp* involved 'compensation provisions for the Judiciary'"). Even if this were truly a limitation on *Stilp*'s reach, it would scarcely stop it from applying in a case about the fundamentals of the Election Code. Judges and justices in

Pennsylvania must run for office and stand for retention, and they thus have as much of an individual stake in the workings of the Election Code as elected members of the other branches.

In any case, Intervenor-Appellants are simply wrong about *Stilp*. Here, declining to enforce Act 77's nonseverability provision preserves the constitutional separation of powers by protecting both the Legislature's power to make the rules governing elections and the Judiciary's power to conduct constitutional review of those rules. Accordingly, even an order striking the date provision from the text of Act 77—relief that, to be clear, Appellees **do not seek** and **do not need** to prevail—would not require disturbing the rest of Act 77.

The relief ordered by the court below vindicates Act 77's overarching purpose of expanding mail ballot voting to all and harmonizes that purpose with the requirements of the Free and Equal Elections Clause. This Court should affirm.

V. CONCLUSION

The decision below should be affirmed.

Dated: March 31, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of 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.

/s/ Stephen Loney
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CERTIFICATION OF WORD COUNT

I hereby certify, pursuant to Pa.R.A.P. 2135 that this Brief does not exceed 14,000 words. I certify that this Brief contains 13,984 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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