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283 MD 2024

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT PROJECT, POWER INTERFAITH, MAKE THE ROAD PENNSYLVANIA, ONEPA ACTIVISTS UNITED, NEW PA PROJECT EDUCATION FUND, CASA SAN JOSÉ, PITTSBURGH UNITED, LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, AND COMMON CAUSE PENNSYLVANIA,
Petitioners,

v.

AL SCHMIDT, in his official capacity as Secretary of the Commonwealth, PHILADELPHIA COUNTY BOARD OF ELECTIONS, AND ALLEGHENY COUNTY BOARD OF ELECTIONS,
Respondents,

v.

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY of PENNSYLVANIA,
Intervenor-Respondents,

v.

DEMOCRATIC NATIONAL COMMITTEE and PENNSYLVANIA DEMOCRATIC PARTY,
Intervenor-Petitioners.

No. 283 MD 2024
Original Jurisdiction

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO REPUBLICAN INTERVENORS' APPLICATION FOR SUMMARY RELIEF

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INTRODUCTION

Timely mail ballots submitted by thousands of eligible Pennsylvania voters are being rejected in every election merely because they arrive in return envelopes that are missing a meaningless handwritten date, or because the date is "incorrect." This mass disenfranchisement cannot withstand scrutiny under the Pennsylvania Constitution. The attempts of Intervenors Republican National Committee and Republican Party of Pennsylvania (collectively, "Republican Intervenors") to convince this Court that it should ignore constitutional infirmities are unavailing.

In their Petition for Review and applications for special and summary relief, Petitioners establish that enforcement of the envelope-dating requirement to reject timely votes violates the Pennsylvania Constitution. Petitioners' entitlement to relief flows from the following propositions:

1. The right to vote is a fundamental right guaranteed by the Free and Equal Elections Clause of the Pennsylvania Constitution;

2. Under settled Pennsylvania authority, laws that affect the fundamental right to vote are subject to strict scrutiny; and

3. Most importantly, the envelope-dating requirement does not serve a compelling government interest or indeed any interest at all, and accordingly cannot withstand strict scrutiny or any level of scrutiny.

These propositions confirm that the Pennsylvania Constitution, and its strong protection of the fundamental right to vote, prohibits disenfranchisement based on the meaningless envelope-dating requirement. In their Application for Summary

Relief, the Republican Intervenors do little to refute the above propositions. Instead, they seek to focus the Court on imagined procedural issues, offer misguided arguments about the role of Pennsylvania courts in interpreting and applying the Pennsylvania Constitution, and rely on irrelevant law from other jurisdictions. Every one of the Republican Intervenors' arguments is wrong:

- *The Pennsylvania Supreme Court has already rejected challenges to the constitutionality of the date requirement (*see *6/24/24 Republican Intervenors' Mem. ("GOP Br.") at 26).* This is simply false. No court has decided the constitutional question against petitioners; in fact, three of the six justices presiding in *Ball v. Chapman* indicated that disenfranchising voters for non-compliance with the date requirement *does* violate the Free and Equal Elections Clause, and no justice suggested otherwise. 289 A.3d 1, 27 n.156 (Pa. 2023).
- *The Free and Equal Elections Clause does not extend to "ballot-casting rules" like the date requirement (*see *GOP Br. at 31–34).* Ignoring controlling authority that strict scrutiny applies where the fundamental right to vote is at stake, Republican Intervenors ask this Court to create immunity from the Free and Equal Elections Clause for what they call "ballot-casting" rules. This artificial, litigation-driven category appears nowhere in the Election Code, and it flies in the face of binding precedent

holding that the Clause must be interpreted in a "broad and robust" manner and that its "expansive" language requires that "*all aspects* of the electoral process, to the *greatest degree* possible, be kept open and *unrestricted*…." *League of Women Voters v. Commonwealth ("LWV")*, 178 A.3d 737, 804 (Pa. 2018). Republican Intervenors present no basis for so limiting the Pennsylvania Constitution's bedrock guarantee of the right to vote and to have one's vote counted. If accepted, Republican Intervenors' argument would render that guarantee useless against all manner of meaningless requirements that could be imposed on voters at the moment they exercise the franchise.

- *Federal constitutional law and/or the laws of other states foreclose the relief petitioners seek (*see *GOP Br. at 43–54).* Federal constitutional law does not control this issue. Rather, the question in this case is whether enforcing the date requirement violates *Pennsylvania's* constitution, which, with respect to the right to vote, "provides a constitutional standard, and remedy, even if the federal charter does not." *LWV*, 178 A.3d at 74*1*. Republican Intervenors cite no case from any jurisdiction finding it constitutional to disenfranchise voters based on a meaningless requirement such as the dating requirement.

- *Invalidating the date requirement would violate the United States Constitution (*see *GOP Br. at 54–55).* This argument is fanciful. It relies on *Moore v. Harper,* where the Supreme Court *rejected* precisely the argument Republican Intervenors are making here, 600 U.S. 1, 37 (2023), as did the Pennsylvania Supreme Court in *LWV*, 78 A.3d at 811 (citing *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002)).
- *This Court lacks jurisdiction to hear Petitioners' claims against Respondents. (See GOP Br. at 11–19).* Republican Intervenors conjure multiple misguided procedural arguments for dismissing this case, essentially arguing that the Secretary is not a proper party and this Court cannot exercise original jurisdiction in a case against only the County Respondents. These arguments rely on a misreading of this Court's unreported decision in *Republican National Committee v. Schmidt* ("*RNC II*"), No. 447 MD 2022 (Pa. Commw. Ct. Mar. 23, 2023). Unlike the petitioners in *RNC II,* however, Petitioners assert viable claims against the Secretary based on his indispensable statutory responsibilities to carry out the envelope-dating requirement at the heart of this case.
- *Petitioners failed to name indispensable parties (GOP Br. at 54–55).* This argument fails for the simple reason that Petitioners do not assert any relief against any county boards of elections that are not named as parties.

Republican Intervenors' position is based on a flawed premise, rejected by the Pennsylvania Supreme Court in *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 582–83 (Pa. 2003), that plaintiffs must join every party who may be impacted by a declaratory judgment action challenging generally applicable legislation.

- *Petitioners' requested relief would require invalidation of Act 77 in its entirety (See GOP Br. at 55–56).* Petitioners seek to halt the unconstitutional *enforcement* of the envelope dating provision in a way that disenfranchises voters for non-compliance; they do not seek to excise "shall ... date," or any other language, from Act 77. Including a date line on mail ballot return envelopes is not the problem; disenfranchising voters when they make a meaningless error in filling it out is. Accordingly, the nonseverability provision is not triggered by this case.

In sum, none of Republican Intervenors' arguments—substantive or procedural—support their request for summary relief dismissing Petitioners' claims.

BACKGROUND

As the Court has noted, all parties agree that the material facts set forth in the Petition for Review are not disputed. To avoid needless repetition, Petitioners incorporate the Statement of Undisputed Facts set forth in their June 24, 2024

Memorandum of Law in Support of Petitioners' Application for Summary Relief ("Pet. Br.," at pp. 3–14) as if fully restated here.

Critical to resolution of the Republican Intervenors' Application for Summary Relief, it is beyond legitimate dispute that the enforcement of the envelope-dating requirement serves no legitimate purpose and is "wholly irrelevant" to election administration. *See Pa. State Conf. of NAACP v. Schmidt* ("*NAACP I*"), No. 1:22-CV-339, 2023 WL 8091601, *31 (W.D. Pa. Nov. 21, 2023), *rev'd on other grounds and remanded*, 97 F.4th 120 (3d Cir. 2024); *see also* Pet. Br. at pp. 7–9, 21–26 (collecting authorities). Indeed, as the state and county Respondents emphasize, requiring them to continue disqualifying votes based on this meaningless requirement only *increases* the administrative burden on election officials. *See* Respondent Counties' Br. at pp. 4–5; Sec'y Br. at pp. 33–35.

Thousands of Pennsylvania voters in every election are, predictably, tripped up and disenfranchised by this meaningless *pro forma* requirement. Until this year, legal challenges had resulted in county boards counting otherwise valid, timely ballots received in envelopes without a voter-written date, or with an incorrect date. Such votes counted in the 2020 election following *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election* ("*In re 2020 Canvass*"), 241 A.3d 1058 (Pa. 2020). In connection with the 2021 municipal election, the Lehigh County Board of Elections was ordered to count those ballots under the Materiality Provision of the

federal Civil Rights Act in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *vacated as moot*, 143 S. Ct. 297 (2022); *see also Chapman v. Berks Cnty. Bd. of Elections, et al.*, No. 355 MD 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022) (following *Migliori* and directing county boards to count disputed mail ballots submitted in the 2022 primary election); *McCormick, et al. v. Chapman, et al.*, No. 286 MD 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2. 2022) (same).

When *Migliori* was vacated on non-merits grounds ahead of the 2022 election, the Pennsylvania Supreme Court held, purely as a matter of statutory construction, that the Election Code requires enforcement of the envelope-dating rule. *See Ball*, 289 A.3d 1. However, when county boards implementing *Ball* set aside more than 10,000 timely mail ballots, impacted voters and voting rights advocacy organizations filed another federal Materiality Provision case in *NAACP I.* The District Court ordered counties to count the individual plaintiffs' 2022 ballots in *NAACP I*, and because that decision was issued in November 2023, many county boards also counted similarly situated ballots in the 2023 municipal election based on that ruling. It was not until after votes were counted and 2023 results were certified that the Third Circuit issued a 2-1 opinion contradicting its prior decision in *Migliori. Pa. State Conf. of NAACP v. Schmidt* ("*NAACP II*"), 97 F.4th 120 (3d Cir. 2024).

Most important for present purposes: None of these cases presented claims under the Pennsylvania Constitution. In *Ball*, a majority of the Court interpreted 25

P.S. §§ 3146.6(a) and 3150.16(a) to require a date on mail ballot return envelopes as a matter of statutory interpretation of the Election Code. 289 A.3d at 20. The short-handed Court evenly split on the question of whether excluding ballots on this basis violated the Materiality Provision of the federal Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). *Id.* at 28. *Migliori* and *NAACP* were decided purely on federal statutory grounds.[1] With state and federal appellate courts having decided the various statutory questions in a way that would require rejection of timely votes by qualified electors, Petitioners now seek to vindicate the right to vote under the Pennsylvania Constitution.[2]

[1] These federal cases did not include claims for violation of the Pennsylvania Constitution, consistent with *Pennhurst State Sch. v. Halderman*, doctrine, 465 U.S. 89 (1983).

[2] Republican Intervenors assert throughout their brief that the Petition for Review contains only a request for relief against the Secretary, but not against the County Respondents. The argument is too clever by a half. It is based entirely on the fact that the opening line in the Petition's "WHEREFORE" clause refers to the Secretary: "Petitioners respectfully requests this Honorable Court enter judgment in their favor and against the Secretary of State ***and****...."* PFR at p. 67 (emphasis added). But this is not the end of Petitioners' prayer for relief, which goes on to seek a declaration that it is unconstitutional to "reject timely mail ballots submitted by eligible voters" based solely on non-compliance with the envelope dating requirement, as well as injunctive relief enjoining enforcement of the envelope-dating provision "to reject timely mail ballots submitted by eligible voters." *Id.* at 67-68. Petitioners seek that relief against all Respondents named in the Petition. And as alleged throughout the Petition (and acknowledged by Republican Intervenors themselves, GOP Br. at 8), County Respondents are the parties that reject noncompliant mail ballots. *See*, *e.g.*, PFR ¶¶ 10, 13,17, 20, 23, 26, 30, 33, 36, 44. These allegations are incorporated in full into each Count of the Petition, both of which are asserted against all named Respondents. *See id.* at ¶¶ 81, 86. The mere fact that County Respondents are not mentioned in the opening line of the prayer for relief does not negate the requests for relief that run to County Respondents, or all of the other allegations and counts establishing claims for relief against those Respondents.

The Republican Intervenors, who have no role in administering elections, have continuously advocated for using the envelope-dating requirement, despite the mass disenfranchisement it causes. They filed the eleventh-hour King's Bench petition in *Ball* and then intervened in *NAACP I* to prevent counting of timely mail ballots in the 2022 election. They now intervene and seek summary relief in this case. Their suggestion that the Pennsylvania courts abdicate their role in protecting the fundamental right to vote under the Pennsylvania Constitution should be rejected, and their application should be denied.

ARGUMENT

I. ENFORCING THE ENVELOPE-DATING REQUIREMENT TO DISENFRANCHISE VOTERS VIOLATES THE PENNSYLVANIA CONSTITUTION

Republican Intervenors agree that the Pennsylvania Supreme Court has "recognized that the right to vote is fundamental." GOP Br. at 41. And they do not attempt to argue that enforcement of the envelope-dating requirement can survive strict scrutiny—the standard that Pennsylvania courts have long applied to evaluate deprivations of fundamental constitutional rights, including the right to vote. Nor do Republican Intervenors seriously dispute that the date requirement serves no actual government interest, let alone a compelling one.

Unable to contest these core propositions, Republican Intervenors offer flawed interpretations of Pennsylvania precedent and invoke irrelevant case law

from other jurisdictions. But they cannot change the fact that the disenfranchisement of thousands of Pennsylvania voters at every election, because of a rule that serves no legitimate purpose, is an affront to the Free and Equal Elections Clause.

A. Republican Intervenors Misstate Pennsylvania Supreme Court Precedent.

Republican Intervenors' primary position on the merits relies on mischaracterizations of two Pennsylvania Supreme Court decisions: *Ball*, 289 A.3d 1, and *Pennsylvania Democratic Party v. Boockvar* ("*PDP*"), 238 A.3d 345 (Pa. 2020). Republican Intervenors wrongly point to these cases to claim that the Pennsylvania Supreme Court upheld the envelope-dating requirement against challenges under the Free and Equal Elections Clause. In fact, neither *Ball* nor *PDP* involved the constitutional claim at issue here, and the Pennsylvania Supreme Court made no such holding.

First, *Ball* was not a Free and Equal Elections case. It did not involve any constitutional claim. The petitioners in *Ball*—led by the Republican Intervenors here—filed claims, including against the Secretary of the Commonwealth, focused exclusively on interpretation of the phrase "shall . . . fill out, date and sign" in the Election Code, 25 P.S. §§ 3146.6, 3150.16. The Pennsylvania Supreme Court was not presented with the question of whether the mass disenfranchisement caused by mandatory enforcement of this phrase survives constitutional scrutiny under the Free and Equal Elections Clause.

Republican Intervenors' suggestion to the contrary hinges on a fleeting reference in the majority opinion to an assertion in the Secretary's brief, which stated that the relief sought (namely, disenfranchising thousands of voters) "***could*** *implicate* the Free and Equal Elections Clause." *Ball*, 289 A.3d 1, 16 (Pa. 2023) (emphasis added); *cf. Ball*, Sec'y Br., 2022 WL 18540590 at *36 (noting the potential constitutional concern); *see also Ball,* Democratic Intervenors' Br., 2022 WL 18540587 at *30 (noting that the petitioners' statutory interpretation "would [] implicate the Free and Equal Elections Clause"). The Court was not describing any claim or defense under the Free and Equal Elections Clause, because there were none asserted in *Ball*.[3] Beyond merely noting the Secretary's stated concern, the Court did *not* conduct an analysis of constitutional implications, *or even mention* the Free and Equal Elections Clause in its legal analysis. Republican Intervenors' suggestion that the *Ball* Court fully considered and rejected any Free and Equal Elections claim is simply false.

Second, *PDP* did not address the envelope-dating provision. Republican Intervenors repeatedly misrepresent that in *PDP* the Pennsylvania Supreme Court

[3] At most, the respondents in *Ball* were invoking the concept of "constitutional avoidance," which is also presented in Count II of the Petition for Review here—*i.e.*, that as a matter of statutory interpretation only, the Court should read the Election Code's "shall…date" language as directory instead of mandatory because the alternative would give rise to constitutional concerns. Petitioners raise here an entirely different point (at Count I), which is that the language the *Ball* Court construed to be mandatory nonetheless cannot be enforced because doing so would violate the Pennsylvania Constitution.

"rejected a challenge under the [Free and Equal Elections] Clause to the broader declaration mandate of which the date requirement is part." GOP Br. at 3 (citing *PDP*, 238 A.3d at 372–74). But nowhere in *PDP* did the Court address an argument that excluding timely mail ballots based on non-compliance with the "declaration mandate" is "an unconstitutional interference with the exercise of the right to suffrage in violation of the Free and Equal Elections Clause." PFR ¶ 84.

The petitioners in *PDP* sought a ruling that, under the Free and Equal Elections Clause, voters should be given notice and an opportunity to cure minor errors in their mail ballot submissions before the ballots were rejected. 238 A.3d at 372. The petitioners did *not* seek any ruling that enforcing the envelope-dating requirement to reject timely ballots is unconstitutional under the Clause. And the *PDP* Court's holding was limited to the conclusion that "the [County Election] Boards are not required to implement a 'notice and opportunity to cure' procedure" because the petitioner had "cited no constitutional or statutory basis" for imposing such a requirement on all counties. *Id.* at 374. At most, then, the Court rejected an argument that the Free and Equal Elections Clause compels the specific affirmative remedy of providing notice and an opportunity to cure mail-ballot defects prior to disenfranchisement. It conducted no analysis of whether the Free and Equal Elections Clause is violated when voters are disenfranchised for failing to handwrite

a date on the return envelope and issued no holding on this point.[4] The *PDP* Court certainly did not say—as the Republican Intervenors falsely claim multiple times—that under the Free and Equal Elections Clause, the question of whether ballots should be rejected due to minor errors is best left to the legislature. This claim cannot be squared with *PDP* or the Court's express recognition in *LWV* that, "while our Constitution gives to the General Assembly the power to promulgate laws governing elections, those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause of our Constitution, and, hence, may be invalidated by our Court." 178 A.3d at 809.[5]

Republican Intervenors are thus factually wrong in claiming that "the very same arguments Petitioners raise here" (GOP Br. at 3) were raised or considered, let alone rejected, in *Ball* or *PDP*. Far from rejecting the same constitutional claim asserted by Petitioners here, three of the six justices presiding over *Ball* agreed that

[4] Separately, the petitioners in *PDP* raised a Free and Equal Elections argument as to enforcement of the secrecy envelope requirement. *See* 238 A.3d at 376. As it did in *Ball*, however, the Court merely noted the parties' contentions implicating constitutional concerns, *id.*, before going on to analyze only a statutory construction of the Election Code provision, *id.* at 378-80. In neither case did the Court engage with—let alone reject—the merits of any claim that enforcement of the envelope-dating rule to reject otherwise timely, valid votes is unconstitutional.

[5] *See also Mixon v. Commonwealth*, 759 A.2d 442, 447 (Pa. Commw. Ct. 2000) (*en banc*), *aff'd without opinion*, 783 A.2d 763 (Pa. 2001) (quoting *Pennsylvania AFL-CIO v. Commonwealth*, 691 A.2d 1023 (Pa. Commw. Ct. 1997)) ("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 under the guise of its deference to a coequal branch of government.").

application of the Free and Equal Elections Clause requires that the law be applied to "enfranchise, rather than disenfranchise." *Ball*, 289 A.3d at 27 n.156.[6] Ultimately, no court—state or federal—has addressed the claim now brought before this Court under Article I, § 5 of the Pennsylvania Constitution.

B. Disenfranchising Voters Due to Noncompliance with the Date Requirement Violates the Free and Equal Elections Clause.

Republican Intervenors do not dispute the uncontroversial point that Pennsylvania courts, in reviewing government conduct challenged under the Pennsylvania Constitution, apply strict scrutiny to restrictions on fundamental rights, including restrictions on the fundamental right to vote. *See*, *e.g.*, *Petition of Berg*, 712 A.2d 340, 342 (Pa. Commw. Ct. 1998), *aff'd*, 713 A.2d 1106 (Pa. 1998) ("laws which affect a fundamental right. . . are subject to strict scrutiny."). Nor do they attempt to claim that the envelope-dating rule serves a compelling government interest sufficient to survive strict scrutiny.

Instead, Republican Intervenors make a meritless policy-based appeal for departing from the standard strict scrutiny analysis in the case of so-called "ballot-casting rules," invoking a distinction that can be found nowhere in Pennsylvania

[6] Republican Intervenors argue that the three justices signing onto footnote 156 invoked the Free and Equal Elections Clause in the context of resolving any potential ambiguities in the federal Materiality Provision. GOP Br. at 30-31. This limited reading ignores the Court's reference to the well-established "attendant jurisprudence" developed under the Free and Equal Elections Clause, which requires courts to apply the law in favor of the fundamental right to vote. *Ball*, 289 A.3d at 27 n.156.

jurisprudence, and that, if accepted, would nullify the protections of the Free and Equal Clause precisely when they matter the most. They also argue that disqualifying thousands of votes in every election is somehow not a restriction on the fundamental right to vote, and that the Court should decline to fulfill its role in upholding the terms of the Pennsylvania Constitution to avoid "second-guess[ing]" the General Assembly. Republican Intervenors are wrong on each point.

1. Strict Scrutiny Applies to Restrictions on the Fundamental Right to Vote, Including Enforcement of the Envelope-Dating Rule.

Strict scrutiny applies here, and its application forecloses Republican Intervenors' position. Under Pennsylvania law, strict scrutiny applies where fundamental rights are at stake, including the right to vote. *See*, *e.g.*, *Berg*, 712 A.2d at 342 (citing *Brown v. Borough of Mahaffey*, 35 F.3d 846 (3d Cir. 1994)) ("It is well settled that laws which affect a fundamental right, such as the right to vote. . . are subject to strict scrutiny."); *Applewhite v. Commonwealth* ("*Applewhite II*"), No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014) (laws that "infringe[] upon qualified electors' right to vote" are analyzed "under strict scrutiny."); and *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302, 1306 (Pa. 1984) (where a "fundamental right has been burdened, another standard of review is applied: that of strict scrutiny"). *See also* 5/29/24 Pets.' Mem. of Law at 13 (citing these authorities).

These authorities require the application of strict scrutiny here. *See* Pet. Br. at 19. As the Pennsylvania Supreme Court noted in *Berg*, this standard applies any time a law "*affect(s)* a fundamental right," expressly including "the right to vote." 712 A.2d at 342 (citation omitted) (emphasis added). In accordance with this well-settled approach, this Court applied strict scrutiny in *Applewhite II* to evaluate a Voter ID Law that "has the effect of disenfranchising" and "*infringe[d] upon* qualified electors' right to vote" as "[h]undreds of thousands of electors in Pennsylvania lack compliant photo ID." 2014 WL 184988, at *20 (emphasis added). The fact that the burden imposed by the Voter ID Law did not fall on all voters, or that it was theoretically surmountable, did not prevent the application of strict scrutiny. This Court accordingly rejected the respondents' reliance on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), for the argument that rational basis review should apply, as it might under the Equal Protection clause of the federal constitution. *Applewhite II*, 2014 WL 184988, at n.25; *cf. LWV,* 178 A.3d at 813 (rejecting argument that Pennsylvania courts should "utilize the same standard to adjudicate a claim of violation of the Free and Equal Elections Clause and the federal Equal Protection Clause").

Republican Intervenors nevertheless encourage the Court here to follow *Crawford* and offer several fringe arguments against application of strict scrutiny, *see infra* 16–18, but they ignore *Pennsylvania* law. Their Application does not even

mention *Applewhite II* or *James.* As for *Berg*, they argue that in that case "this Court *declined* to apply strict scrutiny over an argument that the challenged law implicated the fundamental right to vote." GOP Br. at 41 (emphasis in original). They fail to mention, however, that the Court accepted strict scrutiny as the proper standard when the fundamental right to vote is implicated, but concluded that the fundamental right was not implicated in that case.[7] *See Berg*, 712 A.2d at 344.

Nor can Republican Intervenors rely on *PDP* to support their argument that strict scrutiny should not apply here.[8] *PDP* turned on statutory interpretation, not any analysis of the Free and Equal Elections Clause, *see supra* at 11–13, so it should come as no surprise that the Court did not invoke strict scrutiny. That said, the Court in *PDP* did acknowledge that, consistent with the applicable strict scrutiny framework, "ballots containing mere minor irregularities should only be stricken for *compelling reasons*." 238 A.3d at 379 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798–99 (Pa. 2004)) (emphasis added).

[7] The fundamental right was not at stake in *Berg* because that case did not involve any restriction or burden on the right to vote but instead concerned a gubernatorial candidate's complaint that the requirement of obtaining 100 signatures from Democratic voters in ten different counties in order to participate in the Democratic primary election violated the Free and Equal Elections Clause. *Id.*

[8] Republican Intervenors claim Petitioners relied on *PDP* in support of the argument that strict scrutiny should apply. GOP Br. at 41. Petitioners did no such thing. *See generally* 5/29/24 Pets.' Mem. of Law at 13–14.

Applying strict scrutiny here not only comports with Pennsylvania caselaw; it is also deeply consistent with the principle that the Free and Equal Elections Clause "be given the *broadest* interpretation, one which governs *all aspects* of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *LWV*, 178 A.3d at 814 (emphasis added).

Under strict scrutiny as it is applied under Pennsylvania law, the party defending the challenged law must prove that it serves a compelling government interest. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also*, *e.g.*, *In re Nader*, 858 A.2d 1167, 1180 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016) ("where a precious freedom such as voting is involved, a compelling state interest must be demonstrated"). If the respondent cannot satisfy this heavy burden, the law (or its application) is unconstitutional. *In re Nader*, 858 A.2d at 1181.[9]

[9] Republican Intervenors' refrain that legislative enactments enjoy a presumption of constitutionality misses the point. The presumption of constitutionality gives way to a strict scrutiny analysis where, as here, a fundamental right is at stake. *See Berg* 712 A.2d at 342*; see also Applewhite II,* 2014 WL 184988 at *20 (because the voter ID law "infringes upon qualified electors' right to vote…the court analyzes the provisions of the Voter ID law under strict scrutiny, [under which] 'the burden is on the government"). Moreover, cases that rely on this presumption arise in the context of challenges to the validity of legislative enactments, which Petitioners do not present here. Rather, Petitioners' claim is that *enforcement* of the date provision to disenfranchise is unconstitutional.

Republican Intervenors do not attempt to identify a compelling government interest that would be sufficient to satisfy the strict scrutiny standard. Accordingly, the Court's constitutional analysis can end there.

2. Enforcement of the Envelope-Dating Rule to Disenfranchise Noncompliant Voters Cannot Survive any Level of Scrutiny.

Even if the Court were inclined to agree with Republican Intervenors that strict scrutiny should not apply here, the complete lack of purpose supporting the envelope-dating requirement would still require the Court to deny their Application. Republican Intervenors assert that the Court should not even concern itself with whether the envelope dating requirement serves any legitimate purpose because it imposes "nothing more than the 'usual burdens of voting,'" GOP Br. at 36 (quoting *Crawford*, 553 U.S. at 198)). But under Pennsylvania law, burdens on the right to vote, however severe, must always serve some government purpose to withstand a constitutional challenge. Indeed, Republican Intervenors concede as much: they assert that the envelope dating requirement is subject to rational basis review and admit that even under rational basis review, they must show that the requirement serves the "State's important regulatory interests" to survive. GOP Br. at 49; *cf. Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1252 n.6 (Pa. 2016) (Wecht, J., concurring) (citing the principle, "*cessante ratione legis cessat lex*," or "[w]here stops the reason, there stops the rule").

As Petitioners showed in their Application for Summary Relief, the date requirement serves no purpose, much less any important regulatory interest. *See* Pet. Br. at 21–26. Enforcing the envelope-dating requirement to reject thousands of votes would thereby necessarily fail to satisfy even a basic reasonableness test. It undisputedly is not used to determine the timeliness of a voter's ballot, or a voter's qualifications to vote, or to detect fraud.

Republican Intervenors claim that the Pennsylvania Supreme Court has "already held [that] the date requirement serves several weighty interests…." GOP Br. at 49–50 (citing *In re 2020 Canvass*, 241 A.3d at 1090 (Dougherty, J., concurring in part, dissenting in part)). That is a brazen misstatement of the Court's holding. In fact, the opinion announcing the Court's judgment stated just the opposite: "a signed but undated declaration is sufficient and *does not implicate any weighty interests*." *In re 2020 Canvass,* 241 A.3d at 1078; *see also id.* at 1087 (Wecht, J., concurring in part, dissenting in part) (noting that "colorable arguments may be mounted" both *for and against* the importance of the date requirement). The opinion Republican Intervenors cite as endorsing the theoretical "weighty interest" was endorsed by a *minority* of the Pennsylvania Supreme Court, which was working without the benefit of discovery.

Moreover, those conjectural "weighty interests" have since been debunked with the benefit of discovery from the Secretary and all 67 counties. *See* PFR ¶¶ 66–

67;[10] *see also NAACP II*, 97 F.4th at 125 (agreeing that the envelope-dating requirement the date requirement "serves little apparent purpose"); *NAACP I*, 2023 WL 8091601, at *31 (agreeing after a review of the full record that the voter-written date on the outer return envelope is "wholly irrelevant").

Beyond their mischaracterization of *In re 2020 Canvass*, Republican Intervenors cite three supposed purposes served by the date requirement. Under any level of scrutiny, none can justify the mass disenfranchisement of thousands of Pennsylvania voters each election.

First, Republican Intervenors claim that the date requirement serves as a "useful backstop" for determining whether a ballot is timely. GOP Br. at 50. Yet they fail to cite a single instance when a handwritten date has ever been used to determine timeliness. As the Third Circuit found in *NAACP II*, 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." 97 F.4th at 129. The Republican Intervenors' utter conjecture—that the handwritten date *might* be used to determine timeliness *if* there

[10] Given the Republican Intervenors' prior representation that the facts are undisputed—leading the Court to note that "all the parties agreed that there are no outstanding questions of fact, nor factual stipulations required, and that this matter involves purely legal questions," June 10, 2024 Order—their attempt in the Application for Summary Relief to unravel the established facts surrounding the envelope dating requirement's lack of purpose is a backslide from their initial stance.

were *both* a failure to timestamp the ballot *and* a failure of the scanning procedure implemented by the Statewide Uniform Registry of Electors ("SURE") system—is far too speculative to qualify as an "important regulatory interest." *See In re 2020 Canvass,* 241 A.3d at 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, superfluous.").

Second, Republican Intervenors assert that the date requirement serves the state's interest in "solemnity – i.e., that voters 'contemplate their choices' and 'reach considered decisions about their government and laws'." GOP Br. at 51. Yet they cite no case, from Pennsylvania or anywhere else, standing for this proposition, as none of the cases they do cite has anything to do with requirements to date or sign documents.[11] Whatever interest might exist in "solemnity" is more than accounted

[11] The cases Republican Intervenors cite for their "solemnity" point are strikingly off-topic. *Minnesota Voters All. v. Manseky* is a case about a Minnesota law banning voters from wearing political buttons inside polling places and does not mention signatures, dates, or even any variation of the root word "solemn." 585 U.S. 1 (2018). *Davis v. G N Mortg. Corp.*, is a parol evidence rule decision in a case involving mortgage prepayment penalties, which addresses the value of "legal formalities" generally and again does not mention signature and date requirements. 244 F. Supp. 2d 950 (N.D. Ill. 2003). *Thomas A. Armburuster, Inc. v. Barron* is a statute of frauds case involving a corporate shareholder's alleged oral guarantee of the corporation's debt, which addressed the requirement that a guarantee be in writing, not the purpose of any sign-and-date requirements. 491 A.2d 882 (Pa. Super. Ct. 1985). *Thatcher's Drug Store v. Consol. Supermarkets* was another case about the validity of an oral agreement, which did not mention sign-and-date requirements. 636 A.2d 156 (Pa. 1994). *Vote.org v. Callanen*, the only case cited by Republican Intervenors to mention the concept of "solemnity," was a federal Materiality Provision case that ruled on the materiality of a wet signature requirement but did not mention a handwritten date requirement. 89 F.4th 459 (5th Cir. 2023).

for by all the other requirements for successfully submitting a mail-in ballot—including that the voter submit an application, have their identification verified, and that they hand-sign a declaration stating, "I am qualified to vote the enclosed ballot and I have not already voted in this election."[12] *See* 25 P.S. §§ 3146.4, 3146.6, 3150.14, 3150.16. The voters at issue in this case did all of that. Republican Intervenors offer no reason to think that, after completing these steps, a voter's failing to handwrite a date on the envelope (or for that matter, their making a minor mistake in handwriting the date, as thousands have done) shows that those voters did not "contemplate their choices" and "reach considered decisions about their government and laws."

Third, Republican Intervenors invoke the repeatedly debunked talking point that the date requirement is important for detecting voter fraud because, in a single instance in the 2022 primary, a ballot was submitted with a handwritten date that was twelve days after the voter had died, and the fraudster was convicted. GOP Br. at 51-52. But as the undisputed record in *NAACP* shows, the Lancaster County Board of Elections had learned of the death of the voter and had *already removed* her from

[12] With other elements solemnizing a document, a missing or incorrect date commonly does not deprive a document of its legal effect. For example, "the absence of a date [on declarations under 28 U.S.C. 1746] does not render them 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). Here, the "period when the [envelope] was signed" is known and undisputed, because mail-in ballots were sent to voters on a date certain and are not accepted by county boards after 8:00 p.m. on Election Day.

the rolls long before it received the ballot, and accordingly would not have counted the ballot regardless of the handwritten date on it. *See NAACP I*, 2023 WL 8091601 at *31 n.39 ("the 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"). This is consistent with the Pennsylvania Supreme Court's determination that the date requirement is unnecessary and not used to determine whether a ballot was "fraudulently back-dated." *In re 2020 Canvass*, 241 A.3d at 1077 (no danger of fraudulent backdating because ballots received after 8:00 p.m. on Election Day are not counted).[13]

In sum, even if the Court were to apply a standard of constitutional review less exacting than strict scrutiny, Republican Intervenors have failed to proffer any important government interest served by the date requirement. The requirement accordingly could not satisfy even a rational basis test.

[13] Republican Intervenors also assert, "States do not need to point to evidence of election fraud within their borders in order to adopt rules designed to deter and detect it." GOP Br. at 52. The problem with this argument is there is zero evidence that the date requirement was "designed to deter and detect" fraud in the first place – and a wealth of evidence showing that the date requirement does not serve this purpose in any event.

3. Republican Intervenors' Proposed Limitation on the Free and Equal Clause Has No Basis in Pennsylvania Law.

Lacking any important—let alone compelling—interest that would support disenfranchising thousands of Pennsylvania voters for an irrelevant mistake, Republican Intervenors ask the Court to create a new exception to the Pennsylvania Constitution's Free and Equal Elections Clause. They contend that the envelope-dating requirement generally "comports with" the Free and Equal Elections Clause and that the scope of the Free and Equal Elections Clause simply does not extend to so-called "ballot-casting rules." Such arguments are devoid of merit.

First, Republican Intervenors repeatedly claim 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." *E.g.,* GOP Br. at 33. This phrasing suggests that the Clause provides no remedy for the mass disenfranchisement caused by the failure to jump through a meaningless hoop. In any case, Republican Intervenors cite no Pennsylvania law to support the proposition that the Clause is so limited because there is none.[14]

To the contrary, under the Clause, "each voter . . . has the right to cast [their] ballot *and have it honestly counted*." *Winston v. Moore,* 91 A. 520, 523 (Pa. 1914)

[14] Republican Intervenors also state, without citation, that a voter whose ballot is rejected "does not suffer constitutional harm." GOP Br. at 25. Without further explanation, it is difficult to discern what is meant by the phrase "constitutional harm." As shown herein, however, rejection of a vote before it is counted is no different from denying the constitutional right to vote in that election.

(emphasis added). The Free and Equal Clause is broad in scope, and powerful in its protective force. As the Pennsylvania Supreme Court has explained, 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 (emphases added). The clause "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." *LWV*, 178 A.3d at 809 (citation omitted) (emphasis added).

The right of suffrage is obviously impaired here.[15] Petitioners have shown, and Republican Intervenors do not contest, that over 10,000 eligible, registered voters were disenfranchised in the 2022 general election alone due to the date requirement. *See* PFR ¶ 4; GOP Br. at 38. According to Republican Intervenors' own calculations, this amounts to *almost 1%* (.85%) of mail ballots returned in that election. Republican Intervenors claim, without citation, that because the "vast majority" of Pennsylvania mail ballot voters did not have their ballots excluded on

[15] While Republican Intervenors dismiss as "nonsense" the idea that enforcing the envelope-dating requirement to reject votes denies the right to vote (GOP Br. at 35), it is an idea that has been endorsed by at least three of the six Pennsylvania Supreme Court 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 (quoting 52 U.S.C. § 10101(a)(2)(B)). This Court also agreed in *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 MD 2022, 2022 WL 4100998, at *27. Additionally, four out of the six federal circuit judges to consider the question under federal law in the *Migliori* and *NAACP* cases concluded likewise. That is a lot of judicial firepower on the side of what Republican Intervenors dismiss as "nonsense."

this basis, such mass disenfranchisement "cannot violate the Free and Equal Elections Clause." GOP Br. at 39–40. Their argument flies in the face of Pennsylvania law, which provides that an election is not "free and equal" when "any substantial number of legal voters are, from any cause, denied the right to vote." *LWV*, 178 A.3d at 813 n.71, *see also id*. at 809 (the Free and Equal Elections Clause "strike[s] at all regulations of law which shall impair the right of suffrage. . . ."). By any reasonable standard, thousands of voters being denied the franchise in every single election constitutes a "substantial number."

Second, Republican Intervenors try to support their arguments for a new limitation on the Free and Equal Clause with the assertion that constitutional scrutiny is triggered only where voting requirements "make it so difficult [to vote] as to amount to a denial" of the franchise. GOP Br. at 33. The language Republican Intervenors quote for this flawed premise is from *League of Women Voters*, where the Court held that elections are "free and equal" when, among other things, "the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; *and when no constitutional right of the qualified elector is* ***subverted or*** *denied him*." *LWV*, 178 A.3d at 810 (emphasis added). That final phrase, which Republican Intervenors simply gloss over, proves that the Clause applies not just when voters' right to vote is denied outright, but whenever it is "*subverted*." Indeed, the principle that the Clause reaches conduct

beyond an outright or effective denial of the right to vote is further supported by cases like *Berg* and *Applewhite II*, which held that laws (or the enforcement of laws) that "affect" or "infringe upon" the right to vote come within the Clause. *See supra at 15–16*; *see also* Pet. Br. 19 (citing *Berg* and *Applewhite II*) & n.8 (citing *Winston*, 91 A. at 523).[16] And in any event, as we have seen, enforcement of the envelope dating requirement to discard timely ballots from qualified voters does in fact work a denial of the right to vote—thousands of voters' ballots are excluded and simply not counted. *See supra* at 24–25.

Third, Republican Intervenors ask for a new carveout to the Free and Equal Clause for an invented category of rules called "ballot-casting" rules which (they suggest) must be accorded immunity from the constraints of the Pennsylvania Constitution. The fiction of a "ballot-casting" category that escapes constitutional scrutiny appears throughout their brief (*e.g.*, GOP Br. at 1–3, 24, 32–34, 40–45)—but it is anathema to Pennsylvania constitutional law.

[16] For the same reason, Proposed Intervenor Doug Chew's reliance on *Winston* and *Oughton v. Black*, 61 A. 346 (Pa. 1905), is misguided. Neither case supports his claim that the dating requirement "does not deny the franchise itself", Chew Br. at 30–32. Like Republican Intervenors, Proposed Intervenor Chew ignores that the Free and Equal clause is also violated when the right to vote is "subverted." *Winston* at 523. Enforcement of the envelope-dating rule to disenfranchise thus fails under the fifth factor Chew draws from *Winston.* In any event, Chew ignores the Court's decisions since *Oughton* in 1905 and *Winston* in 1914 prohibiting the enforcement of laws that infringe upon the right to vote under the Free and Equal Elections Clause.

Importantly, the concept of "ballot-casting" rules is not grounded in any provision of the Election Code or anything else in Pennsylvania jurisprudence.[17] Adopting this concept, as it is conceived in Republican Intervenors' brief, would represent a sea change in Pennsylvania law to exempt from the required, searching review all manner of unreasonable and burdensome infringements on the right to vote, as long as they are imposed during a stage that Republican Intervenors call "ballot-casting." Such a ruling would render the Free and Equal Elections Clause impotent against Jim Crow-era requirements like literacy tests, or a requirement to write the name of the voter's paternal grandfather on the mail ballot envelope, or anything else imaginable. Under Republican Intervenors' novel framework, none of these infringements on the fundamental right to vote would be subject to review under the Clause. This proposed carve-out from the Clause cannot be squared with the Pennsylvania Supreme Court's recognition that the Clause is intended to apply in a "broad and robust" manner to "strike. . . at all regulations of law which shall

[17] Indeed, the Election Code undercuts the concept of a "ballot-casting" stage that includes dating the voter declaration. Based on a plain reading of Election Code provisions setting forth mail ballot procedures, completion of the declaration printed on the outer return envelope used to transmit the ballot is not itself "ballot casting." The Election Code provides separate sets of rules apply to the ballot on one hand and the return envelope declaration on the other. *Compare* 25 P.S. § 3146.3(b) (concerning the form of ballots) *with id*. § 3164.14 (concerning the form of return envelope with voter declaration). Lumping the envelope declaration and dating requirement together with "ballot-casting" is a novel concept coined earlier this year by two federal judges in *NAACP II,* which finds no support in the Election Code, in *PDP*, or in any other Pennsylvania case.

impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise." *LWV,* 178 A.3d at 809 (citation omitted).

While the "ballot-casting" exception proposed by Republican Intervenors would actually rewrite the Free and Equal Elections Clause, they wrongly characterize Petitioners' efforts to enforce the Clause as seeking a "dramatic rewrite" of Pennsylvania law. GOP Br. at 40. Squinting through a pinhole, Republican Intervenors surmise that "the Pennsylvania Supreme Court . . . has never invalidated a ballot-casting rule enacted by the General Assembly under the Free and Equal Elections Clause." *Id.* at 2 (emphasis removed). In the first place, this is demonstrably untrue: the Supreme Court applied the Clause to extend the deadline for completed mail ballots to arrive at county boards of elections in the November 2020 general election, because of postal disruptions caused by the COVID-19 pandemic. *PDP,* 238 A.3d at 371–72.

And with a slightly wider aperture, additional examples come into view. For one example, this Court struck as unconstitutional a prohibition against registration to vote by people who have been released from prison for less than five years. *Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Commw. Ct. 2000) (*en banc*), *aff'd without opinion*, 783 A.2d 763 (Pa. 2001). *Mixon*'s invalidation under the Free and Equal Elections Clause of statutes that barred certain categories of people *from casting ballots* is in keeping with a lengthy tradition of judicial review in

Pennsylvania dating back to *McCafferty v. Guyer*, 59 Pa. 109, 112 (1868) (holding that there is no "power of the legislature to disfranchise one to whom the Constitution has given the rights of an elector") and *Page v. Allen*, 58 Pa. 338, 353 (1868) (enjoining enforcement of statute that added ten days to the state constitution's residency requirement for voting). These cases concerned rules for who can complete and cast a ballot, not how they should do so, but in contrast to the Materiality Provision of 52 U.S.C. § 10101(a)(2)(B) as interpreted in *NAACP II*, no "who" versus "how" distinction can be found in the Clause.

In any event, *PDP* invalidated, under the Clause, a statutory "how" requirement (mail ballot received-by deadline). This court has invalidated a "how" rule as well, namely, a rule that part of the process for casting an in-person ballot is to present a photo identification. *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 WL 4497211, at *6 (Pa. Commw. Ct. Oct. 2, 2012) (granting preliminary injunction). This decision followed a remand from the Pennsylvania Supreme Court directing this Court to issue an injunction unless it were "convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement." *Applewhite v. Commonwealth*, 54 A.3d 1, 5 (Pa. 2012). Subsequently, this Court held a trial and issued a permanent injunction blocking the requirement from ever taking effect. *Applewhite II*, 2014 WL 184988, at *27. While Republican Intervenors are narrowly

correct that the *Applewhite* injunctions were not issued by the Supreme Court, it is hardly surprising that the injunctions came from a court of original jurisdiction.

The Supreme Court itself invalidated a statute under Article I, § 5 in another recent instance. *LWV*, 178 A.3d 737. While that case concerned the mapping of districts, not the mechanics of completing and returning a ballot, this does not suggest that *LWV* supports Republican Intervenors' narrow conception of Article I, § 5. To the contrary, the *LWV* Court emphasized at great length that this provision requires "a broad interpretation [that] guards against the risk of unfairly rendering votes nugatory." *Id.* at 814. It stressed that "the words 'free and equal' as used in Article I, Section 5 have a broad and wide sweep," *id.* at 809, and observed that those words "'strike . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.'" *Id.* (quoting Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883)). The Court in *LWV* went on to note that "[a]lthough our Court has infrequently relied on this provision to strike down acts of the legislature pertaining to the conduct of elections . . . our view as to what constraints Article I, Section 5 places on the legislature in these areas has been consistent over the years." *Id.* Judicial rejection of a statutory rule may be infrequent, but it is warranted here.

In the end, *PDP* is the only authority that Republican Intervenors cite for their incorrect assertion that Pennsylvania courts have "routinely upheld ballot-casting rules—such as the declaration mandate and the secrecy-envelope rule—against challenges under the Clause" is *PDP*. GOP Br. at 31. As already explained, the *PDP* Court did not address the constitutionality of the declaration mandate in that case. *See supra* at 10. Nor did it analyze the constitutionality of the secrecy envelope requirement. *Id*. Nor does *PDP* or any other case, or any aspect of the Election Code, identify particular "ballot-casting rules" that may be used to exclude thousands of votes from being counted, regardless of whether such rules serve any legitimate purpose.

Ultimately, the fundamental right to vote under the Pennsylvania Constitution is more than just the right to register or fill out a ballot; it is "the right to cast [a] ballot *and have it honestly counted*." *Winston*, 91 A. at 523 (emphasis added). Enforcement of a rule driving mass disenfranchisement cannot stand under Pennsylvania law unless it is necessary to serve a compelling government interest. As shown many times, none exists here.

4. Republican Intervenors' Reliance on Law Extrinsic to the Pennsylvania Constitution Is Misplaced.

Unable to support their argument using Pennsylvania law, Republican Intervenors ultimately turn elsewhere. They argue that the Court should adopt a novel exception to the Free and Equal Clause based on inapposite federal cases, or

cases from other states, or even that the entire enterprise of judicial review by Pennsylvania Courts is somehow unconstitutional. These arguments fail, too.

First, the federal law cases cited by Republican Intervenors (GOP Br. at 45–54) are entirely irrelevant to this Court's analysis under the Pennsylvania Constitution. The Pennsylvania Supreme Court has expressly held that claims under the Free and Equal Elections Clause require a separate analysis from federal constitutional claims. *See LWV*, 178 A.3d at 812 (citing "unique historical reasons . . . which were the genesis of Article I, Section 5, and its straightforward directive that 'elections shall be free and equal'" to find "such a separate analysis is warranted"). In any event, federal case law also would not support the constitutionality of a meaningless restriction on voting. Federal courts do not uphold regulations simply because the burden is "minor." As the United States Supreme Court held in *Crawford* (a case cited with approval over a dozen times by Republican Intervenors), "*[h]owever slight* that burden may appear…*it must be justified* by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" 553 U.S. at 191 (emphasis added).[18] The Court should reject Republican Intervenors'

[18] The other federal cases cited by Republican Intervenors also do not bolster the suggestion that "minor" voting regulations escape any level of review. In *McDonald v. Bd. of Election Comm'rs*, 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.* at 809. Similarly, in *Timmons v. Twin Cities Area New Party*, the Court applied a "less exacting review"

efforts to have it rule against petitioners based solely on their view of the severity of the burden imposed by the dating requirement. Also irrelevant is the RNC's cursory review of state constitutional decisions involving the right to vote from *other states*, which necessarily do not speak to the protections afforded to the right to vote by the Pennsylvania Constitution. GOP Br. at 44-45. Republican Intervenors cite no case from any state that has rejected a claim that a date requirement or similarly pointless restriction on mail-in ballots violates other states' Free and Equal Elections Clauses. Moreover, other states' precedents, like that of Pennsylvania, emphasize the expansive nature of Free and Equal Election protections, and the sanctity of the right to have one's vote counted.

Republican Intervenors announce that they "are aware of zero cases applying any other State's 'free and equal election' clause to invalidate an ordinary ballot-casting rule like the date requirement." GOP Br. at 44–45 (emphasis removed). But such cases certainly exist. As one example, 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 "E.H." instead of candidate name "Eddie Helton." *McIntosh v. Helton*, 828

(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).

S.W.2d 364, 366–67 (Ky. 1992);[19] *see also*, *e.g.*, *Wallbrecht et al. v Ingram et al.*, 175 S.W. 1022, 1027 (Ky. 1915) (noting, in a case involving a shortage of paper ballots, that "the single inquiry" under a free and equal elections clause is: "Was the election free and equal, in the sense that no substantial number of persons entitled to vote and who offered to vote were denied the privilege"). Similar examples can be found in rulings from Missouri and Delaware courts.[20]

To the extent that such examples are rare, that is in part because courts in some other states "lockstep" the interpretation of their "free and equal" clauses. Those courts effectively collapse their state constitutional analysis into the federal equal protection standards, which results in fewer cases expressly invoking state constitutional standards. *See*, *e.g.*, *Fumarolo v. Chi. Bd. of Educ.*, 566 N.E.2d 1283, 1290 (Ill. 1990); *Fisher v. Hargett*, 604 S.W.3d 381, 400 (Tenn. 2020); *Gentges v. State Election Bd.*, 419 P.3d 224, 230–31 (Okla. 2018); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 767 (Ind. 2010). The Pennsylvania Supreme

[19] The Kentucky court in *McIntosh* also noted, "Over 13% of the voters casting ballots for Helton utilized the 'initialed vote.' This factor, considering the closeness of the vote, is a substantial one. Where, as here, a substantial number of legal voters may, **for any cause**, effectively be denied the right to vote, the election is not free and equal in the meaning of the constitution." 828 S.W.2d at 367 (emphasis added).

[20] *See*, *e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) (invalidating a voter ID law under a state constitutional provision guaranteeing "[t]hat all elections shall be free and open"); *Young v Red Clay Consolidated School*, 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).

Court, by contrast, has repudiated the lockstepping approach. *See LWV,* 178 A.3d at 813 (rejecting argument that Pennsylvania courts should "utilize the same standard to adjudicate a claim of violation of the Free and Equal Elections Clause and the federal Equal Protection Clause").[21] Moreover, many of the out-of-state cases that the Republican Intervenors cite also do not support a cramped reading of the Free and Equal Election Clause or undercut Petitioners' application for summary relief.[22]

[21] Another reason there is not more case law in other states applying their own free and equal election clauses is that plaintiffs in other states could often pursue claims of vote denial under Section 2 of the Voting Rights Act of 1965, until *Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021), made such cases extremely difficult to win. *See, e.g.*, *Common Cause Ind. v. Marion Cnty. Election Bd*., 925 F.3d 928 (7th Cir. 2019) (VRA Section 2 case led to settlement that created new early voting satellite offices); *Bear v. Cnty. of Jackson*, No. 5:14-CV-5059, 2017 WL 52575, at *1 (D.S.D. Jan. 4, 2017) (VRA Section 2 case led to settlement "establish[ing] a satellite office for voter registration and in-person absentee voting in the town of Wanblee on the Pine Ridge Indian Reservation"). In the nascent post-*Brnovich* era, in many states we should expect to see cases filed less often under Section 2 and more often under state constitutional provisions. *See* Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 Wis. L. Rev. 1337 (2022).

[22] For example, in *League of Women Voters of Delaware v. Department of Elections*, the Delaware court noted that the receipt deadline as applied could violate the Free and Equal Election Clause if the postal service is unable to timely deliver mail, resulting in the disenfranchisement of voters." 250 A.3d 922, 938 (Del. Ch. 2020). In *Mills v. Shelby County Election Commission*, the court rejected a challenge to the use of electronic voting machines rather than paper ballots because, unlike here, there was no allegation that any vote had not been counted, and there was ample evidence of the benefits of machine voting. 218 S.W.3d 33, 41–42 (Tenn. Ct. App. 2006); *see also, e.g.*, *Chavez v. Brewer*, 214 P.3d 397, 408 (Ariz. Ct. App. 2009) ("We conclude that Arizona's constitutional right to a 'free and equal' election is implicated when votes are not properly counted"); *Gentges*, 419 P.3d at 228 ("In determining if a law relating to voting was constitutional, we have considered whether the law was designed to protect the purity of the ballot . . . ."); *Ross v. Kozubowski*, 538 N.E.2d 623, 627 (Ill. App. Ct. 1989) (no voting irregularities alleged, and no evidence that any votes were not counted); *Graham v. Secretary of State Michael Adams*, 684 S.W.3d 663 (Ky. 2023) (no issue of rejection of votes presented).

In short, out-of-state precedent regarding the Free and Equal Election Clause is fully consistent with, and supports, Petitioners' claim that applying the date requirement in a manner that rejects timely received mail-in ballots violates the Pennsylvania Constitution. Republican Intervenors' reliance on law from other jurisdictions—state and federal—thus fails twice over. First, because they misstate the law in those jurisdictions. Second, because those other jurisdictions do not 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 our [Supreme] Court's interpretation of that provision. *LWV*, 178 A.3d at 804.[23]

Finally, while Pennsylvania courts have not shied away from enforcing constitutional limitations on voting restrictions, Republican Intervenors now suggest (GOP Br. at 54-55) that the Federal Constitution prohibits the Pennsylvania courts from exercising their basic judicial functions. The Supreme Court reached exactly the opposite conclusion just last year in *Moore v. Harper*, 600 U.S. 1 (2023). The Court in *Moore* firmly "rejected the contention that the Elections Clause vests state

[23] It is for this reason that the Pennsylvania Supreme Court eschewed the lockstep approach to enforcing the constitutional right to vote. "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. Accordingly, "a separate analysis is warranted" under the Free and Equal Elections Clause. *Id.* at 812.

legislatures with exclusive and independent authority when setting the rules governing federal elections." *Id.* at 26. The United States Supreme Court's conclusion aligned perfectly with the Pennsylvania Supreme Court's previous rejection of the same argument in *LWV*, 178 A.3d at 811 (citing *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002) ("in *Erfer*, we rejected the argument. . . that, because Article I, Section 4 of the United States Constitution confers on state legislatures the power to enact congressional redistricting plans, such plans are not subject to the requirements of the Pennsylvania Constitution").

The Court in *Moore* expressly held that "state legislatures remain bound by state constitutional restraints" when they make the rules that apply in federal elections, 600 U.S. at 32, and reaffirmed that "[s]tate courts retain the authority to apply state constitutional restraints" via the power of judicial review according to them by their state constitutions, *id.* at 37. *See also id.* at 38 (Kavanaugh, J., concurring) ("[S]tate laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution."). Only where a state court acts so far outside of its normal remit as to "transgress the ordinary bounds of judicial review" are any rights accorded to state legislatures under the Federal Constitution implicated. *Id.* at 36.

Moore involved the North Carolina legislature's adoption of a congressional districting plan, and the North Carolina Supreme Court's rejection of that plan on

the grounds that partisan gerrymandering was inconsistent with principles of state constitutional law. *Id.* at 7–14. Even in that context, the Court had no trouble confirming that state courts may exercise judicial review to ensure that the enactments of the state legislature comport with the state constitution.

Here, unlike in *Moore*, no legislative body is party in this case, and the RNC is not a proper party to assert the supposed rights granted to the Legislature under the Federal Constitution. And even if the issue were properly presented, the capacious standard set forth in *Moore* is easily satisfied here. As detailed above, *supra* at 34–36, Pennsylvania courts routinely enforce the Free and Equal Elections Clause to limit the application of state laws that impinge on the right to vote. *See*, *e.g.*, *PDP*, 238 A.3d at 371–72; *Page*, 58 Pa. at 364–65; *Applewhite II*, 2014 WL 184988, at *62–64; *Mixon*, 759 A.2d at 452. Republican Intervenors claim that none of these cases involved an invented category that they term "ballot casting rules," but that is both incorrect, as demonstrated by the *PDP* and *Applewhite* examples, and in any case, irrelevant, among other reasons because Pennsylvania state law distinguishes between completing the declaration form on the envelope form and actually voting a ballot, *see* 25 P.S. §§ 3146.6(a), 3150.16(a).

The bottom line is that enforcement of the Free and Equal Clause is part and parcel of the Pennsylvania Courts' longstanding role in safeguarding the fundamental rights independently guaranteed by the Pennsylvania Constitution

through judicial review. See *LWV*, 178 A.3d at 812 (citing "unique historical reasons. . . which were the genesis of Article I, Section 5, and its straightforward directive that 'elections shall be free and equal'" to find "such a separate analysis is warranted"). Petitioners seek no more and no less in this case.

II. INTERVENORS' PROCEDURAL ARGUMENTS FAIL

A. This Court Has Jurisdiction over This Matter, as the Secretary Is an Indispensable Party.

Republican Intervenors argue that Petitioners have "no standing to sue the Secretary." In so doing, they rely heavily on this Court's decision in *RNC II*, arguing that Petitioners' claims do not lie against the Secretary, and that the Court lacks original jurisdiction over this matter because the Secretary is not an indispensable party. Notably, this is not an argument about the Petitioners' standing to assert the claims set forth in the Petition for Review, but rather an argument about whether the Secretary is a proper Respondent. As framed by this Court in *RNC II*, the question is a matter of this Court's subject matter jurisdiction over the case, not standing of the Petitioners.[24]

[24] Republican Intervenors frame this as a standing question based on the claim that Petitioners are not "aggrieved" by the Secretary's challenged conduct. Their Application does not contest whether Petitioners have set forth facts establishing harm sufficient to confer standing. As set forth herein and in the Petition for Review, Petitioners' harm is caused both by the Secretary's carrying out of his statutory duties to implement the envelope-dating rule and by County Respondents' implementation of this rule to set aside timely mail ballots by eligible voters.

Intervenor Respondents argue that the Court lacks subject matter jurisdiction in this case and that the petitioners cannot seek remedial relief from the Secretary. GOP Br. at 11–18.[25] Republican intervenors are incorrect on both points. First, they mischaracterize Petitioners' allegations regarding the Secretary's statutorily-prescribed role in the implementation of the date requirement. Second, they ignore the reality of the unique impact of the relief Petitioners seek on the Secretary's statutory implementation role.

Contrary to Republican Intervenors' assertions, Petitioners do not rely on the Secretary's issuance of guidance as the sole basis for jurisdiction in this case. The Petition for Review sets forth facts relating to the Petitioners' activities and the diversion of resources away from their other voter education and mobilization efforts after the Pennsylvania Supreme Court's decision in *Ball.* In that context, the Secretary chose to communicate its interpretation of the impact of the Supreme Court's rulings to the counties, voters, non-governmental organizations, political parties, candidates and the public. Those allegations establish a sequence of events

[25] Republican Intervenors separately argue that this Court does not have jurisdiction over claims asserted against County Respondents, but only because (they argue) the claims against the Secretary are subject to dismissal. *See* GOP Br. at 19–20 (discussing *RNC II*, slip. op. at 22–27). Because Republican Intervenors are wrong as to the viability of claims against the Secretary, for the reasons stated in this section, their subject matter jurisdiction argument as to County Respondents necessarily fails. *See* 42 Pa.C.S. § 761(c) ("Commonwealth Court shall have ancillary jurisdiction over any claim or other matter which is related to a claim or other matter otherwise within its exclusive original jurisdiction.").

relevant to Petitioners' harm but are not, as Republican Intervenors' arguments assume, the exclusive basis for asserting claims against the Secretary. Indeed, unlike the Republican Intervenors' claims in *RNC II*, Petitioners do not challenge the substance of the Secretary's guidance, but rather the enforcement of a statutory requirement that the Secretary is charged with implementing. The guidance-related allegations cited by Republican Intervenors are not the basis of this Court's subject matter jurisdiction.

Republican Intervenors' "standing" argument thus is wrong in the first instance because it conveniently ignores Petitioners' other allegations detailing the Secretary's statutory duty and authority regarding the envelope-dating requirement at the heart of this case. *See*, *e.g.*, PFR, at ¶¶ 37–40. Because Republican Intervenors have mischaracterized Petitioners' claims so falsely, it bears explaining them in more detail.

The Secretary's general duties and obligations around Election Administration are set forth broadly in Section 201 of the Election Code. 25 P.S. § 2621. However, throughout the Election Code, and in the voter registration laws codified in the consolidated statutes, the General Assembly has delegated specific authority to the Secretary to carry out certain tasks, especially those that require uniformity throughout all 67 counties. *See e.g.,* 25 P.S. § 2861 (determining whether organizations have status as political parties); *id*. § 3031.5 (examination and

approval of electronic voting systems); *id*. §3154(g) (ordering recounts in certain specified circumstances); *id*. §§ 3159, 3161–66 (duties relating to certification); 25 P.a.C.S. § 1201 (voter registration procedure duties) 25 Pa.C.S. § 1222 (duties developing and maintaining the statewide uniform voter registration database); 25 Pa.C.S. §1324 (prescribing the form of the voter registration application).

With respect to voting by both absentee and mail-in ballot, not only must the Secretary "prescribe" the form of the ballots, 25 P.S. § 3146.3(b), the Secretary must also "prescribe" the form of the declaration printed on the absentee and mail ballot envelopes, *id*. §§ 3146.4 (absentee ballots) & 3150.14 (mail-in ballots)("Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election."); *see also In re 2020 Canvass,* 241 A.3d at 1073 (noting that the General Assembly delegated to the Secretary the obligation to prescribe the form of declaration and envelope for mail and absentee ballots). In both of those statutory sections, the legislature also intended that mail ballot packets include "uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth." *Id*. at 1064.

The Secretary implements the mandatory statutory provision whose enforcement is challenged as unconstitutional in this case—sections 1306 and 1306-

D, of the Election Code—by prescribing the form of the declaration and uniform instructions. 25 P.S. §§ 3146.6, 3150.16. ("The elector shall then fill out, ***date*** and sign the declaration printed on such envelope.") (emphasis added). Thus, it is incumbent on the Secretary to prescribe forms that contain a date field just as much as it is incumbent upon the counties to ensure, under current law, that the voter fills out the date field.

Consistent with these statutory duties, the Secretary recently issued a "Directive Concerning the Form of Absentee and Mail-in Ballot Materials, Version 2.0 dated July 1, 2024" ("Mail Ballot Directive").[26] In this newly-issued directive (emphatically not guidance), the Secretary states that "The following Directive is issued July 1, 2024, by the Secretary of the Commonwealth ("Secretary") pursuant to authority contained at Sections 201, 1304, and 1304-D of the Pennsylvania Election Code, 25 P.S. §§ 2621, 3146.4, 3150.14." Mail Ballot Directive at 1. The directive provides descriptions and images of the forms of mail ballot envelopes that the Secretary approves for use in the Commonwealth along with instructions for permissible variations and a process to seek approval for other variances from the Secretary's prescribed form. More importantly, this Directive includes a new

[26] Press Release, Pa. Dep't of State, Directive Concerning the Form of Absentee and Mail in Ballot Materials (July 1, 2024), 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.

requirement that counties are not free to ignore: The form of the outer declaration envelope that contains the disputed date field must be edited by the counties to include the current year pre-filled. Mail Ballot Directive at 3–4.

The statutory provisions detailing the Secretary's duties, and the Secretary's conscientious observation of them, demonstrate the critical role that the Secretary has in implementing the statutory requirement that Petitioners challenge as unconstitutional. The Secretary's role is on the "front end," that is, the Secretary makes sure that all counties in the Commonwealth use a legally acceptable form. And no one other than the Secretary may decide the text, content, shape, size or form of the declaration envelope. The counties' implementation role is on the "back end," as it were. They make sure that the voters comply by inserting the date. Thus, all Respondents named here are responsible for carrying out the unconstitutional enforcement of the envelope-dating requirement, and therefore are proper parties in this constitutional challenge.

Given the Secretary's indispensable role in carrying out the mandate endorsed in *Ball*, Petitioners could not possibly obtain the relief sought without the Secretary as a party to this case. Pennsylvania courts have consistently held that the heads of administrative agencies responsible for implementing a statute and defending it against constitutional challenges are necessary parties in a suit challenging the constitutionality of a statute. *See*, *e.g.*, *Phantom Fireworks Showrooms, LLC v. Wolf*,

198 A.3d 1205, 1217 (2018) (Secretary of Revenue and Secretary of Agriculture were proper parties in constitutional challenge to statute regulating the sale of fireworks); *cf. Allegheny Reprod. Health Ctr. v. Pa. Dept. of Human Servs.*, 309 A.3d 808, 848 (Pa. 2024) (because a constitutional challenge to the Abortion Control Act implicated the "administrative functions" of DHS, the agency was the appropriate necessary party); *Allegheny Sportsmen's League v. Ridge*, 790 A.2d 350, 355 (Pa. Commw. Ct. 2002) (Commissioner of State Police, as the government official charged with the ultimate responsibility of enforcing and administering the provisions of the Firearms Act, was proper party). Similarly, in this case, because the Secretary is under a statutory duty to prescribe the form of the declaration containing the date field, he is indispensable to this litigation and must have the opportunity to argue for or against the constitutionality of the date requirement.

Republican Intervenors either missed Petitioners' allegations making this connection between the mandatory date requirement and the Secretary's statutory role in implementing it, or deliberately obscured it. Importantly, in its own briefing, the Secretary does not challenge the Court's subject matter jurisdiction and has not briefed the issue here even though the acting Secretary *did* challenge the court's jurisdiction in *RNC II*.

Republican Intervenors rely exclusively on *RNC II* for the proposition that the court lacks subject matter jurisdiction here. That reliance is misplaced because,

unlike this lawsuit, the Secretary had no legislatively-mandated duty with respect to the "notice and cure" issues before it in *RNC II*.[27] Significantly, the Secretary's statutory duties in prescribing the form of the mail ballot declaration envelope was not before the Court in *RNC II.* Instead, petitioners in *RNC II* (represented by the same lawyers as this suit) attempted to conjure the Court's jurisdiction based exclusively on the more general responsibilities of, and guidance issued by, the Secretary. That attempt was doomed to fail because as the Supreme Court had held in *PDP*, the Election Code "does not provide for the 'notice and opportunity to cure' procedure sought by Petitioner." 238 A. 3d at 374. In the face of that silence in the Election Code, this Court noted that the petitioners in *RNC II,* in stark contrast to Petitioners here, "have not made any claims implicating the duties and responsibilities of the Acting Secretary," Slip op. at 20. Thus, *RNC II* is factually and legally distinguishable from this case because petitioners did not point to any specific statutory duty that made the Secretary an indispensable party.

[27] "Notice and cure" refers to counties' practices of notifying voters of mistakes on their mail ballots and providing an opportunity for voters to correct the mistakes before the election. Both the Commonwealth Court and the Pennsylvania Supreme Court have held that the Election Code is silent and does not mandate that counties provide "notice and cure" opportunities, *PDP*, 238 A.3d 345, but neither does the Election Code forbid it. *Republican National Committee v. Chapman*, 2022 WL 16754061, at *4 (Pa. Commw. Ct. Sep. 29, 2022) *aff'd by an equally divided court*, 284 A.3d 207 (2022). These cases are in stark contrast to the current case in which the Secretary's duties are specifically established in the statute.

In sum, the Secretary has specific "duties and responsibilities" to implement the unconstitutional date requirement. If Petitioners prevail in this case, the Secretary must review and revise its own compliance with its statutory duties. Consequently, the Secretary is a proper and indispensable party, and the court has subject matter jurisdiction.

B. Non-party County Boards of Elections Are Not Indispensable.

Republican Intervenors do not dispute that the County Respondents are proper defendants in a case challenging the envelope-dating rule.[28] They claim, however, that the case against the Secretary and County Respondents should be dismissed for failure to name each and every county board of elections, on the theory that each of the 67 county boards is an indispensable party.

As an initial matter, Republican Intervenors overstate the extent to which non-party county boards may be interested in the outcome of this litigation. When all 67 counties were named in the federal *NAACP* litigation, the vast majority of them either signed stipulations agreeing not to contest the Petitioners' requested relief or did not substantively respond to the litigation at all. *See NAACP I*, W.D. Pa. No. 1:22-cv-00339, ECF Nos. 157 (1/5/23 Order approving stipulation with 33 county boards) & 192 (1/17/23 Order approving stipulation with 8 additional county boards)

[28] As set forth at note 2, *supra*, Petitioners prayer for relief runs to both the Secretary and the County Respondents.

& 243 (2/22/23 stipulation with 22 additional county boards). Only three county boards offered any resistance to claims that federal law requires them to count timely mail ballots received in undated or incorrectly dated return envelopes. And in the six weeks since Petitioners filed this case seeking a similar declaration under the Pennsylvania Constitution, none of them has sought to participate as intervenors or *amici*. In that time, only a single member of a three-member county board of elections has sought to participate in this case at all.

In any event, none of the 65 non-party county boards is so indispensable that their non-joinder requires dismissal of this case. In determining whether an absent party is indispensable, Pennsylvania courts focus on the relief sought, and whether the absent party's "rights are so connected with the claims of the litigants" that the relief requested could not be granted "without impairing those rights." *Polydyne, Inc. v. City of Phila.*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002) (citing *Vernon Twp. Water Auth. v. Vernon Twp.*, 734 A.2d 935, 938 n. 6 (Pa. Commw. Ct. 1999). Here, the 65 unnamed Pennsylvania counties are not indispensable to either of the forms of relief sought by Petitioners.

As to Petitioners' request for injunctive relief, Petitioners seek an order enjoining the county boards in the Pennsylvania counties with the most impacted voters from continuing to enforce the envelope-dating requirement to disenfranchise voters. No other county board is indispensable to adjudicating this request for relief

against the Philadelphia and Allegheny County Boards, because Plaintiffs do not seek an injunction against any other county board.

As to Petitioner's request for declaratory relief, Petitioners seek a declaration on a generally applicable question of what the Free and Equal Election Clause requires. Of course, should this Court and/or the Pennsylvania Supreme Court declare as a matter of law that it is a violation of the Pennsylvania Constitution to reject timely ballots based solely on non-compliance with the envelope-dating requirement, such a statement of Pennsylvania law should have precedential value to any county board deciding how to handle mail ballots submitted in future elections.[29] But the prospect of being bound by judicial precedent on an issue of constitutional law does not make all who operate in the jurisdiction indispensable parties. As the Pennsylvania Supreme Court has stated, if the Declaratory Judgments Act were construed to require joinder of all persons who could be affected by a challenge to legislation "the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity" of state actions that commonly affect the interests of large numbers of people. *City of*

[29] For this reason, there is no danger that the relief sought here would "establish 'varying standards'...from 'county to county' across the Commonwealth." GOP Br. at 23 (quoting *Bush v. Gore*, 531 U.S. 98, 106–07 (2000)). As set forth in the Petition for Review, efforts to enforce the envelope-dating rule announced in *Ball* are causing inconsistent application (PFR ¶¶ 64–65 & 90), and Petitioners seek a generally applicable declaration from this Court as to what the law requires so as to provide clarity for all counties and voters.

Phila. v. Commonwealth, 838 A.2d 566, 582–83 (Pa. 2003); *cf. Vernon Twp.*, 734 A.2d at 938 n. 6 (concluding not every party impacted by proposed declaratory judgment must be joined as indispensable).

C. Petitioners' Requested Relief Would Not Invalidate Act 77.

In their final attempt to maintain the mass disenfranchisement caused by enforcement of the meaningless envelope-dating rule, Republican Intervenors claim that a declaration invalidating this rule would strike Act 77 in its entirety under the Act's nonseverability clause. GOP Br. at 55-58. This is both incorrect as a matter of law and based on a misunderstanding of the relief sought by Petitioners.

To be clear, Petitioners seek a declaration that it is unconstitutional under the Free and Equal Elections Clause to *enforce* the Election Code's date requirement in a manner that excludes timely ballots received from qualified voters. Petitioners do not ask this Court to re-write, amend, or strike any portion of Act 77. Indeed, they do not seek an order barring Respondents from continuing to direct voters to date mail ballot declaration forms, or from continuing to include a date field next to the signature line. Petitioners simply seek a ruling that enforcement of the date requirement against a voter cannot, consistent with the Free and Equal Elections Clause, result in determinations that signed voter declarations are insufficient or rejections of timely mail ballots.

The Court need not invalidate or excise the "shall . . . date" language from section 3146.6 to grant this relief. A declaration that it is unconstitutional to reject timely mail ballots *based on* the date requirement would not invalidate any portion of Act 77, let alone all of it, particularly given that the provision addressing the sufficiency of the voter declaration on the Return Envelope—section 3146.8(g)—predates Act 77. *Cf. Bonner v. Chapman*, 298 A.3d 153, 168–69 (Pa. Commw. Ct. 2023) (*en banc*) (finding that Act 77 nonseverability clause was not implicated by prior successful challenges to the dating requirement).

Moreover, even a holding that the date requirement is *invalid* would not require the Court to invalidate all of Act 77. As explained in Petitioners' Application for Summary Relief, it would be appropriate under these circumstances to sever enforceability of the date requirement from the rest of Act 77. Pet. Brief at 34-35. The Pennsylvania Supreme Court held in *Stilp v. Commonwealth*, 905 A.2d 918, 970–981 (Pa. 2006), that where a particular provision of legislation "plainly and palpably violate[s] . . . the Pennsylvania Constitution" it should be severed from "the otherwise-constitutionally valid remainder of" an act that contained similar nonseverability language to Act 70. *Id*. at 980–81. That is the case here. Enforcement of the date requirement to reject timely-received mail ballots plainly violates the Constitution, serves no purpose, benefits no one, and disenfranchises thousands. It is easily severed from the rest of Act 77. Accordingly, even a request to strike the

date requirement form the text of Act 77–relief which Petitioners do not seek–would not require the rest of Act 77 to be disturbed.

In support of their argument to the contrary, the Republican Intervenors cite from a dissent in *McLinko v. Dep't of State*, 270 A.3d 1243, 1277–78 (Pa. Commw. Ct. 2022), noting that the severability question "remains open," GOP Br. at 56, but this ambiguous *dictum* does not begin to establish that Act 77 should be invalidated when enforcement of the date requirement is declared unconstitutional. Indeed, the relief Petitioners seek does not implicate severability at all because it does not require any change to the text of Act 77.

Nor does the Republican Intervenors' heavy reliance on a two-person colloquy on the House floor discussing the severability clause of Act 77 prove their point. The colloquy itself focuses on discrimination relating to the availability of braille ballots, not on enforcement of the date requirement to reject timely-returned mail ballots. But no matter the substance of the colloquy, cherry-picking an exchange between two members of the House is no way to interpret a statute. It is established beyond question that "remarks and understanding of individual legislators are not relevant in ascertaining the meaning of a statute." *McCormick v. Columbus Conveyer Co.,* 564 A.2d 907, 910 n.1 (Pa. 1989); *see also, e.g.*, *In re Martin's Estate*, 74 A.2d 120, 122 (Pa. 1950) ("[I]n ascertaining the legislative meaning. . . what is said in debate is not relevant. . . ."); *N.L.R.B. v. SW Gen., Inc.*,

580 U.S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history").

The Court need not be concerned about severability of the envelope-dating requirement from Act 77 if it declares it unconstitutional to enforce this requirement so as to reject otherwise valid, timely ballots from eligible electors.

CONCLUSION

For all of the reasons set forth herein, as well as in Petitioners' June 24, 2024 Application for Summary Relief and Brief in support thereof, Petitioners respectfully request that this Court deny the Republican Intervenors' Application for Summary Relief, grant Petitioners' Application for Summary Relief, and enter judgment in favor of Petitioners.

Dated: July 8, 2024

Respectfully submitted,

/s/ Stephen Loney
Stephen Loney (No. 202535)
Witold J. Walczak (No. 62976)
Marian K. Schneider (No. 50337)
Kate I. Steiker-Ginzberg (No. 332236)
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
(215) 592-1513
sloney@aclupa.org
vwalczak@aclupa.org
mschneider@aclupa.org
ksteiker-ginzberg@aclupa.org

John A. Freedman (*pro hac vice*)
James F. Speyer (*pro hac vice*)
David B. Bergman (*pro hac vice*)
Erica E. McCabe*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
james.speyer@arnoldporter.com
david.bergman@anroldporter.com
erica.mccabe@arnoldporter.com

Ari J. Savitzky (*pro hac vice*)
Sophia Lin Lakin (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
asavitzky@aclu.org
slakin@aclu.org

Mary M. McKenzie (No. 47434)
Benjamin Geffen (No. 310134)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
(267) 546-1313
mmckenzie@pubintlaw.org
bgeffen@pubintlaw.org

* *Pro hac vice* applications to be filed

CERTIFICATE OF COMPLIANCE

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

/s/ *Stephen Loney*