

IN THE SUPREME COURT OF PENNSYLVANIA

NO. ____ MM 2024

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

Petitioners,

v.

AL SCHMIDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE COMMONWEALTH,
AND 67 COUNTY BOARDS OF ELECTIONS
(See back cover for list of County Respondents)

Respondents,

**APPLICATION FOR EXTRAORDINARY RELIEF UNDER THE
COURT'S KING'S BENCH JURISDICTION**

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Respondents.

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I. INTRODUCTION

This Petition presents an issue of extraordinary and immediate importance: Thousands of voters face imminent disenfranchisement in violation of the Pennsylvania Constitution. The voters at risk are those who timely submit mail ballots that county boards of elections will not count because the voter omitted a handwritten date, or wrote some “incorrect” date, on the outer return envelope. The voters are disproportionately older, from both populous and rural counties, from across the political spectrum, and from all walks of life. Since this Court decided *Ball v. Chapman*, two federal courts and the Commonwealth Court have confirmed—based on a complete record including discovery taken in one of those cases from all 67 counties—that the voter-written date serves no purpose. It plays no role in establishing a ballot’s timeliness or voter eligibility and is not used to prevent fraud. No one disputes any of that.

The refusal to count timely mail ballots submitted by eligible voters because of an inconsequential error violates the fundamental right to vote recognized in the Free and Equal Elections Clause, which provides that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. 1, § 5. That clause, at a minimum, demands that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to

the voters of our Commonwealth....” *League of Women Voters v. Commonwealth* (“*LWV*”), 178 A.3d 737, 804 (Pa. 2018).

The imminent threat of mass disenfranchisement warrants this Court’s exercise of its King’s Bench authority. Enforcement of this envelope-date provision disenfranchised more than 10,000 voters in the 2022 general election and thousands more voters in the 2024 Presidential primary, all of them qualified, registered voters whose mail ballots were timely received by Election Day. With a higher turnout anticipated in the November 2024 general election, many thousands more will needlessly lose their right to vote absent immediate relief.

This Court has emphasized that Pennsylvania’s Free and Equal Elections Clause requires “strik[ing]...all regulations...which shall impair the right of suffrage....” *LWV*, 178 A.3d at 809. Whether the Free and Equal Elections Clause—one of the pillars of our constitutional edifice—protects mail ballot voters from the arbitrary disenfranchisement at issue here is a question of first impression and immense importance. This Court has the power to take up this issue, and it has already recognized its worthiness for extraordinary review. In *Ball v. Chapman*, the Court exercised King’s Bench authority mere days before the 2022 general election to decide whether the envelope-date requirement was mandatory rather than directive as a matter of statutory interpretation. *See Ball*, 289 A.3d 1, 32 (Pa. 2023) (Dougherty, J., concurring and dissenting) (“we deemed this case important enough

to warrant an exercise of our ‘very high and transcendent’ King’s Bench authority” (quoting *In re Bruno*, 101 A.3d 635, 669 (Pa. 2014)). Now, just as it did in *Ball*, the Court should again exercise its King’s Bench authority to address the constitutional implications of the envelope-date requirement, and to resolve this issue once and for all, and on a statewide basis.

This is the final opportunity for the parties, and election officials in all counties, to obtain clarity regarding the application of the Free and Equal Elections Clause to the envelope date requirement before the November 2024 general election. Many of the Petitioners sought adjudication of these issues earlier this year in *B-PEP v. Schmidt*. See *Black Political Empowerment Project v. Schmidt* (“*B-PEP*”), No. 283 MD 2024, 2024 WL 4002321 (Pa. Cmwlth. Aug. 30, 2024), *vacated*, No. 68 MAP 2024, 2024 WL 4181592 (Pa. Sept. 4, 2024). But with the dismissal of the *B-PEP* action by this Court on procedural grounds, and with time before Election Day growing short, there is no realistic opportunity through any other procedural means to obtain timely, statewide review on the question presented here.

For the reasons outlined below, Petitioners request that the Court grant review and (1) declare that enforcement of the purposeless envelope-dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to disqualify timely mail and absentee ballots violates the Pennsylvania Constitution’s Free and Equal Elections Clause; and (2) enjoin each of the Respondents from continuing to set aside and not count mail and absentee

ballots based on missing or incorrect voter-written dates. This relief is warranted, reasonable, and, above all, essential to prevent imminent mass disenfranchisement.

II. THE PARTIES

A. Petitioners

Petitioners are nonpartisan organizations dedicated to promoting American democracy and the participation of Pennsylvania voters in our shared civic enterprise. They bring this Petition to ensure that their members, the people they serve, and other qualified Pennsylvania voters do not again lose their constitutional right to vote based on a meaningless requirement.

Absent declaratory and injunctive relief by this Court enjoining enforcement of the envelope-date requirement, each of the Petitioners, their members, and thousands of qualified Pennsylvania voters will suffer the irreparable harm of having timely-submitted mail ballots rejected in this year's general election and at every election thereafter. Moreover, continued enforcement of the envelope-date requirement to disenfranchise voters has forced—and will continue to force—each of the Petitioners to redirect their limited resources away from get-out-the-vote efforts, voter education, and other mission-critical initiatives towards educating voters about the envelope-date requirement and helping notify their members and others in the community when their ballots have been disqualified so that impacted voters can attempt to cure envelope-dating issues or preserving their right to vote by

voting provisionally on Election Day. *See* Ex. A (9/23/24 Decl. of K. Kenner [“Kenner Decl.”]) at ¶¶ 18-21; Ex. B (9/25/24 Decl. of S. Taylor [“Taylor Decl.”]) at ¶¶ 8-14; Ex. C (9/24/25 Decl. of P. Hensley-Robin [“Hensley-Robin Decl.”]) at ¶¶ 7-11; Ex. D (9/24/24 Decl. of A. Widestrom [“Widestrom Decl.”]) at ¶¶ 7-11; Ex. E (5/24/24 Decl. of T. Stevens [“Stevens Decl.”]) at ¶¶ 4-11; Ex. F (5/28/24 Decl. of D. Royster [“Royster Decl.”]) at ¶¶ 4-8; Ex. G (9/24/24 Decl. of D. Robinson [“Robinson Decl.”]) at ¶¶ 7-12; Ex. H (5/27/24 Decl. of S. Paul [“Paul Decl.”]) at ¶¶ 10-22; Ex. I (5/27/24 Decl. of M. Ruiz [“Ruiz Decl.”]) at ¶¶ 9-19; Ex. I (5/27/24 Decl. of A. Wallach Hanson [“Hanson Decl.”]) at ¶¶ 9-17.

New PA Project Education Fund (“NPPEF”) is a nonpartisan, nonprofit organization operating throughout the Commonwealth of Pennsylvania. NPPEF and its affiliated 501(c)(4) organization have offices in West Chester (Chester County), Norristown (Montgomery County), Harrisburg (Dauphin County), City of Chester (Delaware County) and Pittsburgh (Allegheny County). Kenner Decl., ¶ 4. In connection with every election cycle, NPPEF conducts voter registration, voter education, and voter mobilization programs in Allegheny, Beaver, Berks, Bucks, Centre, Chester, Cumberland, Dauphin, Delaware, Erie, Lackawanna, Lancaster, Lawrence, Lebanon, Lehigh, Luzerne, Monroe, Montgomery, Northampton, Philadelphia, and York Counties. *Id.*, ¶ 6. In addition, its online and print voter

education efforts are directed at a statewide audience and have reached Pennsylvania voters in at least 57 counties. *Id.* ¶ 8.¹

NAACP Pennsylvania State Conference (“State Conference”) is a nonprofit, nonpartisan organization that works to, among other objectives, improve the political, educational, social, and economic status of African-Americans and other racial and ethnic minorities, to eliminate racial prejudice, and to take lawful action to secure the elimination of racial discrimination. Taylor Decl., ¶ 5. The State Conference has 106 active chapters and units in 35 Pennsylvania counties, *id.*,² with thousands of members who live and/or work throughout Pennsylvania, many of whom are registered to vote in Pennsylvania and are at risk of disenfranchisement due to refusal to count timely-submitted mail ballots based solely on a missing or incorrect date on the return envelope, *id.*, ¶ 7. The State Conference advocates for civil rights, including voting rights, for Black Americans, both nationally and in Pennsylvania. *Id.* Every election cycle, the State Conference engages in efforts to get out the vote, including by educating Black voters in Pennsylvania on different

¹ Specifically, NPPEF’s voter education efforts have reached voters in Adams, Armstrong, Blair, Bradford, Butler, Cambria, Cameron, Carbon, Clarion, Clinton, Columbia, Crawford, Elk, Franklin, Greene, Huntingdon, Juniata, Lycoming, Mercer, Mifflin, Montour, Northumberland, Perry, Pike, Schuylkill, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Washington, Wayne, Westmoreland, and Wyoming Counties. *Id.*

² The State Conference has local branches and units in Allegheny, Beaver, Berks, Blair, Bucks, Cambria, Centre, Chester, Clinton, Crawford, Dauphin, Delaware, Erie, Fayette, Greene, Indiana, Lackawanna, Lancaster, Lawrence, Lebanon, Lehigh, Luzerne, Lycoming, Mercer, Monroe, Montgomery, Northampton, Northumberland, Philadelphia, Schuylkill, Snyder, Union, Washington, Westmoreland, and York Counties.

methods of voting, providing educational guides on local candidates to increase voter engagement, and focusing on strategies to eliminate Black-voter suppression both nationally and in Pennsylvania. *Id.*

Common Cause Pennsylvania (“Common Cause PA”) is a non-profit, non-partisan organization, and a chapter of the national Common Cause organization. Common Cause PA is a nonpartisan good-government organization with approximately 36,000 members and supporters who live in all 67 counties of Pennsylvania. Hensley-Robin Decl., ¶ 5. One of Common Cause PA’s core functions is to increase the level of voter registration and voter participation in Pennsylvania elections, especially in communities that are historically underserved and whose populations have a low propensity for voting. *Id.*, ¶ 6. Among other civic engagement programs, Common Cause PA mobilizes hundreds of volunteers around every major statewide election to staff the nonpartisan Election Protection Hotline, which helps fellow Pennsylvanians across the entire state navigate problems encountered during the voting process and to cast their votes without obstruction, confusion, or intimidation. *Id.*, ¶ 7.

The League of Women Voters of Pennsylvania (“the League”) is a non-partisan statewide non-profit formed in 1920. Widstrom Decl., ¶ 5. The League is a predominantly volunteer organization with members in 66 of Pennsylvania’s 67

counties,³ as well as 30 member chapters and one Inter-League Organization operating in 28 counties. *Id.*⁴ The League has nearly 2,500 individual members who are registered voters and regularly vote in state and federal elections using, among other methods, absentee and mail ballots. *Id.* During every election cycle, the League conducts voter-registration drives, staffs nonpartisan voter-registration tables, educates incarcerated and formerly incarcerated individuals about their voting rights, and works with local high schools and universities to register young voters. *Id.*, ¶ 6. The League maintains voter information resources on its website in English and Spanish. It also maintains an online database called VOTE411, a nonpartisan and free digital voter resource with information available in both English and Spanish, including registration information, voter guides, mail ballot information, candidate information, and polling rules and locations. *Id.*

Black Political Empowerment Project (“B-PEP”) is a nonprofit, nonpartisan organization that has worked since 1986 to ensure that the Pittsburgh

³ LWV has members in Adams, Allegheny, Armstrong, Beaver, Bedford, Berks, Blair, Bradford, Bucks, Butler, Cambria, Carbon, Centre, Chester, Clarion, Clearfield, Clinton, Columbia, Crawford, Cumberland, Dauphin, Delaware, Elk, Erie, Fayette, Forest, Franklin, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lackawanna, Lancaster, Lawrence, Lebanon, Lehigh, Luzerne, Lycoming, McKean, Mercer, Mifflin, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Pike, Potter, Schuylkill, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Washington, Wayne, Westmoreland, Wyoming, and York Counties. *See* Widestrom Decl., ¶ 5.

⁴ LWV has local leagues in Allegheny, Berks, Bucks, Centre, Chester, Clarion, Dauphin, Delaware, Erie, Indiana, Lancaster, Lawrence, Lehigh, Luzerne, Lycoming, Mercer, Monroe, Montgomery, Northampton, Northumberland, Philadelphia, Pike, Susquehanna, Union, Warren, Washington, and Westmoreland Counties. *See* <https://www.palwv.org/join-the-league>.

African-American community votes in every election. Stevens Decl., ¶ 3. B-PEP and its supporters throughout the Pittsburgh region work with community organizations in and around Allegheny, Westmoreland, and Washington Counties to empower Black and brown communities, including by promoting voting rights and get-out-the-vote efforts. *Id.*, ¶ 4. During every election cycle, B-PEP’s work includes voter registration drives, get-out-the-vote activities, education and outreach about the voting process, and election-protection work. *Id.*

POWER Interfaith (“POWER”) is a Pennsylvania non-profit organization comprising more than 100 congregations of various faith traditions, cultures and neighborhoods committed to civic engagement and organizing communities so that the voices of all faiths, races, and income levels are counted and have a say in government. Royster Decl., ¶ 3. During every election cycle, POWER’s civic engagement efforts include voter education programs, voter registration drives, and “Souls to the Polls” efforts⁵ within Philadelphia County to encourage congregants to vote. *Id.*, ¶ 4.

Make the Road Pennsylvania (“Make the Road PA”) is a not-for-profit, member-led organization formed in 2014 that builds the power of the working class

⁵“Souls to the Polls” refers to the efforts of Black church leaders to encourage their congregants to vote *See, e.g.*, David D. Daniels, III, *The Black Church Has Been Getting “Souls to the Polls” for More Than 60 Years*, The Conversation (Oct. 30, 2020), <https://theconversation.com/the-black-church-has-been-getting-souls-to-the-polls-for-more-than-60-years-145996>.

in Latino and other communities to achieve dignity and justice through organizing, policy innovation, and education services. Robinson Decl., ¶ 5. Make the Road PA's approximately 13,000 members are primarily working-class residents of Pennsylvania, many in underserved communities. *Id.* Make the Road PA's work includes voter protection, voter advocacy, and voter education on, for example, how to register to vote, how to apply for mail/absentee ballots, how to return mail/absentee ballots, and where to vote. *Id.*, ¶ 7. Its get-out-the-vote efforts have included knocking on doors and speaking directly with eligible voters in historically underserved communities of color, especially in Berks, Bucks, Lehigh, Luzerne, Northampton, and Philadelphia Counties. *Id.*

OnePA Activists United (d/b/a "One PA For All") is a community organizing and voter engagement group that fights for racial, economic, and environmental justice. Paul Decl., ¶ 5. It maintains offices in Pittsburgh and Philadelphia, and does voter engagement work in Allegheny, Delaware, Dauphin, and Philadelphia Counties. *Id.*, ¶ 6. One PA For All's mission and programs include a variety of voting- and election-related activities, including boosting voter registration and turnout within Black communities in Pennsylvania and educating and mobilizing community members for active participation in democratic processes, including city council, school board, zoning board hearings, and PA General Assembly meetings. *Id.*, ¶ 7. In connection with every election cycle, One

PA For All engages in door-to-door canvassing, phone calls, relational organizing, text messaging, digital ads, and earned media. *Id.*, ¶ 8.

Casa San José is a nonpartisan, nonprofit organization based in Pittsburgh, Pennsylvania, employing a staff of 24 and supported by three members of the order of the Sisters of St. Joseph and more than 100 volunteers. Ruiz Decl., ¶ 4. Casa San José connects, supports, and advocates with and for the Latino community in the Pittsburgh region. *Id.*, ¶ 5. In connection with every election cycle, Casa San José does voter outreach in Allegheny, Beaver, Butler, Erie, Indiana, Lawrence, Washington, and Westmoreland Counties. *Id.*, ¶ 8. Casa San José engages the rapidly growing Latino community through phone calls, relational organizing, text messaging, and digital ads with a goal to increase the civic participation of the Latino communities. *Id.*

Pittsburgh United is a nonpartisan organization that strives to advance social and economic justice in the Pittsburgh region. Hanson Decl., ¶ 5. It is a membership and coalition organization employing 31 staff members in six offices, one each in Pittsburgh (Allegheny County), Ambridge (Beaver County), Meadville (Crawford County), Erie (Erie County), Greensburg (Westmoreland County) and State College (Centre County). *Id.*, ¶ 6. In connection with each election cycle, Pittsburgh United engages with voters in a variety of ways, including door-to-door canvassing, phone, text and digital outreach, working to increase voter turnout and expand access to

mail voting in Black, low-income, and white working-class communities across its six chapters. *Id.*, ¶ 9.

Respondents' enforcement of the envelope-date provision to set aside and not count timely-submitted mail ballots based solely on a missing or incorrect date on the return envelope forces each Petitioner to divert resources from its voter education, voter mobilization, election protection, and other mission-related initiatives to help ensure people are not disenfranchised by the envelope-date requirement. Each Petitioner will have to continue diverting staff and volunteers to spend time with voters explaining the numerous steps required to accurately complete a mail ballot, including the date field, and assisting voters who have had their ballot rejected. Petitioners have limited resources to reach people who are typically left out of the process of voting. The time necessary to assist voters whose ballots are rejected for noncompliance with the envelope-date requirement diverts organizational resources from voter mobilization and post-election canvass efforts. *See, e.g.*, Kenner Decl., ¶¶ 18-21; Taylor Decl., ¶¶ 7-14; Hensley-Robin Decl., ¶¶ 7-11; Widestrom Decl., ¶¶ 7-11; Stevens Decl., ¶¶ 4-11; Royster Decl., ¶¶ 4-8; Robinson Decl., at ¶¶ 7-12; Paul Decl., ¶¶ 10-22; Ruiz Decl., ¶¶ 17-19; Hanson Decl., ¶¶ 16-17.

B. Respondents

Respondent Al Schmidt is the Secretary of the Commonwealth. The Pennsylvania Election Code confers certain specific authority upon the Secretary to implement absentee and mail voting procedures throughout the Commonwealth, including the responsibility for implementing the mail-ballot procedural requirements at issue here. *See* 25 P.S. §§ 3146.3(b), 3150.13(b) (Secretary prescribes form of absentee and mail ballots); 25 P.S. §§ 3146.4, 3150.14 (Secretary prescribes form of voter declaration for absentee and mail ballots). Pursuant to this authority, on July 1, 2024, Respondent Schmidt issued a Mail Ballot Directive prescribing the text, content, shape, size, or form of the declaration envelope, mandating that the envelopes continue to include the disputed date field on the form, and also mandating that the counties include the current year pre-filled.⁶ This directive also includes mail ballot instructions consistent with prior guidance that timely mail-ballot submissions with a missing or incorrect date must be segregated and excluded from tabulation.⁷

⁶ *See* Pa. Dep't of State, *Directive Concerning the Form of Absentee and Mail-in Ballot Materials*, v.2.0 (July 1, 2024) (“DOS Mail Ballot Directive”), <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>.

⁷ *See, E.g.*, Pa. Dep't of State, *Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures*, v.3.0 (Apr. 3, 2023) (“DOS April 2023 Guidance”), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-DOS-Guidance-Civilian-Absentee-Mail-In-Ballot-Procedures-v3.pdf>.

Respondent Schmidt also has the duty “[t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon ballot questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections....” 25 P.S. § 2621(f). Thus, enforcement of the envelope-date provision directly bears on whether the Secretary’s performance of such certification duties complies with law.

Each of the **67 County Board of Elections Respondents** is responsible for administering elections occurring within its county. *See* 25 P.S. § 2641(a). County Boards are also charged with ensuring elections are “honestly, efficiently, and uniformly conducted.” *Id.* § 2642(g). As set forth in greater detail below, with regard to mail and absentee ballots,⁸ County Boards are responsible for processing mail ballot applications, sending and receiving mail ballot materials, and ensuring that mail-ballot voting is extremely safe and secure, which includes, among other things:

- confirming each mail-ballot applicant’s qualifications by verifying their proof of identification and comparing the information on the application with information contained in the voter’s record;
- maintaining poll books that track which voters have requested mail ballots and which have returned them;

⁸ For ease of reference, “mail ballots” includes both absentee and mail ballots unless otherwise noted. The rules governing treatment of absentee and mail ballots are identical.

- upon return of a mail ballot, stamping the return envelope with the date of receipt to confirm its timeliness;
- logging returned mail ballots in the Department of State’s Statewide Uniform Registry of Electors (“SURE”) system, the voter registration system;
- keeping returned absentee ballots in sealed or locked containers until they are canvassed by the County Board;
- pre-canvassing and canvassing mail ballots, including examining the voter declaration and reviewing them for sufficiency; and
- conducting a formal hearing to hear challenges as to all challenged mail-ballot applications and challenged mail ballots.

See 25 P.S. §§ 3146.2b, 3146.6(a), 3146.6(b)(3), 3146.8(a), 3146.8(g), 3146.9(b)(5), 3150.12b, 3150.16(a), 3150.16(b)(3), 3150.17(b)(5).⁹

Thus, it is the County Boards that receive, time-stamp, and log receipt of mail ballot submissions in the SURE system. And since at least 2022, the County Boards have also been responsible for reviewing outer return envelopes to determine whether they include a correct voter-written date, and setting aside those with a missing or “incorrect” voter-written date. Thus, both the Secretary and the County Boards are responsible for carrying out—in different ways—the unconstitutional enforcement of the envelope-date provision.

⁹ *See* Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, at 2–3 (Sept. 11, 2020) (“DOS September 2020 Guidance”), <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/archived/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

III. STATEMENT OF THE CASE

A. Origins of the Envelope-Date Provision

The Election Code has long provided an absentee ballot option for certain Pennsylvania voters. *See* 25 P.S. §§ 3146.1–3146.9. In 1963, the General Assembly added to the absentee ballot provisions a requirement that the “elector shall...fill out, date and sign [a] declaration printed on” the outer envelope used to return absentee ballots. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1306. At the same time, the Code’s canvassing provision was amended to instruct county boards to set aside ballots returned in envelopes bearing a date after the election, *id.*, sec. 24 § 1308(c). Thus, for a brief time in the 1960s, the Election Code directed use of the handwritten envelope date as part of the determination whether absentee ballots were timely.

But in 1968, the Legislature updated the Code to make *date of receipt* the sole factor in determining timeliness of absentee ballots, eliminating the requirement to set aside ballots based on the envelope date. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, §§ 1308(a) & (c). Thus, while the instruction to “fill out, date and sign” the envelope declaration remained after 1969, the only date used to determine an absentee ballot’s timeliness was date of *receipt*.

In 2019, the General Assembly enacted Act 77, which provides all eligible voters the option of no-excuse mail voting. The General Assembly largely repurposed the Code’s absentee-ballot provisions in the new mail-ballot provisions,

including carrying over the instruction from § 3146.6(a) to “fill out, date and sign” a declaration printed on the return envelope. The Legislature’s Republican Party leadership have acknowledged that absentee-ballot language was adopted wholesale “to minimize the complexities of legislative drafting,” (6/24/24 Br. of *Amici Curiae* Bryan Cutler, et al., 24)¹⁰, *not* because the legislature made any determination that the voter-written date served some purpose in administering the mail ballot process.

B. The Mail-Ballot Process

A voter seeking to vote by mail must complete an application to their county board of elections that includes their name, address, and proof of identification. *See* 25 P.S. §§ 3146.2, 3150.12. The requisite information allows county boards to verify the voter’s qualifications to vote in Pennsylvania—namely, they are over 18 years old, have been a citizen and resided in the election district for at least one month, and are not currently incarcerated on a felony conviction. *See* 25 Pa.C.S. § 1301(a).

The county board then confirms the applicant’s qualifications by verifying proof of identification and comparing the application information with the voter’s record. 25 P.S. §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4).¹¹ The county board’s eligibility determinations are conclusive unless challenged. *Id.* §§ 3146.2c, 3150.12b(3).

¹⁰ A true and correct copy of the relevant excerpt from the Brief of *Amici Curiae* submitted to the Commonwealth Court by Bryan Cutler, et al., in *B-PEP* is attached hereto as Exhibit K.

¹¹ *See also* DOS April 2023 Guidance, *supra* n.7.

After verifying voter identity and eligibility, the county board sends a mail-ballot package that contains a ballot, a secrecy envelope marked with the words “Official Election Ballot,” and a pre-addressed return envelope containing a pre-printed voter declaration form. *Id.* §§ 3146.6(a), 3150.16(a). Both the mail ballot itself and the “form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth.” *Id.* § 3146.4; *see also id.* §§ 3146.3(b), 3150.13(b).

At “any time” after receiving their mail-ballot package, the voter marks their ballot, places it in the secrecy envelope and the return envelope, completes the declaration, and delivers the ballot, by mail or in person, to their county board. *Id.* §§ 3146.6(a), 3150.16(a). The date written on the return envelope is not used to determine or confirm voter identity, eligibility, or timeliness of the ballot. Rather, a mail ballot is timely if the county board receives it by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c).

Upon receipt, the county board must stamp the return envelope with the date of receipt to confirm its timeliness and log the receipt in the Statewide Uniform Registry of Electors (“SURE”) system, the voter database used to generate poll books. *See id.* §§ 3146.9(b)(5); 3150.17(b)(5) (requiring boards to “maintain a record of...the date on which the elector’s completed mail-in ballot is received by

the county board”).¹² The poll books each county generates from the SURE system show which voters requested and returned mail ballots. *Id.* §§ 3146.6(b)(1), 3150.16(b)(1).

Mail ballots are verified pursuant to 25 P.S. § 3146.8(g). Any verified ballot submission that is not challenged is counted and included with the election results. *Id.* § 3146.8(g)(4). After the counties count the ballots, the Secretary has the duty “[t]o receive from [them] the returns of primaries and elections, to canvass and compute the votes cast...; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections...” *Id.* § 2621(f).

C. Litigation over the Envelope-Date Provision

Millions of Pennsylvania voters have voted by mail ballot since Act 77 passed in 2019. Litigation over the validity of mail ballots received in un- and mis-dated envelopes began almost immediately. A series of state and federal cases have interpreted the Election Code’s envelope-dating provisions and considered the application of the federal Materiality Provision, 52 U.S.C. § 10101(a)(2)(B). Before the recent Commonwealth Court decision in *B-PEP*, 2024 WL 4002321, none of those cases presented a claim under the Free and Equal Elections Clause.

¹² See DOS September 2020 Guidance, *supra* n.9, at 2.

In 2020, this Court conducted a statutory analysis of the envelope-date provision and issued a split decision, with four Justices ruling in favor of counting timely ballots received in the 2020 election. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election* (“*In re 2020*”), 241 A.3d 1058, 1076-79 (Pa. 2020), *cert. denied*, 141 S. Ct. 1451 (2021) (opinion announcing judgment of the court [“OAJC”]); *id.*, 1088 (Wecht, J., concurring and dissenting). In those fast-moving, consolidated post-election appeals, appellants (political campaigns seeking to disqualify ballots) postulated governmental interests that supposedly supported strict enforcement of the envelope-date provision. Without any record testing these theories, six Justices split over whether the purported interests appeared sufficiently “weighty” to justify interpreting the Code’s date instruction as “mandatory.”¹³ *See id.*, 1076-79 (OAJC) (envelope-date provision was “a directory, rather than a mandatory, instruction” because purported interests were not “weighty”); *id.*, 1090-91 (Dougherty, J., concurring and dissenting) (crediting purported “weighty interests” to interpret the provision as mandatory).

In early 2022, Lehigh County voters who were disenfranchised by the envelope-date requirement in the 2021 municipal election filed a federal Materiality Provision challenge. A unanimous Third Circuit panel held that the Materiality

¹³ The seventh Justice opined that a plain-text reading should be applied to interpret “shall...date” as mandatory regardless of any “weighty interests,” but voted with the plurality in the OAJC to require the counting of such ballots for the 2020 election only. *Id.*, 1079-80 (Wecht, J.).

Provision prohibited disenfranchising voters for inconsequential envelope-dating errors. *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir.), *vacated as moot*, 143 S. Ct. 297 (2022). Following *Migliori*, state courts directed county boards to count ballots despite envelope-dating errors in the 2022 primary. *See Chapman v. Berks Cnty. Bd. of Elections, et al.*, No. 355 MD 2022, 2022 WL 4100998 (Pa. Cmwlth. Aug. 19, 2022); *McCormick, et al. v. Chapman, et al.*, No. 286 MD 2022, 2022 WL 2900112 (Pa. Cmwlth. June 2, 2022).

In October 2022, after Lehigh County counted the ballots at issue in *Migliori* and certified all 2021 election results, the U.S. Supreme Court vacated the Third Circuit’s opinion for mootness pursuant to *United States v. Munsingwear*, 340 U.S. 36 (1950). *Ritter v. Migliori*, 143 S. Ct. 297 (2022). Within days of that non-merits vacatur, on October 16, 2022, the Republican Party filed a King’s Bench petition in this Court seeking to enjoin officials from counting mail ballots where voters had omitted the handwritten envelope date or written an “incorrect” date on the envelope. The *Ball* petitioners filed their King’s Bench petition mere weeks before Election Day, with voting already underway.

In the context of another fast-moving case without a factual record, this Court granted the King’s Bench petition, applying the bottom-line conclusion from *In re 2020*—that the envelope-date provisions are mandatory under the Election Code. *Ball*, 289 A.3d at 21-22 (citing *In re 2020*, 241 A.3d at 1086-87 (Wecht, J.) & 1090-

91 (Dougherty, J.)). The Court did not revisit the *In re 2020* debate regarding whether “weighty interests” supported mandatory application of the envelope-date provision. And it was not presented with any constitutional claim under the Free and Equal Elections Clause. One week before Election Day, the Court granted the petition and ordered that ballots arriving in un- or incorrectly-dated return envelopes be set aside in the 2022 general election. *Ball v. Chapman*, 284 A.3d 1189, 1192 (Pa. 2022) (per curiam). Consequently, county boards across the Commonwealth, who had prepared pursuant to the Third Circuit’s *Migliori* decision to canvass and count ballots with missing or incorrect voter-written envelope dates, adjusted on the eve of Election Day to set aside those ballots.

D. Election Officials Confirm the Envelope-Date Provision Serves No Purpose.

After the Court’s decision in *Ball*, voters facing disenfranchisement and nonpartisan voting-rights organizations filed a second federal Materiality Provision case against the Secretary and all 67 county boards.¹⁴ *See Pa. State Conf. of NAACP v. Schmidt* (“*NAACP I*”), 703 F. Supp. 3d 632 (W.D. Pa. 2023), *rev’d on other grounds*, 97 F.4th 120 (3d Cir. 2024). This was the first time all parties—including all Respondents here and political party intervenors—conducted full discovery,

¹⁴ The plaintiffs in *NAACP* raised only federal claims in that federal litigation. They did not raise the Free and Equal Elections Clause, which is not referenced in the federal court opinions. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (limiting federal courts from enforcing state constitutional rights against state actors).

including interrogatories, depositions, and admissions, to develop a record regarding the voter-written date's role (if any) in election administration and its impact on voters.

Interrogatory responses from the Secretary and all 67 County Boards, supplemented by deposition testimony, confirmed *no* party or entity responsible for election administration uses the date for any reason—including to determine timely receipt or voter qualifications—other than to disenfranchise voters who did not write a “correct” date. *See NAACP I*, 703 F. Supp. 3d at 668 (“County boards of elections acknowledge that they did not use the handwritten date on the voter declaration on the Return Envelope for any purpose related to determining a voter’s age..., citizenship..., county or duration of residence..., felony status..., or timeliness of receipt....) (internal record citations omitted). Indeed, while political party intervenors defended this pointless requirement, sixty-four County Boards expressly agreed not to contest the requested relief. *See NAACP I*, W.D. Pa. No. 1:22-cv-00339, ECF Nos. 157 (Order approving stipulation with 33 county boards), 192 (Order approving stipulation with 8 additional county boards), 243 (stipulation with 22 additional county boards); 445 (stipulation with Westmoreland County Board).

Based on this comprehensive record, the district court granted summary judgment, finding that the envelope-date provision is “wholly irrelevant” to election administration. *NAACP I*, 703 F. Supp. 3d at 678. A divided Third Circuit panel

subsequently reversed the result in *NAACP I* based on a novel legal interpretation of the federal Materiality Provision, but that court *endorsed* the district court’s conclusions—based on the discovery record from all 67 County Boards about the envelope-date provision—that it “serves little apparent purpose.” *Pa. State Conf. of NAACP Branches v. Schmidt* (“*NAACP II*”), 97 F.4th 120, 125 (3d Cir. 2024). The Third Circuit agreed that the date plays no role in determining a ballot’s timeliness. *Id.*, 125, 127.¹⁵ It also agreed that the date is not used to determine voter qualifications. *Id.*, 129 (“No party disputed that election officials ‘did not use the handwritten date...for any purpose related to determining’ a voter’s qualification under Pennsylvania law.”). And the Third Circuit did not disturb the district court’s conclusion that the envelope date is not used to detect fraud. *See NAACP I*, 703 F. Supp. at 679 n.39 (single instance of purported fraud in Lancaster County was “detected by way of the SURE system and Department of Health records, rather than by using the date on the return envelope”); *see also NAACP II*, 97 F.4th at 139-40 (Shwartz, J., dissenting) (handwritten date “not used to...detect fraud”).¹⁶

¹⁵ *See also NAACP I*, 703 F. Supp. at 679 (“Irrespective of any date written on the outer Return Envelope’s voter declaration, if a county board received and date-stamped a...mail ballot before 8:00 p.m. on Election Day, the ballot was deemed timely received....[I]f the county board received a mail ballot after 8:00 p.m. on Election Day, the ballot was not timely and was not counted, despite the date placed on the Return Envelope.”).

¹⁶ *Cf. In re 2020*, 241 A.3d at 1076-77 (because ballots received after 8:00p.m. on Election Day cannot be counted, there is no “danger that any of these ballots was...fraudulently back-dated”).

E. The Envelope-Date Requirement Is Enforced Inconsistently to Disenfranchise Thousands of Pennsylvanians in Each Election.

Though the date serves no discernible purpose, Respondents have continued to follow *Ball*, and direction from the Secretary, to disqualify and exclude from tabulation timely mail-ballot submissions with a missing or incorrect voter-written date on the return envelope. *See* DOS Mail Ballot Directive, *supra* n.6; DOS April 2023 Guidance, *supra* n.7. Under the current guidance, and consistent with the record developed in *NAACP* regarding post-*Ball* practices by the counties, where the return envelope does not have a handwritten date, it is deemed “not sufficient and must be set aside, declared void, and may not be counted.” DOS April 2023 Guidance, *supra* n.7, at 6. Moreover, if the envelope declaration “contain[s] a date deemed by the county board of elections to be incorrect,” the voter’s ballot “should be set aside and segregated.” *Id.*¹⁷ The Secretary has instructed that such ballots be coded as “CANC – NO SIGNATURE within the SURE system” (*i.e.*, should be coded as canceled in SURE) in addition to being “segregated from other ballots.”¹⁸

¹⁷ In an April 19, 2024 email, Deputy Secretary Jonathan Marks provided “the Department’s view” that certain handwritten dates that can “reasonably be interpreted” as the date in which the voter completed the declaration—such as omitting “24” in the year field—“should not be rejected.” However, the Department otherwise did not modify its previous guidance that envelopes that lack a date or have an otherwise “incorrect” date should not be counted. A true and correct copy of the 4/19/24 Department of State Email is attached hereto as Exhibit L.

¹⁸ Pa. Dep’t of State, *Guidance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court’s Order in Ball v. Chapman* (Nov. 3, 2022) (“DOS November 2022 Guidance”), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf>.

As a result, thousands of mail ballots have been set aside and not counted in every election. In the 2022 general election, enforcement of the envelope-date provision disenfranchised over 10,000 voters. *E.g., NAACP II*, 97 F.4th at 127. Thousands more were disenfranchised for this reason in the 2023 municipal elections, and again in the 2024 presidential primary. *See* Ex. M (5/27/24 Decl. of A. Shapell), at ¶ 12. Indeed, in the 2024 primary, voters across the Commonwealth continued to make inconsequential envelope dating mistakes even after the Secretary mandated a redesign of the envelope form that pre-populated “20” at the beginning of the year of the date line.¹⁹ *See* DOS Mail Ballot Directive, *supra* n.6, at 3-4.

Enforcement of the envelope-date provision has disenfranchised eligible voters throughout Pennsylvania, from all walks of life, and across the political spectrum. *See B-PEP*, 2024 WL 4002321, at *8 n.23 (citing voter declarations); *id.*, *34 nn.56-59 (same). And Respondents’ attempts to implement the envelope-date provision as a mandatory, disenfranchising requirement has led to disparate and arbitrary results among counties, further underscoring its lack of value to election administration. For example, in the 2022 general election:

- Many counties set aside ballots where the envelope date was correct but missing the year; others counted such ballots. *NAACP I*, 703 F. Supp. at 681, n.43.

¹⁹ *See, e.g., Carter Walker Pennsylvania’s Redesigned Mail Ballot Envelopes Trip Up Many Voters Who Left Date Incomplete*, Votebeat Pennsylvania (Apr. 23, 2024), <https://www.votebeat.org/pennsylvania/2024/04/23/primary-mail-ballot-rejections-incomplete-year-election-2024/>.

- More than 1,000 timely-received ballots were set aside because of “an obvious error by the voter in relation to the date,” such as writing a month prior to September or a month after November 8. *Id.*, 681. The district court found that this “shows the irrelevance of any date written by the voter on the outer envelope.” *Id.*, 681.
- Counties took varying approaches to dates written in the international format (*i.e.*, day/month/year). *Id.*, 681-82.
- Counties set aside hundreds of timely-received ballots with obviously unintentional slips of the pen. *Id.*

And many counties *counted* ballots with necessarily “incorrect” envelope dates. For example:

- “[S]ome counties precisely followed [the prescribed] date range even where the date on the return envelope was an impossibility because it predated the county’s mailing of ballot packages to voters.” *Id.*, 680.
- One county counted a ballot marked September 31—a date *that does not exist*—because it was literally within the acceptable date range. *Id.*, 681 n. 45.
- Counties took inconsistent approaches to voters who mistakenly wrote their birthdates. *Id.*, 681.

None of these facts, or the election officials’ admissions that the date serves no purpose, have been disputed in several cases.

F. *Black Political Empowerment Project, et al. v. Schmidt, et al.*

After the Third Circuit’s ruling regarding the scope of the federal Materiality Provision, a group of nonpartisan voting rights organizations—including most Petitioners here—filed suit in the Commonwealth Court against the Secretary and

the County Boards of Elections for Pennsylvania’s two most populous counties, Philadelphia and Allegheny Counties. *B-PEP*, 2024 WL 4002321. *B-PEP* was the first case to challenge enforcement of the envelope-date provision under the Free and Equal Elections Clause of the Pennsylvania Constitution. Political parties again intervened, with Republican Party intervenors defending enforcement of the envelope-date provision; no County Board intervened in defense of using this pointless requirement to disenfranchise their voters.²⁰

The Commonwealth Court determined, consistent with every court to consider the purposes of the envelope-date provision since 2020, that “the date on the outer absentee and mail-in ballot envelopes is not used to determine the timeliness of a ballot, a voter’s qualifications/eligibility to vote, or fraud. It is therefore apparent that the dating provisions are virtually meaningless and, thus, serve no compelling government interest.” *Id.*, *32. While the Republican Party intervenor-defendants attempted to relitigate the determination that the envelope-date provision is meaningless, they never controverted (or sought to put into controversy) the factual record from *NAACP* that established, beyond legitimate dispute, the envelope-date provision’s lack of utility. *Cf. id.*, *11 n.28 (“the parties agreed that there are no factual issues in this case, that no stipulations of fact were

²⁰ A sole county commissioner sought to intervene in *B-PEP*, but admitted that the rest of his board—the Westmoreland County Board of Elections—voted to reject the proposal to intervene as a board in *B-PEP*. *Id.*, *4.

required, and that this matter involves only legal issues”). Accordingly, the Commonwealth Court held that continued enforcement of the envelope-date provision to disqualify timely votes submitted by eligible voters is a violation of the Free and Equal Elections Clause. *Id.*, *38-39.

The Republican Party intervenor-defendants appealed *B-PEP* to this Court. Without ruling on the merits of the constitutional challenge, this Court vacated the Commonwealth Court’s ruling on the grounds that the petitioners had not joined all indispensable parties—namely, all 67 County Boards of Elections—and that the Secretary was not an indispensable party for the purposes of conferring original jurisdiction on the Commonwealth Court.

Petitioners now bring this case with all 67 County Boards joined and seek an order declaring once and for all that the meaningless envelope-date provision cannot be used to deny eligible voters who timely submit their mail ballot their fundamental right to vote under the Free and Equal Elections Clause.

IV. BASIS FOR EXERCISING KING’S BENCH POWER

The imminent disenfranchisement of thousands of Pennsylvanians, in violation of the Pennsylvania Constitution, justifies the invocation of this Court’s King’s Bench power.

“King’s Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the

deleterious effects arising from delays incident to the ordinary process of law.” *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020) (quoting *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015)); *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014); *see also id.*, 672 (“the power of King’s Bench allow[s] the Court to innovate a swift process and remedy appropriate to exigencies of the event”); *Bd. of Revisions of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010) (“King’s Bench jurisdiction...allows [the Court] to exercise power of general superintendency over inferior tribunals even when no matter is pending”); 42 Pa. C.S. § 502.

The Court should grant this Application and exercise its King’s Bench authority here. Pennsylvania’s Free and Equal Elections Clause firmly establishes the right to vote as a fundamental right that may not be diminished by the government. The Clause “strike[s]...at all regulations...which shall impair the right of suffrage....” *LWV*, 178 A.3d at 809 (citation omitted). As an *en banc* panel of the Commonwealth Court recognized, in a 4-1 decision just three weeks ago, rejecting thousands of timely votes cast by eligible voters based on an irrelevant, trivial error violates this sacred constitutional guarantee. Enforcement of the envelope-date provision to reject thousands of timely votes is doing severe damage to Pennsylvanians’ fundamental right to vote, and will continue to do so absent immediate action by this Court.

It is critical that the Court exercise its King’s Bench power *now*. That is true both because this case presents issues of utmost public importance involving imminent danger to the most treasured of fundamental rights, *Friends of Danny DeVito*, 227 A.3d at 884, and because, with the Court’s dismissal of *B-PEP* on procedural grounds, there is no other realistic opportunity to address this grave threat before that fundamental right is again denied to thousands of voters in the November 2024 general election.²¹

There are no procedural barriers to this action. The Commonwealth Court’s recent decision upholding the rights of voters under the Free and Equal Elections Clause was vacated on procedural grounds because the petitioners had not joined all 67 County Boards of Elections, and because the Commonwealth Court did not have original jurisdiction over claims against the Secretary. In seeking an order finally resolving the core constitutional questions on their merits, Petitioners here now join all 67 County Boards, and this Court need not be concerned with the strictures of original jurisdiction over claims against the Secretary.

²¹ One other case—filed by two voters pursuant to 25 P.S. § 3157, challenging their county board’s refusal to count their ballots in a State House special election for noncompliance with the envelope-date provision—is now pending in the Philadelphia County Court of Common Pleas. *Baxter, et al. v. Phila. Bd. of Elections*, Phila. C.P. No. 240902481. That case was filed earlier this week in connection with races in a single county and is not guaranteed to proceed to a stage where a court of general statewide jurisdiction will be able to provide guidance to all election officials across the Commonwealth prior to the November election.

In *Ball*, this Court granted a strikingly similar King’s Bench petition filed by the Republican Party even closer in time to the 2022 general election—solidifying the mandatory application of the envelope-date requirement *as a matter of statutory construction*. The same considerations that applied in *Ball*, including the need to resolve important legal questions presented by the petition that are critical to election officials’ ability to lawfully canvass ballots in a fast-approaching election, apply here. If anything, they apply here with even greater urgency, because the cherished constitutional rights of thousands—and perhaps tens of thousands—of Pennsylvanians are now explicitly at stake.

V. ARGUMENT

A. **Disenfranchising Voters for Noncompliance with the Envelope-Date Provision Violates the Free and Equal Elections Clause.**

1. *The Right to Vote in Pennsylvania Is Paramount.*

In Pennsylvania, the right to vote is enshrined in and protected by the Free and Equal Elections Clause, which states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. The Clause means not only that voters must have an equal opportunity to participate in elections, but also that: “each voter under the law has the right to cast [their] ballot and have it honestly counted,” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914); that “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a

denial,” *id.*; that “no constitutional right of the qualified elector is subverted,” *LWV*, 178 A.3d at 810; and that elections must “be kept open and unrestricted to the voters of our Commonwealth,” *id.*, 804.

Any rule that requires disqualification of votes for noncompliance is, on its face, a restriction on voting. Yet in defending enforcement of the envelope-date provision to disenfranchise voters in prior cases, the Republican Party intervenors in those cases argued that the Free and Equal Elections Clause—perhaps the signal achievement of our Commonwealth’s Constitution—is toothless in the face of a pointless rule driving mass disenfranchisement in every election. Such a radical diminishment of the Clause’s scope cannot be squared with this Court’s longstanding jurisprudence.

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

Pennsylvania’s Constitution, when adopted in 1776, was widely viewed as “the most radically democratic of all the early state constitutions.” Ken Gormley, “Overview of Pennsylvania Constitutional Law,” as appearing in Ken Gormley, ed., *The Pennsylvania Constitution A Treatise on Rights and Liberties*, 3 (2004). 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. *Id.* 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. Our framers envisioned the right to vote as “that most central of democratic rights[.]” *Id.*, 741; *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386-87 (Pa. 2020) (“*PDP*”) (Wecht, J., concurring) (“No right is more precious....Other rights, even the most basic, are illusory if the right to vote is undermined.”).

Accordingly, the “plain and expansive sweep of the words ‘free and equal’” is “indicative of the framers’ intent that ***all aspects*** of the electoral process, to ***the greatest degree possible***, be kept open and ***unrestricted*** to the voters of our Commonwealth....” *LWV*, 178 A.3d at 804 (emphases added). It “strike[s]...at ***all*** regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.*, 809 (citation omitted) (emphasis added).

2. *Strict Scrutiny Applies to the Envelope-Date Requirement’s Restriction on the Fundamental Right to Vote.*

This Court has repeatedly reaffirmed that the right to vote guaranteed by the Free and Equal Elections Clause is fundamental. *See, e.g., PDP*, 238 A.3d at 361 (employing a construction of the Election Code that “favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate”); *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015) (“[T]he right to vote is fundamental and

‘pervasive of other basic civil and political rights’....”) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)). Strict scrutiny applies to any restriction on this fundamental right. *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (“where the fundamental right to vote is at issue, a strong state interest must be demonstrated”).

Laws that “infringe upon,” “affect,” or “burden” the fundamental right to vote may trigger such review, even absent a “severe” burden. *See, e.g., Petition of Berg*, 712 A.2d 340, 342 (Pa. Cmwlth.), *aff’d*, 552 Pa. 126 (1998) (“It is well settled that laws which affect a fundamental right, such as the right to vote...are subject to strict scrutiny.”)²²; *James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984) (“where a...fundamental right has been burdened, another standard of review is applied: that of strict scrutiny”)²³; *see also LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523) (elections are “free and equal when...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**

²² The Court in *Berg* declined to apply strict scrutiny only upon finding that the case did not involve denial of fundamental right to vote. 712 A. 2d at 342-44.

²³ Likewise, infringements on any other fundamental right trigger strict scrutiny. *See, e.g., Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 945-96 (Pa. 2024) (plurality in relevant part) (“[T]he right to reproductive autonomy, like other privacy rights, is fundamental....Accordingly, we would remand to the Commonwealth Court to apply strict scrutiny based on the framework of the Section 26 analysis....”); *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 294 A.3d 537, 957 (Pa. Cmwlth. 2023) (“Petitioners’ equal protection claim is based on a fundamental right to education, the alleged impingement of which should be reviewed under strict scrutiny.”).

denied him.” (emphasis added)); *Applewhite v. Commonwealth* (“*Applewhite II*”), No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Cmwlth. Jan. 17, 2014) (laws that “infringe[] upon qualified electors’ right to vote” are analyzed “under strict scrutiny”). Regardless what terminology one uses to describe the harsh result here, losing the right to have one’s vote included due to a meaningless mistake is an “extremely serious matter” that triggers strict scrutiny under Pennsylvania law. *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) (“The disfranchisement of even one person validly exercising his right to vote is an extremely serious matter.”).

Under strict scrutiny, the proponents of a restriction on fundamental rights have the burden of proving that the law in question is “narrowly drawn to advance a state interest of compelling importance.” *PDP*, 238 A. 3d at 385; *see also, e.g., Appeal of Gallagher*, 41 A.2d 630, 632-33 (Pa. 1945) (noting that the power to throw out ballots based on minor irregularities “must be exercised *very sparingly* and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election *except for compelling reasons*” (emphasis added)).²⁴

²⁴ The Republican Party intervenors’ refrain in *B-PEP* 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 LWV*, 178 A.3d at 803 (“Although plenary, ... legislative power is subject to restrictions enumerated in the Constitution”.... “[T]he people have delegated general power to the General Assembly, with the express exception of certain fundamental rights reserved to the people in Article I....”).

In prior litigation, no party or intervenor has been able to show that enforcing the envelope-date provision on pain of disenfranchisement clears this high bar. Indeed, not even the Republican Party intervenors in *B-PEP* attempted to dispute that the envelope-date provision would fail strict scrutiny. As multiple courts have held, the envelope-date provision has nothing to do with ensuring fairness or integrity in Pennsylvania elections, and application of strict scrutiny to the practice of disenfranchising people based on one meaningless restriction would not imperil election officials' ability to continue implementing ordinary and meaningful rules of election administration.

3. *Enforcement of the Irrelevant Envelope-Date Provision Cannot Survive Even Lesser Constitutional Scrutiny.*

Disenfranchising thousands based on a mandatory envelope-date provision cannot survive even a lower level of scrutiny because that requirement serves no purpose. At a minimum, “under our state charter, we must assess whether the challenged law has ‘a real and substantial relation’ to the public interests it seeks to advance....” *Shoul v. Commonwealth, Dep’t of Transportation, Bureau of Driver Licensing*, 173 A.3d 669, 677-78 (Pa. 2017).

Upon reviewing the detailed and uniform conclusions of multiple courts—including the *NAACP* courts who ruled on a full discovery record—the Commonwealth Court in *B-PEP* correctly held: “As has been determined in prior litigation involving the dating provisions, the date on the outer absentee and mail-in

ballot envelopes is not used to determine the timeliness of a ballot, a voter's qualifications/eligibility to vote, or fraud. It is therefore apparent that the dating provisions are virtually meaningless and, thus, serve no compelling government interest.” 2024 WL 4002321, at *32.

When previously presented with the question of whether the envelope-date provision serves a state interest in a case raising a statutory challenge under the Election Code, a plurality of this Court determined that “a signed but undated declaration is sufficient and *does not implicate any weighty interest.*” *In re 2020*, 241 A.3d at 1078 (OJAC) (emphasis added). A minority of the Court took the opposite view. *Id.*, 1090 (Dougherty, J.). But it did so without the benefit of any record or meaningful exploration by the parties of the purported state interests.

In re 2020 was filed and quickly decided immediately after Election Day in 2020—the first general election with expanded mail voting. Consequently, the Court decided the issue in a vacuum, based only on the political campaigns’ *theories* about how the date *might* be used. Since then, however, there have been multiple elections and subsequent court decisions, including a comprehensive discovery process—involving the Secretary, all 67 counties, and political party intervenors. That discovery produced a record disproving all the hypothetical “weighty interests.” *See, e.g., NAACP II*, 97 F.4th at 125 (agreeing that the envelope-date provision “serves little apparent purpose”); *NAACP I*, 703 F. Supp. 3d at 678 (agreeing after a review

of the full record that the voter-written date on the outer return envelope is “wholly irrelevant”); *cf. B-PEP* 2024 WL 4002321, at *33 (“[C]ounsel for the Secretary confirmed that none of the county boards of elections use the handwritten date for any purpose, and he further relayed that the only reason the date is included on absentee and mail-in ballot envelope declarations is because such requirement is in the Election Code.”).

While failing to address, much less refute, the record and admissions generated since this Court decided *PDP* and *Ball*, the Republican Party intervenors in *B-PEP* simply repackaged three theoretical purposes served by the envelope-date provision. None survive any level of scrutiny.

First, there has been no instance of the envelope-date provision ever serving as a “useful backstop” for determining whether a ballot is timely. Indeed, no party has disputed the Third Circuit’s conclusion that the handwritten date is not “used to determine the ballot’s timeliness because a ballot is timely if received before 8:00 p.m. on Election Day, and counties’ timestamping and scanning procedures serve to verify that.” *NAACP II*, 97 F.4th at 129. The *B-PEP* intervenor-respondents’ pure conjecture—that the handwritten date *might* be used to determine timeliness, *if* there were *both* a failure to timestamp *and* a failure of the SURE scanning procedure—is far too speculative to qualify as an “important regulatory interest.” *See B-PEP*, 2024 WL 4002321, at *33-35 & n.62; *see also* 25 P.S. §§ 3146.9(b)(5); 3150.17(b)(5)

(requiring boards to “maintain a record of...the date on which the elector’s completed mail-in ballot is received by the county board”).²⁵

Second, there is no authority, from Pennsylvania or anywhere else, for the assertion that the voter-written date is necessary to “authenticate” the ballot submission (*B-PEP*, 2024 WL 4002321, at *53 (McCulloch, J., dissenting)), or that it serves some supposed interest in “solemnity.”²⁶ This supposed government interest could not even theoretically justify disenfranchising voters. *See In re 2020*, 241 A.3d at 1089 n.54 (Wecht, J.) (“It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.”). And whatever purported interest might exist in “authenticity” or “solemnity” is accounted for by the other requirements for successfully submitting a mail ballot—including that the voter submit an application, have their identification verified, and that they sign a declaration stating, “I am qualified to vote the enclosed ballot and I have not already voted in this

²⁵ *Cf. In re 2020 Canvass*, 241 A.3d at 1077 (“The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.”).

²⁶ The cases cited by the Republican Party intervenors to the Commonwealth Court in *B-PEP* for this fabricated “solemnity” concern were strikingly off-topic, as none actually involved requirements to date or sign documents. Meanwhile, the *only* case they have ever cited that mentions “solemnity,” *Vote.org v. Callanen*, is a federal Materiality Provision case that ruled on the materiality of a wet *signature* requirement but did not mention a handwritten date requirement except to note that the *immateriality* of the envelope date in Pennsylvania is “fairly obvious.” 89 F.4th 459, 480, 489 (5th Cir. 2023).

election.”²⁷ See 25 P.S. §§ 3146.4, 3146.6, 3150.14, 3150.16. It is insulting to voters and inconsistent with the principles embodied by the Free and Equal Elections Clause to suggest that, after taking all these steps, making a minor mistake in filling in a handwritten date on a form on the envelope somehow negates the “solemnity” of voters’ participation or suggests they did not adequately contemplate their actions.

Third, the notion that the envelope-date provision helps detect voter fraud has been thoroughly debunked since 2020. When pressed, proponents of the envelope-date requirement have pointed to a single instance in the 2022 primary, where a ballot was submitted with a date twelve days after the voter had died, and the fraudster was convicted. 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 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*, 703 F. Supp. at 679 n.39 (“[T]he county board’s own Rule 30(b)(6) designee testified that the fraudulent ballot was first detected by way of the SURE system and Department of Health records, rather than by using the date on the return

²⁷ Indeed, a missing or incorrect date commonly does ***not*** deprive a document of its legal effect. For example, with respect to declarations signed under penalty of perjury in accordance with federal law (28 U.S.C. § 1746), “the absence of a date...does not render [the declaration] invalid if extrinsic evidence could demonstrate the period when the document was signed.” *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 475-76 (6th Cir. 2002). Here, the “period when the [envelope] was signed” is known and undisputed, because mail ballots were sent to voters on a date certain and are not accepted by county boards after 8:00 p.m. on Election Day.

envelope.”).²⁸ This is consistent with this Court’s determination that the envelope-date provision is not independently used to determine whether a ballot was “fraudulently back-dated.” *In re 2020*, 241 A.3d at 1077 (no danger of fraudulent backdating because ballots received after 8:00 p.m. on Election Day are not counted).

In sum, the lack of any *bona fide* government interest served by the envelope-date provision means enforcement of the envelope-date provision to disenfranchise cannot satisfy intermediate, or even rational basis, scrutiny. *Cf. Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1252 n.6 (Pa. 2016) (Wecht, J., concurring) (“Where stops the reason, there stops the rule.”).

B. There Is No Reason to Deny the Requested Relief.

None of the arguments raised in previous cases warrants avoiding adjudication of these important constitutional questions.

²⁸ The majority in *B-PEP* declined the attempt by intervenor-respondents to relitigate their claim that the date written on the envelope was the “only evidence” of fraud in the 2022 Lancaster County example. That assertion has already been squarely rejected based on the Lancaster Board’s admissions. *NAACP I*, 703 F. Supp. at 679 n.39. It is undisputed that the Lancaster Board had learned of the voter’s death weeks earlier and removed her from the voter rolls even before receiving a ballot in her name. *See Ex. N (2/13/23 C. Miller Tr. [“Miller Tr.”])*, at 87:18-94:15. The receipt of a ballot so long after the voter’s death was *itself* evidence of fraud. In any event, election fraud is prevented and detected in the case of deceased voters by reliance on SURE data and Department of Health records, without the need to reference a handwritten envelope date. *Id.*, 100:25-102:18.

1. *This Court Has Not Addressed the Constitutionality of Disenfranchising Voters Due to Envelope-Dating Errors.*

In the *B-PEP* litigation, the Republican Party intervenors contended that this Court’s prior cases foreclosed relief under the Free and Equal Elections Clause. But this Court has yet to address a Free and Equal Elections Clause challenge to the enforcement of the envelope-date provision. The last Pennsylvania Supreme Court case to address the envelope-date provision—*Ball*—involved no Free and Equal Elections Clause challenge. There, the Court reaffirmed its statutory interpretation of the envelope-date provision from *In re 2020*. Indeed, half of the Justices in *Ball* acknowledged that “failure to comply with the date requirement would not compel discarding votes in light of the Free and Equal Elections Clause...” 289 A.2d at 27 n.156. That footnote was the only mention of the Free and Equal Elections Clause in the *Ball* Court’s analysis.²⁹

Nor did *PDP* involve the claim at issue here. The petitioners in *PDP* raised no constitutional challenge to enforcement of the envelope-date provision. Petitioners there claimed only that the Free and Equal Elections Clause affirmatively required that voters be given “*notice and [an] opportunity to cure*” minor errors

²⁹ Discussion of the Clause was otherwise relegated to a fleeting reference in the portion of the *Ball* opinion describing the parties’ respective positions, which noted an assertion in the Secretary’s brief that the RNC’s interpretation of the statute “*could implicate* the Free and Equal Elections Clause.” *Ball*, 289 A.3d at 16 (emphasis added). The Court was not describing any claim or defense under the Free and Equal Elections Clause and did not conduct a constitutional analysis.

before mail ballots were rejected. 238 A.3d at 373 (emphasis added). They did not seek a ruling on the antecedent question, namely, whether enforcing the envelope-date provision to reject timely ballots is unconstitutional. This Court decided only that “the Boards are not required to implement a ‘notice and opportunity to cure’ procedure” because the petitioners had “cited no constitutional or statutory basis” for imposing such a post-hoc cure process requirement on all counties. *Id.*, 374. This case raises an entirely different issue.

In sum, there has been substantial litigation regarding *statutory interpretation* of the envelope-date provision in the Election Code, and *different* constitutional challenges involving *other* Election Code provisions, but before the Commonwealth Court’s decision in *B-PEP*, no court had addressed whether disenfranchising voters for noncompliance with the envelope-date provision violates the Pennsylvania Constitution.³⁰ And until now, this Court has never done so.

2. *The B-PEP Intervenor-Respondents’ Efforts to Neuter the Free and Equal Elections Clause Have No Merit.*

In the *B-PEP* litigation, the Republican Party intervenors contended that Free and Equal Elections Cause did not apply to so-called “ballot-casting” rules. This

³⁰ The Third Circuit, in *NAACP II*, did not and could not opine on the enforceability of the date requirement under the Free and Equal Elections Clause. The court held only that enforcing the date requirement does not violate a *federal statute*, relying on a novel theory that the statute categorically does not apply to mail ballot-related paperwork. There was no state constitutional claim in *NAACP* and there is no reference to the Free and Equal Elections Clause anywhere in the federal court’s opinions. *Cf. Pennhurst*, 465 U.S. 89.

novel position ignores the text, history, and precedent and represents an extreme departure from established principles.

First, the idea of some separate category of “ballot-casting” rules is not grounded in the Election Code or found anywhere in 250 years of precedent.³¹ Adopting this litigation-driven exemption now would require the Court to overturn longstanding jurisprudence applying the Free and Equal Elections Clause to “all aspects of the electoral process,” *LWV*, 178 A.3d at 804, and would render the Clause impotent even against Jim Crow-era requirements like literacy tests (as long as they were imposed as part of the “ballot-casting” process), or a requirement to write the voter’s paternal grandfather’s name on the return envelope. The theories offered by the Republican Party intervenors in *B-PEP* would immunize blatant infringements on the right to vote from any constitutional scrutiny so long as they involve “ballot-casting.” Such a radical carveout is irreconcilable with this Court’s recognition that the Clause must apply in a “broad and robust” manner. *LWV*, 178 A.3d at 814.

Pennsylvania courts have never limited the Clause to a “ballot-casting rule.” Indeed, this Court applied the Clause to the mail-ballot-receipt deadline—clearly a

³¹ The Election Code undercuts the concept of a “ballot-casting” stage that includes dating the return envelope. Based on a plain reading of the Code’s mail-ballot procedures, completion of the envelope declaration is not itself “ballot casting.” The Code provides separate sets of rules that apply to the ballot on one hand and the 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 dating requirement together with “ballot-casting” is a novel concept adopted earlier this year by two federal judges in *NAACP II*, which finds no support in the Code or any Pennsylvania case.

“ballot-casting” rule—during the November 2020 election. *PDP*, 238 A.3d at 371-72. The Commonwealth Court, following remand instructions from this Court, also applied the Clause to invalidate a statute requiring people casting ballots in person to show photo identification. *Applewhite v. Commonwealth*, No. 330 MD 2012, 2012 WL 4497211, at *6 (Pa. Cmwlth. Oct. 2, 2012). This Court also affirmed a ruling that a registration ban on people released from prison within the previous five years violates the Clause. *Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Cmwlth. 2000) (*en banc*), *aff’d without opinion*, 783 A.2d 763 (Pa. 2001). These decisions build on older cases applying the Clause to invalidate statutes that barred certain categories of people **from casting ballots**. *See, e.g., McCafferty v. Guyer*, 59 Pa. 109, 112 (1868) (there is no “power of the legislature to disfranchise one to whom the Constitution has given the rights of an elector”); *Page v. Allen*, 58 Pa. 338, 353 (1868) (enjoining enforcement of statute that added ten days to constitutional residency requirement for voting).

All of this is consistent with this Court’s emphasis that “the words ‘free and equal’ as used in Article I, Section 5 have a broad and wide sweep.” *LWV*, 178 A.3d at 809.

Second, the Clause’s reach is not limited to voting regulations that “make it so difficult [to vote] as to amount to a denial” of the franchise, as the Republican Party intervenors suggested in *B-PEP*. *See id.*, 810. This Court’s decisions, in cases

like *Berg* and *Applewhite*, make clear that voting rules or practices that “affect” or “infringe upon” the right to vote must all be consistent with the Free and Equal Elections Clause’s basic requirements. *See infra*, Section V.A.2.³²

Third, this Court’s precedent also forecloses any argument that the Clause protects only the opportunity to cast a ballot, but not the right to have it counted.³³ The Clause applies broadly, to “*all* aspects of the electoral process.” *LWV*, 178 A.3d at 804 (emphasis added). The fundamental right to vote under the Pennsylvania Constitution extends beyond just the right to register or fill out a ballot; it encompasses “the right to cast [a] ballot *and have it honestly counted.*” *Winston*, 91 A. at 523 (emphasis added). The envelope-date requirement obviously impairs the right to have a ballot “counted.”³⁴

³² The Republican Party intervenors’ contrary view in *B-PEP* was based on a partial quotation from *Winston*. That quote omitted critical language making clear that the Clause extends to restrictions that “effectively” deny the right to vote *or* “deny the franchise itself” *or* “subvert” that right. *LWV*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523). Here, enforcement of the date provision actually *and* effectively denies voters the right to have their ballots included—or at minimum subverts the right. *See B-PEP*, 2024 WL 4002321, at *35.

³³ Nor is there any good argument that the envelope-date provision is so trivial in its effects that the constitutional violation it causes can be ignored. The date line undisputedly trips *thousands* of people in every election, including over 10,000 eligible voters in the 2022 general election. It does not matter that most voters are able to avoid disenfranchisement on this basis; invalidating 10,000 votes is constitutionally problematic. *LWV*, 178 A.3d at 813 n.71 (an election is not “free and equal” when “*any substantial number* of legal voters are, from any cause, denied the right to vote”) (emphasis added). This is more than the entire population of Sullivan and Cameron Counties combined; surely disenfranchising enough people to fill two counties constitutes “a constitutionally intolerable ratio of rejected ballots.” *PDP*, 238 A.3d at 389 (Wecht, J., concurring).

³⁴ At least three of the six Justices who presided in *Ball* expressly agreed that enforcing the date requirement to reject votes “den[ies] the right of an individual to vote....” *Ball*, 289 A.3d at 25 (quoting 52 U.S.C. § 10101(a)(2)(B)). Four out of the six federal circuit judges considering the

This Court should reaffirm over a century of jurisprudence that the Free and Equal Elections Clause and this Commonwealth’s long tradition of safeguarding voters’ rights precludes enforcement of a voting rule that serves no purpose other than to disenfranchise thousands every election.

3. *The Relief Petitioners Seek Does Not Require Invalidation of any Part of Act 77.*

The relief sought here does not implicate Act 77’s nonseverability provision and, contrary to the ominous claims by the Republican Party intervenors in *B-PEP*, would not require striking “no-excuse” mail voting in Pennsylvania.

To begin, Petitioners do not ask this Court to re-write, amend, or strike any provision of Act 77. Nor do Petitioners seek an order barring voters from being directed to date mail ballot declaration forms, or Respondents from continuing to include a date field next to the signature line. The Court accordingly need not invalidate or excise “shall...date” from § 3146.6 to grant the relief sought. Petitioners seek a ruling that enforcement of the envelope-date provision cannot, consistent with the Free and Equal Elections Clause, result in rejecting timely mail ballots. That does not invalidate any provision or application of Act 77, let alone all of it, particularly given that the provision addressing the sufficiency of the voter declaration on the

question under federal law in the *Migliori* and *NAACP* cases concluded likewise. And the Commonwealth Court also agreed in both *Chapman*, 2022 WL 4100998, *27, and *B-PEP*, 2024 WL 4002321, at *35.

return envelope—§ 3146.8(g)—predates Act 77. *Cf. Bonner v. Chapman*, 298 A.3d 153, 168-69 (Pa. Cmwlth. 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 envelope-date provision or its application is invalid would not require the Court to invalidate all of Act 77. Pennsylvania courts regularly deem it appropriate to sever provisions in statutes containing similar nonseverability clauses, because it is not for the “General Assembly to dictate the effect of a judicial finding that a provision in an act is invalid.” *PDP*, 238 A.3d at 397 n.4 (Donohue, J., concurring and dissenting) (internal citations and quotations marks omitted). “[B]oilerplate” nonseverability clauses, designed merely to ward off judicial review, cannot override the courts’ fundamental duty to adjudicate constitutional matters and to fashion legal and equitable relief. *See generally Stilp v. Commonwealth*, 905 A.2d 918, 970-81 (Pa. 2006). That established rule applies with full force here. Indeed, this Court in *Stilp* declined on those powerful separation-of-powers grounds to enforce a “boilerplate” nonseverability provision that is ***literally identical*** to the one in Act 77, instead giving effect to the terms of the binding rules of statutory construction, 1 Pa.C.S. § 1925 (“The provisions of every statute shall be severable”). *Stilp*, 905 A.2d at 979-81; *see also Pa. Fed’n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 753-754 (Pa. 1984) (declining to enforce more specific nonseverability clause on these grounds).

As in those cases, the application of Act 77’s nonseverability provision is neither required nor sensible here. The undisputed facts are that the envelope-date provision serves no purpose, benefits nobody, and disenfranchises thousands. It is easily severed from the rest of Act 77. Accordingly, even an order striking the envelope-date provision from the text of Act 77—relief that, to be clear, Petitioners *do not seek*—would not require the rest of Act 77 to be disturbed.

Indeed, invalidating the entire Act, the result suggested by the Republican Party intervenors in *B-PEP*, would be much more transgressive of the General Assembly’s intentions. It would effectively override the General Assembly’s intent to open no-excuse mail voting to all eligible Pennsylvania voters, on which millions of Pennsylvanians have come to rely, simply because a single pointless provision in a single section of the Act has been enforced in an unconstitutional manner. And it would also nullify numerous other election administration provisions included in Act 77 that have nothing to do with voting by mail, such as provisions eliminating straight-party voting or providing 90 million dollars of financing for the purchase of new voting equipment (which has already been spent). Invalidating the entire Act would needlessly nullify “years of careful [legislative] consideration and debate...on the reform and modernization of elections in Pennsylvania.” *McLinko v. Commonwealth*, 279 A.3d 539, 543 (Pa. 2022). Such an outcome, exactly the type of outlandish, “in terrorem” threat that this Court rejected in *Stilp*, 905 A.2d at 970-

81, would be unreasonable if not absurd—and it is presumed that “the General Assembly does not intend a result that is absurd[.]...or unreasonable.” 1 Pa.C.S. § 1922(1).

The relief sought here would only vindicate Act 77’s larger aims to expand mail ballot voting to all and would harmonize that aim with the requirements of the Free and Equal Elections Clause.

4. *The Relief Requested Does Not Implicate the Federal Elections Clause.*

Republican Party intervenors in *B-PEP* theorized that the U.S. Constitution prohibits Pennsylvania courts from exercising their basic judicial functions, including reviewing state action or the application of state law for compliance with the provisions of the state constitution. The U.S. Supreme Court reached ***exactly the opposite conclusion*** in *Moore v. Harper*, 600 U.S. 1 (2023).

There, the Court firmly “rejected the contention that the Elections Clause vests state legislatures with exclusive and independent authority when setting the rules governing federal elections.” *Id.*, 26. This Court rejected the same Elections Clause argument in *LWV*, 178 A.3d at 811.

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, reaffirming that “[s]tate courts retain the authority to apply state constitutional restraints” via the power of judicial review accorded to them by their

state constitutions, *id.*, 37; *see also id.*, 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.”).

This is not the highly exceptional case where a state court has acted so far outside its normal ambit as to “transgress the ordinary bounds of judicial review” in a manner that implicates the federal Elections Clause. *Moore*, 600 U.S. at 36. Here, the relief sought is consistent with decades of prior cases reviewing state election rules and practices, including ones that affect federal elections, for compliance with the Free and Equal Elections Clause. *Supra*, 44-46; *see also, e.g., PDP*, 238 A.3d at 371-72; *Page*, 58 Pa. at 364-65; *Mixon*, 759 A.2d at 452; *Applewhite II*, 2014 WL 184988, at *62-64.

Indeed, this is an *easier* case than *Moore*, which involved the North Carolina Supreme Court’s rejection of a congressional districting plan on the grounds that partisan gerrymandering was inconsistent with principles of state constitutional law, including North Carolina’s version of a Free and Equal Elections Clause. 600 U.S. at 7-14. Even in that context—where the state court essentially fashioned a new right of action against partisan gerrymandering based on broad principles of state constitutional law, and reached deep into an area where legislative discretion is traditionally at its maximal breadth—the Supreme 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 even a party in this case, and the Republican Party intervenors from *B-PEP* would not have standing as private political parties to assert whatever rights might be granted to the General Assembly by the U.S. Constitution. And even if the issue were properly presented, this case fits easily within the capacious “ordinary bounds of judicial review” standard. Enforcement of the Free and Equal Clause is part of the Pennsylvania courts’ ancient and inalienable role in safeguarding the fundamental rights independently guaranteed by the Pennsylvania Constitution through judicial review. *See LWV*, 178 A.3d at 812. Appellees seek no more and no less in this case.

PRAYER FOR RELIEF

Petitioners have no adequate remedy at law to redress the wrongs suffered as set forth in this petition. Petitioners have suffered and will continue to suffer irreparable harm as a result of the unlawful acts, omissions, policies, and practices of Respondent, as alleged herein, unless this Court grants the relief requested.

WHEREFORE, Petitioners respectfully request that this Honorable Court exercise its King’s Bench authority and enter judgment in their favor and against the Secretary of Commonwealth and all 67 County Boards of Elections:

- a. Declare pursuant to Pennsylvania’s Declaratory Judgments Act, 42 Pa.C.S. § 7531 *et seq.*, that enforcement of the Election Code’s envelope dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject timely mail ballots submitted by eligible voters, based solely on the absence of a handwritten date on the mail ballot return envelope is unconstitutional under the Free and Equal Elections Clause, Pa. Const. art. I, § 5;
- b. Declare pursuant to Pennsylvania’s Declaratory Judgments Act, 42 Pa.C.S. § 7531 *et seq.*, that enforcement of the Election Code’s envelope dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject timely mail ballots submitted by eligible voters, based solely on the determination that the voter wrote an incorrect date on the mail ballot return envelope is unconstitutional under the Free and Equal Elections Clause, Pa. Const. art. I, § 5;
- c. Preliminarily and permanently enjoin further enforcement of the Election Code’s envelope dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject timely mail ballots submitted by eligible voters, based either on (i) the absence of a handwritten date on the mail ballot return envelope or (ii) the determination that the voter-written date is “incorrect”;
- d. Award Petitioners costs; and
- e. Provide such other and further relief as this Honorable Court deems just and appropriate.

Dated: September 25, 2024

Respectfully submitted,

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Elisabeth A. Theodore*
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David B. Bergman*
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* *Pro hac vice* applications to be filed

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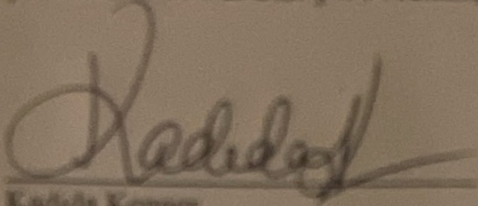
CERTIFICATE OF COMPLIANCE

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

/s/ Stephen Loney

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.



Kadisa Kenner
Chief Executive Officer
New PA Project Education Fund

Dated: September 23, 2024

VERIFICATION


I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

Dated: September 25, 2024

Stacey Taylor
President
State Conference of the NAACP

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

A handwritten signature in cursive script, reading "Philip Hensley-Robin", written over a horizontal line.

Philip Hensley-Robin
Executive Director
Common Cause Pennsylvania

Dated: September 24, 2024

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.



Amy Widestrom
Executive Director
League of Women Voters of Pennsylvania

Dated: September 24, 2024

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

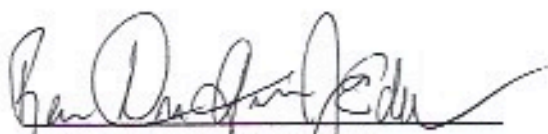


Tim Stevens
Chairman & CEO
Black Political Empowerment Project (B-PEP)

Dated: September 24, 2024

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.




Rev. Dr. Gregory Edwards
Interim Executive Director
POWER Interfaith

Dated: September 25, 2024

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

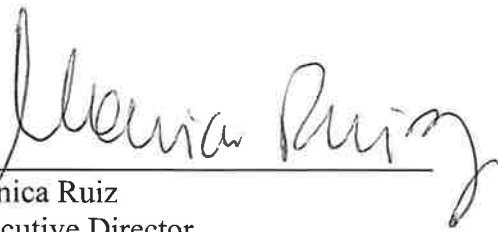
A handwritten signature in black ink, appearing to be 'Diana Robinson', written over a horizontal line.

Diana Robinson
Co-Deputy Director
Make the Road Pennsylvania

Dated: September 24, 2024

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

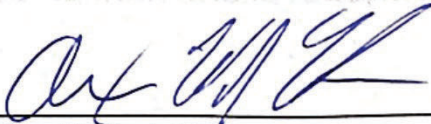


Monica Ruiz
Executive Director
Casa San José

Dated: September 24, 2024

VERIFICATION

I verify that the statements made in the foregoing Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction are true and correct to the best of my knowledge, information and belief. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.



Alex Wallach Hanson
Executive Director
Pittsburgh United

Dated: September 25, 2024