

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

Nos. 1 EAP 2025 & 2 EAP 2025

BRIAN T. BAXTER and SUSAN T. KINNIRY

v.

**PHILADELPHIA BOARD OF ELECTIONS, REPUBLICAN NATIONAL
COMMITTEE; AND REPUBLICAN PARTY OF PENNSYLVANIA**

**APPEAL OF: REPUBLICAN NATIONAL COMMITTEE AND
REPUBLICAN PARTY OF PENNSYLVANIA**

**BRIEF OF *AMICI CURIAE* REPUBLICAN LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES JESSE TOPPER,
PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE KIM
WARD AND MAJORITY LEADER OF THE PENNSYLVANIA SENATE
JOE PITTMAN IN SUPPORT OF APPELLANTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION	2
BACKGROUND	6
ARGUMENT	8
I. The Dating Requirement Is Constitutional.....	8
A. The Dating Requirement Does Not “Clearly, Palpably and Plainly” Violate the Constitution.....	8
B. The Court Below Erred by Skipping Analytical Steps to Improperly Apply Strict Scrutiny Review.....	9
C. The Dating Requirement Does Not Deny the Franchise or Make Voting So Difficult as to Amount to a Denial.	10
II. The Dating Requirement Does Not Abridge Any Voter’s Right to Participate in the Electoral Process.	15
A. The Dating Requirement Does Not Impair Anyone’s <i>Right To Vote</i>	15
B. The Dating Requirement Does Not Discriminate Against or Unduly Burden Certain Voters.	19
III. The Legislative History of the Dating Requirement Further Belies Appellees’ Arguments.....	21
A. The Legislative History of Act 77 Demonstrates a Clear Commitment by the General Assembly to Free and Equal Elections.	22
B. The Dating Requirement Serves a Clear Purpose as a Part of the General Assembly’s Comprehensive Election Code.....	22
IV. The Court Below Usurped the Power of the General Assembly to Legislate for Pennsylvania’s Elections.....	26
CONCLUSION	28
CERTIFICATIONS	

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	4, 14, 15
<i>Ball v. Chapman</i> , 289 A.3d 1 (Pa. 2022)	3, 16, 27
<i>Baxter v. Phila. Bd. of Elections</i> , 325 A.3d 645 (Pa. 2024)	4, 5, 7, 8
<i>Baxter v. Phila. Bd. of Elections</i> , Nos. 1305 & 1309 C.D. 2024, 2024 Pa. Commw. Unpub. LEXIS 582 (Pa. Commw. Ct. Oct. 30, 2024)	<i>passim</i>
<i>Baxter v. Phila. Bd. of Elections</i> , Sep. Term 2024, Docket No. 02481, Order (Phila. C.C.P. Sep. 26, 2024)	7
<i>Baxter v. Phila. Bd. of Elections</i> , Sep. Term 2024, Docket No. 02481, 1925(a) Order (Phila. C.C.P. Oct. 10, 2024)	7
<i>Black Pol. Empowerment Project v. Schmidt</i> , 322 A.3d 221 (Pa. 2024)	4
<i>Black Pol. Empowerment Project v. Schmidt</i> , 283 M.D. 2024, 2024 Pa. Commw. Unpub. LEXIS 464 (Pa. Commw. Ct. Aug. 30, 2024)	8
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	4, 14
<i>Cavanaugh v. Schaeffer</i> , 444 A.2d 1308 (Pa. Commw. Ct. 1982)	11
<i>City Council of Bethlehem v. Marcincin</i> , 515 A.2d 1320 (Pa. 1986)	20, 21
<i>Commonwealth ex rel. Jones v. King</i> , 5 Pa. D.&C. 515 (Dauphin Co. C.C.P. 1924)	20, 21
<i>Commonwealth v. Mihaliak</i> , Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022 (Lancaster Co. C.C.P. 2022)	25
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181 (2008)	21, 25
<i>Democratic Nat'l Comm. v. Wis. State. Legis.</i> , 141 S. Ct. 28 (2020)	26, 27

<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020).....	25
<i>Eakin v. Adams Cty. Bd. of Elections</i> , 1:22-CV-00340 (W.D.Pa.).....	4
<i>In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020</i> <i>General Election</i> , 241 A.3d 591 (Pa. 2020).	3, 24, 27
<i>In re General Election-1985</i> , 531 A.2d 836 (Pa. Commw. Ct. 1987).....	17
<i>In re New Britain Borough Sch. Dist.</i> , 145 A. 597 (Pa. 1929)	17
<i>In re Nomination of Berg</i> , 712 A.2d 340 (Pa. Commw. Ct. 1998).....	11
<i>In re Nomination of Berg</i> , 713 A.2d 1106 (Pa. 1998)	11, 14
<i>In re Walsh</i> , 322 A.3d 900 (Pa. 2024)	2, 9, 10, 12, 13, 14, 15
<i>League of Women Voters of Pa. v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	<i>passim</i>
<i>Mercurio v. Allegheny Cty. Redev. Auth.</i> , 839 A.2d 1196 (Pa. Commw. Ct. 2003)	26
<i>Migliori v. Lehigh Cty. Bd. of Elections</i> , No. 5:22-cv-00397, 2022 U.S. Dist. LEXIS 46352 (E.D. Pa. Mar. 16, 2022)	11, 24
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020)	17, 27
<i>Pa. State Conference of the NAACP Branches v. Schmidt</i> , 97 F.4th 120 (3d. Cir. 2024), <i>cert. denied</i> 220 L.Ed.2d 422, ___ S.Ct. ___ (2025)	3, 16
<i>Pa. State Conference of the NAACP Branches v. Schmidt</i> , No. 1:22-CV-00339 (W.D.Pa.).....	4
<i>Purple Orchid v. Pa. State Police</i> , 813 A.2d 801 (Pa. 2002)	8, 9
<i>Republican National Committee v. All 67 Cty. Bds. of Elections</i> , 326 A.3d 402 (Pa. 2024).....	5

<i>Ritter v. Lehigh Cty. Bd. of Elections</i> , No. 1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1 (Pa. Commw. Ct. Jan. 3, 2022).....	24
<i>Ritter v. Migliori</i> , 142 S. Ct. 1824 (2022).....	12, 16, 18
<i>Shankey v. Staisey</i> , 257 A.2d 897 (Pa. 1969)	21
<i>Shoemaker v. Lawrence</i> , 31 Pa. D.&C. 681 (Dauphin Co. C.C.P. 1938).....	18
<i>Stilp v. Commonwealth</i> , 905 A.2d 918 (Pa. 2006).....	8
<i>Weber v. Shelley</i> , 347 F.3d 1101 (9th Cir. 2003).....	25, 28
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914)	6, 9, 10, 12, 13, 17, 18
<i>Working Families Party v. Commonwealth</i> , 209 A.3d 270 (Pa. 2019)	20

Constitutional and Statutory Authorities

U.S. Constitution amend XIV	4, 9, 10
Pa. Constitution Art. I, Section 5	<i>passim</i>
25 P.S. § 3146.1	22
25 P.S. § 3146.6	2, 3, 5, 7, 23
25 P.S. § 3150.16	2, 3, 5, 23
52 U.S.C. § 10101	3, 16

Other Authorities

Act No. 37, Session of 1963, Pub. L. No. 707 § 22.....	22
Act of October 31, 2019, P.L. 552, No. 77 (Act 77).	22, 23, 25, 27

Charles R. Buckalew, <i>An Examination of the Constitution of Pennsylvania: Exhibiting The Derivation and History of Its Several Provisions</i> (1883).....	19, 20
GROUNDHOG DAY (Columbia Pictures 1993).....	2, 5, 28
IMDb, <i>Groundhog Day</i> , http://www.imdb.com/title/tt0107048/ (last visited Feb. 22, 2025).....	2
Pa.R.A.P. 1925(a)	7

STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici Curiae, Republican Leader of the Pennsylvania House of Representatives Jesse Topper, President Pro Tempore of the Pennsylvania Senate Kim Ward, and Majority Leader of the Pennsylvania Senate Joe Pittman (collectively the “Legislative Leaders” or “*Amici Curiae*”) hereby file this *amici curiae* brief pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(1)(i) in support of Appellants (Intervenor-Respondents in the proceedings below).

This case concerns the constitutionality of election laws enacted by the Pennsylvania General Assembly (the “General Assembly”), including the Legislative Leaders. The provisions challenged here have been the subject of *numerous* challenges, under a plethora of legal theories, over the past several election cycles. The Legislative Leaders have either moved to intervene or filed an *amicus curiae* brief in many of these cases, including in the proceedings below.²

The Legislative Leaders possess a strong legal interest in protecting their exclusive authority, as legislators in the General Assembly, to enact—or repeal—legislation concerning the administration of elections in Pennsylvania, a role which Appellees ask this Court to usurp. Accordingly, the Legislative Leaders file this

¹ No party’s counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

² In the proceedings below, Representative Topper’s predecessor, Representative Bryan Cutler, participated as *amicus curiae* along with Senators Ward and Pittman.

amici curiae brief to bring issues to this Court’s attention about which they possess both a heightened interest and unique viewpoint.

INTRODUCTION

In the words of Phil Connors, the fictional Pittsburgh weather reporter played by Bill Murray, “Well, it’s Groundhog Day . . . again. . .” GROUNDHOG DAY (Columbia Pictures 1993).³ The simple, straightforward requirement that mail-in and absentee ballots contain a valid date has been unsuccessfully attacked ***over and over and over again*** in state and federal courts throughout Pennsylvania. Just like in the movie, courts in Pennsylvania are reliving this day in a seemingly never-ending series of court challenges—now entering their ***sixth*** year.

This saga began back in 2020 in cases where courts were asked “to decide whether the Election Code really means what it says”:⁴ namely whether the plain requirement that absentee and mail-in voters “shall . . . fill out, date and sign the

³ In the 1993 movie, *Groundhog Day*, a Pittsburgh-area weather reporter

is reluctantly sent to cover a story about a weather forecasting ‘rat’ (as he calls it). This is his fourth year on the story, and he makes no effort to hide his frustration. On awaking the ‘following’ day, he discovers that it’s Groundhog Day again, and again, and again. First he uses this to his advantage, then comes the [realization] that he is doomed to spend the rest of eternity in the same place, seeing the same people do the same thing every day.

IMDb, *Groundhog Day*, <https://www.imdb.com/title/tt0107048/> (last visited Feb. 22, 2025).

⁴ *In re Walsh*, 322 A.3d 900, 913 (Pa. 2024) (Wecht, J., concurring).

declaration printed on such [ballot return] envelope” actually needed to be complied with. 25 P.S. § 3146.6; 25 P.S. § 3150.16(a) (same).

After divergent decisions in proceedings below, “[f]our Justices agreed that failure to comply with the date requirement would render a ballot invalid in any election after 2020. Pennsylvania’s candidates, electors, and local officials therefore were on notice that ballots must be dated, and that failure to provide a date would result in disqualification.” *Ball v. Chapman*, 289 A.3d. 1, 22 (Pa. 2022) (citing *In re Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058, 1079-80 (Pa. 2020) (Wecht, J., concurring)).

In the intervening period between *In re Canvass* and *Ball*, a new line of attack on this statutory provision ensued: whether it violated the Materiality Provision of the Civil Rights Act of 1964. 52 U.S.C. § 10101(a)(2)(B). Five years of litigation then ensued in both state and federal courts before this issue was definitively resolved by the Third Circuit Court of Appeals last year. *See Pa State Conf. of NAACP v. Schmidt*, 97 F.4th 120, 125 (3d. Cir. 2024), *cert. denied*, 220 L.Ed.2d 422, ___ S.Ct. ___ (2025) (holding that the Materiality Provision “does not apply to rules, like the date requirement, that govern *how* a qualified voter must cast his ballot for it to be counted.”) (emphasis in original).

Nor have these two lines of cases been the only litigation on this issue. Separate federal constitutional challenges remain pending in the District Court for

the Western District of Pennsylvania. *See Pa. State Conf. of NAACP v. Schmidt*, Case No. 1:22-CV-00339 (where federal Equal Protection and First and Fourteenth Amendment Right-to-Vote/*Anderson-Burdick* challenges to the dating requirement remain pending); *see also Eakin v. Adams Cty. Bd. of Elections*, 1:22-CV-00340 (where First and Fourteenth Amendment Right-to-Vote/*Anderson-Burdick* challenges to the dating requirement remains pending).

The latest volley in this seemingly never-ending saga, however, has been a string of cases, such as this one, where litigants have argued that the dating requirement violates the Free and Equal Elections Clause of the Pennsylvania Constitution. The first of these cases, brought by the same counsel who brought the instant case and who have brought the majority of the litigation challenging the dating requirement, had to be dismissed when the Commonwealth Court’s “*en banc* majority, in its rush to resolve the merits, failed to adequately assess whether it possessed subject matter jurisdiction over the case in the first place.” *Baxter v. Phila. Bd. of Elections*, 325 A.3d 645, 648 (Pa. 2024) (Dougherty, J., concurring) (*citing Black Pol. Empowerment Project v. Schmidt*, 322 A.3d 221 (Pa. 2024)).

Again, here, in this latest litigation, sparse and rushed proceedings in the Philadelphia Court of Common Pleas preceded similarly rushed proceedings in the Commonwealth Court. This Court, however, wisely stepped in and entered a *per curiam* order staying the Commonwealth Court’s judgment so that it “not be applied

to the November 5, 2024 General Election.” *Baxter*, 325 A.3d at 645. Even with this clear instruction, county boards, including the one litigating the present case, *still* then attempted to ignore this Court’s Order, leading to an additional order “that all Respondents, including the Boards of Elections in Bucks County, Montgomery County, and Philadelphia County, **SHALL COMPLY** with the prior rulings of this Court in which we have clarified that mail-in and absentee ballots that fail to comply with the requirements of the Pennsylvania Election Code, *see* 25 P.S. §§ 3146.6(a), 3150.16(a), **SHALL NOT BE COUNTED** for purposes of the election held on November 5, 2024.” *Republican Nat’l Comm. v. All 67 Cty. Bds. of Elections*, 326 A.3d 402, 403 (Pa. 2024) (*per curiam*) (citations omitted) (emphasis in original).

Now, this Court, mirroring Groundhog Day’s protagonist, finds itself *again* needing to answer the question whether writing a date on an envelope is an unconstitutional burden—notwithstanding that this activity, which requires, at most, looking at a calendar or the ever-ubiquitous cell phone and then writing the date, is about as uncomplicated a requirement as could be imagined.

Therefore, this Court should definitively answer and uphold this clear and unambiguous requirement. Indeed, it’s time for these spurious attacks to cease and for Pennsylvanians to have confidence that their elections will be conducted freely, fairly, and securely through the carefully-considered procedures enacted by the General Assembly.

BACKGROUND

The Pennsylvania Constitution provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5 (“Free and Equal Elections Clause”). Few cases have been brought under it, and even fewer such challenges have been successful.

In an early case applying the provision, this Court elaborated that:

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; 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 denied him.

Winston v. Moore, 91 A. 520, 523 (Pa. 1914). More recently, the Supreme Court summarized that “the actual and plain language of” the clause is to “mandate[] that all voters have an *equal opportunity* to translate their votes into representation.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). (emphasis added) (“*LWV*”).

However, in the present case, the Philadelphia Court of Common Pleas and the Commonwealth Court panel’s majority misapplied the relevant precedent and reached errant decisions.

At the trial court level, the proceedings were close to non-existent. Beyond the language of the trial court’s order, which summarily concluded that “the refusal to count a ballot due to a voter’s failure to ‘date . . . the declaration printed on [the outer] envelope’ used to return his/her mail-in ballot, as directed in 25 P.S. §§ 3146.6(a) and 3150.16(a), violates Art. I, § 5 of the Constitution of the Commonwealth of Pennsylvania. . .”, there is very little record to review. Trial Court Order at 2 (Sep. 26, 2024). Indeed, the trial court’s supporting Rule 1925(a) Opinion (entitled a Rule 1925(a) Order) provides **no explanation** for its significant conclusion. In a difficult to discern page-and-a-half order “that is replete with typos making it difficult to read”⁵, the trial court only offered one *ipse dixit* sentence as to its rationale on the merits: “The court’s reasons for its decisions were fully stated on the record at the hearing and are reflected in the transcript.” 1925(a) Opinion at 2.

The Commonwealth Court’s Majority Opinion is arguably just as thin, as it is primarily devoted to explaining, with less than a week to go before November’s General Election, why it “issued a disruptive holding that, in effect, changes the game from the prevailing *status quo* on the very eve of the election, long after mail ballots have been shipped and returned, and guidance has been issued to voters, boards of elections, and election workers concerning the handling of undated and

⁵ *Baxter v. Phila. Bd. of Elections*, Nos. 1305 & 1309 C.D. 2024, 2024 Pa. Commw. Unpub. LEXIS 582, at *20 n.17 (Pa. Commw. Ct. Oct. 30, 2024) (“*Baxter*”).

misdated ballots.” *Baxter v. Phila. Bd. of Elections*, 325 A.3d 645, 652 (Pa. 2024) (Dougherty, J., concurring). “On the merits, the majority essentially re-adopted its earlier, now-vacated analysis from *BPEP I*.” *Id.* at 650.

But that merits analysis was similarly rushed and misapplied the Free and Equal Elections Clause. When properly considered, the Clause’s history shows that the dating requirement is not inconsistent with the history, meaning, and intent of the Free and Equal Elections Clause. “Each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives.” *LWV* at 814 (emphasis in original). As explained below, the dating requirement does not violate this fundamental precept.

ARGUMENT

I. The Dating Requirement Is Constitutional.

A. The Dating Requirement Does Not “Clearly, Palpably and Plainly” Violate the Constitution.

A bedrock principle of judicial review in Pennsylvania is the “judicial presumption that our sister branches take seriously their constitutional oaths.” *Stilp v. Commonwealth*, 905 A.2d 918, 938-39 (Pa. 2006). “It is well settled that a statute is presumed to be constitutional and will not be declared unconstitutional unless it *clearly, palpably and plainly violates the constitution*.” *Purple Orchid v. Pa. State Police*, 813 A.2d 801, 805 (Pa. 2002) (internal citations omitted) (emphasis added). Because of this high standard, “the party challenging the constitutionality of a statute

has a heavy burden of persuasion.” *Id.* For the reasons discussed below, the dating requirement *is* constitutional, and Petitioners have not come close to meeting their “heavy burden” of showing that the dating requirement “clearly, palpably and plainly violates the constitution.” *Id.*

B. The Court Below Erred by Skipping Analytical Steps to Improperly Apply Strict Scrutiny Review.

The court below claimed that the dating requirement for absentee and mail-in ballots should be subject to strict scrutiny. But this presupposes that the dating requirement “burdens” and “interferes with” the right to vote in the first place. It does not. *See In re Walsh*, 322 A.3d 900, 909 (Pa. 2024) (requiring as a threshold matter to “indicate how a statute that requires an elector voting by provisional ballot to sign the ballot’s outer envelope denies the franchise or makes it so difficult as to amount to a denial.”)

In *League of Women Voters of Pa. v. Commonwealth* (“LWV”), this Court held that it considers claims under the Free and Equal Elections Clause as “distinct” from those brought under the U.S. Constitution, “adjudicat[ing] them separately, utilizing the relevant Pennsylvania and federal standards.” 178 A.3d 737, 812 (Pa. 2018). In considering Free and Equal Elections Clause cases, this Court “applie[s] the interpretation . . . set forth in *Winston [v. Moore]*,” while Fourteenth Amendment cases “utilize[] the test for an equal protection clause violation [by] examin[ing]

whether [a] statute serve[s] to impermissibly classify voters without a reasonable basis to do so.” *Id.*

Specifically, this Court in *Winston* held that

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the same right to cast his ballot and have it honestly counted; 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 denied him.

91 A. 520, 523 (Pa. 1914).

Therefore, in a challenge pursuant to the Free and Equal Election Clause, a challenger must first “indicate how a statute . . . denies the franchise or makes it so difficult as to amount to a denial.” *In re Walsh*, 322 A.3d 900, 909 (Pa. 2024). Critically, however, the Commonwealth Court’s majority skips over this threshold question and immediately jumps to strict scrutiny review.

Therefore the initial question before this Court is to analyze, for the first time, whether the date and sign requirement “denies the franchise or makes it so difficult as to amount to a denial.” *Walsh*, 322 A.3d at 909.

C. The Dating Requirement Does Not Deny the Franchise or Make It So Difficult as to Amount to a Denial.

Far from being a “burden” or having a “real and appreciable impact on voters’ rights” (much less a “severe” one), writing the date on the ballot envelope as part of

the voter declaration is one of the easiest steps in the entire voting process—significantly easier than finding a mailbox at which to deposit a ballot and little more burdensome than licking (or peeling and sticking) the flap of the completed envelope. Another court “conclude[d] that the burden imposed by the handwritten date requirement is slight” *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 U.S. Dist. LEXIS 46352, at *24 (E.D. Pa. Mar. 16, 2022) (rejecting a strict scrutiny standard and considering only whether Pennsylvania has “important regulatory interests . . . to justify the restrictions”).⁶

The dating requirement is far less burdensome than other challenged election procedures that were not subjected to strict scrutiny analysis. For example, in *Berg*, the petitioner challenged Pennsylvania’s requirement that prospective gubernatorial candidates obtain 100 signatures from ten counties on their nominating petition. *In re Nomination of Berg*, 712 A.2d 340 (Pa. Commw. Ct. 1998), *aff’d* 713 A.2d 1106 (Pa. 1998). A similar requirement for state Supreme Court candidates was previously challenged in *Cavanaugh v. Shaeffer*, 444 A.2d at 1308. In both cases, this Court concluded that the ballot access requirements did not have a “real and appreciable impact” on the right to vote and therefore applied the rational basis test, rather than strict scrutiny. *Berg*, 713 A.2d at 1109 (*quoting Cavanaugh*, 444 A.2d at 1311).

⁶ Importantly, while this District Court decision was later overruled on other grounds, this part of the decision (declining to apply strict scrutiny) was not appealed to the Third Circuit. *See Migliori v. Lehigh Cty. Bd. of Elections*, No. 22-1499, Appellant’s Brief (ECF # 32) (filed March 29, 2022).

Here, at worst, an “individual’s vote [may not be] counted *because he or she did not follow the rules for casting a ballot*,” which is not a denial of “the right to vote.” *Ritter v. Migliori*, 142 S.Ct. 1824, 1825 (2022) (Alito, J., dissenting) (emphasis added). “Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the *forfeiture* of the right to vote, not the *denial* of that right.” *Id.* (emphasis added).

Indeed, this Court, need only follow its precedential analysis from last fall’s *Walsh* decision. 322 A.3d 900 (Pa. 2024). *Walsh* concerned two provisional ballots challenged by candidates in a closely contested legislative election. *Id.* at 902-03. Relevant here, one of those ballots was challenged for being unsigned. In arguing that the unsigned ballot should be counted, the county board claimed that not doing so violated the Free and Equal Elections Clause because the signature requirement was “constitutionally suspect” by “deny[ing] the franchise itself, or mak[ing] it so difficult as to amount to a denial.” *Id.* (quoting the board’s brief quoting *Winston*, 91 A. 520, 523).

But this Court was “not persuaded constitutional principles require us to ignore such statutory requirements” and rejected the board’s *ipse dixit* argument (accepted here below) that it is proper to summarily conclude that a statutory requirement “den[ies] the franchise, or make[s] it so difficult as to amount to a denial.” *Walsh*, 322 A.3d at 909; *Winston*, 91 A. at 523.

Rather, the *Walsh* court held that “referenc[ing]” the Free and Equal Election Clause was not enough to sustain a challenge. *Walsh*, 322 A.3d at 909. Instead, a challenge must “*indicate how* a statute . . . denies the franchise or makes it so difficult as to amount to a denial.” *Id.* (emphasis added).

Accordingly, after reviewing the long line of cases concerning the oft-litigated dating requirement as analogous, the *Walsh* Court held that it was “not persuaded constitutional principles require us to ignore such statutory requirements” as the board failed to “indicate how a statute that requires an elector voting by provisional ballot to sign the ballot’s outer envelope denies the franchise or makes it so difficult as to amount to a denial.” *Id.* (citing *Winston*, 91 A. at 523); *see also id.* at 920 (Wecht, J., concurring) (“considerations under the Constitution’s Free and Equal Election Clause may moderate [the Election Code’s] enforcement in particular cases. . . [but] . . . Neither the Pennsylvania Constitution nor federal law is implicated in this case.”).

In the proceedings below, the Commonwealth Court acknowledged the controlling precedent of *Walsh*, albeit in a footnote, but it summarily and unpersuasively distinguished it “because, among other reasons, it involved provisional ballots, which are not at issue here.” *Baxter*, 2024 Pa. Commw. Unpub. LEXIS 582, at *46 n.37. First, while it is difficult to conceive of closer cousins than between mail-in ballots and provisional ones—both of which necessitate a

handwritten envelope containing a declaration for security purposes which is then later reviewed by the county board of elections—the even broader point is that the *Walsh* court reiterated the broad construct of *how to evaluate* a Free and Equal Elections Clause claim, not just merely in the context of provisional ballots.

Given that clear framework, the court below failed to explain how writing a date imposes a “severe” burden that “make[s] it so difficult for some voters to exercise the franchise that it effectively amounts to a denial of the franchise itself. *Baxter* at *47. Indeed, this Court should follow the practical wisdom in *Berg* that “[t]o subject every voting regulation to strict scrutiny . . . would tie the hands of states seeking to assure that elections are operated equitably and efficiently.” 713 A.2d at 1109 (*citing Burdick v. Takushi*, 504 U.S. 428 (1992)).

The effect of summarily applying strict scrutiny to run-of-the-mill voting procedures cannot be overstated. As the U.S. Supreme Court has cautioned, “[e]lection laws will invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.’” *Burdick*, 504 U.S. at 433 (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). “Consequently, to subject **every** voting regulation to strict scrutiny and to require that the regulation be

narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* (emphasis added).

The lower court would effect a mammoth shift in Pennsylvania jurisprudence if every state election regulation were subject to strict scrutiny, overturning centuries of jurisprudence, including *Walsh* from just last fall, in the process. This level of analysis is unwarranted in the present case, and the decision of the court below should be reversed.

II. The Dating Requirement Does Not Abridge Any Voter’s Right to Participate in the Electoral Process.

The Free and Equal Election Clause permits reasonable election administration regulations if those regulations do not impair or unduly burden the right to vote itself. *See LWW* at 809. The dating requirement falls squarely within this permissible category, a reasonable regulation directing the manner of exercising the right to vote. It is a minor procedural requirement that does not prevent any eligible voter from casting one’s ballot or having one’s vote counted if the voter complies. The requirement applies equally to all absentee and mail-in voters, without discriminating against any particular group or class of voters.

A. The Dating Requirement Does Not Impair Anyone’s *Right To Vote*.

The court below did correctly frame the Free and Equal Elections Clause as recognizing “[t]he fundamental *right to vote*. . .” *Baxter* at *34 (emphasis added).

As this Court observed, the Free and Equal Elections Clause “strike[s] . . . at all regulations of law which shall impair the *right* of suffrage,” and when legal voters are “denied the *right* to vote, the election is not free and equal.” *LWV* at 809, 813 n.71 (emphasis added).

But “[e]ven the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, *not the denial of that right*.” *Ritter v. Migliori*, 142 S.Ct. at 1825 (Alito, J., dissenting) (emphasis added). This is precisely why the Third Circuit recently concluded that “individuals are not ‘denied’ the ‘right to vote’ if non-compliant ballots [lacking a date] are not counted.” *Pa. State Conference of the NAACP Branches v. Schmidt*, 97 F.4th 120, 135 (3d. Cir. 2024), *cert. denied*, 220 L.Ed.2d 422, __ S.Ct. __ (2025). While arising in the context of the Materiality Provision, the Third Circuit nonetheless centered its analysis specifically on whether the “date and sign” requirement impaired the *right* to vote, ultimately concluding that there was “no authority that the ‘right to vote’ encompasses the right to have a ballot counted that is defective under state law.” *Id.* at 133; *see also Ball*, 289 A.3d 1, 22 (“[F]ailure to comply with the date requirement would render a ballot invalid in any election after 2020. Pennsylvania’s candidates, electors, and local officials therefore were on notice that ballots must be dated, and that failure to provide a date would result in disqualification.”).

Indeed, just as federal courts have agreed that the “date and sign” requirement does not deny the “right to vote” for purposes of the Civil Rights Act, the same holds true for purposes of the Pennsylvania Constitution, where a violation would require the *right* to vote to be impaired.

The history of Free and Equal Elections Clause cases makes this plain. In two such cases, election deadlines were extended when a natural disaster or emergency was found to impede voters’ ability to timely cast their ballots. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); *In re General Election-1985*, 531 A.2d 836, 838-39 (Pa. Commw. Ct. 1987). In these instances, the courts concluded that the original election deadlines would have made voting “so difficult as to amount to a denial” of the *right* to vote. *Winston*, 91 A. at 523.

The other applications of the Free and Equal Elections Clause arose in the context of voting districts that either explicitly or implicitly denied certain Pennsylvanians their *right* to vote. In the early 20th century, a new school district was created that overlapped with the boundaries of two existing school districts. *See In re New Britain Borough Sch. Dist.*, 145 A. 597 (Pa. 1929). This Court found that residents of the two former school districts would “be deprived of their *right* to vote for school directors as allowed in all other fourth-class districts.” *Id.* at 599 (emphasis added). A similar result came when the legislative redistricting act of 1937 excluded ten municipalities from any legislative district, obviously resulting in

voters in those communities being “deprived of the *right* to vote for a representative in the General Assembly.” *Shoemaker v. Lawrence*, 31 Pa. D.&C. 681, 686 (Dauphin Co. C.C.P. 1938) (emphasis added).

More recently, this Court struck down the General Assembly’s 2011 congressional redistricting plan on the basis that it allegedly “subordinate[d] the traditional redistricting criteria in service of achieving unfair partisan advantage,” which would “undermine[] voters’ ability to exercise their *right* to vote in free and ‘equal’ elections.” *LWV* at 821 (emphasis added).

Contrary to these determinations, which were based on an abridgement of the *right* to vote, every eligible Pennsylvania voter currently “has the *right* to cast his [or her] ballot”. *Winston*, 91 A. at 523; *see also Ritter*, 142 S.Ct. at 1825 (“When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot.”). Nor does the dating requirement “deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston*, 91 A. at 523. Instead, the dating requirement is an exceptionally easy step to complete that does not impose any significant additional burden on voters beyond the other steps they must already take to complete and return their ballot. Voters must already fill out and sign the declaration on the envelope, which includes other

attestations and identifying information. The simple step of writing the date on the envelope does not meaningfully increase the burden or complexity of the process.

The dating requirement does not deny Pennsylvanians their right to vote (or make voting so difficult as to effectively impair the right), nor preclude them from having their ballot counted if they record the date on the ballot envelope; thus the requirement falls outside the ambit of what is proscribed by the Free and Equal Elections Clause.

B. The Dating Requirement Does Not Discriminate Against or Unduly Burden Certain Voters.

Not only does the dating requirement not impede any individual Pennsylvanian's right to vote, it also does not benefit (or hinder) any group of voters. This is especially relevant in light of the history of the Free and Equal Elections Clause, which was first introduced to the Pennsylvania Constitution following a century of economic, religious and ethnic factionalism and a bloody revolution against a heavy-handed British Crown. *See LWV*, 178 A.3d at 804-08. The Free and Equal Elections Clause should thus be “viewed against the backdrop of . . . intense and seemingly unending regional, ideological, and sectarian strife” as an attempt to end “the dilution of the right of the people of this Commonwealth to select representatives” of their choosing. *Id.* at 808-09. Charles Buckalew, a delegate to Pennsylvania's 1873 Constitutional Convention, explained that the intent of the Free and Equal Elections Clause was to “exclude not only all invidious discriminations

between individual electors, or classes of electors, but also between different sections or places in the State.” Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania: Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883); *see also LWV*, 178 A.3d at 809 (explaining that the Pennsylvania Supreme Court “has ascribed the same expansive meaning to the terms ‘free and equal’ in Article I, Section 5” as Buckalew).

The dating requirement does not disfavor any particular geographic, economic, religious, ethnic, regional, ideological, or partisan faction. Far from discriminating against any voter “on the basis of his or her particular beliefs or view,” *LWV*, 178 A.3d at 809, or based on the “sections or places in the State” where they live, Buckalew, *An Examination of the Constitution of Pennsylvania*, *supra*, “[e]very voter is treated alike” by the ballot signature requirement, “[e]very voter has the same right as any other voter, and every voter has the right to cast his ballot and have it counted.” *Commonwealth ex rel. Jones v. King*, 5 Pa. D.&C. 515, 518 (Dauphin Co. C.C.P. 1924).

In fact, Pennsylvania courts have rejected challenges under the Free and Equal Elections Clause when the challenged law applies equally to all voters. *See, e.g., Working Families Party v. Commonwealth*, 209 A.3d 270, 282 (Pa. 2019) (upholding Pennsylvania’s “anti-fusion” statutes because minority party supporters had “the same right as every other voter”); *City Council of Bethlehem v. Marcincin*, 515 A.2d

1320, 1324 (Pa. 1986) (upholding a term limits ordinance because it “neither ‘denies the franchise’ to the electors nor dilutes the vote of any segment of the constituency”); *Shankey v. Staisey*, 257 A.2d 897, 899 (Pa. 1969) (upholding a ballot access statute because “minority party candidates and their supporters” had to “secure the same showing of public support before being put on the ballot as required by a majority party candidate”); *King*, 5 Pa. D.&C. at 518 (upholding a ballot access law because “[e]very voter is treated alike”).

In light of the intent behind the Clause and the history of its interpretation, this Court should reject Appellees’ claim.

III. The Legislative History of the Dating Requirement Further Belies Appellees’ Arguments.

Courts have consistently recognized that state legislatures have a legitimate interest in enacting reasonable procedural requirements to ensure the integrity and reliability of the electoral process. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (upholding voter ID law as a reasonable procedural requirement to deter fraud and promote public confidence in elections). While “those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause,” *id.*, as explained above, the dating requirement is a reasonable and non-discriminatory regulation of the electoral process that does not deprive any Pennsylvanian of the right to vote. The requirement falls well within the General Assembly’s plenary authority to establish procedures for the orderly and secure

administration of elections and is entirely consistent with the intent and meaning of the Free and Equal Elections Clause.

A. The Legislative History of Act 77 Demonstrates a Clear Commitment by the General Assembly to Free and Equal Elections.

Appellees have argued that the dating requirement enacted by the General Assembly curtails voting rights, but in reality, Act 77 is the most significant voting expansion in the Commonwealth in a generation.

The dating requirement has a long history as a part of the Commonwealth's Election Code. In 1963, absentee voting was extended from military voters to the general public. *See* Act No. 37, Session of 1963, Pub. L. No. 707, § 22. Even then, absentee voting was only permitted for those with a statutorily-defined reason, such as a physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. In order to cast an absentee ballot, a Pennsylvania voter was required to provide a permissible reason to do so and would have to return his or her absentee ballot no later than 5:00 PM on the Friday before the election. *Id.*

Since that 1963 enactment, the procedure for completing and submitting an absentee ballot has remained consistent. In particular, after marking his or her ballot, a Pennsylvania absentee voter must:

[F]old the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.' This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector . . . *The elector shall then fill out, date*

and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail . . . or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added).

In 2019, Act 77 dramatically expanded the ability for Pennsylvanians to vote by mail, creating a new category of “no excuse” mail-in voting. For reasons including consistency with other non-in-person ballot forms, and familiarity for voters, Act 77 maintained identical procedures for filling out, dating and signing the ballot return envelope for no-excuse mail-in ballots that had always applied with respect to absentee ballots. *Compare* 25 P.S. § 3150.16(a) (procedure for mail-in ballots) *with* 25 P.S. § 3146.6(a) (procedure for absentee ballots). Far from making it harder to vote, the upshot of Act 77 was making it dramatically *easier* for Pennsylvanians to cast a ballot on or before election day.

B. The Dating Requirement Serves a Clear Purpose as a Part of the General Assembly’s Comprehensive Election Code.

Despite Appellees’ and the court below’s glib pronouncements to the contrary, numerous courts have recognized that the requirement that electors date and sign their absentee or mail-in ballot return envelope serves a variety of important election administration purposes. For example,

The date on the ballot envelope provides proof of when the ‘elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot[.]’ The date also ensures the elector

completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes.

In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020) (“2020 Canvass”) (Dougherty, J., concurring and dissenting) (citation omitted); *see also Ritter v. Lehigh Cty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1, at *10-11 (Pa. Commw. Ct. Jan. 3, 2022) (same).

The *Migliori* District Court similarly concluded that these statutory provisions serve “an important public interest in the integrity of an election process that ensures fair, efficient, and fraud-free elections is served by compliance with the statute mandating the handwritten date requirement.” *Migliori*, 2022 U.S. Dist. LEXIS 46352, at *38-39. And as Judge Leeson further observed:

An elector’s compliance with the signature and date requirement is an important guard against fraud. Where an elector fully complies with the instructions on the outer envelope, the electoral authorities conducting the election can be assured of the date on which the ballot was executed. Where, however, the outer envelope remains undated, the possibility for fraud is heightened, as individuals who come in contact with that outer envelope may, post hoc, fill in a date that is not representative of the date on which the ballot was executed.

Id. at *38.

A practical example of the application of this requirement comes from a recent Lancaster County election fraud case concerning a mail-in ballot cast 12 days after a voter’s death. There the date supplied on the ballot declaration was the only piece

of evidence of fraud on the face of the ballot, and in conjunction with the Commonwealth's SURE system, the date on the ballot declaration helped to detect fraud. *See Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022.

As the U.S. District Court for the Western District of Pennsylvania previously concluded, “the Pennsylvania legislature ‘weigh[ed] the pros and cons,’ and adopted a broader system of ‘no excuse’ mail-in voting as part of the Commonwealth’s Election Code.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 395 (W.D. Pa. 2020) (citing *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)). “And the key point is that the legislature made that judgment in the context of erecting a broader election scheme that authorizes other forms of voting and has many . . . safeguards in place to catch or deter fraud and other illegal voting practices.” *Id.* at 396. “In this larger context, the Court cannot say that the balance Pennsylvania struck across the Election Code was unreasonable, illegitimate, or otherwise not ‘sufficiently weighty to justify’” *Id.* (citing *Crawford*, 553 U.S. at 191).

Lastly, as noted in Part III.A above, the General Assembly mirrored the existing ballot return procedures for absentee ballots when crafting Act 77 to create no-excuse mail-in voting. Again, this was an intentional approach to remain consistent with laws governing absentee ballot procedures, and maintain familiarity

for voters wishing to take advantage of mail-in voting who may have previously cast an absentee ballot.

* * *

Therefore, given the General Assembly’s well-recognized constitutional plenary power to prescribe the time, place, and manner of the Commonwealth’s elections, the clear legislative mandate of what is required of the elector, and the election-administration purposes of the statute, the statute in question is an important part of Pennsylvania’s Election Code that should be modified only by legislative enactment.

IV. The Court Below Usurped the Power of the General Assembly to Legislate for Pennsylvania’s Elections.

It is axiomatic that “[t]he judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceeds along suspect lines.” *Mercurio v. Allegheny Cty. Redev. Auth.*, 839 A.2d 1196, 1203 (Pa. Commw. Ct. 2003) (internal citations omitted). Indeed, courts should be cautious before:

[S]woop[ing] in and alter[ing] carefully considered and democratically enacted state election rules when an election is imminent.

That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the State’s interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.

Democratic Nat’l Comm. v. Wis. State Legis., 141 S. Ct. 28, 31 (2020) (Roberts, C.J., concurring). That is precisely why Justice Wecht wrote in *2020 Canvass* that “[a] court’s only ‘goal’ should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said*.” 241 A.3d at 1082 (Wecht, J., concurring and dissenting) (emphasis in original).

“While the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Pa. Democratic Party*, 238 A.3d at 374. Moreover, this Court has previously “determined that the Election Code’s command [regarding the dating requirement] is unambiguous and mandatory.” *Ball*, 289 A.3d at 21-22 (enjoining undated ballots from being counted). Thus, the only way around that “unambiguous and mandatory” application would be for this Court to find that the dating requirement impacts the *right* to vote (which it doesn’t, as discussed in Part II.A), **and** to find discrimination in a statute that, by its express terms treats all voters **equally**.

As such, this Court should reverse the court below and respect the right of the General Assembly to legislate for Pennsylvania’s elections.⁷

⁷ Given that the Commonwealth Court clearly erred in barring enforcement of the Election Code’s mail-in and absentee ballot envelope dating requirements, there is no need for this Court to address the second question presented concerning whether the lower court’s ruling triggered Act 77’s nonseverability provision. The fact that such a question is even before this Court, however, speaks loudly as to the rushed proceedings below.

CONCLUSION

In *Groundhog Day*, Phil Connors laments that “I wake up every day, right here, right in Punxsutawney, and it’s always February 2nd, and there’s nothing I can do about it.” *GROUNDHOG DAY* (Columbia Pictures 1993).

The difference here is that there *is* something that this Court can do about this endless loop: answer the question with finality. Writing a date is simpler than most of the other requirements that apply to voting. As demonstrated by a recent occurrence in Lancaster County, it serves a legitimate purpose ensuring the integrity of our elections as a part of the Commonwealth’s comprehensive Election Code.

The General Assembly, acting on behalf of the people of Pennsylvania, simply carried a longstanding requirement for absentee voting over to mail-in voting. The date requirement is clearly not unconstitutional regardless of the pretense under which a challenge is raised. Therefore, for the foregoing reasons, *Amici Curiae* respectfully request that this Court uphold the General Assembly’s constitutional power and responsibility as the Commonwealth’s “democratically-elected representatives to weigh the pros and cons of various balloting systems,” *Weber*, 347 F.3d at 1106, by reversing the decision of the court below.

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Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Amicus Curiae Brief contains 6,921 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

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

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