

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

**Petitioners,**

**v.**

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

**Respondents.**

**No. 283 MD 2024  
Original Jurisdiction**

**MEMORANDUM OF LAW IN  
SUPPORT OF PETITIONERS'  
APPLICATION FOR  
PRELIMINARY INJUNCTION**

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## INTRODUCTION

Since 2022, thousands of Pennsylvania voters in every election have had their mail ballots rejected because they did not write the date on or “incorrectly” dated the outer envelope. This mass disenfranchisement continues despite the fact that the date written on the outer envelope is utterly useless. It plays no role in establishing a mail ballot’s timeliness or the voter’s eligibility and is not used to detect fraud. Thousands more will undoubtedly face disenfranchisement on the same basis in this November’s presidential election. This severe penalty for a meaningless mistake violates Article I, Section 5 of the Pennsylvania Constitution – the “Free and Equal Elections” clause.

The Free and Equal Elections clause establishes the right to vote as a fundamental individual right that may not be diminished by the government. The clause “strikes at all regulations which shall impair the right of suffrage...” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 740-41 (Pa. 2018) (“*LWV*”). Under any standard of review, rejection of a ballot because of a missing or incorrect date on the envelope unjustifiably burdens this constitutional right.

Granting this Application for Preliminary Injunction is necessary to protect the franchise of Petitioners’ members and constituents, and thousands more Pennsylvania voters whose mail ballots will otherwise not count in the November 2024 election. This Court should enjoin enforcement of the date requirement.

## **BACKGROUND**

In Act 77 of 2019, Pennsylvania adopted “no excuse” absentee or mail-in voting, allowing registered voters to cast their vote by submitting a mail ballot without having to show cause why they cannot make it to the polls on Election Day. The statutory provision establishing mail voting provides the elector “shall . . . fill out, date and sign the declaration printed on [the] envelope” before returning the completed ballot. 25 P.S. §§ 3146.6 (absentee ballots), 3150.16 (other mail-in ballots). The Supreme Court of Pennsylvania has ruled, strictly as a matter of statutory construction divorced from any constitutional considerations, that these provisions require dating the envelope, and ballots arriving in undated or misdated envelopes cannot be counted. *Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023).

As the United States Court of Appeals for the Third Circuit has noted, however, the date requirement “serves little apparent purpose.” *Pa. State Conf. of NAACP v. Sec’y Commonwealth of Pa.*, 97 F.4th 120, 125 (3rd Cir. 2024) (“*NAACP*”). Critically, the date a voter places on the ballot does not play a role in determining a ballot’s timeliness. *Id.* at 127. Instead, timeliness is established by the time and date on which the county board of elections actually receives the ballot, which is confirmed when the board scans a unique barcode on the envelope and applies its own date stamp. *Id.* Because a mail ballot must be received by a County Board of Elections before 8:00 p.m. on Election Day to be counted, the date on the



envelope is not necessary and is not used by any County Board to determine timeliness. *Id.* at 129.

Nor is the handwritten date used to determine a voter's qualifications to vote. "The voter who submits his mail-in package has already been deemed qualified to vote -- first, when his application to register is approved and again when his application for a mail-in ballot is accepted." *NAACP*, 97 F.4th at 137. Thus, the voter declaration (including the handwritten date on the declaration) "is not even remotely a form used in Pennsylvania's voter qualification process." *Id.*; *see also id.* at 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.").

The date requirement is also irrelevant to, and is not used for the purpose of, detecting fraud. Because ballots received by county boards of elections after the 8:00 p.m. election day deadline are ineligible to be counted, only ballots received before the deadline are counted. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1076-77 (Pa. 2020) ("*In re 2020 Canvass*"); *see also NAACP*, 97 F.4th at 129. This eliminates any "danger that any of these ballots was . . . fraudulently backdated." *In re 2020 Canvass*, 241 A.3d at 1077; *see also NAACP*, 97 F.4th at 139-40 (Shwartz, J., dissenting) (handwritten date "not used to . . . detect fraud.").

Despite serving no discernible purpose, the date requirement has caused thousands of Pennsylvanians' ballots to be set aside in every election since 2022. Over 10,000 voters were disenfranchised in the 2022 general election because of the date requirement. *NAACP*, 97 F.4th at 127 (“thousands of Pennsylvania mail-in voters” in the November 2022 election did not have their votes counted because they did not date, or misdated, their ballots); *see also id.* at 144 (Shwartz, J., dissenting) (“more than 10,000 eligible voters had their timely ballots disqualified” because they did not sign, or misdated, their ballots). In the 2023 municipal elections, thousands of eligible Pennsylvania voters' absentee and mail ballots were rejected due to application of the envelope dating provision.<sup>1</sup> And thousands more were disenfranchised in the 2024 Presidential primary because of the date requirement.<sup>2</sup> *See Ex. 1 (5/27/24 Decl. of A. Shapell [“Shapell Decl.”]) at ¶ 12.*

Eligible Pennsylvania voters of all walks of life and across the political spectrum were disenfranchised by Respondents' continued application of the envelope dating rule in the 2024 primary election. They included:

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<sup>1</sup> Following the U.S. District Court's December 2023 determination in *Pennsylvania State Conf. of NAACP v. Schmidt*, 1:22-CV-00339, 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023), *rev'd*, 97 F.4th 120 (3d Cir. 2024), that the envelope dating provision violates the federal Materiality Provision, several counties reversed course and counted these ballots. That decision was later reversed on the merits by the Third Circuit on March 27, 2024.

<sup>2</sup> Petitioners note that the precise number of votes impacted by this issue is currently unknown, as several counties still have not entered all ballot cancelations in the SURE system for the 2024 primary. It is already clear as of the date of this filing, however, that the date requirement again impacted at least 4,000 Pennsylvania voters even in this low-turnout election. *See Shapell Decl. at 12.*

- Allegheny County voter Otis Keasley—a 73-year-old Vietnam veteran who usually drops his ballot off in person but was dealing with a family member’s health situation this year and could not deliver his mail ballot in person to the election office (Ex. 2 [Keasley Decl.]);
- Allegheny County voter Joanne Sowell—a 76-year-old voter who was boarding a flight when she saw an email that her ballot would not be counted because of an envelope dating issue (Ex. 3 [Sowell Decl.]);
- Philadelphia County voter Eugene Ivory—a 74-year-old retired educator who did not receive an email notice that his mail ballot would not be counted until Election Day and could not cure the envelope date issue due to a family emergency (Ex. 4 [Ivory Decl.]);
- Philadelphia County voter Bruce Wiley—a 71-year-old home-bound voter who did not learn until after the primary that there was a problem with his mail ballot submission (Ex. 5 [Wiley Decl.]);
- Montgomery County voter Stephen Arbour, a Chief Technology Officer who has dutifully voted in every election since becoming a naturalized U.S. citizen in 2010 (Ex. 6 [Arbour Decl.]);
- York County voter Kenneth Hickman, an 89-year-old regular voter who was surprised to learn after the primary that his vote had not been counted (Ex. 7 [Hickman Decl.]);
- Bucks County voter Janet Novick, an 80-year-old retired teacher whose mobility issues prevented her and her husband from curing their ballots after learning of envelope dating issues (Ex. 8 [Novick Decl.]);
- Chester County voter Joseph Sommar, a 71-year-old regular voter who was surprised and frustrated to learn that his vote may not count due to an envelope dating error (Ex. 9 [Sommar Decl.]);
- Bucks County Phyllis Sprague, an 80-year-old regular voter who submitted her mail ballot just before a scheduled surgery and could not cast a provisional ballot after suffering a fall on the date of the primary (Ex. 10 [Sprague Decl.]);

- Berks County voter Mary Stout, a 77-year old retired nurse whose mobility issues prevented her from going in person to cure an envelope dating issue (Ex. 11 [Stout Decl.]); and
- Dauphin County voter Lorine Walker, a 74-year-old retired school librarian who did not learn until after the date of the primary that there was a problem with her mail ballot submission (Ex. 12 [Walker Decl.]).

Each of these voters timely applied for, received, and returned their mail ballot packages. Each of their ballots were received prior to the 8:00 pm deadline on April 23, 2024. And none of their ballots was counted in the 2024 primary.

The enforcement of the date requirement has led to arbitrary and inconsistent results among counties. Although some counties have previously accepted misdated mail ballots, others have rejected otherwise timely, valid ballots, disenfranchising voters for reasons having nothing to do with the voter’s eligibility or the timeliness of the ballot. For example, in the 2022 general election:

a. Many counties refused to count ballots where the envelope date was correct but missing the year (even though they only could have been signed in 2022), while other counties counted such ballots. *NAACP*, 2023 WL 8091601, at \*33, n.43 (Baxter, J.)

b. More than 1,000 timely-received ballots were set aside and not counted 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. *NAACP*,

2023 WL 8091601, at \*33. The district court in *NAACP* found that this “shows the irrelevance of any date written by the voter on the outer envelope.” *Id.*

c. Counties also refused to count hundreds of timely-received ballots with obviously unintentional slips of the pen, such as a voter writing in the wrong year. *Id.*

d. Meanwhile, many counties counted ballots with necessarily “incorrect” envelope dates—*e.g.*, the handwritten date indicated a date before the county sent out the mail-ballot package, or after the elections board received it back from the voter. *NAACP*, 2023 WL 8091601, at \*33. (“The record reveals that some 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”). Indeed, at least one county counted a ballot marked September 31—a date that does not exist. *Id.* at \*33, n. 45

e. Counties took varying approaches to counting ballots with dates that appeared to use the international format (*i.e.*, day/month/year), with some counties basing the date range “strictly on the American dating convention” and others “try[ing] to account for both the American and European dating conventions.” *NAACP*, 2023 WL 8091601, at \*33.

f. Counties also took inconsistent approaches to voters who mistakenly wrote their birthdates on the date line. *Id.* at \*33.

In the several rounds of litigation over statutory interpretation of the date provision and other lawsuits asserting that enforcement of the requirement violates the Materiality Provision of the Civil Rights Act of 1964, no court has addressed the constitutionality of the date requirement under the Free and Equal Elections Clause of the Pennsylvania Constitution. However, three Justices of the Pennsylvania Supreme Court have opined that “failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause....” *Ball*, 289 A.3d at 27 n.156 (opinion of Wecht. J., joined by Todd, C.J. and Donohue, J.).

As these Justices recognized, applying the meaningless date requirement to disenfranchise thousands of Pennsylvania voters runs afoul of the Pennsylvania Constitution. As the Pennsylvania Supreme Court held 20 years ago, “ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach v. Bickhart*, 845 A.2d 793, 798-99 (Pa. 2004). No such compelling reason exists here.

## ARGUMENT

### **I. STANDARD OF REVIEW**

In deciding whether to grant relief in the form of a preliminary injunction, the Court considers whether (1) the petitioner “is likely to prevail on the merits”; (2) an injunction “is necessary to prevent immediate and irreparable harm”; (3) “greater injury would result from refusing the injunction than from granting it”, and granting it “will not substantially harm other interested parties”; (4) the injunction “will not adversely affect the public interest”; (5) the injunction “will properly restore the parties to their status” immediately prior to the passage of the law; and (6) the injunction is reasonably suited to abate the offending activity. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501-02 (Pa. 2014). Petitioners’ application satisfies these requirements.

### **II. PETITIONERS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF**

#### **A. Petitioners Are Likely to Prevail on the Merits**

To establish likelihood of success on the merits, the moving party “need not prove the merits of the underlying claim, but need only show that substantial legal questions must be resolved to determine the rights of the parties.” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610, 611 (Pa. Commw. Ct. 2020) (quoting *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. 2009)). Here, demonstrating a violation of the Free and Equal Elections clause is

straightforward: Disregarding these ballots treats the voters who cast these ballots unequally and violates the fundamental right to vote. Conversely, counting such ballots is consistent with decades of holdings from the Supreme Court that the Free and Equal Elections clause “should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to do so.” *LWV*, 178 A.3d at 814; *see also, e.g., Petition of Cioppa*, 626 A.2d 146, 148 (Pa. 1993) (noting the “longstanding and overriding policy in this Commonwealth to protect the elective franchise”) (citations omitted). And counting the ballots is consistent with the Pennsylvania Supreme Court’s mandate that “ballots containing mere minor irregularities should only be stricken for compelling reasons.” *Shambach*, 845 A.2d at 798-99 (citations omitted); *see also In re Luzerne Cnty. Return Bd. (Appeal of Wieskerger)*, 290 A.2d 108, 109 (Pa. 1972) (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)) (acknowledging the “flexible” approach to ministerial requirements of the Election Code “in order to favor the right to vote”).



**1. The Date Requirement Violates the Free and Equal Elections Clause of the Pennsylvania Constitution.**

***a. The Right to Vote Is a Fundamental Right Guaranteed by the Free and Equal Elections Clause.***

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386-87 (2020) (Wecht, J. concurring); *see also LWV*, 178 A.3d at 741 (right to vote is “that most central of democratic rights.”). In Pennsylvania, the right to vote is enshrined in and protected by Article I, Section 5 of the Pennsylvania Constitution, also known as the Free and Equal Elections Clause. That clause 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 Free and Equal Elections Clause is part of the Pennsylvania Constitution’s Declaration of Rights, which is “an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.” *LWV*, 178 A.3d at 803. In accordance with the “plain and expansive sweep of the words ‘free and equal,’” these words are “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. . . .” *Id.* at 804. The clause “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 809. Among other things, an election is not “free and equal” when “any substantial number of legal voters are, from any cause, denied the right to vote.” *Id.* at 813 n.71.

Pennsylvania’s Constitution was adopted in 1776 and “is the ancestor, not the offspring, of the federal Constitution,” adopted in 1787, *LWV*, 178 A.3d at 741. It “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.” *Id.* at 802. With respect to the right to vote, the Pennsylvania Constitution “provides a constitutional standard, and remedy, even if the federal charter does not.” *Id.* at 741. Indeed, the United States Constitution does not grant the right to vote, and contains no provision analogous to the Free and Equal Elections Clause. *Id.* at 804.

In light of this backdrop, there can be no question that voting is a fundamental right in Pennsylvania. *LWV*, 178 A.3d at 803 (the right to vote is a “fundamental right[] reserved to the people in Article I of our Constitution.”); *Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012) (in which the Commonwealth stipulated that “the right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one.”); *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476,

503 (Pa. 2006) (right to vote is “fundamental” under Pennsylvania law); *In re Nader*, 858 A. 2d 1167 (Pa. 2004) (same).

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

“It is well settled that laws which affect a fundamental right, such as the right to vote . . . are subject to strict scrutiny.” *Petition of Berg*, 712 A.2d 340, 342 (Pa. Commw. Ct.), *aff’d*, 713 A.2d 1106 (Pa. 1998); *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at \*20 (Pa. Commw. Ct. Jan. 17, 2014) (laws that “infringe[] upon qualified electors’ right to vote” are analyzed “under strict scrutiny.”); *see also, e.g., 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”).

Under a strict scrutiny analysis, the government bears the burden of proving that the law in question serves a “compelling governmental interest.” *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 596 (Pa. 2002); *see also In re Nader*, 858 A.2d 1167, 1180 (Pa. 2004) (“where a precious freedom such as voting is involved, a compelling state interest must be demonstrated”). If the government cannot satisfy this heavy burden, the law must be stricken as unconstitutional. *Id.* at 1181.

The date requirement restricts the right to have one’s vote counted to those voters who correctly date their mail-in ballot envelopes. Respondents do not count the ballots of voters who do not handwrite the date on their envelopes or misdate

their envelopes. Accordingly, the date requirement “affects,” “burdens,” and “interferes with” a fundamental constitutional right. Indeed, enforcement of the date requirement to prevent timely votes from counting does not just severely burden the right to vote; it eliminates that right entirely for all duly qualified and registered voters who neglect to date their ballot envelope, or who misdate their ballot envelope. *Cf. Applewhite*, 2014 WL 184988, at \*23 (“The right to vote embodied in our Constitution entitles every vote to be counted.”). This triggers strict scrutiny review and thereby requires the government to prove that the requirement serves a compelling state interest.

***c. The Date Requirement Cannot Survive Strict Scrutiny.***

The date requirement serves no compelling government interest. Indeed, it serves no interest at all. As shown above and in several prior litigations, the date requirement is not used to determine (1) the timeliness of a voter’s ballot, (2) a voter’s qualifications, or (3) whether fraud has occurred. *See supra*, 2-4 . In these circumstances, the date requirement cannot stand. The fundamental right to vote enshrined in the Pennsylvania Constitution cannot be waylaid by a legal requirement that serves no purpose.

A rule devoid of any underlying purpose is unworthy of enforcement. Even absent constitutional considerations, this Court should follow the enduring principle “*cessante ratione legis cessat lex*,” or “[w]here stops the reason, there stops the rule.”

*Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1252 n.6 (Pa. 2016) (Wecht, J., concurring). When, as here, a rule is not only unsupported by reason but *also* infringes on fundamental constitutional rights, it must give way to those rights.

While post-hoc justifications have been proffered about how, in theory, the date requirement might serve some purpose, *see, e.g., In re 2020 Canvass*, 241 A.3d at 1090 (Dougherty, J., concurring in part, dissenting in part), strict scrutiny analysis requires focusing on the actual, contemporaneous justifications provided (if any) rather than justifications that are “hypothesized or invented *post hoc* in response to litigation.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 189-90 (2017) (courts must look to “the actual considerations . . . not *post hoc* justifications the legislature in theory could have used but in reality did not”).<sup>3</sup> No party in the past four years of litigating this issue has identified any contemporaneously asserted legislative purpose. That should be the end of the inquiry.

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<sup>3</sup> The Pennsylvania Supreme Court has emphasized that it is “guided by” the U.S. Supreme Court’s application of “strict scrutiny” review where the same standard applies under the Pennsylvania Constitution.” *Kroger Co. v. O’Hara Twp.* 392 A.2d 266, 274 (Pa. 1978). *See generally James v. SEPTA*, 477 A.2d 1302, 1305-06 (Pa. 1984) (citing U.S. Supreme Court standard to define strict scrutiny).

In any event, none of these post-hoc justifications withstands scrutiny. This is consistent with the Third Circuit’s observation just two months ago that the date requirement “serves little apparent purpose.” *NAACP*, 97 F.4th at 125. After years of litigation over the date requirement, including fulsome discovery from the Commonwealth of Pennsylvania and all 67 county boards of election in the *NAACP* case, it is now beyond legitimate dispute that election officials do not use and have no use for the handwritten dates on mail ballot return envelopes. Taking each of the purported purposes in turn:

*First*, the date requirement purportedly “ensures the elector completed the ballot within the proper time frame.” *In re 2020 Canvass*, 241 A.3d at 1091 (Dougherty, J. concurring in part, dissenting in part). But there can be no dispute that the handwritten date plays no role in determining whether the ballot is timely because a ballot has to be received by 8:00 p.m. on Election Day to be counted. *See supra*, 3. Obviously, “a voter whose mail-in ballot was timely received could have only signed the declaration at some point between the time that he received the mail-[in] ballot from election officials and the time election officials received it back. Election officials discarded ballots received after the Election Day deadline. . . .” *NAACP*, 97 F.4th at 155 n.31 (Shwartz, J. dissenting).

*Second*, the date requirement was theorized to “prevent[] the tabulation of potentially fraudulent back-dated votes.” *In re 2020 Canvass*, 241 A.3d at 1091

(Dougherty, J. concurring in part, dissenting in part). But again, there is no danger of back-dated ballots being counted, because election officials simply do not count ballots received after the 8:00 p.m. Election Day deadline. *See supra*, 3-4.

*Third*, some have posited that the date requirement is used to “establish[] a point in time against which to measure the elector’s eligibility to cast the ballot.” *Id.* at 1090. But it is now beyond dispute, particularly given the Commonwealth’s and county boards’ admissions in *NAACP*, that the handwritten date plays zero role in determining a voter’s eligibility to vote. *See supra*, 3.

*Finally*, the handwritten date was said to “provide[] 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.’” *Id.* This rationale does not suggest a legitimate purpose for the date requirement; surely signing and mailing the ballot, with or without a date, sufficiently demonstrates a desire to cast one’s vote by mail in lieu of appearing in person. Nor, in any event, is the handwritten date used to determine when the voter executed their ballot. *Id.* at 1077. As the Election Code specifically states, “at *any* time after receiving an official absentee ballot, but on or before eight o’clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot[.]” 25 P.S. §§ 3146.6(a); 3150.16(a) (emphasis added) Therefore, pinpointing *when* the voter marked the ballot within the statutory timeframe is not even contemplated by the statute.

In sum, as a result of an unjustified, and unjustifiable, rule, tens of thousands of Pennsylvania voters have been disenfranchised, and thousands more will be in future elections. The Free and Equal Elections Clause forbids this perverse result. *LWW*, 178 A.3d at 813 n.71 (“[W]hen any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal.”); *Pa. Democratic Party v. Boockvar*, 238 A.3d at 371 (“in enforcing the Free and Equal Elections Clause,” courts “possess broad authority to craft meaningful remedies when required.”) (citation omitted).

***d. The Date Requirement Cannot Survive any Level of Scrutiny.***

Even if a lesser level of scrutiny than strict scrutiny applied here, the date requirement would still be an unjustified restriction on the right to vote. Pennsylvania recognizes two lesser levels of scrutiny. Under intermediate scrutiny, a law will survive if the Commonwealth can show that the law serves an “important regulatory interest.” *Boockvar*, 238 A.3d at 385. The lowest level of scrutiny is rational basis analysis, where the Commonwealth need only prove that there is a rational basis for the restriction. *Id.* The date requirement cannot survive even the lowest level of scrutiny because it serves no purpose at all. *See supra*, 2-4; *see generally Nixon v. Commonwealth*, 839 A.2d 277, 289 (Pa. 2003) (declaring statute unconstitutional where there was not “a real and substantial relationship to the interest the General Assembly is seeking to achieve”); *Curtis v. Kline*, 666 A.2d 265,



269-70 (Pa. 1995) (declaring statute unconstitutional under rational basis test because it failed to “promote [a] legitimate state interest or public value”); *Gambone v. Commonwealth*, 101 A.2d 634, 636-37 (Pa. 1954) (declaring unconstitutional a law that was “wholly unreasonable and arbitrary and bears no rational relation to” the purported government interests).

**2. Petitioners Preserve the Argument That the Envelope Dating Provision Should Be Reinterpreted Under the Canon of Constitutional Avoidance So as Not to Disenfranchise.**

Petitioners recognize that the Pennsylvania Supreme Court held in *Ball v. Chapman*, that, as a matter of statutory interpretation, the envelope dating provision should be construed as mandatory. For preservation purposes, Petitioners respectfully submit that the date requirement is susceptible to more than one reasonable interpretation, and that under various doctrines of statutory interpretation, including the canon of constitutional avoidance,<sup>4</sup> the requirement should be interpreted as directory and not mandatory in order to avoid a violation of the Free and Equal Elections Clause.

**B. Petitioners Will Be Irreparably Harmed Absent the Requested Injunction**

The Petitioners will be irreparably harmed in at least two ways.

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<sup>4</sup> See, e.g., *Hartford Accident & Indem. Co. v. Ins. Comm’r of Commonwealth*, 482 A.2d 542, 549 (Pa. 1984) (“It is a cardinal principle that ambiguous statutes should be read in a manner consonant with the Constitution.”); *In re Luzerne Cnty.*, 290 A.2d at 109 (the Election Code must be interpreted “in order to favor the right to vote,” and “to enfranchise and not to disenfranchise”) (citing *Appeal of James*, 105 A.2d 64).

First, the date requirement has already resulted in the disqualification of at least one of the Petitioner’s members. *See* Widestrom Decl. ¶ 12. And the disqualification of timely-received ballots from the Petitioners’ members and constituents, based on an irrelevant defect, would irreparably harm qualified and registered Pennsylvania voters.

It is well-settled that deprivation of a Constitutional or statutory right constitutes *per se* irreparable harm. *See Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610-11 (Pa. Commw. Ct. 2020) (citing *Pa. Pub. Util. Comm’n v. Israel*, 52 A.2d 317, 21 (Pa. 1947)); *see also SEIU*, 104 A.3d at 508; *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Commw. Ct. 2016); *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Commw. Ct. 2014) (en banc).

Moreover, the Pennsylvania Supreme Court has repeatedly recognized the paramount importance of the Constitutional right to vote, calling it “sacred,”<sup>5</sup> “fundamental,”<sup>6</sup> and “the most treasured prerogative of citizenship.”<sup>7</sup> This right cannot be bought, sold, or quantified, and once taken away, it cannot be repaired or replaced. “[T]here is no possibility of meaningful post-deprivation process when a voter’s ballot is rejected.” *Self Advocacy Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052 (D.N.D. 2020). Thus, “[t]he disenfranchisement of even one person validly

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<sup>5</sup> *Page v Allen*, 58 Pa. 338, 347 (1868).

<sup>6</sup> *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 488 (Pa. 2006).

<sup>7</sup> *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955).

exercising his right to vote is an extremely serious matter.” *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964).

Because the Pennsylvania Constitution expressly guarantees the right to vote, and because there is no adequate remedy for disenfranchisement, Respondents’ refusal to count the votes of Petitioners’ members would cause them irreparable harm.<sup>8</sup>

Second, an organization is harmed in its own right if an unconstitutional statute forces it to waste resources to carry out its mission. *Applewhite*, 2014 WL 184988, at \*7-8. Absent an injunction, that will be the case here.

The mission and core activities of each Petitioner includes mobilizing and educating Pennsylvania voters. *See* Ex. 14 (5/24/24 Decl. of T. Stevens [“Stevens Decl.”]) at ¶¶ 3-4; Ex. 15 (5/27/24 Decl. of D. Royster [“Royster Decl.”]) at ¶¶ 3-4; Ex. 16 (5/25/24 Decl. of D. Robinson [“Robinson Decl.”]) at ¶¶ 5-7; Ex. 17 (5/27/24 Decl. of S. Paul [“Paul Decl.”]) at ¶¶ 5-8; Ex. 18 (5/27/24 Decl. of K. Kenner [“Kenner Decl.”]) at ¶¶ 5-9; Ex. 19 (5/27/24 Decl. of M. Ruiz [“Ruiz Decl.”]) at ¶ 8; Ex. 20 (5/27/24 Decl. of A. Hanson [“Hanson Decl.”]) at ¶¶ 8-9; Ex. 21 (5/24/24 Decl. of A. Widestrom [“Widestrom Decl.”]) at ¶¶ 5-6; Ex. 22 (5/24/24 Decl. of P. Hensley-Robin [“Hensley-Robin Decl.”]) at ¶¶ 5-8. The prohibition on counting

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<sup>8</sup> Other courts routinely deem restrictions on fundamental voting rights irreparable injury. *See, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986).

ballots from undated and misdated envelopes has forced and will force the Petitioners to divert scarce resources to educating voters regarding compliance with meaningless requirements, rather than devoting those resources to the substantive matters that are central to their missions. *See* Stevens Decl. at ¶¶ 5-11; Royster Decl. at ¶¶ 6-8; Robinson Decl. at ¶¶ 8-12; Paul Decl. at ¶¶ 10-22; Kenner Decl. at ¶¶ 14-20; Ruiz Decl. at ¶¶ 17-19; Hanson Decl. at ¶¶ 10-17; Widestrom Decl. at ¶¶ 7-11; Hensley-Robin Decl. at ¶¶ 9-11. Such expenditure of organizational resources to educate voters in the face of election-administration policies that violate the Pennsylvania Constitution gives rise to per se irreparable harm. *Ball v. Chapman*, 289 A.3d 1, 19-20 (Pa. 2023).

**C. The Public Interest Weighs in Favor of Granting the Injunction.**

No public interest will be adversely affected by not enforcing the date requirement, because it is a meaningless rule that serves no purpose. To the contrary, it is continued enforcement of the date requirement that contravenes the public's interest, because as a result of that enforcement thousands of registered and qualified Pennsylvania voters will be disenfranchised. *See One Three Five, Inc. v. City of Pittsburgh*, 951 F. Supp. 2d 788, 825 (W.D. Pa. 2013) (finding that “injunctive relief is in the public's interest when governmental action is likely to be declared unconstitutional ‘because the enforcement of an unconstitutional law vindicates no public interest.’”) (citing *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d

99, 114 (3d Cir. 2013); *see also* *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004) (finding “that the public interest was ‘not served by the enforcement of an unconstitutional law.’”)

**D. Greater Injury Would Result from Denying the Injunction Than From Granting It.**

The balance of harms weighs heavily in favor of granting a preliminary injunction. Refusing to enforce a rule with no purpose harms no one. But enforcing that rule will continue to strip thousands of registered and qualified voters of the franchise. *See ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (Affirming the district court’s finding that “the government lacks an interest in enforcing an unconstitutional law”). As discussed, thousands of voters in each election over the past two years have faced disenfranchisement based on a requirement that serves no purpose whatsoever. The resulting harm to those voters and the system at large is significant. When even a relatively small number of mail ballots are set aside, application of the date requirement can impact the outcome of close races, sowing distrust in election results and further highlighting the harm done by denying qualified voters their voice in a given election.<sup>9</sup>

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<sup>9</sup> *See, e.g.*, Katherine Reinhard and Robert Orenstein, *Cohen wins Lehigh County judicial election by 5 votes*, PENNSYLVANIA CAPITAL-STAR (June 17, 2022), <https://penncapital-star.com/election-2022/cohen-wins-lehigh-county-judicial-election-by-5-votes/> (noting impact on municipal election results after counting 257 mail ballots received in undated envelopes following *Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022), *vacated as moot*, 143 S. Ct. 297 (2022)); Dan Sokil, *Towamencin supervisors race tied after Montgomery County election update*; THE REPORTER

At the same time, there is no countervailing public interest to support enforcement of a meaningless technical requirement that no respondent (or any other county board) relies upon for any purpose. Moreover, a ruling that prevents county boards from rejecting mail ballots based on envelope dating issues would not cause harm to election officials administering elections going forward. Such a ruling would not require any changes to the envelope and declaration forms, instructions, or methods of distributing or receiving mail ballots. If anything, it would relieve election officials of the obligation to parse whether an envelope needs to be set aside for failure to “correctly” complete an inconsequential date requirement.

**E. An Injunction Will Restore the Status Quo Ante.**

Preliminary injunctive relief is designed to place the parties in the position they were in prior to the commencement of the unlawful conduct – here, the enforcement of an unconstitutional date requirement leading to the rejection of thousands of ballots. Barring the enforcement of this unconstitutional rule would place the parties in the position they were in prior to the rule’s enforcement: ballots would not unconstitutionally be rejected – “the last actual, peaceable and lawful,

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ONLINE (Nov. 27, 2023), <https://www.thereporteronline.com/2023/11/27/towamencin-supervisors-race-tied-after-montgomery-county-election-update/> (noting impact on Towamencin Township supervisor results after counting six impacted mail ballots following *NAACP v. Schmidt, of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601 (W.D. Pa. Nov. 21 2023), *rev’d*, 97 F.4th 120 (3d Cir. 2024)); Borys Krawczeniuk, *Court says six mail-in ballots in state 117th House District race should count*, WVIA NEWS (May 8, 2024), <https://www.wvia.org/news/local/2024-05-08/050824luz-117thhouse> (noting potential impact on outcome of state house race if six outstanding mail ballots are counted in Luzerne County).

noncontested status which preceded the pending controversy.” *Valley Forge Hist. Soc’y v. Washington Mem’l Chapel*, 426 A.2d 1123, 1129 (Pa. 1981). Where important constitutional questions are raised and there is a “threat of immediate and irreparable harm,” there are “reasonable grounds for the entry of a preliminary injunction preserving the status quo.” *Fischer v. Dep’t of Pub. Welfare*, 439 A.2d 1172, 1175 (Pa. 1982).

**F. The Injunction Is Reasonably Suited To Abate The Offending Activity**

The requested injunctive relief is reasonably tailored to abate the unconstitutional invalidation of mail-in ballots that are undated or misdated. It will only prevent respondents from invalidating mail ballots inside undated or misdated envelopes. It will not impact any other requirement for mail-in voting and is the only way to prevent further unwarranted disenfranchisement in violation of the Free and Equal Elections Clause. *See Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 48-49 (Pa. Commw. Ct. 2009) (granting preliminary injunction noting that the injunction was a reasonable way to preventing the possibility of future harm).

**CONCLUSION**

Petitioners respectfully request that the Court enter an order in the form attached hereto, pending final adjudication of the matter.

Dated: May 29, 2024

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