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IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 1 EAP 2025, 2 EAP 2025

BRIAN BAXTER and SUSAN KINNIRY,
Respondents,

v.

PHILADELPHIA BOARD OF ELECTIONS,
Respondent,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF PENNSYLVANIA,
Intervenor-Petitioners,

PENNSYLVANIA DEMOCRATIC PARTY,
Intervenor-Respondent.

BRIEF OF THE HONEST ELECTIONS PROJECT AND RESTORING INTEGRITY AND TRUST IN ELECTIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Appeal from October 30, 2024 Order of the Commonwealth Court of Pennsylvania, No. 1305 C.D. 2024, Affirming the September 26, 2024 Order of the Court of Common Pleas of Philadelphia County, Nos. 2024, 02481

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STATEMENT OF INTEREST

The Honest Elections Project is a nonpartisan organization committed to supporting the right of all lawful voters to participate in free, fair, and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends fair and reasonable measures that protect the integrity of the voting process. It opposes efforts to reshape elections for partisan gain. The Project has a significant interest in this case as it implicates the legislature's preeminent role in setting rules for elections.

Restoring Integrity and Trust in Elections, Inc. ("RITE") is a 501(c)(4) nonprofit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. RITE works to protect the rule of law throughout all phases of the voting process. RITE has a significant interest in ensuring that courts do not legislate election rules from the bench. RITE also supports policies that promote secure elections and enhance voter confidence in the electoral process such as Pennsylvania's mail ballot date requirement. RITE's expertise and national perspective on voting rights,

election law, and election administration will assist the Court in reaching a decision consistent with the Constitution and the rule of law.[1,2]

SUMMARY OF THE ARGUMENT

This is the second time in the last year that the Commonwealth Court has attempted to strike down the Pennsylvania General Assembly's requirement that mail ballot envelopes be dated by the voter. Less than a year ago, this Court vacated the Commonwealth Court's judgment on jurisdictional grounds. *Black Pol. Empowerment Proj. v. Schmidt*, 322 A.3d 221, 222 (2024). It should do so here once again on the same grounds that RITE previously argued. The Commonwealth Court not only lacked jurisdiction. It usurped this Court's "most fundamental" responsibility to "'say what the law is'" under "our Commonwealth's Constitution." *Krasner v. Ward*, 323 A.3d 674, 695 (Pa. 2024) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). This Court has exclusive appellate jurisdiction in cases where the Court of Common Pleas has ruled unconstitutional "any statute" of this Commonwealth. 42 P.S. §722. Yet the Commonwealth Court exercised that

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, its members, or its counsel, made a monetary contribution to its preparation or submission.

[2] On October 31, 2024, RITE applied to file an amicus brief in support of Appellants' emergency request to stay this case before the November election. *See* Br. for RITE as Amicus Curiae Supporting Intervenor-Petitioners, *Baxter v. Phila. Bd. of Elections*, 325 A.3d 645 (2024) (Nos. 76 EM 2024, 77 EM 2024). This Court granted that application. *See Baxter*, 325 A.3d at 646. This brief supplements the arguments RITE made in its earlier brief, *see* Br. for RITE, *supra*, at 3-15, and replies to Appellees' flawed responses to RITE's jurisdictional argument, *see* Resp. Br. of Voter Respondents at 33 n.12, *Baxter*, 325 A.3d 645 (Nos. 76 EM 2024, 77 EM 2024). This brief also for the first time addresses the merits of this case. *See infra* Section II.

jurisdiction itself instead of "transfer[ring]" the appeal "to the proper tribunal of this Commonwealth" as required by law. *Id*. §5103(a). Because the Commonwealth Court lacked jurisdiction, its opinion must be vacated. *Commonwealth v. Morris*, 771 A.2d 721, 735 (Pa. 2001).

On the merits, the Commonwealth Court abandoned over a century of sound precedents interpreting the Free and Equal Elections Clause. This Court has never held a neutral, generally applicable ballot-casting rule unconstitutional under the Free and Equal Elections Clause. *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914); *accord Black Pol. Empowerment Project v. Schmidt (BPEP)*, 325 A.3d 1046, at *40 (Pa. Commw. Ct. 2024) (table op.) (McCullough, J., dissenting). For good reason: "ballot" casting laws "have always been regarded as peculiarly within the province of the legislative branch of government." *Winston*, 91 A. at 522. For this reason, this Court's Free and Equal Elections Clause precedents confirm that the Legislature is "best suited" to establish the rules for the voting process. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). Yet rather than exercising reasonable deference, the Commonwealth Court applied strict scrutiny to the unremarkable requirement that a voter write down the date on a mail ballot envelope. That novel approach could be used to undermine nearly any neutral, generally applicable ballot-casting rule.

Worse, the Commonwealth Court reached this novel approach in a case involving no-excuse mail voting. The Free and Equal Elections Clause addresses the constitutional right to vote. But the dating requirement here regulates no-excuse mail voting, which is a "legislative grace"—not a constitutional right. *BPEP*, 325 A.3d at 39 (McCullough, J., dissenting). Somehow, the Commonwealth Court provided more stringent protection for this legislatively granted privilege than has ever been extended to the constitutional right to vote.

For all these reasons, this Court should vacate the decision of the Commonwealth Court and uphold the dating requirement.

ARGUMENT

I. The Commonwealth Court usurped this Court's exclusive jurisdiction.

The Commonwealth Court's decision must be vacated because this Court has "exclusive jurisdiction" over "final orders in which the court of common pleas declares a statute unconstitutional." *Commonwealth v. Torsilieri*, 316 A.3d 77, 82 n.7 (2024) (citing 42 P.S. §722(7)). Here, the Court of Common Pleas issued a final order holding that the "date" requirement for mail ballots established in "25 P.S. §§3146.6(a) and 3150.16(a)" violates "Art. I, §5 of the Constitution of the Commonwealth of Pennsylvania, which states that 'Elections shall be free and equal.'" Order, *Baxter v. Phila. Bd. of Elections*, No. 02481, at 2 (Pa. C.P., Sept. 26, 2024). Since the Court of Common Pleas declared that multiple provisions of Pennsylvania's

Election Code are unconstitutional, this Court has exclusive jurisdiction over the appeal. 42 P.S. §722(7).

When a case falling within the exclusive jurisdiction of this Court is errantly appealed to the Commonwealth Court, that Court *must* relinquish jurisdiction and transfer the case to the Supreme Court. "If an appeal" is filed in a court that "does not have jurisdiction," the court "shall transfer the record thereof to the proper tribunal." 42 P.S. §5103(a); *see also In re Elliott*, 657 A.2d 132, 133-34 (Pa. Commw. Ct. 1995) ("The Supreme Court" has "exclusive jurisdiction," "we therefore transfer this matter to the Supreme Court."); *Commonwealth v. Brabham*, 241 A.3d 449, 3 (Pa. Super. Ct. 2020) (table op.) ("[T]he Supreme Court has exclusive jurisdiction over this case… Appeal transferred. Jurisdiction is relinquished."). The Commonwealth Court should have transferred this case *sua sponte*, without even waiting for the parties to raise the issue. *See, e.g.*, *In re Mancuso*, 657 A.2d 136, 137 (Pa. Commw. Ct. 1995).

But the Commonwealth Court didn't do that. Instead, just six days before the November 2024 election, the Court pressed ahead and delivered its opinion, expounding upon the meaning of the Free and Equal Elections Clause, thereby usurping this Court's "most fundamental" power to "'say what the law is.'" *Krasner*, 323 A.3d at 695 (quoting *Marbury*, 5 U.S. at 177) (emphasis added). The Commonwealth Court did so over the strong rebuke of dissenting Judge Wolf, who observed

that his Court "lacks appellate jurisdiction," the "Supreme Court" has "exclusive appellate jurisdiction," and "this matter should be before the Pennsylvania Supreme Court without our opinion." *Baxter v. Phila. Bd. of Elections*, 2024 WL 4614689, at *24-*25 (Pa. Commw. Ct. Oct. 30, 2024).

The great weight of authority confirms that Judge Wolf was right. When the Court of Common Pleas declares a statute unconstitutional, this Court has exclusive jurisdiction over the appeal. *See, e.g.*, *Commonwealth v. Noel*, 857 A.2d 1283, 1285 (2004) (exclusive jurisdiction to determine constitutionality of motor vehicle statute); *Commonwealth v. Olivo*, 127 A.3d 769, 773 n.8 (2015) (exclusive jurisdiction to determine constitutionality of statute allowing expert testimony regarding victims' responses to sexual violence); *Commonwealth v. Hopkins*, 117 A.3d 247, 250 n.1 (2015) (exclusive jurisdiction to determine constitutionality of mandatory minimum sentence for possession of controlled substance); *Commonwealth v. Turner*, 80 A.3d 754, 757 n.2 (2013) (exclusive jurisdiction to determine constitutionality of portion of Post–Conviction Relief Act); *Commonwealth v. Torsilieri*, 232 A.3d 567, 572 (2020) (exclusive jurisdiction to determine constitutionality of sex offender statute); *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 81 n.5 (1986) (exclusive jurisdiction to determine constitutionality of Solid Waste Management Act provision); *Commonwealth v. Omar*, 981 A.2d 179, 181 (2009) (exclusive jurisdiction to determine constitutionality of the Trademark Counterfeiting Statute);

Commonwealth v. Williams, 733 A.2d 593, 595 n.4 (1999) (exclusive jurisdiction to determine constitutionality of portions of Megan's Law); *Commonwealth v. Nicely*, 638 A.2d 213, 214 (1994) (exclusive jurisdiction to determine constitutionality of administrative regulation requiring every person placed on probation to pay a supervisory fee).

There is no exception to this rule. It doesn't matter what subject the appeal concerns. *See* 42 P.S. §722(7) (providing exclusive jurisdiction over all "[m]atters" where court of common pleas has ruled "any statute" unconstitutional). It doesn't matter whether the constitutional challenge is facial or as applied. *See, e.g.*, *Torsilieri*, 232 A.3d at 586 (exclusive jurisdiction over case where "trial court held" statute "to be facially unconstitutional, as well as unconstitutional as applied"). If the Court of Common Pleas declares a statute unconstitutional, the case goes directly to this Court, *Commonwealth v. Herman*, 161 A.3d 194, 203 & n.13 (2017), not to the Superior Court, *Commonwealth v. Meyer*, 372 A.2d 850, 852 (1977), and not to the Commonwealth Court, *Butler Ed. Ass'n v. Butler Area Sch. Dist.*, 382 A.2d 1283, 1285 (1978). When the Commonwealth Court refuses to transfer the case and instead usurps this Court's exclusive jurisdiction, the proper procedure is to vacate the Commonwealth Court's opinion. *Egan v. Mele*, 634 A.2d 1074, 1075 & n.2 (1993) ("We vacated the Order of the Commonwealth Court because this Court has exclusive jurisdiction of appeals from final orders of the courts of common pleas.").

When this case first came before this Court in an emergency posture, Voter Appellees, Baxter and Kinniry, barely pretended the Commonwealth Court had jurisdiction. County Appellee, the Philadelphia Board of Elections, didn't even address the issue. *See generally*, Answer of Philadelphia Board of Elections, *Baxter v. Phila. Bd. of Elections*, 325 A.3d 645 (2024) (Nos. 76 EM 2024, 77 EM 2024). Voter Appellees argued this Court should "exercise extraordinary jurisdiction." Response Brief of Voter Respondents at 6, *Baxter v. Phila. Bd. of Elections*, 325 A.3d 645 (2024) (Nos. 76 EM 2024, 77 EM 2024). In a single footnote, they contended that the Commonwealth Court had jurisdiction because the Court of Common Pleas did not hold any "statute" was "invalid as repugnant to the Constitution." *Id*. at 33 n.12. They also argued that, alternatively, the "jurisdictional defect" was waived by Appellants "filing of their appeal in the Commonwealth Court." *Id*. Both arguments lack merit.

Voter Appellees misread the record by claiming that the Court of Common Pleas did not hold "any statute" unconstitutional. *Id*. The Court of Common Pleas held 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." Order, *Baxter*, No. 02481, at 2. While it is true that the Court of Common Pleas reversed a specific decision of the Philadelphia

Board of Elections, a finding of unconstitutionality was essential to the Court of Common Pleas' judgment. In fact, it was the only reason the Court concluded that the Philadelphia Board of Elections erred in refusing to count mail ballots that were not properly dated. *Id*. Where a finding of unconstitutionality is "[a]t the heart" of the Court of Common Pleas' decision, "this Court" has "exclusive appellate jurisdiction." *Herman*, 161 A.3d at 203; *see also Commonwealth v. Levesque*, 364 A.2d 932, 933-34 (1976) (exclusive appellate jurisdiction to review whether a "warrantless arrest" was "constitutionally defective"). Because the Court of Common Pleas ruled "as applied" that the statutory dating requirement violates Pennsylvania's Constitution, this Court has exclusive jurisdiction. *Herman*, 161 A.3d at 203.

Voter Respondents also claim that the Commonwealth Court had jurisdiction because they did not "seek an order invalidating any statutory provision." Response Brief of Voter Respondents at 33 n.12. But Voter Respondents specifically alleged that "the Election Code's envelope dating provisions, 25 P.S. §§3146.6(a), 3150.16(a)" were "an unconstitutional interference with the exercise of the right to suffrage in violation of the Free and Equal Elections Clause." Pet. at ¶63. Regardless, it is the "final order[]" of the Court of Common Pleas that triggers this Court's exclusive jurisdiction, 42 P.S. §722, not what order the Voter Respondents now prefer. And the final order of the Court of Common Pleas was that "25 P.S. §§3146.6(a) and 3150.16(a)" "violates" the Free and Equal Elections Clause of Pennsylvania's

Constitution. Order, *Baxter*, No. 02481, at 2. Thus, "exclusive" jurisdiction was with this Court. *Herman*, 161 A.3d at 203.

Voter Appellees' only other argument is that "Republican" Appellants "waived" the Commonwealth Court's jurisdictional "defect" by filing "their appeal in the Commonwealth Court instead of filing directly in this Court." Response Brief of Voter Respondents at 33 n.12. But this jurisdictional defect cannot be waived because it concerns the Commonwealth Court's subject matter jurisdiction. *Domus, Inc. v. Signature Bldg. Sys. of PA*, 252 A.3d 628, 636 (Pa. 2021). No party may waive the issue of subject matter jurisdiction. *Id*. And for the same reasons, parties can't consent to subject matter jurisdiction. *See Capron v. Van Noorden*, 6 U.S. 126, 127 (1804) ("It was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.").

The Commonwealth Court determined that it had "*subject matter jurisdiction* over the appeals under Section 762(a)(4)(i)(C) of the Judicial Code." *Baxter*, 2024 WL 4614689 at *9 (emphasis added). But Section 762 contains an "[e]xception" to the Commonwealth Court's subject matter jurisdiction encompassing those "classes of appeals from courts of common pleas as are by section 722" within "the exclusive jurisdiction of the Supreme Court." 42 P.S. §762(b). Under Section 722, "[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas" in "[m]atters where the court of common pleas has held

invalid as repugnant" to "the Constitution of this Commonwealth" any "statute." 42 P.S. §722(7). Consequently, the Commonwealth Court has no subject matter jurisdiction over this case. Indeed, "the parties by agreement, may not vest subject matter jurisdiction in a court which does not have it otherwise." *Mercury Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 55 A.3d 1056, 1066 (Pa. 2012).

II. The Free and Equal Elections Clause does not invalidate neutral, generally applicable ballot-casting rules.

This Court has never declared unconstitutional a neutral, generally applicable election law that regulates how voters cast their ballots. *Winston v. Moore*, 91 A. 520, 522 (1914); *accord BPEP*, 325 A.3d at 40 (McCullough, J., dissenting). The "reason" for this is that "ballot" casting laws "have always been regarded as peculiarly within the province of the legislative branch of government." *Winston*, 91 A. at 522. Thus, this Court has recognized that the Legislature's "discretion" over generally applicable ballot-casting rules "is not the subject of review." *Patterson v. Barlow*, 60 Pa. 54, 79 (1869). Indeed, "no act dealing solely with the details of election matters has ever been declared unconstitutional by this court." *Id*. The Commonwealth Court departed from these precedents to strike down a neutral, generally applicable dating requirement for no-excuse mail voting. In doing so, it aligned with a broader trend advocating stricter protection for the privilege of no-excuse mail balloting than for the constitutionally guaranteed right to vote. Neither the Pennsylvania Constitution nor this Court's precedent supports that position.

A. The "task of effectuating" Free and Equal Elections belongs to "the Legislature."

Over a century of unbroken precedent from this Court confirms that the Free and Equal Elections Clause does not authorize the Judiciary to second-guess neutral, generally applicable ballot-casting rules established by the Legislature. Since 1790, the Commonwealth's Constitution has provided that "[e]lections shall be free and equal." Pa. Const. art. I §5. But this command "left the means of accomplishment to the legislature." *Patterson*, 60 Pa. at 75.

The Legislature has "unfettered" discretion when exercising this "undoubted legislative power" granted to it by "the Constitution." *Id*. The Free and Equal Elections Clause does not "require" that ballot-casting laws be "perfect." *Id*. Even though voters "may experience difficulties, and some may even lose their suffrages by the imperfection of the system," a law complies with the Clause "unless it is a clear and palpable abuse of the power in its exercise." *Id*. at 75-76.

Acknowledging the "wide field" given to "the Legislature" for "the exercise of its discretion" in crafting ballot-casting laws, this Court has upheld as constitutional under the Free and Equal Elections Clause every ballot-casting law that it has reviewed. *Winston*, 91 A. at 522. The Court upheld an act requiring a witness affidavit to be provided by an unregistered voter confirming the voter's residency and citizenship before casting a provisional ballot. *Appeal of Cusick*, 20 A. 574, 576, 579 (1890). It upheld a ballot access requirement because the requirement "is but a

regulation, and we think a reasonable one" that "can be safely left to the legislature." *De Walt v. Bartley*, 24 A. 185, 187 (1892). And it upheld a law providing that "[n]o elector may vote" for "more than six candidates upon one ballot" for judicial "office" in the context of an election that had "seven candidates" because "the right of the legislature" to enact such laws "has never been doubted." *Commonwealth ex rel. McCormick v. Reeder*, 33 A. 67, 67-70 (1895).

The law is so well settled that the Commonwealth Court has turned to dissenting opinions for support. In both *BPEP* and *Baxter*, the Commonwealth Court relied on the dissent in *Oughton v. Black*. *Baxter*, 2024 WL 4614689 at *17-18 (citing *Oughton*, 61 A. 346, 349-50 (Dean, J., dissenting)); *BPEP*, 325 A.3d at 34-35 (same). But the *Oughton* majority upheld a law permitting "straight party ticket" voting against a challenge that voters who didn't want to vote straight party ticket had to put a cross beside each candidate they wished to vote for rather than just one cross by the name of the party of their choice. *Id*. at 347-48. That the law *resulted* in different voters following different requirements was irrelevant. The law was "not to be tested by the fact that one voter can cast his ballot by making one mark, while another may be required to make two or more to express his will." *Id.* at 349. So long as each voter "has been afforded the opportunity and been provided with reasonable facilities to vote, the Constitution has been complied with. All else is regulation, and lies in the sound discretion of the Legislature, to whom alone such

regulation is committed." *Id.* (quoting *Todd v. Bd. of Election Comm'rs*, 104 Mich. 474, 481 (1895)).

The *Oughton* majority opinion remains the "controlling" law of this Commonwealth. *Winston*, 91 A. at 524. Its "underlying principle" that "the Legislature" has "the power to regulate the exercise of the elective franchise" through neutral, generally applicable ballot-casting laws has never been questioned. *Id*. When confronted with a neutral, generally applicable ballot-casting law, this Court has never declared the act "void" just because "it may not meet the approval of our judgment." *Winston*, 91 A. at 522, 524 (citing *Oughton*); *see also League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018) (noting that *Winston* reflects this Court's settled interpretation of the Free and Equal Elections Clause). "If the restrictions complained of" are "onerous or burdensome, the Legislature may be appealed to." *Winston*, 91 A. at 524.

In cases concerning Act 77—the statute that sets forth the dating requirement challenged here—this Court has consistently recognized that the Legislature is "best suited" to regulate ballot casting. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). Even if portions of Act 77 "could have a disenfranchising effect," the Act is "permissible to any extent that steers clear of constitutional protections" as "the power to regulate elections is a legislative one." *In re Major*, 248 A.3d 445, 453 (Pa. 2021) (cleaned up). The Act fits squarely within the "power to regulate

elections," which has "been exercised by the General Assembly since the foundation of the government." *McLinko v. Dep't of State*, 279 A.3d 539, 543 (Pa. 2022) (cleaned up). Indeed, in *Boockvar*, this Court rejected the argument that the lack of a "notice and cure" procedure in Act 77 for mail ballots "disenfranchised" voters whose mail ballots were not counted due to the ballots containing "incomplete" information. 238 A.3d at 374. The Court recognized that "the decision to provide a 'notice and opportunity to cure' procedure to alleviate" the "risk" of "a voter" having "his or her ballot rejected due to minor errors" is "one best suited for the Legislature." *Id*.

Despite this overwhelming precedent, the Commonwealth Court replaced this Court's deferential review of ballot-casting rules with strict scrutiny. *See Baxter*, 2024 WL 4614689 at *17. This Court has never applied strict scrutiny in a Free and Equal Elections Clause case. *BPEP*, 325 A.3d at 40 (McCullough, J., dissenting). For good reason. Strict scrutiny for all neutral, generally applicable ballot-casting laws defies "[c]ommon sense, as well as constitutional law," which both "compel" the "conclusion" that the Legislature "must play an active role in structuring elections" if "some sort of order, rather than chaos, is to accompany the democratic processes." *In re Zulick*, 832 A.2d 572, 578 (Pa. Commw. Ct. 2003) (quoting *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)). This Court's deferential review recognizes the "undoubted legislative power" over ballot casting and the impossibility of

requiring ballot-casting rules to be "perfect." *Patterson*, 60 Pa. at 75. The Commonwealth Court's approach would require Pennsylvania courts to apply strict scrutiny any time a voter fails to comply with a neutral, generally applicable ballot-casting rule. *See Baxter*, 2024 WL 4614689 at *17.

B. The Free and Equal Elections Clause does not provide more stringent protection for the privilege of no-excuse mail voting.

The Commonwealth Court's application of a heightened standard is even more inapt because this case involves no-excuse mail voting. No-excuse mail voting is a "legislative grace," not a constitutional right. *BPEP*, 325 A.3d at 39 (McCullough, J., dissenting). The mail-voting privilege is conferred by statute, not by the Constitution. *In re Major*, 248 A.3d at 447. "[T]he advent of no-excuse mail-in voting" in the Commonwealth occurred "in October of 2019" when the Pennsylvania General Assembly "enacted Act 77." *Id*. While the Pennsylvania Constitution guarantees absentee ballots to certain classes of electors, Pa. Const. art. VII, §14, "the same cannot be said of those entitled to vote by mail without an excuse under Act 77," *McLinko*, 279 A.3d at 595 (Wecht, J., concurring). So "[i]f the General Assembly were to repeal that statute tomorrow, the ordinary voter would have no constitutional claim to a no-excuse mail-in ballot." *Id.*

Requiring voters to correctly handwrite the date on a mail ballot envelope does not even implicate the Free and Equal Elections Clause. The Clause applies only when the constitutional "right of suffrage" is violated. Pa. Const. art. 1, §5. The

dating requirement doesn't regulate the constitutional "right of suffrage." It regulates no-excuse mail voting. 25 P.S. §§3146.6(a), 3150.16(a). "[T]here is no constitutional right to vote by mail without excuse" in Pennsylvania. *BPEP*, 325 A.3d at 39 (McCullough, J., dissenting). "It is thus not the right to vote that is at stake here." *Cf. McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969) (finding the constitutional right to vote was not denied, despite denying the opportunity to vote by mail, because other methods of voting were available); *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 192 (5th Cir. 2020) ("[C]onferring a privilege to those at least age 65 to vote absentee did not deny or abridge younger voters' rights who were not extended the same privilege."). An impairment of the right to vote by mail "does not implicate" the constitutional right to vote. *New Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1288 (11th Cir. 2020) (Lagoa, J., concurring). At a minimum, the Commonwealth Court erred by applying an unprecedented, higher standard to regulations of no-excuse mail voting.

CONCLUSION

This Court should vacate the judgment of the Commonwealth Court and uphold the dating requirement under the Free and Equal Elections Clause.

Respectfully Submitted,

Dated: February 26, 2025

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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/ Linda A. Kerns
Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 531

I certify that this brief contains less than 7,000 words and complies with the word count limit under Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(b)(1).

/s/ Linda A. Kerns
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