

IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

DAVID BALL, et al.,

Petitioners,

v.

**LEIGH M. CHAPMAN, ACTING SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA, et al.,**

Respondents.

**BRIEF OF PROPOSED-INTERVENOR PETITIONERS SPEAKER OF
THE PENNSYLVANIA HOUSE OF REPRESENTATIVES BRYAN
CUTLER, MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES KERRY BENNINGHOFF, THE PENNSYLVANIA
HOUSE REPUBLICAN CAUCUS, PRESIDENT PRO TEMPORE OF THE
PENNSYLVANIA SENATE JAKE CORMAN, MAJORITY LEADER OF
THE PENNSYLVANIA SENATE KIM WARD, AND THE
PENNSYLVANIA SENATE REPUBLICAN CAUCUS**

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INTRODUCTION AND SUMMARY OF ARGUMENT

Proposed-Intervenor Petitioners, Speaker of the Pennsylvania House of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, the Pennsylvania House Republican Caucus, President Pro Tempore of the Pennsylvania Senate Jake Corman, Majority Leader of the Pennsylvania Senate Kim Ward, and the Pennsylvania Senate Republican Caucus (collectively the “Legislative Intervenors”) hereby file this Brief pursuant to this Court’s Order dated October 21, 2022.¹

SUMMARY OF ARGUMENT

As discussed more particularly below, the Petitioners, as well as the Legislative Intervenors, have standing to bring the present action. On the substantive issues, the Election Code’s unambiguous requirement that electors “shall . . . date” absentee and mail-in ballots requires that the votes of those electors who do not comply with that instruction not be counted. 25 P.S. §§ 3146.6(a); 3150.16(a). Finally, the statutes in question do not violate the Materiality Provision.

¹ Earlier today, the Legislative Intervenors filed an Application to Intervene in the present matter that is currently pending before this Court. Given that this Application remains pending, the Legislative Intervenors would alternatively request that this Brief be accepted as an *amici curiae* brief in support of the Petitioners in the event that the Court should deny the Legislative Intervenors’ Application to Intervene. The Court’s October 21, 2022 Order notes that *amicus curiae* briefs “will be received” and shall be due by “Monday, October 24, at noon.”

ARGUMENT

I. Petitioners Have Standing to Bring the Present Action

“In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action.” *Stilp v. Commonwealth*, 940 A.2d 1227, 1233 (Pa. 2007) (citations omitted). “The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge.” *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). “An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct and immediate interest in the outcome of the litigation.” *Id.* (citation omitted). A party’s interest is *substantial* if it “surpasses the common interest of all citizens in procuring obedience to the law.” *Id.* (internal quotation omitted). A party’s interest is *direct* if “there is a causal connection between the asserted violation and the harm complained of” and *immediate* “if that causal connection is not remote or speculative.” *Id.* (quoting *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 577 (Pa. 2003)). The Petitioners—both the Voter Petitioners and the Committee Petitioners alike—have standing in the instant case for distinct and overlapping reasons.

a. The Voter Petitioners Have Standing to Bring the Present Action

The Voter Petitioners have a *substantial* interest in the administration of “free and equal elections.” (Pet’rs’ Application 6.) This is not merely a generalized “vote dilution” claim. *Cf. Kauffman v. Osser*, 271 A.2d 236, 239-40 (Pa. 1970) (finding that the “unsupported” assumption that some voters “will vote for candidates at the November election other than those for whom the appellants will vote and thus will cause a dilution of appellants’ votes” does not afford appellants standing). Rather, “it is clear that any person who is registered to vote in a particular election has a substantial interest in obtaining compliance with the election laws” for that election. *In re Barlip*, 428 A.2d 1058, 1060 (Pa. Commw. Ct. 1981) (addressing election laws applicable to candidates).

Moreover, the Voter Petitioners are entitled, by the constitutions of the United States and the Commonwealth of Pennsylvania, to elections conducted on an equal playing field, where county boards of elections not only follow state law but all follow the *same* state law. *See* U.S. Const. amend. XIV (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); Pa. Const. art. I, § 5 (“Elections shall be free and *equal*[.]” (emphasis added)). This matter is distinct from the potential dilution of Voter Petitioners’ ballots, as permitting different county boards of election to maintain different canvassing standards for defective ballots—particularly when most races on the ballot, from State Representative to

United States Senator, span multiple counties—directly impairs Voter Petitioners’ substantial interest in free and *equal* elections, where all ballots are canvassed and counted according to the same rules.

b. The Voter Petitioners Also Have Taxpayer Standing to Bring the Present Action

In addition to the foregoing, the Voter Petitioners also have “taxpayer standing” to bring this action. Taxpayer standing is “an exception to the traditional standing requirements . . . recogniz[ing] that one who [i]s not ‘aggrieved’ so as to satisfy [traditional] standing requirements might nevertheless be granted standing as a taxpayer if certain preconditions [a]re met.” *Pittsburgh Palisades Park LLC v. Commonwealth*, 888 A.2d 655, 661 (Pa. 2005). Taxpayer standing “relax[es] the general rules regarding standing and their requirement of a substantial, direct, and immediate interest.” *Id.* “This policy . . . enable[s] the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement[, in order] ‘to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.’” *Id.* at 661-62 (quoting *In re Biester*, 409 A.2d 848, 851 n. 5 (Pa. 1979)). Taxpayer standing “to challenge an act” exists if five factors are met: “(1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4)

redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim.” *Stilp*, 940 A.2d at 1233-34 (citing *Pittsburgh Palisades Park*, 888 A.2d at 662).

Voter Petitioners meet all five factors in the present case. First, with just 15 days until the November general election, there is no indication of any other effort besides the present action to challenge the Acting Secretary’s guidance to county boards of elections to count undated ballots in their canvass, and the choice by many such county boards to do so. Second, the Acting Secretary and county boards of election who are directly and immediately affected by the mail-in ballot canvassing rules are plainly disinclined to file a challenge similar to Petitioners’ action here, as evidenced by their own response to Petitioners’ Application. (*See, e.g.*, Resp’t Lehigh County Bd. of Elections Answer.) Third, judicial relief is appropriate “because the determination of the constitutionality of the election is a function of the courts.” *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988) (citations omitted). The dating requirement of 25 P.S. §§ 3146.6(a) and 3150.16(a) and the procedures for the canvassing of undated ballots are issues of “vital public importance that require[] timely intervention” by this Court under the King’s Bench authority it has already assumed. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020) (citations omitted). Fourth, Plaintiffs lack the ability to obtain redress through other channels. At least one Respondent board of elections has argued that Petitioners should instead

“challenge Board decisions in courts of common pleas” (Resp’t Philadelphia County Bd. of Elections Answer at p. 21), but *the very same* Respondent also indicated that it does not intend to segregate ballot envelopes with a missing date (Resp’t Philadelphia County Bd. of Elections Answer at p. 10), thereby rendering it impossible for Petitioners to obtain *ex post* relief for undated ballots cast in that county. Lastly, despite several Respondents questioning Petitioners’ standing, none has suggested alternative parties who might be more appropriate petitioners.

c. The Committee Petitioners Have Standing to Bring the Present Action

The Committee Petitioners likewise have a *substantial* interest in in this matter because they “have made significant contributions and expenditures . . . in mobilizing and educating voters in Pennsylvania[,] devot[ed] substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania[, and] ma[de] expenditures to ensure . . . voters understand the rules governing the elections process.” (Pet’rs’ Application 8-9.) Their interest in “ensuring that Pennsylvania administers free and fair elections” (*id.*), so that such efforts were not for waste, are also quite distinct from the “common interest of all citizens,” *City of Philadelphia*, 838 A.2d at 577. For these very reasons, this Court and others have routinely agreed that political parties (like Petitioners Republican National Committee and Republican Party of Pennsylvania) and party committees (like Petitioner National Republican Congressional Committee) have a substantial

interest in orderly election administration. *See, e.g., In re Barlip*, 428 A.2d at 1060 (“[B]ecause a political party, by statutory definition, is an organization representing qualified electors, it maintains the same interest as do its members in obtaining compliance with the election laws so as to effect the purpose of those laws in preventing fraudulent or unfair elections.”); *Pa. Democratic Party v. Republican Party of Pa.*, No. 16-5664, 2016 WL 6582659, at *6 (E.D. Pa. Nov. 7, 2016) (agreeing that a political party which works to elect its members “from the top of the ticket on down in local, county, state, and federal elections” has standing to protect its candidate and voters (internal citation omitted)); *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *5 (E.D. Cal. June 10, 2020) (concluding a national congressional campaign committee and a state political party have a “significant protectable interest” in “advancing their overall electoral prospects” and “diverting their limited resources to educate their members on the election procedures”).

d. The Petitioners’ Interests are Direct and Immediate

The interests of all Petitioners in this action are *direct* because there is a clear causal relationship between the violations of law highlighted by Petitioners in their Application and the harm they will suffer if the violations are not corrected. If county boards of elections include undated or incorrectly dated ballots in their election canvass—in direct contravention of 25 P.S. §§ 3146.6(a) and 3150.16(a), and

resulting in materially disparate canvassing procedures between counties—then the Petitioners’ interest in free and equal elections, and the Committee Petitioners’ efforts undertaken on the presumption and expectation of free and equal elections, will be severely undermined. *See, e.g., Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting from the denial of the application for stay) (“[T]he counting of undated mail-in ballots . . . could well affect the outcome of the fall elections.”).

Finally, Petitioners’ interests are *immediate* because the causal connection described above is neither remote nor speculative. As noted elsewhere, the Acting Secretary has already “direct[ed] county boards of elections to ‘includ[e] in the canvass and pre-canvass . . . [a]ny ballot-return envelope that is undated or dated with an incorrect date but has been timely received,” guidance directly contrary to the plain language of Pennsylvania statute (Pet’rs’ Application at p. 2 (internal citation omitted)). Furthermore, responses to the Petitioners’ Application have already revealed the disparate manner in which county boards of election intend to handle undated ballots absent judicial relief—including both whether such ballots will be counted (*compare* Resp’t Berks County Bd. of Elections Answer at p. 2 (“[I]t was Berks County’s intent to count undated ballots for the November 8th, 2022, general election.”) *with* Resp’ts Bedford County Bd. of Elections *et al.* Answer at p. 3 (questioning whether *any* county board of elections “intends to follow the Acting

Secretary's guidance and count an undated or incorrectly dated absentee or mail-in ballot")) and whether undated ballots will be segregated pending any final judicial determination (*compare* Resp't Philadelphia County Bd. of Elections Answer at p. 10 (The "Board does not identify ballot envelopes with a missing or 'incorrect' handwritten date, much less separate out such ballot envelopes.") *with* Rep't Delaware County Bd. of Elections Joinder ("The Board further advises this Court that it plans to segregate and process undated ballots separately from other ballots.")). By Respondents' own responses, the imminent harm that prompted Petitioners to file their Application will occur within a matter of days, absent relief by this Court.

In sum, the Voter Petitioners and Committee Petitioners meet the traditional standing requirements of a "substantial, direct and immediate interest in the outcome of the litigation." *Fumo*, 972 A.2d at 496. In addition, the Voter Petitioners also satisfy each of the five factors necessary to demonstrate taxpayer standing.

e. Alternatively, the Legislative Intervenors Have Standing

As discussed at length in the Legislative Intervenors' Application to Intervene that is pending before the Court, and is incorporated herein by reference, the Legislative Intervenors also have substantial, "direct and immediate interest in the outcome of the litigation" sufficient to confer standing in the present case. *Id.*

Legislators can initiate litigation where they “can demonstrate an injury to [their] ability ‘to act as a legislator.’” *Allegheny Reproductive Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 909 (Pa. Commw. Ct. 2020) (citation omitted).

Article VII, § 1 of the Pennsylvania Constitution states that the “laws requiring and regulating the registration of electors” are only to be enacted by members of the General Assembly. Article VII, § 14 takes it further, stating “[t]he **Legislature** shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence . . . may vote[.]” *Id.* (emphasis added). And Article I, § 4 of the United States Constitution affirms that “[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed **in each state by the legislature thereof**[.]” *Id.* (emphasis added).

Pennsylvania courts have specifically found that negative impacts on a legislator’s “ability to participate in the voting process” qualify as legally enforceable interests sufficient to confer standing. *Id.* at 910, 913 (citation omitted); *see also Coleman v. Miller*, 307 U.S. 433, 438 (1939) (“[legislators] have a plain, direct and adequate interest in maintaining the effectiveness of their votes.”); *Fumo v. City of Philadelphia*, 972 A.2d 487, 492 (Pa. 2009).

As the determination of this action affects the Legislative Intervenors' legally enforceable interests to pass, modify, repeal and suspend election laws in Pennsylvania, the Legislative Intervenors have standing in the present matter. *Fumo*, 972 A.2d at 502 (“the claim reflects the state legislators’ interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.”).

Accordingly, the standing of the Legislative Intervenors is independently sufficient to allow this Court to reach a decision on the merits in the present case.

II. Pennsylvania’s Election Code Unambiguously Requires Absentee and Mail-In Ballots to be Dated and Signed

Pursuant to the plain text of the Election Code, after marking his or her ballot, the absentee or mail-in voter shall:

then fold 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, and the address of the elector’s county board of election and the local election district 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, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a) (emphasis added).

The procedure in question has been a requirement in Pennsylvania for absentee ballots since the statutory creation of absentee voting for the general public

in the Commonwealth in 1963. *See* Act No. 37, Session of 1963, Pub. L. No. 707, § 22 (amending Section 1306 of the Election Code (25 P.S. § 3146.6) to apply beyond military voters) (“The elector shall then fill out, date[,] and sign the declaration printed on such envelope.”).

In 2019, when the General Assembly expanded the ability to vote by mail by creating a new category of “no excuse” mail-in voting through Act 77, that same procedure of filling out, dating, and signing the envelope was applied to mail-in voters. *See* 25 P.S. § 3150.16(a).

a. The Matter is Controlled by Binding Precedent of this Court

This matter is controlled by the binding precedent of this Court, and pursuant to that decision, the statute in question should be enforced pursuant to its black letter terms. *Id.*

A. In re Canvass of Nov. 3, 2020 General Election Background

During the canvassing of absentee and mail-in ballots for the November 3, 2020 General Election, litigation ensued concerning how county election boards should apply the “fill out, date and sign” language contained in the Election Code. *See, e.g., In re 2,349 Ballots in the 2020 Gen. Election*, 241 A.3d 694 (Pa. Commw. Ct. 2020), *reversed by In re Canvass of Absentee & Mail-in Ballots of November 3, 2020, Gen. Election*, 241 A.3d 1058 (Pa. 2020)).

This Court then consolidated the various cases on this issue and entered its decision on November 23, 2020. *In re Canvass of Absentee & Mail-in Ballots of November 3, 2020, Gen. Election*, 241 A.3d 1058 (Pa. 2020). In deciding the case, three Justices of this Court held that the “shall fill out, date[,] and sign” statutory language was mandatory (Justice Dougherty, joined by then-Chief Justice Saylor and Justice Mundy), three Justices (Justice Donohue, joined by Justice Baer and Justice Todd) held that it was not, while the seventh Justice, Justice Wecht, entered a concurring opinion holding that the requirement to date and sign “is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory.” *In re Canvass of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1079 (Wecht, J., concurring). As such, Justice Wecht opined that “in future elections [after November 3, 2020], I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.” *Id.*

Justice Wecht, however, cited to specific issues related to the 2020 General Election, and held that he “would apply my interpretation only prospectively. So despite my reservations about the OAJC’s analysis, I concur in its disposition of these consolidated cases.” *Id.* at 1079-80.

As such, given this three to three to one split, Justice Donohue’s opinion was designated as the Opinion Announcing Judgment of the Court (“OAJC”), and ballots contained in ballot return envelopes missing the elector’s signature or date were not required to be set aside for purposes of the 2020 General Election. *Id.*

B. Application of the Marks Rule to In re Canvass of Nov. 3, 2020 Gen. Election Decision

Under Pennsylvania law, an “Opinion Announcing the Judgment of the Court . . . reflects only the mandate, and not the rationale, of a majority of Justices.” 210 Pa. Code § 63.4(B)(3). Such split decisions can in certain circumstances be precedential. In such cases, the opinions of the court are analyzed by applying the *Marks* rule, also known as the “narrowest grounds” rule. *See Commonwealth v. Alexander*, 243 A.3d 177, 197 (Pa. 2020) (citing *Marks v. United States*, 430 U.S. 188 (1977) (“We apply the *Marks* rule.”); *see also Commonwealth v. McClelland*, 233 A.3d 717, 731 (Pa. 2020) (applying the *Marks* rule); *Purple Orchid v. Pa. State Police, Bureau of Liquor Control Enf’t*, 721 A.2d 84 (Pa. Commw. Ct. 1998) (same).

As the *Alexander* Court described, “[t]he United States Supreme Court announced in *Marks v. United States* . . . that when it ‘decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .’” *Alexander*, 243 A.3d at 197 (quoting *Marks v. United States*, 430 U.S. 188 (1977)). “This rule ascribes precedential

status to decisions made without majority agreement on the underlying rationale.”
Ramos v. Louisiana, 140 S. Ct. 1390, 1430 (2020).

In *Alexander*, this Court analyzed the holding in that Court’s prior OAJC decision in *Commonwealth v. Gary. Alexander*, 243 A.3d at 197 (citing *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014)). As the *Alexander* Court noted, “Justice Saylor’s concurring opinion provided the crucial fourth vote that allowed *Gary* to constitute a binding holding as opposed to establishing only a case-specific result limited to *Gary* alone.” *Id.* As such, the *Alexander* Court applied the *Marks* rule to determine “the holding of the [*Gary*] Court [that] may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds . . .” *Id.* (quoting *Marks*, 430 U.S. at 188).

Accordingly, under Pennsylvania law, the proper analysis of the OAJC in *In re Canvass* is to determine the “position taken by those Members who concurred in [that] judgment on the narrowest grounds.” *Id.*

Therefore, the operative “narrowest grounds” opinion is not the rationale of the OAJC authored by Justice Donohue, which would have set aside the date-and-sign requirement altogether, but rather the significantly narrower concurrence of Justice Wecht.

In his concurrence, Justice Wecht agreed that the Election Code’s requirement to date and sign “is stated in unambiguously mandatory terms, and nothing in the

Election Code suggests that the legislature intended that courts should construe its mandatory language as directory.” *In re Canvass of Nov. 3, 2020 General Election*, 241 A.3d at 1079 (Wecht, J., concurring).

As such, Justice Wecht opined that “in future elections [after November 3, 2020], I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.” *Id.*

Given that the remaining three Justices dissented from the OAJC and would have applied the statutory requirement both to future elections (as did Justice Wecht) and to the November 3, 2020 General Election as well, Justice Wecht’s concurrence represents the “position taken by those Members who concurred in [that] judgment on the narrowest grounds.” *Alexander*, 243 A.3d at 197 (quoting *Marks v. United States*, 430 U.S. 188 (1977)).

As such, by applying the *Marks* rule, the *In re Canvass* OAJC decision should be viewed as applying to the November 3, 2020 General Election *only*, and that “in future elections [after November 3, 2020], . . . the date and sign requirement . . . [is] mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.” *In re Canvass of Nov. 3, 2020 General Election*, 241 A.3d at 1079 (Wecht, J., concurring).

This is the interpretation reached by the Commonwealth Court in the *Ritter* case, where the Commonwealth Court panel, by analyzing this Court’s decision in *In re Canvass*, “conclude[d] that [Justice Dougherty’s Opinion], in conjunction with [Justice Wecht’s Opinion] should be considered as precedential authority that is binding on this Court and controls the outcome of this case.” *Ritter v. Lehigh Cty. Bd. of Elections*, 272 A.3d 989 (Pa. Commw. Ct. 2022), *allocatur denied* 271 A.3d 1285 (Pa. 2022); *see also In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Commw. Ct. 2022) (holding “that the prevailing view of our Supreme Court is that of Justice Wecht, *i.e.*, that the requirement that the outer envelope be dated by the voter is mandatory and must be strictly enforced in elections held after that of 2020.”).

By contrast, in the recent *Berks County* case, the Commonwealth Court construed the precedential effect of *In re Canvass* too narrowly, concluding that “[t]he judgment of the Pennsylvania Supreme Court in *In re Canvass* was that the ballots accompanied by undated declarations could be counted for the 2020 General Election and did not address future elections.” *Chapman v. Berks Cty. Bd. of Elections*, 2022 Pa. Commw. Unpub. LEXIS 390, at *78 (Pa. Commw. Ct. Aug. 19, 2022) (single judge op.). The *Marks* Rule, however, “treats a case as binding authority on the narrowest of grounds upon which a majority of the Court agree on

both a result and its supporting rationale.” *Commonwealth v. McClelland*, 233 A.3d 717, 731 (Pa. 2020) (internal citations omitted).

Here, the narrowest result and rationale in *In re Canvass* is to allow undated ballots to be counted for the 2020 Election *only*, as opposed to the broader rationale of the OAJC which would allow undated ballots to be counted in perpetuity. *See In re Canvass of Nov. 3, 2020 General Election*, 241 A.3d at 1079 (Wecht, J., concurring). Accordingly, any undated ballots for this and future elections should not be counted pursuant to the controlling precedent of *In re Canvass*.

b. The Pennsylvania Election Code Plainly Requires that Electors Date and Sign their Absentee and Mail-In Ballots

Even if somehow the *In re Canvass* decision were not deemed to be controlling precedent, the text of the statutes in question unambiguously states that an elector is required to date and sign his or her ballot. Pursuant to the plain text of the Election Code, once marking his or her ballot, the absentee or mail-in voter shall:

then fold 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, and the address of the elector’s county board of election and the local election district 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, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a) (emphasis added).

“When presented with matters of statutory construction, this Court is guided by Pennsylvania’s Statutory Construction Act, 1 Pa.C.S. § 1501-1991.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Pursuant to the Act, “the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa.C.S. § 1921(a). When the language of a statute in question is unambiguous, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b).

While “all things being equal, the law will be construed liberally in favor of the right to vote at the same time, we cannot ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004); *see also In re Canvass of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1079 (Dougherty, J., concurring and dissenting) (“the meaning of the terms ‘date’ and ‘sign’— which were included by the legislature — are self-evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them.”) (emphasis in original); *id.* (Wecht, J., concurring) (the date and sign “requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory.”).²

² Here again, the Commonwealth Court in *Berks County* strayed from the position of the majority of justices of this Court, premising its statutory interpretation on the “dating provisions [being] ambiguous.” *Chapman v. Berks Cty. Bd. of Elections*, 2022 Pa. Commw. Unpub. LEXIS 390, at

Given that the statutory “requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory”, any undated absentee or mail-in ballots must not be counted. *Id.*

III. The Election Code’s Date and Sign Requirement Does Not Violate the Materiality Provision

a. Materiality Provision Background

Pursuant to 52 U.S.C. § 10101(a)(2), “[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is **qualified under State law to vote** in such election.” (Emphasis added.)

Also known as the “materiality provision” of the Voting Rights Act (“VRA”), this “provision was intended to address the practice of requiring unnecessary information for **voter registration** with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing

*49 (Pa. Commw. Ct. Aug. 19, 2022). Given that the date and sign “requirement is stated in unambiguously mandatory terms”, the Commonwealth Court’s subsequent statutory interpretation based on the ambiguity of the statute is misplaced. *See In re Canvass of Nov. 3, 2020 General Election*, 241 A.3d at 1079 (Wecht, J., concurring); *see also* 1 Pa.C.S. § 1921(b) (When the language of a statute in question is unambiguous, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

an excuse to disqualify potential voters.” *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (emphasis added). “This [provision] was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age.” *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995). It is “an anti-discrimination statute, designed to eliminate discriminatory practices of registrars through arbitrary enforcement of **registration** requirements” *McKay v. Altobello*, CIVIL ACTION NO. 96-3458 SECTION: E/4, 1996 U.S. Dist. LEXIS 16651, at *1 (E.D. La. Oct. 31, 1996) (emphasis added).

“There are two types of non-material omissions possible under the VRA: 1) failure to provide information, such as race or social security number, that is not directly relevant to the question of eligibility; and 2) failure to follow needlessly technical instructions, such as the color of ink to use in filling out the form.” *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006).

Said statutory “section . . . provides specifically for protections against denials based on errors or omissions on ‘records or papers’ that are immaterial to the determination of an individual’s qualification to vote.” *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1372 (S.D. Fla. 2004). Such “error and omission” . . . [must] pertain to determining eligibility to vote.” *Id.*

Accordingly, the challenged statutory language in this case is far afield from the types of provisions that have been held to be violative of the Materiality

Provision, as the date-and-sign statute has a clear administrative purpose, only constitutes a limited burden to all absentee and mail-in voters, and has no application to voter registration. *Compare Diaz*, 435 F.Supp. 2d at 1213; *see also Schwier v. Cox*, 439 F.3d 1285 (11th Cir. 2006) (affirming immateriality of statutory provision that required disclosure of social security numbers for purposes of the VRA when required disclosure of such information is otherwise prohibited by federal law).

Indeed, a Commonwealth Court panel reached this conclusion in January when it correctly concluded “that section 10101(a)(2)(E) is inapplicable because section 1306-D(a) of the Election Code dictates the validity of a mail-in vote that has been cast by an elector who is otherwise qualified to vote, and does not, in any way, relate to the whether that elector has met the qualifications necessary to vote in the first place.” *Ritter v. Lehigh Cty. Bd. Of Elections*, 272 A.3d 989 (Pa. Commw. Ct. 2022) (*citing Friedman v. Snipes*, 345 F.Supp.2d 1356, 1371 (S.D. Fla. 2004)), *allocatur denied*, 271 A.3d 1285 (Pa. 2022).

The materiality provision is completely inapplicable to the present circumstances.³

³ It is also unclear whether there is a private right of action in seeking relief under the statute in question, as there is a circuit split on that issue. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) (holding that no private right of action exists); *but see Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). When analyzing this issue, the District “Court did not find the question of the existence of a private right of action to be particularly close. Rather, this Court found that the text of the statute, its structure, and its legislative history, all suggested that Congress did not intend to create a private right of action.” *Migliori v. Lehigh Cty. Bd. of Elections*, No. 5:22-cv-00397, 2022 U.S. Dist. LEXIS 48266, at *3-4 (E.D. Pa. Mar. 18, 2022). On the other hand,

b. The Requirement to Date and Sign Absentee and Mail-In Ballots Serves a Clear Purpose as a Part of the General Assembly's Comprehensive Election Code

Even if this Court were to view the Materiality Provision as being applicable to these election administration provisions, the requirement that electors date and sign their absentee or mail-in ballot return envelope serves a variety of important election administration purposes. “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 Nov. 3, 2020 Gen. Election*, 241 A.3d at 1079 (Dougherty, J., concurring and dissenting) (quoting *In re 2,349 Ballots in the 2020 Gen. Election*, 241 A.3d 694 (Pa. Commw. Ct. 2020) (memorandum); *Ritter v. Lehigh Cty. Bd. Of Elections*, 272 A.3d 989 (Pa. Commw. Ct. 2022) (same).

The U.S. District Court for the Eastern District of Pennsylvania reached the same conclusion in its own analysis in the *Migliori* case, holding that these statutory

the vacated Third Circuit decision determined that there was a private right of action. *See Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022). For this Court to invalidate this statute on materiality grounds, it would necessarily need to weigh in on this circuit split and determine that the materiality provision could be enforced by someone other than the Department of Justice.

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 v. Lehigh Cty. Bd. of Elections*, 2022 U.S. Dist. LEXIS 46352, at *38-39 (E.D. Pa. 2022). 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.

As the U.S. District Court for the Western District of Pennsylvania similarly 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.*

Therefore, given the General Assembly’s constitutional 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 requirement in question is an important part of Pennsylvania’s Election Code. The date-and-sign requirement is a material requirement of the Pennsylvania Election Code that applies to all absentee and mail-in voters, and is not in any way discriminatory, or in violation of 52 U.S.C. § 10101(a)(2).

c. The Decision of the Third Circuit in Migliori Was “Very Likely Wrong” and Should Not Serve as Persuasive Authority Here

In a now-vacated decision that in the intervening period created much upheaval in the Commonwealth, the Third Circuit found that voter-plaintiffs possessed both a private right of action to enforce the materiality provision, and that “the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16 are immaterial to a voter’s qualifications and eligibility under § 10101(a)(2)(B).” *Migliori v. Cohen*, 36 F. 4th 153 (3d Cir. 2022), *cert. granted and judgment vacated*, *Ritter v. Migliori*, No. 22-30, 2022 U.S. LEXIS 4530 (U.S. Oct. 11, 2022) (Mem.).

In a decision that Justice Alito deemed “very likely wrong”, “[t]he Third Circuit’s interpretation broke new ground” and allowed election administration provisions in only very narrow circumstances. *Ritter v. Migliori*, 142 S. Ct. 1824,

1824 (2022) (Alito, J. dissenting). Reflecting the attenuated link between the requirement to “date and sign” absentee and mail-in ballots and an elector’s “eligibility to vote”,⁴ rather than examining *whether the statute in question fell within the true bounds of the materiality provision*, the court below instead flipped that inquiry and based its decision on whether the date and sign “requirement is material in determining whether such individual is qualified to vote under Pennsylvania law.” *Migliori*, 36 F.4th at 153. According to this opinion, the only way a Pennsylvania election administration statutory “requirement is material [is] if it goes to determining age, citizenship, residency, or current imprisonment for a felony.” *Id.* (citing 25 Pa. Cons. Stat. §§ 1301(a), 2811).

Indeed, the Third Circuit was ultimately correct that the “date and sign” statutes had no applicability “in determining whether [an] individual is qualified to vote under Pennsylvania law.” *Id.* Rather than rendering the statutes in question violative of the materiality provision, however, that determination instead reflects the threshold problems with the court’s lens of analysis.

The qualification of electors is but one of many parts of administering a free and equal election. Ballots must be cast through specifically prescribed manners,⁵

⁴ *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1372 (S.D. Fla. 2004).

⁵ See *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (“Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.”)

and they must be cast on time,⁶ and in the proper locations.⁷ The alternative of this is an anarchistic system where any registered elector could cast a vote whenever, wherever, and in whatever form the elector so chose.

But our constitutional system does contain election administration rules. “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.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J. dissenting).

The Third Circuit’s analysis, however, ignored the obvious necessity of “rules setting the date of an election, the location of the voter’s assigned polling place, the address to which a mail-in ballot must be sent.” *Id.* While none of these rules “ha[ve] anything to do with the requirements that must be met in order to establish eligibility to vote . . . it would be absurd to judge the validity of voting rules based on whether they are material to eligibility.” *Id.*; see also *Vote.org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) (“It cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that

⁶ Indeed, the Third Circuit’s *Migliori* decision notes this fact, observing that ballot “[d]elivery is timely if received by the board of elections by 8:00 p.m. on Election Day.” *Migliori*, 36 F.4th at 153 (citing 25 Pa. Stat. §§ 3146.6(a), 3150.16(a)).

⁷ See, e.g., Pa. Const. Art. VII, § 1.

individual to vote under § 1971. Otherwise, virtually every rule governing how citizens vote would be suspect.”).

Yet, rather than acknowledging this threshold problem with its analysis, the Third Circuit pigeonholed the administrative “date and sign” requirement into a framework judging whether someone is qualified to vote. It simply does not fit.

Accordingly, given these core issues with the Third Circuit’s analysis of the Materiality Provision, that Circuit’s now-vacated opinion should not hold persuasive authority here.⁸

Accordingly, this Court should continue to follow the Commonwealth Court’s prior analysis of materiality “that section 10101(a)(2)(B) is inapplicable because section 1306-D(a) of the Election Code dictates the validity of a mail-in vote that has been cast by an elector who is otherwise qualified to vote, and does not, in any way, relate to the whether that elector has met the qualifications necessary to vote in the first place.” *Ritter v. Lehigh Cty. Bd. Of Elections*, No. 1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1, at *26 (Pa. Commw. Ct. Jan. 3, 2022) (*allocatur denied*, 271 A.3d 1285 (Pa. 2022) (citations omitted).

⁸ Likewise, the Commonwealth Court’s recent decisions in *McCormick v. Chapman* and *Berks County*, which rely almost exclusively on the Third Circuit’s vacated analysis in *Migliori* in construing the Materiality Provision, should not hold any persuasive authority here. 2022 Pa. Commw. Unpub. LEXIS 319 (Pa. Commw. Ct. June 2, 2022).

CONCLUSION

For the foregoing reasons, the Legislative Intervenors respectfully request that this Court order that the legally insufficient ballots be set aside and not counted.

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 Brief contains 6,992 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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