

IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, S. Michael Streib, Republican National Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania,

Petitioners

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, *et al.*,

Respondents.

BRIEF OF INTERVENOR-RESPONDENTS DCCC, DEMOCRATIC NATIONAL COMMITTEE (“DNC”), AND THE PENNSYLVANIA DEMOCRATIC PARTY (“PDP”)

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INTRODUCTION

In 2020, when Republican party committees, candidates, and legislators first asked this Court to discard thousands of mail-in and absentee ballots (collectively, “mail ballots”) because of a missing, handwritten date on the ballot envelope,¹ they did so in the midst of an exceptional 2020 process with a scant evidentiary record on an expedited schedule. The Court did not have the benefit of thorough briefing on the actual intake and review process for mail ballots; the historical context of the provisions in question; or the potential implications of existing federal law, including the materiality provision of the Civil Rights Act. This resulted in a fractured ruling that permitted undated ballots to be counted in 2020 while leaving the ultimate question unresolved.

Much has changed since then. Evidence developed in recent litigation debunks each justification relied on to suggest that the Date Instruction was mandatory. Specifically, undisputed record evidence shows that the handwritten date is not used to identify fraudulent ballots, establish whether an elector is eligible to vote, or even ensure that a ballot is timely cast. In fact, the Deputy Secretary of the Department of State, Jonathan Marks, has testified that he “cannot think of any administrative purpose” to the

¹ See 25 P.S. §§ 3146.6(a), 3150.16(a) (collectively, the “Date Instruction”).

handwritten date and that he didn't believe there was any situation where the handwritten date would be relevant to whether the vote is counted. App. 17 at p. 0170, *Berks Cnty. N.T.*, J. Marks, at 22:3–8²; *Id.* at p. 0265, *Berks Cnty. N.T.*, J. Marks at 117:15–18; see also, e.g., App. 27 at p. 0681, Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* at 2 (Sept. 11, 2020) (to track when a mailed ballot has been received, Department of State Guidance directs counties to “scan the correspondence ID barcode on the outside of the envelope”). As President Judge Cohn Jubelirer of the Commonwealth Court concluded following a full exploration of the undisputed record evidence, “the purposes expressed” for relying on the declaration date—i.e., determining “an elector’s qualifications, or the timeliness of the ballot,” which are the same interests asserted by Petitioners here—“are unsupported by the facts[.]” *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 at *18 (Pa. Cmwlth. Aug. 19, 2022). This unrefuted evidence conclusively establishes that the Date Instruction does not advance any weighty interest—and thus cannot be considered mandatory under this Court’s precedents.

² Intervenor-Respondents have compiled the relevant parts of the evidentiary record submitted in *Berks County* and attached them as an appendix to this brief.

Further, the text and structure of the Election Code, including the legislative history that was not previously presented to this Court, confirm that the language in the statute was directory and was not intended to disqualify undated ballots. Interpreting the Date Instruction in the draconian manner that Petitioners propose would contradict the statutory language and raise serious questions of federal law: the Third Circuit already has found that disqualifying ballots for simply having undated envelopes violates the Civil Rights Act. And although this Court need not consider that question anew, it should presume—in accordance with the Statutory Construction Act and well-settled rules of statutory interpretation—that the General Assembly was aware of the Civil Rights Act and did not endeavor to violate federal law.

In short, Petitioners' proposed interpretation cannot withstand the evidentiary record, which was not available to the Court in *In re Canvass*, and which conclusively demonstrates that the date on the ballot envelope serves no meaningful purpose; is not consistent with the text, history and structure of the Election Code; and would violate the Civil Rights Act, which prohibits disenfranchisement based on immaterial errors or omissions "on any record or paper relating to" an act "requisite to voting." When analyzed under this Court's settled precedents, each of these sources point in the same direction: the date provision is directory, and undated or misdated

ballots cannot be disqualified—particularly in the middle of an ongoing election.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

a. Do the Petitioners have standing to bring the instant appeal?

Answer: The individual-voter Petitioners do not have standing. Intervenors take no position on political committee Petitioners' standing. Regardless of whether any Petitioner has standing, the pressing need for resolution of this question warrants addressing the merits of this dispute.

b. Does the Election Code's instruction that electors "shall . . . date" absentee and mail-in ballots, 25 P.S. §§ 3146.6(a); 3150.16(a), require that the votes of those electors who do not comply with that instruction are not counted?

Answer: No.

c. Assuming, *arguendo*, that this Court answers the second issue in the affirmative, would such a result violate the materiality provision of the Civil Rights Act of 1964? See 52 U.S.C. § 10101(a)(2)(B).

Answer: Yes.

COUNTER STATEMENT OF THE CASE

In October 2019, the General Assembly—led by unanimous Republican support in the Senate and with only two defections in the House,

along with the support of a sizable number of Democratic legislators in each chamber—approved Act 77 to allow all qualified electors to vote by mail and, according to the Republican House Majority Leader, to “lift the voice of every voter in the Commonwealth.”³

But the 2020 election, along with differing responses to the pandemic, apparently altered the general support for mail-in voting, such that, in the 2020 general election, Democrats cast nearly three times as many mail ballots as Republicans.⁴ As a result of this disparity, the Republican party’s political calculus shifted, and the party’s committees, candidates, legislators, and voters have launched one lawsuit after another to roll back their signature legislative achievement.⁵

³ House Republican Caucus, Historic Election Reform, <https://www.pahousegop.com/electionreform> (last visited Sept. 6, 2022).

⁴ Holly Otterbein, *Democrats return nearly three times as many mail-in ballots as Republicans in Pennsylvania*, POLITICO (Nov. 3, 2020) (hereinafter “Otterbein”), available at <https://www.politico.com/news/2020/11/03/democrats-more-mail-in-ballots-pennsylvania-433951>.

⁵ See, e.g., *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 923 (M.D. Pa. 2020) (challenging Pennsylvania election officials’ ability to implement cure procedures allowing voters to resolve minor, correctible errors on mail ballots); *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377, 384, 391 (3d Cir. 2020) (same); *Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022 (Pa. Cmwlth. Sept. 29, 2022) (same); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331 (W.D. Pa. 2020) (challenging mail-in voting process and seeking to throw out thousands of validly cast mail-in ballots); *In re: Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (same); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683 (W.D. Pa. Jan. 12, 2021) (Republican state senate candidate sought to throw out hundreds of undated mail ballots); *Kelly v. Pennsylvania*, No. 620 MD 2020, 2020 WL 7224280 (Pa. Cmwlth. Nov. 27, 2020)

This action, filed three weeks before the November 8, 2022 general election and after Pennsylvania voters have begun voting by mail, is just the latest chapter in these ongoing efforts to make mail voting more difficult for Pennsylvanians—this time targeting the Acting Secretary’s guidance to include *qualified and registered voters’ timely received* mail ballots in the pre-canvass and canvass.

Act 77 provides a series of instructions for voting by mail, which include the following:

At any time after receiving an official mail-in ballot, but on or before eight o’clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and 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.

(Republican congressman challenging mail-in voting process and moving to exclude mail-in ballots entirely from Pennsylvania and various counties’ certification of the presidential election); *McLinko v. Dep’t of State*, 270 A.3d 1243 (Pa. Cmwlth. 2022) (Republican member of board of elections and Republican members of Pennsylvania House of Representatives challenging constitutionality of entire mail-in voting process); *Bonner v. Chapman*, No. 364 MD 2022 (Pa. Cmwlth. July 20, 2022) (Republican members of Pennsylvania House of Representatives challenging validity of entire mail-in voting process).

Act 77 § 8 (codified at 25 P.S. § 3150.16(a)) (emphasis added); see *also* 25 P.S. § 3146.6(a) (including similar instruction for absentee ballots). Once the ballot is returned, county boards of elections must “examine the declaration” and, “[i]f the county board has verified the proof of identification . . . and is satisfied that the declaration is sufficient” and that the voter has the right to vote, the ballot “shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(g)(3).

Sections 3146.6(a) and 3150.16(a) instruct voters to “date” the declaration printed on a mail ballot’s outer envelope, among other technical directions, including a request to use black lead pencil, or blue or black ink in marking the ballot. Each instruction is preceded by the word “shall”; but, as this Court held 50 years ago when interpreting this provision, not all instructions are mandatory pre-requisites for counting a ballot. See *In re Luzerne Cnty. Return Bd., Appeal of Elmer B. Weiskerger*, 290 A.2d 108, 109 (Pa. 1972) (“This section of the code merely assures the validity of ballots marked in blue, black or blue-black ink. It does not . . . specify that any other type of marking will necessarily be void.”). Thus, the question presented before the Court is whether the Legislature’s “contextually ambiguous use of the word ‘shall’,” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 390-91 (Pa. 2020) (Wecht, J., concurring), prohibits county boards

of elections from determining that an undated or misdated declaration “is sufficient” and counting the vote.

This Court previously concluded that undated ballots must be counted for the 2020 election but left the fate of such ballots in future elections unresolved. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020) (“*In re 2020 Canvass*”), cert. denied sub nom. *Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021). Applying its longstanding and settled precedents, the Court recognized that the framework for determining whether a statutory provision is mandatory or directory turns on whether the directive represents “weighty interests.” *Id.* at 1073 (plurality op.); *id.* at 1090 (Dougherty, J., concurring in part and dissenting in part). Three justices concluded in a plurality opinion that the Date Instruction did not implicate any weighty interests, *id.* at 1078 (plurality op.), and three justices concluded in dissent that it did, *id.* at 1090.

In the two years since *In re 2020 Canvass*, a fuller evidentiary record developed in litigation specifically directed to the Date Instruction has confirmed that this provision does not implicate any weighty state interests and thus must be read as directory. First, in May 2022, the U.S. Court of Appeals for the Third Circuit concluded—based on undisputed evidence developed during the 2021 General Election—that the date on a mail ballot

envelope served no purpose, and that disqualifying undated ballots thus would violate the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022). “The nail in the coffin,” according to the court, was the undisputed evidence that “ballots were only to be set aside if the date was *missing*—not incorrect,” revealing that the content of what a voter supplied on the date line was meaningless. *Id.* at 164.

Although the U.S. Supreme Court recently vacated as moot the Third Circuit’s decision in *Migliori* without commenting on the merits, vacatur does not call into question the Third Circuit’s ruling. *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Rather, “[t]he established practice of the [U.S. Supreme] Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.”⁶ *Munsingwear*,

⁶ The issue came before the Third Circuit in *Migliori* on a suit by voters whose mail-in ballots—all of which were received by county election officials prior to 8 p.m. on election day—were nevertheless rejected in a 2021 local judicial race in Lehigh County, simply because handwritten dates on the ballot envelopes were missing. By the time the Supreme Court considered the petition for certiorari, the 2021 election had been certified and the winning judicial candidate installed.

340 U.S. at 39. And the Third Circuit’s ruling and the factual findings in that case remain persuasive authority.

Indeed, the President Judge of the Commonwealth Court reached the same conclusion this past August relying primarily on Pennsylvania law. *Berks Cnty.*, 2022 WL 4100998, at *24. In a thorough and well-reasoned 67-page opinion—again relying on a fully-developed evidentiary record—the President Judge agreed that “the material facts . . . do not factually support the existence of the ‘weighty interests’ that would require invalidation [of undated or incorrectly dated mail ballots].” *Id.* Consistent with these decisions, the Secretary recently directed county boards to accept and count undated or misdated mail ballots. See Appl. Ex. A. This guidance remains in effect as eligible Pennsylvanians have started voting, with more than 600,000 ballots returned as of October 24, 2022, and tens of thousands more arriving in election offices each day.⁷

SUMMARY OF ARGUMENT

Disputes over undated ballots have proliferated in recent months, casting a cloud of uncertainty over the ballots of millions of Pennsylvanians who plan to vote (or have already voted) by mail—particularly those who

⁷ Pa. Dep’t of State, Election Results, <https://www.vote.pa.gov/About-Elections/Pages/Election-Results.aspx>

inadvertently neglected to enter a handwritten date on their ballot envelope—and will likely result in further post-election litigation in all sixty-seven counties absent judicial intervention. This Court should take the opportunity to confirm that mail ballots cannot be disqualified merely because of a missing date.

The Court's well-established precedents compel this result. For decades, this Court has stated that some legislative commands are mandatory while others are directory, with the distinction turning on the statutory context—including an analysis of the relevant interests advanced by the provision. Consistent with the Statutory Construction Act and this Court's jurisprudence, laws enacted by the General Assembly must be presumed to reflect this long-recognized distinction. Here, the Legislature has directed voters to date their ballot, but it has not ordered boards of elections to discard undated or incorrectly dated ballots, nor has it ascribed any relevance whatsoever to the handwritten date itself. And as the evidence gathered in recent cases has shown, the date on the ballot envelope serves no purpose whatsoever in determining voter eligibility or detecting fraud; instead, it is a vestigial requirement that (if Petitioners prevail) would serve only as pretext to throw out timely votes cast by eligible Pennsylvania voters.

The text, structure, and history of the Election Code confirm that this could not have been the Legislature's intent.

That alone should decide the issue. But even further confirmation of the Legislature's intent can be determined by reference to federal law. The Materiality Provision of the Civil Rights Act prohibits discarding votes due to immaterial errors or omissions on documents or records relating to any acts requisite to voting. Even Petitioners recognize that the handwritten date on the declaration is completely immaterial to determining a voter's qualifications or eligibility to vote. Because the Legislature chose to tie eligibility to the voter's status on Election Day rather than at the time the ballot was signed, the Date Instruction is exactly the type of meaningless technicality targeted by the Materiality Provision. If the Election Code is interpreted as directory, consistent with this Court's longstanding jurisprudence and well-settled canons of statutory interpretation of which the Legislature certainly was aware when it passed Act 77, there is no question of conflict between the Date Instruction and federal law. If, however, this Court accepts Petitioners' ahistorical interpretation of the statute requiring boards of elections to discard otherwise valid ballots for failure to include a handwritten date, it would violate federal law—a problem the Legislature certainly did not intend to create.

This Court’s jurisprudence and the interpretive rules established by the Legislature confirm that mail ballots cannot be discarded because of missing or incorrect declaration dates. This Court should reject Petitioners’ Application in its entirety or, at minimum, clarify that mail votes cast in this election may not be discarded due to immaterial date errors.⁸

ARGUMENT

I. The Court should resolve this pressing issue of public importance regardless of whether Petitioners have standing.

Petitioners consist of (1) registered Pennsylvania voters who intend to participate in the currently ongoing 2022 elections (the “Voter Petitioners”), Appl. 5–7; and (2) Republican Party committees (the “Committee Petitioners”), Appl. 7–9. To demonstrate their standing, Petitioners must identify injuries that are “substantial, direct, and immediate.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). The Voter Petitioners have not, and cannot, identify such an injury.⁹

⁸ Even if this Court finds otherwise, Petitioners’ choice to bring this action now is inappropriate, seeking to throw out ballots in an election in which hundreds of thousands of votes already have been cast.

⁹ Unlike the Voter Petitioners, Intervenors DCCC, Democratic National Committee, and Pennsylvania Democratic Party have an important role in protecting the rights of their members and supporters to exercise the franchise and their rights as candidates. See, e.g., *Pa. Democratic Party v. Republican Party of Pa.*, No. 16-5664, 2016 WL 6582659, *3 (E.D. Pa. Nov. 7, 2016) (recognizing Democratic party committee had standing “to protect the interests of both Democratic candidates running for office and Democratic voters”). Intervenors take no position on the Republican Committee Petitioners’ standing.

At the outset, the Voter Petitioners assert only generalized interests in “knowing” the procedure for mail ballots, not having their votes “canceled out and diluted by the counting of undated or incorrectly dated ballots,” and uniform application of the Election Code across counties, Appl. 6–7; but the same is presumably true of every Pennsylvania voter. As this Court has long held, a voter’s concern that her ballot will somehow be “diluted” by the acceptance of other qualified voters’ ballots cannot confer standing because, even assuming that is a legitimate concern (which is highly questionable), it would be “common to that of all other qualified electors.” *Kauffman v. Osser*, 271 A.2d 236, 240 (Pa. 1970).

Federal courts have overwhelmingly reached the same conclusion.¹⁰ *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 356–60 (3d Cir. 2020) (concluding such vote-dilution claims are “paradigmatic generalized grievance[s] that cannot support standing”), *cert. granted and judgment vacated on other grounds*, 141 S. Ct. 2508 (2021); *Wood v. Raffensperger*, 981 F.3d 1307, 1313–16 (11th Cir. 2020) (holding plaintiff lacked standing to assert claim that “the inclusion of unlawfully processed absentee ballots diluted the weight of his vote”); *see also Donald J. Trump for President, Inc.*

¹⁰ While Pennsylvania’s standing doctrine does not mirror that of federal courts, this Court has looked to federal standing decisions as persuasive authority. *See Markham*, 136 A.3d at 144-45.

v. Cegavske, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020); *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020).

The same reasoning applies to the Voter Petitioners' wish for clarity on the proper procedures for canvassing mail ballots and concern about differing procedures between counties. Not only are these interests shared by every voter in Pennsylvania, but they are also not injuries: Voter Petitioners do not allege an impediment to anyone's ability to cast a ballot or to have it counted. See *Wood*, 981 F.3d at 1315. And their brief does not even acknowledge (let alone distinguish) this Court's rejection of their vote dilution theory in *Kauffman*, nor does it attempt to explain how their generalized interest in the proper application of the voting laws is unique to them. *In re Hickson*, 821 A.2d 1238, 1241-42 (Pa. 2003) (standing requires the identification of an injury that "surpasses the common interest of all citizens in procuring obedience to the law").

In any event, Voter Petitioners' lack of standing should not preclude this Court from resolving the important issues at hand, which, if not addressed now, will almost surely re-emerge in identical future litigation. Standing is a "prudential" doctrine that serves merely as a "useful tool in regulating litigation"; it does not limit the Court's constitutional authority to

resolve a particular legal dispute. *Id.* at 1243 & n.5 (contrasting federal courts' standing doctrine, which "springs from a constitutional source," with Pennsylvania courts' standing doctrine, which "is not constitutionally compelled"). This is especially true when this Court is exercising its King's Bench authority. As Intervenors explained to the Court in their response to this Application, the destabilizing threat to the ongoing 2022 election posed by Petitioners' claims calls for prompt consideration (and rejection) of the relief Petitioners seek. Failure to address Petitioners' claims now will serve only to delay resolution of this issue until the chaotic environment of post-election litigation. These exigencies warrant an expeditious resolution of this dispute.

II. The Election Code does not require discarding undated or misdated mail ballots.

This Court has deployed several analytical tools in determining the consequences of failures to comply with voting instructions set forth in the Election Code. Where the Legislature has clearly specified the appropriate consequences in the text, no further analysis is necessary. Where the text is silent or ambiguous, however, this Court must decide whether the Legislature intended to disqualify ballots because of non-compliance with voting instructions. In conducting this analysis, the Court has established three guiding principles that are instructive here.

First, when interpreting contextually ambiguous provisions, the Court may consider the structure and history of the Election Code to determine the consequences of failure to comply with a statutory directive. *Second*, this Court has considered evidence of any “weighty interests”—or lack thereof—served by the relevant instructions in determining whether a provision is mandatory (requiring the extreme sanction of discarding a voter’s ballot for noncompliance) or directory (allowing the vote to be counted if otherwise valid). *Finally*, the Court must presume that the Legislature is aware of potentially applicable federal law and prevailing common law when enacting legislation; that it fully anticipates its laws will be interpreted in accordance with the standards and guidance developed by this Court, including the well-established distinction between mandatory and directory provisions; and that it does not intend to violate federal law.

All of these foundational tenets point in one direction: missing or incorrect dates on mail ballot envelopes do not supply grounds for discarding ballots and disenfranchising Pennsylvania voters.

A. Interpreting the date provision as directory is consistent with the plain text, structure, and history of the Election Code.

This Court should not impose the extreme consequence of ballot invalidation without clear direction from the Legislature. The text, structure,

and history of the Election Code confirm that the Legislature did not intend to disqualify voters who fail to fully comply with the Date Instruction. Petitioners ask this Court to force election officials to either not count or set aside “undated or incorrectly dated” ballots at the canvassing stage. Pet’rs’ Br. at 52; 25 P.S. § 3146.8. The canvassing statute specifies that a vote shall be counted if the voter’s identification has been verified and the board “is satisfied that the declaration is sufficient.” 25 P.S. § 3146.8(3), (4). Petitioners argue that a declaration cannot be sufficient if the voter fails to include an accurate date, but the plain language and history of the canvassing provision decisively rejects that interpretation.

A statute’s meaning “should be determined based on evidence of the General Assembly’s intention” which is best understood by looking at the text of the statute “in context[] with words bearing their common meaning.” Sec’y’s Answer to App. (“Chapman Answer”) at 16 (citing 1 Pa.C.S. § 1921; *Crown Castle NG E. LLC v. Pa. Pub. Util. Comm’n*, 234 A.3d 665, 674 (Pa. 2020)). And here the statute’s plain language reflects the Legislature’s determination that sufficiency—rather than perfection—is the appropriate standard to apply to mail ballot declarations. As the Secretary explained, undated declarations are *sufficient* so long as they are signed. *Id.* at 15–16 (emphasis added). “Here, the General Assembly required only that a

declaration be ‘sufficient’” to allow the voter to swear their eligibility to vote. *Id.* at 16 (citing 25 P.S. § 3146.4; 25 P.S. § 3150.14). And elsewhere, the Election Code makes clear that a “voter’s signature on a declaration by itself constitutes the voter’s attestation of their qualifications.” *Id.* at 16–17 (citing 25 P.S. § 3553).¹¹

With the benefit of the record and historical research developed over the last two years that was not before the Court in 2020, nothing in the text or structure of the Election Code dictates that undated or misdated ballot declarations are insufficient and require invalidation of the ballot. The General Assembly explicitly identified in the canvassing statute which specific errors necessitate disqualifying a ballot; namely, if the secrecy envelope “contain[s] any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference” or if “an elector fails to provide proof of identification that can be verified by the county board by the sixth calendar day following the election” where proof of identification had not previously been provided. 25 P.S. § 3146.8(g)(4)(ii), (h)(3). As the *Berks County* court correctly recognized, the Election Code “**does not state** that a ballot in a return envelope that lacks a

¹¹ Intervenor-Respondents adopt in full the Secretary of State’s discussion of canvassing requirements laid out in Section II. A. of her Answer.

dated declaration is invalid, should be rejected, or should not be counted, although the General Assembly has specified these consequences with regard to other aspects of absentee or mail-in ballots.” *Berks Cnty.*, 2022 WL 4100998, at *14 (emphasis in original). This Court should not presume that the Legislature intended the extreme consequence of ballot invalidation where it has established a ‘sufficiency’ standard and nowhere stated that undated ballots cannot be sufficient or must be disqualified.

Notably, the Election Code’s history reveals that if the General Assembly wanted to make the Date Instruction a pre-requisite for canvassing, it would have done so explicitly, as it has in the past. As the Secretary’s Answer thoroughly explains, the Election Code previously allowed voters to return absentee ballots by the second Friday after Election Day, despite voters needing to complete their ballots by or on Election Day. Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, §§ 1306, 1307, 1945 Pa. Laws 29, 37. As such, the Legislature amended the canvassing provision in 1945 to instruct county boards to review the postmark on a ballot’s return envelope and to “set aside” ballots in which the jurat was dated after the election. Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, § 1307, 1945 Pa. Laws 29, 37.¹²

¹² Jurat is “[a] certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made.” *Jurat*, Black’s Law Dictionary (11th ed. 2019)

When absentee voting was expanded to certain groups of civilians in 1963, the affidavit and jurat requirements merged into the single declaration still used today. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 22, § 1304, 1963 Pa. Laws 707, 736.

Then, in 1968, the General Assembly imposed a single deadline—by election day—for voters to complete their absentee ballot and for counties to receive them. Act of Dec. 11, 1968, P.L. 1183, No. 375, sec. 8, § 1308(a). After doing so, the General Assembly *deleted* the requirement that counties discard ballots with improper dates on the ballot envelope. Act of Aug. 13, 1963, P.L. 707, No. 379, sec. 8, § 1308(c), 1963 Pa. Laws 707, 736. These provisions remained largely unchanged from 1968 to 2019 and were incorporated by the General Assembly when it passed Act 77 in 2019. Mot. for Leave to File Br. as Amicus Curiae and Br. for Speaker of the Pa. H.R., Bryan Cutler, *et al.*, *Ritter v. Migliori*, 2022 WL 3371220 (U.S.), at *4 (noting that since the first amendment to the Election Code was enacted, “the procedure for marking an absentee ballot has remained constant”). Importantly, “Act 77 continued to impose a single deadline for voters to cast, and for counties to receive, most absentee and all mail-in ballots.” Chapman Answer at 21.

This history shows that, since 1937, the Legislature has required county boards to review mail ballots for sufficiency, but that review has been separate and apart from any review of dates.

Moreover, the Legislature crafted specific language instructing county boards to review the dates on ballot declarations; but it expressly withdrew that requirement in the 1968 amendments when the ballot receipt deadline and election day merged, rendering the declaration date irrelevant to the canvassing process. Chapman Answer at 22 (quoting *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 609 (Pa. 2020)). If the Legislature intended for ballots without a proper date to be excluded, it would have included that language in the canvassing provision, as it has in the past. Its decision not to do so is instructive and provides compelling evidence that discarding undated ballots contravenes the Legislature's intent.

B. Unrefuted evidence of voting and canvassing procedures confirms that the Date Instruction is directory.

Applying this Court's long recognized distinction between "mandatory" and "directory" provisions further confirms that the Legislature did not intend to disqualify undated ballots. Noncompliance with a directive in the Election Code does not disqualify voters in every case; rather, the Court must consider whether the instruction implicates "minor irregularities" or "weighty interests." See *In re 2020 Canvass*, 241 A.3d at 1073.

Where an instruction implicates weighty interests, the Court interprets it as “mandatory,” meaning noncompliance requires the extreme consequence of disqualifying the voter’s ballot. Examples of “weighty interests” include “fraud prevention or ballot security . . . that the General Assembly considered to be critical to the integrity of the election.” *Id.*; see also *Berks Cnty.*, 2022 WL 4100998 at *20 (“Where the provision is essential to the integrity of the election or the validity of the ballot, the provisions have been found to be mandatory”); *Pa. Democratic Party*, 238 A.3d at 380 (recognizing legislative intent that “ballot confidentiality . . . is so essential as to require disqualification” of mail ballots lacking a secrecy envelope). Where an instruction does *not* implicate weighty interests, the Court interprets it as ‘directory,’ meaning noncompliance does not require ballot disqualification.

Petitioners fail to connect any weighty interests to the Date Instruction such that failure to comply renders a ballot declaration insufficient. Instead, they rely on conclusory assumptions about the use of handwritten dates which, in litigation since *In re 2020 Canvass*, have been discredited with undisputed evidence. For instance, Petitioners claim that the Date Instruction: “provides proof of when the elector actually executed the ballot in full . . .”; “establishes a point in time against which to measure the elector’s eligibility to cast the ballot”; and “ensures the elector completed the ballot

within the proper time frame[,]” Pet’rs’ Br. at 27; but the evidentiary record in *Berks County* and *Migliori* conclusively rejects this theory.

First, it is undisputed that the timeliness of the mail ballot is determined by when the bar code on the ballot’s return envelope is scanned into the Statewide Uniform Registry of Electors (SURE) system, *not* by whatever the handwritten date says. *See, e.g., Berks Cnty.*, 2022 WL 4100998, at *6 (noting county commissioners and board members testimony that “the absentee and mail-in ballots are date stamped when they are received by their election bureaus and the barcode on each ballot return envelope that is unique to each elector and each election is scanned into the Statewide Uniform Registry of Electors (SURE) system”); App. 27 at p. 0681, Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* at 2 (Sept. 11, 2020) (to track when a mailed ballot has been received, Department of State Guidance directs counties to “scan the correspondence ID barcode on the outside of the envelope”); App. 18 at p. 0280, *Berks Cnty.* N.T., S. Dunn, at 130:2-5 (“Q: And you don’t use the date written on the outer envelope to determine when the ballot was received, correct? A: That is correct.”); App. 17 at p. 0246, *Berks Cnty.* N.T., Deputy Secretary J. Marks at 98:16-21 (“[I]n determining whether [a mail-in or absentee ballot is] legally cast and in determining whether [a ballot is] timely,

I don't know that the date inserted by the voter is relevant in making that determination. It's the date that the county receives the ballot from the voter that is relevant.").

Second, it is undisputed that the handwritten date has nothing to do with an elector's eligibility to vote. See Pet'rs' Br. at 46–47 (“[C]orrectly dating an absentee or mail-in ballot is not one of the four qualifications to vote in Pennsylvania [T]he date requirement does not result in a qualification determination[.]”); see also, e.g., *Berks Cnty.*, 2022 WL 4100998 at *22 (“[T]he date would not aid in determining an elector's qualifications[.]”). Because eligibility is assessed as of Election Day, the handwritten date cannot establish a point in time against which to measure the elector's eligibility to cast the ballot. See Amicus Br. of Pa., *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, 2022 WL 1045074, at *13 (3d Cir. Apr. 1, 2022).

Third, undisputed evidence shows that the handwritten date itself is not actually used to disqualify ballots for any reason. See App. 17 at p. 0170, *Berks Cnty.* N.T., Deputy Secretary J. Marks, at 22:3–8 (no administrative purpose to the date requirement); App. 19 at p. 0299, *Berks Cnty.* N.T., R. D'Agostino, at 148:2-7 (Q: “Are you aware of any instance in the May, 2022 primary where the date written on the envelope was used to exclude that

ballot from being counted? On the envelope, sorry. A: To exclude [the ballot] based on the date itself other than the case I mentioned¹³, no.”); App. 52 at p. 0987, *Berks Cnty.* N.T., Deputy Secretary J. Marks at 36:8–9 (“I’m not aware of any county that excluded wrongly dated ballots”); *Id.* at 1007, *Berks Cnty.* N.T., Deputy Secretary J. Marks at 117:15–18 (“Q: So is there any situation in which the date written on the envelope would be relevant to whether the vote is counted? A: I don’t believe so, no.”).

Moreover, the handwritten date does nothing to prevent voter fraud. Petitioners point to a criminal complaint involving a fraudulent ballot cast in the name of a deceased voter but fail to explain how a handwritten date would have facilitated (or prevented) such fraud. If a voter is deceased on election day, their ballot cannot be counted, regardless of the date entered on the ballot declaration. 25 P.S. § 3146.8(d); see *also* App. 17 at p. 0265, *Berks Cnty.* N.T., Deputy Secretary J. Marks, at 117:6-14 (“[T]he relevant date is the date the voter is deceased as compared to the date of the election.”); App. 19 at p. 0309-10, *Berks Cnty.* N.T., R. D’Agostino, at 158:12-1, 159:1-4 (noting deceased voter Mrs. Mihaliak was removed from Commonwealth’s voter rolls and marked as deceased by Departments of

¹³ The case referred to is discussed *infra* pp. 26–27 and involved a deceased voter’s ballot being rejected for reasons entirely unrelated to the handwritten date on the envelope.

Health and State on April 25, 2022, prior to her ballot being received by the Board of Elections on April 28, 2022, so her ballot never would have counted regardless of the handwritten date). Further, double voting is detected by the bar code on the mail ballot, not the handwritten date. See *Berks Cnty.*, 2022 WL 4100998, at *22 (“[D]ouble voting was detected through the use of the barcode on the ballot that was scanned and entered into the SURE system[.]”).

Petitioners also misread the mail voting procedures in the Election Code in suggesting that the handwritten date provides proof of when the voter executed the ballot in the event they appear in person at the polling place. Here too, the handwritten date is irrelevant. If a voter submits a completed and valid mail ballot before the deadline, and later attempts to vote in person on election day, the voter will at most be permitted to submit a provisional ballot, which would be disallowed given timely receipt of the mail ballot. See 25 P.S. §§ 3146.6(b), 3150.16(b), 3050(b). Ultimately, “[a] timely received ballot . . . containing a handwritten date, even an incorrect one, does not ensure or establish **anything** in relation to ballot confidentiality, an elector’s qualifications, or the timeliness of the ballot.” *Berks Cnty.*, 2022 WL 4100998, at *18 (emphasis added).

Once the evidentiary record in *Migliori* and *Berks County* clarified the mail voting procedures, President Judge Cohn Jubelirer correctly found “the purposes expressed” by the counties in that case—which are the same as those asserted by Petitioners here and represented by common counsel—“are unsupported by the facts[.]” *Id.* That same evidence is now before the Court—though it was not during the previous challenge in 2020. This Court should reach the same conclusion as President Judge Cohn Jubelirer and find that failure to comply with the Date Instruction does not require invalidation and that therefore the provision is directory.

This does not, however, mean that the Legislature’s directive that a voter “shall . . . date” the ballot declaration is superfluous. The Legislature clearly intends for voters to include the date; after all, “shall means *shall*.” *In re 2020 Canvass*, 241 A.3d at 1084 (Wecht., J., concurring in part). But the Legislature also provided a framework in the canvassing provisions for evaluating whether failure to comply with this directive requires the extreme remedy of ballot invalidation. 25 P.S. § 3146.8(g). The facts as developed in *Migliori* and *Berks County* show that, in practice, the handwritten date has no bearing on whether the declaration is sufficient to establish the voter’s identity or eligibility to vote. To hold that undated ballots nonetheless must

be discarded would contravene both the Legislature's intent and this Court's established precedents.

C. Interpreting the Date Instruction as mandatory contradicts the fundamental purpose and objective of the Election Code and implicates the Free and Equal Elections Clause.

The Election Code's "purpose and objective" is "to obtain freedom of choice, a fair election and an honest election return," and therefore this Court "liberally construe[s]" the Election Code "so as not to deprive . . . electors of their right to elect a candidate of their choice." *Pa. Democratic Party*, 238 A.3d at 356 (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)); see also *Appeal of James*, 105 A.2d 64, 65 (Pa. 1954) ("Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote."). Pursuant to this principle, this Court has explained that "[t]he power to throw out a ballot for minor irregularities," "must be exercised very sparingly" and only "for compelling reasons." *James*, 105 A.2d at 66 (quoting *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945)). That is, when interpreting the Election Code, the "goal must be to enfranchise and not to disenfranchise." *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). Disenfranchising qualified voters on the sole ground that they failed to write a correct date on the outer envelope of their timely mail ballot flips this "longstanding and overriding" interpretation of the Election Code on

its head. And given the long-accepted distinction between directory and mandatory “shall” provisions, this Court should not assume that the Legislature intended such a result. *Pa. Democratic Party*, 238 A.3d at 360–61.

Adopting Petitioners’ interpretation would also implicate the Free and Equal Elections Clause. The right to vote is enshrined in the Pennsylvania Constitution, PA. Const. art. I, § 5, and courts have repeatedly recognized that because “[t]he Constitution is the fundamental law of our Commonwealth,” that means “there is a fundamental right to vote,” *League of Women Voters of Pa. v. Boockvar*, 247 A.3d 1183, 2021 WL 62268, at *11 (Pa. Cmwlth. Jan. 7, 2021), *aff’d sub nom. League of Women Voters of Pa. v. DeGraffenreid*, 265 A.3d 207 (Pa. 2021); *see also Friedman v. Corbett*, 72 A.3d 255, 258 (Pa. 2013). In considering the constitutionality of election regulations under the state constitution, Commonwealth courts apply the same standards adopted by “the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (Pa. 1984)). This analysis requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’

against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiffs’ rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Cmwlth. 2003).¹⁴

For voters who fail to enter a handwritten date on their ballot envelope, the Petitioners’ proposed penalty is draconian: their ballots are discarded and they are disenfranchised. But, as discussed above, discarding undated ballots serves no interest at all, much less a *weighty* interest, *supra* at pp. 23–29. Whether a ballot is timely received by the county boards of election is determined by that ballot’s scan into the SURE System or receipt stamp. *Supra* at pp. 24–25. And the voter-provided date serves no administrative or fraud-detection function. See *supra* at pp. 25–26. The significance of the state interest “depend[s], in part, on whether the state’s intrusion will effect its purpose; for if the intrusion does not effect the state’s purpose, it is a gratuitous intrusion, not a purposeful one.” *Denoncourt v. Commonwealth of*

¹⁴ See Clifford B. Levine & Jacob S. Finkel, *Shall Your Vote Be Counted?: Evaluating Whether Election Code Provisions Are Directory or Mandatory*, 82 U. Pitt. L. Rev. 525, 535–47 (2021) (surveying the Court’s use of balancing tests in interpreting statutory provisions).

Pa., State Ethics Comm'n, 470 A.2d 945, 949 (Pa. 1983). Here, the Date Instruction, if interpreted as mandatory, would be plainly gratuitous, and it certainly does not create the sort of “compelling reason[.]” required to justify “throw[ing] out a ballot for minor irregularities.” *James*, 105 A.2d at 66.

In sum, unrefuted evidence regarding the voting and canvassing process; the Election Code’s plain text, structure, and history; and this Court’s longstanding construction of the Election Code and the Pennsylvania Constitution all counsel against interpreting the Date Instruction in a manner that allows county boards to discard undated ballots and disenfranchise lawful Pennsylvania voters.

III. Petitioners’ requested relief would violate federal law.

The Legislature’s intended application of the Date Instruction can and should be determined under the well-established principles of Pennsylvania common law and statutory interpretation discussed above, without reference to federal law. However, that Petitioners’ preferred interpretation would invite violations of federal law confirms that they are mistaken.

A. The Court should apply Pennsylvania’s rules of statutory construction and interpret the Date Instruction in accordance with the Civil Rights Act.

The Materiality Provision of the Civil Rights Act prohibits any “person acting under color of law” from “deny[ing] 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.” 52 U.S.C. § 10101. This Court need not decide whether the Materiality Provision actually prohibits disqualification of mail ballots lacking accurate dates; that it *may* is enough to require this Court to adopt a permissible alternate interpretation. *Cf. Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017) (“Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction.”); *MCI WorldCom, Inc. v. Pa. Pub. Util. Comm’n*, 844 A.2d 1239, 1249 (Pa. 2004) (“[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”). Here, there is at least a strong possibility that the interpretation advanced by the Petitioners would force county boards to violate the Materiality Provision, and an alternative interpretation can be adopted fully consistent with the SCA.

This Court should avoid interpretations of a statute that raise issues of federal or constitutional law. The SCA directs that “[i]n ascertaining the

intention of the General Assembly in the enactment of a statute” courts may presume “[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.” 1 Pa.C.S. § 1922(3). Where two possible readings of a statute exist—one that creates and one that avoids conflict between state and federal laws—the latter interpretation must be employed. See, e.g., *Commonwealth, Dep’t of Transp. v. McFarren*, 525 A.2d 1185, 1188 (Pa. 1987) (“[I]f one interpretation results in conflict with another statute, or violation of the Federal or State Constitution, such interpretation cannot be accepted”).¹⁵ Because the interpretation advanced by Petitioners would require county boards to violate federal law, this Court should avoid adopting that interpretation if at all possible.

B. Petitioners’ requested relief would violate the Materiality Provision of the Civil Rights Act.

The Materiality Provision has three relevant elements, all of which are implicated by disqualifying absentee ballots based on missing or incorrect

¹⁵ While this Court has previously been asked to interpret Act 77’s ballot dating provision, the question of whether interpreting the statute as mandatory instead of directory violates the Materiality Provision was not fully briefed in 2020. Nonetheless, a majority of this Court then recognized that arguments about this “binding provision” had “some persuasive force,” as “it is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require.” *In re 2020 Canvass*, 241 A.3d at 1075 n. 5, 1089 n. 54. Intervenor-Respondents agree that this persuasive logic is important but believes that the decision is more properly rooted in a fuller consideration of the state law factors discussed above.

dates on the certification envelope. It prohibits (1) denying the right to vote (2) “because of an error or omission on any record or paper . . . relating to any . . . act requisite to voting” (3) so long as the error or omission is not material to the voter’s qualifications. 52 U.S.C. § 10101(a)(2). Based on the plain text of the Provision and relevant sections of the Election Code, refusing to count ballots because of missing or incorrect dates is impermissible.

The first Materiality Provision element is met because the consequence of applying the Petitioners’ interpretation is that voters who misdate or fail to date their ballot certification will not have their votes counted. For purposes of the Materiality Provision, “the word ‘vote’ includes all action necessary to make a vote effective including . . . having [a] ballot counted and included in the appropriate totals of votes cast.” *Id.* U.S.C. § 10101(e). Petitioners’ argument that “[w]hen a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied the right to vote” robs the text of its meaning; per the statute, refusal to count a vote is denial of the right to vote itself. Pet’rs’ Br. at 43–44 (internal quotation omitted).

The Materiality Provision does not *always* prohibit States from disqualifying ballots, however: the statute only prohibits denial of the right to vote based on immaterial errors or omissions on records or documents. It

therefore is of no moment that Petitioners can identify a string of reasons that an individual “may be unable to cast a vote,” including “showing up to the polls after Election Day, failing to use a secrecy envelope for an absentee or mail-in ballot, returning the ballot to the wrong location, or arriving at the wrong polling place.” *Id.* at 44. Petitioners make no argument that these identified reasons involve “an error or omission on any record or paper” at all, and a State may permissibly impose regulations on the exercise of the franchise, see Appl. at 20–21; it may not, however, refuse to count votes because of immaterial errors or omissions on the ballot declaration.

The second Materiality Provision element is met because the ballot declaration is a “record or paper . . . relating to any . . . other act requisite to voting.” 52 U.S.C. § 10101(a)(2)(B). Petitioners argue that “casting a ballot constitutes the *act* of voting, not an application, registration, or other act *requisite* to voting,” and that therefore the declaration is beyond the scope of the Materiality Provision. Appl. at 22. This argument is wrong for at least two reasons. First, the declaration in question appears on the ballot *envelope* and not on the ballot itself. See 25 P.S. § 3146.8(3) (directing board to “examine the declaration *on the envelope of each ballot*”) (emphasis added). Filling out the declaration is therefore a separate act from casting a ballot. Second, Petitioners once again ignore the text of the Materiality Provision.

Because “vot[ing]” includes “having [a] ballot counted,” “any . . . other act requisite to voting” encompasses any act requisite to *having one’s vote counted*. 52 U.S.C. § 10101(a)(2)(B), (e). Completing a declaration that is mandated by law in order to have one’s ballot counted indisputably falls within the scope of activities covered by the statute.

The third Materiality Provision element is met because the date on the declaration is completely immaterial to a voter’s qualification to vote under Pennsylvania law. See *supra* pp. 23–29. As Petitioners concede, “correctly dating an absentee or mail-in ballot is not one of the four qualifications to vote in Pennsylvania, which are being at least 18 years of age on the date of the election; having been a citizen of Pennsylvania for at least one month; having lived in the relevant election district for at least 30 days; and not being imprisoned for a felony.” Pet’rs’ Br. at 46–47 (citing 25 P.S. § 1301). Petitioners argue that the clear immateriality of the declaration date to a voter’s qualifications somehow takes it “outside the plain terms and narrow scope of, and does not violate, the federal materiality provision.” Pet’rs’ Br. at 47. The opposite is true; that the declaration date “is not one of the four qualifications to vote in Pennsylvania,” Pet’rs’ Br. at 46–47, means that an error or omission with respect to that date *cannot* be grounds for refusing to count a vote.

Consistent with this interpretation of the Materiality Provision, the U.S. Court of Appeals for the Third Circuit held in May 2022 that disqualifying undated ballots would violate federal law. See *Migliori*, 36 F.4th 153. The court explained that the Date Instruction “in no way helps the Commonwealth determine whether a voter’s age, residence, citizenship, or felony status qualifies them to vote.” *Id.* at 163. This was particularly so, the court explained, given that all the ballots at issue were timely received, and those containing “an erroneous date were counted.” *Id.* at 163 (“This, without more, slams the door shut on any argument that this date is material.” *Id.* at 164.). The Supreme Court recently vacated that decision as moot, see *Ritter*, 2022 WL 6571686, but that vacatur in no way undermines the Third Circuit’s reasoning. Indeed, months prior to that vacatur, the Supreme Court declined to disrupt the Third Circuit’s ruling when one of the parties in *Migliori* sought an emergency injunction to prevent the counting of consequential undated ballots pending appeal. *Ritter v. Migliori*, 142 S. Ct. 1824 (2022).

Petitioners offer no persuasive reason to depart from the Third Circuit’s analysis but instead rely on arguments that mustered the support of only three dissenting Justices. See *id.* at 1824–26. At most, that dissent establishes that a minority of the Court believes there is some dispute about the proper interaction between the Materiality Provision and the Date

Instruction, but the weight of authority rejects Petitioners' atextual interpretation of the Materiality Provision. See, e.g., *Migliori*, 36 F.4th at 163-64; *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018).¹⁶ That is sufficient reason for this Court to refrain from adopting an interpretation of the Election Code that would require entangling itself in this dispute. 1 Pa.C.S. §§ 1921, 1922.

IV. The Court should decline to disrupt the ongoing 2022 general election.

In addition to the legal defects in Petitioners' Application, it is far too late in this election cycle to provide the relief they request. The 2022 general election has been underway for weeks. Counties have distributed over 1.31

¹⁶ Tellingly, Justice Alito conceded that his dissent constituted only a hasty, preliminary view of the issues involved, explaining: "as is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded." *Ritter*, 142 S. Ct. at 1824.

Moreover, Petitioners' reliance on *Vote.org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022)—a motions panel order issued on an expedited motion for emergency stay pending appeal—is unpersuasive. In that case, the district court agreed that the Materiality Provision barred election officials from rejecting voter registration applications signed with imaged—as opposed to wet ink—signatures and enjoined county officials from enforcing that requirement. *Vote.org v. Callanen*, --- F.3d ---, No. SA-21-CV-00649-JKP, 2022 WL 2181867 (W.D. Tex. June 16, 2022). While the motions panel order that Petitioners cite stayed the injunction, the panel's additional commentary regarding other applications of the Materiality Provision to factual scenarios not before the court was not only irrelevant dicta—there was no dispute that the provision applied to the voter registration forms at issue—but, as even the panel recognized, the ultimate disposition of the case remains a question for the merits panel which has yet to issue a ruling on the case. *Vote.org*, 39 F.4th at 305 n.5.

million mail-in and absentee ballots to voters since late September, and voters have returned more than 600,000 of those ballots. That activity has occurred under guidance from federal court, the Commonwealth Court, and the Acting Secretary of the Commonwealth indicating that the existence of an accurate, handwritten date is *not* grounds for disqualifying a mail-in or absentee ballot. Petitioners claim that reversing all of this guidance, at this exceptionally late stage, and consequently disenfranchising countless lawful Pennsylvania voters will somehow promote confidence in the electoral process and facilitate the functioning of our democracy. Pet'rs' Br. at 9–10. The opposite is true: granting the relief Petitioners seek would upend the status quo in the middle of an ongoing election, causing widespread confusion and significant disenfranchisement, sowing distrust in the electoral system along the way.

This Court has explained that it is appropriate to withhold relief when it would alter the electoral status quo in a way that causes “unnecessary disenfranchisement.” *Appeal of Zentner*, 626 A.2d 146, 149 (Pa. 1993). That is precisely what Petitioners request. As Justice Wecht recognized in 2020, when “local election officials and voters alike lack[] clear information regarding the consequences of, *e.g.*, failing to . . . record the date beside the voter’s declaration signature,” it is deeply inequitable to invalidate those

voters' ballots on that basis. *In re 2020 Canvass*, 241 A.3d at 1089. That voters have lacked clear information cannot be disputed; as the Majority Leader and Speaker of the House wrote in a letter attached as Exhibit D to the Petition, "conflicting judicial interpretations, coupled with frequently revised guidance from [the Department of State], has created ambiguity over this provision." Given such ambiguity, this Court should not grant relief that reverses existing guidance from federal and state actors—particularly when it is far too late to make ballot-design changes to mitigate the risk that voters inadvertently fail to properly date their mail ballots—without providing political committees like Intervenors a sufficient opportunity at this late date to educate voters about such significant changes to the way mail ballots are tallied.

The events that predate Petitioners' Application exemplify the circumstances under which the disruptive, status-quo altering nature of relief sought requires the Court to stay its hand. Two years ago, this Court permitted Philadelphia and Allegheny Counties to count mail-in and absentee ballots on which qualified voters had signed but not dated the outer envelope. *In re 2020 Canvass*, 241 A.3d at 1079. In his opinion agreeing with the judgment, Justice Wecht expressed a "sincere hope that the General Assembly [would] see[] fit to refine and clarify" the Election Code so as "to

advance clarity and uniformity across the Commonwealth” on this question. *Id.* at 1089. In the absence of legislative clarification, voters and election officials received mixed signals from the Commonwealth Court, which issued four relevant decisions on this question between January and August of this year, the two most recent of which indicated that a voter’s failure to include an accurate, written date on their ballot did *not* render it invalid. *Berks Cnty.*, 2022 WL 4100998 (Pa. Cmwth. Aug. 19, 2022); *McCormick for U.S. Senate v. Chapman*, No. 286 MD 2022, 2022 WL 2900112 (Pa. Cmwth. June 2, 2022); *but see In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 933, 2022 WL 96156 (Pa. Cmwth. Jan. 10, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989, 2022 WL 16577 (Pa. Cmwth. Jan. 3, 2022).¹⁷

As discussed, this issue also arose in federal litigation. In late May, the Third Circuit held that federal law prohibited counties from invalidating ballots on the ground that they lacked a written date. *Migliori*, 36 F.4th 153. Two weeks later, the U.S. Supreme Court denied an application to stay the Third Circuit’s decision. *Ritter*, 142 S. Ct. 1824. And when the U.S. Supreme Court vacated the Third Circuit’s decision on mootness grounds just a week ago,

¹⁷ Petitioners’ Application and Brief emphasize that the Commonwealth Court’s decisions in *McCormick* and *Chapman* were “unpublished, non-precedential” orders. Appl. 2, 10, 11, 16; Pet’rs’ Br. at 4–5. Of course, so are *Downington School Board* and *Ritter*.

Ritter, 2022 WL 6571686, the Secretary immediately issued guidance directing counties to maintain the status quo by including undated or incorrectly dated ballots in their pre-canvass and canvass. Appl. Ex. B.

Thus, since the general election began in late September with counties sending mail ballots to voters, see 25 P.S. §§ 3146.5(a), 3150.15, voters and election officials have been operating under nearly uniform federal and state court guidance that the absence of an accurate, written date is *not* a basis for rejecting a mail ballot. At this very moment, voters are returning ballots pursuant to this guidance. Invalidating those voters' ballots due to their failure to comply with an instruction that they were told was not mandatory would be truly inequitable. To reverse course now, in the middle of voting, would pull the rug out from under those voters. The Court should decline Petitioners' invitation for electoral chaos.

CONCLUSION

For the reasons above, this Court should confirm that timely received ballots with missing or incorrect dates should be counted as required by law.

Dated: October 25, 2022

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I, Adam C. Bonin, certify that this filing contains fewer than 14,000 words as prescribed by Pa.R.A.P. 2135.



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I, Adam C. Bonin, 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.



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