

Exhibit A

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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.

**INTERVENORS DSCC, DCCC, DEMOCRATIC NATIONAL COMMITTEE,
AND PENNSYLVANIA DEMOCRATIC PARTY'S RESPONSE TO
APPLICATION FOR INVOCATION OF KING'S BENCH POWER**

Uzoma N. Nkwonta*
Justin Baxenberg*
Daniel C. Osher*
Daniela Lorenzo*
Dan Cohen*
ELIAS LAW GROUP LLP
10 G St. NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
unkwonta@elias.law
jbaxenberg@elias.law
dosher@elias.law
dlorenzo@elias.law
dcohen@elias.law

Adam C. Bonin
**THE LAW OFFICE OF ADAM C.
BONIN**
121 South Broad Street, Suite
400 Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

Kevin M. Greenberg
PA I.D. 082311
Adam Roseman
PA I.D. No. 313809
GREENBERG TRAURIG LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103
(215) 988-7800
greenbergk@gtlaw.com

*Counsel for Pennsylvania
Democratic Party*

Clifford B. Levine
Emma F.E. Shoucair
**DENTONS COHEN & GRIGSBY
P.C.**

625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222-3152
(412) 297-4900
clifford.levine@dentons.com
emma.shoucair@dentons.com

*Counsel for Democratic National
Committee and Pennsylvania
Democratic Party*

M. Patrick Moore, Jr.*
Massachusetts BBO #670323
HEMENWAY & BARNES LLP
75 State Street
Boston, MA 02109
(617) 227-7940
pmoore@hembar.com

*Counsel for Democratic National
Committee*

* *Pro Hac Vice motion forthcoming*

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INTRODUCTION

The 2022 general election has been underway for weeks. Yet, on Sunday, Petitioners filed an Application seeking relief relating to mail ballots already sent to thousands of Pennsylvanians—specifically, they seek to relitigate whether ballots returned with no date handwritten on the envelope declaration should be counted. And this Court is once again confronted with a last-minute attempt by Republican party committees and their supporters to disqualify timely-submitted mail ballots. Recognizing that multiple courts with full evidentiary records have recently concluded that the handwritten date provision is directory and not mandatory, Petitioners chose not to intervene in those other cases, but to invoke this Court’s extraordinary jurisdiction with no evidentiary record, and under the deadline of an already ongoing election.

The Court should take this opportunity to clarify that the Legislature did not intend to disqualify votes due to misdated or undated ballot envelopes. In doing so, the Court should reject Petitioners’ invitation to bypass critical evidence and issue drive-by rulings on important questions of statutory (and constitutional) interpretation; instead, the Court should adopt and consider the extensive evidentiary record developed in *Chapman v. Berks County Board of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Cmwlth. Aug.

19, 2022), which bears directly on the questions raised in Petitioners' Application, and which led the President Judge of the Commonwealth Court, applying settled principles of statutory interpretation, to conclude that the Election Code provisions instructing voters to date their mail-in and absentee ballots (collectively, "mail ballots") are directory, not mandatory.

COUNTER-STATEMENT OF THE CASE

The Legislature has instructed that an elector voting by mail "shall . . . fill out, date and sign the declaration printed" on the ballot envelope. 25 P.S. §§ 3146.6(a); 3150.16(a) (collectively, "date provision"). It also has instructed that the appropriate board of elections "shall 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). The date on the ballot declaration serves no discernible purpose. But because of the Legislature's "contextually ambiguous use of the word 'shall,'" *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 391 (Pa. 2020) (Wecht, J., concurring), this Court must determine whether the Legislature intended to prohibit county boards of elections from determining that an undated or misdated declaration "is sufficient" and counting the vote.

The Court last confronted this question shortly after election day in 2020. In *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020), the judgment of the Court was that undated ballots must be counted for the 2020 election, but no opinion obtained majority support. Six justices applied this Court's longstanding framework for determining whether the Legislature intended its use of "shall" to be mandatory or directory, which turns on whether failure to date the declaration represented "weighty interests." See *id.* at 1073 ("To determine whether the Election Code's directive that the voter handwrite . . . the date of signing the voter declaration on the back of the outer envelope is a mandatory or directory instruction requires us to determine . . . whether the failure to handwrite the information constitutes 'minor irregularities' or instead represent 'weighty interests,' . . . that the General Assembly considered to be critical to the integrity of the election."); *id.* at 1090 (Dougherty, J., dissenting in part) ("I cannot agree that the obligation of electors to set forth the date they signed the declaration on that envelope does not carry 'weighty interests.'"). A plurality opinion by three justices concluded that the Legislature intended the date requirement to be directory, because "a signed but undated declaration is sufficient and does not implicate any weighty interest," *id.* at 1078; a dissent in relevant part by three justices concluded

that there *were* weighty interests implicated, and that the Legislature therefore intended the date requirement to be mandatory, *see id.* at 1090 (Dougherty, J., dissenting in part); and a concurrence by one justice questioned whether the Court should move entirely beyond its existing mandatory/directory jurisprudence by construing “shall” as mandatory—while recognizing that it would be unfair to apply that new rule to the 2020 elections.

In the two years since *In re Canvass*, 241 A.3d 1058, there have been new developments which confirm the plurality’s conclusion that the Election Code does not require undated ballots to be discarded and, more importantly, a fuller record has been developed which should guide the Court’s analysis. In May 2022, the U.S. Court of Appeals for the Third Circuit concluded—based on a full evidentiary record—that the date on a mail ballot envelope served no purpose, and that disqualifying undated ballots would violate the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). *See 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.

In August, after reviewing extensive evidence revealing the absence of any weighty interests advanced by the date provision, the President Judge of the Commonwealth Court, in a thorough and well-reasoned 67-page opinion, agreed that the Legislature's use of the word "shall" in the date provision was directory rather than mandatory because, among other reasons, no interests would be served by discarding undated or misdated mail ballots. See *Berks County*, 2022 WL 4100998.¹ Consistent with these rulings, the Secretary has directed county boards to accept and count undated or misdated mail ballots. See Pet. Ex. A (Department of State Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, updated September 26, 2022) ("Any ballot-return envelope that is undated or dated with an incorrect date but that has been timely received by the county shall be included in the pre-canvass and canvass.").

Last week, the U.S. Supreme Court vacated as moot the Third Circuit's decision in *Migliori* but did not comment on the merits. See *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the 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

¹ This decision was issued under the laws of the Commonwealth and not federal law.

judgment below and remand with a direction to dismiss.”).² As a result, *Migliori*’s reasoning is still persuasive authority. The Supreme Court’s vacatur of *Migilori* also has no effect on the Commonwealth Court’s ruling in *Berks*. And the Secretary of the Commonwealth has reaffirmed that county boards cannot reject ballots because of missing or incorrect dates on the voter’s declaration. See Pet. Ex. B. Petitioners, however, have asked this Court to exercise its King’s Bench jurisdiction to adopt an interpretation of the Election Code that would disenfranchise voters and potentially violate federal law, all while injecting uncertainty and confusion into the ongoing election.

Intervenors strongly disagree with Petitioners’ interpretation of the Election Code, which contradicts evidentiary-based decisions of the Third Circuit and Commonwealth Court, and further believe that this Court should not take any action that could disenfranchise voters so close to an election. However, because the issues raised are of surpassing importance, Intervenors agree that this Court should invoke its King’s Bench powers to

² 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 for which those voters had sought relief was long over.

put the intensely destabilizing potential of Petitioners' claims to rest as soon as possible by conclusively holding that undated or misdated ballots must be counted.

ARGUMENT

I. The Court should exercise its King's Bench powers.

Intervenors agree that with the benefit of existing and incorporable record evidence, which makes clear how boards of election receive ballots and scan in the date through the SURE system, it is appropriate for the Court to exercise its King's Bench powers to address the question of whether counties may reject mail ballots on the sole ground that they lack a written, accurate date. Such action is prudent and appropriate because the 2022 general election is already well underway: Counties began distributing mail ballots weeks ago, see 25 P.S. §§ 3146.5(a), 3150.15, and at this very moment, voters are returning those ballots. Indeed, according to Acting Secretary Chapman, more than 20,000 voters had returned their mail ballots as of October 6³; it is likely that tens of thousands more have done so since then.

³ Br. for Appellees Leigh M. Chapman & Jessica Mathis at 46 n.12, *Republican Nat'l Comm. v. Chapman*, No. 100 MAP 2022 (Pa. Oct. 6, 2022).

These voters and election officials have been operating pursuant to the guidance of two court decisions directing that the absence of a written, accurate date is not a proper basis for excluding a mail ballot from the canvass. The Commonwealth Court issued this instruction two months ago in *Chapman v. Berks County Board of Elections*, 2022 WL 4100998 (Pa. Cmwlth. Aug. 19, 2022). The U.S. Court of Appeals for the Third Circuit issued the same instruction in late May of this year, *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), and the U.S. Supreme Court denied an application to stay that decision two weeks later, *Ritter v. Migliori*, 142 S. Ct. 1824 (2022). While the U.S. Supreme Court ultimately vacated the Third Circuit's opinion a week ago, it did so on mootness grounds, offering no view on the merits. *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022).

Petitioners' claim, which seeks a reversal of the guidance just discussed, threatens to throw the ongoing 2022 election into chaos. Voters who have already submitted their mail ballots could have their votes thrown out due to their failure to comply with an instruction they (along with county officials) had been told was not mandatory, a deeply inequitable result. Voters needlessly have become fearful of voting by mail with the relentless threats that an inadvertent oversight could somehow disqualify their ballots. Candidates and party committees would suddenly need to shift their

strategies during the final weeks of their campaigns to devote significant resources towards warning voters that the failure to include a written, accurate date will result in their ballots being thrown out (despite prior guidance saying the opposite). Boards of elections, who are currently in the midst of accepting mail ballots and preparing for the final stages of election day, will need to take time out from those preparations to develop new procedures for determining whether the written date on a mail ballot is accurate. And to the extent boards of elections have already trained their canvassers, those canvassers would have to be retrained.

The destabilizing threat posed by Petitioners' application for relief warrants "timely intervention" by this Court that will "avoid the deleterious effects arising from delays incident to the ordinary process of law." *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020) (quoting *Commonwealth v. Williams*, 129 A.3d 1199, 1205–06 (Pa. 2015)). While not every election case merits extraordinary jurisdiction, in this case, in light of the mass potential confusion and the inevitable chaos of 67 parallel accelerated litigations, it would be prudent for the to address—and conclusively reject—Petitioners' claims.

II. The Court should not permit Petitioners to bypass the evidentiary record developed in *Berks County*.

Petitioners' Application relies heavily on arguments made on a very limited record in 2020 before this Court in *In re Canvass*, 241 A.3d, while seeking to sidestep the extensive evidentiary record considered this summer by President Judge Cohn Jubelirer in *Berks County*, 2022 WL 4100998. That record, however, was indispensable to the full evaluation of the date requirement.

The *Berks County* court determined that Pennsylvania courts have “[f]or decades ... recognized both a mandatory and directory meaning of ‘shall,’” and that because “[t]he General Assembly is presumed to know the state of the law when it enacts statutes,” the rules of statutory construction compel the conclusion that “the word ‘shall’ is regularly used by the General Assembly to denote different meanings,” both within and outside of the Election Code, resulting in courts needing to determine legislative intent. *Berks County*, 2022 WL 4100998 at *15; see also 1 P.S. § 1922(4) (directing courts to presume that “when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language”). Full determination of the Legislature’s intent in turn can be

informed by evidence related to relevant interests served by interpreting “shall” as either mandatory or directory.

The record before the *Berks County* court showed that “there is no factual or legal basis for concluding that the dating provisions serve” discernible legislative interests that justify disenfranchisement nor that the provision can be interpreted to unequivocally require undated or incorrectly dated ballots to be discarded. *Berks County*, 2022 WL 4100998 at *18. For example, the “undisputed record” in *Berks County* revealed that during the 2020 election “all but a few of [Pennsylvania’s] 67 county boards” counted ballots in return envelopes with incorrect dates and included those votes in their certified results, thereby suggesting that the date did not serve a significant purpose. *Id.* at *18, *28; see also *Migliori*, 36 F.4th at 163 (noting that record revealed “that ballots that were received [by Pennsylvania county boards during the 2020 election] with an erroneous date were counted”).

The record also allowed President Judge Cohn Jubelirer to distinguish the date provision from other requirements that served meaningful purposes; “[u]nlike requiring an elector to personally deliver their absentee or mail-in ballot to a county board or enclose their ballot in the secrecy envelope without any identifying marks, the date on the declaration does not relate to a ballot’s confidentiality or the privacy of the elector’s vote,” nor does it

protect against backdating or fraud deterrence “because the ballots are unique to each election, can only be completed between the time they are mailed and 8:00 p.m. on primary or election day, and are, at a minimum, date stamped when they are received by the county boards.” *Berks County*, 2022 WL 4100998 at *20, *21. In sum, the now-developed evidentiary record demonstrated that the previously asserted fraud-prevention justifications are “unsupported.” *Id.* at *18. This Court should not adopt any process that would allow Petitioners to avoid engaging with those facts.

III. The record in *Berks County* makes clear that Petitioners cannot prevail on the merits and should be incorporated into this proceeding.

As established in the Commonwealth Court’s decision in *Berks*, the Petitioners cannot succeed on the merits in light of the abundant evidence that has been presented below and before the Third Circuit. See *Berks County*, 2022 WL 4100998; *Migliori*, 36 F.4th at 163.

This Court did not have the benefit of a fully developed evidentiary record in the *In re Canvass* proceeding, and as a result the dissenting justices credited unsupported arguments regarding the importance of the declaration date. For example, the dissent explained that “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,” 241 A.3d at 1090 (Dougherty, J., concurring and dissenting), but the evidentiary record since developed shows that county boards do not consult the declaration date when determining whether to count a mail ballot or a provisional ballot cast at a polling place. See 25 P.S. § 3146.8; see also *Berks County*, 2022 WL 4100998 at *18, *28; *Migliori*, 36 F.4th at 163.

Similarly, the dissent in *In re Canvass* reasoned that “[t]he presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot,” but the record in *Berks* and *Migliori* established that county boards give no weight to the declaration date when considering voter eligibility, which is determined at the date of the election. *Berks*, 2022 WL 4100998 at *18, *28 (Pa. Cmwlth. Aug. 19, 2022); *Migliori*, 36 F.4th at 163; see also 25 P.S. § 3146.8

Rather than relying on under-developed arguments and a scant record, this Court should invite submission of the evidence presented to the Commonwealth Court in *Berks County*, which simply reflects how boards of election treat and consider undated ballots, along with any additional, relevant evidence that the parties may submit in an expedited fashion, so that this Court can reach a conclusive determination as to whether there are legitimate interests served by disqualifying undated or misdated mail ballots. Doing so would allow the Court to definitively resolve whether the Legislature

intended to treat a missing handwritten date on a ballot declaration as sufficient reason to deprive a voter of the right to participate in the electoral process.

CONCLUSION

The Court should exercise its King's Bench authority, adopt the record evidence from *Berks County* and allow the parties to submit evidence pertinent to the issues presented by Petitioners' application, and provide the parties the opportunity to submit full briefing on the merits enabling a thorough exploration of those issues.

Dated: October 19, 2022

Respectfully submitted,

By:



Adam C. Bonin

THE LAW OFFICE OF ADAM C. BONIN

121 South Broad Street, Suite 400
Philadelphia, PA 19107

Telephone: (267) 242-5014

Facsimile: (215) 827-5300

adam@boninlaw.com

M. Patrick Moore, Jr.*

Massachusetts BBO #670323

HEMENWAY & BARNES LLP

75 State Street

Boston, MA 02109

(617) 227-7940

pmoore@hembar.com

Uzoma N. Nkwonta*

Justin Baxenberg*

Daniel C. Osher*

Daniela Lorenzo*

Dan Cohen*

ELIAS LAW GROUP LLP

10 G St. NE, Suite 600

Washington, D.C. 20002

Telephone: (202) 968-4490

unkwonta@elias.law

jbaxenberg@elias.law

dosher@elias.law

dlorenzo@elias.law

dcohen@elias.law

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Kevin M. Greenberg
PA I.D. 082311
Adam Roseman
PA I.D. No. 313809
GREENBERG TRAURIG LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103
(215) 988-7800
greenbergk@gtlaw.com
*Counsel for Pennsylvania
Democratic Party*

Clifford B. Levine
Emma F.E. Shoucair
**DENTONS COHEN & GRIGSBY
P.C.**
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222-3152
(412) 297-4900
clifford.levine@dentons.com
emma.shoucair@dentons.com
*Counsel for Democratic National
Committee*

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80929

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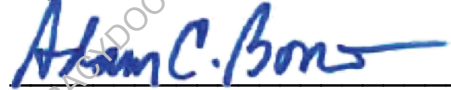
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Adam Bonin

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Attorney No. (if applicable):

80929

Date:

October 19, 2022
