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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

1191 CD 2020

In Re: Canvass of Absentee and/or Mail-In Ballots of Bucks County

BRIEF OF APPELLEE DNC SERVICES CORP./DEMOCRATIC NATIONAL COMMITTEE

On appeal from the 2020 Final Order of the Bucks County Court of Common Pleas, Case No. 2020-05786

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**Admitted Pro Hac Vice*

***Motions for Admission Pro Hac Vice Forthcoming*

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INTRODUCTION

Just moments ago, the Pennsylvania Supreme Court issued a ruling that renders most of the issues in this appeal moot. *See* Opinion, *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election, et al.*, Nos. J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020(Pa. Nov. 20, 2020) (hereinafter "Op."), attached as Exhibit A.[1] The Court held that "the Election Code does not require county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged." *Id*. at 3. The Court further held that, with respect to those issues, the Bucks County Court of Common Pleas "appropriately applied this Court's precedent[.]" *Id*. at 33 n.6.

In deciding that ballots need not be invalidated for arriving in envelopes without a handwritten date, name, or address, the Court's decision definitively resolves most of the issues raised in this appeal. The only issue not directly addressed by the Supreme Court's decision is whether the Election Code requires the county board of elections to disqualify mail-in or absentee ballots submitted by

[1] *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election, et al.*, Nos. J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020, (Pa. Nov. 20, 2020).

qualified electors whose secrecy envelope was "unsealed" in some unidentified way, but (a) where the elector securely placed the ballot inside a secrecy envelope and placed the secrecy envelope inside a sealed outer envelope as directed by statute; (b) where the secrecy of the elector's identity was maintained; and (c) where the board of elections was unable to determine whether the envelope became "unsealed" after the elector sealed it. Although that precise issue was not addressed by the Supreme Court in today's decision, the Court's rationale compels the conclusion that those ballots should also not be rejected.

In this appeal, Donald J. Trump for President, Inc. (the "Campaign") seeks to disenfranchise nearly 2,000 registered and qualified Bucks County voters who made the effort to cast their votes in the midst of an ongoing pandemic. The Campaign *admits* that the ballots were cast by lawfully-registered voters, *admits* that the ballots were cast and received on time, and *admits* that there is not one iota of evidence that any of the ballots are tainted by fraud or any other misconduct. Moreover, all agree that the voters whose ballots are in jeopardy timely requested an application to vote by mail or absentee and timely filled out and submitted their ballots. And each voter complied with the instructions on the outer envelope—to sign the voter's declaration and enclose the ballot in the secrecy envelope. After considering those facts, the Bucks County Board of Elections (the "Board") correctly decided to count these ballots. Yet the Campaign appealed to the Court of Common Pleas to invalidate the

ballots and disenfranchise 1,995 voters based solely on minor technicalities. After briefing and full argument, the Court of Common Pleas of Bucks County upheld the decision of the Board in a 21-page opinion. Continuing its quixotic quest, the Campaign appealed again to this Court.

As the Supreme Court's decision today makes clear, the Board correctly accepted the ballots, and the Campaign's challenges are about merely immaterial issues, none of which provides a reason to invalidate ballots and disenfranchise the voters who cast them. First, there is no statutory requirement that voters must seal the privacy envelope in order to be counted. Second, there is nothing in the Election Code requiring that these ballots be voided for such minor issues. The Campaign would have this Court read into the Election Code consequential language the General Assembly chose not to include and invalidate the ballots for minor trivialities, in direct contravention of longstanding and oft-repeated direction from the Pennsylvania Supreme Court—including today's decision. Third, the Campaign identified *no interest*, let alone a compelling or weighty interest, that is served by imposing the harsh sanction of disenfranchisement here. Finally, even if there were a requirement to seal the privacy envelopes, as a factual matter, the Board could not determine whether the envelopes at issue were sealed by the voter but later became unsealed.

The Pennsylvania Supreme Court reiterated in today's decision that that "ballots containing mere minor irregularities should only be stricken for compelling reasons." *See* Ex. A (Opinion), at 34 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 795 (Pa. 2004)). That is because "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964).

STATEMENT OF JURISDICTION

As explained below, this Court lacks jurisdiction over this appeal because the General Assembly has lodged exclusive jurisdiction in the Pennsylvania Supreme Court. *See* 42 Pa. C.S. § 722(2).

SCOPE AND STANDARD OF REVIEW

The Court of Common Pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. of Election*, 634 A.2d 170, 171–72 (Pa. 1993). The Court of Common Pleas, in turn, could reverse the county board's decision only for an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952) (observing that county election boards have "plenary powers in the administration of the election code"); *see also In re City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d 535, 536–37 (Pa. Com. Pl. 1967) ("[W]e may reverse the board of elections only for a mistake of law or for a clear

abuse of discretion including a capricious disregard of the testimony."); *In re Duquesne Appeals from Cnty. Bd. of Elections*, 39 Pa. D. & C.2d 545, 547 (Pa. Com. Pl. 1965) (confirming an "appeal [from the county election board] is not a de novo proceeding").

STATEMENT OF QUESTIONS INVOLVED

1. Whether the Pennsylvania Supreme Court has exclusive jurisdiction of this appeal where the issues pertain to the regularity of the electoral process and the action creates uncertainty as to the rightful occupant of public office.

   The court below did not address this question.

2. Whether a qualified elector's vote must be canceled where the secrecy envelope is "unsealed" in some unidentified way, but (a) where the elector securely placed the ballot inside a secrecy envelope and placed the secrecy envelope inside a sealed outer envelope as directed by statute; (b) where the secrecy of the elector's identity was maintained; and (c) where the Board was unable to determine whether the envelope became "unsealed" after the elector sealed it.

   The court below correctly answered this question in the negative.

STATEMENT OF THE CASE

I. Background on absentee and mail-in application and voting procedures.

A. Absentee and mail-in application procedures.

Electors in the Commonwealth who wish to vote absentee or by mail must submit applications for such ballots to their county board of elections. In submitting such applications, electors must supply the address at which they are registered to vote and sign a declaration affirming, among other things, that they are "eligible to

vote by mail-in [or absentee] ballot at the forthcoming primary or election," and that "all of the information" supplied in the mail-in or absentee ballot application is "true and correct."

Before sending an absentee or mail-in ballot to the elector, the county board of elections must confirm the elector's qualifications and verify that the elector's address on the application matches the elector's registration. There is no allegation that did not occur here.

B. Balloting materials, elector declaration, and the voting procedure.

Upon approval of the application, the elector is provided: 1) the ballot; 2) instructions for completing and returning the ballot; 3) an inner secrecy envelope into which the ballot is placed; and 4) an outer envelope into which the secrecy envelope containing the ballot is placed and returned to the board. On one side of the outer envelope is a pre-printed voter's declaration, and the elector's name and address are pre-printed below the declaration, just below a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. After receiving a mail-in or absentee ballot envelope, the board scans the bar code to identify and record the elector that submitted the enclosed ballot.

II. Procedural history.

A. The Board's decision.

On November 7, 2020, during the course of the canvass meeting, the Board met to determine, pursuant to 25 P.S. § 3146.8(g)(3), whether the declarations on the outer envelopes of certain ballots were "sufficient." *See* Stipulated Facts, ¶ 18. "The meeting and vote were conducted in the presence of authorized representatives of both Republican and Democratic candidates and parties. No one objected to or challenged the segregation of ballots into the designated categories." Court of Common Pleas Order, at 5.

The Campaign challenges ballots accepted by the Board in the following categories. In each category, the issue identified is the only alleged irregularity:

- Category 1: 1,196 ballots with no date or a partial date handwritten on the outer envelope, Order at 6;
- Category 2: 644 ballots with no handwritten name or address on the outer envelope, *id.*;
- Category 3: 86 ballots with a partial handwritten address on the outer envelope, *id.*; and
- Category 5: 69 ballots with "unsealed" privacy envelopes, *id.*[2]

[2] Although the Campaign initially challenged ballots in two other categories (identified as Category 4 and Category 6 in the stipulated facts), the Campaign orally

As noted, the Supreme Court's decision today directly addresses and resolves Categories 1-3.

C. What is *not* at issue in this case.

The Campaign admitted and stipulated to the following facts.

1. No fraud, misconduct, impropriety, or undue influence.

There is no allegation or evidence of any fraud, misconduct, impropriety, or undue influence in connection with the challenged ballots. Stipulated Facts, ¶¶ 27–30.

2. No ineligible voters, deceased voters, or impersonations.

There is no allegation or evidence that any elector was ineligible to vote. *Id.* ¶ 33. There is no allegation or evidence that any of the challenged ballots were cast by, or on behalf of, a deceased person or by someone other than the elector whose signature is on the outer envelope. *Id.* ¶¶ 34–35.

3. No missing signatures or naked ballots.

There is no allegation or evidence that the Board counted any ballots without signatures on the outer envelope or counted "naked ballots" (ballots that did not arrive in a secrecy envelope). *Id.* ¶¶ 31–32.

withdrew their challenges to those categories at the hearing before the Court of Common Pleas. *Compare* Hearing Tr. at 114-15, *with* Stipulated Facts ¶ 24.

When the challenged ballots were received by the Board, each was inside a privacy envelope, and the privacy envelope was inside a sealed outer envelope with a voter's declaration signed by the elector. *Id.* ¶ 45. With respect to Category 5 (the 69 ballots in "unsealed" privacy envelopes), the Campaign agrees that the Board was unable to determine whether the privacy envelopes were initially sealed by the elector but later became unsealed. *Id.* ¶ 46.

4. No challenge to electors' applications for absentee or mail-in ballots.

The Campaign did not challenge the electors' applications for the absentee or mail-in ballots on or before the Friday before the November 3rd election. *Id.* ¶ 36.

5. The ballots were timely cast and received.

No mail-in or absentee ballots were mailed to electors before October 7, 2020 and each of the challenged ballots was timely received by the Board before 8:00 p.m. on Election Day, November 3, 2020. *Id.* ¶¶ 37–38. Consequently, each of the challenged ballots was completed, and the outer envelope signed, between October 7 and November 3, 2020.

6. No notice has been provided to the electors whose ballots are being challenged.

The Campaign never notified the electors whose ballots are at issue that it is seeking to have their votes invalidated and not counted. *Id.* ¶ 47.

III. The Court of Common Pleas decision.

On November 19, 2020, the Bucks County Court of Common Pleas denied the Petition in full. In its written decision, the court "noted that the parties specifically stipulated in their comprehensive stipulation of facts that there exists no evidence of any fraud, misconduct, or any impropriety with respect to the challenged ballots. There is nothing in the record and nothing alleged that would lead to the conclusion that any of the challenged ballots were submitted by someone not qualified or entitled to vote in this election. At no time did the Campaign present evidence or argument to the contrary. The challenges are all to form rather than substance[.]" Order at 4.

The court acknowledged two "overriding principles" that govern the interpretation of the Election Code: strict enforcement and flexible interpretation "in favor of the right to vote." *Id.* at 7–8. It explained that this Court has balanced these principles by distinguishing between "mandatory" and "directory" provisions in the code. *Id.* at 8. And under longstanding Court precedent, "[b]allots should not be disqualified based upon failure to follow directory provisions of the law." *Id.* (citing *Shambach*, 845 A.2d at 803, and *Weiskerger Appeal*, 447 Pa. 418, 421, 290 A.2d 108, 109 (Pa. 1972)). The Supreme Court reiterated that position today.

The court then applied the law to the stipulated facts. It noted that the Campaign did not allege fraud, misconduct, impropriety, or undue influence as to

the challenged ballots, and found that the 69 ballots with "unsealed" privacy envelopes should be counted because no evidence showed that they "had not been sealed by the elector prior to" canvassing, and it was possible that the glue on the envelope had failed. *Id.* at 20.

IV. The Campaign's appeal.

On November 20, 2020, the Campaign appealed the Court of Common Pleas' ruling to the Commonwealth Court.

V. The Pennsylvania Supreme Court's Decision

Earlier today, the Pennsylvania Supreme Court issued a ruling definitively resolving all but one of the issues here. After exercising its extraordinary jurisdiction over appeals arising from decisions of the Philadelphia and Allegheny County Boards of Elections, the Supreme Court affirmed the decision of the Philadelphia County Court of Common Pleas, which had affirmed the Board of Election's decision to canvass and count ballots that arrived in an envelope missing a handwritten name, date, address, or some combination thereof. The Supreme Court held that failures to include a handwritten name, address, or date on the outer envelope "do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters." Op. at 34. The Court reasoned that "'while both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-

compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.'" *Id*. at 34 (quoting *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 378 (Pa. 2020)). The Court also noted that the Bucks County Court of Common Pleas "appropriately applied this Court's precedent" in affirming the counting of ballots without handwritten names, addresses, or dates. Op. at 32-33, n.6.

SUMMARY OF ARGUMENT

At the threshold, the Pennsylvania Supreme Court has exclusive jurisdiction over this case because the issues pertain to the regularity of the electoral process and the action creates uncertainty as to the rightful occupant of public office. On the merits, the Board did not abuse its discretion in rejecting the attempted challenges at issue. First, there is no statutory requirement that the secrecy envelopes be sealed. Second, nothing in the Election Code mandates that ballots be disqualified for lack of flawless technical compliance. The Campaign fails to identify any compelling reason why these ballots should be rejected—and these voters disenfranchised. The Campaign would have this Court read into the Election Code language that is not there, requiring the invalidation of ballots on the basis of minor technicalities, in direct contravention of longstanding and oft-repeated direction from the Pennsylvania Supreme Court. This Court should affirm the Order entered by the Court of Common Pleas.

ARGUMENT

I. This Court lacks jurisdiction to hear appeals related to the regularity of the electoral process.

The Legislature has lodged "exclusive jurisdiction" in the Pennsylvania Supreme Court "of appeals from final orders of the courts of common pleas" in cases related to the "right to public office." 42 Pa. C.S. § 722(2). The Supreme Court has interpreted this class of cases to include challenges to the "regularity" of the electoral process. *Commw. v. Spano*, 701 A.2d 566, 567 (Pa. 1997) (citing *Appeal of Bowers*, 269 A.2d 712 (Pa. 1970)). While the Commonwealth Court occasionally maintains jurisdiction in some election cases under its authority to hear appeals of "election procedures" under 42 Pa. C.S. § 762(a)(4)(i)(C), the Supreme Court has made clear that it maintains exclusive jurisdiction in election cases where time is of the essence.[3] As the Court explained in *Spano*, "[w]hen the results of an election are challenged, the occupancy of a key public office is left uncertain until the legal contest is decided by the courts. For as long as the contest goes on, there is uncertainty over who is the rightful occupant of that office and no policy can be made." 701 A.2d at 567. "In such cases, the public interest in having a functioning representative government demands that the contest be terminated as expeditiously as possible. *Therefore*

[3] A third statute, 25 P.S. § 3157(b), which purports to prohibit any elections appeals from the courts of common pleas, is dead letter according to settled precedent. *See In re Reading Sch. Bd. Election*, 634 A.2d at 171; *Dayhoff*, 808 A.2d at 1006.

appeals come directly to this court, not because we have more expertise, but because the answer will be final." *Id.* (emphasis added).

As a result, while the Supreme Court and Commonwealth Court each sometimes accept jurisdiction over cases involving election contests, *compare In re Reading Sch. Bd. Election*, 634 A.2d at 171, *with Dayhoff v. Weaver*, 808 A.2d 1002, 1006 (Pa. Commw. Ct. 2002), the Supreme Court's claim to jurisdiction must govern. Here, the election certification process is on a tight timeline: the Board must certify the results to the Commonwealth *today*. *See* 25 P.S. § 2642(k). For this reason, the County and the DNC have already submitted applications to the Pennsylvania Supreme Court asking the Court to exercise extraordinary jurisdiction. Transfer to the Supreme Court would help resolve this dispute on the necessary timeline, which is why the General Assembly has vested it with exclusive jurisdiction over this appeal.

II. The Pennsylvania Supreme Court's decision confirms that the failures at issue here do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters.

Petitioners seek no small thing—they ask this Court to invalidate thousands of votes cast on time by eligible Pennsylvania voters, on the basis of mere technicalities. "One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption. . . . That has not happened." *Donald J. Trump for*

President, Inc. v. Boockver, No. 4:20-CV-2078, slip op. at 22020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020).

Instead, Petitioners ask this Court to decide in its favor based on a decision that was just vacated by the Pennsylvania Supreme Court. And the Pennsylvania Supreme Court's decision squarely resolves nearly every issue presented here. In fact, the Supreme Court noted that, in affirming the Board's decision to count ballots that did not have a handwritten date on the ballot-return envelope, the Bucks County Court of Common Pleas "appropriately applied [the Supreme Court's] precedent in doing so." Op. at *32 n.5. The only issue not directly addressed by the Pennsylvania Supreme Court is the treatment of the unsealed secrecy envelopes. But the Court's reasoning applies with equal force to those ballots.

The Campaign challenges 69 ballots on grounds that they were enclosed in secrecy envelopes that were "unsealed." The Campaign does not allege that the secrecy envelopes were tampered with in any way or that the lack of a seal compromised ballot secrecy at all. To the contrary, the Campaign agrees that when the challenged ballots were received by the Board, each of the ballots was inside a privacy envelope and the privacy envelope was inside a sealed outer envelope with a voter's declaration that had been signed by the elector. The Campaign also concedes that there is no basis for determining whether the privacy envelopes were initially sealed by the elector, but later became unsealed. *See*, Stipulated Facts ¶¶ 42,

43. Indeed, as the Court of Common Pleas noted, there is no evidence showing that the envelopes "had not been sealed by the elector prior to" canvassing, and it was possible that envelopes had been sealed and the glue simply failed. Order, ¶ 9. In the absence of a showing that voters did not seal their envelope, the Campaign cannot demonstrate that the Board acted unlawfully by accepting these ballots.

Even setting that aside, no statutory provision requires that the inner envelope be sealed. The statute requires that the *ballot* be secure within the envelope: "the mail-in elector shall . . . mark the ballot . . . and then fold the *ballot*, enclose and securely seal *the same* in the envelope[.]" 25 P.S. § 3150.16(a) (emphases added); 25 P.S. § 3146.6(a) (same). It is all the more clear that the statute does not require the voter to seal the inner envelope when, just sentences later, it expressly requires the voter to seal the *outer* envelope. 25 P.S. § 3150.16(a) ("This envelope shall then be placed in the second one . . . *Such [second] envelope shall then be securely sealed*.") (emphasis added); 25 P.S. § 3146.6(a) (same). As used in the reference to the ballot inside the inner envelope, securely sealing the ballot in the envelope could mean little more than placing it in the inner envelope so that it does not fall out in transit or otherwise. That could be accomplished by folding the flap over, by tucking the flap inside the envelope, or by fastening the flap with glue. Significantly, the word "seal"—which is not statutorily defined—is not a term of art. It is a commonly used word meaning "to close" or "to make secure." *See* Merriam-Webster

Dictionary. There is no allegation here that the envelopes were not closed or that the ballots were not made secure within the envelopes.

When the Legislature intends that an envelope be sealed, it unequivocally states so. *See, e.g.*, 25 P.S. §§ 3014(a), 3049(b)(3), 3152(a), 3146.7(c). Indeed, in the relevant statute here—Section 3150.16(a)—the Legislature clearly differentiated between directing the elector to securely seal *the ballot* in the inner envelope and directing the elector to seal *the outer envelope:*

> [T]he mail-in elector shall, in secret, proceed to mark the ballot . . . 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 . . . ***Such [second] 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 elections.

25 P.S. § 3150.16(a) (emphases added); 25 P.S. § 3146.6(a) (same).[4]

Even if there was an express requirement that electors seal their secrecy envelopes, failure to satisfy that requirement would not require disenfranchisement. When confronted with an elector's failure to follow an explicit requirement, the outcome turns on legislative intent and the nature of the interest served by the directive, which in the absence of a sanction for noncompliance, are determined by

[4] Nor can Petitioner hang his hat on the word "shall." As the Pennsylvania Supreme Court made clear today, "the word 'shall' is not determinative as to whether the obligation is mandatory or directive in nature." Op. at 30.

reviewing the statutory language in context. *See* Opinion, *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election, et al.*, Nos. J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020, at *21-22 (Pa. Nov. 20, 2020). At the extreme, "where legislative intent is clear and supported by a weighty interest like fraud prevention," or the General Assembly has "signaled beyond cavil" that an issue implicated by the directive, like ballot secrecy, is "so essential" to the voting process, noncompliance merits disqualification. *Pa. Democratic Party v. Boockvar*, 238 A.3d at 380.

Noncompliance with any requirement that an elector seal their secrecy envelope does not justify disenfranchisement. Each of the 69 challenged ballots was securely contained in an unmarked secrecy envelope and further contained in an outer sealed envelope. When the secrecy envelope was removed from the outer envelope, the identity of the elector remained secret. As a result, unlike with naked ballots, counting the ballots here—where the elector's identity is protected—is not contrary to the statutory purpose. *See Pa. Democratic Party*, 2020 WL 5554644, at *25 (purpose of the two-envelope statutory requirement is to ensure that "secrecy in voting [is] protected").

An unsealed secrecy envelope is markedly different from an elector's failure to place their ballot in the secretary envelope. In the latter case, the explicit statutory language clearly signaled "the General Assembly's intention that . . . it should not

be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted." *Pa. Democratic Party*, 238 A.3d at 378; *accord In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004) (emphasizing the General Assembly's commitment to votes "remain[ing] secret and inviolate" in interpreting ban on third-person delivery as mandatory, not directory). But only after concluding that failure to comply with the requirement "defeats this intention" did the Court conclude that the General Assembly had "signaled beyond cavil that ballot confidentiality . . . is so essential as to require disqualification." *Pa. Democratic Party*, 238 A.3d at 379–80 (emphasis added). In contrast, failure to seal the secrecy envelope defeats on weighty interest.

III. Not allowing the challenged ballots potentially violates federal law.

Interpreting the Election Code to deny the right to vote for minor, immaterial omissions on absentee or mail-in ballot envelopes would also potentially violate federal law. Nobody acting under color of state law may deny anyone the right 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(a)(2)(B). Here, the omission of a handwritten date is not material in determining whether the elector was a qualified voter. No party contests that the outer envelope SURE barcode provides a

readily available means to determine that all ballots at issue were cast by voters "qualified under State law to vote in such election" and further allows the Board and the Commonwealth to confirm each voter's name and address among other information. And the handwritten date in the declaration is not material to determining whether an individual is qualified to vote, not allowing these votes to count would violate federal law. *See* Op. at *26 n.5 (noting that the potential violation of federal law).

CONCLUSION

For the foregoing reasons, the DNC respectfully requests this Court affirm the Court of Common Pleas and deny the Petition for Review of Decision.

Dated: November 23, 2020

Respectfully submitted,

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**Admitted Pro Hac Vice*

***Application for admission Pro Hac Vice forthcoming*

Attorneys for Intervenor-Defendant DNC Services Corp. / Democratic National Committee

CERTIFICATION PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 127

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 23, 2020 By: */s/ Matthew I. Vahey*
Matthew I. Vahey

CERTIFICATION PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2135(d)

I certify that this brief's word count is 4,633 and, accordingly, complies with the limitations set forth in Pennsylvania Rule of Appellate Procedure 2135.

Date: November 23, 2020 By: */s/ Matthew I. Vahey*
Matthew I. Vahey

CERTIFICATE OF SERVICE

I, Michael R. McDonald, certify that on this day, I caused a true and correct copy of the foregoing brief to be served on counsel for Petitioners and Defendants via this Court's electronic filing system.

Date: November 23, 2020

By: */s/ Matthew I. Vahey*
Matthew I. Vahey

Exhibit A

[J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020]
IN THE SUPREME COURT OF PENNSYLVANIA

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	:	No. 31 EAP 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	:	No. 32 EAP 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	:	No. 33 EAP 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	:	No. 34 EAP 2020
APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION	:	No. 35 EAP 2020
	:	SUBMITTED: November 18, 2020

APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	
IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION	:	No. 29 WAP 2020
	:	Appeal from the Order of the
	:	Commonwealth Court entered
APPEAL OF: ALLEGHENY COUNTY BOARD OF ELECTIONS	:	November 19, 2020 at No. 1162 CD
	:	2020, reversing the Order of the
	:	Court of Common Pleas of Allegheny
	:	County entered November 18, 2020
	:	at No. GD 20-011654 and remanding
	:	
	:	SUBMITTED: November 20, 2020
	:	

Justice Donohue announces the judgment of the Court, joined by Justices Baer, Todd and Wecht, and files an opinion joined by Justices Baer and Todd

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE DONOHUE **DECIDED: November 23, 2020**

These appeals present the question of whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged. Pursuant to our longstanding jurisprudence, central to the disposition of these appeals is whether the information is made mandatory by the Election Code or whether the inclusion of the information is directory, i.e., a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot.

We are guided by well-established interpretive principles including that where the language of a statute is unambiguous, the language shall be controlling. 1 Pa.C.S. §

1921(b). In the case of ambiguity, we look to ascertain the legislative intent, and in election cases, we adhere to the overarching principle that the Election Code should be liberally construed so as to not deprive, inter alia, electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). Stated more fully:

> Election laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure. No construction of a statute should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Appeal of James, 105 A.2d 64, 65-66 (Pa. 1954).

Guided by these principles and for the reasons discussed at length in this opinion, we conclude that the Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.

* * *

In connection with five of these consolidated appeals, Petitioner Donald J. Trump for President, Inc. (the "Campaign") challenges the decision of the Philadelphia County Board of Elections (the "Philadelphia Board") to count 8,329 absentee and mail-in ballots. The Campaign does not contest that these ballots were all timely received by the Philadelphia Board prior to 8:00 p.m. on November 3, 2020 (election day); that they were cast and signed by qualified electors; and that there is no evidence of fraud associated

with their casting. The Campaign instead contends that these votes should not be counted because the voters who submitted them failed to handwrite their name, street address or the date (or some combination of the three) on the ballot-return outer envelope. The Philadelphia County Court of Common Pleas, per the Honorable James Crumlish, upheld the Philadelphia Board's decision to count the ballots, ruling that the Election Code does not mandate the disqualification of ballots for a failure to include the challenged information, stressing that the inclusion or exclusion of this information does not prevent or promote fraud. The Campaign pursued an appeal to the Commonwealth Court. This Court granted the Philadelphia Board's application to exercise our extraordinary jurisdiction, 42 Pa. C.S. § 726, over these cases then pending in the Commonwealth Court.

At or around the same time that the matters were being litigated in Philadelphia, across the state in Allegheny County, Nicole Ziccarelli, a candidate for the Pennsylvania Senate in the 45th Senatorial District (Allegheny-Westmoreland counties) challenged the November 10, 2020 decision of the Allegheny County Board of Elections (the "Allegheny County Board") to canvass 2,349 mail-in ballots that contained a signed – but undated – declaration. Again, all of the outer envelopes were signed, they are conceded to be timely and there are no allegations of fraud or illegality. On November 18, 2020, the Court of Common Pleas of Allegheny County, per the Honorable Joseph James, upheld the decision of the Allegheny County Board to count the ballots. *Ziccarelli v. Allegheny County Board of Elections*, No. GD-20-011654 (Allegheny Cty. Ct. Com. Pl.). Ziccarelli filed an appeal to the Commonwealth Court and an application in this Court requesting that we exercise extraordinary jurisdiction over her appeal. During the pendency of the

request to this Court, on November 19, 2020, a three-judge panel of the Commonwealth Court, with one judge dissenting, reversed the common pleas court decision.

On November 20, 2020, the Allegheny County Board filed an emergency petition for allowance of appeal, which we granted, limited to whether the ballots contained in undated outer envelopes should be invalidated. We stayed the order of the Commonwealth Court pending the outcome of this appeal and consolidated it with the Philadelphia Board cases.

In these appeals, we are called upon to interpret several provisions of the Election Code. We set them forth at the outset since they guide the resolution of these appeals.

Section 3146.6(a) provides as follows with respect to absentee ballots:

> (a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot 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.

25 P.S. § 3146.6(a) (emphasis added).

Section 3150.16(a) sets forth the procedure for the submission of a mail-in ballot:

> (a) General rule.--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.

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

Sections 3146.4 and 3150.14(b) delegate to the Secretary of the Commonwealth the responsibility to prescribe the form of the elector's declaration on the outer envelope used to mail the absentee and mail-in ballots:

> **§ 3146.4. Envelopes for official absentee ballots**
>
> The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. **On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county**. The larger envelope shall also contain information indicating the local election district of the absentee voter. **Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors qualifications, together with a statement that such elector has not already voted in such primary or election**. The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as

> prescribed by the Secretary of the Commonwealth and nothing else.

25 P.S. § 3146.4 (emphasis added).

> **§ 3150.14. Envelopes for official mail-in ballots**
>
> * * *
>
> (b) Form of declaration and envelope.--**The form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain, among other things, a statement of the elector's qualifications, together with a statement that the elector has not already voted in the primary or election**.

25 P.S. § 3150.14(b) (emphasis added).

The pre-canvassing or canvassing of absentee and mail-in ballots proceed in accordance with the dictates of 25 P.S. § 3146.8(g)(3), as follows:

> **§ 3146.8. Canvassing of official absentee ballots and mail-in ballots**
>
> When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), **the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote**, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3) (emphasis added).

Pursuant to the authority granted in § 3150.14(b), the Secretary of the Commonwealth developed the following declaration used in connection with the 2020 General Election:

> I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.
>
> [BAR CODE]
>
> Voter, sign or mark here/Votante firme o margue aqui
>
> **X**_____
>
> _____
> Date of signing (MM/DD/YYYY)/Fechade firme (MM/DD/YYYY)
>
> _____
> Voter, print name/Votante, nombre en letra de impreta
>
> _____
> Voter, address (street)/Votante, dirreccion (calle)
>
> [LABEL – Voters' name and address]

In addition, the Secretary issued guidance to the county boards of elections with respect to the examination of ballot return envelopes. First, on September 11, 2020, she issued the following guidance:

> 3. EXAMINATION OF DECLARATION ON BALLOT RETURN ENVELOPES:
>
> The county board of elections is responsible for approving ballots to be counted during pre-canvassing.

> To promote consistency across the 67 counties, the county boards of elections should follow the following steps when processing returned absentee and mail-in ballots.
>
> After setting aside ballots of elector's who died prior to the opening of the polls, the county board of elections shall examine the Voter's Declaration on the outer envelope of each returned ballot and compare the information on the outer envelope, i.e., the voter's name and address, with the information contained in the "Registered Absentee and Mail-in Voters File, the absentee voter's list and/or the Military Veterans' and Emergency Civilians Absentee Voters File."
>
> If the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted. If the board determines that a ballot should not be counted, the final ballot disposition should be noted in SURE. The ballot return status (Resp Type) should be noted using the appropriate drop-down selection.
>
> If the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing unless challenged in accordance with the Pennsylvania Election Code.

Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes, 9/11/2020, at 3. On September 28, 2020, the Secretary offered additional guidance on the treatment of ballot return envelopes:

> With regard to the outer ballot-return envelope:
>
> A ballot-return envelope with a declaration that is filled out, dated, and signed by an elector who was approved to receive an absentee or mail-in ballot is sufficient and counties should continue to pre-canvass and canvass these ballots.
>
> A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.

All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

* * *

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
  - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
  - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.
- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020, at 5, 8-9.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the General Assembly's passage of Act 77 of 2019, voters in Pennsylvania may cast their ballots in elections by absentee or no-excuse mail-in ballots. To do so, they must submit applications to county boards of elections, and in connection therewith must provide the address at which they are registered to vote. They must also sign a declaration affirming, among other things, that they are "eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election," and that "all of the information" supplied in the mail-in or absentee ballot application is "true and correct." 25 P.S. §§ 3150.12, 3146.2. Upon receipt of the application, the county board of elections must confirm the elector's qualifications and verify that the elector's address on the application matches the elector's registration. Upon the county board of elections' approval of the application, the elector is provided with a ballot, an inner "secrecy envelope" into which the ballot is to be placed, and an outer envelope into which the secrecy envelope is to be placed and returned to the board. The outer envelope has pre-printed on it (1) a voter's declaration, (2) a label containing the voter's name and address, and (3) a unique nine-digit bar code that links the outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ("SURE") system. After receiving the outer envelope, the board of elections stamps the date of receipt on it and then scans the unique nine-digit bar code, which links the voter's ballot to his or her registration file.

The pre-canvassing or canvassing of absentee and mail-in ballots then proceeds in accordance with the dictates of 25 P.S. § 3146.8(g)(3):

> When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3).

Pursuant to this section, on November 9, 2020, the Philadelphia Board met to determine whether ballots separated into nine categories were "sufficient" to be pre-canvassed or canvassed. It concluded that four categories were not sufficient to be pre-canvassed or canvassed: (1) 472 ballots where the outer envelope lacked a signature and any other handwritten information; (2) 225 ballots where the outer envelope was not signed by the voter; (3) 112 ballots where the individual who completed the declaration appeared to be different from the individual who had been assigned the ballot; and (4) 4,027 ballots that were not submitted in a secrecy envelope.

In contrast, the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed the ballots in five categories: (1) 1,211 ballots that lacked a handwritten date, address, and printed name on the back of the outer envelope (but were signed); (2) 1,259 ballots that lacked only a handwritten date on the back of the outer envelope (but were signed and contained a handwritten name and address); (3) 533 ballots that lack only a

handwritten name on the back of the outer envelope (but were signed and dated and contained a handwritten address); (4) 860 ballots that lack only a handwritten address on the back of the outer envelope (but were signed and dated and contained a handwritten name); (5) 4,466 ballots that lack only a handwritten name and address on the back of the outer envelope (but were signed and dated).

On November 10, 2020, the Campaign filed five pleadings entitled "Notice of Appeal via Petition for Review of Decision by the Philadelphia County Board of Elections," one for each of the five categories referenced above that the Philadelphia Board approved as sufficient to be pre-canvassed or canvassed. In each petition for review, the Campaign alleged that this Court, in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), declared that absentee and mail-in ballots cast in violation of the Election Code's mandatory requirements are void and cannot be counted. Petition for Review, 11/10/2020, ¶ 14. The Campaign further alleged that failures to include hand-written names, addresses and dates constituted violations of mandatory obligations under Sections 3146.6(a) and/or 3150.16(a) of the Election Code. *Id.* at 15-16. Accordingly, the Campaign alleged that the Board's decisions with respect to the absentee and mail-in ballots in the above-referenced five categories were based on a clear error of law and must be reversed. *Id.* at 32.

On November 13, 2020, Judge Crumlish held oral argument on the issues raised in the Petition for Review. In response to questions from Judge Crumlish, counsel for the Campaign agreed that the Petition for Review was "not proceeding based on allegations of fraud or misconduct." Transcript, 11/13/2020, at 13-14. She further agreed that the Campaign was not challenging the eligibility of the 8,329 voters in question and did not

contest either that all of the ballots at issue were signed by the voters or that they had been timely received by the Board. *Id.* at 30-31, 37. Instead, she indicated that the Campaign was "alleging that the ballots were not filled out correctly." *Id.* at 14. Counsel for the DNC[1] argued that the failures to handwrite names, addresses and dates "are, at most, minor technical irregularities that the Supreme Court of Pennsylvania has repeatedly said do not warrant disenfranchisement." *Id.* at 14. Counsel for the Philadelphia Board added that the Election Code includes no provision requiring "absolute technical perfection" when filling out the declaration on the outer envelope containing an absentee or mail-in ballot. *Id.* at 38.

Later that same day, Judge Crumlish entered five orders affirming the Philadelphia Board's decision to count the contested ballots. In his orders, Judge Crumlish noted that while the declaration contained a specific directive to the voter to sign the declaration, it made no mention of filling out the date or other information. Trial Court Orders, 11/13/2020, ¶ 2. He further found that while the Election Code provides that while the voter shall "fill out" and date the declaration, the term "'fill out' is not a defined term and is ambiguous." *Id.* at ¶ 4. He indicated that the outer envelope already contains a pre-printed statement of the voter's name and address, and that "[n]either a date nor the elector's filling out of the printed name or of the address are requirements necessary to prevent fraud." *Id.* at ¶ 5-6. Concluding that "[t]he Election Code directs the Court of Common Pleas in considering appeals from the County Board of Elections to make such

[1] DNA Services Corp./Democratic National Committee (hereinafter "DNC") intervened in the proceedings before the trial court.

decree as right and justice may require[,]" *id.* at ¶ 8 (quoting 25 P.S. § 3157), Judge Crumlish upheld the decision of the Philadelphia Board.

The Campaign filed appeals from Judge Crumlish's orders in the Commonwealth Court on November 14, 2020, and the next day the Commonwealth Court issued an order consolidating the five appeals and setting an expedited briefing schedule. On November 17, 2020, the Philadelphia Board filed an application with this Court to exercise its extraordinary jurisdiction, 42 Pa.C.S. § 726, over the consolidated appeals, which we granted by order dated November 18, 2020.

In our order granting the Philadelphia Board's application for the exercise of extraordinary jurisdiction, we stated the issue to be decided as follows:

> Does the Election Code require county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite their name, their address, and/or a date, where no fraud or irregularity has been alleged?

On November 10, 2020, the Allegheny County Board decided to canvass 2,349 mail-in ballots that contained a signed but undated declaration. Ziccarelli challenged the decision in an appeal to the court of common pleas ultimately heard and decided by the Honorable Joseph James. It was not disputed that all 2,349 voters signed and printed their name and address on the outer envelopes and returned the ballots to the Allegheny County Board on time. Each of the ballots was processed in the Statewide Uniform Registry of Electors ("SURE") system and was time-stamped when it was delivered to the Allegheny County Board on or before November 3, 2020. At a hearing, via Microsoft Teams, on November 17, 2020, the Democratic Party and James Brewster (Ziccarelli's opponent in the 45th Senatorial District race) moved to intervene, which motion was

granted. At the hearing, Ziccarelli stated that she was not claiming voter fraud regarding the challenged ballots.

In an opinion and order dated November 18, 2020, Judge James affirmed the Allegheny County Board's decision to count the ballots. He concluded that the date provision in Section 3150.16(a) is directory, not mandatory, and that "ballots containing mere minor irregularities should only be stricken for compelling reasons," citing *Shambach v. Shambach*, 845 A.2d 793, 798 (Pa. 2004). Noting that the ballots were processed in the SURE system and time-stamped when delivered to the Allegheny County Board, he found that the technical omission of the handwritten date on a ballot was a minor technical defect and did not render the ballot deficient.

Ziccarelli immediately appealed Judge James' decision to the Commonwealth Court and contemporaneously filed an application to this Court requesting our exercise of extraordinary jurisdiction, noting that the issue presented was accepted by this Court as part of the Philadelphia Board appeals. While the application was pending, the Commonwealth Court ordered expedited briefing and on November 19, 2020, issued an opinion and order reversing the Court of Common Pleas of Allegheny County and remanded. *In Re: 2,349 Ballots in the 2020 General Election; Appeal of: Nicole Ziccarelli,* __ A.3d __, 1162 C.D. 2020 (Commw. Ct. 2020). Ziccarelli then withdrew her application for extraordinary jurisdiction.

On November 20, 2020, this Court granted the Allegheny County Board's Petition for Allowance of Appeal limited to the question of whether the ballots contained in undated but signed outer envelopes should be invalidated. The opinion of the Commonwealth

Court will be discussed, as necessary, in the analysis that follows. The order was stayed pending our disposition of these consolidated cases.

The pertinent scope and standard of review follow: the Court of Common Pleas' decision is reviewed on appeal "to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made." *In re Reading Sch. Bd. of Election*, 634 A.2d 170, 171–72 (Pa. 1993). The Court of Common Pleas, in turn, could reverse the Philadelphia Board's decision only for an abuse of discretion or error of law. *See Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952). As the issue involves the proper interpretation of the Election Code, it presents a question of law and our standard of review is de novo and our scope of review is plenary. *See, e.g., Banfield v. Cortés*, 110 A.3d 155, 166 (Pa. 2015).

II. ARGUMENTS OF THE PARTIES

Although more fully developed in our analysis set forth later in this opinion, we here briefly summarize the arguments of the parties and intervenors.

The Campaign argues that the General Assembly set forth in the Election Code the requirements for how a qualified elector can cast a valid absentee or mail-in ballot. Campaign's Brief at 22. One of those requirements is for each elector to "fill out, date, and sign" the declaration on the Outside Envelope. *Id.* (citing 25 P.S. §§ 3146.6(a) and 3150.16(a)). According to the Campaign, this Court has repeatedly ruled that the requirements of the sections of Election Code relevant here impose mandatory obligations, and that ballots cast in contravention of the these requirements are void and cannot be counted. *Id.* at 23. As a result, the Campaign insists that the trial court erred

in affirming the Board's decision to count the 8,329 non-conforming absentee and mail-in ballots. *Id.*

The Philadelphia Board, conversely, contends that the Election Code does not require the Philadelphia Board to set aside timely-filed ballots by qualified electors that are merely missing handwritten names, street addresses, and/or dates on the signed voter declaration. Philadelphia Board's Brief at 12. Contrary to the Campaign's contention that the provisions of the Election Code at issue here impose exclusively mandatory requirements, the Philadelphia Board argues that Pennsylvania courts have long held that minor errors or omissions should not result in disenfranchisement, particularly in cases where the errors or omissions do not implicate the board's ability to ascertain the voter's right to vote or the secrecy or sanctity of the ballot. *Id.* Here, the Philadelphia Board notes that the Campaign does not allege that the voters at issue here were not qualified to vote and have not asserted that any fraud or other impropriety has occurred. *Id.* As such, it concludes that it acted properly and within its discretion in determining that these omissions were not a basis for setting aside those ballots. *Id.*

The DNC largely concurs with the Philadelphia Board's arguments, indicating that there is no statutory requirement that voters print their full name or address on the outer envelopes and that adding a date to the envelope serves no compelling purpose. DNC's Brief at 9-10.

Ziccarelli argues further that, in regard to outer envelopes not containing a voter-supplied date, this Court's opinion in *In Re: Nov. 3, 2020 General Election*, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020) definitively speaks to the mandatory nature of the date requirement and, without much extrapolation, requires that such ballots not be

counted. The Allegheny County Board agrees with its Philadelphia counterpart. It counters Ziccarelli's reliance on *In Re Nov. 3, 2020 General Election* by noting that Ziccarelli's challenge to the ballots for lack of a date is based on the premise that the date is essential to the validity of the signature. Allegheny County Board points out this is the precise type of challenge that was disavowed in the case upon which Ziccarelli relies.

III. ANALYSIS

We begin by recognizing from the outset that it is the "longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Shambach v. Birkhart*, 845 A.2d 793, 798 (Pa. 2004). "The Election Code must be liberally construed so as not to deprive ... the voters of their right to elect a candidate of their choice." *Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963). It is therefore a well-settled principle of Pennsylvania election law that "[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." *Appeal of Norwood*, 116 A.2d 552, 554–55 (Pa. 1955). It is likewise settled that imbedded in the Election Code is the General Assembly's intent to protect voter privacy in her candidate choice based on Article VII, Section 4 of the Pennsylvania Constitution and to prevent fraud and to otherwise ensure the integrity of the voting process.

We agree with the Campaign's observation that in Sections 3146.6(a) and 3150.16(a), the General Assembly set forth the requirements for how a qualified elector may cast a valid absentee or mail-in ballot. Campaign's Brief at 22. We further agree that these sections of the Election Code specifically provide that each voter "shall fill out, date, and sign" the declaration on the outside envelope. *Id.* We do not agree with the Campaign's contention, however, that because the General Assembly used the word

"shall" in this context, it is of necessity that the directive is a mandatory one, such that a failure to comply with any part of it requires a board of elections to declare the ballot void and that it cannot be counted. It has long been part of the jurisprudence of this Commonwealth that the use of "shall" in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory. *See, e.g.*, *Commonwealth v. Baker*, 690 A.2d 164, 167 (Pa. 1997) (citing *Fishkin v. Hi–Acres, Inc.*, 341 A.2d 95 (Pa. 1975)); *see also Commonwealth ex rel. Bell v. Powell*, 94 A. 746, 748 (Pa. 1915) (quoting *Bladen v. Philadelphia*, 60 Pa. 464, 466 (1869) ("It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory and imperative.")). The Campaign's reliance on this Court's recent decision in *Pa. Democratic Party v. Boockvar,* 238 A.3d 345 (Pa. 2020) for the proposition it asserts is misplaced.

In *Pa. Democratic Party*, we held that the requirement in Section 3150.16(a) that a mail-in voter place his or her ballot in the inner secrecy envelope was a mandatory requirement and thus a voter's failure to comply rendered the ballot void. *Pa. Democratic Party*, 238 A.3d at 380. In concluding that the use of the secrecy envelope was a mandatory, rather than a discretionary directive, we reviewed our prior decisions on the distinction between mandatory and discretionary provisions in the Election Code, including *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004), *In re Luzerne County Return Board, Appeal of Elmer B. Weiskerger*, 290 A.2d 108 (Pa. 1972), and *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004).

In *Shambach*, the Court declined to invalidate a write-in vote cast for a candidate who was named on the ballot, in direct violation of the Election Code's instruction that a voter could only write in a person's name if the name of said individual was "not already printed on the ballot for that office." *Shambach*, 845 A.2d at 795. In reaching that conclusion, the Court observed that "[m]arking a ballot is an imprecise process, the focus of which is upon the unmistakable registration of the voter's will in substantial conformity to the statutory requirements." *Id.* at 799 (quoting *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa 1945)).

In *Weiskerger*, this Court refused to invalidate a ballot based upon the "minor irregularity" that it was completed in the wrong color of ink. The provision of the Election Code in question provided that "'[a]ny ballot that is marked in blue, black or blue-black ink ... shall be valid and counted." *Weiskerger*, 290 A.2d at 109 (citing 25 P.S. § 3063). In providing that ballots completed in the right color must be counted, we noted that the General Assembly "neither stated nor implied that ballots completed in a different color must not be counted." *Id.* We thus treated the instruction to use blue, black or blue-black ink as merely directory.

In *Pa. Democratic Party*, we compared these cases to our decision in *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004), where we held that the Election Code's "in-person" ballot delivery requirement, *see* 25 P.S. § 3146.6, was mandatory, and that votes delivered by third persons must not be counted. *Appeal of Pierce*, 843 A.2d at 1231. There, we recognized that the in-person requirement served important purposes in the Election Code, including "limit[ing] the number of third persons who unnecessarily come in contact with the ballot[,]

... provid[ing] some safeguard that the ballot was filled out by the actual voter, ... and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it." *Id.* at 1232. We thus explained in *Pa. Democratic Party* that "the clear thrust of *Appeal of Pierce*, … is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism." *Pa. Democratic Party*, 238 A.3d at 380 (citing *Appeal of Pierce*, 843 A.2d at 1232).

Based upon this comparison between *Shambach, Weiskerger* and *Appeal of Pierce,* in *Pa. Democratic Party* we determined that the decision in *Appeal of Pierce* provided the appropriate guidance for the analysis of the secrecy envelope requirement. We held that "[i]t is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention." *Pa. Democratic Party*, 238 A.3d at 380. Unlike in *Shambach* and *Weiskerger* which involved "minor irregularities," the use of a secrecy envelope implicated a "weighty interest," namely secrecy in voting protected expressly by Article VII, Section 4 of our state charter. *Id.* As such, we recognized the use of a secrecy envelope as a mandatory requirement and that failures to comply with the requirement required that the ballot must be disqualified." *Id.*; *see also id.* at 378 (quoting *JPay, Inc. v. Dep't of Corr. & Governor's Office of Admin.*, 89 A.3d 756, 763 (Pa. Commw. 2014) ("While both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to

strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.")).

To determine whether the Election Code's directive that the voter handwrite their names, address and 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 intent of the General Assembly was clear and whether the failure to handwrite the information constitutes "minor irregularities" or instead represent "weighty interests," like fraud prevention or ballot secrecy that the General Assembly considered to be critical to the integrity of the election.

(1) Failures to include handwritten names and addresses

Beginning with the Campaign's contention that ballots may not be counted if a voter fails to handwrite their name and/or address under the full paragraph of the declaration on the back of the outer envelope, we conclude that given the factual record in this case and the mechanics of the pre-canvassing and canvassing procedures including the incorporation of reliance on the SURE system, this "requirement" is, at best, a "minor irregularity" and, at worst, entirely immaterial. More to the point, the direction to the voter to provide a handwritten name and/or address is not only not mandatory, it is not a directive expressed in the Election Code. Thus, these directions do not meet the first prong of the test used in *Pa. Democratic Party*: the clear intent of the General Assembly.

The Election Code does not require that the outer envelope declaration include a handwritten name or address at all. Instead, Sections 3146.4 (absentee) and 3150.14(b) (mail-in) provide only that the declaration must include "a statement of the elector's

qualifications, together with a statement that the elector has not already voted in the primary or election." 25 P.S. §§ 3146.4, 3150.14(b). Aside from this information (none of which is relevant to the present issue), the General Assembly delegated to the Secretary of the Commonwealth the obligation to prescribe the form of declaration and envelope for absentee and mail-in ballots, presumably to allow the inclusion of information that would be helpful for administrative or processing purposes. *Id.*[2] As such, the decision to include spaces in the declaration for handwritten names and addresses was made solely by the Secretary of the Commonwealth, not the General Assembly. It would be a stretch to divine that the General Assembly was advancing any weighty interest for the inclusion of handwritten names and addresses in the declaration such that a voter's failure to include them should result in the ballot not being counted. Moreover, the Campaign does not argue that the Secretary's request for handwritten names and addresses implicated any "weighty interests" that would compel a finding that the request to provide them constituted a mandatory requirement.[3]

[2] None of the parties have challenged whether these provisions constituted improper delegations of legislative authority. *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017).

[3] Conversely, the Philadelphia Board and the DNC have both selectively relied upon guidance provided by the Secretary to the county boards of election that indicated that a voter's failure to handwrite his/her name and address was not a ground to set the ballot aside. Philadelphia Board's Brief at 19; DNC's Brief at 15. They have directed the Court to the Guidance published on September 11, 2020, in which the Secretary advised that "[i]f the Voter's Declaration on the return envelope is signed and the county board is satisfied that the declaration is sufficient, the mail-in or absentee ballot should be approved for canvassing." Guidance, 9/11/2020, at 3. As discussed infra at n.6, however, on September 28, 2020 the Secretary issued arguably contrary guidance stating that "[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." Guidance,

The Campaign argues that we should read the "handprinted name and address" requirement into the directives in Section 3146.6(a) and 3150.16(a) that the voter "fill out" the declaration. Campaign's Brief at 30. Citing to dictionary definitions, the Campaign contends that "fill out" means "to write or type information in spaces that are provided for it." *Id.* at 32. Because 8,349 voters did not "fill out" one or more spaces provided on the outer envelope provided in the declaration (including the voter's name and/or address), the Campaign argues that those ballots were non-conforming and could not be counted. *Id.* at 29. The directive to "fill out" does not give any legislative definition to the specific information to be placed in the blank spaces. It is the weight of the information that must be tested in the analysis. As stated, since the General Assembly did not choose the information to be provided, its omission is merely a technical defect and does not invalidate the ballot.

Further, as Judge Crumlish observed, the term "fill out" is ambiguous.[4] Trial Court Opinion, 11/13/2020, ¶ 4. As Judge Crumlish recognized, the term "fill out" is not a defined term under the Election Code. *Id.* Moreover, and contrary to the Campaign's contention that no alternative understanding of the term "fill out" has been proffered, the Campaign has failed to recognize, **the voter's name and address are already on the back of the outer envelope on a pre-printed label affixed no more than one inch**

9/28/20, at 9. Confusingly, she also incorporated by reference the September 11, 2020 Guidance. Both sets of Guidance are set forth on pages 8-10 supra.

[4] Where an election statute is ambiguous, courts apply the interpretative principle that that "election laws ... ordinarily will be construed liberally in favor of the right to vote." *Pa. Democratic Party*, 238 A.3d at 360–61.

from the declaration itself. A voter could reasonably have concluded that the blanks requesting his or her name and address needed to be "filled out" only if the name and/or address on the label was incorrect or incomplete, as it was unnecessary to provide information that was already on the back of the outer envelope.[5] To add further confusion, the declaration itself can be read to refer to the label: "I hereby declare that I am qualified to vote from the below stated address" can be read to mean the address as already stated on the label.

The text of the Election Code provides additional evidence of the directory nature of the provisions at issue. With regard to individuals who are not able to sign their name due to illness or physical disability, the General Assembly imposed a requirement that the declarant provide his or her "complete address." 25 P.S. § 3146.6(a)(3); 25 P.S. §

[5] The DNC argues, with some persuasive force, that the Campaign's requested interpretation of Pennsylvania's Election Code could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons. Nobody acting under color of state law may deny anyone the right 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(a)(2)(B).

Under this section, the so-called "materiality provision" of the Voting Rights Act, federal courts have barred the enforcement of similar administrative requirements to disqualify electors. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) (disclosure of voter's social security number is not "material" in determining whether a person is qualified to vote under Georgia law for purposes of the Voting Rights Act); *Washington Ass'n of Churches v. Reed*, 492 F.Supp.2d 1264 (W.D. Wash. 2006) (enjoining enforcement of "matching" statute, requiring state to match potential voter's name to Social Security Administration or Department of Licensing database, because failure to match applicant's information was not material to determining qualification to vote); *Martin v. Crittenden*, 347 F.Supp.3d 1302 (N.D. Ga. 2018), *reconsideration denied*, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018) (voter's ability to correctly recite his or her year of birth on absentee ballot envelope was not material to determining said voter's qualifications).

3150.16(a.1). These provisions demonstrate that the General Assembly clearly knew how to impose such a requirement when it wishes to do so. *In re Nov. 3, 2020 Gen. Election*, __ A.3d __, 2020 WL 6252803, at *14 (Pa. 2020) (stating that the General Assembly's prior inclusion of a signature comparison requirement demonstrated that "it understands how to craft language requiring signature comparisons at canvassing when it chooses to do so"). Moreover, Sections 3146.6(a)(3) and 3150.16(a.1) contain a precise form of declaration, crafted by the General Assembly, pertaining to voters with disabilities evidencing the General Assembly's understanding of how to mandate a precise declaration without resort to delegating non-essential information to the Secretary.

Finally, the text of the Election Code further demonstrates the lack of any need for handwritten names and addresses. Section 3146.8(g)(3), which relates to the canvassing of official absentee ballots and mail-in ballots, provides, in relevant part:

> When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable.

25 P.S. § 3146.8(g)(3). The county board of elections' duty to keep a "Military Veterans and Emergency Civilians Absentee Voters File," which is not relevant to the current dispute, is governed by 25 P.S. § 3146.2c(b). Section 3146.2c(a) previously housed the board's duty to keep a "Registered Absentee and Mail-in Voters File." However, the General Assembly recently eliminated this directive. *See* 2020, March 27, P.L. 41, No.

12, § 8, imd. effective (deleting subsection (a), which required county board of elections to maintain at its office "a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent"). By virtue of this amendment, the General Assembly eliminated one of the reference points that still appear in Section 3146.8(g)(3). The current Section 3146.2c(c) directs the county board to maintain the "the absentee voters' list" referenced in Section 3146.8(g)(3). The General Assembly also amended Section 3146.2c(c), which previously only directed the chief clerk to "prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee ballots shall have been issued," to include such voting residents who were issued mail-in ballots. *See* 2019, Oct. 31, P.L. 552, No. 77, § 5.1, imd. effective (inserting "or mail-in" twice in subsection (c)).

As such, as relevant for our purposes, Section 3146.8(g)(3) directs that "the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) [a voter who dies before the election] and shall compare the information thereon with that contained in the … the absentee voters' list," which, pursuant to Section 3146.2c(c), now also contains voters who received mail-in ballots. A close reading of the language chosen by the General Assembly here is telling. Section 3146.8(g)(3) directs the board to "examine the declaration **on the envelope**" and "compare the information **thereon**" to the absentee (and mail-in) voters' list. 25 P.S. § 3146.8(g)(3) (emphasis added). Reading these phrases together, it is clear that the General Assembly intended that the information to be compared to the absentee (and mail-in) voters' list is the information on the outer envelope which includes the pre-printed name and address. If

the General Assembly intended for the information written by the voter to be compared to the absentee voters' list, it would have used the term "therein," thus directing the board to compare the information contained "within" the declaration (the handwritten name and address).

The following sentence in this section further suggests that the General Assembly intended such bifurcation. Section 3146.8(g)(3) next states:

> If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the … the absentee voters' list … verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

25 P.S. § 3146.8(g)(3). Here, the board is directed to consider whether the declaration is sufficient (i.e., the examination contained in the previous sentence) and also ensure that the absentee voters' list confirms the voter's right to vote (i.e., the comparison of the printed information to the relevant list from the prior sentence).

(2) Failures to include dates

Both the Campaign and Ziccarelli argue that the requirement to state the date on which declaration was signed is a mandatory obligation requiring disenfranchisement for lack of compliance. We disagree, as we conclude that dating the declaration is a directory, rather than a mandatory, instruction, and thus the inadvertent failure to comply does not require that ballots lacking a date be excluded from counting. As reviewed hereinabove, in our recent decision in *Pa. Democratic Party*, we reiterated that the distinction between directory and mandatory instructions applies with respect to a voter's obligations under the Election Code, and that only failures to comply with mandatory

obligations, which implicate both legislative intent and "weighty interests" in the election process, like ballot confidentiality or fraud prevention, will require disqualification. *Pa. Democratic Party*, 238 A.3d at 379-80.

The Commonwealth Court and Ziccarelli relied upon the Election Code's use of the of "**shall** … date" language in construing the date obligation as mandatory. *In Re: 2,349 Ballots in the 2020 General Election, Appeal of: Nicole Ziccarelli*, __ A.3d __, 1162 C.D. 2020, 10 (Pa. Comm. 2020). Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word "date" in the statute does not change the analysis because the word "shall" is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries "weighty interests." The date that the declaration is signed is irrelevant to a board of elections' comparison of the voter declaration to the applicable voter list, and a board can reasonably determine that a voter's declaration is sufficient even without the date of signature. Every one of the 8,329 ballots challenged in Philadelphia County, as well as all of the 2,349 ballots at issue in Allegheny County, were received by the boards of elections by 8:00 p.m. on Election Day, so there is no danger that any of these ballots was untimely or fraudulently back-dated. Moreover, in all cases, the receipt date of the ballots is verifiable, as upon receipt of the ballot, the county board stamps the date of receipt on the ballot-return and records the date the ballot is received in the SURE system. The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superflous.

Ziccarelli offers two alternative "weighty interests" for our consideration. She first contends that the date on which the declaration was signed may reflect whether the

person is a “qualified elector” entitled to vote in a particular election. Pursuant to Section 3150.12b (entitled “Approval of application for mail-in ballot”), a board of elections may have determined that the person was a qualified elector and thus entitled to receive a mail-in ballot. Pursuant to Section 2811, however, to be a qualified elector, “[h]e or she shall have resided in the election district where he or she shall offer to vote at least thirty days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within thirty days preceding the election.” 25 P.S. § 2811. As a result, Ziccarelli contends that the person may have been qualified to vote in a particular voting district at the time of applying for a mail-in ballot, but no longer a qualified elector in that voting district on Election Day. Ziccarelli’s Brief at 16.

This unlikely hypothetical scenario is not evidence of a “weighty interest” in the date on the document for assuring the integrity of Pennsylvania’s system for administering mail-in voting. Among other things, the canvassing statute, 25 P.S. § 3146.8(g)(3), directs the board to examine the declaration on the envelope of each ballot and compare the information thereon with that contained in the now defunct "Registered Absentee and Mail-in Voters File." *See* discussion supra pp. 27-29. The date of signing the declaration will not be of any benefit in performing this task, as the name of the voter at issue will be on this list (as a result of his or her approval to receive a mail-in ballot), and the date of signing will provide no information with respect to whether or not he or she has left the voting district in the interim. Most critically, our current statutory framework includes no requirement that a county board of elections investigate whether an individual who had

been confirmed as a qualified elector at the time of approval to receive a mail-in ballot remains as a qualified elector on Election Day. If the General Assembly had so intended, it would certainly have expressly stated it, as opposed to nebulously tucking such an unprecedented requirement into the instructions to the Secretary for designing the declaration.

Second, Ziccarelli argues that the date of signature of the declaration will serve to prevent double voting, as "whether an elector has already voted in the election for which the ballot is issued, by its very nature, depends on the date on which the declaration was signed." Ziccarelli's Brief at 16. Boards of elections do not use signatures or any handwritten information to prevent double voting. Duplicate voting is detected by the use of bar codes through the SURE system, and the board identifies the earlier cast vote by referencing the date it received the ballot, not the date on which the declaration was signed.

Ziccarelli and the Commonwealth Court insist that this Court "has already held that mail-in ballots with undated declarations are not 'sufficient' and, thus, must be set aside." Ziccarelli's Brief at 9; *In Re: 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, at 10. In support of this contention, they reference an observation in our recent decision in *In re November 3, 2020 General Election*, __ A.3d __, 2020 WL 6252803 (Pa. 2020), that when assessing the sufficiency of a voter's declaration, "the county board is required to ascertain whether the return envelope has been filled out, dated, and signed – and if it fails to do so then the ballot cannot be designated as "sufficient" and must be set aside.[6]

[6] In her brief, Ziccarelli cites to the Guidance distributed by the Secretary of the Commonwealth on September 28, 2020 to the county boards of elections, advising that

Id. at *12-13. This statement is being taken out of context. Our statement in 2020 *General Election* was in reference to the limitations on what an election board is directed by the statute to do when assessing the sufficiency of a voter's declaration for the express purpose of indicating what they were not to do, i.e., signature comparisons. The question in *In Re: Nov. 3, 2020 General Election* was a narrow one. We did not address (as it was not at issue) whether a county board of elections could find a declaration as sufficient even though it was undated. That question requires an entirely different analysis that

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"[a] ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted." As noted in footnote 3 supra, however, the Secretary also issued Guidance on September 11, 2020, which was cited with approval by the Philadelphia Board and the DNC. No party referenced both sets of Guidance, however, even though the September 28 Guidance incorporated the September 11 Guidance. *See* Guidance, 9/28/2020, at 9 ("For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.").

In any event, we will not consider this Guidance in making our decision. Neither of the parties explain how the potentially contradictory directives are to be understood. More importantly, the Secretary has no authority to definitively interpret the provisions of the Election Code, as that is the function, ultimately, of this Court. The Secretary also clearly has no authority to declare ballots null and void. "[I]t is the Election Code's express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code." *In re Scroggin*, 237 A.3d 1006, 1021 (Pa. 2020). Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots. 25 P.S. § 2621(f.2).

Finally, with respect to the September 28 Guidance indicating that undated ballots must be set aside, we note that in addition to the Philadelphia and Allegheny County Boards, at least two other boards of elections also did not follow it. *Donald J. Trump for President Inc. v. Bucks Cnty. Bd. of Elections,* No. 2020-05786 (Bucks Cty. Ct. Com. Pl.); *Donald J. Trump for President, Inc., et al. v. Montgomery Cnty. Bd. of Elections*, No. 2020-18680 (Nov. 13, 2020). Both the Bucks County and Montgomery County Courts of Common Pleas affirmed the counting of the ballots even though the declarations had not been filled out in full. Each of the courts of common pleas appropriately applied this Court's precedent in doing so.

depends in significant part on whether dating was a mandatory, as opposed to a directive, requirement. We have conducted that analysis here and we hold that a signed but undated declaration is sufficient and does not implicate any weighty interest. Hence, the lack of a handwritten date cannot result in vote disqualification.

IV. CONCLUSION

As we recognized in *Pa. Democratic Party*, "while both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved." *Pa. Democratic Party*, 238 A.3d at 378. Here we conclude that while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters. As we acknowledged in *Shambach*, "ballots containing mere minor irregularities should only be stricken for compelling reasons." *Shambach*, 845 A.2d at 799; *see also Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) ("[T]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons."). Having found no compelling reasons to do so, we decline to intercede in the counting of the votes at issue in these appeals.

The decision of the Philadelphia Court of Common Pleas is hereby affirmed. The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated.

Justices Baer and Todd join the opinion.

Justice Wecht concurs in the result and files a concurring and dissenting opinion.

Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.

[J-118A-F-2020] [OAJC: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 31 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 32 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 33 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 34 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 35 EAP 2020 SUBMITTED: November 18, 2020
IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION	:	No. 29 WAP 2020

APPEAL OF: ALLEGHENY COUNTY BOARD OF ELECTIONS	:	Appeal from the Order of the Commonwealth Court entered November 19, 2020 at No. 1162 CD 2020, reversing the Order of the Court of Common Pleas of Allegheny County entered November 18, 2020 at No. GD 20-011654 and remanding
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	:	
	:	SUBMITTED: November 20, 2020

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT **DECIDED: November 23, 2020**

I agree with the conclusion that no mail-in or absentee ballot should be set aside solely because the voter failed to hand print his or her name and/or address on the declaration form on the ballot mailing envelope. These items are prescribed not by statute but by the Secretary of the Commonwealth under legislatively delegated authority. Absent evidence of legislative intent that what in context amounts to redundant information must be furnished to validate a mail ballot, their omission alone should not deny an elector his or her vote. But I part ways with the conclusion reflected in the Opinion Announcing the Judgment of the Court ("OAJC") that a voter's failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a "minor irregularity." This requirement is stated in unambiguously mandatory terms, and nothing in the Election Code[1] suggests that the legislature intended that courts should

[1] Act of June 3, 1937, P.L. 1333, art. I, § 101, *codified as amended at* 25 P.S. §§ 2601, *et seq*.

construe its mandatory language as directory. Thus, in future elections, 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.[2] However, under the circumstances in which the issue has arisen, I would apply my interpretation only prospectively. So despite my reservations about the OAJC's analysis, I concur in its disposition of these consolidated cases.

Concurring in this Court's recent decision in *Pennsylvania Democratic Party v. Boockvar*, I expressed my increasing discomfort with this Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent.

> [If this Court is] to maintain a principled approach to statutory interpretation that comports with the mandate of our Statutory Construction Act,[3] if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all.[4]

There, I wrote separately in support of this Court's ruling requiring the invalidation of mail-in ballots that were returned to boards of elections not sealed in their secrecy envelopes as required by statutory language. The secrecy envelope requirement at issue in that case was no less ambiguous than the "fill out, date and sign" mandate at issue in this

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[2] None of the parties or courts involved in these consolidated cases dispute that a voter's failure to sign a mail-in or absentee ballot's declaration requires invalidation.

[3] Act of Dec. 6, 1972, No. 290, § 3, *codified as amended at* 1 Pa.C.S. §§ 1501, *et seq*.

[4] 238 A.3d 345, 391 (Pa. 2020) (Wecht, J., concurring) (hereinafter "*PDP*").

case.[5] Nonetheless, departing from that holding for reasons that do not bear close scrutiny, the OAJC concludes that invalidation should *not* follow for failure to comply with the Election Code provisions requiring that "the elector shall . . . fill out, date and sign the declaration printed on" the ballot mailing envelope, even though this requirement appears in precisely the same statutory provisions as were at issue in *PDP*.

Section 3150.16 of the Election Code, governing "[v]oting by mail-in electors"—and its counterpart for absentee ballots, which employs the same operative language[6]—provides:

> 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.[7]

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[5] Specifically, 25 P.S. § 3150.16(a) provides that the mail-in ballot 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*.'"

[6] *Compare* 25 P.S. § 3150.16(a) ("Voting by mail-in electors") *with* 25 P.S. § 3146.6(a) ("Voting by absentee electors"). Each provision governing the form of mail-in ballots and the voter's obligations in preparing and transmitting them has its verbatim equivalent for absentee ballots, and the issue presented applies equally to both. Hereinafter, for simplicity's sake, I refer exclusively to mail-in ballots and cite and quote only the provisions that apply to mail-in ballots, but my analysis applies identically to both. The OAJC reproduces the relevant sections at length. *See* OAJC at 5-7.

[7] 25 P.S. § 3150.16(a) (emphasis added).

While this Court has not reviewed every constituent step this provision prescribes, we have addressed several of the requirements, taking it upon ourselves to weigh in each instance whether to interpret the mandatory statutory language as being mandatory in fact. The law those cases now comprise is so muddled as to defy consistent application, an inevitable consequence of well-meaning judicial efforts to embody a given view of what is faithful to the spirit of the law, with the unfortunate consequence that it is no longer clear what "shall" even means.

Nearly fifty years ago, this Court considered whether a ballot completed in red or green ink should be counted given that the statute provided by its terms only for the canvassing of ballots completed in blue/black ink.[8] Then-applicable Section 3063 of the Election Code provided that "[a]ny ballot that is marked in blue, black or blue-black ink, in fountain pen or ball point pen, or black lead pencil or indelible pencil, shall be valid and counted."[9] The Court determined that the Code did not require the invalidation of ballots completed in other colors, holding that the mandatory language was merely directory in effect:

> [T]he power to throw out a ballot for minor irregularities should be sparingly used. It should be done only for very compelling reasons. Marking a ballot in voting is a matter not of precision engineering but of an unmistakable registration of the voter's will in substantial conformity to statutory requirements. In construing election laws[,] while we must strictly enforce all provisions to prevent fraud over overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise. 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. We have noted in other cases that the dominant theme of this section is to prevent ballots from being identifiable. A ballot should not be invalidated

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8 *Appeal of Weiskerger*, 290 A.2d 108 (Pa. 1972).

9 25 P.S. § 3063 (applicable through October 30, 2019).

> under [25 P.S. § 3063] unless the voter purposely makes a mark thereon or commits some other act in connection with this ballot to distinguish and identify it. The proper interpretation of this portion of the statute considering the occasion for its enactment, the mischief to be remedied, and the policy to liberally construe voting laws in the absence of fraud, is that the ballot is valid unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable.[10]

As this Court later stressed in *Appeal of Pierce*, *Weiskerger* "was decided before the enactment of the Statutory Construction Act [("SCA")], which dictates that legislative intent is to be considered only when a statute is ambiguous."[11] Thus, while *Pierce* focused on distinguishing *Weiskerger*, it nonetheless implicitly called into question the *Weiskerger* Court's casual dismissal of the language of the statute there at issue because the various factors the *Weiskerger* Court cited as relevant to its decision not to give "shall" mandatory effect are relevant under the SCA only when the statute is susceptible of two or more reasonable interpretations.[12]

In insisting that a court's goal should be to "enfranchise and not to disenfranchise" and to be "flexible" in furtherance of that goal, the *Weiskerger* Court found itself awash in

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[10] *Weiskerger*, 290 A.2d at 109 (cleaned up).

[11] *Appeal of Pierce*, 843 A.2d 1223, 1231 (Pa. 2004); *see* 1 Pa.C.S. 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."); *see also Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 n.2 (Pa. 1997) (rejecting a party's reliance upon a 1965 case because it was at odds with the ambiguity-first, reliance-upon-rules-of-construction-later approach to statutory construction required by the SCA).

[12] Without suggesting that the ink color language at issue in that case was ambiguous on its face, the *Weiskerger* Court suggested that interpreting the language required it to consider, *inter alia*, "the occasion for its enactment" and "the mischief to be remedied." *Weiskerger*, 290 A.2d at 109. Section 1921 of the SCA similarly provides that courts may consider "[t]he occasion and necessity for the statute" and "[t]he mischief to be remedied"—but *only* "[w]hen the words of the statute are not explicit." 1 Pa.C.S. § 1921(c).

language so slippery as to defy consistent application. The Court posited the existence of "minor irregularities," a term we repeat often but have yet to define with suitable rigor,[13] and posited that ballots should be invalidated only for "very compelling reasons."[14] It also blessed "substantial conformity," and directed courts to "be flexible in order to favor the right to vote"—evidently even when doing so runs counter to statutory directives stated in mandatory terms.[15]

Perhaps most troublingly, the Court posited that its "*goal* must be to enfranchise and not to disenfranchise."[16] A court's only "goal" should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said*. And even where the legislature's goal, however objectionable, is to impose a requirement that appears to have a disenfranchising effect, it may do so to any extent that steers clear of constitutional protections. In any event, even if the *Weiskerger* Court

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[13] *See, e.g., Appeal of Norwood*, 116 A.2d 552, 555 (Pa. 1955); *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945).

[14] *Weiskerger*, 290 A.2d at 109 (quoting *In re Petitions to Open Ballot Boxes*, 188 A.2d 254, 256 (Pa. 1963)).

[15] In contrast to *Weiskerger*'s capacious understanding of this principle, the Court adopted a more measured tone in *Appeal of Urbano*, 190 A.2d 719 (Pa. 1963). There, citing the presumption in favor of counting votes, it allowed for relief from the apparent consequences of failing to satisfy mandatory statutory language, but did so specifically because the common-law presumption was in keeping with additional statutory language expressly granting the court discretion to permit amendments to cure even "material errors or defects." *Id.*

[16] *Weiskerger*, 290 A.2d at 109 (emphasis added).

faithfully applied the common-law principles it cited, it did so inconsistently with the SCA's contrary guidance, which issued later the same year and binds us today.[17]

But the advent of the SCA did not prevent this Court from repeating the same mistake even decades later. In *Shambach v. Bickhart,*[18] a voter wrote in a candidate for office despite the fact that the candidate appeared on the official ballot for that office. This facially violated the Election Code, which provided that the voter shall, in the designated area, "write the identification of the office in question and the name of *any person not already printed on the ballot for that office*, and such mark and written insertion shall count as a vote for that person for such office."[19] Echoing *Weiskerger*, the *Shambach* Court observed that, "although election laws must be strictly construed to prevent fraud, they

[17] To be clear, *Weiskerger* was by no means our original sin in this area. In one earlier example cited by the OAJC, this Court discerned reason to disregard the mandatory connotation of "shall" in *Appeal of James*, 105 A.2d 64 (Pa. 1954). Indeed, one can detect aspects of the same open-ended analysis in, *e.g.*, our 1922 decision in *In re Fish's Election*, 117 A. 85, 87 (Pa. 1922) (quoting *Knight v. Borough of Coudersport*, 92 A. 299, 300 (Pa. 1914)) ("If the law declares a specified irregularity to be fatal, the court will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declaration the judiciary endeavor, as best they may, to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a full and free expression of the popular will. . . . [If not], it is considered immaterial."). Our willingness to substitute our judgment for that of the legislature perhaps reached its nadir in *Norwood*, where we held that "[e]very rationalization within the realm of common sense should aim at saving [a] ballot rather than void it," 116 A.2d at 554-55, an expression that the OAJC embraces as a "well-settled principle of Pennsylvania election law." OAJC at 19. Perhaps no passage better illustrates the liberties this Court has taken when probing for reasons to treat mandatory language as anything but mandatory.

[18] 845 A.2d 793 (Pa. 2004).

[19] 25 P.S. § 3031.12(b)(3) (emphasis added). The language in question has been amended in the intervening years.

ordinarily will be construed liberally in favor of the right to vote."[20] Thus, the Court "[has] held that ballots containing mere irregularities should only be stricken for compelling reasons."[21] In support of this particular proposition, though, the Court cited only decisions that predated the SCA.[22] Much as in *Weiskerger*, the Court held that the absence of statutory language requiring the invalidation of a ballot completed in violation of the mandatory language of Section 3031.12(b)(3), combined with the amorphous principles it drew from the Court's prior cases, precluded the invalidation of a nonconforming ballot, effectively writing unambiguous language out of the Election Code entirely.

We restored a greater degree of rigor in *Pierce*. In that case, we considered whether absentee ballots delivered by third persons on behalf of non-disabled voters were invalid under the Election Code, which provided that "*the elector shall* send [the absentee ballot] by mail, postage prepaid, except where franked, *or deliver it in person* to said county board of election."[23] There, in a step the *Shambach* Court tacitly bypassed, the Court underscored the SCA's direction that a court's sole objective in construing a statute is to "ascertain and effectuate the intention of the General Assembly," and that, "[g]enerally speaking, the best indication of legislative intent is the plain language of a

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20 *Shambach*, 845 A.2d at 798 (quoting *James*, 105 A.2d at 65).

21 *Id*. at 798.

22 *See Appeal of Mellody*, 296 A.2d 782, 784 (Pa. 1972); *Reading Defense Committee*, 188 A.2d at 256; *Gallagher*, 41 A.2d at 632. The OAJC similarly relies substantially for these principles on pre-SCA case law. *See*, *e.g.*, OAJC at 3 (quoting *James*, 105 A.2d at 65-66 (Pa. 1954)); *id.* at 19 (quoting *Urbano*, 190 A.2d at 719, and *Norwood*, 116 A.2d at 554).

23 25 P.S. § 3146.6(a) (emphasis added); *see Pierce*, 843 A.2d at 1231.

statute."[24] "[I]t is only when the words of a statute 'are not explicit' that a court may resort to other considerations, such as the statute's perceived 'purpose,' in order to ascertain legislative intent."[25] In this light, the Court turned to the legislature's use of the word "shall." "Although some contexts may leave the precise meaning of the word 'shall' in doubt," the Court opined, "this Court has repeatedly recognized the unambiguous meaning of the word in most contexts."[26] As noted *supra*, this Court in *Pierce* declined to treat *Weiskerger* as controlling in part because it was decided before the enactment of the SCA. While we did not assert *Weiskerger*'s abrogation, we certainly cast doubt upon its probity, as well, by extension, as all similarly permissive Election Code case law relying upon the presumption to count votes that violated the Code's unambiguous directives.

In *In re Scroggin*,[27] too, we applied the relevant statutory language strictly in conformity with its terms, despite colorable arguments that doing so would deny ballot access to a candidate who had "substantially complied" with the statutory requirements. And at issue in that case was not merely the votes of a small percentage of otherwise qualified voters, but whether a political body's Presidential candidate would appear on the ballot at all in the wake of a placeholder nominee's failure to satisfy the Code's mandatory affidavit requirement. "[T]he provisions of the election laws relating to the form of nominating petitions and the accompanying affidavits are not mere technicalities," we

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24 *Pierce*, 843 A.2d at 1230 (citations omitted).

25 *Id*.

26 *Id*. at 1231-32 (citing, *inter alia*, BRYAN GARNER, DICTIONARY OF MODERN LEGAL USAGE 939 (2d ed. 1995)).

27 237 A.3d 1006 (Pa. 2020).

explained, "but are necessary measures to prevent fraud and to preserve the integrity of the election process. . . . Thus, the policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process."[28]

Finally, in *PDP*, we held that the failure strictly to comply with the Election Code's mandatory requirement that mail-in ballots be sealed in the provided "Official Election Ballot" envelope required invalidation. Again, we specifically rejected the appellants' reliance upon *Weiskerger* and *Shambach*, relying instead upon *Pierce*. As in *Pierce*, we found that to interpret "shall" as directory rather than mandatory would render the Code's requirements "meaningless and, ultimately, absurd," notwithstanding the absence of an express, statutorily-prescribed sanction for non-compliance.[29] While we did not go out of our way to express a jaundiced a view of our cases holding that "minor irregularities" might be overlooked, the gravamen of our decision in that case, as in *Pierce*, was clear: shall means *shall*.[30]

Although I joined the Majority in that case, I wrote separately to underscore the difficulties endemic to judicial efforts to discern ulterior meanings ostensibly obscured by the legislature's use of mandatory language. I observed that relying upon such unbounded investigations invited courts "to bend unclear texts toward whatever ends that

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28 *Id*. at 1019 (quoting *Appeal of Cubbage*, 359 A.2d 383, 384 (Pa. 1976)).

29 *PDP*, 238 A.3d at 379 (quoting *Pierce*, 843 A.2d at 1232).

30 *Id*. at 380 ("[*Pierce*] leads to the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified. . . . Accordingly, we hold that the secrecy [envelope] language in Section 3150.16(a) is mandatory and the mail-in elector's failure to comply . . . renders the ballot invalid.").

they believe to be consonant with legislative intent, but with little or no contemporaneous insight into whether they have done so successfully."[31] Acknowledging that legislation is sometimes less than a model of clarity, and that this Court consequently will continue to face invitations to treat mandatory language as something less, I wrote: "[I]f we are to maintain a principled approach to statutory interpretation that comports with the mandate of [the SCA], if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all."[32]

It is against this case law, and particularly the views I expressed in *PDP*, that I review the question now before us, briefly addressing the Secretary-imposed name and address requirement first, before proceeding to consider the statutory requirement that the voter date and sign the voter declaration.

As to the former question, I agree with the OAJC's conclusion, although I subscribe to the narrower approach briefly set forth by Justice Dougherty in his Concurring and Dissenting Opinion and developed variously in the OAJC's analysis. But while the OAJC acknowledges the reasons that Justice Dougherty cites as militating against invalidation, it supplements them with the minor-irregularity analysis familiar from *Weiskerger* and *Shambach*, which is neither necessary nor advisable. Justice Dougherty's approach requires no reliance upon cases that *Pierce* and *PDP* rightly have called into question. Rather, the fact that the name and address requirement does not stem from mandatory

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31 *Id*. at 391 (Wecht, J., concurring).

32 *Id*.

statutory language,[33] as well as questions about the Secretary's authority to compel county boards of elections to conform with whatever guidance the Secretary offers,[34] combined with our presumption in favor of treating qualified voters' ballots as valid absent clear legal mandates to the contrary where statutory language is less than clear,[35] collectively recommend against invalidating ballots for this omission alone.[36] That is enough for me.

The same cannot be said about the date and sign requirement, which derives from an unmistakable statutory directive. Drawing upon our less rigorous case law, and relying heavily upon the interpretive latitude this Court has arrogated to itself sporadically for generations, the OAJC assumes that our mission is to determine whether the apparent mandate is in fact directory, hanging the entire inquiry upon the question of mandatory versus directory effect. That reading, in turn, must rely upon the "minor

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33 *See* Conc. & Diss. Op. at 2 (Dougherty, J.).

34 *See* OAJC at 32-33 n.6.

35 *See PDP*, 238 A.3d at 356 ("[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice."). Notably, the OAJC cites *PDP* for the same proposition, correctly qualifying the principle by noting that liberal construction comes into play only "[*w*]*here an election statute is ambiguous*." OAJC at 25 n.4 (emphasis added).

36 I also find cause for concern in the absence of clear instruction on the ballot materials indicating that a ballot lacking a name or address will be disqualified, a concern that informs my preference for prospective application of the statutory date requirement. *Cf. Reading*, 188 A.2d at 256 (declining to invalidate ballots upon which voters did not signal their intended votes strictly with the X or check mark mandated by statute for various reasons—including a "minor irregularity" approach I reject—especially where the printed instruction on the ballot did not specify that only those two methods of signaling one's vote would be recognized).

irregularity" / "weighty interest" dichotomy underlying the cases that *Pierce* and *PDP* have called into question.

> To determine whether the Election Code's directive that the voter handwrite their names, address, and 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 intent of the General Assembly was clear and whether the failure to handwrite the information constitutes "minor irregularities" or instead represent[s] "weighty interests" . . . that the General Assembly considered to be critical to the integrity of the election.[37]

To be clear, the OAJC offers a commendably thorough analysis, but its length and involution is necessary only *because* of the open-ended inquiry it embarks upon. And it is no surprise that, like the cases upon which it relies, the OAJC involves protean characterizations of voting requirements as "technicalities,"[38] "minor irregularities,"[39] and

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[37] OAJC at 23.

[38] *See id*. at 3 (quoting *James*, 105 A.2d at 66 ("Technicalities should not be used to make the right of the voter insecure.")). *James*'s tendentious resort to the word "technicalities," which seldom is used constructively when invoked in connection with the law, is contradicted at least in tenor by subsequent pronouncements. *See Pierce*, 843 A.2d at 1234 ("[S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed . . . ."); *Appeal of Weber*, 159 A.2d 901, 905 (Pa. 1960) ("The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed.").

[39] *See* OAJC at 22-23 (counterposing "minor irregularities" and "weighty interests" as the framework for decision). Notably, the question as to which we granted review quite confused the meaning of "irregularity." We proposed to answer the question whether "the Election Code require[s] county boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed their ballot's outer envelopes but did not handwrite their name, their address, and/or a date, *where no fraud or irregularity has been alleged*?" *Id.* at 15. But this formulation is irreconcilable with the question whether failing to date a ballot declaration is, itself, a "minor irregularity" and, as such, not subject to the sanction of ballot invalidation—the very crux of the case, as the OAJC defines it. I raise this discrepancy because it illustrates how these constructs lend themselves to confusion, complicating what should be simple questions by engrafting unenumerated considerations upon plainly worded statutes.

even "superfluous."[40] As illustrated in my review of earlier case law, the OAJC does not conjure this terminology from the ether—all but the last of these terms have been central to this Court's decisional law going back decades. But properly understood, all of these terms signal (and implicitly bless) the substitution of judicial appraisals for legislative judgments.

The OAJC approach ultimately requires that in *any* case requiring interpretation of the Election Code to determine the validity of votes nonconforming with facially mandatory requirements, the Court must assess the effect of that language *de novo* before deciding whether the legislature intended for it to be interpreted as mandatory or merely directory.[41] Thus, while a court embracing that test might take it as obvious, *e.g.*, that the signature requirement should be construed as mandatory, it could not merely have taken its mandatory effect as a given by virtue of the statutory language alone. If the mandatory/directory inquiry is ever appropriately applied to mandatory language, then the Court can only conclude that mandatory language must be applied as such after applying its balancing test, with cases that *seem* obvious merely reflecting that the Court deemed the "interest" to be protected so "weighty" that its omission clearly cannot be viewed as a "minor irregularity."

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[40] *See id*. at 30 ("The date stamp and the SURE system provide a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous."); *cf. id.* at 23 (characterizing the handwritten name and address requirement as, "at best, a 'minor irregularity' and, at worst, entirely immaterial").

[41] *See id*. at 30 ("Although unlike the handwritten name and address, which are not mentioned in the statute, the inclusion of the word 'date' in the statute does not change the analysis *because the word 'shall' is not determinative as to whether the obligation is mandatory or direct[ory] in nature*." (emphasis added)).

The only practical and principled alternative is to read "shall" as mandatory. Only by doing so may we restore to the legislature the onus for making policy judgments about what requirements are necessary to ensure the security of our elections against fraud and avoid inconsistent application of the law, especially given the certainty of disparate views of what constitute "minor irregularities" and countervailing "weighty interests."

I do not dispute that colorable arguments may be mounted to challenge the necessity of the date requirement, and the OAJC recites just such arguments.[42] But colorable arguments also suggest its importance, as detailed in Judge Brobson's opinion as well as Justice Dougherty's Concurring and Dissenting Opinion.[43] And even to *indulge* these arguments requires the court to referee a tug of war in which unambiguous statutory language serves as the rope. That reasonable arguments may be mounted for and against a mandatory reading only illustrates precisely why we have no business doing so.

Ultimately, I agree with Judge Brobson's description of the greatest risk that arises from questioning the intended effect of mandatory language on a case-by-case basis:

> While we realize that our decision in this case means that some votes will not be counted, the decision is grounded in law. It ensures that the votes will not be counted because the votes are invalid as a matter of law. Such adherence to the law ensures equal elections throughout the Commonwealth, on terms set by the General Assembly. The danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules that will have some defective ballots counted and others discarded, depending on the county in which a voter resides. Such a patchwork system does not guarantee voters

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42 *See id*. at 30-32.

43 *See In re 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, slip op. at 12 (Pa. Cmwlth. Nov. 19., 2020) (memorandum); Conc. & Diss. Op. at 3 (Dougherty, J.).

> an "equal" election, particularly where the election involves inter-county and statewide offices. We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law.[44]

We must prefer the sometimes-unsatisfying clarity of interpreting mandatory language as such over the burden of seeking The Good in its subtext. Substantive perfection is the ever-elusive concern of the legislature. Ours must be consistency of interpretive method without fear or favor, a goal that recedes each time a court takes liberties with statutory language in furtherance of salutary abstractions. Because the OAJC favors a more intrusive and ambitious inquiry, I respectfully dissent.

But just because I disagree with the OAJC's interpretation of the date and sign requirement does not inexorably lead me to the conclusion that the votes at issue in this case must be disqualified. While it is axiomatic that *ignorantia legis neminem excusat* (ignorance of the law excuses no one), this Court may elect to apply only prospectively a ruling that overturns pre-existing law or issues a ruling of first impression not foreshadowed by existing law. Indeed, we have done so in at least one case under the Election Code. In *Appeal of Zentner*,[45] we confronted a statute governing candidates' obligation to submit statements of financial interests by a time certain that had been revised specifically to correct our previously fluid interpretations of the predecessor statute. We were forced to consider whether our newly strict construal of the revised statute should result in the invalidation of entire ballots already cast because they included one or more candidates who had failed to satisfy the statutory disclosures. We

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44 *In re 2,349 Ballots*, slip op. at 12-13.

45 626 A.2d 146 (Pa. 1993)

held, as the legislature clearly intended, that a candidate's "failure to file the requisite financial interests statement within the prescribed time shall be fatal to a candidacy."[46] But we also concluded that to "void the results of an election where all candidates were submitted to the voters, with late but nonetheless filed financial statements which left adequate time for study by the electorate, would be an unnecessary disenfranchisement."[47] Thus we determined that our holding should apply prospectively but not to the election at issue.[48]

It goes without saying that 2020 has been an historically tumultuous year. In October of 2019, the legislature enacted Act 77,[49] introducing no-excuse mail-in voting with no inkling that a looming pandemic would motivate millions of people to avail themselves of the opportunity to cast their ballots from home in the very first year that the law applied. Soon thereafter, Act 12,[50] introduced and enacted with unprecedented

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46 *Id*. at 149.

47 *Id*.

48 *Cf. Andino v. Middleton*, No. 20A55, ___ U.S. ___, 2020 WL 5887393, *1 (Oct. 5, 2020) (staying the district court's injunction of an absentee ballot witness requirement, "except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement" in light of the fact that voters cast nonconforming absentee ballots in reliance upon the guidance of state elections officials during the pendency of the injunction); *In re Beyer*, 115 A.3d 835, 843-44 (Pa. 2015) (Baer, J., dissenting) (finding it "reasonable for this Court to rule prospectively that a candidate may only designate his occupation or profession as 'lawyer' on nomination papers after he or she has graduated from law school, passed the bar exam, and is in good standing as an active member of the Pennsylvania Bar," but dissenting because, "at the time Candidate Beyer filed his nomination papers, neither a majority of this Court nor the Commonwealth Court had ever made such an express declaration").

49 *See* Act of Oct. 31, 2019, P.L. 552, No. 77.

50 *See* Act of March 27, 2020, P.L. 41, No. 12.

alacrity in response to the pandemic, further amended the Election Code to address emergent concerns prompted by the looming public health crisis. While aspects of the new provisions that are relevant to this case were not wholly novel to the Code, as such—for example, the provisions that authorized no-excuse mail-in voting by and large just expanded the pool of voters to whom the rules that long had governed absentee balloting applied—the massive expansion of mail-in voting nonetheless presented tremendous challenges to everyone involved in the administration of elections, from local poll workers to the Secretary of the Commonwealth. Importantly, it transformed the incentives of probing the mail-in balloting provisions for vulnerabilities in furtherance of invalidating votes. For the first time, a successful challenge arising from a given technical violation of statutory requirements might result in the invalidation of many thousands of no-excuse mail-in ballots rather than scores or hundreds of absentee ballots.

In advance of the 2020 election, neither this Court nor the Commonwealth Court had occasion to issue a precedential ruling directly implicating the fill out, date and sign requirement. Moreover, as the OAJC highlights in multiple connections, the Secretary issued confusing, even contradictory guidance on the subject.[51] Thus, local election officials and voters alike lacked clear information regarding the consequence of, *e.g.*, failing to handwrite one's address on an envelope that already contained preprinted text with that exact address or record the date beside the voter's declaration signature.

I have returned throughout this opinion to our decision in *PDP*, and I do so once more. I maintained in that case that the Election Code should be interpreted with

[51] *See* OAJC at 24 n.3, 32-33 n.6; *see also id.* at 8-10 (reproducing all relevant aspects of the guidance documents pertaining to the issues presented).

unstinting fidelity to its terms, and that election officials should disqualify ballots that do not comply with unambiguous statutory requirements, when determining noncompliance requires no exercise of subjective judgment by election officials.[52] The date requirement here presents such a case. But I *also* emphasized that disqualification is appropriate "[s]o long as the Secretary and county boards of elections *provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere*" to those requirements.[53] I cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case. As in *Zentner*, it would be unfair to punish voters for the incidents of systemic growing pains.

In case after case involving the Election Code, especially this year, we have been reminded how important it is that the General Assembly provide unambiguous guidance for the administration of the election process. But it is imperative that we recognize when the legislature has done precisely that, and resolve not to question the legislature's chosen language when it has done so. And perhaps it is a silver lining that many of the problems that we have encountered this year, in which a substantially overhauled electoral system has been forced to make its maiden run in stormy seas, are now clear enough that the legislature and Department of State have notice of what statutory refinements are most needful. It is my sincere hope that the General Assembly sees fit to refine and clarify the Election Code scrupulously in the light of lived experience. In particular, because this is the second time this Court has been called upon to address the

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52 *See PDP*, 238 A.3d at 389 (Wecht, J., concurring).

53 *See id*. (emphasis added).

declaration requirement, it seems clear that the General Assembly might clarify and streamline the form and function of the declaration, perhaps prescribing its form to advance clarity and uniformity across the Commonwealth.[54]

[54] In this regard, the OAJC observes that the Democratic National Committee "argues, with some persuasive force, that the Campaign's requested interpretation of Pennsylvania's Election Code could lead to a violation of [the federal Voting Rights Act] by asking the state to deny the right to vote for immaterial reasons." OAJC at 26 n.5; *see* 52 U.S.C. § 10101(a)(2) (No person acting under color of law shall . . . (B) 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 . . . ."). The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the date requirement could qualify as "not material in determining whether such individual is qualified under State law to vote." Given the complexity of the question, I would not reach it without the benefit of thorough advocacy. But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. 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.

[J-118A-2020, J-118B-2020, J-118C-2020, J-118D-2020, J-118E-2020 and J-118F-2020] [OAJC]
IN THE SUPREME COURT OF PENNSYLVANIA

IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 31 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 32 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 33 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 34 EAP 2020 SUBMITTED: November 18, 2020
IN RE: CANVASS OF ABSENTEE AND MAIL-IN BALLOTS OF NOVEMBER 3, 2020 GENERAL ELECTION APPEAL OF: DONALD J. TRUMP FOR PRESIDENT, INC.	:	No. 35 EAP 2020 SUBMITTED: November 18, 2020

IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION APPEAL OF: ALLEGHENY COUNTY BOARD OF ELECTIONS	:	No. 29 WAP 2020 : Appeal from the Order of the Commonwealth Court entered November 19, 2020 at No. 1162 CD 2020, reversing the Order of the Court of Common Pleas of Allegheny County entered November 18, 2020 at No. GD 20-011654 and remanding : : SUBMITTED: November 20, 2020

CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY **DECIDED: November 23, 2020**

I concur in the decision to affirm the lower courts' orders pertaining to ballots where the qualified electors failed to print their name and/or address on the outer envelope containing their absentee or mail-in ballots. However, 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." Opinion Announcing the Judgment of the Court (OAJC) at 30. I therefore respectfully dissent from the holding at Section III(2) of the OAJC which provides that the undated ballots may be counted.

The applicable statutes require that electors "shall [ ] fill out, date and sign" the declaration printed on the ballot envelope. 25 P.S. §§3146.6(a), 3150.16(a). In my view, the term "fill out" is subject to interpretation. Maybe it means printing one's name and address on the envelope, and maybe it does not. Given that our goal in interpreting the Election Code is to construe ambiguous provisions liberally, in order to avoid disenfranchisement where possible, I do not consider the failure of qualified electors to "fill out" their name and address, particularly where the name and address already appear

on the other side of the envelope, to require disqualification of the ballot. I am further persuaded of this position by the fact that the blank spaces on the envelope indicating where the name and address should be "filled out" were designated by the Secretary, not the General Assembly. 25 P.S. §3146.4 ("Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth[.]"); *see also* Concurring and Dissenting Opinion at 12-13 (Wecht, J.). But, 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. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) ("[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.") (citation omitted). Accordingly, I do not view the absence of a date as a mere technical insufficiency we may overlook.

In my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration. As Judge Brobson observed below, 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[.]" *In Re: 2,349 Ballots in the 2020 General Election*, 1162 C.D. 2020, slip op. at 12 (Pa. Cmwlth. Nov. 19, 2020) (memorandum). The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes. *Cf. In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d at 1232-33 (statutory requirement that ballot be submitted by elector and not third-party is mandatory safeguard against fraud). I recognize there is presently no dispute that all undated ballots at issue here arrived in a

timely manner. But I am also cognizant that our interpretation of this relatively new statute will act as precedential guidance for future cases.

Chief Justice Saylor and Justice Mundy join this concurring and dissenting opinion.