IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LINDA MIGLIORI, et al.,	:	
	:	**No. 22-1499**
Appellants,	:	
	:	
v.	:	
	:	
LEHIGH COUNTY BOARD OF ELECTIONS, et al.	:	
	:	
	:	
Appellees.	:	

ORDER

AND NOW, this _____ day of _____, 2022, upon consideration of the Emergency Motion for an Injunction Pending Appeal filed by above-captioned Plaintiffs, and any responses thereto, it is hereby ordered that said Motion is **DENIED WITH PREJUDICE**.

_____

, J.

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LEHIGH COUNTY BOARD OF ELECTIONS, et al.	:	
	:	
	:	
Appellees.	:	

MEMORANDUM OF LAW IN OPPOSITION OF PLAINTIFFS' MOTION FOR EMERGENCY INJUNCTION PENDING APPEAL

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I. INTRODUCTION

The Lehigh County Board of Elections (Board) respectfully requests this Court deny Plaintiffs' Motion for an Emergency Injunction Pending Appeal. Plaintiffs recently filed a Notice of Appeal from the well-reasoned and well-written Opinion and Order of the District Court dated March 16, 2022, and subsequently filed for Emergency Relief. Upon review of the District Court's Opinion and Order, it is clear that Plaintiffs cannot satisfy the legal requirements for the Emergency Relief in the form of an injunction or stay pending the instant appeal.

From a substantive standpoint, the sole issue presented to the District Court, and to this Court on appeal, is whether the Board must count 257 mail-in ballots that were submitted with a facially deficient ballot-return envelope. Specifically, all 257 mail-in ballots at issue failed to contain the date, which is required by Pennsylvania law, next to the signature line on the envelope. Upon receipt of the mail-in ballot and discovery of the missing date, these ballots were not opened and immediately set aside pursuant to Pennsylvania law.

The 2021 Municipal Election was held on November 2, 2021, and in that Election, six candidates vied for three open seats on the Court of Common Pleas of Lehigh County. At the current time, two of the three judicial positions have been certified and Judges have been installed. The third position, which remains unofficially, but not officially certified under Pennsylvania Law, has David Ritter winning the judicial position over Zachary Cohen by 71 votes.[1]

[1] Of note, originally, 261 mail-in ballots were set aside for defects on the ballot-return envelope. 257 of those ballots were for missing dates, and 4 were previously set aside for having the date in the wrong location on the ballot-return envelope. Following a decision by the Court of Common Pleas and the conclusion of the Appeal to the Commonwealth Court, the 4 votes with dates in the wrong location were counted. As a result, at a meeting on February 1, 2022, the Board counted the 4 votes and unofficially recertified the election. Under 25 P.S. §3154, the certification of an election in Pennsylvania is a two-step process. The first step requires the Board to unofficially certify the Election and then it must wait 5 calendar days to officially (finally) certify the Election. At a meeting on February 1, 2022, the Board unofficially certified the Election with David Ritter winning the judicial position by 71 votes over Zachary Cohen.

II. BACKGROUND and PROCEDURAL HISTORY

In the 2021 Municipal Election, the County's Office of Voter Registration and Elections received approximately 22,000 mail-in ballots. Of those ballots, 261 were deemed invalid by the Chief Clerk based upon the omission of a date or the inclusion of an improperly placed date on the elector declaration on the ballot-return envelope. Of the 261 ballots, 257 lacked a date, and 4 ballots contained a date, but in the wrong location. As such, the Chief Clerk determined the ballots would not be pre-canvassed or canvassed (counted) based on the Pennsylvania Election Code ("Election Code"),[2] Pennsylvania case law, and guidance from the Pennsylvania Department of State.

In response, Zachary Cohen challenged the Chief Clerk's decision to set aside these mail-in ballots. On November 15, 2021, the Board held a hearing on Cohen's challenge, and the Board voted 3-0 to canvass the 261 mail-in ballots. Two days later, David Ritter filed an appeal to the Court of Common Pleas of Lehigh County.

Following a hearing and the submission of briefs on all issues raised, including an issue concerning the Materiality Provision of the Civil Rights Act, the Court issued a decision affirming the Board's decision to count all 261 mail-in ballots. David Ritter filed an appeal to the Commonwealth Court of Pennsylvania.

Ultimately, the Commonwealth Court reversed the decision of the Court of Common Pleas, concluding the mail-in ballots should not be counted. In so doing, the Commonwealth Court addressed the Materiality Provision of the Civil Rights Act, and relied upon the Pennsylvania Supreme Court's decision in In re Canvass of Absentee and Mail-in Ballots of November 3, 2020

Pursuant to the District Court's Order dated February 2, 2022, and by agreement of the parties, the Board has not taken any action to officially certify the Election results until this Court enters an Order relative to the remaining 257 mail-in ballots that have not been opened, reviewed, or counted to date.

[2] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2601-3591.

General Election, 241 A.3d 1058 (Pa. 2020). Zachary Cohen then filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on January 27, 2022. Ritter v. Lehigh County Board of Election, No. 9 MAL 2022, (Pa. Jan. 27, 2022), 2022 WL 244122.

On January 31, 2022, 5 individuals, with the assistance of the ACLU, filed the instant suit. All five of the named plaintiffs voted by mail-in ballot in the election, and their ballots were rejected because of the lack of a date on the ballot-return envelope. Initially, this suit sought a preliminary injunction seeking to enjoin the Board from officially certifying the election and future relief consistent with that position.

Following initiation of that litigation, the parties agreed to have the Board unofficially certify the election, but to then take no further action relative to officially certifying the election. Subsequently, the parties, with the Court's consent, agreed to file a stipulation of facts and convert this matter to cross-motions for summary judgment for the District Court's disposition. The cross-motions for summary judgment were submitted, and by Opinion and Order dated March 16, 2022, the U.S. District Court, through the Honorable Joseph F. Leeson, granted summary judgment in favor of the Board and against Plaintiffs. In so doing, the District Court concluded that the 257 ballots at issue should not be counted.

Consistent with the aforementioned Opinion and Order, the Board set a meeting for the purpose of formally/officially certifying the election results from November 2021, which will result in the vacant judicial position being filled by David Ritter, for Monday, March 21, 2022, at 3:00 p.m.[3]

[3] We do note that the parties justifiably relied on undersigned counsel's representation that the meeting to formally/officially certify the election was scheduled for Monday, March 21, 2022, at 1:30 p.m. After notice of that date and time were provide to the parties and/or all interested parties, the time of the meeting was moved from 1:30 p.m. until 3:00 p.m. on the same day (Monday, March 21, 2022). Undersigned counsel apologizes for any confusion that resulted from the initial report of the time for the meeting and the meetings subsequent new time of 3:00 p.m.

III. STANDARD

A stay and/or injunction pending appeal is not a matter of right, even if irreparable injury might otherwise result." Virginian Ry. Co. v. United States, 272 U.S. 658, 672 (1926). It is instead, "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." Id., at 672–73; see Hilton v. Braunskill, 481 U.S. 770, 777 (1987), 107 S.Ct. 2113 ("[T]he traditional stay factors contemplate individualized judgments in each case"). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. See, e.g., Clinton v. Jones, 520 U.S. 681, 708, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); Landis v. North American Co., 299 U.S. 248, 255, 57 S.Ct. 163, 81 L.Ed. 153 (1936).

The fact that the issuance of a stay is left to the court's discretion, however, "does not mean that no legal standard governs that discretion .... '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) (quoting United States v. Burr, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)). The aforementioned legal principles have, over time, been distilled into consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton, at 776, 107 S.Ct. 2113; see also, e.g., Virginia Petroleum Jobbers Assn. v. FPC, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958); Washington Metropolitan Area Comm'n v. Holiday Tours, Inc., 182 U.S.App.D.C. 220, 221–222, 559 F.2d 841, 842–844 (1977); Garcia-Mir

v. Meese, 781 F.2d 1450, 1453 (CA11 1986); Accident Fund v. Baerwaldt, 579 F.Supp. 724, 725 (WD Mich.1984).[4]

The first two factors of the traditional standard are the most critical. Nken v. Holder, 556 U.S. 418 (2009). It is not enough that the chance of success on the merits be "better than negligible." Sofinet v. INS, 188 F.3d 703, 707 (C.A.7 1999) (internal quotation omitted). Indeed, "[m]ore than a mere 'possibility' of relief is required." Nken. By the same token, simply showing some "possibility of irreparable injury," Abbassi v. INS, 143 F.3d 513, 514 (C.A.9 1998), fails to satisfy the second factor. Id. (as the Court pointed out earlier, the "'possibility' standard is too lenient") (internal citations omitted)).

In the Third Circuit, a sufficient degree of success for a strong showing exists if there is "a reasonable chance, or probability, of winning." Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir.2011) (en banc). Thus, while it "is not enough that the chance of success on the merits be 'better than negligible,'" Nken, 556 U.S. at 434, 129 S.Ct. 1749 (citation omitted), the likelihood of winning on appeal need not be "more likely than not," Singer Mgmt. Consultants, 650 F.3d at 229; see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C.Cir.1977) (noting that the trouble with a "strict 'probability' requirement is [ ] it leads to an exaggeratedly refined analysis of the merits at an early stage in the litigation").

IV. ISSUE PRESENTED

WHETHER THIS COURT SHOULD GRANT A STAY AND/OR /INJUCNTION PENDING THE APPEAL FILED BY PLAINTIFFS.

Suggested Answer: No.

[4] There is substantial overlap between these and the factors governing preliminary injunctions, see Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24, 129 S.Ct. 365, 376–77, 172 L.Ed.2d 249 (2008); not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

V. ARGUMENT

Federal Rule of Civil Procedure 62(d) allows a court to grant temporary injunctive relief and/or stay an order of judgment while an appeal is pending if the following four factors are satisfied: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton, at 776.

The first requirement necessitates that Plaintiffs demonstrate a strong showing that they are likely to succeed on the merits on appeal. Upon review of the District Court's Opinion dated March 16, 2022, however, Plaintiffs have unequivocally failed to set forth sufficient support to satisfy this element on its face. As noted in the Opinion, the statutory language, context, legislative history, and common law all support the conclusion that Plaintiffs are highly likely *not* to succeed on the merits moving forward.

Nevertheless, in support of their position, Plaintiffs argue the District Court erred in its analysis of their standing under the Materiality Provision of the Civil Rights Act, 52 U.S.C. §10101. To the contrary, however, the Court's determination is well-reasoned, and impeccably supported.

When presented with the instant inquiry, the District Court concluded that the statutory language, legislative history, as well as a review of the substantive interpretations of that language by courts in preceding cases, dictate the conclusion that Congress did not intend to provide a private cause of action for the vindication of personal rights contained in the Materiality Provision. The comprehensive analysis and discussion of this issue is set forth in clear, logical, and unequivocal terms, and nothing set forth in Plaintiffs' Brief in Support of the Injunction presents a new issue that the District Court failed to address. In the absence of any such presentation, there is absolutely nothing upon which this Court can specify to indicate that the outcome of this matter will be different on appeal.

Further, the Board reiterates its position that the clear identification of the Attorney General in subsection (c) of Section 10101, without further identification of enforcement by private citizens, supports the District Court's determination. See Willing v. Lake Orion Community Schools Bd. of Trustees, 924 F.Supp. 815 (S.D. Mich. 1996) (concluding that Section 1971 of the Voting Rights Act (now Section 10101(a)(2)(B)) does not afford a private cause of action); see also Good v. Roy, 459 F.Supp. 403, 405 (D. Kan. 1978) (subsection (c) provides for enforcement of the statute by the Attorney General with no mention of enforcement by private persons.... [T]he unambiguous language of Section 1971 will not permit us to imply a private right of action, and, thereby, refusing to imply a private right of action).

Section 10101 is intended to prevent racial discrimination at the polls and is enforceable by the Attorney General, not by private citizens. Id.; 52 U.S.C. §10101(c). Not only is the statutory language affirmative, the Sixth Circuit Court of Appeals has also held the negative implication of Congress's provision for enforcement by the Attorney General is that the statute does not permit private rights of action. McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000).

Furthermore, the decision in Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003), cited by Plaintiffs in support of their position, does not compel a different result. While the Eleventh Circuit held that a private cause of action does exist for a perceived violation of the Civil Rights Act under Section 10101(a)(2)(B), its analysis and conclusion is illogical and wanting legally.

To that end, it is well settled that "[t]he first step in interpreting a statute is to determine 'whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" Valansi v. Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) (quoting Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (internal citations omitted)). "Where the language of the statute is clear ... the text of the statute is the end of the matter." Steele v. Blackman, 236 F.3d 130, 133 (3d Cir. 2001). At the outset, the clear language of the statute here directs the contra result concluded.

Specifically, the Eleventh Circuit failed to undertake an examination of the clear language under statutory construction principles. Despite the clear and unambiguous language in the statute, the Court elected to ignore the language in order to read into the statute that the notation of the Attorney General was not intended to limit who can bring suit. The result of such action is to assume Congress intended to authorize a private cause of action that existed at the time the statute was amended despite the statute's clear limitation on who could enforce the rights contained in the express language of the amendment. Such action is nothing short of a Court inappropriately and improperly rewriting a statute to reach a specified result, in direct contravention of well-settled statutory construction principles.

Where, as here, the language is clear and unambiguous, Courts are required to give effect to all the words of the statute and recognize that if Congress intended to provide a nonexclusive enforceability provision, especially where the right was in existence at the time of the amendment, it would have said so. Especially given the fact that such a right was provided for since 1870, and Congress expressly left out an express private cause of action for private individuals. Where a right existed in federal law, that Congress is presumed to have known about at the time of drafting, and was expressly left out, indicates clear intent to alter the existing law and left out a private remedy for violations of the Materiality Provision. It would illogical and absurd to assume Congress wanted to include a private cause of action and/or remedy in a newly drafted provision, but left such a right to implication versus an express directive. In the absence of a clear directive in the statute itself, an implication crafted by a Court is simply insufficient to render such a determination proper or persuasive. Based on the Sixth Circuit's logical approach to the language, together with the parameters set forth under the well-settled statutory construction principles, the District Court's conclusion that Plaintiffs to the instant litigation lack standing to pursue a claim under Section 10101(a)(2)(B) is proper and appropriate.

In addition, Plaintiffs position that the District Court will be overturned on appeal relative to the burden imposed by the date requirement on the mail-in ballot lacks merit. More particularly, Plaintiffs argue the date requirement violates the First and Fourteenth Amendments as it constitutes an undue burden on voters. Stated otherwise, Plaintiffs contend the Commonwealth of Pennsylvania lacks an adequate interest to justify the burden imposed by the requirement. Again, as discussed in a comprehensive manner by the District Court, this argument will not lie as a matter of law, and Plaintiffs cannot show entitlement to an injunction and/or stay of the proceedings pending an appeal to this Honorable Court.

In addressing this issue, the District Court properly determined the two-step approach to determine the substantive validity of the challenge presented by Plaintiffs. First, the Court needed to identify the burden, and then, based on appropriate considerations, determine the level of scrutiny to be applied to that burden. The Court undertook these two required actions and applied those actions to the undisputed facts of this case. Given the nature of the burden, the District Court correctly concluded that an important regulatory and public interest justifies the minor imposition of the date requirement, and, therefore, the date requirement does not constitute an undue burden upon voters in violation of the First and Fourteenth Amendments.

Moreover, in examining this issue, the Pennsylvania Supreme Court, to which the Federal Courts are required to apply full faith and credit to in this instance, conclusively determined that the date requirement encompasses weighty interests of the Commonwealth. To that end, recently, in In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020), the Pennsylvania Supreme Court considered whether the date on the elector declaration on the outside envelope of a mail-in ballot is a mandatory requirement for purposes of Section 1306-D(a) of the Election Code. A divided Court issued three opinions on this issue.

In an Opinion Announcing the Judgment of the Court ("OAJC"), Justice Donahue, joined by Justices Todd and Baer, determined undated mail-in ballots should be canvassed because an

undated signature on an elector declaration constituted a minor irregularity that did not warrant invalidation of the ballots. In so doing, Justice Donahue stated:

> 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 … ballots challenged [in these matters], 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, superfluous.
>
> [In our prior decision,] [w]e did not address … 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 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. …
>
> [W]e conclude that while failures to include a … 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*, 351 Pa. 451, 41 A.2d 630, 632 (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.

Id. at 1078. Thus, three of the Justices of the Supreme Court determined that the lack of a date on the elector declaration on the outside envelope did not justify invalidation of mail-in ballots.

In contrast, Justice Dougherty, in a concurring and dissenting opinion joined by Chief Justice Saylor and Justice Mundy disagreed concluding, "the statutory language expressly requires that the elector provide [a date]." *Id.* at 1090 (Pa. 2020) (Dougherty, J., concurring and dissenting). Thus, three of the Justices of the Supreme Court determined the lack of a date on the elector declaration on the outside envelope of mail-in ballots rendered those ballots invalid.

However, the seventh Justice of the Supreme Court, Justice Wecht, authored a concurring and dissenting opinion in which he agreed with Justices Dougherty and Mundy and Chief Justice Saylor, that an elector's failure to comply with the date requirement on the elector declaration rendered the mail-in ballots invalid. In so doing, Justice Wecht believed this ruling, which announced a new rule of law, should only be applied prospectively so that the undated mail-in ballots would be canvassed in the November 2020 election, but they would not be counted in future elections. To that end, Justice Wecht opined:

> I part ways with the conclusion reflected in the [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 suggests that the legislature intended that courts should construe its mandatory language as directory. Thus, in future elections, I would treat the date … requirement as mandatory in both particulars, with the omission of [the date] sufficient without more to invalidate the ballot in question. 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. …
>
> 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. But colorable arguments also suggest its importance, as detailed in Judge Brobson's opinion [below] as well as Justice Dougherty's Concurring and Dissenting Opinion. 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 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.

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 … 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* [626 A.2d 146 (Pa. 1994)], 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 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.' 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.' Thus we determined that our holding should apply prospectively but not to the election at issue.

It goes without saying that 2020 has been an historically tumultuous year. In October of 2019, the legislature enacted Act 77, 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, introduced and enacted with unprecedented 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. 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 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. 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. 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 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.

Id. at 1079-89 (Wecht, J., concurring and dissenting) (footnotes omitted) (emphasis added). As a result, the majority of the Justices of the Supreme Court held that Section 1306-D(a) of the Election Code requires that the elector declaration on the outside envelope be dated and the failure to include a date rendered undated ballots invalid.

In interpreting the Supreme Court's decision in In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, the Department of State, through its Deputy Secretary of Elections and Commissions, issued the following guidance (with emphasis added):

> Since the Municipal Primary on May 18, [2021] the department has seen several news articles suggesting that some counties are continuing to accept and count ballots that do not contain … a date on the voter's declaration.
>
> As you know, the department updated the content and the instructions on the declaration envelope to ensure that voters know they must sign and date the envelope for their ballot to be counted. Furthermore, our updated guidance is consistent with the Supreme Court's ruling last September in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, wherein the Court held that in future elections a voter's declaration envelope must be … dated for the ballot to count. Though we share your desire to prevent the disenfranchisement of any voter, particularly when it occurs because of a voter's inadvertent error, we must strongly urge all counties to abide by the Court's interpretation of this statutory requirement.

> We also believe that it is prudent to again remind you of our previous clarification of 10/25/2020. As noted in that communication, there is no basis to reject a ballot for putting the 'wrong' date on the envelope, nor is the date written used to determine the eligibility of the voter. You should process these ballots normally.

See Ex. A. This guidance from the Department of State is consistent with the Supreme Court's precedent.

Under Pennsylvania law, and given the determination by the Commonwealth Court, review of which was declined by the Pennsylvania Supreme Court, in the state court challenges to the ballots at issue, under both Pennsylvania statutory law and administrative guidance, failure to sign and date the ballot-return envelope is an unambiguous statutory requirement, and the failure to affix a date as required disqualifies the ballot from consideration. Thus, the District Court's conclusion is consistent with existing state law and no error is present that Plaintiffs' can point to support their position that they have a strong likelihood of success on appeal.

Although it is beyond dispute that "voting is of the most fundamental significance under our constitutional structure ... [i]t does not follow … that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." Burdick v. Takushi, 504 U.S. 428 (1992) (citations omitted). In fact, the Constitution itself provides that states may prescribe the "Times, Places and Manner of holding Elections" and the United States Supreme Court has recognized that states retain the power to regulate their elections. Id.; see also Siegel v. Lepore, 234 F.3d 1163, 1179–80 (11th Cir. 2000); Art. I, § 4, cl. 1 of the Constitution. As the United States Supreme Court noted in Burdick, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest

and if some sort of order, rather than chaos, is to accompany the democratic processes.' " 504 U.S. at 433 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

It is also well-settled that all election laws result in the imposition of a burden on voters. Id. As a result, not every election law will be subjected to strict scrutiny by the courts. Id.; see also Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569–70, 75 L.Ed.2d 547 (1983). In Anderson, the United States Supreme Court established that a court considering a challenge to a state election law must instead weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications forth burden imposed by its rule. "In passing judgment, the Court must consider the extent to which those interests make it necessary to burden the plaintiff's rights." Id. at 789.

Whether an election law is subject to strict scrutiny or some lesser standard of review depends upon the extent to which the law burdens a plaintiff's First and Fourteenth Amendment rights. Burdick, 504 U.S. at 434. If the election law imposes a "severe" restriction on a plaintiff's First and Fourteenth Amendment rights, the election law must be "narrowly drawn to advance a state interest of compelling importance." Id. (citing Norman v. Reed, 502 U.S. 279, 289 (1992)). If the election law imposes "reasonable, nondiscriminatory restrictions" upon the plaintiff's First and Fourteenth Amendment rights, the "State's important regulatory interests are generally sufficient to justify" the restrictions imposed by the election law. Id. (citing Anderson, 460 U.S. at 788, 103 S.Ct. at 1569–70); accord McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995) (applying strict scrutiny to election law which directly regulated free speech and which did not merely control the "mechanics of the electoral process"); Rosario v. Rockefeller, 410 U.S. 752 (1973); Green Party v. Weiner, 216 F.Supp.2d 176, 187

(S.D.N.Y.2002) (finding that lesser standard of review applied to election law which mandated that primaries for certain parties would be conducted on paper ballots rather than voting machines because law only regulated the "mechanics" of the election).

Here, where Pennsylvania's Election Code imposes only "reasonable, nondiscriminatory" restrictions upon the right to vote, strict scrutiny is not required, a showing that there are important regulatory interests which justify the limited restrictions imposed, a violation of First and Fourteenth Amendment rights will not lie. A review of U.S. Supreme Court precedent supports this conclusion.

To that end, in Burdick, the plaintiff was a registered voter who challenged Hawaii's prohibition of allowing voters to vote for write-in candidates in primary or general elections. 504 U.S. at 430. Burdick claimed Hawaii's ban on write-in voting violated his First Amendment right of expression and association and asked the district court to enter a preliminary injunction ordering the state to permit and count write-in votes in the general election. The Ninth Circuit Court of Appeals held, although Hawaii's ban on write-in voting placed some restrictions on Burdick's right to vote, the restriction was justified in light of Hawaii's broad powers to regulate elections and the specific interests advanced by the state. Id. Burdick appealed to the United States Supreme Court, which agreed with the Ninth Circuit Court of Appeals. Id.

The United States Supreme Court recognized Hawaii's election law did have an impact on Burdick's right to vote; however, the Court found that the ban on write-in voting did not unconstitutionally limit the right of voters to have candidates of their choice placed on the ballot. Id. at 434. In finding that Hawaii's system provided easy access to ballots and that any burden on voters was limited to those voters who chose their candidate days before the election, the Court in Burdick noted that it gave little weight to the interest a voter may have in "making a later rather

than an early decision to seek independent ballot status." Id. at 437. In affirming the Ninth Circuit's decision vacating the injunction, the Burdick Court concluded that "[r]easonable regulation of elections does not require voters to espouse positions that they do not support; it does require them to act in a timely fashion if they wish to express their views in the voting booth." Id.

Similarly, in Rosario, the United States Supreme Court upheld another state election law which imposed a deadline by which voters were required to enroll in a political party in order to vote in a subsequent election. In holding that a New York election law did not constitute a ban on the voters' freedom of association under the First Amendment, the Rosario Court emphasized that the statute did not "absolutely disenfranchise the class to which the petitioners belong ... [r]ather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary." Id. at 757.

The Court distinguished the limited restrictions on petitioners' right to vote imposed by the law in those cases from cases in which where a state's election laws "totally denied the electoral franchise to a particular class or residents, and there was no way in which the members of that class could have made themselves eligible to vote." Id. (referring to Carrington v. Rash, 380 U.S. 89 (1965) (where the Texas constitution prohibited all servicemen from voting regardless of the length of residence in the state); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (state law prohibited residents who were not parents or property owners from participating in school board elections); Cipriano v. City of Houma, 395 U.S. 701 (1969) (state law prohibited residents who were not property owners from voting in bond elections); Evans v. Cornman, 398 U.S. 419 (1970) (state law prohibited residents of a national facility located in the state from voting in any election)).

Since the voters could have enrolled in a party before the deadline in time to vote in the next election, the Rosario Court held that the deadline imposed by the state did not constitute a ban on the voters' First Amendment freedoms but was merely a time limitation on when the voters had to act in order for them to participate in the next election. Id. at 758; see also Friedman (where law does not deny the right to vote to a class of persons, the state had a substantial interest in regulating their elections in order to make the elections "fair and honest" and to ensure that "some sort of order, rather than chaos, is to accompany the democratic processes).

In support of their position, Plaintiffs previously cited Northeast Ohio Coalition for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016). There, the Court was faced with a challenge to the requirement under Ohio Law that voters who failed to write their correct address and birthdate on absentee-ballot envelopes would not have their ballot counted. While acknowledging the requirements were small, the Court held that Ohio failed to set forth any justification for mandating technical precision in the address and birthdate fields of the absentee-ballot identification envelope. The Court, however, did note that "combatting voter fraud perpetrated by mail is undeniably a legitimate concern," (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam), yet before the District Court, Ohio did not even "offer[ ] combatting voter fraud" as a relevant interest.

The Court's decision in Northeast Ohio is factually and legally inapposite here. First, both the Commonwealth Court and the Pennsylvania Supreme Court have examined the sufficiency of the date requirement on the ballot-return envelope, and both Courts have conclusively determined it serves weighty governmental interests. In so doing, and as noted above, the Pennsylvania Supreme Court stated, the date requirement is not a minor irregularity that can be overlooked; instead, it serves "weighty interests," including fraud prevention, and is mandatory. As such, the

absence of a date on the ballot-return envelope is not a minor defect. In re Canvass, see also In re Morrison-Wesley, 946 A.2d 789, 795 (Pa. Cmwlth. 2008) ("[t]he date is essential to determine the validity of the signature").

Likewise, the Commonwealth Court, stating that the Supreme Court's rationale contained in the concurring and dissenting opinion authored by Justice Dougherty in In re Canvass was persuasive, concluded the date requirement was a material requisite under the Election Code because it justified weighty interests, Ritter v. Lehigh County Board of Elections, 2022 WL 16577 (Pa. Cmwlth. 2022), at *9, and the Pennsylvania Supreme Court denied review of this determination.

Thus, the interest, as determined by both the Pennsylvania Supreme Court and the Commonwealth Court of Pennsylvania, of ensuring a fair and honest election, and the manner in which Pennsylvania has elected to address this concern is miniscule and purely mechanical, passes muster under the Burdick/Anderson framework. As a result, the burden placed upon mail-in voters under Pennsylvania Law does not constitute an undue burden under the First or Fourteenth Amendments to the United States Constitution, and Plaintiffs cannot demonstrate the requisite first element of a viable claim for the relief requested as a matter of law.

On the second factor for the imposition of a stay or injunction, the applicant must "demonstrate that irreparable injury is likely [not merely possible] in the absence of [a] [stay]." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (emphasis in text). With regard to this prong, the Board admits that once the election is certified officially, no further action can be taken to open the election or seek to have the Plaintiffs votes counted towards the results of election held in November 2021. While harm is present, as noted

in greater detail below, the existence of such harm, is not determinative and, such harm does not outweighs the harm to the nonmoving party here.

Of note, once an applicant satisfies the first two factors, which is expressly denied as set forth above, the stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. Nken, 556 U.S. at 435. The Court must weigh the likely harm to the movant (absent a stay) (factor two) against the likely irreparable harm to the stay opponent(s) if the stay is granted (factor three). In re Revel AC, Inc., 802 F.3d 558 (3rd Cir. 2015). This is called the balancing of harms or balancing of equities. Id. The Court must also take into account where the public interest lies (factor four)—in effect, how a stay decision has "consequences beyond the immediate parties." Roland Mach., 749 F.2d at 388.

In this context, a number of outcomes are possible. Where the balance of harms and public interest weigh in favor of a stay, and the Court deems that the stay movant has made a sufficient showing of success on appeal, a stay should be granted. Id. Where the opposite is true—i.e., the merits, balance of harms, and public interest favor the stay opponent—a stay should be denied. Id. Between these easy examples are the more difficult cases, such as "where the merits favor one party and the balance of harms favors the other." Gotanda, at 821. There (along with the public interest) we must "evaluate the degree of irreparable injury with the prospects of prevailing on the merits." Id.

In deciding how strong a case a stay movant must show, the Third Circuit views favorably what is often referred to as the "sliding-scale" approach. See Constructors Ass'n of W. Pa. v. Kreps, 573 F.2d 811, 815 (3d Cir.1978); Del. River Port Auth. v. TransAmerican Trailer Transp., Inc., 501 F.2d 917 (3d Cir.1974). Under it, "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors.'" Mohammed, 309

F.3d at 101 (second alteration in original) (quoting Wash. Metro., 559 F.2d at 843). Stated another way, "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in [its] favor; the less likely [it] is to win, the more need it weigh in [its] favor." Roland Mach., 749 F.2d at 387.

Here, the third and fourth requirements of the applicable test weigh decidedly in favor of denying the requested relief. As noted by Judge Leeson in his Order denying the requested stay and/or injunction in the first instance, the electors of the Commonwealth have a significant interest in the conclusion of elections and in finality of determinations. While it is acknowledged that the votes at issue here will not be counted if the election is certified on Monday at 3:00 p.m., Plaintiffs will not incur any tangible harm to person, property, or liberty beyond that harm.

On the other hand, the continued extension of the instant election is negatively impacting the Board's ability to adequately and appropriately prepare for the next election, which are the primaries slated for approximately two months from now. The harm to the public if this election is not concluded soon, not to mention the lack of confidence distilled by the continuation of this matter, far exceeds the impact noted by Plaintiffs. This is even more so evident when coupled with the realization that the challenges to this single election have been addressed by no less than 4 separate Courts, and addressed on the merits in part by the Supreme Court of Pennsylvania. This includes the comprehensive review undertaken by the District Court below, the Court of Common Pleas, the Commonwealth Court, and the Pennsylvania Supreme Court, which have all examined the challenges to this election (the Pennsylvania Supreme Court by denying review).

Additionally, as noted by Judge Leeson in his Order dated March 18, 2022, denying Plaintiffs' Emergency Motion, the Board agreed to a stay pending the review by the District Court

of the issues presented. That review has been completed, with the provision of a comprehensive analysis of all applicable issues, and the absence of any readily identifiable errors.

Keeping in mind that the first two factors are the most critical, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the other party, which is expressly denied, for a stay to be granted, the moving party is still required to show, at a minimum, 'serious questions going to the merits.'" Mich. Coal. of Radioactive Material Users, 945 F.2d at 153–54 (see In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir.1985)). As three of the four factors decidedly and unequivocally weight against Plaintffs, and there is a notable absence of a single serious question going to the merits, the imposition of a stay and/or injunction pending the current appeal is improper and must be denied.

In sum, Plaintiffs have failed to satisfy the well-settled test for the imposition of an injunction and/or stay pending an appeal to this Court. In the absence of the requisite showing, Plaintiffs' requested relief, an injunction or stay pending appeal, mut be denied with prejudice as a matter of law.

Respectfully Submitted,

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DATED: March 19, 2022

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LINDA MIGLIORI, et al.,	:	
	:	**No. 22-1499**
Appellants,	:	
	:	
v.	:	
	:	
LEHIGH COUNTY BOARD OF ELECTIONS, et al.	:	
	:	
	:	
Appellees.	:	

CERTIFICATE OF SERVICE

I, Lucas J. Repka, Esq. hereby certify a true and correct copy of the foregoing Brief was served on the following parties electronically through the Court's ECF System:

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DATED: March 19, 2022