

IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

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

Petitioners,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, and All 67 County Boards of Elections

Respondents.

**BRIEF OF RESPONDENTS ALLEGHENY, BUCKS, CHESTER,
DELAWARE, MONTGOMERY, AND PHILADELPHIA COUNTY
BOARDS OF ELECTIONS**

Appeal Subject to the Supreme Court's King's Bench Authority Pursuant
to the Court's October 21, 2022 Order

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INTRODUCTION

Petitioners seek to prospectively deprive thousands of qualified Pennsylvania voters of their franchise by invalidating their votes based on a mere technicality—*i.e.*, failure to handwrite the date on the exterior envelope of a mail-in ballot. Naturally, the Election Code provides instructions to voters and to the County Boards of Elections (“County Boards”) on how to cast and count the ballots, respectively. But the Election Code does not demand that any misstep is fatal to the franchise. Rather, the Code provides one set of instructions to voters—indicating what the voter “shall” do to cast their ballot—while separately proscribing how County Boards determine whether the ballot should be counted. To do this, the Code enumerates the particular circumstances that require the County Board to invalidate a mail-in ballot, but it neither requires nor countenances wholesale disenfranchisement of voters whose only error has been to omit the date on their ballot envelope.

In fact, the Code provides an affirmative mandate *in favor* of counting ballots where the County Board verifies that the voter has the “right to vote” and establishes a specific process for the County Boards to make this determination. In particular, 25 P.S. § 2146.8(g)(3) requires County Boards to “examine the declaration on the envelope” and if the County Board is “satisfied that the declaration is sufficient and the information contained [in the voter file or voter list] *verifies his right to vote*,”

id. § 2146.8(g)(3), then such votes “***shall be counted,***” *id.* § 2146.8(g)(4). Thus, the Election Code requires that the County Board use the declaration to verify a voter’s “right to vote,” not to police compliance with every technical instruction the Code prescribes.

Applying this standard—by which the County Boards evaluate the declaration to verify a voter’s right to vote—has the additional virtue of keeping the Election Code in harmony with the materiality provision of the federal Civil Rights Act, which prohibits states from denying an individual’s right to vote on the basis of an “error or omission” that 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). By contrast, Petitioners’ reading of the Election Code silences the voice of thousands of voters and violates this fundamental federal civil rights requirement. Indeed, Petitioners recognize that the purpose of the federal materiality requirement is to “safeguard against discriminatory application of state voter qualifications and registration rules,” including “disqualifying voters for their failure to provide information irrelevant to their eligibility to vote.” Pet. Br. 45-46. But that is exactly what the Petitioners seek to do. By filing their King’s Bench petition mere weeks before the General Election, Petitioners are attempting to invoke an immaterial technical requirement to wipe out thousands of otherwise duly cast votes by qualified

Pennsylvania electors—a gambit that, if successful, will disproportionately disenfranchise elderly voters in this Commonwealth.

Petitioners’ inability to assign any material significance to the dating requirement underscores that they do not seek redress for any credible injury or grievance. Far from asserting any actual injury, Petitioners want to serve as roving civil enforcers of the Election Code’s instructions and procedures at the expense of Pennsylvania voter’s most precious electoral rights. Petitioners’ unbounded theory of standing is premised on a repudiated “vote dilution” theory, which if adopted, would provide limitless opportunities for anyone in the general population to bring lawsuits to enforce the Election Code. Petitioners have no particularized injury different from the public and therefore lack standing to pursue this untimely lawsuit.

COUNTER-STATEMENT OF JURISDICTION

This Court has exercised its King’s Bench authority over this matter. *See* October 21, 2022 Order. King’s Bench jurisdiction allows the Court to exercise power of “general superintendency” over inferior courts even when a matter is not pending before a lower court. *See Bd. of Revision of Taxes, City of Phila. v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010).

ORDER OR DETERMINATION IN QUESTION

There is no particular order or determination in question in this matter. Petitioners have merely decided, after mail-in and absentee voting has already started, to challenge long-standing practice and existing case law.

STATEMENT OF THE QUESTIONS INVOLVED

- a. Do the Petitioners have standing to bring the instant petition?

SUGGESTED ANSWER: No.

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

SUGGESTED ANSWER: No.

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

SUGGESTED ANSWER: Yes.

COUNTER-STATEMENT OF THE CASE

Petitioners the Republican National Committee, National Republican Congressional Committee, Republican Party of Pennsylvania, (together, the "Republican Committees" or the "Committees") and a group of voters from eight

counties (the “Voter Petitioners,” and collectively with the Committees, the “Petitioners”) seek to prevent County Boards from counting ballots from qualified electors that lack handwritten dates on their outer envelopes.

I. Counter-Statement of Facts

In Pennsylvania, an individual is qualified to vote if, as of Election Day, they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not incarcerated as a felon. 25 Pa. Cons. Stat. § 1301(a); 25 P.S. § 2811. Pennsylvania allows qualified electors to vote in-person or by absentee or mail-in ballot. *See* 25 P.S. §§ 3050, 3146.1, 3150.11(a). Qualified electors must apply to their County Board of Elections to vote by absentee or mail-in ballot. 25 P.S. §§ 3146.2, 3146.2a, 3150.12, 3150.12a. Upon receipt of an application for an absentee or mail-in ballot, the County Board then verifies that the voter is a qualified elector based on proof of identification and voter registration information. 25 P.S. §§ 3146.2b, 3150.12b.

Once approved, a Board delivers a ballot packet to the qualified elector. 25 P.S. §§ 3146.5, 3150.15. To vote, a qualified elector fills out their absentee or mail-in ballot, encloses their ballot in a “secrecy envelope,” and places that envelope in an exterior mailing envelope printed with a declaration. 25 P.S. §§ 3146.6(a), 3150.16(a). The ballot, secrecy envelope, and exterior mailing envelope are all included in the ballot package provided to a voter. 25 P.S. §§ 3146.4, 3150.14(a).

The mailing envelope includes a unique barcode. *Chapman v. Berks Cnty. Bd. of Elections*, 355 M.D. 2022, 2022 WL 4100998, at *20 (Pa. Cmwlth. Aug. 19, 2022) (unpublished) (hereinafter “*Berks Cnty.*”). The Election Code instructs that the voter:

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 . . . The elector shall then fill out, date and sign the declaration printed on such envelope.

25 P.S. § 3146.6(a) Qualified electors must then return the absentee or mail-in ballot package by 8:00 p.m. on Election Day. 25 P.S. §§ 3146.6, 3150.16.

Boards have measures in place to ensure that absentee or mail-in ballots received after 8:00 p.m. are not counted. *See* Declaration of David Voye ¶ 16, a copy of which is attached as Ex. A.; Declaration of Thomas A. Freitag ¶ 16, a copy of which is attached as Ex. B; Declaration of Karen Barsoum ¶ 16, a copy of which is attached as Ex. C; Declaration of James P. Allen ¶ 16, a copy of which is attached as Ex. D; Declaration of Lee Soltysiak ¶ 16, a copy of which is attached as Ex. E; Declaration of Nick Custodio ¶ 14, a copy of which is attached as Ex. F. Ballot envelopes are then kept secure pending the pre-canvass. *See* Voye Decl., ¶ 17, Ex. A.; Freitag Decl., ¶ 17, Ex. B; Barsoum Decl., ¶ 17, Ex. C; Allen Decl., ¶ 17, Ex. D; Soltysiak Decl., ¶ 17, Ex. E; Custodio Decl., ¶ 11, Ex. F.

Since the adoption of no-excuse mail-in voting, several thousand qualified electors have cast timely ballots without a handwritten date on the exterior envelope. *See* Voye Decl., ¶ 18, Ex. A.; Freitag Decl., ¶ 18, Ex. B; Barsoum Decl., ¶ 18, Ex. C; Allen Decl., ¶ 18, Ex. D; Soltysiak Decl., ¶ 18, Ex. E; Custodio Decl., ¶ 18, Ex. F. For the 2022 General Election, Boards have already begun mailing absentee and mail-in ballots to qualified electors and have already begun to receive completed ballot envelopes. *See* Voye Decl., ¶ 14, Ex. A.; Freitag Decl., ¶ 14, Ex. B; Barsoum Decl., ¶ 14, Ex. C; Allen Decl., ¶ 14, Ex. D; Soltysiak Decl., ¶ 14, Ex. E; Custodio Decl., ¶ 17, Ex. F.

The County Boards have received thousands of ballots over the last several elections that omit a date on the exterior envelope. *See* Voye Decl., ¶ 19, Ex. A.; Freitag Decl., ¶ 19, Ex. B; Barsoum Decl., ¶ 19, Ex. C; Allen Decl., ¶ 19, Ex. D; Soltysiak Decl., ¶ 19, Ex. E; Custodio Decl., ¶¶ 17, 19-22, Ex. F. One Board has further determined that the voters who fail to include a date are, on average, elderly Pennsylvanians, with an average age, for example of 70. *See* Soltysiak Decl., ¶ 20, Ex. E. The practical effect, therefore, of Petitioners' position would be to disproportionately disenfranchise older voters.¹

¹ For example, as Third Circuit Court of Appeals noted in *Migliori*, “of the disputed ballots” in that case, “the ‘average age of these voters was 71 at the time they voted. 224 of them were over 55 and 193 were over 65. Fifteen of the [d]isputed [b]allots came from voters over the age of 90, one of whom was 100 years old and another was 103 years old.’” *Migliori*, 36 F.4th at 156 n.18.

II. Procedural History

On October 16, 2022, Petitioners filed their Application for the Exercise of King’s Bench Power or Extraordinary Jurisdiction against the Acting Secretary of the Commonwealth and every County Board of Elections in the Commonwealth. The Application brought three counts challenging certain County Board of Elections procedures relating to the Election Code’s date requirements for absentee and mail-in ballots. Count 1 sought a declaratory judgment that County Boards of Elections may not count any “undated or incorrectly dated” absentee or mail-in ballots. Count 2 sought a declaratory judgment holding invalid the Acting Secretary’s guidance that County Boards should count these ballots. Count 3 sought an injunction—without using that language or addressing all the required injunction criteria—requiring County Boards of Elections to segregate ballots lacking a correct handwritten date in the 2022 General Election. Petitioners did not file this case before the Commonwealth Court or any Courts of Common Pleas. On October 21, 2022, this Court granted the petition as to the three questions presented.

III. Multiple Recent Pennsylvania Cases Have Held that the Absence of a Handwritten Date on the Outer Envelope Does Not Disqualify a Ballot

Multiple Pennsylvania cases resolving challenges involving the date on mail-in and absentee ballots have found in Respondents’ favor. *See, e.g., In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa.

2020). For example, in *In re Canvass*, the Trump Campaign challenged the Allegheny County Board of Elections' decision to count several thousand challenged absentee and mail-in ballots from voters whose ballots-return outer envelopes were missing some combination of handwritten names, street addresses, or dates. Justice Donohue, writing for the majority, agreed with Respondents' position here, holding that a voter's failure to handwrite their name or address on the back of the outer envelope was not a material violation of the statutory directive to "fill out" the form. *Id.* at 1079. Justice Wecht, writing in concurrence, wrote that he would treat the "date and sign requirement" as mandatory in future elections. *Id.* The United States Supreme Court denied certiorari on the case. *See Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021).

More recently, the Third Circuit also addressed the same date issue in *Migliori v. Cohen* and similarly concluded that a missing date on an outer envelope should not invalidate a qualified voter's ballot. There, the Third Circuit held that the interpretation of the Election Code urged by Petitioners here would violate the materiality provision of the federal Civil Rights Act because the date on the outer envelope of a ballot was not material to a voter's qualifications to vote and thus an error or omission in the date cannot be a basis for disqualifying such ballots. The United States Supreme Court vacated that holding as moot on October 11, 2022. *See*

Migliori v. Cohen, 36 F.4th 153 (3d Cir. 2022), *cert. granted and judgment vacated*, *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.).

Relatedly, the Commonwealth Court also addressed the issue of missing dates on the exterior envelope in *McCormick for U.S. Senate v. Chapman*, where a Republican senatorial candidate sued a County Board that *refused* to count absentee and mail-in ballots in the May 17, 2022 primary election. No. 286 M.D. 2022, 2022 WL 2900112, at *1 (Pa. Cmwlth. June 2, 2022) (unpublished). Notably, ***the RNC intervened in McCormick and argued that ballots without a handwritten date on their exterior envelopes should be counted***, but then withdrew their appeal of the Commonwealth Court’s decision to this Court. *See* Praecipe for Discontinuance of Appeal, *McCormick for U.S. Senate v. Chapman*, 67 MAP 2022 (Pa. Jul. 9, 2022). In any event, the Commonwealth Court followed *Migliori*’s holding that it would violate federal law to disqualify votes by qualified voters that were submitted in outside envelopes without handwritten dates, observing that it was obvious that the ballots at issue were timely completed regardless of the date on the outer envelope. *Id.* at *13. And finally, in *Berks County*, the Commonwealth Court again reiterated that “the lack of a handwritten date on the declaration on the return envelope of a timely received absentee or mail-ballot does not support excluding those ballots under both Pennsylvania law and Section 10101(a)(2)(B) of the Civil Rights Act.” *Berks Cnty.*, 2022 WL 4100998, at *30.

IV. Petitioners' Claims

Petitioners allege they are seeking this Court's intervention in the midst of the election to inform voters if ballots (some of which have already been cast) will be counted if they fail to date or properly date the outer envelopes.

Petitioners contend that the votes of electors who correctly filled out the "date" line on the outer envelope are being improperly diluted by the otherwise-valid ballots of qualified electors in Pennsylvania who have somehow missed or improperly filled out that line on the outer envelope. Pet. Br. at 17; Pet. App. at 13, 25. Petitioners' "vote dilution" theory is premised on isolated, technical provisions contained in the Election Code. These technical provisions include, among other things, the color and type of pen to be utilized, the envelopes to be utilized, the filling out of the ballot in secret, a signature and date, and the process for returning the ballot. *See* 25 Pa. C.S. 3146.6(a). Petitioners assert no plausible link between the date on the exterior of the ballot envelope and the qualification of voters. Nor do they plausibly assert that the date is utilized in the canvassing of ballots. This is not surprising given that the County Boards' canvassing process does not rely on the handwritten date to establish a voter's qualifications to vote or the timeliness of the ballot. *See* Voye Decl., ¶¶ 7-8, 16, Ex. A.; Freitag Decl., ¶¶ 7-8, 16, Ex. B; Barsoum Decl. ¶¶ 7-8, 16, Ex. C; Allen Decl., ¶¶ 7-8, 16, Ex. D; Soltysiak Decl., ¶¶ 7-8, 16, Ex. E; Custodio Decl., ¶¶ 12, 14, Ex. F.

Petitioners also claim that even though the materiality provision of the federal Civil Rights Act explicitly prohibits states from denying electors the right to vote over immaterial errors or omissions, that provision does not apply to the requirement to handwrite the date on the outer envelope for a ballot. *See* 52 U.S.C. § 10101(2)(B). Specifically, they claim that the ministerial error of failing to accurately write a date on the outer envelope, even when the ballot is received before the deadline and without other indicia that the voter is not qualified, requires voter disqualification.

ARGUMENT

I. Petitioners Do Not Have Standing

Petitioners lack standing because they are not and cannot be injured by the counting of qualified electors' timely votes—rather, they are attempting to enforce technical requirements of the Election Code with no bearing on their own rights. “In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action.” *Stilp v. Com., Gen. Assembly*, 940 A.2d 1227, 1233 (Pa. 2007). “[T]he core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge.” *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009). An individual is

“aggrieved” if he can establish “a substantial, direct and immediate interest in the outcome of the litigation.” *Id.* (citation omitted).

As set forth below, neither the Republican Committees nor the Voting Petitioners have presented anything that even suggests, let alone establishes, that they would be “negatively impacted in some real and direct fashion.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005). Each theory of injury identified, to the extent these theories even constitute injuries at all, is “a mere generalized grievance about the conduct of government” that does not confer a basis to seek Court redress. *Markham v. Wolf*, 136 A.3d 134, 137 (Pa. 2016).

A. The Republican Committees Do Not Have Standing

The Republican Committees do not have standing because they fail to identify an injury that differs from the public at large, any interest they have in free and fair elections is the same as the public’s generally, the mere expenditure of money does not create an actionable case or controversy, and their interests in “winning” elections is insufficient.

At the outset, they appear to argue that because the Pennsylvania Democratic Party had standing in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (“*PDP*”), the Republican Committees must have standing here as well. *See* Pet. Br. at 12. That caption-deep analysis obscures the fact, however, that this Court in *PDP* exercised its King’s Bench jurisdiction to resolve extraordinary

concerns about the complete denial of voting rights of Pennsylvania citizens in the unprecedented circumstances surrounding the 2020 election and the COVID-19 pandemic. This case cuts in the opposite direction: Petitioners do not identify any actual, concrete concerns about the deprivation of voting rights, only speculation that undated ballot envelopes of presumably qualified voters may somehow “dilute” their votes. *See, e.g.*, Pet. Br. at 18.

The Republican Committees’ other rationalizations fare no better. Although they argue they have “a substantial and particularized interest in ensuring that Pennsylvania administers free and fair elections,” Pet. at 9, that is true for every citizen of the Commonwealth, and therefore does not meaningfully distinguish the Committees’ interest from “the public generally.” *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970). And it is similarly immaterial that Pennsylvania law permits “one representative from each political party . . . to remain in the room in which the absentee ballots and mail-ballots are pre-canvassed.” 25 P.S. § 3146.8(g)(1.1); *see* Pet. Br. at 13. Section 3146.8(g)(1.1) could give rise to an actionable legal controversy if, for example, a representative were denied the right to remain in the room during the pre-canvassing of absentee ballots. But it does not give the Republican Committees standing to request judicial intervention on any-and-all questions of election law.

Nor can the Committees establish standing on the theory that they “make expenditures” on voter education. *See* Pet. Br. at 15. The Committees cannot manufacture an actionable case or controversy issues simply by spending money educating voters, especially since they have failed to establish that these educational programs are concretely affected by the counting of ballots without a handwritten date on the outside envelope. *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 380-81 (W.D. Pa. 2020) (“Because Plaintiffs’ harm is not ‘certainly impending,’ . . . spending money in response to that speculative harm cannot establish a concrete injury.”).

The Committees also wrongly assert they have standing because of a “concrete interest” in “winning [elections]” and in preserving the “structur[e] of [the] competitive environment” in elections. Pet. Br. at 16 (quoting *Shays v. F.E.C.*, 414 F.3d 76, 86 (D.C. Cir. 2005)). *Shays* does not help their case. There, political candidates actively engaged in re-election campaigns had standing to challenge electoral regulations on issues such as funding and advertising because candidates subject to such regulations operated in “the electoral analogue to participants in a market,” who would have standing to challenge similar economic regulations. 414 F.3d at 86. The Committees stretch *Shays* far out of proportion when they contend there is any such analogy here. Unlike questions of funding and advertising, which implicate core First Amendment freedoms, the Committees offer only speculation

as to how the construction and validity of Section 3146.6(a) “fundamentally alter the environment” of Pennsylvania’s elections. *Id.*

The weakness and speculative nature of Petitioners’ claim to standing is confirmed by the submissions they have provided in support of their request for judicial intervention. Petitioners append guidance from the Department of State, two news clippings, a blank ballot envelope, a criminal complaint and docket sheet, and a letter from two members of the House of Representatives who are not parties to this action. *See* Pet. Exs. A-E. None of this represents a “peculiar, individualized interest” belonging to any of *the Petitioners*. *See Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 659 (Pa. 2005) (finding that petitioners lacked standing in constitutional challenge to gaming regulations because they did not establish an interest “greater than that of any other citizen”); *see also Citizens Against Gambling Subsidies, Inc. v. Pa. Gaming Control Bd.*, 916 A.2d 624, 628 (Pa. 2007) (“A direct interest requires a showing that the matter complained of caused harm to the person’s interest.”).²

² The declarations of Leslie Oche, Kimberly Geyer, and Angela Alleman do not move the needle either. *See* Pet. Br., Exs. A-C. The first two of these declarants simply recite that they are aware of the law and guidelines of Pennsylvania election law but that they do not intend to follow the Secretary of State’s guidance, while the Alleman declaration similarly recites an awareness of the law and opines on the efficacy of the training programs of the Republican Party of Pennsylvania. None suggest that the Petitioners face a substantial, direct, and immediate injury.

Indeed, the one concrete example Petitioners have been able to muster—a police criminal complaint and docket sheet from June 3, 2022, Pet. Ex. F—concerns a single instance of alleged voter fraud involving a non-party that was discovered not based on the handwritten date on the envelope, but rather, because the deceased was removed from the election rolls. And this sole instance of fraud was swiftly redressed by the judicial system, in any event. This example thus refutes, rather than proves, Petitioners’ allegations that the dating of ballot envelopes will somehow “fundamentally alter” this election. Although the Committees doubtlessly perceive some advantage in seeking to disenfranchise voters for technicalities under the guise of spurious allegations of “voter fraud,” this speculative interest in “winning” has little to do with the issues at the heart of this case.

B. The Voter Petitioners Do Not Have Standing

As for the Voter Petitioners, their primary justification for this needless lawsuit is that individual voters have standing to protect “the right to vote and the right to have one’s vote counted.” *See* Pet. Br. at 12 (citing *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994 (Pa. 2002)). But *Albert* does not confer a right to receive judicial intervention on preferred questions of statutory interpretation. It stands for the proposition that non-voters do *not* have standing to pursue a re-apportionment challenge; and it did not find, as Petitioners wrongly suggest, that the bare assertion that Petitioners vote, or educate others about voting,

is enough to confer standing. *Albert*, 790 A.2d at 995. As Petitioners correctly note, the right to vote is indeed “personal,” Pet. Br. 18, and that means any standing premised on the exercise of that right must flow from a particularized injury and not from a free-floating contention about what the law is or should be. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) (“[V]oters who allege facts *showing disadvantage to themselves as individuals* have standing to sue.” (emphasis added)). This Court decides cases or controversies, not questions that are “common to that of the public generally.” *Kauffman*, 271 A.2d at 239.

The Voter Petitioners cannot manufacture standing through their supposition that their votes “will be canceled out and diluted by the counting of undated or incorrectly dated ballots.” Pet. at 6; *see also* Pet. Br. at 18. This argument fails on its own terms: it can hardly be said that participation in the democratic process constitutes an injury, because no Petitioner’s vote is “otherwise disadvantaged relative to those of the entire population of Pennsylvania.” *Toth v. Chapman*, No. 22-208, 2022 WL 821175, at *7 (M.D. Pa. Mar. 16, 2022). But even if the Court were willing to credit Petitioners with identifying *an* injury in “voter dilution,” this would be *everyone’s* injury, not *their* injury. As this Court held in *Kauffman*, which Petitioners make no effort to address in their briefing, Petitioners’ arguments about “voter dilution” are “not peculiar to them” and are “too remote and too speculative,”

and therefore “cannot afford a sound basis” for proceeding with this action. 271 A.2d at 239-40.

Federal courts around the country have rejected similar arguments about “voter dilution.” *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (holding that voter plaintiffs did not have standing to challenge generalized vote dilution); *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 354-56 (3d Cir. 2020) (holding that “vote dilution . . . is not a concrete harm under the Equal Protection Clause” and that “dilution” claims are “paradigmatic generalized grievance[s]”), *cert. granted, judgment vacated as moot sub nom.*, *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *Penn. Voters Alliance v. Centre Cnty.*, No. 20-cv-1761, 2020 WL 6158309, at *3-7 (M.D. Pa. Oct. 21, 2020) (holding that voters’ injuries were too speculative and generalized to support standing); *id.*, No. 20-3175 (3d Cir. Oct. 28, 2020) (denying motion for injunction pending appeal for lack of standing); *Donald J. Trump for President, Inc., v. Cegavske*, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020); *accord Nolles v. State Comm. for the Reorg. of Sch. Dists.*, 524 F.3d 892, 900 (8th Cir. 2008) (finding that a “generalized grievance shared in common by all [Nebraska] voters” does not confer standing). And for good reason: just as in these cases, the only “injury” that the Voter Petitioners allege here is that the law “has not been followed,” which is “precisely the kind of undifferentiated, generalized grievance about the

conduct of government” that courts have “refused to countenance.” *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

The Voting Petitioners also wrongly suggest that they “have a right under the Declaratory Judgment Act” for this Court to declare the construction and validity of sections of the Election Code. *See* Pet. Br. at 18-19. But the Declaratory Judgment Act merely creates a remedy; it does not create a statutory entitlement to relief or an independently cognizable basis for standing. *See, e.g., Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997) (“Where no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained.”). As the Commonwealth Court has aptly observed, “[d]eclaratory judgment is not appropriate in cases where we are asked to determine rights in anticipation of events which may never occur.” *Allegheny Cnty. Constables Ass’n, Inc. v. O’Malley*, 528 A.2d 716, 718 (Pa. Cmwlth. 1987).

Finally, all of these “injuries” are even more speculative once considered in their proper context. The Election Code provides myriad ways for parties who are actually aggrieved to challenge County Board decisions in the courts of common pleas. *See, e.g.,* 25 P.S. § 3157(a) (“Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom . . . to the court of common pleas of the proper county.”). But the Election Code does *not* provide opportunities for

parties lacking a cognizable harm to bring state-wide challenges immediately prior to elections “whenever an elections board counts any ballot that deviates from the requirements of a state’s legislatively enacted code.” *Bognet*, 980 F.3d at 360, *cert. granted, judgment vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). There is a well-worn path for litigating voter- and candidate-specific election disputes if and after they actually arise; Petitioners have no grounds to say their speculation about voter fraud constitutes an immediate injury.

* * *

This Court should reject standing on the basis of Petitioners’ “dilution” theory and hold that Petitioners lack standing to pursue their groundless efforts to use the Election Code’s technical requirements to disenfranchise Pennsylvanians and to impugn the integrity of the Commonwealth’s elections. Petitioners’ suggestion here that questions of election practices without real and concrete controversies warrants this Court’s intervention itself erodes confidence in the Commonwealth’s election system. This Court is not the proper forum for airing generalized, prospective grievances about Pennsylvania elections.

II. The Election Code Does Not Demand Disenfranchisement of a Qualified Elector Who Cast a Timely Absentee or Mail-In Ballot That Lacks a Handwritten Date on the Outer Mailing Envelope

The Election Code does not require County Boards disqualify ballots solely because the outer envelope lacks a handwritten date. Rather, the Election Code

provides instructions to a qualified elector, regarding the process for filling out and returning a mail-in ballot. These are requirements for the voter to follow. The Election Code separately instructs the County Boards how to examine, process, and count mail-in ballots, and the Code provides for specific and enumerated circumstances requiring ballot disqualification—that do not include the absence of a date on the exterior envelope. Rather, when pre-canvassing and canvassing absentee and mail-in ballots, the Board must, among other things, determine whether it is “satisfied that the declaration is sufficient and the information contained in [certain lists] *verifies his right to vote.*” 25 P.S. § 3146.8(g)(3) (emphasis added). If the Board determines that this information verifies “his right to vote,” then, absent a prior challenge, the absentee or mail-in ballot “*shall be counted.*” 25 P.S. § 3146.8(g)(4). The Code thus requires the County Boards count each ballot where it verifies the voter has the right to cast it, not to wholesale disqualify voters who fail to follow instructions unrelated to electoral qualifications.

When interpreting the Election Code, a court should look to the plain language so long as the words are “clear and free from all ambiguity”; but when the words are not explicit, a court may ascertain the “intentions of the General Assembly” by considering other factors. *Id.* § 1921(b)-(c). The Statutory Construction Act (“SCA”) requires a court to “ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). A court must also be mindful that the

Pennsylvania Constitution declares that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. This clause protects an elector’s individual right to an equal, nondiscriminatory electoral process. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018). This Court has observed that the “purpose and objective of the Election Code . . . is to obtain freedom of choice, a fair election and an honest election return.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (internal quotation omitted). For this reason, “all things being equal, the law will be construed liberally in favor of the right to vote.” *In re Canvass of Absentee Ballots of November 4, 2003 General Election (Appeal of Pierce)*, 843 A.2d 1223, 1231 (Pa. 2004).

In this case, the question is whether the Election Code requires that voters be disenfranchised if their ballot lacks a handwritten date on the back of the outer envelope. The answer to this question is no. There is no express provision in the Election Code that directs the County Board to invalidate undated ballots envelopes. Indeed, the plain text and structure of the Election Code expressly provides that the County Board *shall* canvas ballots where it verifies that the declaration is sufficient to demonstrate, in conjunction with the voter rolls and proof of voter identification, that the voter has the right to vote. And when considering other factors, it becomes even clearer that the General Assembly did not intend for County Boards to

invalidate ballots on mere technicalities that are not supported by any weighty interest.

A. The Plain Text of the Election Code Directs the County Boards to Count a Voter's Ballot Where It "Verifies His Right to Vote"; Not to Invalidate Votes for Lack of a Date on the Declaration

Nowhere in the plain text of the Election Code did the General Assembly prohibit the counting of a ballot merely because the outer envelope of that ballot lacks a handwritten date. The opposite is true: the Election Code requires County Boards to count ballots if, after reviewing the declaration, the County Board is satisfied that it can verify the voter's right to vote. The Election Code thus establishes a detailed process and statutory standard for the County Boards to examine the declaration to verify whether the voter has the "right to vote" and whether the ballot can be counted. The Code, moreover, provides clear and explicit instructions when a ballot must be invalidated, and those instructions do not grant County Boards the ability to throw out ballots merely because the date is not filled in.

To be sure, the Election Code provides a list of instructions to voters on how to cast either a mail-in or in-person ballot. See 25 Pa. Stat. § 3146.6(a). That provision requires the voter "in secret" to "mark the ballot" in ink, "fold the ballot" "enclose and securely seal the same in the envelope," and "fill out, date and sign the

declaration printed on such envelope.” *Id.* Each of these instructions is preceded by the word “shall.”

Contrary to Petitioners’ argument, the use of “shall” in the instructions to vote does not demonstrate the General Assembly’s intent that ballots be automatically invalidated whenever the outer envelopes are undated. While “shall means shall,” *In re Canvass*, 241 A.3d at 1084 (Opinion of Justice Wecht), it does not mean “shall or else your vote will not be counted.” The corollary to the maxim “every right has a remedy,”³ is not that every ministerial error bears a fatal consequence. The question therefore is not whether the General Assembly intended a voter to handwrite the date on the exterior mailing envelope, but “whether the General Assembly clearly intended that if the date is omitted, the ballot is invalid and will not be counted.” *Berks Cnty.*, 2022 WL 4100998, at *14.

Although the Election Code’s instructions establish the process a voter must use to cast a vote, the Election Code does not provide that the failure to follow each technical instruction requires invalidation of the ballot and the serious consequence of disenfranchisement of a qualified elector. To the contrary, numerous provisions of the Code use the term “shall” without requiring a County Board to throw out those ballots that does not comply with the provisions’ technical instructions. For

³ See *Marbury v. Madison*, 5 U.S. 137, 162, 163 (1803); 1 William Blackstone, *Commentaries on the Laws of England* 23.

example, an in-person voter “**shall** retire to one of the voter compartments, and draw the curtain or shut the screen door.” 25 P.S. § 3055(a). And after marking the ballot, such a voter “**shall** fold his ballot, without displaying the markings thereon, in the same way it was folded when received by him.” *Id.* § 3044(d). These days, however, many voting stations do not have curtains or doors, and voting machines cannot accept folded ballots. Yet, “no one would reasonably argue” that the General Assembly meant for “shall” in these instances to indicate that voters who do not satisfactorily draw a curtain or shut a door, or who do not fold their ballot properly before returning it, must have their ballot thrown out. *See Berks Cnty.*, 2022 WL 4100998, at *14. In other words, the Election Code frequently embraces mandatory language without the draconian result of invalidation of the ballot. Calling these instructions “artifacts of prior voting regimes” (Pet. Br. 38) does not somehow change the Code’s language, which uses the same “shall” formula to specify that a voter “shall retire” to a voter compartment when voting in person as when it provides the voter “shall date” the declaration when voting by mail.

The Court need not “peer behind the curtain of mandatory language,” *PDP*, 241 A.3d at 1080, to recognize that the Election Code does not require that the consequence of failing to date a ballot envelope is for the ballot to be thrown out entirely. Rather, the General Assembly explicitly indicated when it intended to invalidate a voter’s ballot for lack of compliance. 25 P.S. § 3146.8. For example,

an absentee or mail-in ballot “shall be set aside and **declared void**” if the secrecy envelope “contain[s] any test, mark or symbol which reveals” identifying information about the elector or their political affiliation, and “**shall not be counted**” “[i]f an elector fails to provide proof of identification that can be verified by the county board by the sixth calendar day following the election” where proof of identification had not previously been provided. 25 P.S. § 3146.8(g)(4)(ii), (h) (emphasis added). Likewise, if a qualified elector had returned an absentee or mail-in ballot, but died prior to Election Day, the ballot “**shall be rejected** by the canvassers.” *Id.* § 3146.8(d); *see also, e.g.*, 25 P.S. § 3063 (providing for what ballots may not be counted). Indeed, this Court has repeatedly looked to the language of these provisions as the proper source from where to determine the General Assembly’s intent as to whether County Boards may or may not count ballots. *See In re November 3, 2020 General Election*, 240 A.3d 590, 605-11 (Pa. 2020) (examining Section 3146.8 and holding that nothing permits County Boards to disqualify ballots based on signature comparisons); *PDP*, 238 A.3d at 378-80 (reviewing Section 3146.8 and holding that County Boards may not count ballots not placed in the inner secrecy envelope).

But no text of the Election Code allows the County Boards to automatically invalidate ballots lacking a handwritten date. Rather, the Election Code distinguishes between directives to the voter in casting a ballot, and directives to the

County Board in canvassing and counting them. When it comes to what ballots are counted, the Election Code provides specific instructions: that the “board shall examine the declaration . . . and shall compare the information thereon” with certain lists, and if the Board has “verified the proof of identification,” “is satisfied that the declaration is sufficient,” and the information “verifies his right to vote” then the ballots “are to be pre-canvassed or canvassed.” 25 P.S. § 3146.8(g)(3). Once that verification is complete, the Election Code then mandates, in Section 3146.8(g)(4), that these ballots “**shall be counted**” in accordance with the process that section provides. *Id.* § 3146.8(g)(4) (emphasis added).

Thus, the Election Code does not require the County Board to check that the voter has complied with the requirement of Sections 3146.6(a) and 3150.16(a), and it does not permit County Boards to invalidate a ballot because of the declarations lack of completeness. Indeed, the Section 3146.8(g)(3) is directed entirely at the process by which the County Board satisfies itself that the voter is qualified to vote; it says nothing about whether other voting instructions were followed. The language in these provisions indicate the General Assembly’s intent that a ballot **must be counted** in accordance with Section 3146.8(g)(4) if, after review of the declaration

and other identification and voter-roll information, the County Board can verify a voter's right to vote.⁴

Unlike Petitioners' reading of the Election Code—which would invalidate a qualified voter's ballot on technicality—this proper construction of the Election Code also comports with federal law, because it directs the County Board to examine the declaration to verify the voter's "right to vote." As discussed below, *infra* Part III, the federal Civil Rights Act, prohibits states from invalidating a ballot based on an "error or omission" that "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). By limiting the examination of the declaration to determine the voter's qualification to vote in the election, the Election Code's process is in harmony with this federal requirement and avoids the conflict with federal law that Petitioners' interpretation would entail if the Code were to require invalidation of a ballot on grounds immaterial to the voter's qualifications to vote.

This result also comports with the ordinary meaning of "sufficient." Petitioners argue that "sufficient" is satisfied only if all the components of the declaration are filled in correctly in accordance with the Election Code's instructions. But "sufficient" does not mean perfect, rather it has been long

⁴ Unlike the date, which is not relevant to verifying the right to vote, a signature is a voter's verification that he or she is qualified elector in the election. 25 P.S. §§ 3146.4, 3150.14, and 3553.

understood to require only “[o]f a quantity, extent, or scope adequate to a certain purpose or object.” *Sufficient*, Oxford English Dictionary (2d ed.) (dating this use of “sufficient” to 1380). The Code, moreover, specifies that the declaration—combined with the other available information on the ballot and in the voter rolls—must be sufficient for the Board to be “satisfied” that it can verify the voter’s “right to vote.” 25 Pa. Stat. § 3146.8(g)(3). And if the County Board can verify the voter’s “right to vote” without a handwritten date—which these days, it can—then the Election Code provides that such ballots must be counted. *Id.* § 3146.8(g)(4).

B. The Date on the Outer Envelope Serves No Anti-Fraud Purpose, and the General Assembly Did Not Intend to Disqualify Undated or Incorrectly Dated Ballots

Even if the language of Election Code is ambiguous, this Court should still find that the General Assembly intended County Boards to count ballots in undated or incorrectly dated outer envelopes. In cases of ambiguity, the SCA directs courts to consider other factors, including the “occasion and necessity for the statute,” the “mischief to be remedied,” “the object to be attained,” and “the consequences of a particular interpretation.” 1 Pa. C.S. § 1921(c)(1), (3), (4), (6). A court may also assume “that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable,” or that violates the constitution. *Id.* § 1922(1). And specifically for the Election Code, we adhere to the overarching principle that it

should be liberally construed so as not to deprive voters of their right to elect a candidate of their choice. *PDP*, 238 A.3d at 356.

Decades of this Court's precedent interpreting the Election Code hold that County Boards cannot invalidate ballots for minor irregularities. *See, e.g., Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954) (holding that only compelling reasons should be used to "throw out a ballot" and that should occur "very sparingly."); *In re Luzerne Cnty. Return Bd., Appeal of Elmer B. Weiskerger*, 290 A.2d 108, 109 (Pa. 1972) (refusing to invalidate a ballot because of the "minor irregularity" that it was completed with the wrong color ink); *Shambach v. Bickart*, 845 A.2d 793, 795 (Pa. 2004) (declining to invalidate a write-in vote cast for a candidate who was named on the ballot). Unlike in *Appeal of Pierce*, there is no "obvious and salutary purpose—grounded in hard experience" behind the dating provision. 843 A.2d 1223, 1232 (Pa. 2004).

Here, the dating provision is a minor irregularity and serves no "weighty interest." *PDP*, 238 at 380. It does not assist County Boards with determining the qualification of a voter. It does not contribute to ballot secrecy. And it does not prevent the untimely or fraudulent casting of ballots. It would be absurd to hold the General Assembly intended County Boards to invalidate ballots for failing to comply with a mere technicality.

Qualification. Only qualified electors are permitted to cast absentee and mail-in ballots. *E.g.*, 25 P.S. §§ 3146.2b(a); 3150.12b(a), 3146.8(g)(3). But the handwritten date is not relevant to determine a voter's qualification. Instead, voter qualification is determined by the Board when approving the application for an absentee or mail-in ballot, 25 P.S. §§ 3146.2b(a); 3150.12b(a), and is measured as of Election Day, not any day prior, Pa. Const. art. VII § 1; 25 Pa. C.S. § 1301(a). The Election Code does not require the Board to re-verify a voter's qualifications during the pre-canvass or canvass; instead, the Board must check certain lists to verify the voter's "right to vote." 25 P.S. § 3146.8(g)(3).

Secrecy. Under Pennsylvania law, "secrecy in voting" must be "preserved." *See* Pa. Const. art. VII § 4. But the handwritten date is to be written on the exterior mailing envelope of an absentee or mail-in ballot, which already contains the voter's name and address. The absence of a handwritten date or a purportedly incorrect date does nothing to undermine the secrecy of the ballot contained inside the internal secrecy envelope.

Timeliness. To be counted by the Board, all absentee and mail-in ballots must be received "on or before eight o'clock P.M." on Election Day. 25 P.S. §§ 3146.6(a), 3150.16(a). But the handwritten date is not relevant to determine the timeliness of the ballot; instead, a ballot is timely if in the possession of the Board as of 8:00 p.m. on Election Day. To avoid any doubt, each Board has processes in place to ensure

receipt of ballots by 8:00 p.m. and to set aside any ballots not timely received. *See* Voye Decl., ¶ 16, Ex. A.; Freitag Decl., ¶ 16, Ex. B; Barsoum Decl., ¶ 16, Ex. C; Allen Decl., ¶ 16, Ex. D; Soltysiak Decl., ¶ 16, Ex. E; Custodio Decl., ¶ 14, Ex. F. An ambiguous handwritten date on the mailing envelope is therefore unnecessary to ensure that that a ballot was timely cast. Indeed, the fact that no Boards accept ballots received after 8:00 p.m. on Election Day is itself sufficient evidence of a timely received ballot.

Prevention of fraud. The declaration on the exterior envelope of an absentee or mail-in ballot contains “a statement of the elector[']s qualifications” and “a statement that such elector has not already voted in such primary or election.” 25 P.S. § 3146.4; *accord id.* § 3150.14(b). A voter, by signing the declaration, affirms under penalty of criminal liability that they do not “know[] any matter declared therein to be false,” have not “vote[d] any ballot other than one properly issued to the person, or vote[d] or attempt[ed] to vote more than once in any election for which an absentee ballot or mail-in ballot shall have been issued to the person ,” and have not violated other provisions of the Election Code. 25 P.S. § 3553. It is the signature of the voter, not the date, that carries the penalty of criminal liability. *Id.* (“If any person shall sign an application for absentee ballot, mail-in ballot or declaration of elector” (emphasis added)). And as discussed, *infra* Part III.A., a handwritten

date on a return envelope is not a tool for preventing back-dated voting or double-voting.⁵

Petitioners are correct in one thing— “these are no mere theoretical interests” (Pet. 27). Petitioners are attempting to disenfranchise actual voters who validly cast their ballots because of an inconsequential failure to handwrite a date. There is little indication that the General Assembly intended to deny the franchise to qualified electors who failed to comply with a requirement that serves no meaningful purpose in the administration of free and fair elections in Pennsylvania.

C. The U.S. Constitution Does Not Prevent This Court from Interpreting the Election Code

Finally, a century of binding precedent refutes the position that the Election Clause of the U.S. Constitution prevents this Court from reviewing Pennsylvania election law. In *Smiley v. Holm*, the United States Supreme Court held that the Elections Clause does not “render[] inapplicable the conditions which attach to the

⁵ Moreover, the Election Code does not even specify which date the voter should handwrite on the envelope. Petitioners attempt to get around this ambiguity by creating a requirement that the date must fall between “the date on which election officials mailed the absentee or mail-in ballot to the individual” and “the date on which officials received the completed ballot.” (Pet. 8). Aside from being created out of whole cloth, no need exists for a voter to handwrite a date within the boundaries of mail and receipt because counties know and record their when they mail out their ballots, *see* Voye Decl., ¶ 8, Ex. A.; Freitag Decl., ¶ 8, Ex. B; Barsoum Decl., ¶ 8, Ex. C; Allen Decl., ¶ 8, Ex. D; Soltysiak Decl., ¶ 8, Ex. E; Custodio Decl., ¶ 11, Ex. F, and they do not accept any ballots after 8:00 p.m. on Election Day, *see* Voye Decl., ¶ 16, Ex. A.; Freitag Decl., ¶ 16, Ex. B; Barsoum Decl., ¶ 16, Ex. C; Allen Decl., ¶ 16, Ex. D; Soltysiak Decl., ¶ 16, Ex. E; Custodio Decl., ¶ 14, Ex. F.

making of state laws,” including “restriction[s] imposed by state Constitutions upon state Legislatures when exercising lawmaking power.” 285 U.S. 355, 365, 369 (1932).

Similarly, in *Wesberry v. Sanders*, the United States Supreme Court emphasized that “nothing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of courts to protect the constitutional right of individuals from legislative destruction.” 376 U.S. 1, 7 (1964). More recently, the United States Supreme Court held that “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

There is no credible argument that the law today prevents state courts from reviewing and interpreting state election law. Petitioners’ reliance on single- and three-Justice dissents (Pet. Br. at 29) does not change a century of precedent allowing this Court to interpret the Pennsylvania Election Code.

III. Disqualifying Ballots Because They Lack a Correct, Handwritten Date Would Violate the Materiality Provision of the Civil Rights Act (52 U.S.C. § 10101(A)(2)(B))

If this Court disqualifies absentee and mail-in ballots on the ground those ballots were in undated or “incorrectly” dated outer envelopes, such a result would violate the materiality provision of the Civil Rights Act of 1964, 52 U.S.C.

§ 10101(a)(2)(B). The provision serves to prevent states from “requiring unnecessary information” and then using the omission of that information to deny a person's right to vote. *Schwier v. Cox*, 340 F. 3d 1284, 1294 (11th Cir. 2003); *see also, e.g., League of Women Voters of Arkansas v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (explaining the provision prohibits “state election practices that increase the number of errors or omissions on papers or records related to voting and provide an excuse to disenfranchise otherwise qualified voters”). Because federal law prohibits County Boards from setting aside a ballot on the basis that the voter omitted a date from the return envelope’s declaration, Petitioners are not entitled to the relief they are seeking here.

**A. Petitioners Urge this Court to Grant Relief that Would
Disenfranchise Thousands of Voters and Violate the
Materiality Provision of the Civil Rights Act**

As numerous courts have recognized, federal civil rights law prohibits states from disqualifying unquestionably timely votes due to an immaterial paperwork mistake on the form declaration that is printed on the outer envelope. The Civil Rights Act provides in relevant part as follows:

No person acting under color of law shall ... deny the right of any individual to vote in any election because of *an error or omission on any record or paper relating to any application, registration, or other act requisite to voting*, if such error or omission is *not material in determining whether such individual is qualified under State law to vote in such election*.

52 U.S.C. § 10101(a)(2)(B) (emphases added). This “materiality” provision was enacted to end trivial requirements that “served no purpose other than as a means of inducing voter-generated errors that could be used to justify” denying the right to vote. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008).

When this Court last considered the class of ballots at issue here, four Justices observed that voiding ballots for minor errors might conflict with 52 U.S.C. § 10101(a)(2)(B). *In re Canvass*, 241 A.3d at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting). Justices Donohue, Baer, and Todd observed that there was “some persuasive force” to the argument that Petitioners' proposed interpretation of the Election Code “could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons.” *In re Canvass*, 241 A.3d at 1074 n.5. In support of that view, they cited numerous cases in which “federal courts have barred the enforcement of similar administrative requirements to bar electors.” *Id.* (citing *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003); *Washington Ass’n of Churches v. Reed*, 492 F.Supp.2d 1264 (W.D. Wash. 2006); *Martin v. Crittenden*, 347 F. Supp. 3d 1302 (N.D. Ga. 2018)). And Judge Wecht declined to “reach it without the benefit of thorough advocacy,” but nonetheless recognized that 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.” *Id.* at 1089 n.54 (Wecht, J.,

concurring and dissenting). Ultimately, given the Court’s determination that those ballots should be counted, there was no reason at that time to resolve whether Section 10101(a)(2)(B) also required counting those ballots.

Since then, the Third Circuit has addressed the federal question that this Court first identified in *In re Canvass*, holding that the handwritten date requirement is “immaterial to a voter’s qualifications and eligibility under § 10101(a)(2)(B).” *Migliori v. Cohen*, 36 F.4th 153, 157 (3d Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 2022 WL 6571686 (U.S. Oct. 11, 2022).⁶ The Third Circuit determined that because the date on a return envelope’s declaration is not material to determining a voter’s qualifications, omitting a date cannot justify invalidating a ballot. *Id.* at 164.

After the Third Circuit issued its decision, the Commonwealth Court twice adopted the persuasive reasoning of *Migliori* to hold that such mail-in and absentee ballots must be counted as a matter of both state and federal law. *Berks Cnty.*, No.

⁶ The United States Supreme Court vacated the judgment in *Migliori* because the case had become moot after one party conceded the election following the Third Circuit’s judgment. It is not an assessment of the merits of the Third Circuit’s analysis. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (noting that reversing or vacating a decision that became moot on its way to the U.S. Supreme Court is the “established practice” of the Court). In any event, an order vacating the Third Circuit’s judgment has no bearing on its *persuasive* authority given that this Court was never bound by the Third Circuit’s judgment. *Stone Crushed P’ship v. Kassab Archbold Jackson & O’Brien*, 908 A.2d 875, 884 (Pa. 2006).

2022 WL 4100998, at *12-*29 (adopting the Third Circuit’s reasoning in *Migliori* as “persuasive”); *McCormick for U.S. Senate*, 2022 WL 2900112, at *9-*15 (same).

This Court should follow the Third Circuit’s persuasive analysis because disqualifying ballots based on omitting a date from the return-envelope declaration denies the right to vote for an immaterial omission. The Third Circuit correctly held that setting aside a ballot return envelope prior to canvassing “den[ies] the right . . . to vote” under the materiality provision of the Civil Rights Act. 52 U.S.C. § 10101(a)(2)(B). That is clear from the text of the statute, which prohibits “deny[ing] the right of any individual to vote in any election because of an *error or omission on any record or paper relating to any application, registration, or other act requisite to voting*, if such error or omission is not material in determining *whether such individual is qualified under State law to vote in such election.*” 52 U.S.C. § 10101(a)(2)(B) (emphases added).

Petitioners’ request to invalidate undated or incorrectly dated votes falls within the scope of the above-quoted language of the materiality provision. First, an omitted or “incorrect” date is an “error or omission.” Second, the error occurs on a “record or paper” that is “requisite to voting”—*i.e.*, the form declaration printed on the outer return envelope of the ballot. And third, the date is immaterial to whether the voter “is qualified under State law to vote in [the] election”—or whether the ballot was timely received by a County Board. For those straightforward

reasons, Petitioners' request for relief thus violates the plain language of the Civil Rights Act, as unpacked in further detail below.

Inadvertently failing to comply with the "date requirement" is an "error or omission" that would result in the denial of the "right to vote"—i.e., the right to have their "ballot counted." The Civil Rights Act's definition of vote confirms that conclusion. Indeed, Section 10101 itself defines its "vote" to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, *casting a ballot, and having such ballot counted* and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. § 10101(e). Because an omitted handwritten date is clearly an "error or omission," failure to include a date on the return cannot be a basis for an elector to not have their "ballot counted" if the error or omission is: (i) "on any record or paper relating to any . . . act requisite to voting," and (ii) "not material in determining whether such individual is qualified under State law to vote in such election." *Id.* §§ 10101(a)(2)(B), (e). Both requirements are satisfied here.

First, recording a date on the outer envelope of a ballot is an "act requisite to voting" within the meaning of the Civil Rights Act. The Election Code requires a voter to place the voted (paper) ballot into the (paper) secrecy envelope and place that secrecy envelope into the exterior (paper) mailing envelope. 25 P.S.

§§ 3146.6(a), 3150.16(a). The Board cannot count absentee or mail-in ballots not in the exterior mailing envelope, *id.* § 3146.8(g)(3), making the exterior envelope a prerequisite to voting. So, assuming omission of a date is a disqualifying error, then dating the return-envelope declaration is an “act requisite to voting.” 52 U.S.C. § 10101(a)(2)(B).

Second, the “date requirement” is not “material in determining whether such individual is qualified under State law to vote.” *Id.* § 10101(a)(2)(B). That is because the date does not assist in determining if the ballot was cast by someone eligible to vote under Pennsylvania law. Under Pennsylvania law, the eligibility criteria are those that “go[] to determining age, citizenship, residency, or current[] imprisonment for a felony.” *Migliori*, 36 F.4th at 163. As the Third Circuit thoroughly explained, there is no “persuasive reason for how this requirement helped determine any of these qualifications.” *Id.* at 163-64. Moreover, as explained in *Chapman*, the handwritten date on the exterior mailing envelope plays no role in determining a voter’s qualification during the pre-canvass or canvass; instead, voter qualification is assessed when the Board approves the application for an absentee or mail-in ballot. *See Berks Cnty.*, 2022 WL 4100998 at *19. And because the handwritten date on the exterior mailing envelope does not play any role in determining a person’s qualification to vote, the date quickly becomes “meaningless.” *Migliori*, 36 F.4th at 164. That is because each County Board

knows when it received each ballot (4 Pa. Code § 171.14(a); 25 P.S. §§ 3146.6(c), 3150.16(c)), and because each County Board requires each absentee and mail-in ballot to be received before the 8:00 p.m. deadline on Election Day (25 P.S. §§ 3146.6(a), 3150.16(a)). *See* Voye Decl., ¶ 16, Ex. A.; Freitag Decl., ¶ 16, Ex. B; Barsoum Decl., ¶ 16, Ex. C; Allen Decl., ¶ 16, Ex. D; Soltysiak Decl., ¶ 16, Ex. E; Custodio Decl., ¶ 14, Ex. F; *see Migliori*, 36 F.4th at 164; *see id.* at 166 (Matey, J., concurring). Thus, the Election Code’s dating provision does nothing to prevent supposed “back-dating” of ballots or “ensuring the elector completed the ballot within the proper time frame.” *In re Canvass*, 241 A.3d at 1091 (Dougherty, J., concurring and dissenting). Because the handwritten date on the exterior mailing envelope plays no role in determining a person’s qualification to vote in Pennsylvania, any error in or omission of that date cannot form the sole basis for rejecting a ballot.

Again, the role of the date on the exterior envelope in determining a voter’s eligibility was fully explored, and the arguments rejected, by the Third Circuit in *Migliori*. *The Migliori* court held that “[i]t is unclear how this date would help determine one’s residency” or that it would assist in determining whether an elector was previously found guilty of voter fraud. *Id.* at 163. *Migliori* further holds that, “whatever sort of fraud deterrence or prevention this requirement may

serve, it in no way helps the Commonwealth determine whether a voter's age, residence, citizenship, or felony status qualifies them to vote.” *Id.*

To be clear, Petitioners have provided no evidence of fraud in connection with the challenged date requirement. A timely received absentee or mail-in ballot from a qualified elector that lacks a handwritten date on the exterior envelope is not fraudulent. Petitioners cite a single instance of voter fraud in support of the utility of the handwritten date, Pet. at 15—but that case, ironically, contained no evidence that the handwritten date was missing or incorrect. The handwritten date also played no role in invalidating the ballot. Pet. at Ex. F. Instead, the affidavit of probable cause reveals that the deceased voter had already been marked deceased and removed from the voter rolls on April 25, 2022—three days before the ballot was received by the Lancaster County Board of Elections. *Id.* Pursuant to the Election Code, which requires rejecting votes by persons who die prior to Election Day, 25 P.S. § 3146.8(d), the deceased's ballot was already going to be voided. The Petitioners' citation of a single instance of an ineligibly cast ballot, one where the handwritten date was not relevant to determining whether the vote would be counted, cannot justify the disenfranchisement of qualified electors across the Commonwealth who return timely ballots.

Instead, the entire effort to deem a missing or “incorrect” date on the outer envelope represents a callous effort to disenfranchise those perceived to be likely to

vote against Petitioners' chosen candidates, and is the result of Petitioners' scouring the Election Code to find any technical "requirements" to fit the pre-existing strategy to challenge the mail-in ballot process. If Petitioners succeed, the Pennsylvania residents facing disenfranchisement are disproportionately the elderly and those with disabilities. *See* Soltysiak Decl., ¶ 20, Ex. E. The population of those unable to leave their homes to vote in person for reasons related to health or age undoubtedly overlaps with the population of individuals who have difficulty legibly writing the date. And County-level data shows that voters who fail to include a handwritten date ranges are primarily elderly Pennsylvanians with an average age of 70. *See* Soltysiak Decl., ¶ 20, Ex. E.

This was largely the case in *Migliori*. The Plaintiffs in the *Migliori* case were senior citizens who had been voting in Lehigh County for decades. *Joint App'x, Migliori v. Cohen*, No. 22-1499 (3d Cir.), Dkts.33-1 & 33-2, at 62-77, 172-175. These plaintiffs were individuals who vote in most every election. *Id.* They filled out their mail ballots and sent them in on time, signed the declaration on the Return Envelope, but made a mistake on the Return Envelope paperwork and left off a handwritten date. The Third Circuit came to the right decision that this accidental omission was immaterial and therefore cannot be a basis for disqualification under federal law. This Court should follow suit and not allow the unnecessary disenfranchisement of untold voters.

B. Petitioner' Contrary Arguments Lack Merit

Petitioners' contrary contention that their request for relief does not implicate the Civil Rights Act should be rejected. It is inconsistent with the text and purpose of the Act and, if adopted, would nullify the Act by disenfranchising voters based on immaterial errors and omissions. None of Petitioners' arguments are supported by the purpose of the Civil Rights Act. Among the many considerations at issue during the passing of this statute was to respond to the practice of Black voters' registration being rejected for spelling errors, typos, or other "trivial reasons" in filling out the requisite forms. H. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2491; *see also Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). "Trivial reasons" are exactly what Petitioners assert should invalidate thousands of votes.

Petitioners falsely analogize a missing or "incorrect" date on the outer envelope with certain acts that would otherwise result in an otherwise qualified elector's vote not being counted. Actions such as "showing up to the polls after Election Day, failing to sign or to use a secrecy envelope for an absentee or mail-in ballot, returning the ballot to the wrong location, or arriving at the wrong polling place" are not the same as the issue here. Pet. Br. at 44. These examples implicate the act of voting itself; they are outside the limited scope of Section 10101(a)(2)(B) because none is an "error or omission on any record or paper," not because the

voters have not been denied the right to vote as defined under Section 10101(e). *See Democratic Cong. Campaign Comm. v. Kosinski*, No. 22-1029 (RA), 2022 WL 2712882, at *21 (S.D.N.Y. July 13, 2022) (noting that with respect to the scope of the materiality provision, “[a] ballot that is cast in a polling place at which a voter is ineligible to vote is not analogous” to “missing handwritten dates on absentee ballot envelopes” or “the inclusion of social security numbers on voter registration forms”).

Petitioners’ exclusive reliance on a dissent by Justice Alito is misguided. In addition to the obvious fact that it is a dissent, even Justice Alito confessed that he had only limited time to study the issue and did not rule out changing his view. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting). Petitioners ignore that cautionary note, instead repeating a number of observations that are inconsistent with Section 10101’s text or with Pennsylvania law.

Petitioners insist that Section 10101 has no application when a ballot is not filled out correctly, Pet. Br. at 43-44, or when an error is made during the “act of voting,” *id.* at 47. But here, the mistake is not on the ballot or in the act of voting. The mistake is on the return-envelope declaration that Petitioners believe must be properly dated if the envelope is to be opened and the ballot within is to be counted. If Petitioners are right that Pennsylvania law demands setting aside all return envelopes lacking a date, or containing the “incorrect” date, then the ballots within

those envelopes will never be opened. 25 P.S. § 3146.8(g)(4) (directing that only ballots are opened only if they satisfy the canvassing criteria in § 3146.8(g)(3)).

Additionally, Petitioners suggest that a voter whose vote will not count for failing to comply with some state rule has not been denied the chance to vote, but instead has not followed the rules for voting. Pet. Br. at 44. That argument not only renders Section 10101—which presumes noncompliance with some state-imposed prerequisite to voting—completely null, it also ignores that Section 10101 itself defines denials of the right to vote to include when someone’s ballot has not been counted and included in the final election results. 52 U.S.C. § 10101(e).

Finally, Section 10101(a)(2)(B) is not inapplicable here, as Petitioners urge. Pet. Br. at 43-44. They contend that the materiality provision is not applicable because it prohibits only denial of the right to vote, not mandatory rules on the act of completing and casting a ballot. *Id.* Proceeding from that premise, they argue the Civil Rights does not even apply because the date requirement “is not one of the four qualifications to vote in Pennsylvania.” *Id.* at 46-47. But that is precisely to point. The Civil Right Act *prohibits* states from disqualifying voters for immaterial errors or omissions in voting, and it applies here because the declaration date is immaterial to whether a voter is qualified to vote, as Petitioners concede. There is no basis for Petitioners’ argument that this Court should conclude that errors and omissions may allow disenfranchisement so long as the requested information is

“not material in determining whether [an] individual is qualified under State law to vote.” Pet. Br. at 49. That view flips the Civil Rights Act upside-down. Section 10101(a)(2)(B) applies when state law would disenfranchise a voter for making an error or omission on a record or paper if the erroneous or omitted information was not needed to judge the voter’s qualifications—*i.e.*, where the required information was “not material in determining whether [an] individual is qualified under State law.” 52 U.S.C. § 10101(a)(2)(b); *see Martin*, 347 F. Supp. 3d at 1308. So is the case here.

CONCLUSION

For these reasons, this Court should deny Petitioners all of the relief they seek.

Respectfully submitted,

Dated: October 25, 2022

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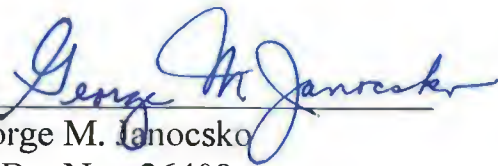
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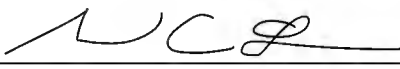
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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: October 25, 2022

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RULE 2135(d) CERTIFICATE OF COMPLIANCE

I certify pursuant to Pa.R.A.P. 2135(d) that this brief contains fewer than the 14,000 words, excluding the supplementary matter outlined in Pa.R.A.P. 2135(b), as determined using Microsoft Word for Office 365 software, and therefore complies with the word count limit set forth in Pa. R.A.P. 2135(a).

Dated: October 25, 2022

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/s/ Ilana H. Eisenstein

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2022, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

Dated: October 25, 2022

DLA PIPER LLP (US)

/s/ Ilana H. Eisenstein

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EXHIBIT A

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No. 102 MM 2022

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

5. Under the Pennsylvania Election Code, registered voters may request an absentee ballot if they fulfill the requirements for voting absentee, or any registered voter may request a mail-in ballot from their county board of elections, being the Allegheny County Board of Elections (the “Board”) here.

6. Pennsylvania absentee and mail-in ballot applications require the voter to provide their name, address of registration, and proof of identification. 25 P.S. §§ 3146.2, 3150.12.

7. After the Board receives an absentee and mail-in ballot application, it verifies that the voter is a qualified elector based on proof of identification and voter registration information, as set forth in 25 P.S. §§ 3146.2b and 3150.12b.

8. Once the Board verifies the voter's identity and eligibility to vote, they send an absentee or mail-in ballot package to the voter that contains: (1) the ballot; (2) a "secrecy envelope" marked with the words "Official Election Ballot"; and (3) a pre-addressed outer return envelope that contains the voter declaration. The packet also contains instructions to the voter for marking their ballot and submitting it properly. The Board maintains the date a packet is mailed to a voter.

9. Each mailing envelope includes a unique barcode that corresponds to Pennsylvania's Statewide Uniform Registry of Electors ("SURE").

10. The Pennsylvania Department of State's SURE system contains various information about each elector in the Commonwealth, and county boards of election, like this Board, are able to access the SURE system to add, modify, or delete information regarding registered voters within their own county in the system as necessary.

11. Absentee and mail-in ballot voters are directed to mark their ballot, place it in the secrecy envelope, also known as the "Official Election Ballot Envelope" and then place the secrecy envelope in the outer return envelope, also known as the "Declaration Envelope" that includes a printed voter declaration. *Id.* §§ 3146.6(a) and 3150.16(a).

12. Absentee and mail-in ballot voters are required to deliver the entire package by mail or hand it to the Board, and delivery is timely if made by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c) and 3150.16(c).

II. The 2022 Election

13. The 2022 General Election will be held on Tuesday, November 8, 2022.

14. Allegheny County has been issuing absentee and mail-in ballots for the 2022 General Election to qualifying voters since October 3, 2022.

15. As of October 24, 2022, the Board has received 98,890 completed absentee and mail-in ballot envelopes.

16. Allegheny County has measures in place to ensure late absentee or mail-in ballots received after 8:00 p.m. on Tuesday, November 8, 2022, are not counted.

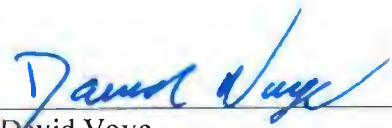
17. Ballot envelopes are kept secure pending the pre-canvass.

III. Historical Absentee and Mail-In Ballot Information

18. Since the adoption of no-excuse mail-in voting, thousands qualified electors in Allegheny County have cast timely ballots without a handwritten date on the exterior envelope.

19. In the 2022 Primary election, the Board received 93,758 absentee and mail-in ballots. Of those ballots received, 206 did not have a handwritten date.

Affiant states nothing further.



David Voye

Date: October 25, 2022

EXHIBIT B

RETRIEVED FROM DEMOCRACYDOCKET.COM

No. 102 MM 2022

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF BUCKS)

5. Under the Pennsylvania Election Code, registered voters may request an absentee ballot if they fulfill the requirements for voting absentee, or any registered voter may request a mail-in ballot from their county board of elections, being the Bucks County Board of Elections (the “Board”) here.

6. Pennsylvania absentee and mail-in ballot applications require the voter to provide their name, address of registration, and proof of identification. 25 P.S. §§ 3146.2, 3150.12.

7. After the Board receives an absentee and mail-in ballot application, it verifies that the voter is a qualified elector based on proof of identification and voter registration information, as set forth in 25 P.S. §§ 3146.2b and 3150.12b.

8. Once the Board verifies the voter's identity and eligibility to vote, they send an absentee or mail-in ballot package to the voter that contains: (1) the ballot; (2) a "secrecy envelope" marked with the words "Official Election Ballot"; and (3) a pre-addressed outer return envelope that contains the voter declaration. The packet also contains instructions to the voter for marking their ballot and submitting it properly. The Board maintains the date a packet is mailed to a voter.

9. Each mailing envelope includes a unique barcode that corresponds to Pennsylvania's Statewide Uniform Registry of Electors ("SURE").

10. The Pennsylvania Department of State's SURE system contains various information about each elector in the Commonwealth, and county boards of election, like the Board, are able to access the SURE system to add, modify, or delete information regarding registered voters within their own county in the system as necessary.

11. Absentee and mail-in ballot voters mark their ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer return envelope that includes a printed voter declaration. *Id.* §§ 3146.6(a) and 3150.16(a).

12. Absentee and mail-in ballot voters are required to deliver the entire package by mail or hand it to the Board, and delivery is timely if made by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c) and 3150.16(c).

II. The 2022 Election

13. The 2022 General Election will be held on Tuesday, November 8, 2022.

14. Bucks County has been issuing absentee and mail-in ballots for the 2022 General Election to qualifying voters since October 4, 2022.

15. As of October 24, 2022, the Board has received completed absentee and mail-in ballot envelopes.

16. Bucks County has measures in place to ensure late absentee or mail-in ballots received after 8:00 p.m. on Tuesday, November 8, 2022, are not counted.

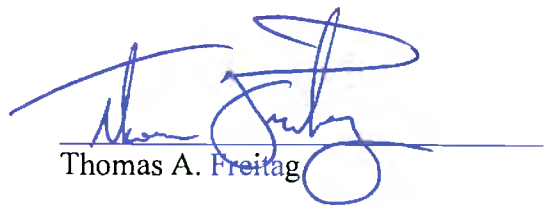
17. Ballot envelopes are kept secure pending the pre-canvass.

III. Historical Absentee and Mail-In Ballot Information

18. Since the adoption of no-excuse mail-in voting, several thousand qualified electors in Bucks County have cast timely ballots without a handwritten date on the exterior envelope.

19. For example, in the 2020 General Election, the Board received approximately 165,000 absentee and mail-in ballots. Of those ballots received, 1,196 either did not have a handwritten date, had a date placed in the wrong location, or had a facially erroneous date.

Affiant states nothing further.



Thomas A. Freitag

Date: October 25, 2022

EXHIBIT C

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE SUPREME COURT OF PENNSYLVANIA

David Ball *et al.*,

Petitioners,

v.

Leigh M. Chapman *et al.*,

Respondents.

No. 102 MM 2022

AFFIDAVIT OF KAREN BARSOUM IN SUPPORT OF RESPONDENTS

COMMONWEALTH OF PENNSYLVANIA)

) SS:

COUNTY OF CHESTER)

I, Karen Barsoum, being duly sworn according to law, state:

1. I am over 18 years of age, of sound mind and otherwise competent to make this Affidavit, which I submit in support of Respondents' Reply.

2. The facts set forth in this Affidavit are based on facts known to me personally through my work as Director of the Department of Voter Services.

3. The statements made in this affidavit are true and correct to the best of my personal knowledge or information and belief.

4. I understand that statements made in this Affidavit are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

I. The 2022 Election Cycle

5. Under the Pennsylvania Election Code, registered voters may request an absentee ballot if they fulfill the requirements for voting absentee, or any registered voter may request a mail-in ballot from their county board of elections, being the Chester County Board of Elections (the "Board") here.

6. Pennsylvania absentee and mail-in ballot applications require the voter to provide their name, address of registration, and proof of identification. 25 P.S. §§ 3146.2, 3150.12.

7. After the Board receives an absentee and mail-in ballot application, it verifies that the voter is a qualified elector based on proof of identification and voter registration information, as set forth in 25 P.S. §§ 3146.2b and 3150.12b.

8. Once the Board verifies the voter's identity and eligibility to vote, they send an absentee or mail-in ballot package to the voter that contains: (1) the ballot; (2) a "secrecy envelope" marked with the words "Official Election Ballot"; and (3) a pre-addressed outer return envelope that contains the voter declaration. The packet also contains instructions to the voter for marking their ballot and submitting it properly. The Board maintains the date a packet is mailed to a voter.

9. Each mailing envelope includes a unique barcode that corresponds to Pennsylvania's Statewide Uniform Registry of Electors ("SURE").

10. The Pennsylvania Department of State's SURE system contains various information about each elector in the Commonwealth, and county boards of election, like the Board, are able to access the SURE system to add, modify, or delete information regarding registered voters within their own county in the system as necessary.

11. Absentee and mail-in ballot voters mark their ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer return envelope that includes a printed voter declaration. *Id.* §§ 3146.6(a) and 3150.16(a).

12. Absentee and mail-in ballot voters are required to deliver the entire package by mail or hand it to the Board, and delivery is timely if made by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c) and 3150.16(c).

II. The 2022 Election

13. The 2022 General Election will be held on Tuesday, November 8, 2022.

14. Chester County has been mailing absentee and mail-in ballots for the 2022 General Election to qualifying voters since October 10, 2022.

15. As of October 24, 2022, the Board has received completed absentee and mail-in ballot envelopes.

16. Chester County has measures in place to ensure late absentee or mail-in ballots received after 8:00 p.m. on Tuesday, November 8, 2022, are not counted.

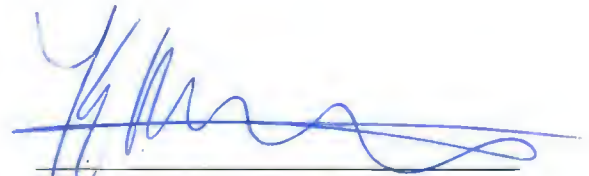
17. Ballot envelopes are kept secure pending the pre-canvass.

III. Historical Absentee and Mail-In Ballot Information

18. Since the adoption of no-excuse mail-in voting, many qualified electors in Chester County have cast timely ballots without a handwritten date on the exterior envelope.

19. For example, in the 2022 Primary Election, the Board received approximately 35,022 absentee and mail-in ballots. Of those ballots received, 78 either did not have a handwritten date, had a date placed in the wrong location, or had a facially erroneous date.

Affiant states nothing further.



Karen Barsoum

Date: October 25, 2022

EXHIBIT D

RETRIEVED FROM DEMOCRACYDOCKET.COM

David Ball *et al.*,

No. 102 MM 2022

V.

Respondents.

COMMONWEALTH OF PENNSYLVANIA

(

) SS:

COUNTY OF DELAWARE

)

1. I am over 18 years of age, of sound mind and otherwise competent to make this

Affidavit, which I submit in support of Respondents' Reply.

2. The facts set forth in this Affidavit are based on facts known to me personally

through my work as Director of Elections for Delaware County, Pennsylvania.

3. The statements made in this affidavit are true and correct to the best of my

personal knowledge or information and belief.

4. I understand that statements made in this Affidavit are made subject to the

penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

I. The 2022 Election Cycle

5. Under the Pennsylvania Election Code, registered voters may request an absentee

ballot if they fulfill the requirements for voting absentee, or any registered voter may request a mail-in ballot from their county board of elections, being the Delaware Board of Elections (the “Board”) here.

6. Pennsylvania absentee and mail-in ballot applications require the voter to provide their name, address of registration, and proof of identification. 25 P.S. §§ 3146.2, 3150.12.

7. After the Board receives an absentee and mail-in ballot application, it verifies that the voter is a qualified elector based on proof of identification and voter registration information, as set forth in 25 P.S. §§ 3146.2b and 3150.12b.

8. Once the Board verifies the voter's identity and eligibility to vote, they send an absentee or mail-in ballot package to the voter that contains: (1) the ballot; (2) a "secrecy envelope" marked with the words "Official Election Ballot"; (3) a pre-addressed outer return envelope that contains the voter declaration. The packet also contains instructions to the voter for marking their ballot and submitting it properly, including a list of Delaware County drop boxes and hours for same. The Board maintains the date a packet is mailed to a voter.

9. Each mailing envelope includes a unique barcode that corresponds to Pennsylvania's Statewide Uniform Registry of Electors ("SURE").

10. The Pennsylvania Department of State's SURE system contains various information about each elector in the Commonwealth, and county boards of election, like the Board, is able to access the SURE system to add, modify, or delete information regarding registered voters within their own county in the system as necessary.

11. Absentee and mail-in ballot voters mark their ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer return envelope that includes a printed voter declaration. *Id.* §§ 3146.6(a) and 3150.16(a).

12. Absentee and mail-in ballot voters are required to deliver the entire package by mail or hand it to the Board, and delivery is timely if made by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c) and 3150.16(c).

II. The 2022 Election

13. The 2022 General Election will be held on Tuesday, November 8, 2022.

14. Delaware County has been issuing absentee and mail-in ballots for the 2022 General Election to qualifying voters since October 5, 2022.

15. As of October 24, 2022, the Board has received completed absentee and mail-in ballot envelopes.

16. Delaware County has measures in place to ensure late absentee or mail-in ballots received after 8:00 p.m. on Tuesday, November 8, 2022, are not counted.

17. Ballot envelopes are kept secure pending the pre-canvass.

III. Historical Absentee and Mail-In Ballot Information

18. Since the adoption of no-excuse mail-in voting, several hundreds of qualified electors in Delaware County have cast timely ballots without a handwritten date on the exterior envelope.

19. For example, in the 2020 General Election, the Board received more than 130,000 absentee and mail-in ballots. Of those ballots received, hundreds either did not have a handwritten date, had a date placed in the wrong location, or had a facially erroneous date.

Affiant states nothing further.

A handwritten signature in black ink, appearing to read "James P. Allen", with a horizontal line underneath.

James P. Allen, Director of Elections

Date: October 25, 2022

EXHIBIT E

RETRIEVED FROM DEMOCRACYDOCKET.COM

No. 102 MM 2022

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF MONTGOMERY)

5. Under the Pennsylvania Election Code, registered voters may request an absentee ballot if they fulfill the requirements for voting absentee, or any registered voter may request a mail-in ballot from their county board of elections, being the Montgomery County Board of Elections (the “Board”) here.

date on the outer envelope. *See* Transcript of Meeting of the Commissioners at 7:7-12:10 (May 26, 2021).²

21. In the November 2021 General Election, the Board counted approximately 74,000 absentee and mail-in ballots. In that same election, the Board received 1,807 timely ballots from qualified electors that were only missing the handwritten date on the outer envelope. *See* Transcript of Meeting of the Commissioners at 6:15-8:15 (Nov. 12, 2021).³

22. In the May 2022 Primary Election, the Board counted approximately 79,000 absentee and mail-in ballots. Of these, approximately 2,125 were timely ballots from qualified electors that were only missing the handwritten date on the outer envelope. *See* Transcript of Meeting of the Commissioners at 10:7-16:24 (May 25, 2022).⁴

23. For the past three elections, as people have become more familiar with the mail-in ballot process, the Board has not identified any person who voted both in person and by mail-in or absentee ballot.

² https://vote.phila.gov/files/announcements/MeetingTranscripts/052621_Meeting_Transcript.pdf.

³ https://vote.phila.gov/files/announcements/MeetingTranscripts/111221_Meeting_Transcript.pdf.

⁴ https://vote.phila.gov/files/announcements/MeetingTranscripts/052522_Meeting_Transcript.pdf.

6. Pennsylvania absentee and mail-in ballot applications require the voter to provide their name, address of registration, and proof of identification. 25 P.S. §§ 3146.2, 3150.12.

7. After the Board receives an absentee and mail-in ballot application, it verifies that the voter is a qualified elector based on proof of identification and voter registration information, as set forth in 25 P.S. §§ 3146.2b and 3150.12b.

8. Once the Board verifies the voter's identity and eligibility to vote, they send an absentee or mail-in ballot package to the voter that contains: (1) the ballot; (2) a "secrecy envelope" marked with the words "Official Election Ballot"; and (3) a pre-addressed outer return envelope that contains the voter declaration. The packet also contains instructions to the voter for marking their ballot and submitting it properly. The Board maintains the date a packet is mailed to a voter.

9. Each mailing envelope includes a unique barcode that corresponds to Pennsylvania's Statewide Uniform Registry of Electors ("SURE").

10. The Pennsylvania Department of State's SURE system contains various information about each elector in the Commonwealth, and county boards of election, like the Board, are able to access the SURE system to add, modify, or delete information regarding registered voters within their own county in the system as necessary.

11. Absentee and mail-in ballot voters mark their ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer return envelope that includes a printed voter declaration. *Id.* §§ 3146.6(a) and 3150.16(a).

12. Absentee and mail-in ballot voters are required to deliver the entire package by mail or hand it to the Board, and delivery is timely if made by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c) and 3150.16(c).

II. The 2022 Election

13. The 2022 General Election will be held on Tuesday, November 8, 2022.

14. Montgomery County has been issuing absentee and mail-in ballots for the 2022 General Election to qualifying voters since September 30, 2022.

15. As of October 24, 2022, the Board has received completed absentee and mail-in ballot envelopes.

16. Montgomery County has measures in place to ensure late absentee or mail-in ballots received after 8:00 p.m. on Tuesday, November 8, 2022, are not counted.

17. Ballot envelopes are kept secure pending the pre-canvass.

III. Historical Absentee and Mail-In Ballot Information

18. Since the adoption of no-excuse mail-in voting, several thousand qualified electors in Montgomery County have cast timely ballots without a handwritten date on the exterior envelope.

19. For example, in the 2021 Primary Election, the Board received approximately 56,000 absentee and mail-in ballots. Of those ballots received, 176 did not have a handwritten date. In the 2021 General Election, the Board received approximately 72,000 absentee and mail-in ballots. Of those ballots received, 234 did not have a handwritten date. In the 2022 Primary Election the Board received approximately 64,000 absentee and mail-in ballots. Of those received 230 did not have a handwritten date. To date in the 2022 General Election the Board has received 73 ballots that do not have a handwritten date and may be subject to rejection.

20. Additionally, of those 2021 Primary Election ballots received with no handwritten date, the average age of the voters was 71. Of those 2021 General Election ballots received with no handwritten date, the average age of the voters was 70. Of those 2022 Primary Election

ballots received with either no handwritten date, the average age of the voters was 70. Of those ballots received to date in the 2022 General Election, the average age of the voters is 73.

Affiant states nothing further.

A handwritten signature in black ink, appearing to read "Lee Soltysiak".

Lee Soltysiak
Chief Clerk, Montgomery County
Board of Elections

Date: October 25, 2022

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EXHIBIT F

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IN THE SUPREME COURT OF PENNSYLVANIA

David Ball *et al.*,

Petitioners,

v.

Leigh M. Chapman *et al.*,

Respondents.

No. 102 MM 2022

AFFIDAVIT OF NICK CUSTODIO IN SUPPORT OF RESPONDENTS

COMMONWEALTH OF PENNSYLVANIA)

) SS:

COUNTY OF PHILADELPHIA)

I, Nick Custodio, make this Affidavit and state as follows:

1. I am of legal age and competent to provide this Affidavit. All the information herein is based on my own personal knowledge unless otherwise stated.

2. Since January 29, 2018, I have served as Deputy Commissioner for Philadelphia City Commissioner Lisa Deeley. I hold a B.A. in Political Science with a minor in History from the Pennsylvania State University.

3. The Philadelphia City Commissioners are three elected officials in charge of elections and voter registration for the City of Philadelphia. Each Commissioner is elected to serve a four-year term. The Commissioners set and enforce department policies to administer voter registration and conduct elections in accordance with federal and state voter registration and election laws.

4. Pursuant to the Pennsylvania Election Code and the Philadelphia Home Rule Charter, the Commissioners constitute the Board of Elections for Philadelphia County. The day-to-day operations of the Board, including much of the work describe below that is performed in preparation for elections, is conducted by the Board's employees, overseen by Executive Director Joseph Lynch, and the offices of the City Commissioners. References below to "the Board" include the work of the Board staff and offices of the City Commissioners in preparation for the election and are not limited to matters on which the three-member Board has reached a formal determination.

5. By virtue of my work as Deputy Commissioner for Commissioner Deeley, I have a thorough knowledge of Philadelphia's election procedures and administration and have firsthand knowledge of the Board's preparation for the pre-canvassing and canvassing of ballots for the general election in Philadelphia on November 8, 2022, and with prior elections going back to January 2018.

I. The 2022 Election Cycle

6. Pennsylvania voters can apply for mail-in or absentee ballots online or by paper application. When approving a mail-in or absentee ballot application, the Board determines whether the applicant is a qualified elector by verifying the proof of identification and comparing the information provided by the applicant with the

information contained in the Statewide Uniform Registry of Electors (SURE) system. 25 P.S. §§ 3146.2b, 3150.12b.

7. The Board provided mail-in and absentee ballots only to qualified voters who requested them. The Board sent mail-in and absentee ballots to these voters, along with instructions for filling out and returning the ballots using the two envelopes provided – the inner “secrecy” envelope and the outer “declaration” envelope.

8. The outer declaration envelope contains a unique barcode tied to the individual voter who requested the absentee or mail-in ballot and the election in which they requested it.

9. Voters complete their ballots, place their ballots in the provided secrecy envelope, then place the secrecy envelope containing their ballot in the provided declaration envelope. The outside of each declaration envelope had a declaration form, which voters fill out, date, and sign. Combined, these items constitute a “ballot submission.”

10. There are three general stages of the Board’s handling of absentee and mail-in ballot submissions.

11. First, mail-in and absentee ballot submissions arrive at the Board. Each outer envelope is run through a sorter which stamps it with the date and time and generates a file, based on the unique barcodes, to update the status in the

SURE system. The sorters also organize the ballots by Ward and Division to prepare for the pre-canvass and canvass and to enable the Board to update poll books as required by the Election Code. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1). The ballot submissions are then kept secure pending the pre-canvass.

12. The Board's sorting machines are not currently able to identify outer envelopes that are missing a handwritten date, much less identify outer envelopes with an "incorrect" handwritten date.

13. Second, the Board pre-canvasses and canvasses mail-in and absentee ballots. 25 P.S. § 3146.8. Pre-canvassing is "the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots." 25 P.S. § 2602 (q.1). Canvassing is "the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots." 25 P.S. § 2602(a.1).

14. The Board sets aside all ballot submissions delivered to the Board after 8 p.m. on Election Day and the ballots are not canvassed or tallied.

15. During the pre-canvass, Board workers set aside ballot submissions that are missing a handwritten date on the outer envelope.

16. Third, the Commissioners holds a public meeting to resolve ballot submissions that are set aside during the pre-canvass or canvass. Among other

things, the Commissioners vote on whether to canvass and count timely received ballot submissions from qualified voters if the outer envelope is missing a handwritten date.

17. For the 2022 General Election, the Board began issuing absentee and mail-in ballots to qualifying voters on October 10, 2022. The Board has issued approximately 150,000 absentee and mail-in ballots, of which approximately 60,000 have already been returned to the Board.

II. Historical Absentee and Mail-In Ballot Information

18. Since the adoption of no-excuse mail-in voting, several thousand qualified electors have cast timely ballots without a handwritten date on the outer envelope.

19. For example, in the 2020 General Election, the Board counted approximately 375,000 absentee and mail-in ballots. Of these, approximately 1,259 were timely ballots from qualified electors that were only missing the handwritten date on the outer envelope. *See* Transcript of Meeting of the Commissioners at 7:14-8:8 (Nov. 9, 2020).¹

20. In the May 2021 Primary Election, the Board counted approximately 62,000 absentee and mail-in ballots. In that same election, the Board received 1,319 timely ballots from qualified electors that were only missing the handwritten

¹ https://vote.phila.gov/files/announcements/MeetingTranscripts/11920_Meeting_Transcript.pdf.

I affirm that the statements set forth in this Affidavit are true to the best of my knowledge and belief. I understand that the statements are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: October 25, 2022



Nick Custodio
Deputy Commissioner

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