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102 MM 2022

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
(See back of cover for list of County Respondents),

Respondents.

PETITIONERS' BRIEF

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

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Respondents/Appellants.

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STATEMENT OF JURISDICTION

The Court has exercised King's Bench authority over this matter. *See* Order of October 21, 2022. Accordingly, the Court has invoked "a swift process and remedy appropriate to the exigencies," *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014), of reiterating that the General Assembly's date requirement for absentee and mail-in ballots is mandatory such that election officials may not pre-canvass, canvass, or count any noncompliant ballot in the 2022 general election and beyond, *see* 25 P.S. §§ 3146.6(a), 3150.16(a); *see also See In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1079–80 (2020) (Opinion of Justice Wecht); *id.* at 1090–91 (Opinion of Justices Dougherty, Saylor, and Mundy) (*In re 2020 Canvass*).

ORDER OR OTHER DETERMINATION IN QUESTION

No dispute is pending in a lower court. *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884 (Pa. 2020); *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015). Instead, this matter presents the question of the proper interpretation of 25 P.S. §§ 3146.6(a) and 3150.16(a), where the General Assembly has mandated that a voter who chooses to vote via absentee or mail-in ballot "shall . . . fill out, date and sign the declaration" printed on the outer envelope of the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a).

SCOPE OF REVIEW AND STANDARD OF REVIEW

Each of the issues to be addressed by the Court "presents a pure question of law, over which our standard of review is *de novo* and our scope of review is plenary." *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 355 (Pa. 2020) (citing *In re Vencil*, 152 A.3d 235, 241 (Pa. 2017)).

STATEMENT OF THE QUESTIONS INVOLVED

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

SUGGESTED ANSWER: Yes.

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

SUGGESTED ANSWER: Yes.

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: No.

STATEMENT OF THE CASE

The General Assembly has mandated that a voter who uses an absentee or mail-in ballot "shall . . . fill out, date and sign the declaration" printed on the outer

envelope of the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a). A majority of this Court has already held that any absentee or mail-in ballot that does not comply with the General Assembly's date requirement is invalid and cannot be counted in any election after the 2020 general election. *See In re 2020 Canvass*, 241 A.3d at 1079–80 (Opinion of Justice Wecht); *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy).

In the first two cases after *In re 2020 Canvass*, the Commonwealth Court adhered to the majority's construction of the date requirement and denied requests to count undated absentee or mail-in ballots. On both occasions, this Court allowed the Commonwealth Court's decisions to stand. *See In re Election in Region 4 for Downington Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Commw. 2022) (unpublished), *appeal denied*, 273 A.3d 508 (Pa. 2022); *Ritter v. Lehigh Cnty. Bd. of Elecs.*, 272 A.3d 989 (Pa. Commw. 2022) (unpublished), *appeal denied* 271 A.3d 1285 (Pa. 2022).

Four days after this Court resolved *Ritter*, individual voters filed a new lawsuit in federal court claiming that Pennsylvania's date requirement violates federal law. A panel of the Third Circuit held that application of the date requirement to preclude counting of undated ballots somehow violates the federal materiality statute, which regulates how election officials determine whether an "individual is qualified under State law to vote." 52 U.S.C. § 10101(2)(B). The U.S. Supreme Court vacated that

holding earlier this month. *See Migliori v. Cohen*, No. 22-1499 (3d Cir. May 27, 2022), *cert. granted and judgment vacated*, *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.). And when addressing a request for a stay at an earlier stage in that case, three Justices opined that the Third Circuit's now-vacated holding is "very likely wrong" on the merits because it rested upon a misconstruction of the materiality provision. *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Mem.) (Alito, J., dissenting from the denial of the application for stay).

Meanwhile, the Commonwealth Court twice has invoked the now-vacated decision in *Migliori* to depart from the General Assembly's date requirement and the majority's construction in unpublished, non-precedential cases arising out of the 2022 primary election. *See McCormick for U.S. Senate v. Chapman*, 2022 WL 2900112 (Pa. Commw. June 2, 2022) (unpublished); *Chapman v. Berks County Bd. of Elecs.*, 2022 WL 4100998, *6 (Pa. Commw. Aug. 19, 2022) (unpublished). In those cases, the Commonwealth Court held that treating the date requirement as mandatory violates state law and the federal materiality provision. *See McCormick*, 2022 WL 2900112 at *10-*14; *Chapman*, 2022 WL 4100998 at *13-*25.

Following the U.S. Supreme Court's vacatur of *Migliori*, the Acting Secretary of the Commonwealth doubled down on guidance that purports to direct county boards of elections to "include[] in the canvass and pre-canvass . . . [a]ny ballot-return envelope that is undated or dated with an incorrect date but has been timely

received." Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (Sept. 26, 2022), available at https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-3.0.pdf. That guidance rests on the two non-precedential Commonwealth Court decisions issued earlier this year. *See Acting Secretary of State Issues Statement on SCOTUS Order on Undated Mail Ballots* (Oct. 11, 2022), available at https://www.media.pa.gov/pages/state-details.aspx?newsid=536. On the very day that the U.S. Supreme Court vacated *Migliori*, the Acting Secretary stated that "every county is expected to include undated ballots in their official returns for the Nov. 8 election, consistent with the Department of State's guidance." *Id.*

The Acting Secretary's guidance is particularly odd, however, given that her own website advises the public that "[i]f you do not complete the declaration on the return envelope" of an absentee or mail-in ballot, "your ballot will not be counted." *See* Mail-In and Absentee Voting, https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx. County boards of elections have likewise informed voters that their ballots "will not be counted" if they do not comply with the date requirement. *See, e.g.*, Philadelphia County Voter Declaration ("YOUR BALLOT WILL NOT BE COUNTED UNLESS . . . [y]ou sign and date the voter's declaration in your own handwriting"), a copy of which is attached to the

Application as Ex. C. And as two of its three commissioners have confirmed, the Butler County Board of Elections "will not include in the pre-canvass or canvass any ballot-return envelope that is undated or dated with an incorrect date absent an order of the Pennsylvania Supreme Court to the contrary." Declaration of Leslie A. Osche ¶ 8, a copy of which is attached as Ex. A; Declaration of Kimberly D. Geyer ¶ 8, a copy of which is attached as Ex. B.

Thus, the Acting Secretary disagrees with the conclusion of the majority of this Court that the General Assembly's date requirement is mandatory and valid, as well as with the statement on her own website and the instructions of county boards of elections that a noncompliant ballot will not be counted. But before this Court, the Acting Secretary reiterates her agreement that the General Assembly's signature requirement for absentee and mail-in ballots is mandatory under state law and valid under federal law. *See* Acting Sec'y Ans. 15-23. The date and signature requirements, of course, appear in the same sentence of §§ 3146.6(a) and 3150.16(a) and form part of the same declaration on an absentee or mail-in ballot. *See also* 25 P.S. § 3146.6(a) (voter "shall . . . fill out, date and sign the declaration"); *id.* § 3150.16(a) (same). The Acting Secretary makes no effort to reconcile her apparent position that the General Assembly's *single* use of the term "shall" in that sentence

conveys *two* different meanings: a mandatory and valid meaning for the signature requirement and a directory or invalid meaning for the date requirement.

Petitioners are Pennsylvania voters and political party committees that support and seek to uphold free and fair elections on behalf of all Pennsylvanians. Petitioners therefore ask the Court to reiterate that the General Assembly's date requirement—like its signature requirement in the same statutory sentence and its secrecy-envelope and delivery requirements in the same statutory paragraphs, *see id.* §§ 3146.6(a), 3150.16(a)—is mandatory such that election officials may not pre-canvass, canvass, or count a noncompliant absentee or mail-in ballot. *See* Acting Sec'y Ans. 15-23 (conceding that signature requirement is mandatory and valid); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231-32 (Pa. 2004) ("*Appeal of Pierce*") (holding that delivery requirement in § 3146.6(a) is mandatory); *Pa. Dem. Party*, 238 A.3d at 379–80 (holding that secrecy-envelope requirement in § 3150.16(a) is mandatory).

In particular, Petitioners ask the Court to enter an order declaring that county boards of elections may not pre-canvass, canvass, or count any absentee or mail-in ballot that is undated or contains a facially incorrect date and that the Acting Secretary's contrary guidance is invalid. In the alternative, and at a minimum, Petitioners ask the Court to direct county boards of elections to segregate any undated or incorrectly dated absentee or mail-in ballots received in connection with

the 2022 general election. A ballot has a "facially incorrect" date or is "incorrectly dated" under the order Petitioners seek when the date provided on the declaration falls outside the period between (i) the date on which election officials mailed the absentee or mail-in ballot to the individual and (ii) the date on which officials received the completed ballot from the individual. *See* 25 P.S. §§ 3146.5, 3150.15.

SUMMARY OF THE ARGUMENT

The Court should declare that the General Assembly's date requirement is mandatory and that the Acting Secretary's guidance is unlawful before the pre-canvass and canvass of absentee and mail-in ballots begins on Election Day, November 8, 2022. *See* 25 P.S. § 3146.8. The validity of undated absentee and mail-in ballots already led to costly and unnecessary post-election lawsuits after the 2021 election and again after the 2022 primary election. *See In re Election in Region 4 for Downington Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993, *appeal denied*, 273 A.3d 508; *Ritter*, 272 A.3d 989, *appeal denied* 271 A.3d 1285 (Pa. 2022); *McCormick*, 2022 WL 2900112; *Chapman*, 2022 WL 4100998. Moreover, the issue "could well affect the outcome of the fall elections" in which Petitioners seek to exercise their constitutional rights to vote and to participate. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from the denial of the application for stay). And the available information suggests that, absent an order from this Court, county boards of elections across the Commonwealth may take different approaches to whether,

and how, to count absentee or mail-in ballots that do not comply with the date requirement.

Thus, while the General Assembly has made the date requirement clear and explicit in the Election Code, the actions of other courts, the Acting Secretary, and some county boards of elections have generated a lack of clarity and transparency. Those actions may also result in unequal treatment of otherwise identical ballots based upon the county in which the voter resides. In particular, the Butler County Board of Elections and perhaps some county boards of elections will follow the plain statutory text, the Acting Secretary's website, and their own instructions to voters and decline to count an undated or incorrectly dated absentee or mail-in ballot. *See* Declaration of Leslie A. Osche ¶ 8, a copy of which is attached as Ex. A; Declaration of Kimberly D. Geyer ¶ 8, a copy of which is attached as Ex. B. On the other hand, other county boards may choose to follow the Acting Secretary's guidance and to count any undated or incorrectly dated ballot.

Any counting of ballots that the General Assembly has declared invalid—and the lack of statewide uniformity in the treatment of undated or incorrectly dated ballots—are eroding public trust and confidence in the integrity of Pennsylvania's elections at a vital moment in the Nation's and the Commonwealth's history. The Court's timely entry of the order Petitioners request will promote "[c]onfidence in the integrity of our electoral process," facilitate "the functioning of our participatory

democracy," and eliminate the "consequent incentive to remain away from the polls" that the current state of affairs creates. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

ARGUMENT

"States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin City Area New Party*, 520 U.S. 351, 358 (1997). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *see also Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2347-48 (2021) (because voter "[f]raud is a real risk," a state may act prophylactically to prevent fraud "without waiting for it to occur and be detected within its own borders").

The General Assembly has prescribed such a regulation through the date requirement, which directs that an absentee or mail-in voter "shall . . . fill out, date and sign the declaration" printed on the outer envelope of the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a). A majority of this Court already has held that the date requirement is mandatory such that election officials may not pre-canvass, canvass, or count any ballot that does not comply with it. *See In re 2020 Canvass*, 241 A.3d at 1079 (Opinion of Justice Wecht); *id.* at 1090 (Opinion of Justice Dougherty, Chief

Justice Saylor, and Justice Mundy). Moreover, the narrow federal materiality provision does not preempt the date requirement because mandatory application of that requirement does not "deny the right of any individual to vote" or result in a "determin[ation] whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B).

Petitioners have standing to seek an order from this Court reiterating that the date requirement is mandatory and that election officials may not pre-canvass, canvass, or count any absentee or mail-in ballot that fails to comply with it. The Republican Committees have "substantial," "direct," and "immediate" interests in protecting their statutory right to appoint effective poll watchers and pre-canvass and canvass observers, in educating Republican voters, and in maintaining the structure of the competitive environment in which their voters vote and their candidates seek election. *In re T.J.*, 739 A.2d 478, 481 (Pa. 1999); *Pa. Dem. Party*, 238 A.3d at 352 (resolving on the merits an appeal regarding the proper interpretation of the Election Code brought by "[t]he Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates"). The Voter Petitioners have standing based upon "the right to vote and the right to have one's vote counted," *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994 (Pa. 2002), as well as their interest in knowing the rules applicable to the casting and counting of their ballots, *see* 42 P.S. § 7533. The Court should enter an order upholding

mandatory application of the date requirement and precluding election officials from pre-canvassing, canvassing, and counting any absentee or mail-in ballot that does not comply with it.

I. PETITIONERS HAVE STANDING TO BRING THIS ACTION.

Two years ago, this Court resolved on the merits an appeal regarding the proper interpretation of the Election Code brought by "[t]he Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates." *Pa. Dem. Party*, 238 A.3d at 352. The Court should follow suit here because Petitioners have standing to bring this action and to secure relief from this Court.

A party has standing where it has "1) a substantial interest in the subject matter of the litigation; 2) [its] interest [is] direct; and 3) [its] interest [is] immediate and not a remote consequence of the action." *In re T.J.*, 739 A.2d at 481. An organization may establish standing in its own right when it suffers a concrete injury to its own cognizable interest as a result of the complained-of conduct. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 308 (3d Cir. 2014). Individual voters also have standing to protect "the right to vote and the right to have one's vote counted." *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994 (Pa. 2002). The Court

has jurisdiction to resolve any issue presented by at least one party with "standing to assert" it. *Friends of DeVito v. Wolf*, 227 A.3d 872, 893 n.12 (Pa. 2020).

Both the Republican Committee Petitioners—the Republican National Committee ("RNC"), National Republican Congressional Committee ("NRCC"), and the Republican Party of Pennsylvania ("RPP")—and the Voter Petitioners have standing to bring this action and to secure an order from this Court reiterating that the date requirement is mandatory.

A. The Republican Committees Have Standing.

The Republican Committees have standing to seek declaratory and injunctive relief upholding the date requirement on at least three bases. *First*, the Republican Committees (and in particular RPP) have standing to protect their statutory right to have "one representative . . . remain in the room in which the absentee ballots and mail-in ballots are" pre-canvassed and canvassed. 25 P.S. § 3146.8(g)(1.1)–(2).

The Republican Committees have actively exercised this right in past elections and are doing so again in the 2022 general election. In particular, the Republican Committees "devote substantial time and resources" toward training watchers on the rules for casting, canvassing, and counting ballots and "monitoring . . . the voting and vote counting process in Pennsylvania." App. 8. Such activities include monitoring whether election officials canvass and count only ballots that are

"lawful[]" under the Election Code. *Id.*; *see also* Declaration of Angela Alleman, a copy of which is attached as Ex. C.

The Republican Committees' exercise of their statutory right to monitor the pre-canvass and canvass is effective, however, only if the legal rules that govern casting, counting, and canvassing of ballots are clear. But the Commonwealth Court's rulings and the Acting Secretary's guidance departing from *In re 2020 Canvass* have purported to change the governing law. At a minimum, those actions have created a lack of clarity—and, in fact, may lead to *different* counting and canvassing practices across counties. *See, e.g.*, App. 4, 8.

If left uncorrected, these disparate approaches to the General Assembly's date requirement across the Commonwealth will harm the Republican Committees by rendering their training and monitoring activities less effective, wasting the considerable resources they have devoted to those activities, or requiring them to devote even more resources to them. *See id.* at 8; *see also* Declaration of Angela Alleman, a copy of which is attached as Ex. C. An order from this Court reiterating that the date requirement is mandatory would redress that harm. *See* App. 8; *see also* Declaration of Angela Alleman, a copy of which is attached as Ex. C. The Republican Committees therefore have a "substantial," "immediate," and "direct" interest in securing an order from this Court declaring that the date requirement is mandatory, declaring that the Acting Secretary's contrary guidance is unlawful, or

in the alternative requiring segregation of undated or incorrectly dated ballots. *See In re T.J.*, 739 A.2d at 481; *Havens Realty*, 455 U.S. at 378-79; *Blunt*, 767 F.3d at 308; *see also La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022) (holding that national and county political party committees had an interest of right to intervene in a case challenging regulation of poll watchers appointed by the committees).

Second, as part of their organizational mission to "assist[] Republican candidates" and voters, the Republican Committees "make expenditures to ensure that they and their voters understand the rules governing the election process, including applicable dates, deadlines, and requirements for voting by mail or absentee." App. 8-9. Once again, the purported change of law and lack of clarity surrounding the date requirement generated by the Commonwealth Court, the Acting Secretary, and some county boards of elections will harm the Republican Committees by rendering their voter education activities ineffective, wasting the resources they have devoted to those activities, or requiring them to devote even more resources to them. An order from the Court clarifying those rules on behalf of all Pennsylvania voters and political parties will redress that harm. This "substantial," "immediate," and "direct" interest in the Court reiterating that the date requirement is mandatory likewise suffices to confer standing. *In re T.J.*, 739 A.2d at 481; *Havens Realty*, 455 U.S. at 378-79; *Blunt*, 767 F.3d at 308.

Third, the Republican Committees have a "concrete interest" in "winning [elections]" and in preserving the "structur[e] of [the] competitive environment" in which their voters vote and their candidates vie for office. *Shays v. Fed. Elec. Comm'n*, 414 F.3d 76, 86 (D.C. Cir. 2005) (holding that a congressional candidate had standing to challenge an FEC rule on this basis). Indeed, because their supported candidates seek election or reelection "in contests governed by the" General Assembly's date requirement, the Republican Committees have an interest in "demand[ing] adherence" to those requirements and preventing changes to the "competitive environment" those rules foster. *Id.* at 85, 88.

Yet the actions of the Commonwealth Court, the Acting Secretary, and some county boards of elections purporting to erode the date requirement "fundamentally alter the environment" in which Pennsylvania's elections are conducted and in which Pennsylvanians vote. *Id.* at 86. If left uncorrected, the erosion of the General Assembly's date requirement would expose the Republican Committees' candidates to a "broader range" of putative ballots—undated and incorrectly dated ballots—than Pennsylvania law "would otherwise allow." *Id.* In fact, those actions could even "alter" the outcome of an election in which the Republican Committees' voters and supported candidates participate. *Id.*

This is no mere uncognizable "*prospect* of injury to their political interests." *Pa. Dem. Party v. Boockvar*, No. 133 MM 2020, Concurring and Dissenting

Statement at 4 (Sept. 3, 2020) (Wecht, J.) (emphasis original). The Third Circuit's misconstruction of the date requirement in *Migliori* actually *did* change the outcome of an election in which the Republican candidate had prevailed. *See* Cert. Pet. at 7-12, *Ritter v. Migliori*, No. 22-30 (U.S. July 7, 2022), https://www.supremecourt.gov/DocketPDF/22/22-30/229591/20220707140738344_Ritter%20Petition.pdf. And, as discussed, that misconstruction also spawned costly and unnecessary litigation following the May 2022 primary election. *See McCormick*, 2022 WL 2900112; *Chapman*, 2022 WL 4100998.

Finally, this Court's holding that "any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge [a] reapportionment plan," *Albert*, 790 A.2d at 995, is of no moment here. For one thing, this case is not "a challenge to [a] reapportionment plan." *Id.* For another, the Republican Committees have asserted their *own* "substantial," "immediate," and "direct" interests in this case. *In re T.J.*, 739 A.2d at 481; *Havens Realty*, 455 U.S. at 378-79; *Blunt*, 767 F.3d at 308. The Republican Committees have standing to ask the Court to uphold the date requirement and its mandatory application to noncompliant ballots. *See Pa. Dem. Party*, 238 A.3d at 352.

B. The Voter Petitioners Have Standing.

The Voter Petitioners have standing to protect "the right to vote and the right to have one's vote counted." *Albert*, 790 A.2d at 994. Indeed, those rights are of

little moment if the weight of Voter Petitioners' votes can be "debase[d] or dilute[ed]" by the counting of invalid ballots. *Bush v. Gore*, 531 U.S. 98, 105 (2000) (upholding standing to challenge unlawful counting of invalid ballots because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise"). The Voter Petitioners face precisely that injury here because "the votes [they] validly cast . . . have been and will be canceled out and diluted by the counting of undated or incorrectly dated ballots" in contravention of the General Assembly's date requirement. App. 6. The order from this Court that Petitioners seek would redress that injury. *See id.*; *Bush*, 531 U.S. at 105. Thus, the Voter Petitioners have a "substantial," "immediate," and "direct" interest sufficient to confer standing. *In re T.J.*, 739 A.2d at 481; *Albert*, 790 A.2d at 994.

Moreover, the Voter Petitioners have a "substantial," "immediate," and "direct" interest in securing an order from this Court declaring that the date requirement is mandatory and declaring that the Acting Secretary's contrary guidance is unlawful. *See In re T.J.*, 739 A.2d at 481. The Voter Petitioners have a statutory right to vote via absentee or mail-in ballot, *see* 25 P.S. §§ 3146.1, 3150.11, and the "right to vote," though widespread, "is personal," *Albert*, 790 A.3d at 994. As such, the Voter Petitioners are "person[s] . . . whose rights, status, or other legal relations are affected by a statute," and therefore also have a right under the

Declaratory Judgments Act to "have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." 42 Pa. C.S. § 7533; *see also Bayada Nurses, Inc. v. Dep't of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010) (holding that the Declaratory Judgment Act was enacted "to curb the courts' tendency to limit the availability of judicial relief to only cases where an actual wrong has been done or is imminent"). The Voter Petitioners therefore have an interest in seeking an order from the Court declaring their rights and obligations under the Election Code.

The Acting Secretary and the Philadelphia County Board of Elections challenge Petitioners' standing, *see* Acting Sec'y Ans. 40-42; Phila. Ans. 19-22, but they do not discuss the Republican Committees' interests in protecting their statutory poll-watching rights, in educating their voters, or in preventing changes to the competitive environment in which their voters vote and their candidates seek election, *see supra* Part I.A; Acting Sec'y Ans. 40-42; Phila. Ans. 19-22. Instead, they contend that the Voter Petitioners have alleged only a "generalized grievance" shared by all members of the public. Acting Sec'y Ans. 40; *see also* Phila. Ans. 19-22. But merely because the injury of vote dilution or debasement is *widespread* does not mean that it presents only an uncognizable *generalized* grievance. *See Bush*, 531 U.S. at 105.

Moreover, in all events, this Court has not foreclosed voters from raising such interests in voting cases where the personalized right to vote is at stake. After all, this Court has permitted plaintiffs to challenge entire reapportionment plans and not only the districts where those voters reside and, thus, may be affected by unconstitutional or illegal redistricting. *See Erfer v. Com.*, 794 A.2d 325, 329-330 (Pa. 2002) ("[W]e decline to find that a litigant challenging a reapportionment scheme must confine his attack to the drawing of the lines of his own district."). It is undisputed that undated and incorrectly dated absentee and mail-in ballots will be returned in every county during the 2022 general election. *See McCormick*, 2022 WL 2900112; *Chapman*, 2022 WL 4100998. Accordingly, the weight of each Voter Petitioner's vote will be "debase[d] or dilut[ed]" if the county boards in which they reside include such ballots in the canvass. *Bush*, 531 U.S. at 105. The Voter Petitioners' interest in avoiding such personalized dilution of their votes is far more "substantial," "immediate," and "direct," *In re T.J.*, 739 A.2d at 481; *Albert*, 790 A.2d at 994, than any interest in challenging district lines on the other side of the state that have no effect on the district where the plaintiff lives and votes, *see Erfer*, 794 A.2d at 329-330. The Voter Petitioners have standing.

II. THE GENERAL ASSEMBLY'S DATE REQUIREMENT IS MANDATORY AND CONSEQUENTIAL.

"The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). "When the

words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent." *Pa. Dep't of Transp. v. Weaver*, 912 A.2d 259, 264 (Pa. 2006) (quoting *Hannaberry HVAC v. Workers' Comp. App. Bd.*, 834 A.2d 524, 531 (Pa. 2003)). "[T]he letter of [a statute] is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b).

A. The Plain Meaning Of The General Assembly's Date Requirement Is Mandatory.

The General Assembly could not have been clearer: an absentee or mail-in voter "*shall* . . . fill out, date and sign the declaration" printed on the outer envelope of the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added). A majority of this Court has already concluded that the General Assembly said what it meant and meant what it said: the date requirement is unambiguous and mandatory. *See In re 2020 Canvass*, 241 A.3d at 1079 (Opinion of Justice Wecht) ("[The date] requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory."); *id.* at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy) ("[T]he meaning of the terms 'date' and 'sign' … are self-evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them."). Accordingly, election officials may not pre-canvass, canvass, or count any absentee or mail-in ballot that does not comply with the date requirement: after all, "a mandate without consequence is no mandate at all." *Id.* at

1079 (Opinion of Justice Wecht); *see also id.* at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy).

The majority's reading of the date requirement is correct—and tracks the Court's prior precedent. "[T]his Court has repeatedly recognized the unambiguous meaning of the word ['shall'] in most contexts." *Appeal of Pierce*, 843 A.2d at 1231-32. Those contexts include the Election Code, where "[t]he word 'shall' carries an imperative or mandatory meaning." *Id.*

This Court's decision in *Appeal of Pierce* confirms this result. There, the Court construed another clause of 25 P.S. § 3146.6(a)—the same statutory provision that imposes the date requirement for absentee ballots. *See* 25 P.S. § 3146.6(a). In particular, the Court addressed the requirement that "the elector shall send [his absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." *Id.*; *see also Appeal of Pierce*, 843 A.2d at 1231-32. The Court concluded that "under the statute's plain meaning, a non-disabled absentee voter has two choices: send the ballot by mail or deliver it in person. Third-person hand-delivery of absentee ballots is not permitted." *Id.* at 1231. Thus, "ballots delivered in contravention of this mandatory provision are void." *Id.* at 1234.

The Court held that its "well-settled practice of construing the Election Code liberally in favor of the right to vote" did not alter this result because that practice

does not authorize the Court to "ignore the clear mandates of the Election Code." *Id.* And construing § 3146.6(a) to be "merely directory" and to excuse noncompliance with the delivery requirement "would render the limitation [on third-party delivery] meaningless and, ultimately, absurd." *Id.* at 1232.

The Court alternatively reasoned that even if it were to conclude that the word "shall" in § 3146.6(a) were somehow "ambiguous," it still would uphold the delivery requirement as mandatory. *Id.* The Court concluded that it would do so because "there is an obvious and salutary" anti-fraud purpose "behind the limitation on delivery of the absentee ballots." *Id.*

The Court returned to the proper interpretation of the word "shall" in § 3150.16(a) in *Pennsylvania Democratic Party*. That section directs that a voter using a mail-in ballot "shall . . . enclose and securely seal" the ballot in a secrecy envelope. 25 P.S. § 3150.16(a). Section 3146.6(a) contains an identical directive for a voter using an absentee ballot. *See id.* § 3146.6(a). Relying on *Appeal of Pierce*, the Court held that the General Assembly's use of "shall" in the secrecy-envelope requirement "is mandatory and that the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid." *Pa. Dem. Party*, 238 A.3d at 379–80.

Before this Court, the Acting Secretary agrees that the General Assembly's directive that a voter "shall . . . sign the declaration," 25 P.S. §§ 3146.6(a),

3150.16(a), is mandatory and valid, *see* Acting Sec'y Ans. 15-23. The signature requirement appears in the same sentence in §§ 3146.6(a) and 3150.16(a)—and uses the same "shall"—as the date requirement, *see* 25 P.S. § 3146.6(a) (voter "shall . . . fill out, date and sign the declaration"); *id.* § 3150.16(a) (same).

Appeal of Pierce, *Pennsylvania Democratic Party*, and the Acting Secretary's own position underscore that the majority's reading of the date requirement in *In re 2020 Canvass* was correct. The word "shall" in § 3146.6.(a) and the parallel statute modeled upon it, § 3150.16(a), is unambiguous and mandatory. *See* 25 P.S. §§ 3146.6(a), 3150.16(a); *Appeal of Pierce*, 843 A.2d at 1231-32; *Pa. Dem. Party*, 238 A.3d at 379–80. It forecloses election officials from pre-canvassing, canvassing, or counting an absentee or mail-in ballot that does not comply with those sections' requirements, including the date requirement. *In re 2020 Canvass*, 241 A.3d at 1079 (Opinion of Justice Wecht); *id.* at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see also Appeal of Pierce*, 843 A.2d at 1231-32; *Pa. Dem. Party*, 238 A.3d at 379–80. Indeed, casting an undated or incorrectly dated absentee or mail-in ballot is "not permitted" by §§ 3146.6(a) and 3150.16(a), and "there is nothing to suggest that an absentee [or mail-in] voter has a choice between whether" she may comply with the date requirement. *Appeal of Pierce*, 843 A.2d at 1231, 1232. Any ballot that does not comply with the date requirement is "void"

and may not be pre-canvassed, canvassed, or counted. *Id.* at 1234; *Pa. Dem. Party*, 238 A.3d at 379–80.

The unambiguous meaning of the word "shall" in §§ 3146.6(a) and 3150.16(a) is the end of the matter. *See In re 2020 Canvass*, 241 A.3d at 1079 (Opinion of Justice Wecht); *id.* at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy). Indeed, as Justice Wecht explained in 2020, this Court should not "peer behind the curtain of mandatory statutory language in search of some unspoken directory intent." *Id.* at 1080 (Opinion of Justice Wecht). To the contrary, "[a] court's only 'goal' should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said*." *Id.* at 1082 (Opinion of Justice Wecht) (emphasis original).

Moreover, construing the General Assembly's use of the "shall" in the date requirement to be merely directory and to permit pre-canvassing, canvassing, and counting of a noncompliant ballot "would render [the date requirement's] limitation meaningless." *Appeal of Pierce*, 843 A.2d at 1232. After all, there would have been no reason for the General Assembly to prescribe the date requirement if noncompliance were inconsequential. *See id.*; *see also In re 2020 Canvass*, 241 A.3d at 1079 (Opinion of Justice Wecht) ("a mandate without consequence is no mandate at all"); *Pa. Dem. Party*, 238 A.3d at 380 ("violations of the mandatory

statutory provisions that pertain to integral aspects of the election process should not be invalidated sub silentio for want of a detailed enumeration of consequences").

And it would be particularly "absurd," *Appeal of Pierce*, 843 A.2d at 1232, to construe "shall" as directory in the date requirement because the Court *already* has held that "shall" is mandatory in the delivery requirement and the secrecy-envelope requirement contained *in the exact same statutory provision*, § 3146.6(a). *See Appeal of Pierce*, 843 A.2d at 1231-32; *Pa. Dem. Party*, 238 A.3d at 379–80. Thus, construing the date requirement as directory would require the conclusion that the General Assembly assigned two different meanings to the word "shall"—one directory and one mandatory—in consecutive sentences of the same paragraph. *See* 25 P.S. §§ 3146.6(a), 3150.16 (prescribing the date requirement and the delivery requirement in consecutive sentences and the secrecy-envelope requirement in the same paragraph). If for some reason that is not enough, the Acting Secretary's position requires the conclusion that the General Assembly's *single use of the word "shall" in one sentence conveys two different meanings*: a mandatory and valid meaning for the signature requirement and a directory or invalid meaning for the date requirement. *See* 25 P.S. § 3146.6(a) (voter "shall . . . fill out, date and sign the declaration"); *id.* § 3150.16(a) (same); Acting Sec'y Ans. 15-23. Merely to point out these absurdities is to foreclose the conclusion that the date requirement is directory rather than mandatory.

In all events, even if the Court were to conclude that the meaning of "shall" in the date requirement is "ambiguous," it still should uphold that requirement as mandatory such that a noncompliant ballot may not be pre-canvassed, canvassed, or counted. *Appeal of Pierce*, 843 A.2d at 1232. The date requirement serves several "obvious and salutary" goals, *id.*, and has an "unquestionable purpose," *In re 2020 Canvass*, 241 A.3d at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy) (citing then-Judge Brobson's "observ[ations] below"). The date "provides proof of when the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at the polling place." *Id.* It "establishes a point in time against which to measure the elector's eligibility to cast the ballot." *Id.* And it "ensures the elector completed the ballot within the proper time frame and prevents tabulation of potentially fraudulent back-dated votes." *Id.* at 1091; *see also id.* at 1087 (Opinion of Justice Wecht) ("colorable arguments also suggest [the] importance" of the date requirement).

These are no mere theoretical interests. Earlier this year, officials in Lancaster County discovered that an individual had cast a fraudulent ballot in her deceased mother's name. At least one piece of crucial evidence was the fact that the date provided on the outer envelope was April 26, 2022, twelve days *after* the mother had passed away. *See* Affidavit of Probable Cause ¶ 2, Police Criminal Complaint, *Com. v. Mihaliak*, No. CR-126-22 (June 3, 2002), a copy of which is attached to Petitioners'

Application as Ex. F; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194 (2008) (U.S. Supreme Court upholding Indiana's photo ID requirement even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history."); *Brnovich*, 141 S. Ct. at 2348 (U.S. Supreme Court upholding Arizona's mail ballot harvesting ban without "evidence that fraud in connection with early ballots has occurred in Arizona" because "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders").

Finally, any state judicial or administrative construction—such as the construction adopted by the Commonwealth Court and the Acting Secretary this year—that fails to uphold the date requirement's plain and mandatory meaning for federal elections violates the Elections Clause of the U.S. Constitution. The Elections Clause directs: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections," including related to "counting of votes." *Smiley v. Holm*, 285 U.S. 355, 366 (Pa. 1932).

Thus, the Clause "delegate[s] to" state *legislatures*—but not any other organ of state government—the "authority to regulate election to" federal offices created by the Constitution. *Cook v. Gralike*, 531 U.S. 510, 522 (2010); *see also Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from the denial of certiorari) ("the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections[.]") (emphasis added). As Justice Alito observed, the "Clause could have said that these rules are to be prescribed 'by each State,' which would have left it up to each State to decide which branch, component, or officer of the state government should exercise that power, as States are generally free to allocate state power as they choose." *Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). "But that is not what the Elections Clause says. Its language specifies a particular organ of a state government, and we must take that language seriously." *Id.*; *see also Hawke v. Smith*, 253 U.S. 221, 227 (1920) (affirming that "legislature" means the "representative body which made the laws of the people"); *Smiley*, 285 U.S. at 365 (same).

Accordingly, state courts and executive branch officers wield no authority to regulate federal elections and may not deploy broad and amorphous state constitutional provisions to rewrite state laws governing those elections. *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1; *Smiley*, 285 U.S. at 366; *Republican Party of Pa.*, 141

S. Ct. at 733 (Thomas, J., dissenting from the denial of certiorari); *Moore*, 142 S. Ct. at 1090 (Alito, J., dissenting from the denial of application for stay). Thus, neither the Commonwealth Court, the Acting Secretary, nor this Court may erode, much less set aside, the General Assembly's mandatory date requirement as applied to federal elections. The Court should uphold the date requirement.

B. There Is No Basis To Treat The Date Requirement As Directory And Inconsequential.

The three-justice *In re 2020 Canvass* plurality, the Commonwealth Court in its two decisions earlier this year, and Respondents here offer eight main arguments in support of their position that the date requirement's use of "shall"—unique among sentences in §§ 3146.6(a) and 3150.16(a)—is directory and inconsequential rather than mandatory. Each of those arguments fails.

First, the *In re 2020 Canvass* plurality, the Commonwealth Court, and the Acting Secretary reason that failure to comply with the date requirement is a "minor irregularity" and that the General Assembly's date requirement does not represent "weighty interests." *In re 2020 Canvass*, 241 A.3d at 1071-73, 1076-79 (plurality op.); *McCormick*, 2022 WL 2900112, at *12–14; *Chapman*, 2022 WL 4100998, 22-24; Acting Sec'y Ans. 22. This reasoning is legally and factually flawed. On the law, while this Court has applied the "minor irregularities"/"weighty interests" approach to statutory construction in some prior cases construing the Election Code, it did not even mention that approach in *Appeal of Pierce*, where it held that the

General Assembly's use of "shall" in the delivery requirement is mandatory and consequential. *See Appeal of Pierce*, 843 A.2d at 1231-32. Moreover, the Court's 2020 decision in *Pennsylvania Democratic Party* further "called" the approach "into question." *In re 2020 Canvass*, 241 A.3d at 1085 (Opinion of Justice Wecht).

It is easy to see why. The "minor irregularities"/"weighty interests" approach first arose in *Appeal of Weiskerger*, a case involving the color of ink used to complete a ballot. *See* 290 A.2d 108 (Pa. 1972). But that case's approach to statutory construction is no longer good law because it pre-dated "enactment of the Statutory Construction Act, which dictates that legislative intent is to be considered only when a statute is ambiguous." *Appeal of Pierce*, 843 A.2d at 1231; *see* 1 Pa. C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

Moreover, as Justice Wecht has explained, the "minor irregularities"/"weighty interests" approach is unworkable. *See In re 2020 Canvass*, 241 A.3d at 1082-86 (Opinion of Justice Wecht). The approach "signal[s] (and implicitly bless[es]) the substitution of judicial appraisals for legislative judgments." *Id.* at 1086. It thus requires the Court to assess the General Assembly's every use of "shall" "*de novo*" through a judicial "balancing test" of whether such use is sufficiently "obvious" to satisfy the Court that the requirement it conveys is "weighty" enough to preclude dismissing noncompliance as a "minor irregularity."

Id. In other words, that approach "requires the court to referee a tug of war in which unambiguous statutory language serves as the rope." *Id.* at 1087.

Unsurprisingly, then, the *Weiskerger* Court "found itself awash in language so slippery as to defy consistent application." *Id.* at 1082 (Opinion of Justice Wecht). The *Weiskerger* Court engaged in this exercise on the view that its "goal must be to enfranchise and not to disenfranchise" when, in fact, "[a] court's only 'goal' should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said*." *Id.*

In other words, "[t]he only practical and principled alternative" to the policy-bound "minor irregularities"/"weighty interests" approach is for the Court "to read 'shall' as mandatory." *Id.* at 1087. "Only by doing so may we restore to the legislature the onus for making policy judgments about what requirements are necessary to ensure the security of our elections against fraud and avoid inconsistent application of the law." *Id.*; *see also id.* (agreeing with then-Judge Brobson); *see also id.* at 1090-91 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy).

In all events, even if the "minor irregularities"/"weighty interests" approach to statutory construction remained tenable, it cannot support treating the date requirement as directory and inconsequential on the facts here. That is because the

date requirement *does* serve weighty interests and an "unquestionable purpose." *In re 2020 Canvass*, 241 A.3d at 1090 (Opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy); *see also id.* at 1087 (Opinion of Justice Wecht) ("colorable arguments also suggest [the] importance" of the date requirement); Affidavit of Probable Cause ¶ 2, Police Criminal Complaint, *Com. v. Mihaliak*, No. CR-126-22 (June 3, 2002), a copy of which is attached to Petitioners' Application as Ex. F; *supra* pp. 27–28.

Second, the Commonwealth Court pointed to the Free and Equal Elections Clause, PA. CONST. art. I, § 5, for the proposition that "the Election Code should be liberally construed so as not to deprive electors of their right to elect the candidate of their choice." *McCormick*, 2022 WL 2900112, at *13–14; *see also Chapman*, 2022 WL 4100998, at *13–25. The *In re 2020 Canvass* plurality, the Acting Secretary, and the Philadelphia County Board of Elections likewise invoke this notion of "liberal" construction of the Election Code. *In re 2020 Canvass*, 241 A.3d at 1062; Acting Sec'y Ans. 29-35; Phila. Ans. 28. But as the Court declared in *Appeal of Pierce*, any such liberal construction rule cannot allow the Court to "ignore the clear mandates of the Election Code." *Appeal of Pierce*, 843 A.2d at 1231 (citing *In re Nomination Pet. of Gallagher*, 359 A.2d 791, 792 (Pa. 1976) ("[W]e cannot permit a resort to sophistry in an effort to avoid the clear mandates of the Election Code.")). Moreover, of course, the Free and Equal Elections Clause and any rules

of construction it requires were before this Court in 2020, when the majority concluded that the date requirement is mandatory such that non-compliant ballots may not be counted. *See In re 2020 Canvass*, 241 A.3d at 1079–87 (Opinion of Justice Wecht); *id*. at 1090–91 (Opinion of Justices Dougherty, Saylor, and Mundy). And, as explained above, the Elections Clause of the U.S. Constitution forecloses state courts and the Acting Secretary from wielding the Free and Fair Elections Clause, state rules of statutory construction, or any other provision of state law to rewrite the General Assembly's date requirement for federal elections. *See supra* Part II.A.

Third, the Commonwealth Court noted that the majority in *In re 2020 Canvass* did not expressly address a case where "ballots that had exterior envelopes with incorrect dates were counted and included in the election totals." *McCormick*, 2022 WL 2900112, at *14; *see also Chapman*, 2022 WL 4100998, *24. The Commonwealth Court, however, nowhere explains how the fact that the different category of incorrectly dated ballots was not raised somehow erodes the General Assembly's clear mandate and the majority's reading of the date requirement. *See McCormick*, 2022 WL 2900112, at *14; *see also Chapman*, 2022 WL 4100998, at *24. Nor could it, since the majority's reading broadly supports the General Assembly's date requirement in all applications, not merely as applied to some scenarios. *See In re 2020 Canvass*, 241 A.3d at 1079–87 (Opinion of Justice Wecht);

id. at 1090–91 (Opinion of Justices Dougherty, Saylor, and Mundy). And, in all events, that putative distinction is irrelevant here, where no ballots have yet been included in any election totals and Petitioners seek a declaration that any undated or incorrectly dated ballot is invalid and may not be counted.

Fourth, the Commonwealth Court, the Acting Secretary, and the Philadelphia County Board of Elections argue that the General Assembly's use of "shall" is insufficient to confer mandatory and consequential meaning on the date requirement because other provisions of the Election Code use "shall" to specify that "invalidation" of the ballot "is the consequence of not meeting [other] requirements." *Chapman*, 2022 WL 4100998, at *14; Acting Sec'y Ans. 26-27; Phila. Ans. 26-27. As examples, the Commonwealth Court and the Acting Secretary point to provisions specifying that any ballot in a secrecy envelope with identifying marks "shall be set aside and declared void," that ballots of voters who fail timely to provide identification "shall not be counted," and that ballots of electors who died before election day "shall be rejected." 25 P.S. § 3146.8(d), (g)(4)(ii), (h); *see Chapman*, 2022 WL 4100998, at *14; Acting Sec'y Ans. 27.

But there is no requirement that the General Assembly (redundantly) specify the *consequences* of noncompliance in order to make a rule *mandatory*. *See In re 2020 Canvass*, 241 A.3d at 1079 (Opinion of Justice Wecht) ("[A] mandate without consequence is no mandate at all."). Respondents' proposed rule of statutory

construction is invented out of whole cloth. As the Court has stated, "violations of the mandatory statutory provisions that pertain to integral aspects of the election process should not be invalidated sub silentio for want of a detailed enumeration of consequences." *Pa. Dem. Party*, 238 A.3d at 380. Indeed, the delivery requirement in § 3146.6(a) does not specify the consequences for noncompliance, *see* 25 P.S. §§ 3146.6(a), 3150.16(a), but this Court upheld that requirement as mandatory and consequential in *Appeal of Pierce*. *See* 843 A.2d at 1231. Nor does the Election Code specify that absentee or mail-in ballots *lacking* a secrecy envelope (as opposed to those whose secrecy envelope contains identifying marks) are invalid, *see* 25 P.S. § 3146.8(g)(4)(ii), yet this Court held that the failure to include a secrecy envelope requires invalidation of an absentee or mail-in ballot in *Pennsylvania Democratic Party*, *see* 238 A.3d at 374–80.

The General Assembly reiterated the date requirement for absentee ballots in § 3146.6(a) and extended it to the new category of mail-in ballots in § 3150.16(a) when it enacted Act 77 in 2019, after the Court's 2004 decision in *Appeal of Pierce*. It simply makes no sense to hold that the General Assembly was obligated to specify the consequences of noncompliance in order to make the date requirement mandatory after *Appeal of Pierce* disproved that any such obligation exists.

Fifth, the Acting Secretary recites the history of the date requirement for absentee ballots and suggests that the requirement is no longer mandatory because

the General Assembly removed language specifying the consequences for noncompliance in 1968. *See* Acting Sec'y Ans. 17-22. But the Acting Secretary's resort to the "former law," 1 Pa. C.S. § 1921(c)(5) (cited at Acting Sec'y Ans. 17), is misplaced because the words of the current date requirement in §§ 3146.6(a) and 3150.16(a) "are clear[,] free from all ambiguity," and "explicit," 1 Pa. C.S. §§ 1921(b), (c). Moreover, as explained, this Court upheld the delivery requirement as mandatory in *Appeal of Pierce* even though that requirement does not specify the consequences of noncompliance. *See* 843 A.2d at 1231. The General Assembly therefore could not have been obligated—let alone *known* it was obligated—to specify such consequences when it reiterated the date requirement for absentee ballots and extended the requirement to mail-in ballots 15 years later in Act 77. The Court should decline the Acting Secretary's invitation to hold otherwise.

Sixth, the Commonwealth Court and the Acting Secretary mention 25 P.S. §§ 3055(a) and (d), which provide that an elector "shall . . . draw the curtain or shut the screen or door" to prepare his ballot, and that "the elector shall fold his ballot" before leaving the voting booth. *See Chapman*, 2022 WL 4100998, at *14; Acting Sec'y Ans. 26–27. According to the Commonwealth Court, "[t]oday, many voting booths do not have curtains or a door, and if paper ballots are used, they are not folded so they can be accepted into a voting machine." *Chapman*, 2022 WL 4100998, at *14. Because "no one would reasonably argue that these ballots should

not be counted for these reasons," the Commonwealth Court and the Acting Secretary make the quantum leap to the conclusion that the word "shall" should not be given its plain and mandatory meaning in the date requirement. *Id.*

At most, however, that intervening developments have made it impossible to comply with the "artifacts of prior voting regimes," Acting Sec'y Ans. 23 n.10, embodied in the curtain and folding requirements means that *those* requirements are no longer mandatory. But it says absolutely nothing about whether the date requirement—which *remains* possible to comply with—is mandatory and consequential. The Commonwealth Court's and the Acting Secretary's strained effort to read "shall" out of the date requirement fails.

Seventh, the *In re 2020 Canvass* plurality, the Commonwealth Court, the Acting Secretary, and the Philadelphia County Board of Elections again attempt to change the subject, pointing to a different provision of the Election Code, 25 P.S. § 3146.8(g)(3), which directs election officials to determine "that the declaration" on the absentee or mail-in ballot return envelope "is sufficient." 25 P.S. § 3146.8(g)(3); *see also In re 2020 Canvass*, 241 A.3d at 1076-78; *Chapman*, 2022 WL 4100998, at *13-*20; Acting Sec'y Ans. 15-23; Phila. Ans. 23-26. The *In re 2020 Canvass* plurality determined that this provision renders the date requirement directory rather than mandatory because, in its view, a county board of elections may determine "that a signed but undated declaration is sufficient." *In re 2020 Canvass*,

241 A.3d at 1078; *see also Chapman*, 2022 WL 4100998, at *13-*20; Acting Sec'y Ans. 15-23; Phila. Ans. 23-26.

This position is untenable. For starters, the *In re 2020 Canvass* plurality does not consistently embrace the notion that the general "sufficien[cy]" statute trumps the specific date requirement in §§ 3146.6(a) and 3150.16(a). After all, the plurality held that the voter's signature is necessary to make the declaration sufficient—and the signature requirement is part of the same sentence as the date requirement in §§ 3146.6(a) and 3150.16(a). *See In re 2020 Canvass*, 241 A.3d at 1076-78; *see also Chapman*, 2022 WL 4100998, at *19-*20; Acting Sec'y Ans. 15-23. Moreover, to the extent there is any "conflict" between the "general" sufficiency "provision" and the "specific" date "provision," the Court must construe them to give "effect . . . to both" or apply the specific over the general. 1 Pa. C.S. § 1933. It can do so by holding that the date requirement is mandatory and, thus, that the presence of a facially correct date is necessary to make a declaration "sufficient." 25 P.S. § 3146.8(g)(3).

In addition, the *In re 2020 Canvass* plurality's suggestion that county election officials or this Court can read the sufficiency provision to render the date requirement directory and inconsequential repeats the error of "substitut[ing] judicial appraisals for legislative judgments." *In re 2020 Canvass*, 241 A.3d at 1086 (Opinion of Justice Wecht). It is for the General Assembly to determine what makes

a declaration sufficient; it has done so by declaring that the date requirement is mandatory such that noncompliance on a declaration results in the ballot not being pre-canvassed, canvassed, or counted. *See id.* at 1079-87; *id.* at 1090-91 (Opinion of Justices Dougherty, Saylor, and Mundy).

Finally, the Acting Secretary expresses concern that it is too late to reiterate that the date requirement is mandatory "for the 2022 General Election" because, in her view, doing so will result in "voter confusion" and "election administrator confusion." Acting Sec'y Ans. 1, 12. Of course, the Acting Secretary harbored no such concerns when she challenged the date requirement and sought to compel county boards to change their counting practices after the 2022 primary election. *See McCormick*, 2022 WL 2900112; *Chapman*, 2022 WL 4100998.

The Acting Secretary's theory of voter confusion—that voters may be aware of the decisions in *Migliori*, *Berks*, and *McCormick*, *see* Acting Sec'y Ans. 10, 12—is dubious at best. It also ignores that any voters who have been following the litigation regarding the date requirement are *also* aware of the majority's decision in *In re Canvass* and the Supreme Court's vacatur of *Migliori*. Any such voters are entitled to a declaration of the rules applicable to their absentee or mail-in ballots. *See supra* pp. 18–19.

More to the point, voters would not be confused by this Court reiterating that the date requirement is mandatory for the simple reason that voters have been told—

including by the Acting Secretary—that the requirement *is* mandatory. If anything, voters would be more confused by the Acting Secretary's position that the date requirement is optional. The Acting Secretary's own website advises the public that "[i]f you do not complete the declaration on the return envelope" of an absentee or mail-in ballot, "your ballot will not be counted." *See* Mail-In and Absentee Voting, https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx. County boards of elections have given voters similar instructions. *See, e.g.*, Philadelphia County Voter Declaration ("YOUR BALLOT WILL NOT BE COUNTED UNLESS . . . [y]ou sign and date the voter's declaration in your own handwriting"), a copy of which is attached to the Application as Ex. C. The Acting Secretary has pointed to no instructions suggesting to voters that the date requirement is not mandatory—and she does not even address her own website stating that it is. In any event, the Acting Secretary cannot generate "voter confusion," Acting Sec'y Ans. 12, by taking inconsistent positions in her unlawful guidance and on her website, and then use that "confusion" to shield herself from a judicial order.

The Acting Secretary's theory of "election administrator confusion," Acting Sec'y Ans. 12, is belied by the fact that county election officials proved more than capable of complying with the Commonwealth Court's orders in the post-primary cases in which the Acting Secretary participated, *see McCormick*, 2022 WL 2900112; *Chapman*, 2022 WL 4100998. In fact, no county board of elections that has filed its

own answer in this matter has claimed that election officials will be confused if the Court directs them not to include undated or facially incorrectly dated ballots in the pre-canvass or canvass. *See* Phila. County Ans.; Luzerne County Ans.; Lehigh County Ans.; Bedford County Ans; *see also* Declaration of Leslie A. Osche ¶ 8, a copy of which is attached as Ex. A; Declaration of Kimberly D. Geyer ¶ 8, a copy of which is attached as Ex. B.

The equities favor granting relief now. Ordering relief before any pre-canvass or canvass begins on Election Day will promote "[c]onfidence in the integrity of our electoral process," facilitate "the functioning of our participatory democracy," and eliminate the "consequent incentive to remain away from the polls" that the current state of affairs creates. *Purcell*, 549 U.S. at 4–5; App. 5, 24-26. The Court should enter an order declaring that county boards of elections may not count any undated or incorrectly dated absentee or mail-in ballot and that the Acting Secretary's contrary guidance is invalid. In the alternative, and at a minimum, the Court should direct county boards of elections to segregate and not to count any undated or incorrectly dated absentee or mail-in ballots received in connection with the 2022 general election.

III. MANDATORY AND CONSEQUENTIAL APPLICATION OF THE DATE REQUIREMENT DOES NOT VIOLATE THE FEDERAL MATERIALITY PROVISION.

A. Application Of The Date Requirement Does Not Deny Any Individual Of The Right To Vote Or Result In A Determination Regarding Whether An Individual Is Qualified To Vote.

As three Justices of the U.S. Supreme Court already have concluded, the notion that mandatory and consequential application of the General Assembly's date requirement violates the federal materiality provision is "very likely wrong." *Ritter*, 142 S. Ct. at 1824 (Mem.) (Alito, J., dissenting from the denial of the application for stay). The materiality provision states:

> 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).

Application of the General Assembly's date requirement to preclude pre-canvassing, canvassing, and counting of undated or incorrectly dated absentee or mail-in ballots does not violate this provision for at least three reasons. *First*, the materiality provision prohibits only "deny[ing] the right of any individual to vote," not imposing mandatory rules on the act of completing and casting a ballot. *Id.* The materiality provision therefore has no application to the date requirement because "[w]hen a mail-in ballot is not counted because it was not filled out correctly, the

voter is not denied 'the right to vote.'" *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay) (quoting 52 U.S.C. § 10101(a)(2)(B)). Rather, "that individual's vote is not counted because he or she did not follow the rules for casting a ballot." *Id.* An individual "may be unable to cast a vote for any number of reasons," 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. *Id.* Application of these rules does not deny the right to vote; nor does application of the date requirement. *See id.* at 1825 ("Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right."); *id.* ("[I]t would be absurd to judge the validity of voting rules based on whether they are material to eligibility."); *see also Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (application of neutral state-law voting requirement does not "disenfranchise" voters); *Timmons*, 520 U.S. at 358 ("States may, and inevitably must, enact reasonable regulations" for effectuating votes); *Brnovich*, 141 S. Ct. at 2338 ("Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules."); *DNC v. Wisconsin State Leg.*, 141 S. Ct. 28, 35 (Mem.) (Oct. 26, 2020) (Kavanaugh, J., concurring) ("In other words, reasonable election deadlines do not 'disenfranchise' anyone under any legitimate

understanding of that term."). As the Fifth Circuit has reasoned in a precedential, non-vacated decision, "[i]t cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under" the federal materiality provision. *Vote.Org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022).

Second, the materiality provision requires that the error or omission affect a "determin[ation] whether such individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). It therefore regulates requirements and practices related to qualifications and registration to vote, not "requirements that must be met in order to cast a ballot that will be counted." *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see also Vote.Org*, 39 F.4th at 305 n.6.

Congress's purpose in enacting the materiality statute was to "forbid[] the practice of *disqualifying voters* for their failure to provide information irrelevant to their eligibility to vote." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (emphasis added). In particular, Congress addressed "the practice of requiring unnecessary information for voter registration"—such as listing the registrant's "exact number of months and days in his age"—"with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Id.* In other words,

"[s]uch trivial information served no purpose other than as a means of inducing voter-generated errors that could be used to *justify rejecting applicants*." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008) (emphasis added); *see also* Acting Sec'y Ans. 36 (selectively omitting "justify rejecting applicants" from quotation of *Browning*).

The federal materiality statute thus functions as a safeguard against discriminatory application of state voter qualification and registration rules. *See id.* The other two subsections of § 10101(a)(2) further underscore this point: those subsections require election officials to apply uniform "standard[s], practice[s], [and] procedure[s] . . . in determining whether any individual is qualified to vote under state law," 52 U.S.C. § 10101(a)(2)(A), and restrict the use of literacy tests "as a qualification for voting in any election," *id.* § 10101(a)(2)(C).

In all events, the Acting Secretary agrees that "the date on the declaration is not used to determine a voter's qualification." Acting Sec'y Ans. 30. The Philadelphia County Board of Elections also agrees that "the handwritten date is not relevant to determine a voter's qualification." Phila. Ans. 28-29. They are exactly right on that point: mandatory application of the date requirement results in invalidation of a noncompliant *ballot*, not a "determin[ation]" that the *individual* is or is not "qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). Indeed, correctly dating an absentee or mail-in ballot is not one of the four qualifications to

vote in Pennsylvania, which are being at least 18 years of age on the date of the election; having been a citizen of Pennsylvania for at least one month; having lived in the relevant election district for at least 30 days; and not being imprisoned for a felony. *See* 25 P.S. § 1301. That point is dispositive: because mandatory application of the date requirement does not result in a qualification determination, it is outside the plain terms and narrow scope of, and does not violate, the federal materiality provision. *See id.*; *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay); *see also Vote.Org*, 39 F.4th at 305 n.6; *Schwier*, 340 F.3d at 1294.

Third, the materiality provision demands that the "record or paper" be related to an "application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). To be sure, an absentee or mail-in ballot and the declaration is a "record or paper." *Id.* But casting a ballot—which, under Pennsylvania law, requires completing the declaration, *see* 25 P.S. §§ 3146.6(a), 3150.16(a)—constitutes the *act* of voting, not an application, registration, or other act *requisite* to voting. *Ritter*, 142 S. Ct. at 1826 n.2 (Mem.) (Alito, J., dissenting from the denial of the application for stay). It therefore would be an "awkward" statutory construction at best to extend the materiality provision to absentee and mail-in ballots and the date requirement. *Id.* Voting is voting; it is not an act requisite to voting.

B. There Is No Tenable Basis To Conclude That Mandatory Application Of The Date Requirement Violates The Federal Materiality Provision.

The Commonwealth Court, Respondents, and *amici* offer five main arguments for their position that mandatory application of the date requirement violates the federal materiality provision. All fail.

First, the Commonwealth Court and the Acting Secretary point to what they view as the "persuasive" reasoning in *Migliori*, *Chapman*, 2022 WL 4100998, *27; Acting Sec'y Ans. 27 & n.14, but that decision has been vacated, *see County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) ("A decision of the United States Supreme Court "vacating the judgment of a Federal Court of Appeals deprives the Court of Appeals' opinion of precedential effect."). It was also wrong for the reasons laid out above. *See supra* Part III.A; *Ritter*, 142 S. Ct. at 1824 (Mem.) (Alito, J., dissenting from the denial of the application for stay).

Second, the Acting Secretary makes the remarkable argument that the "right to vote" has been denied within the meaning of the federal materiality provision "when[ever] someone's ballot has not been counted and included in the final election results." Acting Sec'y Ans. 39. That reading of federal law is both breathtakingly broad—and, unsurprisingly, incorrect.

Under the Secretary's reading, states could have absolutely *no* mandatory rules touching on voting "record[s] or paper[s]" except those that merely implement

the "material" requirements for "determining whether [an] individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The Secretary's reading "would subject virtually every electoral regulation" related to voting records and papers to the superintendence of the federal materiality provision, "hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). That is not the law: as explained, states can and do enact a range of laws that regulate how voting is conducted, and mandatory application of those laws to exclude a noncompliant ballot from "the final election results," Acting Sec'y Ans. 39, does not "deny the right of any individual to vote," 52 U.S.C. § 10101(a)(2)(B); *see supra* Part III.A.

In fact, the Acting Secretary does not consistently embrace her own sweeping position. For example, the General Assembly's signature requirement would violate the materiality provision on the proposed reading in the Acting Secretary's Answer: a failure to provide a signature is an "omission on a record or paper," the signature requirement is "not material in determining whether [an] individual" meets Pennsylvania's four qualifications "to vote," 52 U.S.C. § 10101(a)(2)(B), and excluding a ballot from the "final election results" based upon the signature requirement, Acting Sec'y Ans. 39, would "deny the right of an[] individual to vote" in the Acting Secretary's view, 52 U.S.C. § 10101(a)(2)(B).

But the Acting Secretary elsewhere *agrees* that mandatory application of the signature requirement is valid under federal law. *See* Acting Sec'y Ans. 15-23; *see also Ritter*, 142 S. Ct. at 1826 n.2 (Mem.) (Alito, J., dissenting from the denial of the application for stay) (discussing signature requirement). The Acting Secretary never even attempts to reconcile the various positions she advances in her Answer. She never reconciles her agreement that the signature requirement does not violate federal law with her Answer's sweeping proposed reading of the materiality provision. And she also never reconciles her position that the signature requirement is valid under federal law with her position that the date requirement *in the same sentence and with the same "shall"* in §§ 3146.6(a) and 3150.16(a) is somehow invalid under that same law. *See* Acting Sec'y Ans. 15-23.

Mandatory application of the secrecy-envelope requirement in §§ 3146.6(a) and 3150.16(a) is yet another example that disproves the Acting Secretary's overbroad reading of the federal materiality provision. That requirement would violate the materiality provision on the proposed reading in the Acting Secretary's Answer: failing to use or improperly marking a secrecy envelope is an "error or omission on a record or paper," the secrecy envelope requirement is "not material in determining whether [an] individual" meets Pennsylvania's four qualifications "to vote," 52 U.S.C. § 10101(a)(2)(B), and excluding a ballot from the "final election results" based upon the secrecy-envelope requirement, Acting Sec'y Ans. 39, would

"deny the right of an[] individual to vote" in the Acting Secretary's view, 52 U.S.C. § 10101(a)(2)(B). Yet again, however, the Acting Secretary agrees that the secrecy-envelope requirement is valid under federal law, without any attempt to reconcile that agreement with the other positions taken in her Answer. *See* Acting Sec'y Ans. 39 n.15.

Third, the Acting Secretary and the Philadelphia County Board of Elections point out that the federal statutory definition of "vote" is expansive. *Id.* at 37; Phila. Ans. 34. But the question under the federal materiality statute is not whether the date requirement relates to how individuals "vote"; instead, the question is whether mandatory application of the requirement affects a "determin[ation] whether [an] individual is qualified to vote under state law" and "den[ies] the right of an individual to vote." 52 U.S.C. § 10101(a)(2)(B). Because the answer to each part—and, here, all parts—of that question is "no," mandatory application of the date requirement does not violate federal law. *See supra* Part III.A.

Fourth, the Acting Secretary and the Philadelphia County Board of Elections stake out the position that the declaration is not the absentee or mail-in ballot but, instead, that completing the declaration is an "act requisite to voting." 52 U.S.C. § 10101(a)(2)(B); Acting Sec'y Ans. 38; Phila. Ans. 34–35. Under Pennsylvania law, however, completing the declaration is part and parcel of voting by absentee or mail-in ballot. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). Accordingly, completing the

declaration is part of the act of voting, not an act *requisite* to voting. *See supra* Part III.A; *Ritter*, 142 S. Ct. at 1826 n.2 (Mem.) (Alito, J., dissenting from the denial of the application for stay).

Finally, the Commonwealth Court, the Acting Secretary, the Philadelphia County Board of Elections, and the League of Women Voters *amici* assert that the date requirement is not material "to determining a voter's qualifications." *Chapman*, 2022 WL 4100998, *19; Acting Sec'y Ans. 39–40; Phila. Ans. 35–36; LWV Ans. 12–22. That assertion is undisputed—and entirely beside the point. The point is that the date requirement is not even *relevant* to "determining whether [an] individual is qualified under State law to vote" (and its mandatory application does not deny any individual's right to vote), so it does not implicate, let alone violate, the federal materiality provision. 52 U.S.C. § 10101(a)(2)(B).

CONCLUSION

The Court should enter an order declaring that county boards of elections may not count any undated or incorrectly dated absentee or mail-in ballot and that the Acting Secretary's contrary guidance is invalid. In the alternative, and at a minimum, the Court should direct county boards of elections to segregate any undated or incorrectly dated absentee or mail-in ballots received in connection with the 2022 general election.

Respectfully submitted,

Dated: October 24, 2022

/s/ Kathleen A. Gallagher

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* *Pro hac vice application forthcoming*

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.

GALLAGHER GIANCOLA LLC

Dated: October 24, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Russell D. Giancola

Counsel for Petitioners

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).

GALLAGHER GIANCOLA LLC

Dated: October 24, 2022

/s/ Kathleen A. Gallagher
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Counsel for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA

David Ball, *et al.*, Petitioners, v. LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, *et al.*, Respondents.	No. 102 MM 2022

DECLARATION OF

1. I, Leslie A. Osche, am over the age of eighteen and am competent to testify as to the matters set forth below.

2. I reside in Butler County, Pennsylvania and am a member of the Butler County Board of Elections.

3. I am qualified and registered to vote in the Commonwealth of Pennsylvania and am a duly elected member of the Board of Commissioners of Butler County, and as such, a member of the Board of Elections of Butler County.

4. I understand that the Pennsylvania Election Code provides that voters who choose to vote via absentee or mail-in ballot "shall … fill out, date and sign the declaration" printed on the outer envelope of the ballot, 25 P.S. §§ 3146.6(a), 3150.16(a).

Ex. A

5. I am familiar with guidance and statements issued by the Acting Secretary of the Commonwealth that contradicts these provisions of the Election Code, to wit, that "[a]ny ballot-return envelope that is undated or dated with an incorrect date but that has been timely received by the county shall be included in the pre-canvass and canvass," Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (Sept. 26, 2022), available at https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-3.0.pdf, and that "every county is expected to include undated ballots in their official returns for the Nov. 8 election, consistent with the Department of State's guidance," *Acting Secretary of State Issues Statement on SCOTUS Order on Undated Mail Ballots* (Oct. 11, 2022), available at https://www.media.pa.gov/pages/state-details.aspx?newsid=536.

6. As a member of the Butler County Board of Elections, I understand that county boards of elections "have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act." 25 P.S. § 2641(a).

7. Further, as a member of the Butler County Board of Elections, I understand that county boards of elections have the power "to make and issue such

rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f).

8. Accordingly, the Butler County Board of Elections does not intend to follow the Secretary's Guidance of September 26, 2022 and will not include in the pre-canvass or canvass "[a]ny ballot-return envelope that is undated or dated with an incorrect date" absent an order of the Pennsylvania Supreme Court to the contrary.

9. I declare under penalty of perjury under the law of the Commonwealth of Pennsylvania that the foregoing is true and correct. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Signed on the 23 day of October, 2022, at 10:20 p.m., Butler County, Pennsylvania, United States of America.

Leslie A. Osche
Signature

Leslie A. Osche
Printed Name

IN THE SUPREME COURT OF PENNSYLVANIA

David Ball, *et al.*, Petitioners, v. LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, *et al.*, Respondents.	No. 102 MM 2022

DECLARATION OF

1. I, Kimberly D. Geyer, am over the age of eighteen and am competent to testify as to the matters set forth below.

2. I reside in Butler County, Pennsylvania and am a member of the Butler County Board of Elections.

3. I am qualified and registered to vote in the Commonwealth of Pennsylvania and am a duly elected member of the Board of Commissioners of Butler County, and as such, a member of the Board of Elections of Butler County.

4. I understand that the Pennsylvania Election Code provides that voters who choose to vote via absentee or mail-in ballot "shall … fill out, date and sign the declaration" printed on the outer envelope of the ballot, 25 P.S. §§ 3146.6(a), 3150.16(a).

Ex. B

5. I am familiar with guidance and statements issued by the Acting Secretary of the Commonwealth that contradicts these provisions of the Election Code, to wit, that "[a]ny ballot-return envelope that is undated or dated with an incorrect date but that has been timely received by the county shall be included in the pre-canvass and canvass," Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (Sept. 26, 2022), available at https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-3.0.pdf, and that "every county is expected to include undated ballots in their official returns for the Nov. 8 election, consistent with the Department of State's guidance," *Acting Secretary of State Issues Statement on SCOTUS Order on Undated Mail Ballots* (Oct. 11, 2022), available at https://www.media.pa.gov/pages/state-details.aspx?newsid=536.

6. As a member of the Butler County Board of Elections, I understand that county boards of elections "have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act." 25 P.S. § 2641(a).

7. Further, as a member of the Butler County Board of Elections, I understand that county boards of elections have the power "to make and issue such

rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f).

8. Accordingly, the Butler County Board of Elections does not intend to follow the Secretary's Guidance of September 26, 2022 and will not include in the pre-canvass or canvass "[a]ny ballot-return envelope that is undated or dated with an incorrect date" absent an order of the Pennsylvania Supreme Court to the contrary.

9. I declare under penalty of perjury under the law of the Commonwealth of Pennsylvania that the foregoing is true and correct. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Signed on the 24th day of October, 2022, at 07:18 am, Butler County, Pennsylvania, United States of America.

Kimberly D. Geyer
Signature

Kimberly D. Geyer
Printed Name

IN THE SUPREME COURT OF PENNSYLVANIA

David Ball *et al.*, Petitioners, v. Leigh M. Chapman *et al.*, Respondents.	No. 102 MM 2022

AFFIDAVIT OF ANGELA ALLEMAN

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF DAUPHIN)

Angela Alleman who having been first duly sworn, deposes and states as follows:

1. I am an adult over the age of 18.

2. I am currently the Executive Director of the Republican Party of Pennsylvania (the "RPP").

3. The RPP is a major political party, 25 P.S. § 2831(a), and the "State committee" for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered "State Committee" of the Republican Party as defined by 52 U.S.C. § 30101(15).

4. Section 1.2 of RPP's Bylaws provides:

> *Rule 1.2: The Republican Party of the Commonwealth of Pennsylvania, which is a political party as defined in §2831 of the Election Code, shall consist of the following bodies:*

Ex. C

a. The State Party (i.e., the Republican State Committee under §2834 of the Election Code);

b. The Leadership Committee of the State Party;

c. The State Party Finance Committee;

d. Republican County Committees, as defined in §2837 of the Election Code (the "County Committees"), and such subordinate committees of a County Committee as the rules of a County Committee shall provide;

e. Such Committees of the State Party as may from time to time be recognized by the State Party Chairman;

f. The six (6) Regional Republican Caucuses of the State Party as defined in Rule 9.1, below; and

g. All validly registered Republican electors in the Commonwealth of Pennsylvania.

5. The RPP supports and seeks to uphold free and fair elections for all Pennsylvanians.

6. The RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections consistently throughout the Commonwealth.

7. The RPP, on behalf of itself and its members, including its voters, nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

8. Additionally, the RPP devotes substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania.

9. RPP has statutory rights to appoint both poll watchers to observe casting, counting, and canvassing of ballots at the polling place, 25 P.S. § 2687(a), and an "authorized representative" to "remain in the room" at the county board of elections and observe the pre-canvass and canvass of "absentee ballots and mail-in ballots," *id.* §§ 3146.8(g)(1.1)-(2).

10. RPP has exercised these statutory rights in the past several election cycles and is doing so again for the 2022 general election.

11. In conjunction with its Election Day Operations ("EDO"), the RPP devotes substantial time and resources toward the recruitment and training of poll workers, poll watchers, and volunteers throughout the 67 counties of the Commonwealth to assist voters on election day, to observe the casting and counting of ballots at the polling place, and to observe the pre-canvass and canvass of absentee and mail-in ballots at the county board of elections.

12. As part of its EDO, the RPP also devotes substantial time and resources toward the recruitment and training of a "ground team" of lawyers throughout the Commonwealth who stand ready on Election Day to assist poll workers, poll watchers, and volunteers should questions arise as to elections laws or the voting process within the Commonwealth.

13. The RPP has devoted substantial time and resources in mobilizing and educating voters in Pennsylvania in the past many election cycles and continues to

do so again in 2020. In this regard, the RPP, among other things, routinely publishes a newsletter entitled "PA GOP Morning."

14. Each of the RPP's EDO, training programs, and voter education efforts relies upon, utilizes, and is built upon the clear language of the Election Code.

15. In particular, following the enactment of Act 77, which fundamentally changed the manner in which Pennsylvania are permitted to vote, most notably by providing a new universal mail-in voting regime, RPP significantly updated and altered its EDO, training programs, and voter education programs.

16. Following the enactment of Act 77, RPP substantially increased the amount of its time and resources dedicated to educating voters, poll workers, poll watchers, volunteers, and its legal teams throughout Pennsylvania's 67 counties regarding the provision of Act 77.

17. RPP's EDO, training programs, and voter education programs include training and information regarding the requirements for voters to cast lawful and valid ballots, and the governing rules delineating unlawful and invalid ballots and preventing election officials from pre-canvassing, canvassing, or counting such ballots.

18. I am aware that a majority of this Court held in 2020 that the General Assembly's date requirement is mandatory such that any non-compliant ballot may not be counted in any election after the 2020 general election.

19. I am aware that the Commonwealth Court nonetheless ordered the counting of undated absentee and mail-in ballots in two cases earlier this year.

20. I am aware that Acting Secretary Chapman has promulgated a guidance document purporting to direct county boards of elections to include undated and incorrectly dated ballots in the pre-canvass and canvass. A copy of that guidance is attached hereto as **Exhibit 1**.

21. I am also aware that some county boards of elections may choose to pre-canvass, canvass, and count undated and incorrectly dated ballots in the 2022 general election, while other county boards of elections may not.

22. RPP's EDO, training programs, and voter education programs include training and information regarding the General Assembly's date requirement.

23. The change in the governing law around the date requirement that the Commonwealth Court, the Acting Secretary, and some county boards of elections have purported to make harms the RPP by rendering its EDO, training programs, and voter education programs less effective, wasting the resources they have devoted to such programs, and requiring them to expend new resources to update those programs.

24. Moreover, if left uncorrected, the disparate approaches to the General Assembly's date requirement across the Commonwealth would require the RPP to alter its statewide EDO, training programs, and voter education programs based

upon each county board of elections' approach to pre-canvassing, canvassing, and counting undated or incorrectly dated ballots.

25. I declare under penalty of perjury that the foregoing is true and correct.

Affiant sayeth nothing further.

Executed on October 23, 2022

Angela Alleman

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

GALLAGHER GIANCOLA LLC

Dated: October 24, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Russell D. Giancola

Counsel for Petitioners