[J-85-2022] [MO: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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,	:	No. 102 MM 2022
Petitioners	:	SUBMITTED: October 25, 2022
v.	:	
LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH, AND ALL 67 COUNTY BOARDS OF ELECTIONS,	:	
Respondents	:	

CONCURRING AND DISSENTING OPINION

DECIDED: November 1, 2022
JUSTICE DOUGHERTY **OPINION FILED: February 8, 2023**

I join Sections I, II, and III(B) of the majority opinion in full, and Section III(A) subject to the following caveat. In our order granting expedited consideration of this significant election matter, we identified it as an "appeal." *See Ball v. Chapman*, 102 MM 2022 (Pa. Oct. 21, 2022) (*per curiam*) (assuming "King's Bench authority over the instant appeal"). But our characterization was inaccurate. This is not an appeal. We "assum[ed] King's Bench jurisdiction . . . to consider [petitioners'] request for injunctive and declaratory relief

concerning undated and incorrectly dated mail-in and absentee ballots." Majority Opinion at 2 n.2; *see id*. at 2 n.4 (explaining the Court exercised King's Bench power rather than extraordinary jurisdiction "[b]ecause no dispute was pending before a lower court"). In addition, upon prompting from the Acting Secretary of the Commonwealth, *see* Acting Secretary's Answer to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Relief at 35-42, we ordered briefing on two other important issues: (1) whether petitioners have standing, and (2) whether enforcing Pennsylvania law in the manner petitioners propose with respect to undated and incorrectly dated ballots would violate the "materiality provision" of the Civil Rights Act of 1964, 52 U.S.C. §10101(a)(2)(B).

Regarding standing, I emphasize that we deemed this case important enough to warrant an exercise of our "very high and transcendent" King's Bench authority even though no matter was pending in any court below. *In re Bruno*, 101 A.3d 635, 669 (Pa. 2014). In granting King's Bench, we necessarily suspended all usual, well-founded "prudential concerns implicating courts' self-imposed limitations." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013); *accord Town of McCandless v. McCandless Police Officers Ass'n*, 901 A.2d 991, 1002 (Pa. 2006) (explaining standing, ripeness, and mootness are related justiciability considerations that "are concerned with the proper timing of litigation" but do not involve a court's jurisdiction). Indeed, although it appears we have never directly said as much, our case law confirms normal justiciability concerns simply do not exist when we consider a case under our sweeping King's Bench authority. *See generally In re Bruno*, 101 A.3d at 669 ("The exercise of King's Bench authority is not limited by prescribed forms of procedure . . .; the Court may employ any type of process or procedure necessary for the circumstances."); *id.* at 671 ("[w]e have often undertaken flexible measures deriving from our broad power at King's Bench"); *id*.

at 672 ("the power of King's Bench allow[s] the Court to innovate a swift process and remedy appropriate to the exigencies of the event"); *see also id*. at 669-70 (collecting King's Bench cases and explaining "[n]ot all of [this Court's] exercises of power result in published decisions" and "thus, a survey of the Pennsylvania Reporter does not account for the parameters of the Court's authority"). This includes standing. *See, e.g.*, *In re Off. of Philadelphia Dist. Att'y*, 244 A.3d 319, 321 (Pa. 2020) (*per curiam*) (exercising King's Bench power to consider claims raised by widow of deceased police officer even though private citizens, including victims, generally lack standing to intervene in criminal proceedings).

As a result, whether petitioners have standing to pursue their claim is irrelevant for purposes of our consideration here on King's Bench, and I was not under the impression the Court viewed it otherwise. Instead, it was my understanding that we added the standing issue because we saw this case as a suitable vehicle through which to provide much-needed guidance to our lower courts. Obviously, election litigation has exploded in recent years.[1] And, as a natural corollary, challenges to party standing — which tend to weed out the most tenuous of these cases — have also swelled in significance and number. It was understandable, then, that we seized the opportunity to offer guidance in this area of the law despite the fact it has absolutely no bearing on our ability to proceed to the merits under our King's Bench authority. Accordingly, while I join the majority's thoughtful merits analysis of the standing issue, I distance myself from any suggestion that standing (or any ordinary prudential concern, for that matter) could ever impede our

[1] *See* Patrick Marley, *How Votes Are Cast and Counted is Increasingly Decided in Courtrooms*, WASH. POST (Oct. 26, 2022, 8:13 a.m.), https://www.washingtonpost.com/politics/2022/10/26/2022-election-lawsuits-legal-challenges/ ("Over the past 20 years, the rate of election litigation has nearly tripled[.]").

review on King's Bench. With that qualification, I otherwise join Section III(A) of the majority opinion.

That we exercised King's Bench authority over this matter is also central to my next point concerning Section III(C) of the majority opinion. As our November 1, 2022 order revealed, following expedited briefing (but without oral argument) the Court was "evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. §10101(a)(2)(B)." *Ball v. Chapman*, 102 MM 2022 (Pa. Nov. 1, 2022) (*per curiam*). Typically, when the votes of the participating members of an appellate court are evenly divided, the result is an automatic affirmance of the lower court's order. *See, e.g.*, *Commonwealth v. Koch*, 106 A.3d 705, 705 (Pa. 2014) (*per curiam*) ("[T]he Court being evenly divided, the Order of the Superior Court is affirmed."). This practice stems from the rule that "where courts consist of several members, [ ] no affirmative action can be had . . . where the judges are equally divided in opinion as to the judgment to be rendered or order to be made." *Durant v. Essex Co.*, 74 U.S. 108, 110 (1868). When this happens within the context of an appeal, in which "the affirmative action sought [by the appellant] is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force, to be carried into effect by the ordinary means." *Id*.; *see id*. at 112 ("In cases of appeal[,] . . . [i]f the judges are divided, the reversal cannot be had, for no order can be made.").

Most jurisdictions take this approach. As well, "[s]ince at least 1792, the [United States Supreme] Court has followed the rule that where the Justices are evenly divided, the lower court's decision is affirmed, and the Supreme Court's order has no precedential effect." Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 245 (2016). Yet, we differ in one important respect: whereas the High Court's "usual practice is not to express any opinion" when it hits an impasse, *Ohio ex rel. Eaton v. Price*, 364 U.S. 263,

264 (1960) (*per curiam*), this Court has long permitted the authoring of dueling opinions in the face of a deadlock on appeal. *See* Pa. Sup. Ct. INTERNAL OPERATING PROCEDURES §4(B)(3) ("When the votes [of the participating justices] are equally divided, any resulting opinions shall be designated as the 'Opinion in Support of Affirmance' or 'Opinion in Support of Reversal,' as the case may be.").

I reiterate, however, that what is presently before us is not an appeal. It is a case taken on King's Bench authority. We granted petitioners' application with respect to the state law claim and *sua sponte* tacked on two others pertaining to standing and the federal Civil Rights Act.[2] Because we ultimately deadlocked on the federal law issue, "we issued no order on that basis[.]" Majority Opinion at 38; *see id*. at 3 (explaining we "issued no decision on that question"). This is significant, because "[t]he operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment." Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999); *see id*. at 133 ("each member of a multimember court . . . must ultimately vote on the judgment[,]" the tally of which "produces a judgment of the court"); *see also Durant*, 74 U.S. at 110 ("The judgment of affirmance [by an equally divided court is] the judgment of the entire court. The division of opinion between the judges [i]s the reason for the entry of that judgment; but the reason is no part of the judgment itself."). Thus, when a tie emerges **on appeal**, opinions are permissible because a "judgment of affirmance is, after all, a judgment, and an opinion explaining that judgment, or one's vote on that judgment, is therefore not a forbidden

[2] Although the Acting Secretary's answer referenced the federal law issue, *see* Acting Secretary's Answer to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Relief at 35-36, it omitted any request that we invoke King's Bench to consider that issue. In fact, the Acting Secretary expressly asked us to "deny the request to exercise either King's Bench Power or Extraordinary Jurisdiction." *Id*. at 42.

advisory opinion." Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 661 n.77 (2002). But the same cannot be said here.

Although the exercise of King's Bench jurisdiction "is not, strictly speaking, [the exercise of] original jurisdiction[,]" *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886), the two concepts share one important attribute: both situations "by definition present no lower court ruling to affirm" in the event of a tie. Michael Coenen, *Original Jurisdiction Deadlocks*, 118 YALE L.J. 1003, 1003 (2009); *see id*. at 1007 ("the procedural posture of original jurisdiction cases precludes extension of the clear-cut summary affirmance rule governing appellate ties; after all, one cannot affirm the lower court when there is no lower court to affirm"). It thus stands to reason that, because a tie vote in a King's Bench case yields no judgment (at least when there is no lower court ruling to affirm), any opinions in support of or against that result are prohibited as advisory. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining advisory opinion as "[a] nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose."). Indeed, our own internal operating procedures support this understanding by limiting the acceptable opinion designations to two: those supporting affirmance and those supporting reversal. *See* Pa. Sup. Ct. INTERNAL OPERATING PROCEDURES §4(B)(3); *see also Phila. Entm't and Dev. Partners v. City of Phila.*, 937 A.2d 385, 392 (Pa. 2007) (courts "should not give answers to academic questions or render advisory opinions"); *Pa. Pub. Util. Comm'n v. Allegheny Cty.*, 203 A.2d 544, 546 (Pa. 1964) ("[W]e will not render a decision which would be solely advisory in character.").

Because our deadlock prevented us from taking any action on the federal law question we asked the parties to brief, I respectfully believe it is improper to opine on that unresolved issue through what are plainly advisory expressions. *See* Majority Opinion at Section III(C). From my point of view, "the better course is not to speak at all [on this

issue], for [we] cannot fulfill [our] responsibility to provide guidance to lower courts." *United States v. Hamrick*, 43 F.3d 877, 891 n.1 (4th Cir. 1995) (Ervin, C.J., dissenting). I thus join those sections of the majority's opinion noted above, which "provide[ ] the rationale that our November 1 order promised" as it pertains to the questions of standing and interpretation of the Election Code. Majority Opinion at 3. But, with respect to the unresolved federal law issue, I would let our November 1st order speak for itself and say no more.