[J-85-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

DAVID BALL, JAMES D. BEE, JESSE D. DANIEL, GWENDOLYN MAE DELUCA, ROSS M. FARBER, LYNN MARIE KALCEVIC, VALLERIE SICILIANO-BIANCANIELLO, S. MICHAEL STREIB, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, AND REPUBLICAN PARTY OF PENNSYLVANIA, Petitioners v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH, AND ALL 67 COUNTY BOARDS OF ELECTIONS, Respondents	:	No. 102 MM 2022 SUBMITTED: October 25, 2022

Justice Wecht delivers the Opinion of the Court with respect to Parts I, II, III(A), III(B), and IV, and delivers an opinion with respect to Part III(C) joined by Chief Justice Todd and Justice Donohue.

OPINION

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

The Election Code states that a voter who submits an absentee or mail-in ballot "shall . . . fill out, date and sign the declaration" that is printed on the envelope in which

the ballot is returned.[1] Petitioners contend that failure to comply with this instruction renders a ballot invalid, and they challenge guidance from the Acting Secretary of the Commonwealth that instructs county boards of elections to canvass and pre-canvass "[a]ny ballot return-envelope that is undated or dated with an incorrect date but that has been timely received by the county."[2] [3] Petitioners ask this Court: to declare that absentee and mail-in ballots which are "undated or incorrectly dated" cannot be included in the pre-canvass or canvass of votes; to segregate such ballots; and to direct the Acting Secretary to withdraw her guidance.[4]

The Acting Secretary[5] challenges Petitioners' standing and opposes their claim that the Election Code requires disqualification of undated and incorrectly dated absentee and mail-in ballots. Moreover, she argues that failing to count ballots which do not comply

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[1] 25 P.S. §§ 3146.6(a) (absentee ballots); 3150.16(a) (mail-in ballots).

[2] On October 21, 2022, this Court granted Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction, assuming King's Bench jurisdiction, *see* PA. CONST. art. V, § 10; 42 Pa.C.S. § 502, to consider their request for injunctive and declaratory relief concerning undated and incorrectly dated mail-in and absentee ballots. Petitioners are eight individual voters ("Voter Petitioners"), the Republican National Committee ("RNC"), the National Republican Congressional Committee ("NRCC"), and the Republican Party of Pennsylvania ("RPP").

[3] *See* Pennsylvania Department of State, Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes (Sept. 26, 2022); Application Ex. A.

[4] *See* Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction at 26-27. Because no dispute was pending before a lower court in this instance, King's Bench Power is appropriate, as opposed to Extraordinary Jurisdiction. *See In re Bruno*, 101 A.3d 635, 668-70 (Pa. 2014) (explaining the distinction).

[5] Petitioners instituted this action against the boards of elections in all sixty-seven counties as well. For ease of reference, and in light of the Acting Secretary's submission of the most extensive briefing on these questions, this Opinion refers to the Acting Secretary rather than the county boards.

with the Election Code's date requirement would violate federal law, specifically, the "materiality provision" of the Civil Rights Act of 1964.[6]

By order dated October 21, 2022, we distilled these claims into the following questions:

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

2. 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?

3. 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).

Following expedited review of the briefing that ensued, we issued a *per curiam* order dated November 1, 2022, granting Petitioners' requested relief in part and denying it in part. For the November 8, 2022 election, we ordered the county boards of elections to refrain from counting any absentee or mail-in ballots that arrived in undated or incorrectly dated envelopes.[7] We directed county boards to segregate and preserve such ballots. And we dismissed Voter Petitioners from the case for lack of standing. We divided evenly on the issue of whether failing to count undated or incorrectly dated ballots violated federal law, and accordingly issued no decision on that question. This Opinion provides the rationale that our November 1 order promised.

I. Background

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[6] *See* 52 U.S.C. § 10101(a)(2)(B).

[7] By supplemental order dated November 5, 2022, the Court identified "incorrectly" dated ballots for purposes of the November 8, 2022 election as those mail-in ballots arriving in envelopes "with dates that fall outside the date range of September 19, 2022, through November 8, 2022," and absentee ballots arriving in envelopes "with dates that fall outside the date range of August 30, 2022, through November 8, 2022."

Pennsylvania law allows qualified electors to vote by mail, whether on an absentee basis or on a no-excuse basis.[8] The Election Code sets forth instructions for those processes. An elector must mark his or her ballot before 8:00 p.m. on Election Day, place the marked ballot in a secrecy envelope marked "Official Election Ballot," and then deposit the secrecy envelope in a ballot return envelope.[9] The ballot return envelope bears a pre-printed declaration that contains "a statement of the [elector's] qualifications, together with a statement that such elector has not already voted in such primary or election."[10] The Election Code states that electors "shall . . . fill out, date and sign" the declaration.[11]

In 2020, this Court considered the Election Code's date requirement.[12] On that occasion, candidates challenged the decisions of county boards of elections to count absentee and mail-in ballots that had been timely received but lacked complete and accurate handwritten declarations on their ballot return envelopes.[13] The Commonwealth Court issued a decision in one of the cases, and ordered that the ballots not be counted.[14] We stayed that order, granted allowance of appeal to several parties, invoked extraordinary jurisdiction with respect to others, and consolidated the relevant appeals.

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8 25 P.S. §§ 3146.1; 3150.11.

9 *Id.* §§ 3146.6(a); 3150.16(a).

10 *Id.* §§ 3146.4; 3150.14(b).

11 *Id.* §§ 3146.6(a); 3150.16(a).

12 See In re Canvass of Absentee and Mail-In Ballots of November 3, 2020, 241 A.3d 1058 (Pa. 2020) ("In re 2020 Canvass").

13 *See id.* at 1062-63. Nicole Ziccarelli, a candidate for Pennsylvania Senate in the 45th Senatorial District, challenged the Allegheny County Board of Elections' decision to count 2,349 such ballots. Donald J. Trump for President, Inc., a presidential campaign organization, challenged the Philadelphia County Board's decision to count 8,329 such ballots.

14 *See In re 2,349 Ballots in 2020 Gen. Election*, 1162 C.D. 2020, 2020 WL 6820816 (Pa. Cmwlth. Nov. 19, 2020) (unpublished).

The ensuing Opinion Announcing the Judgment of the Court ("OAJC") explained three Justices'[15] conclusion that, "while failures to include a handwritten name, address or date in the voter declaration on the back of the outer envelope" constituted "technical violations of the Election Code," those failures did not warrant "the wholesale disenfranchisement of thousands of Pennsylvania voters."[16] These three Justices maintained that the use of the word "shall" in a statute "is not always indicative of a mandatory directive" and, "in some instances . . . is to be interpreted as merely directory."[17] Under this Court's precedent interpreting the requirements of the Election Code, the OAJC understood the question as implicating the distinction between a "minor irregularity,"[18] which is nonfatal to a ballot, and a "weighty interest,"[19] which is critical to the integrity of the election and must be applied strictly.[20] Because "a signed but undated

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15 The OAJC in *In re 2020 Canvass* was authored by Justice Donohue and joined by then-Justice Baer and then-Justice Todd.

16 *In re 2020 Canvass*, 241 A.3d at 1079.

17 *Id.* at 1071 (citations omitted).

18 *See, e.g.*, *Shambach v. Bickhart*, 845 A.2d 793 (Pa. 2004) (declining to invalidate a write-in vote cast for a candidate whose name was already on the ballot, in violation of the Election Code's instructions); *In re Luzerne Cnty. Return Bd., Appeal of Elmer B. Weiskerger*, 290 A.2d 108 (Pa. 1972) ("*Appeal of Weiskerger*") (declining to invalidate ballots because it was only a "minor irregularity" that they were completed in red and green ink, as opposed to blue or black ink, as the Election Code required).

19 *See, e.g.*, *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (holding that the failure of a mail-in voter to put the ballot into the inner secrecy envelope rendered the ballot void); *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election, Appeal of John Pierce*, 843 A.2d 1223 (Pa. 2004) ("*Appeal of Pierce*") (holding that in-person delivery of ballots was mandatory, and that votes delivered by third parties were void).

20 *In re 2020 Canvass*, 241 A.3d at 1073.

declaration is sufficient and does not implicate any weighty interest,"[21] these Justices would have held that "the lack of a handwritten date cannot result in vote disqualification."[22]

Three Justices dissented in relevant part.[23] They declined to characterize "the absence of a date as a mere technical insufficiency" that the Court could "overlook."[24] In these Justices' view, the date on the ballot return envelope "provides proof of when the 'elector actually executed the ballot in full [and] . . . establishes a point in time against which to measure the elector's eligibility to cast the ballot.'"[25] The date requirement thus carried an "unquestionable purpose."[26] Accordingly, these three Justices would have ruled that the ballots in question were not to be counted, for failure to comply with the Election Code.

This author concurred in the result of the OAJC but not in its rationale, and filed a concurring and dissenting opinion.[27] That opinion expressed this author's view that "the Election Code should be interpreted with unstinting fidelity to its terms, and . . . election

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21 All 8,329 ballots challenged in Philadelphia County and all 2,349 ballots challenged in Allegheny County had been received by the county boards of elections before 8:00 p.m. on Election Day. Therefore, according to the OAJC, there was "no danger that any of [them] was untimely or fraudulently back-dated." *In re 2020 Canvass*, 241 A.3d at 1077. Moreover, other canvassing procedures precluded double voting, as well as the "unlikely hypothetical scenario" of an elector being qualified to vote at the time of applying for a ballot, but being disqualified sometime before Election Day. *Id.*

22 *Id.* at 1078.

23 *See id.* at 1090-91 (Dougherty, J., concurring and dissenting). Justice Dougherty's concurring and dissenting opinion was joined by then-Chief Justice Saylor and Justice Mundy.

24 *Id.* at 1090.

25 Id. (quoting In re 2,349 Ballots in the 2020 Gen. Election, 2020 WL 6820816 at *6).

26 *Id.*

27 *See id.* at 1079-89 (Wecht, J., concurring and dissenting).

officials should disqualify ballots that do not comply with unambiguous statutory requirements."[28] The opinion recognized, though, that the Secretary of the Commonwealth had "issued confusing, even contradictory guidance" regarding the date requirement, such that "local election officials and voters alike lacked clear information regarding the consequence" of failing to "record the date beside the voter's declaration signature."[29] Our question was one of first impression that had not been considered by the Commonwealth Court or this Court at any time before 2020, which was "an historically tumultuous year."[30] Because our ruling was "not foreshadowed by existing law,"[31] this author proposed to apply the limiting interpretation of the Election Code only prospectively. Accordingly, for purposes of the 2020 election, four votes supported the result of counting non-compliant ballots.

The Commonwealth Court has weighed the precedential effect of our 2020 ruling on multiple occasions, albeit in non-binding memoranda. Twice, that court denied requests to count undated and incorrectly dated absentee and mail-in ballots.[32] In other

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28 *Id.* at 1089.

29 *Id.*

30 *Id.* at 1088.

31 *Id.* (citing *Appeal of Zentner*, 626 A.2d 146 (Pa. 1993)).

32 *See In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 1381-85 C.D. 2021, 1395-99 C.D. 2021, 1403 C.D. 2021, 2022 WL 96156 at *3 (Pa. Cmwlth. Jan. 10, 2022) (Memorandum Opinion Stating the View of Senior Judge Leadbetter) ("I must conclude that the prevailing view of our Supreme Court is that of Justice Wecht"); *Ritter v. Lehigh Cnty. Bd. of Elections*, 1322 C.D. 2021, 2022 WL 16577 at *7 (Pa. Cmwlth. Jan. 3, 2022) (concluding that "[Justice Dougherty's concurring and dissenting opinion], in conjunction with [Justice Wecht's opinion concurring in the result] should be considered as precedential authority that is binding on this Court and controls the outcome of this case").

disputes, the Commonwealth Court reached the opposite conclusion, and ordered that undated and incorrectly dated absentee and mail-in ballots could be counted.[33]

Following one of these Commonwealth Court decisions—*Ritter*— individual Lehigh County voters filed a federal lawsuit, claiming that applying the date requirement to disqualify non-compliant mail-in ballots violates the materiality provision of the federal Civil Rights Act of 1964. That statute provides that:

> [n]o 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.[34]

A federal district court disposed of the Lehigh County case on summary judgment, reasoning that Congress had not intended to create a private right of action to enforce the materiality provision.[35] The United States Court of Appeals for the Third Circuit reversed, finding that the materiality provision was enforceable under 42 U.S.C. § 1983, and that disqualification of ballots for failure to comply with the date requirement violated that provision.[36]

Before the Lehigh County Board of Elections could count the 257 disputed ballots in question, the candidate who had been leading in the race for a seat on the Lehigh

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[33] *See Chapman v. Berks Cnty. Bd. of Elections*, 355 M.D. 2022, 2022 WL 4100998 at *23 (Pa. Cmwlth. Aug. 19, 2022) (single-Judge memorandum) ("'[W]hen a court is faced with a plurality opinion, usually only the result carries precedential weight; the reasoning does not[.]' . . . For these reasons, the [c]ourt does not view the reasoning set forth in the *In re* [*2020*] *Canvass* opinions as binding precedent on other parties under other factual circumstances.") (quoting *Commonwealth v. Bethea*, 828 A.2d 1066, 1073 (Pa. 2003) (emphasis and footnote omitted)).

[34] 52 U.S.C. § 10101(a)(2)(B).

[35] *See Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 WL 802159 at *13 (E.D. Pa. Mar. 16, 2022).

[36] *See Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022).

County Court of Common Pleas—David Ritter—applied for a stay, which Justice Samuel Alito of the Supreme Court of the United States granted. Shortly thereafter, however, the full Court denied the stay and vacated Justice Alito's order. Ritter petitioned for a writ of *certiorari*. While his petition was pending, Lehigh County proceeded to count the disputed ballots and certified the election in favor of Ritter's opponent. Then, on October 11, 2022, the Supreme Court granted Ritter's petition, vacated the judgment of the Third Circuit, and remanded the matter with instructions to dismiss the case as moot in light of the certification.[37]

Before the Supreme Court of the United States disposed of *Ritter*, the Acting Secretary issued guidance on September 26, 2022, directing county boards of elections to count undated or incorrectly dated ballots.[38] The Supreme Court's ensuing vacatur in *Ritter* prompted the Acting Secretary to issue the following statement:

> 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. That guidance followed the most recent ruling of the Pennsylvania Commonwealth Court holding that both Pennsylvania *and* federal law prohibit excluding legal votes because the voter omitted an irrelevant date on the ballot return envelope.
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> Today's order from the U.S. Supreme Court vacating the Third Circuit's decision on mootness grounds was not based on the merits of the issue and does not affect the prior decision of Commonwealth Court in any way. It provides no justification for counties to exclude ballots based on a minor

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37 *Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (Mem.). *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (establishing the practice that, "in dealing with a civil case from a court in the federal system which has become moot while on its way [to the Supreme Court of the United States] or pending [the Court's] decision on the merits," and where the lack of review is attributable to "happenstance," the judgment will be reversed or vacated, and remanded with instructions to dismiss the case as moot).

38 *See supra* note 3.

> omission, and we expect that counties will continue to comply with their obligation to count all legal votes.[39]

Five days later, Petitioners filed the instant Application. They asserted that the state of the law was clear, and that ballots which do not comply with the date requirement should not be counted. Furthermore, Petitioners argued that there was insufficient time for the "ordinary process of law" to resolve the issues they presented, and that it might prove impossible to grant effectual relief once pre-canvassing and canvassing started.[40] We promptly granted review.[41]

II. Arguments

A. Standing

The various campaign arms of the Republican Party ("Party Petitioners") advance three theories of standing. First, they assert that their organizations devote substantial time and resources to training election monitors. Party Petitioners allege that the Acting Secretary's guidance and Commonwealth Court precedent[42] created "a lack of clarity" regarding the meaning and application of the date requirement.[43] Without such clarity,

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[39] *Acting Secretary of State Issues Statement on SCOTUS Order on Undated Mail Ballots*, (Oct. 11, 2022) (emphasis in original), available at https://www.media.pa.gov/pages/state-details.aspx?newsid=536 (last visited November 18, 2022).

[40] *See Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 884, *cert. denied*, 141 S. Ct. 239 (2020).

[41] Our order of October 21, 2022 also granted Intervenor status to the Democratic Congressional Campaign Committee, the Democratic National Committee, and the Pennsylvania Democratic Party, and allowed for the filing of *amicus* briefs. *See* Pa.R.Civ.P. 2327(4) (allowing for intervention where the determination of the action "may affect any legally enforceable interest" of the applicant).

[42] *See Berks Cnty. Bd. of Elections*, 2022 WL 4100998 at *23 (finding that *In re 2020 Canvass* did not constitute binding precedent).

[43] Petitioners' Br. at 14.

Party Petitioners assert, their "training and monitoring activities" will be rendered "less effective, wasting the considerable resources they have devoted to those activities, or requiring them to devote even more resources to them."[44]

Second, Party Petitioners argue that the lack of clarity concerning the meaning of the date requirement will affect the resources and expenditures that they devote to ensuring that Republican candidates and their prospective voters "understand the rules governing the election process."[45] Third, they claim a concrete interest in winning elections, and they assert that, if left uncorrected, the Acting Secretary's guidance will result in a broad range of non-compliant ballots being counted in a way that could alter the final tallies of votes.[46] In support, Party Petitioners point to the Lehigh County litigation in which the counting of ballots that did not comply with the date requirement decided the outcome of a race for a seat on the Court of Common Pleas.[47] Party Petitioners assert an interest in preserving "the structur[e] of the competitive environment" in which the election is to be run.[48]

For their part, Voter Petitioners cite the "right to vote and to have one's vote counted" as a basis for standing.[49] The right to vote is "of little moment," they submit, if the weight of that vote can be "'debase[d] or dilut[ed]' by the counting of invalid ballots."[50]

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44 *Id.*

45 *Id.* at 15.

46 *Id.* at 16.

47 *Id.* at 17; *see Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-00397, 2022 WL 802159 at *13 (E.D. Pa. Mar. 16, 2022); *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022).

48 Petitioners' Br. at 16 (quoting *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 86 (D.C. Cir. 2005)).

49 Albert v. 2001 Legislative Reapportionment Comm'n, 790 A.2d 989, 994 (Pa. 2002).

50 Petitioners' Br. at 17-18 (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000)).

Voter Petitioners observe as well that this Court has not precluded individual voters from raising claims that sound in dilution or the impact of which would sweep far beyond their own political activity.[51]

The Acting Secretary[52] argues that all of the various Petitioners lack standing, because none of them has the "substantial, direct, and immediate interest" our precedent requires.[53] A professed interest in obedience to the law generally is not an interest that surpasses that of any other citizen or the public at large.[54] With respect to Voter Petitioners, the Acting Secretary submits that we rejected identical arguments for standing in *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970). There, this Court dismissed, for lack of standing, a challenge brought by a group of voters to rules allowing certain electors to vote by absentee ballot. We explained that the petitioners' interest was "not peculiar to them," "not direct," and "too remote and too speculative" to afford them standing.[55] The *Kauffman* electors' challenge assumed that the votes to which they objected would be cast "for candidates . . . other than those for whom [they] would vote and thus will cause a dilution of [their] votes."[56] Because that assumption was

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51 *Id.* at 20 (discussing *Erfer v. Commonwealth*, 794 A.2d 325, 329-30 (Pa. 2002) (permitting plaintiffs to challenge entire reapportionment plans and not only the lines of the district in which the plaintiffs reside)).

52 Various *amici* and several of the County Respondents—representing Adams County, Allegheny County, Bucks County, Chester County, Delaware County, Luzerne County, Montgomery County, and Philadelphia County—filed briefs in opposition to Petitioners' requested relief. Because their arguments largely echo those advanced by the Acting Secretary, we do not elaborate upon them here. We treat the *amici* who filed briefs in support of Petitioners in the same manner.

53 *See Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016).

54 *See Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009).

55 *Kauffman*, 271 A.2d at 239.

56 *Id.* at 239-40.

"unsupported factually" and "unwarranted," their vote dilution theory was insufficient to establish standing.[57]

B. The Date Requirement

Petitioners view our 2020 decision as holding that, after the 2020 election, the date requirement would be deemed mandatory and that the counting of non-compliant ballots would be barred in future elections.[58] In their view, the General Assembly's use of the mandatory "shall" in 25 P.S. §§ 3146.6(a) and 3150.16(a) renders invalid any ballots arriving in return envelopes that bear no date or an incorrect date. Petitioners further assert that this result coheres with our decisions in *Appeal of Pierce*[59] and *Boockvar*,[60] and that the contrary result in *Appeal of Weiskerger*—which adopted the "minor irregularity" / "weighty interests" approach—could be attributed to the fact that it predated enactment of the Statutory Construction Act.[61] The Statutory Construction Act provides that courts should consider indicia of legislative intent *only* when the text of a statute is ambiguous. Thus, Petitioners argue, while the *Weiskerger* Court could look to underlying legislative intent even in the face of clear statutory language, later courts could not. It would be absurd, in Petitioners' view, if the word "shall" in consecutive sentences of the Election Code could bear two different meanings.

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57 *Id.* at 240.

58 *See* Petitioners' Br. at 21 (discussing *In re 2020 Canvass*).

59 843 A.2d at 1231-32. *See supra*, note 19.

60 238 A.3d at 379-80. *See supra*, note 19.

61 *See* Petitioners' Br. at 31 (citing 1 Pa.C.S. § 1921(b)); *see also supra*, note 18.

Petitioners also dispute the idea that the Free and Equal Elections Clause of the Pennsylvania Constitution[62] can support a liberal construction of clear statutory commands.[63] As evidence that the date requirement has an "unquestionable purpose,"[64] Petitioners point to a circumstance in Lancaster County wherein officials discovered that a ballot was fraudulent because the outer envelope had been dated twelve days after the putative elector had died.[65] Finally, Petitioners argue that "any state judicial or administrative construction . . . that fails to uphold the date requirement's plain and mandatory meaning for federal elections violates the Elections Clause[66] of the U.S. Constitution."[67]

The Acting Secretary advances three main arguments against construing the Election Code in a way that would invalidate undated or incorrectly dated absentee and mail-in ballots. First, she argues that nothing in the statutory language compels that result, as evidenced by (i) the structure of the Code and its use of "sufficiency"; (ii) the

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62 PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

63 Petitioners' Br. at 33-34 (citing *Appeal of Pierce*, 843 A.2d at 1231).

64 *See In re 2020 Canvass*, 241 A.3d at 1090 (Dougherty, J., concurring and dissenting).

65 *See* Petitioners' Br. at 27.

66 U.S. CONST. art. I, § 4, cl. 1 ("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 [sic] Senators.").

67 Petitioners' Br. at 28. This last argument stems from the "independent state legislature" theory, the idea that the federal Constitution singularly delegates the authority to regulate federal elections to state legislatures, to the exclusion of state courts and state executive branches, and regardless of state constitutional provisions. *See Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732-38 (2021) (Thomas, J., dissenting from the denial of *certiorari*); *Moore v. Harper*, 142 S. Ct. 1089, 1089-92 (2022) (Alito, J., dissenting from the denial of a stay)).

express provision that certain defects, but not others, will result in ballots not being counted; and (iii) the history of the Code's development. Separate sections of the Election Code govern the *casting* of ballots and the *counting* of ballots.[68] The sections that govern counting, the Acting Secretary alleges, make clear that the touchstone is whether the board of elections is "satisfied that the declaration is sufficient."[69] By using the word "sufficient," she asserts, "the legislature made clear that less than perfect compliance with the voting instructions was acceptable for a ballot to be counted, so long as the declaration achieves its purpose."[70] Where the General Assembly intended that failure to comply would result in disqualification, it said so unambiguously.[71]

The Acting Secretary alleges that history bears out her reading because, beginning in 1945, the Election Code affirmatively required county boards of elections to "set aside" ballots that were untimely.[72] When the General Assembly removed that provision in 1968, she argues, all that was left was the benchmark of "sufficiency," and disqualification of ballots was no longer required.

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[68] *Compare* 25 P.S. § 3146.8(g)(4) ("Canvassing of official absentee ballots and mail-in ballots"), *with* 25 P.S. § 3146.6(a) ("Voting by absentee electors"). When legislative efforts—which ultimately proved unsuccessful—proposed to require that these ballots be discounted, the General Assembly attempted to amend those sections dealing with *counting* ballots, not *casting* them. *See* Respondents' Br. at 24 (citing HB 1300, Session of 2021, § 20).

[69] 25 P.S. § 3146.8(g)(3).

[70] Respondents' Br. at 25.

[71] *See, e.g.*, 25 P.S. § 3146.8(g)(4)(ii) (providing that, if an envelope "contain[s] any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference," the ballot shall be "declared void").

[72] Respondents' Br. at 29 (citing Act of Mar. 9, 1945, P.L. 29, No. 17, sec. 10, § 1307).

The Acting Secretary warns as well that Petitioners' statutory interpretation countenances results that would be "absurd, impossible of execution or unreasonable."[73] The word "shall" appears "thousands of times" in the Election Code, providing direction for "virtually every step to be taken in the planning and execution of an election."[74] If Petitioners were to prevail, the Acting Secretary predicts, "the next similar challenge could involve ink color, or pen or pencil types."[75] She asserts that such "draconian" consequences for "insignificant errors" could implicate the Free and Equal Elections Clause, as well as the Supreme Court of the United States' precedent on the right to vote.[76] Finally, the Acting Secretary argues that none of the proffered justifications for the date requirement withstand scrutiny, and that if the Court finds any ambiguity in the Election Code, such ambiguity should be resolved in favor of the exercise of the franchise.[77]

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[73] 1 Pa.C.S. § 1922(1).

[74] Respondents' Br. at 35.

[75] *Id.* at 37.

[76] *Id.*

[77] The Acting Secretary rebuts several arguments for the date requirement's functionality. It cannot be used to determine voter eligibility, she argues, because that is determined based on an elector's qualifications "*as of Election Day*," not as of the moment that the elector fills out a ballot. Respondents' Br. at 41 (emphasis in original). It cannot be used to ensure timeliness, because counties already have procedures for time-stamping ballots that have been received and for scanning their barcodes into the SURE system. *Id.* at 42. It cannot be used to confirm that an elector intended to vote by ballot—in a circumstance where the voter both mails a ballot and casts a provisional one at the polling place—because, by statute, only the absentee or mail-in ballot would count. *Id.* at 44 (citing 25 P.S. § 3050(a.4)(5)(ii)(F)). Finally, in the isolated case of alleged fraud in Lancaster County that Petitioners cited, the Acting Secretary submitted that "the date played no role in determining that the ballot at issue would not be counted." *Id.* at 45. County commissioners already had determined, via the SURE system, that the elector had died prior to the date of the primary, and so an investigation would have followed no matter what was written on the return envelope. *See id.* (citing *Berks Cnty. Bd. of Elections*, 2022 WL 4100998 at *21 n.14) (noting that "the ballot at issue had already (continued…)

C. The Materiality Provision

Petitioners maintain that their reading of the Election Code would not violate federal law. In their view, an elector whose absentee or mail-in "ballot is not counted because it was not filled out correctly . . . is not denied 'the right to vote'"; rather, "that individual's vote is not counted because he or she did not follow the rules for casting a ballot."[78] Congress enacted the materiality provision, Petitioners assert, to "forbid . . . the practice of *disqualifying voters* for their failure to provide information irrelevant to their eligibility to vote."[79] The focus was upon regulations that "requir[ed] unnecessary information for voter registration," such as one's age in the "exact number of months and days," intending to "increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters."[80] Because determining that a ballot return envelope is missing a date or has been incorrectly dated does not pertain to a qualification determination, Petitioners argue, the materiality provision is irrelevant here.

While Petitioners concede that "an absentee or mail-in ballot and the declaration is a 'record or paper,'" they maintain that "casting a ballot—which, under Pennsylvania law, requires completing the declaration—constitutes the *act* of voting, not an application,

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been separated by the chief clerk because the scan of the return envelope revealed, through the SURE system, that the elector was deceased")). *See Boockvar*, 238 A.3d at 361 (adopting a "construction of the Code that favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate").

78 Petitioners' Br. at 43-44 (quoting *Ritter v. Migliori*, 142 S. Ct. 1824 (Mem.) (2022) (Alito, J., dissenting from the denial of a stay)); *see also Vote.Org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022) ("It 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 materiality provision].").

79 *Id.* at 45 (quoting *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003)) (emphasis in brief).

80 *Id.*

registration, or other act *requisite* to voting."[81] In other words, "[v]oting is voting; it is not an act requisite to voting."[82] Petitioners assert that, under Pennsylvania law, "completing the declaration is part and parcel of voting by absentee or mail-in ballot."[83] To read the materiality provision otherwise 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.'"[84] Relevantly, Petitioners argue that the Acting Secretary never reconciled her position that the signature requirement does not violate federal law with her broad interpretation of the materiality provision.[85]

The Acting Secretary replies that Petitioners' strict interpretation of "deny the right . . . to vote" is contrary to the Civil Rights Act's definitions,[86] and that it would render the provision itself—"which operates *only* when there is non-compliance with some prerequisite to voting—completely null."[87] Furthermore, she argues, while it is true that Congress passed Section 10101(a)(2)(B) to thwart efforts that disenfranchised African-

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81 *Id.* at 47 (citation omitted) (emphases in original).

82 *Id.*

83 *Id.* at 51.

84 *Id.* at 49 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)). Notably, *Clingman* concerned not the materiality provision, but rather claims that a semi-closed primary system placed a severe burden on associational rights.

85 *See id.* at 50.

86 *See* 52 U.S.C. § 10101(e). For purposes of the materiality provision, "the word 'vote' includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election[.]"

87 Respondent's Br. at 51 (emphasis in original).

American voters by requiring unnecessary information to register to vote, Congress may "choose a broader remedy" when "combating specific evils."[88] Here, she maintains, Congress did so. According to the Acting Secretary, the materiality provision applies whenever a state "would deny someone the right to vote for failing to satisfy a state's request for information if that information was not needed to judge the voter's qualifications."[89] Second, the Acting Secretary argues, completing a declaration on a ballot return envelope cannot be subsumed within the act of voting, because that would read the words "act requisite to voting" out of the statute.[90] She contends that disqualifying ballots for failure to follow the ordinary election regulations that Petitioners identified[91] would not trigger the materiality provision, because none of them pertain to an "error or omission on any record or paper" related to voting.[92]

Because the statutory definition of "vote" includes "all action necessary to make a vote effective including . . . having such ballot counted and included in the appropriate totals of votes cast,"[93] the Acting Secretary argues that the materiality provision applies. In her view, the date requirement "serve[s] no purpose other than as a means of inducing

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88 *Id.* at 52 (quoting *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008)).

89 *Id.* at 52-53.

90 *See id.* at 53.

91 *Id.* at 54 (citing Petitioners' Br. at 44) (suggesting that the Acting Secretary's interpretation of the materiality provision might apply to an elector who "show[s] up to the polls after Election Day, fail[s] to sign or to use a secrecy envelope for an absentee or mail-in ballot, return[s] the ballot to the wrong location, or arriv[es] at the wrong polling place").

92 *See id*. at 54.

93 52 U.S.C. § 10101(e).

voter-generated errors that could be used to justify" denying the right to vote.[94] She observes that county boards act under color of state law, a ballot return envelope is a "record or paper," and the lack of a date or an incorrect date is an "error or omission."[95] Moreover, she notes, many federal courts have concluded that setting aside an individual ballot falls within the scope of the statute.[96] Accordingly, the Acting Secretary concludes, federal law requires that ballots sent in return envelopes that do not comply with the date requirement must nevertheless be counted.

III. Analysis

As we exercise this Court's King's Bench authority here, our standard of review for these purely legal questions is *de novo*, and the scope of our review is plenary.[97]

A. Standing

We begin with standing.[98] Pennsylvania standing doctrine "stems from the principle that judicial intervention is appropriate only where the underlying controversy is

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94 Respondents' Br. at 47 (quoting *Browning*, 522 F.3d at 1173).

95 52 U.S.C. § 10101(a)(2)(B).

96 *See* Respondents' Br. at 49 (citing *La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 1651215 at *21 (W.D. Tex. May 24, 2022); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F.Supp.3d 1260, 1282 (N.D. Ga. 2021); *Martin v. Crittenden*, 347 F.Supp.3d 1302, 1308-09 (N.D. Ga. 2018); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640 at *4 (W.D. Ark. Nov. 15, 2021)); *see also Common Cause v. Thomsen*, 574 F.Supp.3d 634, 636 (W.D. Wis. 2021) ("[T]he text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration.").

97 See *Commonwealth v. Williams*, 129 A.3d 1199, 1213 (Pa. 2015); *Stilp v. Commonwealth*, 905 A.2d 918, 930 (Pa. 2006).

98 Justice Dougherty surveys case law in which this Court has granted King's Bench review, and opines that "normal justiciability concerns simply do not exist" when we exercise this "sweeping . . . authority." Concurring and Dissenting Op. at 2 (Dougherty, J.). Because standing is one of these concerns, he posits that "whether petitioners have standing to pursue their claim is irrelevant for purposes of our consideration here on (continued…)

real and concrete, rather than abstract,"[99] and its touchstone is "protect[ing] against improper plaintiffs."[100] To support standing, a plaintiff's interest in the outcome of a given suit must be "substantial, direct, and immediate."[101] An interest is "substantial when it surpasses the interest of all citizens in procuring obedience to the law"; it is "direct when the asserted violation shares a causal connection with the alleged harm"; and it is "immediate when the causal connection with the alleged harm is neither remote nor speculative."[102]

We agree with the Acting Secretary that an organization's expenditure of resources alone ordinarily does not confer standing,[103] but we are unpersuaded that the instant dispute falls within the category of "general grievance[s] about the correctness of

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King's Bench." *Id.* at 3. To be sure, a lack of standing is something that the Court may, in its discretion, overlook when exercising this power. *See, e.g.*, *In re Off. of Philadelphia Dist. Att'y*, 244 A.3d 319, 321 (*per curiam*) (considering the claims of a deceased police officer's widow despite the fact that private citizens and victims generally lack standing to intervene in a criminal proceeding). But it does not necessarily follow that a standing inquiry becomes irrelevant. This Court may still exercise its broad discretion in King's Bench jurisdiction to consider standing as a prudential matter, and may wield that discretion as a means of identifying the proper parties that might be entitled to relief. Indeed, that is what the Court did here. *See* Order, 11/1/22, at 2 (*per curiam*) (dismissing Voter Petitioners from the case for lack of standing, without any noted dissent on that question). In any event, as Justice Dougherty notes, this case was a suitable vehicle for the Court to offer guidance regarding challenges to party standing in elections cases. *See* Concurring and Dissenting Op. at 3 (Dougherty, J.).

99 *City of Phila. v. Commonwealth*, 838 A.2d 566, 577 (Pa. 2003).

100 *In re Application of Biester*, 409 A.2d 848, 851 (Pa. 1979).

101 *Markham*, 136 A.3d at 140.

102 Commonwealth, Office of Governor v. Donahue, 98 A.3d 1223, 1229 (Pa. 2014).

103 *See* Respondents' Br. at 19-20; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998) ("[*Havens*] did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs.") (quoting *Fair Emp't Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994)).

governmental conduct."[104] Had Party Petitioners facially challenged an existing interpretation of settled law, or simply sought to compel the Commonwealth to act in a way that aligns with its mission or its investment of resources, that challenge would have been unlikely to succeed. But the particular facts giving rise to this case are highly relevant, and they must guide our analysis. The Commonwealth Court has issued contradictory interpretations as to the import of our 2020 ruling.[105] The Acting Secretary published unambiguous guidance that was consistent with one of these competing approaches and that was, in part, based upon a reading of recent federal decisions that had been vacated for mootness. Accordingly, Party Petitioners could not have asserted an interest in adherence to the law, because the law was unclear with respect to which ballots should be discounted.

Under these circumstances, we hold that Party Petitioners' expenditure of resources to educate candidates, electors, and voting officials concerning adherence to the Election Code constitutes a substantial interest. The alleged violation (the Secretary's guidance regarding an unsettled legal question) shares a causal connection with the alleged harm (Party Petitioners' inability to educate candidates, electors, and voting officials effectively), and that connection is neither remote nor speculative.[106] Accordingly, we hold that Party Petitioners have standing.

Conversely, Voter Petitioners' argument for standing is foreclosed by this Court's ruling in *Kauffman*.[107] There, electors sought to "enjoin and restrain the election officials from issuing or recognizing a certain class of absentee ballots on the ground that the

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104 *Cf. Markham*, 136 A.3d at 145.

105 *See supra* notes 32 and 33 (discussing the application of *In re 2020 Canvass*).

106 *See Markham*, 136 A.3d 140; *Donahue*, 98 A.3d at 1229.

107 *See* 271 A.2d at 239-40.

provisions of the Absentee Ballot Law authorizing such class of ballots [were] invalid under the federal and state constitutions."[108] But, as we observed, a fundamental assumption of the *Kauffman* appellants' theory of standing was that "those who obtain absentee ballots, by virtue of statutory provisions which [the appellants deemed] invalid, [would] vote for candidates . . . other than those for whom the appellants [would] vote and thus [would] cause a dilution of appellants' votes."[109] This assumption was unsupported by facts, and its centrality to their arguments defeated their attempts to demonstrate injury that was "peculiar to them."[110] The same is true here. Voter Petitioners have not substantiated their assumption that the ballots they believe should not be counted would dilute their own. There is no way of knowing whether undated or incorrectly dated absentee or mail-in ballots will be cast for Republicans, Democrats, or others. Accordingly, Voter Petitioners lack standing.

In light of our finding that Party Petitioners have standing, we proceed to the merits.

B. The Date Requirement

1. *Undated Ballots*

Petitioners assert that a "majority of this Court has already concluded that . . . the date requirement is unambiguous and mandatory."[111] Meanwhile, the Acting Secretary insists that, by virtue of its divergent rationales, our 2020 ruling did not "put this issue to rest."[112] Petitioners' view is correct.

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108 *Id.* at 237 (footnote omitted).

109 *Id.* at 239-40.

110 *Id.* at 240.

111 Petitioners' Br. at 21 (citing *In re 2020 Canvass*, 241 A.3d at 1079 (Wecht, J., concurring and dissenting); *id.* at 1090 (Dougherty, J., concurring and dissenting)).

112 Respondents' Br. at 8 (discussing *In re 2020 Canvass*).

As this Court has observed, "it is possible to cobble together a holding out of a fragmented decision."[113] Doing so requires "a majority of the Court [to] be in agreement on the concept which is to be deemed the holding."[114] In 2018's *T.S.*[115] decision, for instance, we considered the precedential import of this Court's fractured decision in *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017). *L.B.M.* yielded a lead opinion, a concurring opinion, and two dissenting opinions. Notwithstanding the fact that none of the four writings was joined by more than two other Justices, the appellant in *T.S.* argued that the three-Justice plurality in *L.B.M.* constituted binding precedent. The *T.S.* Court disagreed, stating that the "majority view of [four] Justices was *apparent from the face of the opinions* in *L.B.M.*," even though all four of those Justices expressed their support for that holding from a concurring or dissenting posture.[116]

Similarly, in *Commonwealth v. McClelland*, 233 A.3d 717, 732-33 (Pa. 2020), we ruled upon the precedential value of *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172 (Pa. 1990). In *Verbonitz*, this Court had considered whether hearsay evidence alone is sufficient to establish a *prima facie* case in criminal proceedings. The lead opinion, authored by Justice Larsen and joined by Justices Zappala and Papadakos,

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113 *Pap's A.M. v. City of Erie*, 719 A.2d 273, 278 (Pa. 1998), *rev'd on other grounds*, 529 U.S. 277 (2000).

114 *Id.*

115 *See In re T.S.*, 192 A.3d 1080, 1088 (Pa. 2018).

116 *Id.* (emphasis added) (citations omitted); *see L.B.M.*, 161 A.3d at 184 (Saylor, C.J., concurring, joined by Todd, J.) (finding that the "propriety" of the same individual serving both as counsel and as a guardian *ad litem* for children during a contested termination of parental rights proceeding "should be determined on a case-by-case basis"); *id.* at 188-89 (Baer, J., dissenting, joined by Mundy, J.) (finding that the statute in question did not "mandate" the appointment of a distinct individual, absent a conflict of interest); *id.* at 190-91 (Mundy, J., dissenting, joined by Baer, J.) (concluding that, under applicable court rules, a single individual can serve as both counsel and guardian *ad litem*, unless there is a conflict of interest); *see also In re T.S.*, 192 A.39 at 1099 (Wecht, J., dissenting).

concluded that such evidence standing alone is not sufficient, and that any determination otherwise was a violation of the defendant's right to confront witnesses against him.[117] Justice Flaherty wrote a concurrence, which Justice Cappy joined, reaching the same conclusion but with a different rationale.[118] While these two Justices agreed that hearsay evidence alone is not sufficient to establish a *prima facie* case, they deemed their conclusion "to be a requirement of *due process*," not of the right to witness confrontation.[119] In *McClelland*, we opined that "five Justices in *Verbonitz* agreed a *prima facie* case cannot be established by hearsay evidence alone, and the common rationale among those Justices involved due process considerations."[120] Accordingly, "although *Verbonitz* is nominally a plurality decision, it [was] clear that a five-member majority of the Court" had held that hearsay evidence alone would not suffice in establishing a *prima facie* case.[121] *Verbonitz* thus had precedential value notwithstanding the fact that the lead opinion and the minority expression diverged with respect to some finer points of the legal analysis.

Consistent with our approach in *T.S.* and in *McClelland*, we recognize that, although the Court's rationale was expressed in serial opinions,[122] an undeniable majority already has determined that the Election Code's command is unambiguous and

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117 581 A.2d at 174-75.

118 *See id.* at 175-76.

119 *Id.* at 175 (Flaherty, J., concurring) (emphasis added).

120 233 A.3d at 732.

121 *Id.* at 733.

122 *Compare In re 2020 Canvass*, 241 A.3d at 1086-87 (Wecht, J., concurring and dissenting) (rejecting the "minor irregularity" / "weighty interest" dichotomy and relying upon the statutory use of mandatory language), *with id.* at 1090-91 (Dougherty, J., concurring and dissenting) (concluding that the date requirement serves "weighty interests.").

mandatory, and that undated ballots would *not* be counted in the wake of *In re 2020 Canvass*.[123] This result was "apparent from the face of the opinions."[124] Four Justices agreed that failure to comply with the date requirement would render a ballot invalid in any election after 2020. Pennsylvania's candidates, electors, and local officials therefore were on notice that ballots must be dated, and that failure to provide a date would result in disqualification. As a matter of statutory interpretation of our Election Code, we now reaffirm that conclusion.

2. *Incorrectly Dated Ballots*

Petitioners' prayer for relief identifies for disqualification not only ballots that arrive in undated return envelopes, but those that arrive in "incorrectly dated" return envelopes as well.[125] While the *In re 2020 Canvass* Court did not address what constitutes an "incorrectly" dated ballot, this has been the subject of judicial attention from the Commonwealth Court in *Berks County Board of Elections* and from the Third Circuit in *Migliori*.

In *Berks County Board of Elections*, President Judge Cohn Jubelirer observed that the Election Code "says 'date,'" but it "does not specify *which* date."[126] In *Migliori*, a panel

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123 *See In re 2020 Canvass*, 241 A.3d at 1079 (Wecht, J., concurring and dissenting) ("[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 (Dougherty, J., concurring and dissenting) ("the 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").

124 *T.S.*, 192 A.3d at 1088.

125 *See* Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction at 26-27.

126 2022 WL 4100998 at *18 (emphasis added).

of the Third Circuit recognized that, per guidance promulgated by the Department of State, "ballots with obviously incorrect dates" were routinely counted.[127] On this reading, because the statute simply instructs electors to "date" the declaration, any date is sufficient, even if it bears no correlation with the action of marking the ballot or signing the declaration.

We reject this interpretation. Implicit in the Election Code's textual command that electors "shall . . . fill out, date and sign the declaration,"[128] is the understanding that "date" refers to the day upon which an elector signs the declaration. To hold otherwise would be to require unnecessarily specific drafting on the part of the General Assembly. For instance, it need not be specified in an instruction such as "sign" that an elector must sign his or her *own* name, as opposed to someone else's. Similarly, when an instruction to "date" something appears in close quarters with other actions—here, filling out and signing the declaration—it is evident that the instruction refers to the day upon which those actions are completed, and not one selected at random.[129]

How county boards are to verify that the date an elector provides is, in truth, the day upon which he or she completed the declaration is a question that falls beyond our purview. Our supplemental order of November 5, 2022 sought—for purposes of the

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127 36 F.4th at 163; *see id.* at 165 n.3 (Matey, J., concurring).

128 25 P.S. §§ 3146.6(a); 3150.16(a).

129 Justice Donohue disagrees, and contends that the word "'date,' unencumbered by qualification is not express and its meaning is not self-evident," as demonstrated by several voters' "confusion about what date to provide." Concurring Op. at 6 (Donohue, J.). But our conclusion does not stem from the notion that "date," standing alone, bears an implicit meaning. Rather, that instruction must be read in the context of what proceeds and follows it. *See Gavin v. Loeffelbein*, 205 A.3d 1209, 1221 (Pa. 2019) ("[W]e must always read the words of a statute in context, not in isolation"). To read the phrase "*fill out*, date *and sign*," 25 P.S. §§ 3146.6(a); 3150.16(a) (emphases added) to allow for any date, regardless of its relation to the acts of filling out and signing the declaration on an absentee or mail-in ballot would be to sanction an absurd result. *See* 1 Pa.C.S. § 1922(1).

November 8, 2022 election—to provide guidance and to promote uniformity without the benefit of having yet issued this Opinion. In that order, we identified mail-in ballots arriving in envelopes "with dates that fall outside the date range of September 19, 2022, through November 8, 2022," and absentee ballots arriving in envelopes "with dates that fall outside the date range of August 30, 2022, through November 8, 2022" as being "incorrectly" dated within the context of the November 8, 2022 election.[130] These date ranges were intended to capture the broadest discernible period of time within which an elector could have an absentee or mail-in ballot in hand, and thus could become able to "fill out, date and sign" the declaration on the return envelope.[131] For purposes of the 2022 General Election, a date outside these ranges, therefore, is incapable of being the "correct" date, *i.e.*, the date of signing of the declaration.

This Court having now issued guidance for the conduct of the most recent election, county boards of elections retain authority to evaluate the ballots that they receive in future elections—including those that fall within the date ranges derived from statutes indicating when it is possible to send out mail-in and absentee ballots—for compliance with the Election Code.

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130 Supplemental Order, 11/5/2022, at 1-2. By statute, county boards of elections may receive applications for mail-in ballots "not earlier than 50 days before the primary or election." *See* 25 P.S. § 3150.12a(a). Applications received earlier than fifty days before the election "shall be held and processed upon commencement of the 50-day period or at such earlier time as the county board of elections determines may be appropriate." *Id.* § 3150.12a(b). Fifty days prior to November 8, 2022 is September 19, 2022. Depending upon their location of origin, absentee ballots could be mailed seventy days prior to an election, or forty-five days prior to an election, at the earliest. *See* 25 P.S. § 3146.5(a). Seventy days prior to November 8, 2022 is August 30, 2022.

131 25 P.S. §§ 3146.6(a); 3150.16(a).

C. The Materiality Provision[132]

Having held, as a matter of statutory interpretation, that our Election Code requires the disqualification of ballots that arrive in undated or incorrectly dated return envelopes, we now must examine whether that disqualification would nonetheless violate federal law.[133] The materiality provision of the federal Civil Rights Act of 1964 states that:

> [n]o 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.[134]

The Acting Secretary cites the Third Circuit's holding that such disqualification would offend the materiality provision,[135] and she suggests that "this Court should follow [that] rationale."[136] While this Court is not bound by the decisions of federal circuit or district courts on issues of federal law, and while we consider such decisions for their persuasive value only,[137] we find ourselves in agreement here with the Third Circuit's result.

We begin with the statutory text, which may be broken down into six distinct elements. Violations of the materiality provision occur when: (1) a "person acting under

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[132] For purposes of this subsection, all uses of "we" and "our" refer only to those Justices who would find that disqualifying ballots that arrive in undated or incorrectly dated return envelopes would constitute a violation of federal law.

[133] In our view, when this Court granted review of the materiality question, it agreed to resolve an issue of substantial public importance that required timely intervention. *See Bruno*, 101 A.3d at 670. The opinions addressing this federal question provide the rationales that underlie this Court's deadlock.

[134] 52 U.S.C. § 10101(a)(2)(B).

[135] *Migliori*, 36 F.4th at 162-64.

[136] Respondents' Br. at 48. The Acting Secretary explains that federal appeals courts often treat cases in which the Supreme Court of the United States has vacated a judgment on mootness grounds as persuasive authority, assuming that the vacatur was not an assessment of the merits. *See* Respondents' Br. at 48 (collecting cases).

[137] See Hall v. Pennsylvania Bd. of Prob. and Parole, 851 A.2d 859, 865 (Pa. 2004).

color of law"; (2) "den[ies] the right of an individual to vote in any election"; (3) "because of an error or omission"; (4) "on any record or paper"; (5) "relating to an application, registration, or other act requisite to voting"; (6) if that error "is not material in determining" whether an elector is qualified to vote.[138]

No party disputes that (1) election officers and county boards of elections are actors under color of law, or that (3) the failure to include a date, or to include a correct date, constitutes an error or omission. Petitioners concede that "an absentee or mail-in ballot and the declaration" constitute (4) a "record or paper," and they recognize that the date requirement is (6) not material to the determination of whether an individual is qualified to vote.[139] Accordingly, our focus is whether invalidation of a ballot for failure to comply with the date requirement (2) "den[ies] the right of an individual to vote in any election," and whether ballot return envelopes are records or papers (5) "relating to an application, registration, or other act requisite to voting."[140] Upon examination, we answer both questions in the affirmative.

Petitioners argue that, when a ballot is not counted because of a defect in the date on the declaration, the elector "is not denied 'the right to vote,'" but, rather, that individual's

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138 52 U.S.C. § 10101(a)(2)(B).

139 *See* Petitioners' Br. at 46-47. According to Petitioners, the four qualifications to vote in Pennsylvania 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." Petitioners' Br. at 47 (citing 25 Pa.C.S. § 1301). Because the date requirement bears no relation to the demonstration of any of these qualifications, Petitioners argue that "it is outside the plain terms [of] . . . the federal materiality provision." *Id.* However, rather than demonstrating that the materiality provision is inapplicable to the date requirement, Petitioners' logic in fact establishes that the date requirement is simply "not material in determining whether such individual is qualified" to vote. 52 U.S.C. § 10101(a)(2)(B).

140 52 U.S.C. § 10101(a)(2)(B).

vote is "not counted because he or she did not follow the rules for casting a ballot."[141] This analysis would be persuasive if not for the fact that the statute provides Congress' own expansive definition for the word "vote," a definition which we are not at liberty to ignore. For purposes of the materiality provision:

> [T]he word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election[.][142]

Congress, then, has foreclosed Petitioners' reading by instructing courts to look not only for individuals being stripped of their ability to exercise the right to vote generally, but for individuals who are denied the right to have their ballots counted and included in the tallies for an individual election.[143] Federal courts that have evaluated the materiality provision in similar contexts concur in this reading.[144]

Moreover, the Acting Secretary is correct that Petitioners' reading would render the materiality provision "completely null."[145] The provision is only triggered by an error or omission—*i.e.*, when an elector has failed to follow the rules for voting. If Petitioners' interpretation prevailed, 52 U.S.C. § 10101(a)(2)(B) would never be violated, because every "error or omission" would constitute an elector's accidental forfeiture of his or her vote by failing to follow the rules for voting, rather than a denial of the "right to vote" for which a state actor would be responsible. The text draws no distinction between an "error

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141 Petitioners' Br. at 43-44 (quoting *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of a stay)).

142 52 U.S.C. § 10101(e).

143 See id.

144 *See supra* note 96.

145 Respondents' Br. at 51.

or omission" that would justify denying the right to vote and one that would not. It does not differentiate between a requirement that has a valid purpose and one that does not.[146] We therefore decline to read such considerations into the language of the Act. In light of the statutory definition of "vote," and in order to render the materiality provision effectual, we find that invalidating ballots received in return envelopes that do not comply with the date requirement denies an individual the right of "having such ballot counted and included in the appropriate totals of votes cast,"[147] and therefore (2) "den[ies] the right of an individual to vote in any election."[148]

Petitioners raise additional arguments, grounded in the legislative history and congressional intent behind enacting the materiality provision. None are persuasive. The thrust of these points is that—contrary to the law's definitions section—Congress used "right to vote" in a narrow sense, as opposed to the expansive one set forth above in the statute's text. Petitioners therefore contend that individual instances of ballot exclusion do not rise to 52 U.S.C. § 10101(a)(2)(B)'s purview. Petitioners likely are correct that the principal focus of the materiality provision was forbidding "the practice of requiring unnecessary information for voter registration," such as listing one's age in the "exact number of months and days," which was intended to "increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential

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146 Indeed, one aim of the materiality provision may well have been for courts to eschew an examination of the "validity" of state election regulations, or their animating purposes. The statute provides one legitimate basis upon which an error or omission can result in the disqualification of a ballot—it must be "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). All others fail.

147 52 U.S.C. § 10101(e).

148 *Id.* § 10101(a)(2)(B).

voters."[149] But Congress' aims and unstated intent are irrelevant. "The text is the law, and it is the text that must be observed."[150] Even assuming that Congress passed the materiality provision to combat Jim Crow-era efforts that sought to disenfranchise African-American voters by denying them the opportunity to register to vote, it is within Congress' prerogative to "choose a broader remedy" in "combating specific evils."[151] Here, it did so. The "right to vote," as Congress defined it in the materiality provision, is to be understood broadly, and it includes the right to have an individual vote counted in a particular election notwithstanding errors or omissions that are immaterial to determining whether the voter is qualified to vote.

Finally, filling out a declaration on the return envelope in which an elector's ballot will travel constitutes (5) an "act requisite to voting."[152] A reasonable starting point for the determination of what "act requisite to voting" means is the delineation of what it certainly cannot mean. By using the word "other," Congress made clear that, though registering to vote and applying for an absentee ballot unquestionably are acts requisite to voting, the statute sweeps more broadly than that; an "*other* act requisite to voting" must be something else.[153] Logic and ordinary rules of statutory construction also dictate that an

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149 Petitioners' Br. at 45 (quoting *Schwier*, 340 F.3d at 1294).

150 ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (Amy Gutmann ed., 1997); *see also Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1737 (2020) ("Only the written word is the law, and all persons are entitled to its benefit.").

151 *Browning*, 522 F.3d at 1173. *See also* SCALIA, *supra* note 150, at 29 ("the objective indication of the words, rather than the intent of the legislature, is what constitutes the law"); *id.* at 35 (discussing the idea that a duly enacted statute merits the attention of courts because it has "been passed by the prescribed majority," and opining that whether the legislators acted "*with or without adequate understanding*" of what the statute would do is irrelevant) (emphasis in original).

152 52 U.S.C. § 10101(a)(2)(B).

153 *Id.* (emphasis added).

"act requisite to voting" must be different from voting itself. Accordingly, we can exclude from the category of "other act[s] requisite to voting" the marking of a ballot to indicate support for candidates or ballot measures, and the action of transporting a ballot to the appropriate authorities for it to be counted. Without either, an individual has not successfully voted.

Because writing a date as part of a declaration on a ballot return envelope neither relates to registering to vote, nor to applying for a mail-in ballot, nor to marking an individual ballot[154] nor to transporting it to the appropriate authorities to be counted, it must be an "other act requisite to voting." While we might also conceive of *all* the steps involved in casting a ballot—from filling it out to completing the declaration to affixing it with postage to dropping it in a mailbox, and so on—as voting, the rule against superfluities counsels against such a reading. This familiar interpretive canon instructs courts to construe a statute's language "so that effect is given to all its provisions, [and] so that no part will be inoperative or superfluous, void or insignificant."[155] If *all* of the steps involved in casting a ballot are encompassed in voting, then "other act requisite to voting" bears no meaning. We must avoid such a result.[156]

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[154] *Cf. Ritter*, 142 S. Ct. at 1826 n.2 (Alito, J., dissenting from the denial of a stay) ("A mail-in ballot is a 'record or paper' . . . [T]he casting of a ballot constitutes the act of voting."). As mentioned, the declaration that is the subject of this appeal does not appear on the mail-in ballot itself, but rather on the return envelope in which the ballot travels.

[155] *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations omitted); *see Commonwealth v. Mack Bros. Motor Car Co.*, 59 A.2d 923, 925 (Pa. 1948) (articulating this rule in Pennsylvania).

[156] In the event that Congress' meaning in the phrase "other act requisite to voting" might be deemed ambiguous, we would reach the same result. In such a circumstance, failure to comply with the date requirement would not compel the discarding of votes in light of the Free and Equal Elections Clause, and our attendant jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth. *See* PA. CONST. art. I, § 5; *Boockvar*, 238 A.3d at 361.

Petitioners raise various ancillary arguments regarding the consequences of this reading of the materiality provision, but none compels a different conclusion. They warn, for instance, that the Secretary's "sweeping" interpretation risks subjecting "'virtually every electoral regulation' related to voting records and papers to the superintendence of the federal materiality provision, 'hamper[ing] the ability of States to run efficient and equitable elections, and compel[ling] federal courts to rewrite state electoral codes.'"[157] While much of this statement is accurate, Petitioners draw a faulty conclusion. First, state election regulations are indeed subject to the superintendence of federal law, and recognizing as much is neither controversial nor improper.[158] Second, Petitioners' own phrasing of the ostensible threat demonstrates the narrow nature of this discrete congressional action. The materiality provision only affects regulations "*related to voting records and papers*,"[159] and does not threaten the states' broad authority to institute and operate election systems of their own design. For this reason, it does not hamper a state's ability to run elections, nor does it in any way compel the rewriting of regulations by federal courts.[160]

Though we need not—and do not—pass upon questions or challenges that are not before us, it is worth noting that many of the rules for voting that Petitioners identify as

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157 Petitioners' Br. at 49 (quoting *Clingman*, 544 U.S. at 593); *see supra* note 84.

158 *See* U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

159 Petitioners' Br. at 49 (emphasis added).

160 The latter part of this argument seems to have originated from *Clingman*, in which the plaintiffs' requested relief ostensibly would have involved a federal court ordering the State of Oklahoma to develop a new primary system. *See* 544 U.S. at 593. Such an argument has no bearing here, where compliance with the federal materiality provision would require simply that county boards of elections not disqualify absentee and mail-in ballots for failure to comply with the date requirement.

being under threat from the Acting Secretary's reading likely fall outside of the materiality provision's purview. "[S]howing up to the polls after Election Day" or "arriving at the wrong polling place,"[161] for instance, do not implicate an "*error or omission on any record or paper* relating to any application, registration, or other act requisite to voting."[162] Furthermore, it would be challenging to argue that failure to "use a secrecy envelope,"[163] constitutes an "omission *on* any record or paper,"[164] as opposed to the omission *of* any record or paper. While signature requirements[165] may constitute a closer call, they likely could be upheld under factor (6) of the materiality provision; a signature serves as a means of verifying that the individual who fills out information on a ballot or record is indeed the individual who is qualified and registered to vote. Therefore, there is at least a colorable argument that signatures *are* material.

In any event, the Court's task today is not to survey the entirety of the Election Code for instances of non-compliance with the materiality provision, nor is it to interpret federal law in a way that prospectively would save as many of those regulations as possible. Our constitutional obligation is simple and straightforward: to apply the text as it is written and to answer the question before us. Because application of the relevant provision of the Election Code would result in (1) county boards of elections (2) denying an elector the right to have his or her ballot counted (3) due to an erroneous or absent date (4) in a declaration on a ballot return envelope, (5) completion of which is an act requisite to voting, and (6) because that date is not material in determining an elector's

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161 Petitioners' Br. at 44 (citing *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from the denial of a stay)).

162 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

163 Petitioners' Br. at 44.

164 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

165 *See* Petitioners' Br. at 44.

qualifications, failure to count such ballots would violate federal law.[166] Accordingly, we would order county boards of elections to count all absentee and mail-in ballots arriving in undated or incorrectly dated mail-in return envelopes, provided that they have been timely received.

IV. Conclusion

Based upon our disposition of all of the claims set forth above, we found that Party Petitioners have standing, and we granted their requested relief in part. The Election Code commands absentee and mail-in electors to date the declaration that appears upon ballot return envelopes, and failure to comply with that command renders a ballot invalid as a matter of Pennsylvania law. The Court having divided evenly on the question of the federal materiality provision, we issued no order on that basis, but the analysis above offers a rationale that aligns with the Third Circuit's interpretation.

Justice Donohue files a concurring opinion in which Chief Justice Todd joins.

Justice Dougherty files a concurring and dissenting opinion.

Justice Brobson files a concurring and dissenting opinion in which Justice Mundy joins.

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166 52 U.S.C. § 10101(a)(2)(B).