

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, Acting Secretary of the
Commonwealth and the PENNSYLVANIA
DEPARTMENT OF STATE,

Petitioners,

v.

BERKS COUNTY BOARD OF ELECTIONS, *et al.*,

Respondents.

No. 355 MD 2022

**MEMORANDUM IN SUPPORT OF PETITIONERS' EMERGENCY
APPLICATION FOR PEREMPTORY JUDGMENT AND SUMMARY
RELIEF**

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INTRODUCTION

Three county boards of elections are holding up final certification of Pennsylvania's 2022 primary election because they refuse to send the Acting Secretary of the Commonwealth certified returns that include *every* ballot lawfully cast in that election. Their duty to send the Acting Secretary those returns is a ministerial and non-discretionary act, and there is no longer doubt that the ballots the county boards refuse to include—timely received absentee and mail-in ballots cast by qualified voters who neglected to write a date on the declaration printed on the ballot's return envelope—were lawfully cast and must be included in the certified returns. This Court should order the three county boards that are delaying resolution of the 2022 primary election to send to the Acting Secretary certifications reflecting *all* lawfully cast ballots.

STATEMENT OF THE CASE

In mid-May, over 2.5 million people voted in Pennsylvania's 2022 primary election. Eight weeks later, the results of that election remain uncertified.

At first, the delay was primarily because of litigation about whether county boards of election must count timely received absentee and mail-in ballots cast by qualified voters if the voter neglected to hand write a date on the declaration

printed on the return envelope.¹ By mid-June, however, that litigation was resolved.

In one case, concerning a judicial race in Pennsylvania's 2021 general election, the U.S. Court of Appeals for the Third Circuit ruled that 52 U.S.C. § 10101(a)(2)(B) forbids a Pennsylvania county board of elections from refusing to canvass and count a timely received absentee or mail-in ballot cast by a qualified voter on the basis that the voter did not date the return envelope's declaration. *Migliori v. Lehigh Cnty. Bd. of Elections*, 36 F.4th 153, 162-64 (3d Cir. 2022). The U.S. Supreme Court, over a dissent written by Justice Alito, denied a motion to stay the Third Circuit's ruling. *Ritter v. Migliori*, 142 S. Ct. 1824 (2022).

In a second case, this Court ruled that § 10101(a)(2)(B) and, independently, Pennsylvania law likely require county boards of elections to canvass timely received absentee and mail-in ballots cast by qualified voters even if the voter neglected to write a date on the return envelope's declaration. *See generally* Memorandum Opinion, *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022). This Court issued a preliminary injunction, ordering that county boards of election (including the boards for Berks, Fayette, and Lancaster counties)

¹ Voters return absentee and mail-in ballots to their board of election in an envelope that has printed on the back a declaration with a statement that the voter is qualified to vote and has not already voted in that election. 25 P.S. § 3146.4; 25 P.S. § 3150.14.

canvass those ballots for the 2022 primary election. *See Order, McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022). So that accurate results could be certified if a different conclusion was reached at final judgment, this Court ordered county boards to report two tallies to the Acting Secretary: one including timely received absentee and mail-in ballots without a handwritten date, and one excluding them. Memorandum Opinion at 37, *McCormick v. Chapman*.

Both an appeal from the order in *McCormick* and the underlying action were voluntarily dismissed. Therefore, neither this Court nor the Pennsylvania Supreme Court ever entered a contrary order, and the preliminary order remains undisturbed.² Indeed, this Court denied a request to vacate its order after the appeal and underlying action were dropped. *See Order, McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 10, 2022).

Since *Migliori* and *McCormick* were resolved, the Department has contacted all county boards several times, instructing them to transmit to the Acting Secretary certified returns for the 2022 primary election that include timely

² For other elections, panels of the Commonwealth Court have ruled that ballots without the voter's handwritten date may not be counted. *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156 (Pa. Commw. Ct. Jan. 10, 2022), *appeal denied* 2022 WL 536196 (Pa. Feb. 23, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 CD 2021, 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022). Those non-precedential decisions were wrongly decided, *see infra* Section II, and, in any event, have no bearing on what the order in *McCormick* demands of counties for the 2022 primary election.

received absentee and mail-in ballots cast by qualified voters even if the voter neglected to write a date on the ballot's return envelope. In other words, the Department instructed the counties to send certified results that include the very ballots that this Court ordered in *McCormick* must be canvassed, which also are the same type of ballots that the Third Circuit ruled in *Migliori* must be counted.

Sixty-four of the 67 county boards have submitted to the Acting Secretary certified returns from the 2022 primary election that include all lawfully cast votes, including those at issue in *McCormick*. But three outliers have not. The Berks County Board of Elections, the Fayette County Board of Elections, and the Lancaster County Board of Elections still refuse to do so.

The Acting Secretary and the Department initiated this action to compel those three boards to execute their duty to submit to the Acting Secretary certified returns of the 2022 primary election that include all lawfully cast and canvassed ballots, including timely received absentee and mail-in ballots cast by qualified voters even if the voter neglected to write a date on the declaration printed on their ballot's return envelope.

LEGAL STANDARD

Both an application for peremptory judgment in mandamus and application for summary relief are resolved under the same standard, which is that petitioners prevail if there are no genuine disputes of material fact and the right to relief is

clear as a matter of law. *MFW Wine Co., LLC v. Pennsylvania Liquor Control Bd.*, 231 A.3d 50, 52 n.2 & 56 (Pa. Commw. Ct. 2020).

SUMMARY OF ARGUMENT

The Pennsylvania Election Code imposes upon county boards of elections an obligation to certify the returns of a general or primary election based on a count of all ballots that were lawfully cast, and thus were canvassed and counted. 25 P.S. § 3154(a), (f). This Court already has ordered that timely received absentee and mail-in ballots cast by qualified voters who failed to date the declaration on their ballot's return envelope must be canvassed for the 2022 primary election. June 2 Order, *McCormick v. Chapman*. But the boards of elections for Berks, Fayette, and Lancaster counties refuse to include those ballots in their certified returns. Because the county boards have a duty to certify returns that include all legally canvassed ballots, this Court's order in *McCormick* requires the Respondent boards to include the ballots at issue there in their certified returns for the 2022 primary election. Because Petitioners do not have an alternative way to compel the Respondent boards to execute their duty to certify returns that include every lawfully cast ballot, this Court should issue a writ of mandamus.

Additionally, Pennsylvania's Election Code directs that absentee and mail-in ballots should be canvassed—and thus included in certified returns—if the return envelope's "declaration is sufficient." 25 P.S. § 3146.8(g)(3). A signed but undated

declaration is sufficient. Pennsylvania law thus requires enjoining Respondents from excluding the ballots at issue from their final returns.

Independently, federal law prohibits a county from excluding from its final election returns any ballot based on an error or omission that is not material to determining a voter's qualification. 52 U.S.C. § 10101(a)(2)(B), (e). Because failing to date the declaration on a ballot return envelope is such an omission, no county board can exclude a ballot from its final election returns based on that omission. *Migliori v. Lehigh Cnty. Bd. of Elections*, 36 F.4th 153 (3d Cir. 2022).

This Court therefore should declare that neither Pennsylvania nor federal law allows a county board to exclude from its certified returns a timely received absentee or mail-in ballot cast by a qualified voter who failed to date the return envelope's declaration, and should enjoin the Respondents from excluding those ballots from their certified returns for the 2022 primary election.

ARGUMENT

I. Petitioners Meet the Standard for a Writ of Mandamus

Pennsylvania's Election Code requires county boards to certify returns that include all ballots that were lawfully canvassed in an election. Petitioners are entitled to a writ of mandamus compelling the Respondent boards to perform this ministerial duty for the 2022 primary election because Petitioners can establish their clear right to relief, the Respondent boards' corresponding duty, and the lack

of an adequate alternative remedy. *MFW Wine Co.*, 231 A.3d at 56 (explaining standard for writ of mandamus).

A writ of mandamus may issue to compel performance of a ministerial act, which is “one which a public officer is required to perform upon a given state of facts and in a prescribed manner in obedience to the mandate of legal authority.” *Philadelphia Firefighters’ Union, Loc. 22, Int’l Ass’n of Firefighters, AFL-CIO ex rel. Gault v. City of Philadelphia*, 119 A.3d 296, 303 (Pa. 2015) (internal citations omitted). And the right to compel that act “is shown where the right to require performance of the act is clear” and where the recalcitrant public officer is governed by statutory language stating that the “act shall be done.” *Id.* at 304 (internal citations omitted).

A. The Respondent Boards Must Include in Their Certified Results Timely Received Absentee and Mail-in Ballots Cast by Qualified Voters

For the 2022 primary election, this Court already has ordered the three Respondent boards “to canvass [ballots that lack a dated return envelope] assuming there are no other deficiencies or irregularities that would require otherwise.” June 2 Order, *McCormick v. Chapman*; accord Memorandum Opinion at 37, *McCormick v. Chapman*. Because the Election Code requires county boards to include all canvassed ballots in their final, certified returns, that order also

obligates the three Respondent boards to include the same ballots in their certified returns for the 2022 primary election.

Pennsylvania’s Election Code prescribes how a voter may cast an absentee or mail-in ballot in a general or primary election and have that vote included in the final election returns. With an exception for military voters and their families, absentee and mail-in ballots that a county board of elections receives by 8 p.m. on Election Day shall be canvassed if the board has verified the voter’s identity and the declaration on the voter’s ballot return envelope is “sufficient” (assuming the voter has not died before Election Day and the ballot is not being challenged). 25 P.S. § 3146.8(d), (g)(1)-(3). Once a ballot is canvassed, the Election Code leaves no further discretion: the ballot “shall be counted and included with the returns of the applicable election district.” *Id.* § 3146.8(g)(4).

Election boards convene three days after a general or primary election ends to perform their own duty to compute and canvass returns of legally cast ballots that the county’s various election districts already canvassed and counted. *Id.* § 3154(a). A county board computes and canvasses the election returns received from their districts by maintaining “all the returns from the various election districts which are entitled to be counted,” which then “shall be added together.” *Id.* § 3154(f); *see also id.* § 2642(k) (commanding county boards “[t]o receive from district election officers the returns of all primaries and elections, to canvass and

compute *the same*, and to certify, no later than the third Monday following the primary or election, the results thereof”) (emphasis added).

After a board has added together the returns from its election districts, the board announces its unofficial election results. *Id.* § 3154(f). After five days, or after all recounts and recanvasses are completed, the announced results are certified as the county’s official returns. *Id.*

County boards must then supply the Acting Secretary with certified returns for any general or primary election involving a race for statewide office, for a seat in the General Assembly, or for federal office (among some other positions), such as the 2022 primary election. *Id.* §§ 3158, 3159. In those elections, a copy of the county board’s certified results “shall [] be forwarded by the county board to the Secretary of the Commonwealth on forms furnished by the Secretary of the Commonwealth.” *Id.* § 3158; *see also id.* § 2642(k).

Under this statutory framework, the absentee and mail-in ballots that an election district canvasses at the beginning of the counting process must be reflected in the certified returns that a county board computes—and then sends to the Secretary—at the end of the counting process. The Election Code affords the Respondent boards no discretion to exclude from their certified returns ballots that lawfully were canvassed. Therefore, this Court’s order in *McCormick* directing the

Respondent boards to canvass the ballots at issue here dictates that the same ballots must also be included in the Respondent boards' certified returns.

It does not matter that *McCormick* was voluntarily dismissed before this Court entered a final judgment. While this Court left open the theoretical possibility that it might ultimately reach a different final decision, neither this Court—nor the Pennsylvania Supreme Court—ever did, and the order in *McCormick* remains undisturbed. The Respondent boards were parties to *McCormick* and could have pursued an appeal had they chosen. Instead, they acceded to the order.

This Court's order in *McCormick* dictates that the returns the Respondent boards must certify and send to the Acting Secretary for her final certification of the 2022 primary election must include timely received absentee and mail-in ballots cast by qualified voters that neglected to write a date on the declaration printed on their ballot's return envelope.

B. Petitioners Have No Alternative Remedy

Petitioners do not have any alternative avenue of requiring the Respondent boards to transmit to the Acting Secretary an accurate certification of the 2022 primary election results. The Department has instructed the Respondent boards multiple times to submit accurate certifications, but to no avail. Finally, Petitioners' request for declaratory and injunctive relief does not defeat the request

for a writ of mandamus as those forms of relief may be awarded along with a writ of mandamus. *See, e.g., MFW Wine Co.*, 231 A.3d at 58-59.

II. Petitioners Meet the Standard for Declaratory and Injunctive Relief

Additionally, this Court should declare that Pennsylvania and federal law require that a county board's certified results include timely received absentee and mail-in ballots cast by qualified voters even if the voter did not date the return envelope's declaration. And this Court should order the Respondent boards to include those ballots in their certified returns for the 2022 primary election. Petitioners meet the standard for an injunction because they have a clear right to relief, an injunction is needed to avoid an injury that cannot be compensated by damages, and a greater injury will result from refusing the injunction. *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560 (Pa. Commw. Ct. 2022).

A. State Law Requires Respondent Boards to Include in Their Certified Results Timely Received Absentee and Mail-in Ballots Cast by Qualified Voters

As described, *see supra* at 8-9, a county board's certified election results must include all absentee and mail-in ballots that meet the statutory criteria to be canvassed and counted under 25 P.S. § 3146.8(g). One such criteria is that the "declaration is sufficient." 25 P.S. § 3146.8(g)(3). The referenced declaration is the one printed on the back of a ballot's return envelope, which contains a statement that the voter is qualified and has not already voted. 25 P.S. § 3146.4; 25 P.S.

§ 3150.14. Elsewhere, the Election Code instructs that a voter “shall . . . fill out, date and sign” the declaration before returning their ballot. 25 P.S. § 3146.6(a); *accord* 25 P.S. § 3150.16(a). These provisions do not allow a county board to refuse to canvass a timely received absentee or mail-in ballot on the basis that the voter did not date the declaration, and so do not allow a county to refuse to include in their certified returns a ballot on that basis.

First, by requiring that the declaration only be “sufficient” for an absentee or mail-in ballot to be canvassed, the Election Code tolerates declarations that do not perfectly comply with § 3146.6(a) or § 3150.16(a). Indeed, the ordinary meaning of “sufficient” going back centuries is “[o]f a quantity, extent, or scope adequate to a certain purpose or object.” *Sufficient*, Oxford English Dictionary (2d ed.) (dating this use of “sufficient” to 1380).³ The purpose of the declaration is for the voter to swear that they are qualified to vote and have not already voted. 25 P.S. § 3146.4; 25 P.S. § 3150.14. As the Election Code elsewhere indicates, a signed declaration alone constitutes the voter’s attestation of their qualifications and is the voter’s confirmation that they have not already voted. 25 P.S. § 3553 (creating criminal penalties for anyone who falsely *signs* the declaration). Because a signature alone

³ Section 3146.8’s requirement that a “declaration is sufficient” traces back to section 1330 of the original 1937 version of the Election Code. In the original election code, a soldier’s ballot would be canvassed if the “county board is satisfied that the signatures correspond and that the affidavit and jurat are sufficient.” P.L. 1333, art. XIII, § 1330 (June 3, 1937).

fulfills the declaration's purpose, a signed but undated declaration is "sufficient." Had the General Assembly intended for county boards to canvass only ballots for which the voter both signed and dated the declaration, the General Assembly would have needed to use language, for example, such as that the "declaration is complete" or "the declaration fully complies with § 3146.6(a) and § 3150.16(a)."

Second, that the Election Code instructs that voters "shall . . . fill out, date and sign" the declarations printed on an absentee or mail-in ballots' return envelope, 25 P.S. §§ 3146.6(a), § 3150.16(a), does not signal that the General Assembly meant for a "sufficient" declaration to be a declaration completed in perfect compliance with § 3146.6(a) or § 3150.16(a). If, contrary to the General Assembly's approval of "sufficient" declarations, the General Assembly had meant for a voter's failure to date their declaration to result in a ballot being excluded, the General Assembly would have said so explicitly, as it has done in other parts of in the Election Code.

For example, the Election Code explicitly limits the set of absentee ballots (unless cast by a military voter) and mail-in ballots that may be canvassed to those "received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 25 P.S. § 3146.8(g)(1)(ii). Elsewhere, the Election Code instructs that if a voter returns an absentee or mail-in ballot with identifying markings on the secrecy envelope, "the envelopes and the ballots

contained therein shall be set aside and declared void.” 25 P.S. § 3146.8(g)(4)(ii). Additionally, the Election Code directs that absentee and mail-in ballots cast by someone who died before Election Day “shall be rejected.” 25 P.S. § 3146.8(d). Nothing in the Election Code identifies a remedy for noncompliance with the “shall . . . date” language, let alone does so with this level of clarity. Because courts should not impose requirements that go beyond the General Assembly’s statutory schemes, *Sadler v. Workers’ Comp. Appeal Bd.*, 244 A.3d 1208, 1214 (Pa. 2021), this Court should not add remedial language that the General Assembly did not include itself.

Given the General Assembly’s practice of specifically identifying when noncompliance results in disenfranchisement, the instruction that voters “shall” date the return envelope does not, alone, identify what happens when a voter fails to date the declaration. Interpreting all Election Code provisions expressing that voters “shall” do something to mean that noncompliance must result in a ballot being excluded would lead to concerning results. For example, the Election Code directs that voters who vote in person by ballot “shall retire to one of the voting compartments, and draw the curtain or shut the screen door” 25 P.S. § 3055(a). Those same voters are told that they “shall fold [their] ballot . . . in the same way it was folded when received” before returning it. *Id.* § 3055(d). The General Assembly could not have meant to use “shall” in each case to indicate that

voters who do not satisfactorily draw their curtain or who do not fold their ballot properly before returning it must have their ballot excluded.

Even if what makes a declaration “sufficient” were ambiguous, the Counties should still be required to include these ballots in their certified totals. When interpreting an ambiguous statute, Pennsylvania courts determine the General Assembly’s intent by considering, among other factors, the “occasion and necessity for the statute,” the “mischief to be remedied,” “the object to be attained,” and the “consequences of a particular interpretation.” 1 Pa.C.S. § 1921(c)(1), (3), (4), (6). Consistent with these principles, “the Election Code should be liberally construed so as not to deprive electors of their right to elect the candidate of their choice,” ballots should be thrown out for “minor irregularities” only “very sparingly, and voters should not be disenfranchised except for compelling reasons.” Memorandum Opinion at 32, *McCormick v. Chapman*; see also *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (“The Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice.”). That is because “[t]he purpose in holding an election is to register the actual expression of the electorate’s will and to see the true result.” Memorandum Opinion at 32, *McCormick v. Chapman*.

Following these tenets of interpretation, the Election Code’s dating provisions must be read to preclude excluding the ballots of voters who neglect to date the declaration on their ballot’s return envelope. That handwritten date is not necessary for any purpose, does not remedy any mischief, and does not advance any other objective. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1077 (Pa. 2020) (opinion announcing judgment) (explaining why a handwritten date is “unnecessary and, indeed, superfluous”); Memorandum Opinion at 28-30, *McCormick v. Chapman* (explaining why a handwritten date does not serve any weighty interest). The consequence of interpreting the Election Code to require that ballots be excluded if the voter does not include a date is disenfranchising voters for failing to provide the county with inconsequential information.

Several additional presumptions apply when Pennsylvania courts confront an ambiguous statute, including that the General Assembly intends “the entire statute to be effective” and that it “does not intend to violate the Constitution of the United States or of this Commonwealth.” 1 Pa.C.S. § 1922(2), (3); *see also In re Canvass*, 241 A.3d at 1082 (Wecht, J., concurring and dissenting) (recognizing that the legislature may “impose a requirement that appears to have a disenfranchising effect” but only if it “steers clear of constitutional protections”).

Imposing the drastic consequence of disenfranchisement for omitting a date could conflict with the Free and Equal Elections Clause. Under that clause, voters’ rights “may not be taken away by an act of the legislature, and that that body is prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 812 (Pa. 2018). Likewise, excluding ballots received without a voter’s handwritten date on the return envelope from a county board’s certified returns would conflict with federal law, as discussed *infra*, which counsels in favor of avoiding such an interpretation.

B. Federal Law Requires Respondent Boards to Include in their Certified Results Timely Received Absentee and Mail-in Ballots Cast by Qualified Voters

Although Pennsylvania law provides an independent and adequate basis to require the Respondent boards to include in their certified results timely received absentee and mail-in ballots cast by qualified voters who neglected to date the return envelope’s declaration, federal law requires them to do so too.

1. This Court Should Follow the Third Circuit’s Interpretation of Federal Law

When the Pennsylvania Supreme Court last considered the class of ballots at issue here, four Justices observed that voiding ballots for minor errors might conflict with 52 U.S.C. § 10101(a)(2)(B). *In re Canvass*, 241 A.3d at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and

dissenting). But because the relevance of that federal statute had not been briefed, and because the Supreme Court ordered that, under state law, timely received ballots without the voter's handwritten date on the return envelope must be counted in the 2020 election, there was no reason to resolve whether § 10101(a)(2)(B) also required counting those ballots.

The Third Circuit has now answered the federal question that the Supreme Court first identified. In a case about ballots identical in all relevant respects to those at issue here, the Third Circuit ruled that because the date on a return envelope's declaration is not material to determining a voter's qualifications, omitting a date cannot justify refusing to count a ballot. *Migliori*, 36 F.4th at 164.

While *Migliori* was specifically about a refusal to canvass ballots, the Third Circuit's analysis applies just the same to boards that exclude ballots from their certified returns. That is because § 10101(a)(2)(B) prohibits denying "the right of any individual to vote" based on trivial mistakes, and the statute defines "vote" to include "all action necessary to make a vote effective including, but not limited to . . . having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office," 52 U.S.C. § 10101(e). In fact, when this Court announced its view that the Third Circuit likely interpreted § 10101(a)(2)(B) correctly, *see* Memorandum Opinion at 27, *McCormick v. Chapman*, it specifically highlighted the language in the statutory definition of

“vote” that compels applying the result in *Migliori* (and in *McCormick*) to any refusal to include a ballot in a county board’s certified returns, *id.* at 22-23.

The Third Circuit’s interpretation of federal law should be followed here. Indeed, the Pennsylvania Supreme Court treats Third Circuit interpretations of federal law as persuasive authority. *Stone Crushed P’ship v. Kassab Archbold Jackson & O’Brien*, 908 A.2d 875, 884 (Pa. 2006). It does so to ensure that individuals denied relief in a Pennsylvania court cannot merely “‘walk across the street’ to gain a different result”—“an unfortunate situation [that] would cause disrespect for the law.” *Hall v. Pennsylvania Bd. of Prob. & Parole*, 851 A.2d 859, 864 (Pa. 2004) (opinion announcing judgment) (quoting *Commonwealth v. Negri*, 213 A.2d 670, 672 (Pa. 1965)). Affording the Third Circuit’s interpretations of federal law persuasive weight means “it is appropriate for a Pennsylvania appellate court to follow the Third Circuit’s ruling on federal questions to which the U.S. Supreme Court has not yet provided a definitive answer.” *W. Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Commw. Ct. 2017).

Departing from the Third Circuit’s judgment would be particularly troublesome in this case. Violations of § 10101(a)(2)(B) are privately enforceable through 42 U.S.C. § 1983. *Migliori*, 36 F.4th at 162. So, if this Court determines that § 10101(a)(2)(B) does not require that undated ballots be counted, any affected voter could then bring a federal action and obtain a contradictory order. Avoiding

that scenario is precisely why this Court should rule consistently with the Third Circuit's interpretation of § 10101(a)(2).

2. A Handwritten Date on a Ballot's Return Envelope is not "Material" to Determining Eligibility Under Pennsylvania Law

Even if this Court analyzes the federal question anew, it should still conclude that § 10101(a)(2)(B) prohibits excluding ballots on the basis that the voter failed to comply with the dating provisions. That statute, passed as part of the Civil Rights Act of 1964, provides:

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

52 U.S.C. § 10101(a)(2)(B). It was enacted to end trivial requirements that “served no purpose other than as a means of inducing voter-generated errors that could be used to justify” denying the right to vote. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). Denying eligible Pennsylvania voters’ right to vote for merely failing to date the envelope used to return an absentee or mail-in ballot violates § 10101(a)(2)(B).

Applying the federal statute here, a mailing envelope is a “record or paper.” Counties that treat omitting an envelope date as a disqualifying error have made dating the return envelope an “act requisite to voting.” And dating the declaration

on an absentee or mail-in ballot return envelope is not “material” because the date does not assist in determining if the ballot was cast by someone eligible to vote under Pennsylvania law.

To determine whether an error or omission is “material” under § 10101(a)(2)(B), courts compare the erroneous or omitted information against state law voter qualifications. *See, e.g., Migliori*, 36 F.4th at 162–63; *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018); *Wash. Ass’n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005). If the error or omission, accepted as true, does not preclude (or at least interfere with) determining a voter’s eligibility, the error or omission is not “material.” *NAACP*, 522 F.3d at 1175.

In Pennsylvania, a person may vote if, as of Election Day, they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811(2), (3); 25 Pa.C.S. § 1301(a).⁴

⁴ *See also* *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (holding that individuals with felony convictions, other than those currently incarcerated, may register to vote); 1972 Op. Atty. Gen. No. 121 (concluding durational residency requirements longer than 30 days are unenforceable); U.S. Const. amend. XXVI (prohibiting denial of right to vote to citizens 18 years of age or older because of age).

Whether the declaration on a return envelope is dated is not relevant to any of these criteria.

Nor is the date used to determine the point in time against which to measure the elector's eligibility to cast the ballot. Eligibility is assessed as of Election Day. *See* Pa. Const. art. VII, § 1 (imposing residency requirements for the time period “immediately preceding the election”); 25 P.S. § 2811(2), (3) (same); *id.* § 3146.8(d) (directing counties to discard absentee and mail-ballots cast by individuals who died before Election Day); 25 Pa. C.S. § 1301 (allowing anyone “who will be at least 18 years of age on the day of the next election” to register). Thus, a dated declaration would not be used, for example, to determine whether to count the absentee or mail-in ballot of someone who moved out of state, or was convicted of a felony, before Election Day. Anyone who does not meet Pennsylvania's voter qualifications as of Election Day may not have their vote counted, even if that person may have met the eligibility qualifications when completing their ballot.

Moreover, the voter's handwritten date on the return envelope does not assist in separating timely cast absentee or mail-in ballots from untimely ones. A ballot is timely if a county board *receives* it by 8 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c). County boards have a statutory obligation to track the date that every absentee or mail-in ballot was received and make that information

available for public inspection. 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5). They have procedures for doing so—including stamping ballots as “received” and scanning return envelopes’ barcodes into the SURE system. *See* Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (“Sept. 2020 Guidance”), at 2 (Sept. 11, 2020)⁵; *In re Canvass*, 241 A.3d at 1077 (opinion announcing judgment). Plus, timely and untimely ballots remain segregated. Pennsylvania law and procedures thus provide “a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.” *In re Canvass*, 241 A.3d at 1077 (opinion announcing judgment). In fact, the date written on a return envelope would be an exceedingly poor proxy for determining if a ballot was received by 8 p.m. on Election Day as ballots dated in advance of that day certainly may arrive sometime after.

Because in all cases counties independently verify if a ballot was received by Election Day’s 8 p.m. deadline without reference to the date handwritten on the return envelope, the handwritten date is not a tool for preventing fraudulently back-dated votes. In any event, because Pennsylvania employs only a received-by deadline, 25 P.S. §§ 3146.6(c), 3150.16(c), back-dating is not a way to fraudulently

⁵ Available at: <https://www.dos.pa.gov/VotingElections/OtherServices/Events/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

convert an ineligible ballot into a seemingly eligible one. A ballot is received by the deadline or it is not.

Additionally, the handwritten date on a mailed ballot's return envelope does not determine which vote to count in the event someone voted absentee or by mail and also tried to vote in person. Election district registers identify which voters have requested an absentee or mail-in ballot. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1). Those voters may not vote in person unless they surrender their blank absentee or mail-in ballot, and its return envelope, to their polling place; otherwise, they may vote only provisionally. *Id.* §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3). If a voter returns a completed absentee or mail-in ballot before the deadline and also casts a provisional ballot at a polling place, only the absentee or mail-in ballot is counted, regardless of the date written on it. *Id.* § 3050(a.4)(5)(ii)(F).

What is more, consistent with the Department's guidance, county boards do not invalidate ballots with "wrong" dates—meaning dates that do not accurately reflect when the envelope declaration was signed. But for obviously wrong dates—such as birth dates or dates with the incorrect year—there would be no means of verifying that the date written on a declaration envelope is actually the date the declaration was signed. Counting ballots returned with the wrong date underscores that the underlying information is unimportant and thus immaterial.

Finally, nothing in Justice Alito’s dissenting opinion from the Supreme Court’s order denying a motion to stay *Migliori* undermines that § 10101(a)(2)(B) requires county boards to include timely received absentee and mail-in ballots cast by qualified voters in their election returns even if the declaration is undated.

First, in that opinion for just three Justices, Justice Alito confessed he had only limited time to study the issue and did not rule out changing his view. *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting).

Second, Justice Alito’s preliminary observation that excluding a vote because of the voter’s noncompliance with a state rule is not a denial of the right vote is at odds with the § 10101’s statutory definition of vote, which, again, includes “all action necessary to make a vote effective including, but not limited to . . . having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office.” 52 U.S.C. § 10101(e).

Third, Justice Alito’s further observation that writing a date on the return envelope’s declaration is a state-law voting qualification for purposes of § 10101(a)(2)(B) is incorrect under both Pennsylvania and federal law. Pennsylvania law, both by Constitution and statute, is clear about where to locate voting qualifications. *See supra* at 21-22. The applicable constitutional provisions and statutes do not list dating the return envelope’s declaration as a voter qualification. And § 10101(a)(2)(B) cannot be read to treat every state law

procedural rule as a voter qualification. In all circumstances under which § 10101(a)(2)(B) would apply, a voter will not have complied with *some* state law requirement, since the statute requires an “error or omission.” If all those requirements necessarily are qualifications to vote, then the federal statute no longer has any function because every error or omission will be material to some qualification.

Pennsylvania has now conducted five elections with no-excuse mail-in voting, and questions relating to timely received ballots without handwritten dates on the return envelope have been litigated on multiple occasions. All arguments made for excluding voters who omit the date from the declaration on their return envelope are either unsupported by Pennsylvania law or are irrelevant to the analysis that must be performed under § 10101(a)(2)(B).

C. Petitioners Satisfy the Remaining Injunction Factors

Certifying election returns that exclude lawfully cast votes is a harm that cannot be compensated by damages. It both deprives certain individuals of their fundamental right to vote and distorts the tallies of Pennsylvania’s elections. Further, allowing just three county boards to exclude votes that all other county boards have included in their returns creates impermissible discrepancies in the administration of Pennsylvania’s 2022 primary election. That harm also cannot be compensated by damages.

The county boards would suffer no injury from being ordered to certify returns that include timely received absentee and mail-in ballots from qualified voters who failed to date the declaration. In fact, the boards already have been ordered to canvass those ballots and report how many there are. An order here would not even require any meaningful additional work on the part of the county boards. And its effect would be only to require the Respondent boards to certify returns for the 2022 primary election in accordance with the law.

CONCLUSION

For the reasons above, this Court should grant Petitioners' Emergency Application for Peremptory Judgment and Summary Relief.

Dated: July 11, 2022

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CERTIFICATE OF COMPLIANCE

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

Dated: July 11, 2022

/s/ Jacob B. Boyer
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CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 6,353 words. I have relied on Word's word count function to determine the length of this brief.

Dated: July 11, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the following persons by commercial carrier, which service satisfies the requirements of Pa.R.A.P. 121:

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