IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leigh M. Chapman, Acting Secretary of the Commonwealth and the Pennsylvania Department of State, Petitioners	:	
v.	:	No. 355 M.D. 2022
	:	Heard: July 28, 2022
Berks County Board of Elections, Fayette County Board of Elections, and Lancaster County of Board of Elections, Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE COHN JUBELIRER FILED: August 19, 2022

Leigh M. Chapman, Acting Secretary of the Commonwealth (Secretary), and the Pennsylvania Department of State (Department) (together, Petitioners) challenge the actions of three county boards of election – the Berks County Board of Elections, Fayette County Board of Elections, and Lancaster County Board of Elections (Boards) – which did not include in their certified results of the May 17, 2022 General Primary Election (Primary Election) timely received absentee and mail-in ballots of qualified Pennsylvania electors[1] who signed the declaration on the ballot return envelope but did not handwrite a date. Petitioners assert such ballots are

[1] The Court notes that while the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591, uses the word "elector," the precedent interpreting the Election Code has used "elector" and "voter" interchangeably; this Court will do the same.

lawfully cast ballots under the current state of the law, where no fraud or irregularity has been alleged, and should be included in the Boards' certified returns. The Boards challenge the Court's jurisdiction and the Secretary's authority to direct them to include these ballots, which they argue are invalid and properly excluded from their certified results because the Pennsylvania Election Code (Election Code)[2] requires the declaration on the return envelope to be dated.

I. BACKGROUND

On July 11, 2022, Petitioners filed a Petition for Review in the Nature of a Complaint in Mandamus and/or in the Nature of an Action for Injunctive and Declaratory Relief (Petition), wherein Petitioners allege the Boards are refusing to execute their mandatory duty to certify the results of the Primary Election based on a full and accurate count of all lawfully cast votes. In particular, Petitioners argue that the Boards will not include in their certified results timely received absentee and mail-in ballots that lack a handwritten date on the declaration located on the return mailing envelope. According to Petitioners, the Boards' refusal to include such ballots in their certified results prevents the Secretary from performing her own certification duties under the Election Code. Count I of the Petition seeks a writ of mandamus, and Count II of the Petition seeks declaratory and injunctive relief pursuant to the Declaratory Judgments Act (DJA).[3] On July 12, 2022, Petitioners filed an Emergency Application for Peremptory Judgment and Summary Relief (Application),[4] which this Court treats as a Motion for Summary Relief, to which

[2] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

[3] 42 Pa.C.S. §§ 7531-7541.

[4] Petitioners filed the Application pursuant to Pennsylvania Rule of Civil Procedure 1098, Pa.R.Civ.P. 1098 ("At any time after the filing of the complaint, the court may enter judgment if the right of the plaintiff thereto is clear."), and Pennsylvania Rule of Appellate Procedure 1532(b), **(Footnote continued on next page…)**

the Boards filed an Answer, denying the allegations and challenging the Court's jurisdiction. The Application is presently before the Court.

To resolve the Application requires an examination of the interplay, and interpretation, of numerous provisions of the Election Code relating to how electors vote using absentee and mail-in ballots, how the county boards of elections (county boards) review, count, and certify the votes, and how the Secretary handles such certifications once submitted to the Secretary. The Court begins by setting forth the most relevant provisions of the Election Code as background.

The Election Code provides that, after an elector marks their absentee or mail-in ballot and secures it in a secrecy envelope, the elector is to place that envelope into the return envelope on which is printed a "declaration of the elector" that "[t]he elector shall then fill out, date and sign" (dating provisions). Sections 1306(a) and 1306-D(a) of the Election Code. 25 P.S. §§ 3146.6(a) (absentee ballots), 3150.16(a) (mail-in ballots) (emphasis added).[5] The elector then either sends the return envelope by mail, postage prepaid, or delivers it in person to the elector's respective county board. The county boards are required to "canvass," which means to gather, count, compute, and tally the votes reflected in the absentee and mail-in ballots that are received no later than eight o'clock p.m. on the day of the primary. Section 1308(g) of the Election Code, 25 P.S. § 3146.8(g); Section 102 of the Election Code, 25 P.S. § 2602 (defining "canvass").[6] Each county board is to examine the

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Pa.R.A.P. 1532(b) ("At any time after the filing of a petition for review in an . . . original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.").

[5] Section 1306(a) of the Election Code was added by Section 11 of the Act of March 6, 1951, P.L. 3, and Section 1306-D(a) of the Election Code was added by Section 8 of the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

[6] Section 1308 of the Election Code was added by Section 11 of the Act of March 6, 1951, P.L. 3.

declaration of the absentee and mail-in ballots, which includes comparing the information thereon with the information the county board has in its files, verifying the proof of identification and the right to vote of the elector, and determining whether the elector's declaration is sufficient. 25 P.S. § 3146.8(g)(3). Where no challenge to the absentee or mail-in ballot has been made, and the elector is not deceased, "[a]ll absentee ballots . . . and all mail-in ballots . . . that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district." 25 P.S. § 3146.8(d), (g)(4).

The county boards' computation and certification of returns are governed by Section 1404(f) of the Election Code, which relevantly provides that after the returns from each election district are read, computed, and found to be correct, they are recorded and added together, announced, and attested to by the computing clerks, the entries are signed by the members of the county board and submitted, as unofficial returns, to the Secretary. 25 P.S. § 3154(f). Those returns are "unofficial" for a period of five days after the computation of the vote, if no recount or recanvass is ordered, or for a period of five days after the completion of the computation of a recount or recanvass. *Id.* Thereafter, "the county board shall certify the returns so computed in said county in the manner required by" the Election Code, unless an appeal or recount requires revision of the returns, which will be revised and then certified. *Id.* For elections involving federal offices, statewide offices, senators and representatives in the General Assembly, and certain judicial offices, the county board must send a certificate to the Secretary, showing the totals of the returns cast for each office respectively. Section 1408 of the Election Code, 25 P.S. § 3158. Upon receipt of the certified returns of a primary from the county boards, the Secretary "shall forthwith proceed to tabulate, compute and canvass the votes cast

for all candidates enumerated in [S]ection 1408 . . . and shall thereupon certify and file in [her] office the tabulation thereof." Section 1409 of the Election Code, 25 P.S. § 3159.

II. THE PETITION & APPLICATION

In Count I of the Petition, Petitioners allege that the Boards have a legal obligation and duty to include all ballots in their certified results if the voter's identity is verified and the declaration is sufficient, unless the voter died before Election Day or the ballot is successfully challenged. This obligation, Petitioners argue, arose out of this Court's order in *McCormick v. Chapman* (Pa. Cmwlth., No. 286 M.D. 2022, filed June 2, 2022) (single-Judge opinion). (Petition for Review (Pet. for Rev.) ¶¶ 34-37.) Essentially, Petitioners assert that this Court in *McCormick* concluded the timely received absentee and mail-in ballots of qualified electors who did not include a handwritten date on the declaration on the return envelopes were lawfully cast. This conclusion, they argue, removed any discretion the Boards may have had to not canvass those ballots by directing them to do so and imposed a mandatory duty that they certify results that included those ballots. The Boards' refusal to perform this mandatory duty, Petitioners argue, precludes the Secretary from performing her duty to certify accurate returns of all lawfully cast votes, and she does not have the authority to direct the Boards to include these ballots in their certified results. (*Id.* ¶¶ 38-39.)

In Count II, Petitioners argue that the Boards are violating Pennsylvania law, including the Election Code, which does not require that these ballots be voided. (*Id.* ¶¶ 44-45.) They further argue that the Boards are violating the Pennsylvania Constitution for the reasons cited in *McCormick*, which considered whether refusing to canvass timely and otherwise valid absentee and mail-in ballots due to their being

submitted without a handwritten date next to the signature on the declaration on the return envelope would violate article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, § 5, the Free and Equal Elections Clause.[7] (*Id.* ¶ 45.) The lack of a handwritten date, Petitioners maintain, is a minor and meaningless irregularity, as recognized by this Court in *McCormick*, that does not impact the purpose of the declaration or the Election Code. (*Id.*) Additionally, Petitioners contend that the Boards' actions violate Section 10101(a)(2)(B) of the Civil Rights Act,[8] (commonly referred to as the "materiality provision"), because the dating provisions under the Election Code are immaterial to whether an elector is qualified to vote under state law, as the United States Court of Appeals for the Third Circuit (Third Circuit) held in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), *petition for writ of certiorari filed*, *Ritter v. Migliori* (U.S., No. 22-30, filed July 7, 2022), and this Court held in *McCormick*. (Pet. for Rev. ¶¶ 46-49.)

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[7] The Free and Equal Elections Clause provides: "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." PA. CONST. art. I, § 5.

[8] Section 10101(a)(2)(B) of the Civil Rights Act provides, in relevant part, as follows:

> **(a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions**
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> . . . .
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> **(2)** No person acting under color of law shall--
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> . . . .
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> **(B)** 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) (emphasis in the original).

As relief, Petitioners request that the Court "issue a writ of mandamus compelling the . . . [B]oards . . . to include in the certified election returns that are transmitted to the [] Secretary" "all timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope." (Pet. for Rev., Prayer for Relief ¶ 1.) Petitioners further ask for a declaration that the Boards "may not exclude from certified election returns transmitted to the [] Secretary timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope." (Pet. for Rev. ¶ 50 & Prayer for Relief ¶ 2.) Finally, Petitioners seek an injunction that prohibits the Boards "from excluding from their certified election returns timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope." (*Id.* ¶ 3.)

On July 12, 2022, Petitioners filed the Application asking the Court to enter peremptory judgment on their mandamus claim and summary relief on their claim seeking declaratory and injunctive relief. This relief is warranted, Petitioners assert, because there are no material facts in dispute and their right to that relief is clear as a matter of law. Relying primarily on their interpretation of the Election Code, *McCormick*, and *Migliori*, Petitioners argue that there is no longer doubt that the ballots the Boards refuse to include in their certified results must be included under Pennsylvania and federal law because they are lawfully and legally cast. (Application ¶¶ 4-6.)

III. THE BOARDS' PRELIMINARY OBJECTIONS & ANSWERS

The Berks and Lancaster Boards filed preliminary objections to the Petition, asserting that Petitioners lack standing, citing a lack of aggrievement and case or controversy, and have failed to state claims in Counts I and II upon which relief can be granted (demurrer). The Fayette Board filed preliminary objections, demurring to Counts I and II of the Petition, maintaining that the Petition is barred by the doctrine of laches, and asserting that this Court lacks jurisdiction because Petitioners failed to exhaust an available remedy and the Petition is an untimely appeal.

In addition, the Berks and Lancaster Boards filed a joint answer and memorandum of law, and the Fayette Board filed an answer and memorandum of law, opposing the Application and asserting, as defenses, many of the same bases that were asserted in their POs. The Boards assert that the mandamus claim fails because their actions are discretionary and Petitioners seek to have the Court direct the exercise of that discretion in a particular way, which is not proper under mandamus. They further assert Petitioners had an adequate remedy, an appeal under Section 1407(a) of the Election Code,[9] 25 P.S. § 3157(a), which similarly precludes

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[9] Section 1407(a) of the Election Code states:

> Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election, or regarding any recount or recanvass thereof under [S]ections 1701, 1702 and 1703 of this act, may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not, to the court specified in this subsection, setting forth why he feels that an injustice has been done, and praying for such order as will give him relief. If a recount or recanvass is made under [S]ection 1404(g), the appeal must be made to Commonwealth Court. Unless a recount or recanvass is made under [S]ection 1404(g), the appeal must be made to the court of common pleas of the proper county. Upon the payment to the prothonotary of a fee for filing such appeal, a judge of the court shall fix a time and place for hearing the matter in dispute within three days thereafter, of which due

(Footnote continued on next page…)

the grant of mandamus. As to the declaratory and injunctive relief claims, the Boards argue there is no actual case or controversy between Petitioners and the Boards, which is required to assert an action under the DJA. The Boards further argue that Petitioners' right to relief is not clear because their arguments are based on a mischaracterization of the Election Code, and neither *McCormick* nor *Migliori* compel that the certified results include the ballots at issue. In contrast, they assert that it is apparent from the Pennsylvania Supreme Court's plurality decision in *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) (*In re Canvass*), in which that Court addressed mail-in ballots that lacked dated declarations in the context of the November 2020 General Election, that these ballots are not to be included in the certified results. They further assert that the panel decision of this Court in *Ritter v. Lehigh County Board of Elections* (Pa. Cmwlth., No. 1322 C.D. 2021, filed January 3, 2022), which relied on the two concurring and dissenting opinions in *In re Canvass* to hold that absentee and mail-in ballots that lacked a dated declaration could not be counted notwithstanding that they were cast by qualified electors and were timely received, is highly persuasive. The Fayette Board additionally argues that the claims are barred by the doctrines of laches and unclean hands because Petitioners did not appeal the Boards' certification decision pursuant to Section 1407(a) of the Election Code. Last, the Fayette Board asserts, as a threshold matter, that the Court lacks

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> notice shall be served, with a copy of such appeal, by the appellant upon a member of the county board whose action is complained of and upon every attorney, watcher or candidate who opposed the contention of the appellant before the county board, and upon any other person that the judge shall direct, at least two days before the matter shall be reviewed by the court. Proof of such notice or the waiver thereof must be filed therein before any appeal is sustained.

25 P.S. § 3157(a).

subject matter jurisdiction because Petitioners had an alternative remedy, an appeal under Section 1407(a) of the Election Code, which they did not exhaust prior to bringing this matter.

IV. PARTIES' EVIDENCE

The parties filed a Joint Stipulation of Facts. Therein, the parties submitted 14 joint exhibits, including: a sample of the declaration form contained on the return envelope; Guidance issued to the county boards by the Department on September 11 and 27, 2020, and May 24, 2022; and correspondence between Jonathan Marks, Deputy Secretary of Elections and Commissions (Deputy Secretary), or the Department's Chief Counsel Tim Gates and the Boards between June 17, 2022, and July 8, 2022. The parties also stipulated as follows. The declarations used by the Boards instructed electors that their votes would not be counted if the declaration was not signed and dated, and the Guidance issued by the Department is not binding on the Boards. (Joint Stipulation of Facts (Jt. Stip.) ¶¶ 2-4, 8, 13-22.) The number of ballots lacking a handwritten date on the ballot return envelope are as follows: 507 Democratic ballots and 138 Republican ballots in Berks County; 45 Democratic ballots and 6 Republican ballots in Fayette County; and 46 Democratic ballots and 38 Republican ballots in Lancaster County. (*Id.* ¶ 7.) The Berks and Lancaster Boards reported their two tallies, as set forth in the *McCormick* order, to the Secretary on June 6, 2022. (*Id.* ¶ 9.) Also on June 6, 2022, the Berks and Lancaster Boards submitted their certified results to the Secretary and those results did not include any timely received ballots that did not include a handwritten date on the ballot return envelope declaration. (*Id.* ¶ 10.) The Fayette Board submitted its certified results to the Secretary on June 7, 2022, which did not include any timely received ballots that did not include a handwritten date on the ballot return envelope

declaration. (*Id.* ¶ 11.) The Berks Board submitted a revised certification to the Secretary on June 8, 2022, that included additional votes from certain provisional ballots. (*Id.* ¶ 12.) The Secretary has not certified the results of any election in the Primary Election in which votes were cast in Berks, Fayette, and Lancaster Counties, including district-level, such as offices in the General Assembly, and statewide races. (*Id.* ¶ 23.) No elector, candidate, or other "aggrieved person" has challenged the Boards' final certification of the results of the Primary Election. (*Id.* ¶ 24.)

At a hearing on July 28, 2022, Petitioners offered the testimony of Deputy Secretary and the testimony of the following County Commissioners and Board Members, as on cross-examination: Scott Dunn, Vice-Chair of the Fayette County Board of Commissioners; Ray D'Agostino, Chair of the Lancaster County Board of Commissioners; and Christian Leinbach, Chair of the Berks County Board of Commissioners. The Boards cross examined Deputy Secretary and obtained the direct testimony of Commissioners Dunn, D'Agostino, and Leinbach. In addition, the Boards offered, among other documents, the Secretary's Memorandum of Law in support of a motion to dismiss in *Ziccarelli v. Allegheny County Board of Elections* (W.D. Pa., No. 2:20-cv-001831-NR, filed January 12, 2021), 2021 WL 101683, in which, they assert, the Secretary took a position different than the one taken here – that the Secretary had no authority to declare ballots null and void or to direct the county boards' actions.

Deputy Secretary testified about what, in his view, Petitioners' roles are in the election process under the Election Code, and how the Secretary reviews certified results as they are submitted to ensure that they are accurate and inquires with county boards if the results appear to be in error. Deputy Secretary described the Department's Guidance issued in September 2020, which reflected that absentee and

mail-in ballots that did not contain a handwritten date on the declaration on the return envelope should not be counted but that declarations with obviously incorrect dates, such as the elector's birthdate or the wrong year, should be counted and, to his knowledge, were counted by all county boards. Deputy Secretary also testified about the Department's Guidance issued on May 20, 2022, indicating that, pursuant to *Migliori*, the absentee and mail-in ballots that were not accompanied by a dated declaration on the return envelope should be counted. He indicated that canvassing the votes cast is the process of reviewing and tabulating the election returns, including the absentee and mail-in ballots, and agreed on cross-examination that canvassing and certification are different, with the former involving a discretionary act and the latter a ministerial act. Deputy Secretary described the communications he had with the Boards, among other county boards, following their submission of their certified results regarding why the Department believed such results were incorrect under Pennsylvania and federal law, and the Boards' responses disagreeing with that position. According to Deputy Secretary, the Department attempts to resolve differences of opinions with county boards through communication, rather than litigation. On cross-examination, Deputy Secretary agreed that the ballot return envelopes clearly instructed that ballots would not be counted if the declaration was not signed and dated. He further agreed that the Secretary did not file an appeal or challenge in a court within two days of the certified results, nor, to his knowledge, had any elector or candidate. Deputy Secretary was not aware if including these ballots in the certified results would change any of the elections that the Secretary certifies.

Commissioners Dunn, D'Agostino, and Leinbach testified regarding their roles in overseeing the management of elections in their respective counties, which

do not include the day-to-day operations. They testified consistently that their role, relevant to this litigation, is to review and make decisions on questionable ballots or challenged ballots to determine whether such ballots should be counted. In their counties, the absentee and mail-in ballots are date stamped when they are received by their election bureaus and the barcode on each ballot return envelope that is unique to each elector and each election is scanned into the Statewide Uniform Registry of Electors (SURE) system. Commissioner Dunn indicated that the Fayette Board did not canvass the ballots that did not have a handwritten date on the declaration on the ballot return envelope, send two tallies to the Secretary as provided for in the *McCormick* June 2, 2022 order, or include those ballots in its certified votes because, in Commissioner Dunn's view, the law as of the date of the Primary Election was that such ballots should not be counted. Commissioner D'Agostino testified that the date was important to him in reviewing the validity of a ballot, pointing to, as an example, an instance where Lancaster County did not count a ballot based on the handwritten date because it was signed using a date after the purported elector had died, whose death was reflected in the SURE system causing the chief clerk to set the ballot to the side for further review, a matter which has led to ongoing criminal prosecution. *See Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022. According to Commissioner D'Agostino, if there is no challenge to a ballot, Lancaster County counts any ballot that contains a handwritten date on the declaration because that is consistent with the Election Code's plain language. Commissioner D'Agostino indicated that if the ballots at issue were included in the certified results, none of the statewide or district-level elections would be affected, but he was not aware if any of the local or county-level elections would be affected. Finally, Commissioner

Leinbach testified that Berks County would count timely received absentee and mail-in ballots if the declaration was signed and dated, that each ballot contains a barcode that is unique to the election and to Berks County, and that there is a possibility that some local or county races, such as party committee offices, could be impacted if the ballots at issue are included in the certified results as the certified winners of those races had begun to participate in party meetings.

After the hearing, it came to the parties' attention that a fourth county board of elections, Butler County, had also not included the timely received and otherwise valid absentee or mail-in ballots without handwritten dates on the return envelope declarations in the certified results it submitted to the Secretary, and that the Secretary had certified the results. The parties filed a Supplemental Joint Stipulation to this effect. Petitioners also filed an Application for Leave to File a Supplemental Declaration of Deputy Secretary to supplement and correct his testimony given at the July 28, 2022 hearing. At an August 12, 2022 status conference, the Boards indicated that, under the circumstances, they did not oppose the application, and the Court granted the request.

In the Supplemental Declaration, Deputy Secretary indicates that the Butler County Board of Elections sent a letter dated June 21, 2022, in response to his June 17, 2022 communication, indicating that it would not canvass any ballots "which are not compliant with the statutes of this Commonwealth." (Supplemental Declaration ¶ 9.) However, as a result of human error, Butler County was identified by the Department as not having had any absentee or mail-in ballots that lacked a handwritten date on the return envelope declaration, and it was on this understanding that the Secretary certified Butler County's results for district-level races. Deputy Secretary states that, upon the Department's further review of its records and files,

these are the only four counties that did not include these ballots in their certified results. Petitioners explain that "in light of the fact that the [] Secretary has already certified races for districts that include all or part of Butler County, they do not intend to take further action with respect to Butler County." (Petitioners' Application for Leave to File a Supplemental Declaration ¶ 8.)

V. DISCUSSION

Petitioners seek peremptory judgment and summary relief in the form of an order of this Court that issues a writ of mandamus directing the Boards to complete their certification of the results of the Primary Election by including in those results the timely received absentee and mail-in ballots of qualified Pennsylvania electors who did not handwrite a date on the ballot return envelope declaration. Petitioners also seek a declaration that the Boards may not exclude from their certified returns "timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope." (Pet. for Rev. ¶ 50 & Prayer for Relief ¶ 2.) Finally, Petitioners seek an injunction that prohibits the Boards from excluding these ballots from their certified election returns submitted to the Secretary.

A motion for peremptory judgment can be treated as an application for special and summary relief under Pennsylvania Rules of Appellate Procedure 123 and 1532(b), Pa.R.A.P. 123, 1532(b). *MFW Wine Co., LLC v. Pa. Liquor Control Bd.*, 231 A.3d 50, 52 n.2 (Pa. Cmwlth. 2020). "[I]n ruling on a motion for summary relief, the evidence must be viewed in the light most favorable to the non-moving party and the court may enter judgment only if: (1) there are no genuine issues of material fact; and (2) the right to relief is clear as a matter of law." *Flagg v. Int'l*

Union, Sec., Police, Fire Pros. of Am., Loc. 506, 146 A.3d 300, 305 (Pa. Cmwlth. 2016).

The Boards assert several arguments as to why the Application should be denied and the Petition dismissed, including a challenge to this Court's subject matter jurisdiction and that Petitioners do not have a clear right to the relief sought. These arguments track those made in their respective POs. The Court observes that while it stated that the Boards' POs are not technically before it in the consideration of the Application, the arguments made in the POs were either explicitly or implicitly incorporated into the Boards' answers and arguments in opposition to the Application. The resolution of those arguments, whether asserted in a PO or in opposition to the Application, which are potentially dispositive, will be addressed by the Court.

A. Potential Bars to Relief

1. Untimely Appeal/Failure to Exhaust an Available Remedy

The Boards argue that this Court lacks subject matter jurisdiction because the Petition, to which the Application relates, is an appeal of their certification decision that had to be filed within two days to be timely pursuant to Section 1407(a) of the Election Code and it was not. The Fayette Board further asserts that this provision constituted an available remedy that Petitioners did not exhaust. Petitioners respond that this section does not apply to certification decisions and, therefore, does not bar the Petition and Application. Upon review of the Election Code, the Court agrees that Section 1407(a) does not deprive this Court of jurisdiction.

Section 1407 of the Election Code provides, in relevant part, that

> (a) [a]ny person aggrieved by any order or decision of any county board regarding the **computation or canvassing** of the returns of any primary or election, . . . may appeal therefrom within two days after

> such order or decision shall have been made, whether then reduced to writing or not, . . . setting forth why he feels that an injustice has been done, and praying for such order as will give him relief. . . .
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> (b) The court on an appeal shall have full power and authority to hear and determine all matters pertaining to any fraud or error committed in any election district to which such appeal relates, and to make such decree as right and justice may require. **Pending such appeal**, the **county board shall suspend any official <u>certification</u> of the votes cast** in such election district. . . . .

25 P.S. § 3157 (emphasis added). By its plain language, Section 1407(a) of the Election Code applies to appeals from an order or decision regarding the computation or canvassing of returns. "Canvass," as defined by the Election Code, "mean[s] the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots." 25 P.S. § 2602. This definition does not include certification, which the credited testimony of Deputy Secretary indicates is a separate action, which is consistent with the argument offered by the Boards' counsel. That canvassing and computing differ from certification is confirmed by Section 1407(b), which specifically states that certification will be stayed pending the resolution of an appeal of the canvassing and computation of the votes. Accordingly, based on the plain language of Sections 1407 and 102 of the Election Code, the Court concludes that Petitioners' failure to file the Petition within two days of the Boards' certification decisions does not preclude this Court from exercising subject matter jurisdiction.

2. <u>The Doctrine of Unclean Hands</u>

The Fayette Board also maintains that the Application cannot be considered because Petitioners have "unclean hands" since they could have appealed the certification and did not, and Secretary is not performing her mandatory duty to certify the results presented to her. Petitioners respond that the Secretary was not

required to appeal the certification and is seeking to obtain relief from the Court where the Boards' failure to provide an accurate certification of the results is interfering with her own statutory obligations.

"The doctrine of unclean hands requires that one seeking equity act fairly and without fraud or deceit as to the controversy in issue." *Terraciano v. Dep't of Transp.*, 753 A.2d 233, 237-38 (Pa. 2000). Nothing in the record reflects that Petitioners have acted unfairly or engaged in fraud or deceit as to this controversy. Therefore, the Court concludes that the doctrine of unclean hands does not bar the Application.

3. Laches

The Fayette Board also argues that the Application should be denied, and the Petition dismissed, because Petitioners simply waited too long to file the Petition, which has led to prejudice to those who have already begun fulfilling their duties based on the current certification. Therefore, it asserts, laches bars Petitioners' claims. Petitioners assert that the Court should consider the testimony that, following the certifications submitted, the Department was attempting to resolve the issue through communication, not through immediate litigation. This, they argue, is their normal process of trying to resolve disputes with county boards.

Laches is an equitable doctrine that "bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute [an] action to the prejudice of another." *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988). To prevail on the assertion of laches, it must be established that there was an inexcusable delay arising from Petitioners' failure to exercise due diligence, and prejudice to the party asserting laches resulting from the delay. *Id.*; *Meier v. Maleski*, 648 A.2d 595, 603

(Pa. Cmwlth. 1994). "[T]he question of laches is factual and is determined by examining the circumstances of each case." *Sprague*, 550 A.2d at 187.

Examining the evidence offered and the circumstances of this case, the Court concludes that the Fayette Board did not establish that laches is a bar to Petitioners' claims. Based on the credited evidence, the delay in this matter was not inexcusable or for want of due diligence. Petitioners were attempting, as is their practice, to work with the Boards, and all county boards, to resolve the differences in their respective interpretations of the law regarding what ballots should be included in the certified results. Petitioners' attempts to resolve the disputes amicably through multiple communications, rather than immediately engage in litigation, reflect they acted with due diligence and provide an excuse for any delay in filing the Petition.

Further, the Court is not convinced that the Fayette Board established that it was prejudiced by the delay in filing the Petition. The party asserting laches "must establish prejudice from some changed condition of the parties which occur during the period of, and in reliance on, the delay." *Meier*, 648 A.2d at 604-05 (citing *Sprague*, 550 A.2d at 188) (emphasis omitted). Such prejudice has been found where "records have become lost or unavailable, witnesses die or cannot be located, and **where the party asserting laches has changed its position** in anticipation that a party will not pursue a particular claim." *Id.* (emphasis added and omitted). The evidence offered does not establish that the Fayette Board changed its position based on the delay in filing the Petition. While the Fayette Board points out that, if Petitioners prevail, it will have to call another meeting at which to certify the results, this is not prejudice – this would be a natural consequence of a legal determination that not including the ballots at issue violates the law. Thus, on these facts, the Court cannot say that laches applies here.

4. Actual Case or Controversy

The Boards also argue that the Court cannot consider Petitioners' claims because there is no actual case or controversy between the Secretary and the Boards, and that Petitioners seek an improper advisory opinion. Petitioners respond that the Secretary has the authority to seek relief from the Court where the Boards' failure to provide an accurate certification of the results is interfering with her own constitutional and statutory obligations.

Mandamus is an extraordinary writ, reserved for those instances where an agency has failed or refused to perform a ministerial act or a mandatory duty. *County of Carbon v. Panther Valley Sch. Dist.*, 61 A.3d 326, 330 (Pa. Cmwlth. 2013). A mandamus action will be dismissed as moot if there is no actual case or controversy, which requires "a real and not hypothetical legal controversy and one that affects another in a concrete manner so as to provide a factual predicate for a reasoned adjudication."

Requests for declaratory relief, the purpose of which is to "settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations," 42 Pa.C.S. § 7541, also require the presence of an actual case or controversy. *Ruszin v. Dep't of Lab. & Indus.*, 675 A.2d 366, 371 (Pa. Cmwlth. 1996); *see also Pa. State Lodge v. Dep't of Lab. & Indus.*, 692 A.2d 609, 613 (Pa. Cmwlth. 1997) ("[T]he [DJA] requires a petition praying for declaratory relief to state an actual controversy between the petitioner and the named [respondent]."). As the Pennsylvania Supreme Court has stated:

> The presence of antagonistic claims indicating imminent and inevitable litigation coupled with a clear manifestation that the declaration sought will be of practical help in ending the controversy are essential to the granting of relief by way of declaratory judgment . . . .

> Only where there is a real controversy may a party obtain a declaratory judgment.
>
> A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.

Gulnac v. S. Butler Sch. Dist., 587 A.2d 699, 701 (Pa. 1991) (citations omitted).

Upon review, the Court concludes that there is an actual case or controversy in this matter. There can be no dispute that there is uncertainty and insecurity regarding whether timely received absentee and mail-in ballots of electors who do not handwrite a date on the declaration printed on the ballot return envelope should be included in a county board's certified results to the Secretary when they are timely received. Indeed, it appears that of the counties that received timely absentee and mail-in ballots that lacked a handwritten date on the ballot return envelope declaration, only these Boards, and, as subsequently discovered, Butler County, continued to exclude those ballots in their certified results after receiving the communications from Petitioners.

The Secretary, like the Boards' members, took an oath to uphold the constitutions of the United States and Pennsylvania and the law. In finding that a member of a county board of elections had standing to challenge the constitutionality of Act 77[10] in *McLinko v. Department of State*, 270 A.3d 1243, 1266-67 (Pa. Cmwlth. 2022) (*McLinko I*), *rev'd on other grounds*, __ A.3d __ (Pa., Nos. 14-15, 17-19 MAP, filed August 2, 2022) (*McLinko II*), this Court relied on the petitioner's duties under the Election Code to certify election results and his contention that, in applying Act 77, he would be required to certify results that were unconstitutional.

[10] Act of October 31, 2019, P.L. 552, No. 77.

Similar objections are the basis of this litigation. The Secretary argues that the Boards' refusal to submit an accurate certification, which should, in her view of Pennsylvania and federal law as interpreted by the courts, include the ballots at issue, precludes her from performing her duty of certifying accurate election results that include all lawfully cast votes. The Boards assert that their opposite view of Pennsylvania and federal law, as interpreted by the courts, is correct, they have performed their obligations under the law, and it is the Secretary who is not performing her mandatory duty under the Election Code to certify the results the Boards have submitted.

Therefore, the Court cannot say that it is presented only with a "hypothetical legal controversy" that affects no one "in a concrete manner." *Finn*, 990 A.2d at 104-05. Rather, the issue before it is "real" and "provides a factual predicate for a reasoned adjudication" as to whether mandamus should be granted, and, as such, presents an actual case or controversy. *Id.* Under the facts and arguments presented, the Court also cannot conclude that there is a lack of "antagonistic claims indicating imminent and inevitable litigation" or that "a clear manifestation that the declaration sought w[ould not] be of practical help in ending the controversy." *Gulnac*, 587 A.2d at 701. Nor is the Court convinced that Petitioners' request for "declaratory judgment [is being] employed to determine rights in anticipation of events which may never occur" or is for the purpose of obtaining "an advisory opinion which may prove to be purely academic." *Id.* The issue before the Court is not purely academic and reflects an ongoing legal controversy. Accordingly, the Court concludes that there is an actual case or controversy before it and that this is not a reason to deny the Application.

To the extent there is a question about Petitioners' standing, the Court's conclusion that there is an actual case or controversy in this matter similarly demonstrates that, like the county board member in *McLinko I*, Petitioners' interests in this matter are substantial, meaning Petitioners' interests "surpass[] the common interest of all citizens in procuring obedience to the law," *McLinko I*, 270 A.3d at 1266, their interests are directly affected by the Boards' actions, and the causal connection is not remote or speculative. Accordingly, Petitioners have a substantial or direct interest in this matter.

Having disposed of the potential bars to relief, the Court addresses the Petitioners' claims.

B. Count I – Mandamus

As stated, mandamus is an extraordinary writ, reserved for those instances where an agency has failed or refused to perform a ministerial act or a mandatory duty. *County of Carbon*, 61 A.3d at 330. Mandamus may not be used to establish legal rights, nor may it be used to direct the exercise of discretion or judgment in a particular way. *Brimmeier v. Pa. Tpk. Comm'n*, 147 A.3d 954, 964 (Pa. Cmwlth. 2016). "Where the action sought to be compelled is discretionary, mandamus will not lie to control that discretionary act, . . . but courts will review the exercise of the actor's discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law." *County of Allegheny v. Commonwealth*, 490 A.2d 402, 408 (Pa. 1985) (citations omitted). *See also Toland v. Pa. Bd. of Prob. & Parole*, 263 A.3d 1220, 1228 (Pa. Cmwlth. 2021) (citing *County of Allegheny* for this standard). To prevail, the petitioner seeking mandamus relief must establish the following: "(1) a clear legal right to relief; (2) a corresponding duty in the

respondent; and (3) the lack of any other adequate and appropriate remedy." *Baron v. Dep't of Hum. Servs.*, 169 A.3d 1268, 1272 (Pa. Cmwlth. 2017).

Petitioners argue, as clarified at the hearing, their clear right to relief on this claim is based on their interpretation of this Court's decision and order in *McCormick*. Although acknowledging that *McCormick* involved the grant of a preliminary injunction and did not address certification of election results, Petitioners posit that the Court concluded that the timely received absentee and mail-in ballots of qualified electors who did not provide a handwritten date on the declaration on the return envelope were lawfully cast when the Court directed, in the June 2, 2022 order, that county boards were to segregate the ballots at issue, canvass those ballots, and provide two vote tallies to the Secretary. The effect of this Court's June 2, 2022 order in *McCormick*, they argue, was to remove the Boards' discretion as to whether such ballots should be counted and included in the results certified to the Secretary. According to Petitioners, once these ballots were canvassed at the *McCormick* Court's direction based on the conclusion that the ballots were lawfully cast, Section 1308(g)(4) of the Election Code requires that those ballots "shall be counted and included with the results." 25 P.S. § 3146.8(g)(4). Petitioners contend the Boards' failure to do so prevents the Secretary from performing her legal duty to certify the results of the Primary Election. Because the Secretary does not have the authority to direct the Boards to comply with the June 2, 2022 order in *McCormick*, she lacks an adequate remedy, thus permitting her to request a writ of mandamus. For these reasons, Petitioners assert they are entitled to summary relief on their mandamus claim.

The Boards respond that *McCormick* involved only a grant of a preliminary injunction, did not constitute a final resolution of whether the ballots in question

were lawfully cast, and did not address certifying either of the tallies provided to the Secretary. Accordingly, the Boards maintain that *McCormick* does not provide Petitioners with a clear right to relief on the mandamus claim and their Application should be denied as to that claim. They further assert mandamus cannot lie because under Pennsylvania law, canvassing and computing votes are discretionary acts under *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952), which cannot be directed in a particular way, and Petitioners had an adequate remedy, an appeal under Section 1407(a) of the Election Code, that they did not pursue.

To prevail on their request for summary relief on this claim, Petitioners must first establish that, as a matter of law, *McCormick* provides them with a clear right to relief by imposing a duty on the Boards to certify results that included the timely received absentee and mail-in ballots of qualified electors who did not write a date on the declaration on the return envelope.

In *McCormick*, Dave McCormick for U.S. Senate and David H. McCormick filed a petition for review against the Secretary and 60 county boards challenging, in the context of a recount, those county boards' decisions not to count absentee and mail-in ballots in the Republican primary for U.S. Senate, where the electors did not write a date on the declaration on the return envelope. *McCormick*, slip op. at 2-3. The petitioners argued that this refusal violated both Pennsylvania law, including the Free and Equal Elections Clause of the Pennsylvania Constitution, and federal law, Section 10102(a)(2)(B) of the Civil Rights Act, as interpreted by the Third Circuit in *Migliori*. In *Migliori*, the Third Circuit held that ballots without handwritten dates on the return envelope should be counted in the November 2, 2021 General Municipal Election for judge in Lehigh County.

In granting a preliminary injunction, the Court analyzed the legal issue of whether such ballots should be counted under the standard for granting preliminary injunctive relief. This standard required the Court to determine whether the petitioners were "likely to prevail on the merits." *McCormick*, slip op. at 19. Importantly, the grant of a preliminary relief "[does not] serve as a judgment on the merits" because "it is a temporary remedy granted until that time when the party's dispute can be completely resolved." *Id.* at 20 (quoting *Appeal of Little Britain Twp. from Decision of Zoning Hearing Bd.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994)) (emphasis omitted) (internal quotations omitted). Thus, the Court's determination was not a final decision on the merits. *McCormick*, slip op. at 27-31, 33-34, 37. Given the procedural posture, the Court could not make a final determination that these ballots were lawfully cast, but determined that the petitioners in *McCormick* were likely to succeed on that argument under Pennsylvania and federal law.

The Court's June 2, 2022 order in *McCormick* also did not reference the certification of election results. That order granted the preliminary injunction and directed county boards

> to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require otherwise, report two vote tallies to Leigh M. Chapman, Acting Secretary of the Commonwealth . . . , one that includes the votes from ballots that lack dated exterior envelopes and one that does not; and to report a total vote tally which includes the votes from ballots that had both dated and undated exterior envelopes as the total votes cast.

(*McCormick*, Order at 1-2.) Petitioners interpret the Court's direction that these ballots be canvassed, and to report a total vote tally as requiring the Boards to certify those results under Section 1308(g)(4), which requires that all canvassed ballots

must be included in the results. However, viewed in light of the Court's legal analysis, which did not finally resolve the issue of whether these ballots were lawfully cast, and the procedural posture of the case, this direction is more appropriately understood as directing canvassing of the ballots in anticipation of a final determination. Because *McCormick* involved the grant of preliminary relief, the results of which could change pending final resolution of the legal issue, the Court would not have had the authority to require the Boards to certify their election results to include the ballots without handwritten dates on the return envelope. Accordingly, the Court will not interpret the June 2, 2022 order in *McCormick* to require such certification, and, therefore, Petitioners have not met their burden of proving their entitlement to summary relief on their mandamus claim.

C. Count II – Declaratory Relief

In Count II, Petitioners seek both declaratory and injunctive relief based on state and federal law. The Court begins with Petitioners' request for declaratory relief under state law. Declaratory judgments are not obtainable as a matter of right. *Ronald H. Clark, Inc. v. Township of Hamilton*, 562 A.2d 965, 968-69 (Pa. Cmwlth. 1989). Rather, whether a court should exercise jurisdiction over a declaratory judgment proceeding is a matter of sound judicial discretion. *Id.* at 969.

1. Whether Petitioners Have a Clear Right to Relief Under Pennsylvania Law

a. The Parties' Arguments

The Court begins with the state law claims, which Petitioners argue provides them with a clear right to relief to have the Court: (1) declare that these Boards may not exclude from their certified returns provided to the Secretary "timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope," (Pet. for Rev. ¶ 50

& Prayer for Relief ¶ 2); and (2) order the Boards to include such ballots in their certified results. Petitioners argue that, under the Election Code, undated declarations accompanying the timely received absentee and mail-in ballots of qualified electors are sufficient and those ballots represent all lawfully cast votes that the Boards are required to include in their certified results.

Specifically, Petitioners assert that the dating provisions of Sections 1306(a) and 1306-D(a) are ambiguous, and, when those provisions are reviewed under the principles of statutory construction, the Court should conclude that the use of the word "shall" is not mandatory, but directory, meaning "a directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot." *In re Canvass*, 241 A.3d at 1062. Petitioners maintain that neither *In re Canvass* nor *Ritter*, which previously interpreted these provisions, are binding precedent. When the dating provisions are read *in pari materia* with other sections of the Election Code and the purpose of the declaration, Petitioners argue the directory nature of the dating provisions is confirmed. This interpretation recognizes, Petitioners argue, the drastic consequence of disenfranchising otherwise qualified Pennsylvania voters due to an omission that does not relate to the timeliness of the ballot, the qualifications of the voter, or support the purpose of the declaration. Petitioners assert that disenfranchising voters on the basis of such a minor irregularity would violate the Free and Equal Elections Clause. This is particularly so, Petitioners maintain, where ballots that were accompanied by declarations that contained obviously wrong or incorrect dates are counted. For these reasons, Petitioners contend their right to relief is clear and they are entitled to summary relief on Count II.

The Boards argue that Petitioners' right to relief is not clear because the use of "shall" in Sections 1306(a) and 1306-D(a)'s dating provisions reflects that the General Assembly intended that absentee and mail-in ballots are valid and should be included in the certified election results only if the declaration on the return envelope contains **both** the elector's signature **and** a handwritten date. This interpretation, they maintain, is clearly supported by a majority of justices, as reflected in the concurring and dissenting opinion of Justice Wecht and concurring and dissenting opinion of Justice Dougherty in *In re Canvass*. Pursuant to the combined reasoning of those justices' opinions, the Boards argue that, while these types of ballots could be counted for the November 2020 General Election, these ballots are not valid in subsequent elections. This result was recognized by this Court in *Ritter*, which the Boards assert the Court should find persuasive.

The Boards further argue that Petitioners' decision not to seek relief against Butler County, whose results the Secretary certified notwithstanding that it did not include timely received absentee and mail-in ballots without a date on the return envelope declaration, undermines Petitioners' arguments in support of the declaratory judgment claim. Petitioners respond that the Secretary's certification was made under the mistaken belief that Butler County did not have any of the ballots at issue. Petitioners contend that, upon discovering otherwise, they balanced the need to have accurate results with the need to have finality in these already-certified elections and concluded that, under these circumstances, the latter need outweighed the former. Thus, they argue that the decision not to decertify and/or recertify Butler County's results do not impact their claims against these Boards, who are not complying with the law and whose results have not yet been certified by the Secretary.

b. The Relevant Statutory Language and Statutory Construction

The Court begins with the relevant language of Sections 1306(a) and 1306-D(a), which provides that, after an elector marks their ballot in secret and places it in the secrecy envelope, the elector is to place the secrecy envelope into a second envelope, "on which is printed the form of declaration of the elector," and "[t]he elector **shall** then fill out, date and sign the declaration printed on such envelope." 25 P.S. §§ 3146.6(a) (absentee ballots); 3150.16(a) (mail-in ballots) (emphasis added).

In construing the language of the Election Code to ascertain the General Assembly's intent, which is the object of all interpretation and construction of statutes, Section 1921(a) of the Statutory Construction Act of 1972 (SCA), 1 Pa.C.S. § 1921(a), the Court is mindful that the Pennsylvania Constitution declares that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5. For over 100 years, the Pennsylvania Supreme Court has held that elections are "free and equal" "when every voter has the same right as any other voter[,] . . . the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial[,] and when no constitutional right of the qualified elector is subverted or denied him." *Working Families Party v. Commonwealth*, 209 A.3d 270, 281 (Pa. 2019) (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018)); *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). This clause protects an elector's individual right to an equal, nondiscriminatory electoral process. *League of Women Voters*, 178 A.3d at 810 (citing *Winston*, 91 A. at 523).

With the constitutionally protected right to an equal, nondiscriminatory electoral process at issue, the overarching principle guiding the interpretation of the Election Code is that it should be liberally construed so as not to deprive electors of their right to elect a candidate of their choice. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). This interpretative direction is not newly minted but has been recognized by the courts for more than 70 years, through different administrations and throughout decades of economic, political, and social changes in Pennsylvania. Thus, the Supreme Court has cautioned that

> [t]he power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons**. . . . The purpose in holding elections is to register **the actual expression of the electorate's will** and that computing judges should endeavor to see **what was the true result**. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

Appeal of James, 105 A.2d 64, 67 (Pa. 1954) (quoting *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945)) (emphasis added). Thus, efforts must be made to avoid disenfranchisement even when it happens "by inadvertence." *League of Women Voters*, 178 A.3d at 812 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

There are also general principles in the SCA that control the Court's interpretation of a statute, which provide that the clearest indication of legislative intent is a statute's plain language, and if the words are clear and free from ambiguity, the letter should not be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b). However, if the words are not explicit, then the SCA

provides that "the intention of the General Assembly may be ascertained by considering" the factors set forth in the SCA, "among other matters.". 1 Pa.C.S. § 1921(c).

Thus, the Court must determine whether the General Assembly clearly intended that if the date is omitted, the ballot is invalid and will not be counted by stating that an elector "shall then fill out, date and sign the declaration printed on such envelope," 25 P.S. §§ 3146.6(a), 3150.16(a). The General Assembly's clearest expression of intent that an action will be invalidated if required actions or conditions are not met, is when the General Assembly expressly states that is the consequence of not meeting those requirements. For example, in other provisions of the Election Code, the General Assembly expressly provides that an absentee or mail-in ballot "shall be set aside and **declared void**" if the secrecy envelope "contain[s] any text, mark or symbol which reveals" identifying information about the elector or their political affiliation, and "shall **not be counted**" "[i]f an elector fails to provide proof of identification that can be verified by the county board by the sixth calendar day following the election" where proof of identification had not previously been provided. 25 P.S. § 3146.8(g)(4)(ii), (h) (emphasis added). Notably, the Election Code **does not state** that a ballot in a return envelope that lacks a dated declaration is invalid, should be rejected, or should not be counted, although the General Assembly has specified these consequences with regard to other aspects of absentee or mail-in ballots.

As is evident from a review of the Election Code, there are circumstances in which the General Assembly has used the term "shall" without intending that a ballot that does not technically comply with the statute should not be counted. For instance, Section 1215(a) and (d) of the Election Code, 25 P.S. § 3055(a), (d),

respectively, requires that after receiving a ballot at a polling place, the elector "**shall** retire to one of the voting compartments, and **draw the curtain or shut the screen or door**," and that after marking the ballot, the elector "**shall fold his ballot,** without displaying the markings thereon, in the same way it was folded when received by him." (Emphasis added.) Today, many voting booths do not have curtains or a door, and if paper ballots are used, they are not folded so they can be accepted into a voting machine. Although electors may not be technically complying with these provisions of the Election Code, where an elector votes in a booth set away from others and, after voting, inputs their own ballot into the machine to be tabulated, their ballots are still counted because this creates secrecy of voting and thus satisfies the purpose of those provisions. Although the General Assembly did use the word "shall" in these provisions, no one would reasonably argue that these ballots should not be counted for these reasons.

As will be illustrated further below, the General Assembly regularly uses the word "shall" in statutes and merely doing so, without more, does not clearly provide that the intended consequence for noncompliance is invalidation. Such was Justice Donohue's conclusion in *In re Canvass*, 241 A.3d at 1062, 1071-72, 1076-77, and this Court likewise finds the dating provisions ambiguous. "A statute is ambiguous or unclear if its language is subject to two or more reasonable interpretations." *Bethenergy Mines, Inc. v. Dep't of Env't Prot.*, 676 A.2d 711, 715 (Pa. Cmwlth. 1996). Here, the parties have provided different and reasonable interpretations of Sections 1306(a) and 1306-D(a). The reasonableness of these differing interpretations is supported by the judicial disagreements over how to interpret these same provisions as set forth in the various opinions from the courts that have interpreted the dating provisions thus far.

Accordingly, the Court looks for guidance to the SCA, which was enacted by the General Assembly to assist in the interpretation of a statute. To ascertain legislative intent, the SCA requires consideration of the following: "[e]very statute shall be construed, if possible, to give effect to all its provisions,"1 Pa.C.S. § 1921(a); "[t]he object to be obtained" and "[t]he consequences of a particular interpretation," 1 Pa.C.S. § 1921(c); and it is presumed "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable" or that violates the constitution, Section 1922(1) of the SCA, 1 Pa.C.S. § 1922(1). "Statutes or parts of statutes are *in pari materia* when they relate to the same . . . things," and "[s]tatutes *in pari materia* shall be construed together, if possible, as one statute." Section 1932 of the SCA, 1 Pa.C.S. § 1932. Additionally, courts "must listen attentively to what the statute says, but also to what it does not say." *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017) (internal quotations omitted) (quoting *Johnson v. Landsdale Borough*, 146 A.3d 696, 711 (Pa. 2016)). Thus, "where a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent." *Fonner v. Shandon, Inc.*, 724 A.2d 903, 907 (Pa. 1999).

As previously described, the word "shall" is regularly used by the General Assembly to denote different meanings and courts routinely must determine legislative intent when it does so. In some instances, the use of the word "shall" is mandatory and, in others, it is directory. "While both mandatory and directory provisions of the [General Assembly] are meant to be followed, the difference between a mandatory and directory provision is the **consequence** for noncompliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved." *JPay, Inc. v. Dep't of Corr.*, 89

A.3d 756, 763 (Pa. Cmwlth. 2014) (emphasis added). "Whether a particular statute is mandatory or directory does not depend upon its form, but upon the intention of the [General Assembly], to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other." *Deibert v. Rhodes*, 140 A. 515, 517 (Pa. 1928) (internal quotations omitted) (quoting *In re McQuiston's Adoption*, 86 A. 205, 206 (Pa. 1913)); *see also MERSCORP, Inc. v. Delaware County*, 207 A.3d 855, 866 (Pa. 2019) (same); *JPay, Inc.*, 89 A.3d at 763 (same).

With these principles in mind, the Court examines whether the General Assembly intended "shall" in the dating provisions to mean, under these facts, that a handwritten date on the return envelope declaration is "mandatory" and an elector's failure to include a date invalidates the ballot, or "directory" where noncompliance does not, by itself, invalidate the ballot. In doing so, it is also helpful to consider how courts have interpreted the General Assembly's use of the term "shall" in other cases involving the Election Code, as well as in other statutes. As will be discussed more fully below, courts consider a variety of factors, including whether: (1) the legislature expressly provides for a consequence of noncompliance; (2) the purpose of the provision is not fulfilled unless there is compliance; or (3) fraud, secrecy, or privacy is furthered by requiring compliance.

i. Specifying the Consequences of Noncompliance

The dating provisions state that "[t]he elector shall then fill out, date and sign the declaration printed on such envelope." 25 P.S. §§ 3146.6(a), 3150.16(a). As previously discussed, a significant factor in determining whether a statute is mandatory or directory is whether the General Assembly expressly provided a consequence for noncompliance. The dating provisions at issue do not expressly

provide that such ballots should not be counted, unlike other provisions of the Election Code. When certain provisions of the Election Code do not expressly provide for a consequence of noncompliance, the courts have found that, without something more, such as fear of fraud, the ballot should not be invalidated. For example, the Election Code states that an elector "**shall** vote for candidates" by marking the square opposite the candidate's name or use the write-in space to vote for a "person not already listed as a candidate for that office" on the ballot. Section 1112-A(b)(3) of the Election Code, 25 P.S. § 3031.12(b)(3) (emphasis added).[11] Where 10 electors wrote in the name of a candidate that did appear on the ballot, rather than mark the box next to the candidate's name on the ballot, the Supreme Court did not invalidate those ballots, instead finding the provision was directory. *Shambach v. Bickhart*, 845 A.2d 793, 801-02 (Pa. 2004). In doing so, the Supreme Court distinguished this provision, which "d[id] **not declare** that such a write-in vote **must be voided** and **may not be counted**," from another section of the Election Code, in which the General Assembly "unambiguously required" that non-compliant ballots "**be void[ed] and not counted**." *Id.* at 801 (emphasis added). Finding the lack of disqualifying language in Section 1112-A(b)(3) "significant," the Supreme Court held that the use of "shall" was not mandatory. *Id.* at 801-02. Furthermore, because the electors' intent was clear and there was no evidence of fraud, the Supreme Court determined that invalidating those ballots would be contrary to the liberal construction of the Election Code. *Id.* at 802-03.

This Court used a similar analysis where the Election Code stated that "[s]ubstituted nomination certificates to fill vacancies caused by the withdrawal of candidates nominated at primaries or by nomination papers **shall** be filed . . . at least

[11] Section 1112-A was added by Section 4 of the Act of July 11, 1980, P.L. 600.

seventy-five (75) days before the day of the general or municipal election." Section 981(a) of the Election Code, 25 P.S. § 2941(a) (emphasis added). In finding that the failure to file within the time period would not bar a substitution, the Court observed that, unlike in other statutes, the General Assembly had **not** used "absolute and unequivocal prohibitory language" that warranted reading the provision as mandatory. *In re Ross*, 109 A.3d 781, 784, 786 (Pa. Cmwlth. 2014). The Court further explained that reading "shall" to permit substitution of candidates when doing so would not disrupt the election was consistent with "the paramount and fundamental importance under the Election Code of protecting the right of the voters to elect the candidate of their choice." *Id.* at 787.

This approach is consistent with how other jurisdictions construe their respective election statutes. For example, an Illinois statute stated that election judges "**shall** sign, seal in a marked envelope and deliver [a certificate of election results (Form 80)] to the county clerk." Section 18-14 of the Illinois Election Code, 10 ILCS § 5/18-14 (emphasis added). When four election precincts failed to complete Form 80s, a losing candidate challenged the election results arguing that Section 18-14 was mandatory and the failure to comply with its provisions voided the election and required a new election in those precincts. *Calloway v. Chicago Bd. of Elec. Comm'rs*, 155 N.E.3d 509, 512 (Ill. App. Ct. 2020). Affirming on appeal the trial court's conclusion that Section 18-14 was directory, the Illinois Appellate Court explained

> [t]here is no universal formula for distinguishing between mandatory and directory provisions. Whether a particular statutory provision is mandatory, or directory is determined by the legislature's intent, which is ascertained by examining the nature and object of the statute and the consequences which would result from any given constructions.

Id. at 515 (internal quotations and citations omitted). The Illinois Appellate Court held that a mandatory construction would be given to a provision where it **expressly stated** that failure to act in a certain way **voids the ballot**, but a directory interpretation would be given where the provision **described the manner** in which to perform a certain action, and there was no indication that mandatory compliance was **essential to the validity of the ballot**. *Id.* at 515-16 (citing *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990)). It concluded that, notwithstanding the use of "shall," Section 18-14 was directory because the legislature had failed to provide a consequence for noncompliance and the failure to comply with the requirement was not needed to preserve the integrity of the election process where other means did so, particularly where there were no allegations of errors that were "so pervasive as to undermine the integrity of the vote." *Id.* at 516.

New Jersey courts also found the lack of express language addressing the consequence of noncompliance with its election statute weighed in favor of the provision being directory. *Clemency v. Beech*, 703 A.2d 399 (N.J. Super. Ct. App. Ct. Law Div. 1997). At issue there was Section 23-16 of the New Jersey Election Code, which provides that "any person nominated at the primary by having his name written or pasted upon the primary ballot **shall** file a certificate stating that he is qualified for the office for which he has been nominated" and accepts that nomination, and "[s]uch acceptance **shall** be filed within seven days" of the primary with the county clerk or secretary of state, depending on the office. N.J. Stat. Ann. § 19:23-16 (emphasis added). The New Jersey Court of Appeals Law Division held that the above provision was directory, so that a candidate's certificate was not void when it was not received within the seven days because "[t]he right to vote is the constitutional engine that powers our democracy," and "[t]he sentiments of the

voters should not be defeated . . . unless there is a **direct and express mandate by statute** that allows for no other interpretation." 703 A.2d at 401 (emphasis added).

Finally, in Texas, courts consider the state's entire election statute to determine whether the statute contains a mandatory provision that **requires** the voiding of a ballot if there is noncompliance. Section 86.006(a), (h) of the Texas Election Code provides, in relevant part:

> (a) A marked ballot voted under this chapter **must** be returned to the early voting clerk in the official carrier envelope. The carrier envelope may be delivered in another envelope and must be transported and delivered only by:
>
> (1) mail;
> (2) common or contract carrier; or
> (3) subject to Subsections (a-1) and (a-2), in-person delivery by the voter who voted the ballot.
>
> . . . .
>
> (h) A ballot returned in violation of this section **may not be counted**.

7 Tex. Elec. Code Ann. § 86.006(a), (h) (emphasis added). Under Texas's Code Construction Act, "may not" is construed as meaning "shall not" unless the context provides otherwise. Section 311.06 of the Code Construction Act, Tx. Govt. § 311.016. Thus, because the Texas Election Code included express language of the consequence of noncompliance, the court found the requirement mandatory. *Reese v. Duncan*, 80 S.W.3d 650, 657-58 (Tx. Ct. App. 2002).

Here, the General Assembly did not specifically state, as it has with other provisions, that the consequence for not including a handwritten date on the declaration is to declare the ballot invalid. This differs, for example, from the requirement that an absentee or mail-ballot must be placed and sealed in the secrecy envelope in order to be valid because the secrecy envelope serves the purpose of voting in secrecy, as protected by the Pennsylvania Constitution, and the General

Assembly expressly directed that ballots not so secured "shall be set aside and declared void," 25 P.S. § 3146.8(g)(4)(ii). *Boockvar*, 238 A.3d at 379-80. No such clear directive appears in relation to the dating of the return envelope declaration, although the General Assembly was obviously aware of how to add such a directive, and the General Assembly's decision not to include such a directive in the dating provisions should be given effect. *Discovery Charter Sch.*, 166 A.3d at 321; *Fonner*, 724 A.2d at 907. Because the General Assembly did not expressly provide for a consequence if an elector did not comply with the dating provision, as the courts have done in other cases within the Commonwealth involving the Election Code and in other states under their respective election laws, the Court will not find the dating provisions are mandatory unless there is something more that provides evidence of that legislative intent.

ii. The Purpose of the Statutory Provision

Another factor the courts consider in construing whether a statutory provision that contains the word "shall" is mandatory or directory is the purpose behind the provision and whether compliance is required in order to fulfill that purpose. Before determining whether the date is required on the return envelope declaration, the Court must first determine the purpose behind the declaration. The declaration at issue, which was submitted as Joint Exhibit 1, states:

> I hereby declare that I am qualified to vote in this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I understand I am no longer eligible to vote at my polling places after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.

(Jt. Ex. 1.)

Sections 1304 and 1304-D(b) of the Election Code, 25 P.S. §§ 3146.4 (absentee ballots), 3150.14(d)[12] (mail-in ballots), establish the requirements for the declaration. Specifically, these sections provide that the "form of the declaration" "shall contain . . . a statement of the elector's **qualifications**, together with a statement that the elector **has not already voted** in the primary or election." 25 P.S. §§ 3146.4, 3150.14(d) (emphasis added). Section 1308(g)(3) provides that, as part of the county board's process of canvassing absentee and mail-in ballots and determining whether such ballots should be counted and included in the results, the county "board . . . examine[s] the declaration . . . and compare[s] the information thereon" to its records for that elector and determines whether it "is satisfied that the declaration is **sufficient**." 25 P.S. § 3146.8(g)(3) (emphasis added). Finally, Section 1853 of the Election Code, 25 P.S. § 3553,[13] addresses the possibility of criminal charges where a "person . . . **sign[s] a[]** . . . **declaration of elector** . . . knowing any matter declared therein is false." (Emphasis added.)

None of these provisions speak directly to the purpose of, or need for, having an elector handwrite a date on the declaration, nor what date to use. Rather, these provisions focus on: (1) whether a person has **signed** a declaration knowing that the information is false; (2) the elector's **qualifications**; (3) whether they have **already voted**; and (4) whether the declaration is "**sufficient**." Reviewing Sections 1306(a) and 1306-D(a) *in pari materia* with the other provisions in the Election Code relating to declarations and important dates, it is apparent that the General Assembly did not identify the date on the return envelope declaration as supporting a particular purpose.

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[12] Sections 1304 and 1304-D were added by, respectively, Section 11 of the Act of March 6, 1951, P.L. 707, and Section 8 of the Act of October 13, 2019, P.L. 552.

[13] Section 1853 was added by Section 3 of the Act of January 8, 1960, P.L. (1959) 2135.

Justice Dougherty, in his concurring and dissenting opinion in *In re Canvass*, opined that

> there is an unquestionable purpose behind requiring electors to date and sign the declaration. As [then-]Judge Brobson observed below, the date on the ballot envelope provides proof of when the "elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector's eligibility to cast the ballot." . . . . The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes. . . .

241 A.3d at 1090-91 (Dougherty, J., concurring and dissenting) (internal citations omitted). Notably, the reasons identified in Justice Dougherty's concurring and dissenting opinion appear to be based on the belief that the date written on the declaration on the return envelope **was the actual date the ballot was completed**, not an elector's birthday or some other date. However, the undisputed record in this matter shows that timely received ballots that had return envelopes that contained handwritten dates other than the day of execution or obviously wrong dates have **not** been invalidated. The statute says "date" – it does not specify which date. Moreover, it would be difficult to ascertain whether a date accurately reflects the day the declaration was signed. Thus, the purposes expressed in that concurring and dissenting opinion in *In re Canvass*, in the abstract, are unsupported by the facts in this case. A timely received ballot with a declaration on the return envelope containing a handwritten date, even an incorrect one, does not ensure or establish anything in relation to ballot confidentiality, an elector's qualifications, or the timeliness of the ballot. When there is **no factual or legal basis** for concluding that the dating provisions serve these interests, these interests no longer support interpreting the word "shall" as mandatory, causing the disenfranchising of qualified

electors whose ballots were timely received, as evidenced by the county boards' stamping the ballots with the time and date of receipt.

In an analogous case, *Application of Egan*, 511 N.Y.S.2d 465, (N.Y. Sup. Ct. 1986), a New York Court found that a lack of a date on an oath on the absentee ballot return envelope did not render the absentee ballots invalid because the purpose behind the statutory provision was met. Section 8-410 of New York's Election Law states that an elector "shall then take and subscribe an oath on the envelope, with blanks properly filled in." NY ELEC § 8-410. One of the blanks to be filled in was the date. In reviewing whether an absentee ballot that was enclosed in an undated envelope should be opened and counted, the New York Court found the statutory provision was not mandatory, and the lack of a date on the date line on the oath of an absentee ballot envelope did not invalidate the ballot because the date added nothing to determining the timeliness of the ballot, which was the purpose of the provision, and the statute was silent as to the consequences of not dating the envelope. *App. of Egan*, 511 N.Y.2d at 467-69. *See also Willis v. Thomas*, 600 P.2d 1079, 1082-83 (Ak. 1979) (absence of date by witness or postmark where other indicia established timeliness of the ballot not invalidating).

Furthermore, the date on the return envelope declaration is immaterial to determining a voter's qualifications. The date as of which an elector's qualifications are determined is **election day**. *See* Article VII, section 1 of the Pennsylvania Constitution, PA. CONST. art. VII § 1 (an elector is qualified as of "the election"); Section 1301 of the Voter Registration Act, 25 Pa.C.S. § 1301 (elector is qualified "the day of the election" or "the election"). Thus, if the elector died, moved, or otherwise became ineligible to vote prior to election day, even if the elector was qualified when signing and dating the return envelope, that ballot would not count,

no matter what date was on the declaration on the return envelope. Thus, the date the declaration is signed is not relevant to the voter's qualifications as of election day.

The Colorado Supreme Court reached a similar conclusion in *Erickson v. Blair*, 670 P.2d 749, 752-53, 757 (Colo. 1983). There, the Colorado Supreme Court examined whether absentee electors' failure to fully complete an affidavit on the return envelope by leaving certain non-signature lines blank or not checking boxes invalidated the ballots under former Section 32-1-821(4) of Colorado's Special District Act, CO. ST. § 32-1-821(4), *repealed by* Section 122 of H.B. 92-1333 (setting forth what "shall" be printed on the return envelope for an absentee ballot, including an affidavit which "shall contain a space for the person's name, address, and signature, and date of election"). Considering "the nature and purpose of absentee voting legislation as well as the specific legislative provisions relating" to the particular type of election, and the principle that electors should not be disenfranchised, the Colorado Supreme Court held that, in the absence of fraud or other similar issue, substantial, not complete, compliance was needed. *Id.* at 755-57. This **substantial compliance**, it held, was satisfied by the elector's **signature** and the provision of sufficient information to determine their qualifications. *Id.* at 756-57.

Nor does the date serve to ensure that an elector had not already voted. The Election Code provides that so long as a qualified or absentee elector has not actually **submitted** their absentee or mail-in ballot to a county board, which is something that appears in a polling place's register, the elector is authorized to vote at a polling place, either by provisional ballot or regular ballot, depending on the circumstances. *See* Sections 1306(b) and 1306-D(b) of the Election Code, 25 P.S. §§ 3146.6(b),

3150.16(b). Thus, even if an elector already signed and dated the declaration, if they did not submit the ballot, they may still choose to vote in person under the law. Additionally, it cannot be disputed that electors receive only one absentee or mail-in ballot, which, per Commissioner Leinbach's credible testimony, has a barcode that is unique to the elector, the election, and the county, is scanned into the SURE system, and is reflected on the elector's entry. Thus, an elector cannot submit multiple absentee or mail-in ballots in one election, and the fact that an elector may indicate by dating the declaration that they did not vote as of that date does not preclude the elector from appearing at the polling place to vote so long as they have not submitted that ballot by election day.

While the General Assembly found some dates to be of particular importance, such as the date of the primary or general election, which is the date on which the civilian absentee and mail-in ballots must be returned by 8:00 p.m., 25 P.S. §§ 3146.6(c), 3150.16(c), and the date as of which an elector's qualifications to vote is determined, *see* PA. CONST. art. VII, § 1; 25 Pa.C.S. § 1301, the date of the declaration cannot override these dates. Ultimately, the parties have not identified a specific purpose served by dating the declaration on the return envelope, and the Court cannot discern any. This is particularly true where, as here, there is no dispute that **all of the ballots were received by 8:00 p.m. on Primary Election Day**, which was not necessarily true in *In re Canvass*, which involved a unique situation where, in the midst of an ongoing global pandemic, absentee and mail-in ballots were to be counted, by order of the Supreme Court, if they had been cast by Election Day and arrived within three days of Election Day. Accordingly, the Court concludes that the inclusion of a handwritten date on the declaration is not needed to make the declaration sufficient for the purpose identified in Sections 1304(b) and 1304-D(b)

of the Election Code. The declaration relates to an elector's qualifications and whether they have already voted, and, as discussed above, the dates relevant to those determinations is not the date the elector signed the declaration. Thus, it cannot be reasonably said that the General Assembly intended the handwritten date on the declaration to be essential to the declaration's purpose.

iii. Preventing Fraud and/or Protecting Secrecy in Voting

Another consideration in determining whether a provision is mandatory or directory is whether the provision is designed to prevent fraud, or to protect the privacy and secrecy of voting. Where the provision is essential to the integrity of the election or the validity of the ballot, the provisions have been found to be mandatory. For example, Section 1306(a) of the Election Code, which provides that "elector[s] **shall** send [their absentee ballot] . . . or deliver it in person to said county board of election," 25 P.S. § 3146.6(a) (emphasis added), is designed to prevent fraud and protect ballot secrecy. Therefore, the Supreme Court found it was mandatory and precluded third parties from returning a non-disabled elector's absentee ballot. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231-33 (Pa. 2004). Similarly, in *Boockvar*, the Supreme Court held that mail-in ballots that were not contained in security envelopes were not valid, determining that the language in Section 1306-D(a) stating that an elector "**shall**, in secret, . . . enclose and securely seal the [ballot] in the envelope on which is printed, stamped or endorsed 'Official Election Ballot,'" 25 P.S. § 3150.16(a), was mandatory. *Boockvar*, 238 A.3d at 378 (emphasis added). The Supreme Court read Section 1306-D(a)'s requirement that the secrecy envelope be placed in the return envelope *in pari materia* with Section 1308(g)(4)(ii), which voided any ballot that was in a secrecy envelope containing any identifying markings, and found the

General Assembly's clear intent was that "it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted," "during the collection and canvassing processes, when the return envelope in which the ballot arrived is unsealed and the sealed ballot removed." *Id.* The Court noted that "in providing for the disqualification of mail-in ballots that arrive in secrecy envelopes that bear markings identifying the elector, the elector's party affiliation, or the elector's vote" by voiding such ballots pursuant to Section 1308(g)(4)(ii), the General Assembly "signaled beyond cavil that **ballot confidentiality** up to a certain point in the process [was] so **essential** as to require disqualification," a purpose that was served by the secrecy envelope itself. *Boockvar*, 238 A.3d at 380 (emphasis added). Because a mail-in ballot not contained in a statutorily-mandated secrecy envelope related to the ballot's confidentiality, "the inescapable conclusion" was that such ballots "must be disqualified." *Id.*

Unlike requiring an elector to personally deliver their absentee or mail-in ballot to a county board or enclose their ballot in the secrecy envelope without any identifying marks, the date on the declaration does not relate to a ballot's confidentiality or the privacy of the elector's vote. Nor could it reasonably be found to do so because the declaration is **signed by the elector** and is found on the ballot **return** envelope. The ballot **return** envelope contains identifying information about the elector, including a barcode which, when scanned, links to the elector's entry in the SURE system.

The dating provisions are more akin to the Election Code provision that states ballots marked in "blue, black or blue-black ink, in fountain pen or ball point pen, or black lead pencil or indelible pencil, **shall** be valid and counted." Section 1223(a) of the Election Code, 25 P.S. § 3063 (emphasis added). In reviewing that provision,

the Supreme Court held that ballots marked in other colors of ink could also be valid and counted in the absence of fraud. *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). While the Supreme Court explained that the purpose of this requirement was to prevent the ballots from being identifiable, it concluded the use of different colored ink would not make the ballots identifiable given the prevalence of multi-colored ink pens. *Id.* Therefore, the Supreme Court determined that accepting them as valid ballots would not invalidate the purpose of the section. *Id.*

Other jurisdictions similarly examine whether the provision speaks to the integrity of the election. For instance, the Mississippi Supreme Court has stated that "[i]f a statute does not **expressly declare** that a particular act is **essential to the election's validity** or that omission of the particular act will render the election **void,** the statute is considered directory rather than mandatory, so long as the irregular act is not intended to affect the **integrity** of the election." *Rogers v. Holder*, 636 So.2d 645, 647-48, 650 (Miss. 1994) (emphasis added). There, the Mississippi Supreme Court examined, among provisions related to absentee voting, Section 23-15-635 of the Mississippi Election Code, Miss. Code Ann. § 23-15-635, which stated that "the form of the elector's certificate, [and] attesting witness certification . . . on the back of the envelope used by absentee voters . . . **shall** be as follows" and included lines for an attesting witness's name, official title, address, and city and state. (Emphasis added). The Mississippi Court held that this section was mandatory and that an absentee ballot that lacked the signature of a witness was invalid because the certification of the attesting witness was "intended to ensure the integrity of absentee ballots." *Rogers*, 636 So.2d at 649.

While the Boards posit that the date on the declaration is intended to deter fraud, the Court is unpersuaded, particularly where a ballot that contains **any** date

on the declaration is considered valid. As discussed above, the issue of backdating of absentee or mail-in ballots, which was another reason cited by Justice Dougherty in *In re Canvass*, is not present in this case because the ballots are unique to each election, can only be completed between the time they are mailed and 8:00 p.m. on primary or election day, and are, at a minimum, date stamped when they are received by the county boards. Further, as the Pennsylvania Supreme Court has very recently held, the **signature** on the declaration may be used to verify an elector's identity, and, therefore, qualifications. *McLinko* II, __ A.3d at __, slip op. at 63 (citing *In re November 3, 2020 General Election*, 240 A.3d 591, 596-97 (Pa. 2020)). Last, a single instance of **alleged** fraud related to a ballot that would have been rejected anyway because the elector had died prior to the Primary Election Day, 25 P.S. § 3146.8(d), does not support the drastic consequence of disenfranchising otherwise qualified Pennsylvania electors due to an omission that is unrelated to their qualifications or the timeliness of their ballot.[14] The Court's determination does not preclude challenges to individual ballots based on factors other than the existence of an undated declaration. Indeed, the relief Petitioners seek is limited only to those timely received absentee and mail-in ballots of qualified Pennsylvania electors that are not otherwise challenged.

c. Interpretation of "Shall" in Other Statutes

The Court's use of these factors to interpret the word "shall" in the Election Code is consistent with how other Pennsylvania statutes containing the word "shall" are interpreted. *See, e.g.*, *MERSCORP, Inc.*, 207 A.3d at 861 (holding "all . . .

[14] *Commonwealth v. Mihaliak*, Docket Nos. MJ-02202-CR-000126-2022; CP-36-CR-0003315-2022. Notably, Commissioner D'Agostino testified that the ballot at issue had already been separated by the chief clerk because the scan of the return envelope revealed, through the SURE system, that the elector was deceased.

conveyances . . . **shall be recorded** in the . . . office for the recording of deeds" is directory as purpose was to protect subsequent bona fide purchasers by providing notice of conveyances, where there were no "specific, limited, consequences [for the] failure to record" under that provision.); *Lorino v. Workers' Comp. Appeal Bd. (Commonwealth of Pa.)*, 266 A.3d 487, 492-94 (Pa. 2021) (using "shall" and "may" in the same section of attorneys' fees provision in the Workers' Compensation Act was a clear indication that the General Assembly intended some of the acts to be mandatory and the other directory); *In re McQuiston's Adoption*, 86 A. at 209 (interpreting adoption statute as directory so as not to invalidate adoption decree where the humane and benevolent purpose of the adoption act required liberal construction); *Dep't of Transp., Bureau of Driver Licensing v. Claypool*, 618 A.2d 1231, 1233 (Pa. Cmwlth. 1992) (determining that a statute providing that a court clerk "**shall** certify to the Department of Transportation a final judgment of conviction" for certain drug or alcohol related offenses within 10 days was not mandatory because the intent was to promote traffic safety which was met by removing offenders from the road as soon as possible); *Delaware County v. Dep't of Pub. Welfare*, 383 A.2d 240, 242-43 (Pa. Cmwlth. 1978) (finding a provision that an agency "**shall** adjust one or more installments of the next annual grant in order to recover the amount of" an excess grant was not mandatory because the statute did not indicate that time was of the essence and purpose was to allow the expeditious adjustment of excessive grants); *Borough of Pleasant Hills v. Carroll*, 125 A.2d 466, 468-69 (Pa. Super. 1956) (holding that where a statute provided that any municipal ordinance imposing a tax under authority of a tax act "**shall** state that it is enacted under the authority of" that act, municipality's failure to include that statement did not render the ordinance invalid because reading that provision as mandatory was

"not necessary for the protection of citizens from unjust and inequitable taxation, or from the overarching of the tax authorities; but it would permit unwarranted exemptions from taxation").

The Court's analysis here is also consistent with how other jurisdictions, including the United States Supreme Court, the Third Circuit, and various state courts, examine a legislature's use of "shall" to determine if it intended to be mandatory or directory. *See, e.g.*, *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 759 (2005) (Colorado statutory provisions that "[a] peace officer **shall** use every reasonable means to enforce a restraining order," "[a] peace officer **shall** arrest or . . . seek a warrant for the arrest of a restrained person," and "[a] peace officer **shall** enforce a valid restraining order whether or not there is a record of the restraining order in the registry," not mandatory based on other language used in the statute, such as "reasonable means" and "seek a warrant," did not support mandatory interpretation). *Accord Midtown Med., LLC v. Dep't of Health & Hosps.*, 135 So.3d 594 (La. 2014); *Emerald Island Casino, Inc. v Ill. Gaming Bd.*, 803 N.E.2d 914, (Ill. App. Ct. 2003); *Tran v. Fairfax Cnty. Bd. of Supervisors*, 49 Va. Cir. 189, 1999 WL 797173 (Va. Cir. 1999); *G & M Ross Enters., Inc. v. Bd. of License Comm'rs of Howard Cnty.*, 682 A.2d 1190 (Md. Ct. Spec. App. 1996); *Angelsea Prods., Inc. v. Comm'n on Hum. Rights & Opportunities*, 674 A.2d 1300 (Conn. 1996).

d. *In re Canvass* and *Ritter*

The Boards argue that *In re Canvass* and *Ritter* represent clear, binding interpretations of the dating provisions in Sections 1306(a) and 1306-D(a) of the Election Code and preclude Petitioners' requested relief. A plurality of the Supreme Court in *In re Canvass* concluded that the dating provisions were ambiguous, the "shall" was directory, and so the inadvertent failure to handwrite a date on the return

envelope declaration did not render that ballot invalid in the November 2020 General Election. *In re Canvass*, 241 A.3d at 1062, 1071-22, 1076-77. Similar to the analysis here, in the Opinion Announcing the Judgment of the Court (OAJC), Justice Donohue explained that "only failures to comply with mandatory obligations, which implicate both legislative intent and 'weighty interests' in the election process, like ballot confidentiality and fraud prevention, w[ould] require disqualification." *Id.* at 1076. The OAJC found the date was irrelevant to the county boards' comparison of the declaration to the voter list, and the county boards "c[ould] reasonably determine that a voter's declaration [wa]s sufficient without the date of [the] signature." *Id.* at 1077. The OAJC rejected alternative "weighty interests" asserted by one of the appellants, who contended that the date could relate to whether the person was a qualified elector and would prevent double voting. The OAJC reasoned that the date would not aid in determining an elector's qualifications, and that double voting was detected through the use of the barcode on the ballot that was scanned and entered into the SURE system. *Id.* Ultimately, based on this analysis, the OAJC concluded that "a signed but undated declaration is sufficient and does not implicate any weighty interest" and "cannot result in vote disqualification." *Id.* at 1078. Justices Baer (now Chief Justice) and Todd joined in the OAJC.

The Boards' argument is based on concurring and dissenting opinions written by Justice Wecht and Justice Dougherty that explained their reasoning. Justice Wecht concurred in the result, which resulted in a judgment allowing for the timely received ballots of qualified Pennsylvania electors that lacked a handwritten date on the declaration to be counted. *Id.* at 1079. However, the Boards posit that given the discussion in Justice Wecht's concurring and dissenting opinion and Justice Dougherty's concurring and dissenting opinion, which then-Chief Justice Saylor and

Justice Mundy joined, a majority of the Supreme Court would now find that the dating provisions' requirements are mandatory and that, in the future, failure to comply would invalidate any ballot, even those cast by qualified Pennsylvania electors that were timely received and were otherwise unchallenged. They further assert that this interpretation was accepted and confirmed by this Court in *Ritter*, by which the Court must be persuaded.

Both Justice Wecht[15] and Justice Dougherty thoughtfully analyzed the dating provisions after the first general election with no excuse mail-in voting, and without the benefit of the factual record in this case. Notably, *In re Canvass* is a plurality opinion and, under the *Marks* rule, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys" a majority of judges, "the holding of the Court may be viewed as that position by those [m]embers who concurred **in the judgments** on the **narrowest grounds**." *Marks v. United States*, 430 U.S. 188,

[15] Justice Wecht disagreed with the conclusion that the failure to date the declaration "should be overlooked as a 'minor irregularity.'" *In re Canvass*, 241 A.3d at 1079 (Wecht, J., concurring and dissenting). He considered the use of "shall" in the dating provisions as unambiguously mandatory, and the failure to conform with that requirement meant an elector's ballot was invalid. *Id.* at 1080. Justice Wecht indicated an "increasing discomfort with th[e] Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent," believing that the Court "must read mandatory language as it appears" in order to "interpret statutes faithfully to the drafters' intended effect." *Id.* (citation omitted). Justice Wecht opined that the Court's "only 'goal' should be to remain faithful to the terms of the statute that the General Assembly enacted." *Id.* at 1082. Justice Wecht explained, therefore, that "even where the legislature's goal, however objectionable, is to impose a requirement that appears to have a disenfranchising effect, it may do so to any extent that steers clear of constitutional protections." *Id.* Justice Wecht concluded that "[t]he only practical and principled alternative" to interpreting "shall" as meaning either mandatory or directory based on considering factors other than the language itself, "is to read 'shall' as mandatory," particularly where there were disparate views as to what constitutes weighty interests or minor irregularities. *Id.* at 1087. Justice Wecht allowed the ballots at issue to be counted, believing a prospective application of his analysis was warranted given the factual circumstances, including the recent enactment of Act 77, the COVID-19 Pandemic, and lack of clear guidance regarding the consequence if an elector failed to include the date on the declaration. *Id.* at 1088-89.

193 (1977) (emphasis added) (citation and internal quotation marks omitted). The Supreme Court itself has cautioned that "[w]hen a court is faced with a plurality opinion, usually **only the result carries precedential weight**; **the reasoning does not**." *Commonwealth v. Bethea*, 828 A.2d 1066, 1073 (Pa. 2003) (emphasis added). This Court has similarly held that plurality opinions are "binding on the parties in that particular case" but are "**not** binding precedent." *Kretschmann Farm, LLC v. Township of New Sewickley*, 131 A.3d 1044, 1059 n.20 (Pa. Cmwlth. 2016). The judgment of the Pennsylvania Supreme Court in *In re Canvass* was that the ballots accompanied by undated declarations **could** be counted for the 2020 General Election and did not address future elections. 241 A.3d at 1073. For these reasons, the Court does not view the reasoning set forth in the *In re Canvass* opinions as binding precedent on other parties[16] under other factual circumstances.

Additionally, the specific material facts in this case were not described by the Supreme Court in *In re Canvass*, particularly the fact that ballots with return envelopes that contained incorrectly dated declarations are counted and included in the election results and that all but a few counties counted the ballots that lack a handwritten date on the declaration on the return envelope in their election results. It is unclear to this Court whether, had the factual circumstances in this case been part of the discussion in *In re Canvass*, the concurring and dissenting justices would

[16] Notably, the Fayette Board argues that the Secretary is taking a position different than that asserted in *Ziccarelli*, which was a federal action filed by one of the candidates who was unsuccessful in *In re Canvass*, who sought to prevent Allegheny County from counting the ballots with undated declarations in federal court. The Court is persuaded by Petitioners' argument that the Secretary's filings in *Ziccarelli* were based primarily on the fact that the Pennsylvania Supreme Court had already authorized the actions by Allegheny County to count the ballots at issue and she could not direct or argue otherwise. Thus, this is not a reason to reject Petitioners' arguments in this matter.

have analyzed the "weighty interests" served by the date on the declaration in the same fashion.

For similar reasons, the thorough and thoughtful decision of a panel of this Court in *Ritter*, which involved the 2021 General Municipal Election and the office of judge on a court of common pleas in Lehigh County, is not controlling here. The panel in *Ritter* held, based on Justice Wecht's and Justice Dougherty's concurring and dissenting opinions, that the majority reasoning of *In re Canvass* was that the dating provisions were mandatory in all elections after the November 2020 General Election and that timely received absentee and mail-in ballots that were enclosed in return envelopes with undated declarations were not valid. *Ritter*, slip op. at 17-18. The dissenting opinion disagreed that "that a 'majority' reasoning may be divined from the plurality opinion of the Supreme Court in *In re Canvass*," and, citing the liberal construction of the Election Code, would conclude that the undated declaration was a minor irregularity akin to an elector using red or green ink. *Ritter*, slip op. at 3-5 (Wojcik, J., dissenting).

As in *In re Canvass*, there is no mention in the *Ritter* opinion of the material facts that are presently before the Court in this case, on which this Court relies, such as the fact that ballots that had return envelopes with incorrect or inaccurate dates on them are counted, consistent with the language of the statute. Thus, the material facts in this case do not factually support the existence of the "weighty interests" that would require invalidation. In addition, *Ritter* involved a challenge to the actions of a single county board, not a challenge to several county boards involving some statewide elections. Thus, *Ritter* did not have to consider that different counties were treating the ballots without a dated declaration on the return envelope differently, leading to a question of unequal treatment of Pennsylvania electors

casting ballots for the same candidates for the same office. As an aside, the Court also notes that, as an unreported opinion, technically *Ritter* is not binding authority under Pennsylvania Rule of Appellate Procedure 126(b), Pa.R.A.P. 126(b), and Section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code § 69.414(a).[17]

e. Butler County

Finally, the Boards argue that Petitioners' position to not seek to decertify and/or recertify Butler County's certified results, which did not include the ballots at issue, undermines Petitioners' arguments. While Petitioners' position regarding Butler County may weaken some of their arguments, it does not, in the Court's view, eliminate those arguments' validity under these circumstances. The need for uniformity between the county boards' treatment of ballots is unquestionably important, and Petitioners' decision to allow Butler County's now-certified results to stand appears to acknowledge the Department's mistake and the need for finality in these already-certified races, which is an important consideration. Petitioners have sought specific relief against these Respondent Boards, whose results have yet to be certified by the Secretary. The fact that the Secretary mistakenly certified results and, in the interest of finality, does not intend to take further action does not require the Court to disregard the valid arguments made in support of the relief sought against these Boards.

[17] Pennsylvania Rule of Appellate Procedure 126(b), Pa.R.A.P. 126(b), provides that "unreported memorandum opinion[s] of the Commonwealth Court filed after January 15, 2008," are "non-precedential decisions" and "may be cited for their persuasive value." Section 414(a) of this Court's Internal Operating Procedures states that "[a]n unreported panel decision of this Court issued after January 15, 2008," may be cited "for its persuasive value, but not as binding precedent." 210 Pa. Code § 69.414(a).

f. Conclusion

The Court's analysis illustrates that courts have examined the Election Code's use of "shall" as it relates to other provisions of the Election Code, its purpose, and the consequences of a particular interpretation. Where the provision did not expressly state that the ballot should not be counted, was not found necessary to the purpose of the provision, or was not found to be essential to the integrity of the election or the validity of the ballot, such as ballot confidentiality or secrecy, or to prevent fraud, the courts concluded the legislature intended "shall" to be directory. Ultimately, the Court must be mindful that the Election Code is to be liberally construed and that only compelling reasons, not minor irregularities, should be used "to throw out a ballot," and that should occur "very sparingly." *Appeal of James*, 105 A.2d at 66.

For decades, federal and state courts have interpreted the word "shall" consistently in accordance with the rules of statutory construction, which recognize both a mandatory and directory meaning of "shall." The General Assembly is presumed to know the state of the law when it enacts statutes, *SEDA-COG Joint Rail Authority v. Carload Express, Inc.*, 238 A.3d 1225, 1238 (Pa. 2020), and as this Court's discussion of the legislative use of the word "shall" illustrates, the General Assembly does not intend every use to be mandatory. There is no reason to think the General Assembly intended to invalidate ballots cast in polling places simply because the voting booths do not have doors or curtains, or the paper ballots are not folded, notwithstanding that the General Assembly used the word "shall." (*See* discussion *supra*). Thus, interpreting every use of the word "shall" as mandatory would not be giving the drafters' their intended effect.

Upon "a consideration of the entire [Election Code], its nature, its object, and the consequences that would result from construing it one way or the other," *Deibert* 140 A. at 517, the Court concludes that the General Assembly's intent was for the "shall" used in the dating provisions to be directory, not mandatory, such that timely received absentee and mail-in ballots of qualified Pennsylvania electors are not invalid only because they lack a handwritten date on the return envelope declaration. Such defect, in the absence of fraud, should not be used to "to throw out a ballot." *Appeal of James*, 105 A.2d at 66. Thus, Petitioners' right to relief to a declaratory judgment as asserted in Count II is clear, and the Application is granted as to that claim.

2. Whether Petitioners Have a Clear Right to Relief Under the Federal Civil Rights Act

The overarching principles that have long guided our liberal construction of the Election Code, including that electors may be disenfranchised only for compelling reasons and not minor irregularities, are also reflected in Section 10101(a)(2)(B) of the Civil Rights Act, which Petitioners also assert as a basis for summary relief on the declaratory judgment claim. Section 10101(a)(2)(B) of the Civil Rights Act states:

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

52 U.S.C. § 10101(a)(2)(B) (emphasis added). The requirement that an error or omission must be "material in determining whether such individual is qualified under State law to vote," *id.*, is consistent with the state law requirement that only

compelling reasons justify the disenfranchisement of a qualified voter, *Appeal of James*, 105 A.3d at 67. Under Section 10101(e) of the Civil Rights Act:

> 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.

52 U.S.C. § 10101(e) (emphasis added). Thus, the word "vote" is broadly defined and covers more than just registration and the act of voting, but also **all** actions necessary to make a vote effective and having a vote counted. *Id.* Section 10101(e) further provides that the words "qualified under State law" means "qualified according to the laws, customs, or usages of the State." *Id.*

The law of Pennsylvania provide that individuals are qualified to vote in Pennsylvania if they are 18 years old as of the election, a United States citizen for at least 1 month, a resident of the Commonwealth for at least 30 days, a resident of the relevant election district for at least 30 days immediately preceding the election, and are not an incarcerated felon. PA. CONST. art. VII, § 1; Section 701 of the Election Code, 25 P.S. § 2811; Section 1301(a) of the Voter Registration Act, 25 Pa.C.S. § 1301(a); *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Cmwlth. 2000) (persons with felony convictions, but not currently incarcerated, may register to vote); 1972 Op. Att'y Gen. No. 121[18] (concluding a durational requirement of longer than 30 days is unenforceable).

[18] *See* https://www.duq.edu/assets/Documents/law/pa-constitution/_pdf/attorney-general/1972-121.pdf (last visited Aug. 19, 2022).

Petitioners contend that, while they are entitled to summary relief under Pennsylvania law, this relief is also available under federal law because the Boards' refusal to include the timely received absentee and mail-in ballots of eligible Pennsylvania electors who did not handwrite a date on the declaration on the return envelope in their certified results violates Section 10101(a)(2)(B) of the Civil Rights Act by disenfranchising eligible electors based on an immaterial error or omission. This result is supported by the Third Circuit's reasoning in *Migliori*, which, Petitioners argue, this Court should find persuasive because the Supreme Court, in *In re Canvass*, did not address the issue, and the United States Supreme Court has not ruled otherwise. Petitioners acknowledge that a petition for writ of certiorari has been filed in *Migliori* and that Justice Alito filed a dissenting opinion, from the United States Supreme Court's denial of the stay in *Migliori*. They argue, however, that Justice Alito's dissent does not require the rejection of the Third Circuit's reasoning.

The Boards respond that, as the decision of a federal circuit court, *Migliori* is not binding on this Court, even on issues of federal law. They further assert *Migliori* was not in effect at the time they certified their results, but was stayed by the United States Supreme Court, which was not lifted until June 9, 2022. Finally, they assert that *Migliori* was wrongly decided for the reasons set forth in Justice Alito's dissent to the denial of the stay.

Migliori[19] involved the refusal to count ballots of qualified Pennsylvania electors that were timely received but did not have a handwritten date on the declaration on the return envelope, notwithstanding that ballots enclosed in return envelopes that had incorrect or inaccurate dates on the declaration were counted, as

[19] *Migliori* was the federal litigation involving the same candidates, same election and same ballots as in *Ritter*.

in this case. In finding that Section 10101(a)(2)(B) was violated by not counting the ballots that had undated declarations under those circumstances, the Third Circuit reasoned:

> th[is] requirement is material if it goes to determining age, citizenship, residency, or current imprisonment for a felony.
>
> Appellees cannot offer a persuasive reason for how this requirement helped determine any of these qualifications. And we can think of none. Appellees try to make several reaching arguments. None of which we find persuasive. For example, Appellees argue that the date confirms a person is qualified to vote from their residence since a person may only vote in an election district s/he has resided in for at least thirty days before the election and one's residency could change in a matter of days. It is unclear how this date would help . . . but even supposing it could, this argument assumes the date on the envelope is correct. . . .
>
> Intervenor-Appellee Ritter also claims that the date requirement "serves a significant fraud-deterrent function" and "prevents the tabulation of potentially fraudulent back-dated votes." Even if this were true, [Section 10101(a)(2)(B)] is clear that an "error or omission is not material" unless it serves to "determin[e] whether such individual is qualified under State law to vote in such election." Fraud deterrence and prevention are at best tangentially related to determining whether someone is qualified to vote. But whatever sort of fraud deterrence or prevention this requirement may serve, it in no way helps the Commonwealth determine whether a voter's age, residence, citizenship, or felony status qualifies them to vote. It must be remembered that all agree that the disputed ballots were received before the 8:00 p.m. deadline on Election Day. It must also be remembered
>
> that ballots that were received with an erroneous date were counted. We are at a loss to understand how the date on the outside envelope could be material when incorrect dates – **including future dates** – are allowable but envelopes where the voter simply did not fill in a date are not. Surely, the right to vote is "made of sterner stuff" than that.
>
> . . . . The nail in the coffin, as mentioned above, is that ballots were only to be set aside if the date was **missing** – not incorrect. If the substance of the string of numbers does not matter, then it is hard to

> understand how one could claim that this requirement has any use in determining a voter's qualifications. . . .
>
> Upon receipt, the [election board] timestamped the ballots, rendering whatever date was written on the ballot superfluous and meaningless. It was not entered as the official date received in the SURE system, nor used for any other purpose. Appellees have offered no compelling reasons for how these dates – even if correct, which we know they did not need to be – help determine one's age, citizenship, residence, or felony status. And we can think of none. Thus, we find the dating provisions under 25 [P.S.] §[§] 3146.6(a) and 3150.16(a) are immaterial under [Section 10101(a)(2)(B)].

Migliori, 36 F.4th at 163-64 (footnotes omitted) (emphasis in original).

Upon the Court's review of Section 10101(a)(2)(B) of the Civil Rights Act, the Civil Rights Act's broad definition of "vote" that includes far more than simply the act of voting, the facts here, and the Third Circuit's analysis in *Migliori*, the Court finds *Migliori* persuasive on the question of federal law asserted. While this Court is not bound by the decisions of the federal district and intermediate appellate courts on issues of federal law, "it is appropriate for a Pennsylvania appellate court to follow the Third Circuit's ruling on federal questions to which the U[nited] S[tates] Supreme Court has not yet provided a **definitive** answer." *W. Chester Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Cmwlth. 2017) (emphasis added).

In finding that reasoning persuasive, the Court notes that neither the Pennsylvania Supreme Court in *In re Canvass* nor this Court in *Ritter* had the benefit of the thorough advocacy on this federal issue that had been presented to the Third Circuit in *Migliori*. Indeed, the lack of such advocacy led the Supreme Court in *In re Canvass* not to address the issue,[20] and this Court in *Ritter* observed that the

[20] It is apparent from the opinions in *In re Canvass* that the federal materiality question was not resolved in that case. The OAJC found "persuasive" an argument that not counting ballots that lacked a dated return envelope could lead to a violation of Section 10101(a)(2)(B), 241 A.3d **(Footnote continued on next page…)**

federal issue had been raised *sua sponte* by the trial court. Additionally, neither had the benefit of the Third Circuit's interpretation of Section 10101(a)(2)(B) as it relates to Sections 1306 and 1306-D of the Election Code and the handwritten date on the declaration on the return envelope.

The facts here are very similar to those in *Migliori*, in that, here, ballots with return envelopes that had incorrect or inaccurate dates on the declaration were counted and then included in all but a few of the 67 county boards' certified results. This is supported by the record. Deputy Secretary credibly testified that the Guidance was, and remains, that ballots enclosed in return envelopes that had incorrect or inaccurate dates on the declaration should be counted and certified. Commissioners Dunn and D'Agostino credibly testified, absent **other** information raising questions about the validity of the ballot, all ballots enclosed in a return envelope with a dated declaration were counted. And Commissioner Leinbach credibly stated that if a declaration was signed and dated, regardless of the date, the ballot was counted. Thus, *Migliori* is not factually distinguishable from the matter presently before the Court.

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at 1074 n.5, but did not otherwise address the argument. Justice Wecht offered his own insight into that question, stating

> The OAJC does not pursue this argument, except to acknowledge a handful of cases that might be read to suggest that the name and address, and perhaps even the dat[ing provisions] could qualify as "not material in determining whether such individual is qualified under State law to vote." Given the complexity of the question, I **would not reach it without benefit of thorough advocacy.** But I certainly would expect the General Assembly to bear that binding provision in mind when it reviews our Election Code. **It is inconsistent with protecting the right to vote to insert more impediments to its exercise than considerations of fraud, election security, and voter qualifications require**.

Id. at 1080 n.54 (Wecht, J., concurring) (emphasis added). Finally, Justice Dougherty's concurring and dissenting opinion did not reference Section 10101(a)(2)(B).

The Third Circuit's reasoning in *Migliori* is similar to this Court's analysis supporting the grant of summary relief on Petitioners' state law claim, which is that, based on the facts presented and the interpretation of statutory language, the failure of an elector to handwrite a date on the declaration on the return envelope does not relate to the timeliness of the ballot or the qualification of the elector.

When asked why *Migliori* would not apply because it had been administratively stayed when the Boards certified their results, the Boards' response was that *Migliori* was wrongly decided. As this Court noted in *McCormick*, the stay "did not include any discussion of the merits of the Third Circuit's decision," it simply "maintain[ed] the status quo," and did "not . . . affect the persuasive value of the" Third Circuit's reasoning and analysis. *McCormick*, slip op. at 25 n.16. The Supreme Court did not continue the stay of *Migliori*, to which Justice Alito dissented. The Boards argue that the Court must reject the Third Circuit's analysis in *Migliori* based on that dissent. However, Justice Alito indicated his dissent was based on the review that the abbreviated time allowed, that it was "likely" the Third Circuit was incorrect, and that it was possible that additional briefing and argument could "convince [him] that [his] current view [was] unfounded." *Ritter v. Migliori*, 142 S. Ct. at 1824. Given that the dissent was not definitive and was based on a preliminary review of the issues, the Third Circuit's reasoning remains persuasive.

In accordance with the foregoing analysis, the Court concludes that Petitioners have established that invalidating ballots for the sole reason that the declaration on the return envelope does not contain a handwritten date violates the materiality provision of the Civil Rights Act, and the Boards cannot exclude these ballots from their certified results submitted to the Secretary for her certification for that reason.[21]

[21] As observed in the OAJC in *In re Canvass*, other federal courts have
(Footnote continued on next page…)

Thus, Petitioners' Application as to their federal law claim set forth in Count II of the Petition is granted.

3. Injunctive Relief

Petitioners also seek injunctive relief in the form of an order of this Court that prohibits the Boards "from excluding from their certified election returns timely received absentee and mail-in ballots cast by a qualified voter even if the voter failed to write a date on the declaration printed on the ballot's return envelope." (Pet. for Rev., Prayer for Relief ¶ 3.) "To justify the award of a permanent injunction, the party seeking relief must establish: [(1)] that his right to relief is clear, [(2)] that an injunction is necessary to avoid an injury that cannot be compensated by damages, and [(3)] that greater injury will result from refusing rather than granting the relief requested." *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560 (Pa. Cmwlth. 2022) (internal quotations and citation omitted). Unlike a preliminary injunction, "the party need not establish either irreparable harm or immediate relief[,] and a court may issue a final injunction if such relief is necessary to prevent a legal wrong

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> have barred the enforcement of similar administrative requirements to disqualify electors. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003) (disclosure of voter's social security number is not "material" in determining whether a person is qualified to vote under Georgia law for purposes of the [Civil] Rights Act); *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006) (enjoining enforcement of "matching" statute, requiring state to match potential voter's name to Social Security Administration or Department of Licensing database, because failure to match applicant's information was not material to determining qualification to vote); *Martin v. Crittenden*, 347 F. Supp. 3d 1302 (N.D. Ga. 2018), *reconsideration denied*, 1:18-CV-4776-LMM, 2018 WL 9943564 (N.D. Ga. Nov. 15, 2018) (voter's ability to correctly recite his or her year of birth on absentee ballot envelope was not material to determining said voter's qualifications).

241 A.3d at 1074 n.5.

for which there is no adequate redress at law." *Id.* (internal quotations and citation omitted).

Based on its foregoing conclusions, the Court will grant Petitioners summary relief on their request for injunctive relief regarding the Boards as requested in the Petition. The Secretary does not certify all of the results submitted by the Boards, but certifies, in this Primary Election, the votes for United States Senators, Representatives in Congress, Governor, Lieutenant Governor, and senators and representatives in the General Assembly. 25 P.S. § 3158. The Court is cognizant that the Boards have already certified winners in races that are not subject to the Secretary's certification, and, in some instances, those winners have already taken their oaths of offices and begun serving their positions. Nothing in this Court's order is intended to upset those certifications.

Petitioners have a clear right to relief, as this Court has declared that under Pennsylvania and federal law, the Boards may not refuse to include in their certified results submitted to the Secretary for her certification the timely received absentee and mail-in ballots of qualified Pennsylvania electors, that are otherwise unchallenged, on the basis that the electors did not date the declaration on the return envelope. Further, the injury involved is disenfranchising qualified Pennsylvania electors, which cannot be compensated by damages. Disenfranchising these electors results in a greater injury than denying the requested relief. As such, Petitioners have also established a clear right to relief to a permanent injunction against the Boards. *City of Philadelphia*, 271 A.3d at 560.

VI. CONCLUSION

The right to vote in a free and fair election is essential in a representative democracy. The Court recognizes the tireless and dedicated efforts of the Boards,

as well as all county boards, and their employees, in the critical work of administering elections. Under the facts in this case, the Court concludes that Petitioners have not met their burden of proof to obtain summary relief on Count I of the Petition, which seeks mandamus relief. As to Count II, however, the Court concludes that Petitioners have established a right to summary relief on their declaratory judgment and injunction claim, based on both Pennsylvania and federal law. Thus, the Application is granted as to Count II. Accordingly, the lack of a handwritten date on the declaration on the return envelope of a timely received absentee or mail-ballot does not support excluding those ballots from the Boards' certified results under both Pennsylvania law and Section 10101(a)(2)(B) of the Civil Rights Act.[22] Consequently, the Boards are directed to take such actions as necessary to certify their 2022 Primary Election results for those races that require the Secretary's certification under Sections 1408 and 1409 of the Election Code to include all lawfully cast ballots, which includes those at issue in this litigation and to certify those results to the Secretary as soon as possible but no later than August 24, 2022.

RENÉE COHN JUBELIRER, President Judge

[22] The reasoning set forth in this opinion likewise resolves the Boards' respective POs to the Petition, which are overruled.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Leigh M. Chapman, Acting Secretary of the Commonwealth and the Pennsylvania Department of State, Petitioners	:	
v.	:	No. 355 M.D. 2022
Berks County Board of Elections, Fayette County Board of Elections, and Lancaster County of Board of Elections, Respondents	:	

O R D E R

NOW, August 19, 2022, the Emergency Application for Peremptory Judgment and Summary Relief (Application) filed by Leigh M. Chapman, Acting Secretary of the Commonwealth (Secretary) and the Pennsylvania Department of State (together, Petitioners) is **DENIED IN PART** and **GRANTED IN PART**. The Application is **DENIED** as to Count I of Petitioners' Petition for Review in the Nature of a Complaint in Mandamus and/or in the Nature of an Action for Injunctive and Declaratory Relief. The Application is **GRANTED** as to Count II in accordance with the foregoing opinion. The Preliminary Objections filed by The Berks County Board of Elections, the Fayette County Board of Elections, and the Lancaster County Board of Elections (together, Boards) are **OVERRULED**. The Boards are **DIRECTED** to take such actions as necessary to certify their election results in those races that require the Secretary's certification under Sections 1408 and 1409 of the Election Code, 25 P.S. §§ 3158-3159, to include all lawfully cast ballots, as

set forth in the foregoing opinion, and to **CERTIFY** those results to the Secretary as soon as possible but no later than August 24, 2022.

RENÉE COHN JUBELIRER, President Judge

Order Exit
08/19/2022