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IN THE SUPREME COURT OF PENNSYLVANIA
No. 102 MM 2022

DAVID BALL, JAMES D. BEE, JESSE D. DANIEL, GWENDOLYN MAE DELUCA, ROSS M. FARBER, LYNN MARIE KALCEVIC, VALLERIE SICILIANO-BIANCANIELLO, S. MICHAEL STREIB, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and REPUBLICAN PARTY OF PENNSYLVANIA,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, and ALL 67 COUNTY BOARDS OF ELECTIONS,

Respondents.

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS OF THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, POWER, COMMON CAUSE PENNSYLVANIA, BLACK POLITICAL EMPOWERMENT PROJECT, THE NAACP PENNSYLVANIA STATE CONFERENCE, AND MAKE THE ROAD PENNSYLVANIA

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae—League of Women Voters of Pennsylvania, Philadelphians Organized to Witness, Empower and Rebuild, Common Cause Pennsylvania, Black Political Empowerment Project, the NAACP Pennsylvania State Conference, and Make the Road Pennsylvania—are nonpartisan organizations dedicated to promoting American democracy and the participation of Pennsylvania voters in our shared civic enterprise.[1] *Amici*'s ongoing and expansive get-out-the-vote efforts will be undermined by the relief sought in Petitioners' action—namely, the last-minute disenfranchisement of numerous Pennsylvania voters based on an inconsequential paperwork error.

Collectively, *amici* have thousands of members, many of whom are registered voters in Pennsylvania who regularly vote in state and federal elections, including by mail or absentee ballot. On behalf of those members, *amici* represent the interests of Pennsylvania voters in ensuring that every valid vote is counted—regardless of political-party

[1] No party or counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

alignment. Petitioners' proposed relief would impose substantial burdens on Pennsylvania's voters and its democracy.

It is also contrary to law. In particular, a ruling that Pennsylvania law requires rejecting a ballot whenever a voter omits a handwritten date from the outer envelope of an otherwise signed, date-stamped, and timely-received mail ballot would put state law in conflict with the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), which prohibits disenfranchising voters based on immaterial errors or omissions on voting-related paperwork.

On October 21, this Court issued an order inviting *amici* to submit a brief in this King's Bench proceeding, and identifying three potential issues presented. *Amici* take no position on the first question related to petitioners' standing, and will address the substance of the Court's second question, related to state law, only briefly. *Amici* focus on the Court's third question, regarding the application of federal law, which requires counting the ballots at issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Less than six months ago, a unanimous panel of the U.S. Court of Appeals for the Third Circuit, composed of judges appointed by presidents of both political parties, held that county election boards violate federal law when they refuse to count Pennsylvania voters' mail ballots solely due to the omission of a handwritten date on the outer mail ballot return envelope. *See Migliori v. Cohen*, 36 F.4th 153 (3rd Cir. 2022), *vacated as moot*, 2022 WL 6571686 (U.S. Oct. 11, 2022); *see* 52 U.S.C. § 10101(a)(2)(B).[2] The Supreme Court later vacated that decision as moot, but in a non-merits order that did not question the Third Circuit's analysis. Indeed, *Migliori* was rendered moot because the Supreme Court *refused* to stay the Third Circuit's decision, thus allowing mail ballots without a handwritten envelope date to be counted in a 2021 county election. *See Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (mem.).

Petitioners now ask this Court to order every county in the Commonwealth to do precisely what the unanimous *Migliori* panel ruled to be illegal under the federal law. *See* Pet.'s Br. 52. Moreover, they ask

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[2] The undersigned counsel represented the five plaintiff voters at all stages of the *Migliori* litigation.

the Court to intervene in an ongoing election season in which thousands of mail ballots have already been returned, potentially disenfranchising thousands of Pennsylvania voters who have already voted and injecting confusion into an ongoing election.

State law does not require disenfranchising Pennsylvania voters in this manner, as the Commonwealth Court twice held just this past summer. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022). *Amici* write, at the Court's invitation, to emphasize that federal law is not just in accord, but affirmatively prohibits the result Petitioners seek.

Under the Civil Rights Act's Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), voters may not be disenfranchised based on an "error or omission" on a "record or paper" that is made "requisite to voting," where the error or omission is not material to determining their eligibility vote under state law. In plain language, the statute prohibits invalidating voters' ballots because of some minor paperwork error in one of the forms they have filled out in the registration or voting process. The statute's

application here is clear: Registered, qualified voters who timely submit their mail ballots (and whose ballots are accordingly date-stamped by the local board of elections) must have their votes counted, not thrown out because of a paperwork error on the return envelope that has no bearing on the timeliness of their ballots or their eligibility to vote. Any other conclusion would irreconcilably conflict with the Materiality Provision.

The right result here—counting the votes of duly registered and eligible Pennsylvania voters—is especially clear because these are King's Bench proceedings, where the Court's fundamental imperative is to do justice. *Cf. In re Bruno*, 101 A.3d 635, 665-77 (Pa. 2014). This Court does not "punish voters for the incidents of systemic growing pains." *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1089 (Pa. 2020) (Wecht, J.). As Petitioners themselves emphasize, the systemic growing pains regarding mail ballot rules that this Court identified two years ago have not subsided; rather, there remains a "lack of clarity and transparency" in the law. Pet.'s Br. 9; *see also* Pet.'s Br. 14. That is in no small part because of Petitioners' persistent efforts to resist multiple state and federal court decisions

holding that ballots in return envelopes without a handwritten date must be counted.

It would be contrary to justice as well as federal civil rights law to impose a new, more restrictive rule on Pennsylvania voters, who are now weeks into the 2022 mail ballot voting process. Ensuring that the votes of qualified, duly registered Pennsylvania voters will be counted is consistent with justice, with state law, and with the federal Materiality Provision. Petitioners' position is not.

BACKGROUND

A. Pennsylvania Expands Mail Ballot Voting

Pennsylvania has long provided absentee-ballot options for voters who cannot appear at their polling place on election day because of certain excused reasons. *See* 25 P.S. § 3146.1-3146.9. In 2019, Pennsylvania enacted new mail voting provisions, which allow all registered, eligible voters to vote by mail. Act of Oct 31, 2019, P.L. 552, No. 77, § 8. This Court recently upheld the constitutionality of universal mail voting. *See McLinko v. Dep't of State*, 279 A.3d 539 (Pa. 2022).

A voter seeking to vote by mail must complete an application to enable county election boards to verify their identity and qualifications.

The voter must provide their name, address, and proof of identification to their county board of elections. 25 P.S. §§ 3146.2, 3150.12. Such proof of identification may include, among other things, a Pennsylvania driver's license number or the last four digits of the voter's social security number. 25 P.S. § 2602(z.5)(3). This information gives county election boards everything they need to verify that the voters are qualified to vote in Pennsylvania—namely, that they are at least 18 years old, have been a U.S. citizen for at least one month, have resided in the election district for at least 30 days, and are not incarcerated on a felony conviction—before receiving a mail ballot. 25 Pa. C.S. § 1301.

After the application is submitted, the county board of elections confirms applicants' qualifications by verifying the provided proof of identification and comparing the information on the application with information contained in a voter's record. 25 P.S §§ 3146.2b, 3150.12b; *see also id.* § 3146.8(g)(4).[3] The county board's determinations are conclusive as to voter eligibility unless challenged prior to Election Day. *Id.* Once the county board verifies the voter's identity and eligibility, it

[3] *See also* Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* at 2 (Sept. 11, 2020).

sends a mail-ballot package that contains a ballot, a "secrecy envelope" marked with the words "Official Election Ballot," and the pre-addressed outer return envelope, on which a voter declaration form is printed (the "Return Envelope"). *Id.* §§ 3146.6(a), 3150.16(a). Poll books kept by the county show which voters have requested mail ballots. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3).

At "any time" after receiving their mail-ballot package, the voter marks their ballot, puts it inside the secrecy envelope, and places the secrecy envelope in the Return Envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). The voter delivers the ballot, in the requisite envelopes, to their county elections board. To be considered timely, a county board of elections must receive a ballot by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Upon receipt of a mail ballot, county boards of elections stamp the Return Envelope with the date of receipt to confirm its timeliness and enter this information in the Statewide Uniform Registry of Electors ("SURE") system, the voter registration system used to generate poll books.[4]

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[4] *See, e.g.*, Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* at 2-3 (Sept. 11, 2020).

Pennsylvania's expansion of mail-ballot voting has been a boon for voter participation in the Commonwealth. In 2020, 2.7 million Pennsylvanians voted by absentee or mail ballot.[5]

B. Partisan Actors Who Seek to Disenfranchise Valid Voters File this Action on the Eve of the 2022 Election

Voting in Pennsylvania's 2022 general election is already underway. All counties have already sent out mail ballots to voters and established ballot drop box locations. The pre-canvass and canvass of mail ballots will begin early on Election Day, November 8, 2022. *See* 25 P.S. § 3146.8.

On October 16, 2022, with voting underway and Election Day rapidly approaching, Petitioners filed this action requesting that this Court exercise King's Bench jurisdiction to enjoin the counting of mail ballots returned in envelopes that are signed but lack handwritten dates. On October 21, this Court granted jurisdiction, set a briefing schedule, and invited *amici* to submit this brief.

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[5] Pa. Dep't of State, Report on the 2020 General Election at 9 (May 14, 2021), https://www.dos.pa.gov/VotingElections/Documents/2020-General-Election-Report.pdf. For ease of reference, the term "mail ballots" is used herein to encompass both absentee and mail ballots.

Petitioners seek to enjoin the counting of mail ballots based on an Election Code provision relating to the Return Envelope that states a voter "shall … fill out, date and sign the declaration printed on such envelope." *See* 25 P.S. §§ 3146.6(a), 3150.16(a).

Petitioners' position is that even if an indisputably eligible registered voter properly fills out their mail ballot, places it in the secrecy envelope, signs the declaration on their Return Envelope, timely returns the package, and the county board of elections confirms timely ballot return with a date stamp, the voter's ballot must nevertheless be discarded if the voter merely forgot to add a superfluous handwritten date next to their signature on the Return Envelope. Pet.'s Br. 7-8.

C. The Emerging Consensus on the Issue, Which Petitioners Seek to Disrupt, Is That These Ballots Must Be Counted

Petitioners' position runs counter to an emerging consensus that the ballots at issue here must count as a matter of both state and federal law. In particular, and as discussed below, the envelope-dating provision at issue has been the subject of much litigation, as well as guidance from the Department of State. Virtually all of that litigation and guidance suggests or requires counting these mail ballots even when a voter forgets to handwrite a date next to their signature on the Return Envelope.

1. *In re Canvass*

In 2020, this Court concluded in a 3-1-3 decision that mail ballots contained in signed but undated Return Envelopes should be counted for that election. *In re Canvass*, 241 A.3d at 1062. Justice Wecht concurred, writing that the "shall … date" language in the Election Code was mandatory as a matter of statutory construction and thus a possible basis for voters to be disqualified, but that he would only apply such a rule in circumstances where voters were given "adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere to those requirements." *Id*. at 1089 (Wecht, J., concurring and dissenting) (internal quotation marks omitted).

A majority of the Court also suggested, albeit without deciding, that invalidating votes for failure to comply with the envelope-dating provision "could lead to a violation of federal law by asking the state to deny the right to vote for immaterial reasons," contrary to the Materiality Provision. *In re Canvass*, 241 A.3d 1058 at 1074 n.5 (opinion announcing the judgment for three Justices); *id*. at 1089 n.54 (Wecht, J., concurring and dissenting) (expressing similar concern). Indeed, Justice Wecht was

so concerned that he urged the Pennsylvania General Assembly to review the Election Code with "[the Materiality Provision] in mind." *Id.*

2. *Migliori*

The envelope-dating requirement again arose in the November 2021 county elections. In Lehigh County, 257 timely-received mail ballots (1% of all mail ballots) were initially excluded based on mail ballot voters' inadvertent failure to handwrite a date on the Return Envelope. Three quarters of the affected voters were over 65 years old, and fifteen of them were older than 90. *See* Joint App'x, *Migliori v. Cohen,* No. 22-1499 (3d Cir.), Dkt.33-2 [hereinafter *Migliori* J.A.], at 168-169 (¶¶ 21, 25).

Consistent with guidance from the Secretary of the Commonwealth,[6] the County Board of Elections counted ballots where the Return Envelopes had plainly wrong dates on them, *e.g.*, a voter wrote their own birthdate instead of the date they signed the envelope. *Migliori* J.A. at 254-255. The county clerk affirmed that he would have accepted a mail ballot if the envelope date said "1960" or even was "a date in the future." *Id.* As the clerk explained, he did so because state law "doesn't say what date." *Id.*; *accord* 25 P.S. §§ 3146.6(a), 3150.16(a)

[6] *See, e.g.*, *Migliori* J.A. at 192.

(voters may complete and return mail ballots "any time" after receiving them).

The Board of Elections ultimately voted to count the 257 mail ballots without a date on the outer envelope, explaining, among other reasons, that the voters had made a "technical error," that there was no question that the ballots were "received on time," that "the signatures [on the Return Envelopes] match the poll book," and that the directive on the Return Envelope to include a date was in small print and could have been made "much more visible to the voters." *Migliori* J.A. at 169-170 (¶¶ 30-34); *id.* at 255-258.

However, a candidate for County Court of Common Pleas, who was then leading the vote count by less than 257 votes, challenged the Board of Elections decision in state court. A divided panel of the Commonwealth Court eventually ruled in his favor in a decision that briefly mentioned, but did not resolve, the Materiality Provision issue. *See Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 C.D. 2021, 272 A.3d 989 (Tbl.), 2022 WL 16577 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied*, 271 A.3d 1285 (Pa. 2022).

A bipartisan group of voters then sued in federal court. After a district judge dismissed their case on procedural grounds, a unanimous three-judge panel of the U.S. Court of Appeals for the Third Circuit reversed, upholding plaintiffs' right to have their votes counted under federal law. *See Migliori*, 36 F.4th at 162-64; *see also id.* 164-66 (Matey, J., concurring). The court concluded that because omitting the handwritten date on the Return Envelope was not "material in determining whether [a voter] is qualified to vote under Pennsylvania law," disenfranchising voters based on that omission violated federal law, namely, the Materiality Provision. *Id.* at 162-63; *accord* 52 U.S.C. § 10101(a)(2)(B). Judge Matey concurred that the defendants had offered "no evidence, and little argument, that the date requirement for voter declarations under the Pennsylvania Election Code … is material as defined in § 10101(a)(2)(B)." *Migliori*, 36 F.4th at 165 (Matey, J., concurring). The court ordered Lehigh County to count the 257 mail ballots in undated envelopes.

The Court of Common Pleas candidate pressing the appeal, David Ritter, then sought a stay from the U.S. Supreme Court, making virtually identical arguments to those Petitioners and allied *amici* advance in this

proceeding. For example, Ritter suggested the Third Circuit's unanimous decision was too broad, implicating various non-paperwork election rules beyond the requirement to handwrite a date on the Pennsylvania mail-ballot Return Envelope. Ritter Stay Appl., *Ritter v. Migliori*, No. 22-30 (U.S.) [hereinafter *Ritter* Stay Appl.], at 9-11; *compare* Pet.'s Br. 44-45. He also argued the return-envelope-dating requirement was a "ballot validity" rule that went to whether a voter had correctly filled out their ballot, not external paperwork falling within the Materiality Provision's ambit. *Compare* Ritter Stay Appl. at 9, 12-13 *with* Pet.'s Br. 47.

The Supreme Court denied the stay, with three justices dissenting, thus allowing Lehigh County to count the 257 mail ballots. *See Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (mem.). The 2021 election was then certified with all the ballots counted, which the parties agreed mooted the controversy. The Supreme Court later granted Ritter's request to vacate the Third Circuit's decision as moot, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which the Court did in a short-form order that did not question the correctness of the Third Circuit's decision, *see Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022).

3. ***McCormick* and *Berks County***

The envelope-dating requirement next arose in the 2022 primary election. First, a Republican candidate for U.S. Senate, Dave McCormick, sued in Commonwealth Court seeking a ruling that mail ballots in Return Envelopes without the handwritten date should be counted. The Commonwealth Court held that, as a matter of both state *and* federal law, the mail ballots at issue must be counted. *McCormick*, 2022 WL 2900112, at *9-*15. The court noted, among other things, the development of new facts since *In re Canvass*, such as the fact that a number of counties had counted mail ballots where voters had handwritten obviously erroneous dates on the envelope. *Id.* at *12-*13.

Around the same time, four counties announced they would not count timely-submitted mail ballots from registered, eligible voters if the Return Envelope was signed but undated. The Department of State sued three of the four recalcitrant counties, and the Commonwealth Court reaffirmed its holding that the ballots returned in undated envelopes must be counted, again under *both* state and federal law. *See Berks Cnty.*, 2022 WL 4100998, at *12-*29 (concluding that "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").

Consistent with those decisions, the Secretary of the Commonwealth advised counties just last month to count otherwise valid and timely-received mail ballots even where voters omitted a handwritten date on the Return Envelope.[7] And the Secretary reaffirmed that guidance after the U.S. Supreme Court vacated on mootness grounds the Third Circuit's *Migliori* decision.[8]

Now, with mail voting well underway, Petitioners seek to upend the cumulative weight of federal court, state court, and considered administrative guidance in favor of disenfranchising thousands of Pennsylvania voters.

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[7] *See* Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (Sept. 26, 2022), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-3.0.pdf (advising county boards of elections to "include[] in the canvass and pre-canvass ... [a]ny ballot-return envelope that is undated or dated with an incorrect date but has been timely received").

[8] *See* Pennsylvania Pressroom, *Acting Secretary of State Issues Statement on SCOTUS Order on Undated Mail Ballots* (Oct. 11, 2022), https://www.media.pa.gov/Pages/State-details.aspx?newsid=536.

ARGUMENT

I. THE RELIEF PETITIONERS SEEK WOULD VIOLATE FEDERAL LAW

A. Petitioners Ask This Court to Violate the Materiality Provision of the Civil Rights Act

The merits issue before this Court is whether voters may be disenfranchised due to a meaningless paperwork mistake on the form declaration printed on the outer mail ballot Return Envelope. In particular, the issue is whether the direction in state law that mail-ballot voters "fill out, date and sign" the form declaration, 25 P.S. §§ 3146.6(a), 3150.16(a), means that a voter who is duly registered and eligible and indisputably submits their ballot on time may nonetheless be denied the right to have their ballot counted based solely on the failure to write a date on the Return Envelope.

A unanimous Third Circuit panel and the two most recent Commonwealth Court decisions to address the issue all concluded that disenfranchising a voter under those circumstances would violate the Materiality Provision of the Civil Rights Act. 52 U.S.C. § 10101(a)(2)(B). That provision prohibits denying "the right of any individual to vote in any election" based on 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). *See Migliori*, 36 F.4th at 162--64; *id.* at 164-66 (Matey, J., concurring); *see also Berks Cnty.*, 2022 WL 4100998, at *25-*29; *McCormick*, 2022 WL 2900112, at *9-*13. A majority of this Court pointed to similar concerns about violating the federal Materiality Provision in 2020. *See In re Canvass*, 241 A.3d at 1074 n.5 (opinion announcing the judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting).

Those decisions are correct, and this Court's concerns from 2020 were well-founded. The Materiality Provision applies where a state actor disenfranchises a voter based on a minor paperwork error, if that error is unrelated to their eligibility to vote under state law in the election. 52 U.S.C. § 10101(a)(2)(B); *see also, e.g.*, *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008). The statute was added to the civil rights laws as part of the 1964 Civil Rights Act, in response to the practice of Black voters' registrations being rejected for spelling errors, typos, or other "trivial reasons" in filling out the requisite forms.

H. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2491; *see also Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). Notwithstanding the urgent aim of addressing disenfranchisement in the Jim Crow South, Congress used race-neutral terms to provide more broadly for a prophylactic against unfair disenfranchisement, the better to protect the fundamental right to vote for all. *See Browning*, 522 F.3d 1153, 1173 ("in combating specific evils," Congress may nevertheless "choose a broader remedy").[9]

The Materiality Provision is relatively narrow. It applies *only* where there has been an "immaterial error or omission" on some "record or paper" that is made "requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Here, Petitioners seek exactly what the terms of the statute forbid, namely to deny the right to vote based on an immaterial paperwork error on a form made requisite to voting. Specifically, Petitioners say voters' mail ballots should be invalidated:

[9] *See also, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003) ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

(1) based on an "omission" (namely, leaving off the handwritten date);

(2) on a "record or paper" that is "made requisite to voting" (namely, the form declaration printed on the outer Return Envelope);

(3) that is immaterial to whether the voter "is qualified under State law to vote in [the] election," or for that matter on whether the mail ballot was timely received (namely because, as Petitioners concede, the handwritten date on the envelope has no bearing on whether a voter meets the age, residency, or citizenship and felony status requirements of state law, or has voted timely).

52 U.S.C. § 10101(a)(2)(B).

In sum: Petitioners ask this Court to order a violation of federal law. Petitioners' various attempts to get around the Materiality Provision's plain text and clear meaning fall flat.

First, Petitioners suggest that invalidating a voter's mail ballot does not deny their right to vote. Pet.'s Br. 43-45. But that argument contravenes both common sense and the statutory text, which provides that "the word 'vote' includes all action necessary to make a vote effective

including … casting a ballot, and *having such ballot counted*." 52 U.S.C. §§ 10101(a)(3)(A) & (e) (emphasis added).

Petitioners repeatedly confuse filling out the Return Envelope paperwork with filling out the actual ballot. But the issue here is not whether the ballot itself was "filled out correctly." Pet.'s Br. 43 (quoting *Ritter*, 142 S. Ct. at 1825 (Mem.) (Alito, J., dissenting from the denial of the application for stay)). Petitioners seek to disenfranchise voters because of an error in filling out *not* the ballot but *the form on the Return Envelope*. The distinction matters, as Pennsylvania law demonstrates by calling a ballot a "ballot," and an envelope an "envelope." 25 P.S. §§ 3146.6(a), 3150.16(a). The analogy in the non-mail-ballot context would be to a qualified voter who shows up to the polls on Election Day, but is denied the right to vote because of an immaterial error on some required form at the check-in desk. As here, that would violate federal law. *See, e.g.*, *Ford v. Tennessee Senate*, No. 06-2031-DV, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (disenfranchisement for immaterial paperwork errors regarding polling place poll book unlawful).

By contrast, the Materiality Provision does not implicate numerous election rules that have nothing to do with paperwork. That is true in the

various inapposite cases Petitioners cite involving things like party registration or absentee ballot deadlines, the availability of fusion voting, in-precinct voting requirements, and mail-ballot-collection practices. Pet.'s Br. 44-45.[10] Nor, contrary to Petitioners' suggestion (*id.* at 49-50), would the Materiality Provision apply to the mail ballot secrecy envelopes or to the Return Envelope signature requirement, because a requirement that a mail ballot be placed in a secrecy envelope is not a voter paperwork error—*i.e.*, "an error or omission *on* a record or paper," 52 U.S.C. § 10101(a)(2)(B) (emphasis added). And a voter's signature (or the lack thereof) on the voter declaration (at least as it is set out on the Pennsylvania mail ballot return envelope) could be material to determining whether they are qualified to vote. *See, e.g.*, *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006).

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[10] *See* Pet.'s Br. 44-45 (citing *Rosario v. Rockefeller*, 410 U.S. 752, 754 (1973) (party registration deadline); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) (fusion voting); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021) (in-precinct voting requirement and mail ballot collection rules); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (absentee ballot deadlines)).

But while the Materiality Provision does not apply to many of the myriad rules governing when, where, and how to vote, it *does* specifically apply to the type of inconsequential paperwork errors for which Petitioners now ask this Court to disenfranchise thousands of eligible Pennsylvania voters.

Second, Petitioners argue that the Materiality Provision applies only to "voter qualification and registration rules," not requirements related to casting a ballot. Pet.'s Br. 46. But the statute's text refutes that argument by broadly defining the protected right as including "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." 52 U.S.C. §§ 10101(a)(3)(A) & (e). Limiting the Materiality Provision's application to records or papers relating to "registration," which is just one of the expressly listed categories, would contravene the statute's plain text and render other listed categories (including the broad term "or other act requisite to voting") dead letters. *See, e.g.*, *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998) ("[C]ourts should endeavor to give meaning to every word which Congress used and therefore should

avoid an interpretation which renders an element of the language superfluous."); *accord Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008).

In light of that clear statutory language, courts have repeatedly concluded that the Materiality Provision "by definition includes not only the registration and eligibility to vote, but also the right to have that vote counted" and "prohibits officials from disqualifying votes for immaterial errors and omissions." *Ford*, 2006 WL 8435145, at *11; *see also*, *e.g.*, *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 636 (W.D. Wis. 2021) ("[T]he text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration."); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640 (W.D. Ark. Nov. 15, 2021) (materiality challenge relating to absentee ballot envelope requirements); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018) (similar). The Third Circuit agreed, concluding as a matter of "plain meaning" that "we cannot find that Congress intended to limit this statute" to registration alone. *Migliori*, 36 F.4th at 162 n.56. And the U.S. Department of Justice, which has non-exclusive statutory authority to enforce the Materiality Provision, agreed with this position as well in an *amicus* brief

filed in *Migliori*. *See* U.S. Dep't of Justice Br. at 25-29*, Migliori v. Cohen*, No. 22-1499 (3d Cir.), Dkt.45 (Apr. 1, 2022) (arguing "[t]he Materiality Provision [i]s [n]ot [l]imited [t]o [v]oter [r]egistration [d]ocuments").

Petitioners' further suggestion that the Materiality Provision does not apply because "correctly dating an absentee or mail-in ballot is not one of the four qualifications to vote in Pennsylvania" is exactly backwards. Pet.'s Br. 46-47. The Materiality Provision prohibits a voter from being disenfranchised for an error or omission that 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). Petitioners now say it is "undisputed" that the envelope-dating requirement is "not material 'to determining a voter's qualifications.'" Pet.'s Br. 52 (quoting *Chapman*, 2022 WL 4100998, at *19). Petitioners' concession that the envelope date paperwork requirement has nothing to do with a voter's qualifications is precisely why an error or omission in completing that immaterial paperwork requirement cannot be used to reject the voter's ballot. And Petitioners' suggestion that the envelope-dating requirement "does not result in a qualification determination" (*e.g.*, Pet.'s Br. 47) misses the point. As Petitioners acknowledge, *other*

parts of Section 10101 deal with unequal standards and practices related to voter qualification determinations, *see* 52 U.S.C. § 10101(a)(2)(A). By contrast, the Materiality Provision is concerned with disenfranchisement due to paperwork errors that are unrelated to a voter's qualifications—just like the envelope-dating requirement at issue here.

Third, Petitioners suggest that the Materiality Provision does not apply because filling out the Return Envelope paperwork is the same as casting a ballot and thus constitutes the act of voting itself, rather than an "act requisite to voting" within the meaning of the statute, 52 U.S.C. § 10101(a)(2)(B). *See* Pet.'s Br. 47; *see also* Pet.'s Br. 51-52. That argument is inconsistent with state law, which distinguishes the Return Envelope from the ballot. Petitioners' argument is also inconsistent with federal court decisions that have applied the Materiality Provision to mail-ballot-envelope-paperwork requirements, just like this one. *See, e.g.*, *Martin*, 347 F. Supp. 3d at 1308-09 (requirement to write birth year on mail ballot envelope likely immaterial); *Thurston*, 2021 WL 5312640,

at *4 (duplicative information requirement on mail ballot envelope potentially immaterial).[11]

Petitioners raise additional arguments in their latest brief to this Court, but all are without merit. Petitioners' hand-waving about *Migliori*'s "precedential effect" (Pet.'s Br. 48) is misguided. Courts can and do consider decisions that have been vacated as moot to be "persuasive authority." *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522, 1534 (3d Cir. 1993).[12] Indeed, while non-merits vacatur renders a decision non-binding as vertical precedent, such a vacatur is "irrelevant" in assessing the decision's persuasive force. *Barrett v. Harrington*, 130 F.3d 246, 258 n.18 (6th Cir. 1997). Here, the persuasive force of a

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[11] It is irrelevant that other, different paperwork requirements have been upheld in Materiality Provision cases because courts concluded they *were* material. For example, *Vote.Org v. Callanen*, 39 F.4th 297, 305-06 (5th Cir. 2022), a motions-panel decision on a temporary stay application that Petitioners nevertheless cite repeatedly, suggested a wet-signature requirement that applied to one method of registering to vote was likely material. *See* Pet.'s Br. 45 (citing *Callanen*).

[12] *See also, e.g.*, *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 328 (4th Cir. 2021); *Hayes v. Osage Mins. Council*, 699 F. App'x 799, 804 (10th Cir. 2017); *Brown v. Kelly*, 609 F.3d 467, 476-77 (2d Cir. 2010).

unanimous Third Circuit decision, from less than six months ago, on this precise legal issue is substantial.

Petitioners also theorize (Pet.'s Br. 48-51) that other requirements in the registration and voting processes might fail to satisfy the materiality standard applied by the Third Circuit and the Commonwealth Court, but they never identify what those requirements might be. (*See supra* pp. 23-25 & n.10 (explaining why secrecy envelope and signature requirements not implicated here)). Petitioners' suggestion that the Materiality Provision might require states to "rewrite [their] electoral codes" is fanciful. The Materiality Provision does not take state election rules off the books; it only prohibits errors or omissions on immaterial paperwork requirements from being enforced on pain of disenfranchisement.

The bottom line is that the recent decisions of the Third Circuit and the Commonwealth Court were right: Disenfranchising Pennsylvania voters in the manner Petitioners suggest would violate federal law. A majority of this Court previously suggested exactly this result, but, as Justice Wecht explained, the Court then declined "to reach [that question] without the benefit of thorough advocacy." *In re Canvass*, 241

A.3d at 1089 n.56. Since then, the relevant issues have been thoroughly briefed, and this Court's concerns from 2020 now look prescient.

Litigation over the last year has also demonstrated that some of the potential rationales for the envelope-dating rule that were previously suggested by a majority of this Court in *In re Canvass*, such as preventing supposed "back-dating" or "ensuring the elector completed the ballot within the proper time frame," are not actually implicated. *See* 241 A.3d at 1091 (Dougherty, J., concurring and dissenting). For example, because a ballot's timeliness under Pennsylvania law is determined by when it was received and stamped by the county board of elections, 25 P.S. §§ 3146.6(c), 3150.16(c), "back-dating" the envelope has no conceivable effect on whether a ballot is considered timely. *Accord Migliori*, 36 F.4th at 164 ("Upon receipt, the [Board] timestamped the ballots, rendering whatever date was written on the ballot superfluous and meaningless."). Nor does the envelope date "ensur[e] the elector completed the ballot within the proper time frame," because under state law, the proper time

frame is "any time" between when a voter receives the ballot and 8 p.m. on Election Day, 25 P.S. §§ 3146.6(a), 3150.16(a).[13]

Litigation over the past year has also clarified that it is Pennsylvania voters who will lose if this Court imposes Petitioners' requested relief. The Plaintiffs in *Migliori* were senior citizens who had voted in Lehigh County for decades. *Migliori* J.A. at 62-77, 172-175. They were Republicans and Democrats alike; regular people like thousands of *amici*'s members—a foundry blaster, a teacher, a business owner—who vote in most every election. *Id.* They filled out their mail ballots, sent

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[13] Petitioners suggest the envelope-date requirement guards against "fraud," but beyond the rationales discussed already in text, they point only to a supposed case in which a daughter forged her deceased mother's signature on an absentee ballot envelope. Pet.'s Br. 27-28; *see* Pet. Ex. F (daughter admitted to forging signature). But votes cast by persons who die before Election Day *do not count*, 25 P.S. § 3146.8(d), so the mother's ballot would never have been counted. And it is irrelevant for purposes of federal law that a handwritten envelope date (if accurate) might theoretically be used for some purpose other than assessing voter qualifications, such as providing evidence in a post-hoc forgery case. If the envelope date is not "material in determining whether [a mail ballot voter] is qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), it may not be used to disenfranchise voters. *See Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (agreeing that requiring social security numbers "could help to prevent voter fraud" but holding that doing so violated the Materiality Provision), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *accord Migliori*, 36 F.4th at 163.

them in on time and signed the declaration on the Return Envelope, but made a mistake on the Return Envelope by omitting a handwritten date. The Third Circuit did the right thing to order that their votes be counted, consistent with federal law. This Court should do no less.

B. Petitioners' Elections Clause Arguments Are Misplaced

Petitioners repeatedly suggest that the U.S. Constitution's Elections Clause requires the Court to order the disenfranchisement of Pennsylvania mail ballot voters. That argument is wrong on multiple levels.

First, Petitioners dramatically overstate the potential role in this case of the U.S. Constitution's Elections Clause. No court has ever accepted the theory that Petitioners posit, namely that state courts and administrative officers "wield no authority to regulate federal elections" even when they are merely interpreting their own state law and constitutions. Pet.'s Br. 29; *see* Br. of Amicus Curiae Conference of Chief Justices, *Moore v. Harper*, No. 21-1271 (Sept. 6, 2022) (Conference of Chief Justices explaining why this theory is wrong and the Elections Clause does not "displace the States' established authority to determine the final content of their election laws, including through normal judicial

review”). Indeed, while the Supreme Court granted *certiorari* in *Moore*, a redistricting case involving the so-called “independent state legislature theory,” it also recently *denied* a petition for certiorari premised on similar arguments in another redistricting case from this Court. *See Carter v. Chapman*, 270 A.3d 444, 450 (Pa. 2022), *cert. denied sub nom. Costello v. Ann Carter*, 2022 WL 4651817 (U.S. 2022). Petitioners' suggestion that state courts are prohibited from interpreting any state election laws is a radical and unaccepted theory, not the law.

Even if Petitioners' novel theory were the law, however, it still would have no bearing here. The Elections Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*.” U.S. Const. art I, § 4 (emphasis added). Of course, Congress *has* legislated on this very subject. It passed the Materiality Provision and prohibited voters from being disenfranchised for minor paperwork errors or omissions, like the handwritten envelope date at issue. If anything, then, the Elections Clause emphasizes the need for the Court to adhere to the Materiality Provision.

II. THE RELIEF PETITIONERS SEEK IS AGAINST THE INTERESTS OF JUSTICE

This Court's King's Bench jurisdiction is reserved "only for issues requiring timely intervention to cure injustice." Michael J. Schwab, *Long Live the King*, 65 Vill. L. Rev. 677, 678 (2020). When this Court exercises its King's Bench jurisdiction, it does so to "remedy injustice," to serve "the interest of justice," to "conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth." *In re Bruno*, 101 A.3d at 673-76. The interests of justice may certainly be served by upholding Pennsylvanians' basic political rights. *Cf. Fagan v. Smith*, 41 A.3d 816, 819 (Pa. 2012) (ordering writs of election). But the interests of justice cannot be served by disenfranchising them.

In 2020, Justice Wecht explained that, even viewing the envelope-dating provision in the Election Code as mandatory, it would be wrong to disqualify voters on that basis, because voters had not been "adequately informed as to what was required to avoid the consequence of disqualification." *In re Canvass*, 241 A.3d at 1089. Under those

circumstances, Justice Wecht explained, "it would be unfair to punish voters for the incidents of systemic growing pains." *Id.*

What Petitioners ask this Court to do now would be similarly unfair to voters. Since 2020, the Election Code has not been "refine[d] and clarif[ied] … scrupulously in the light of lived experience," as Justice Wecht suggested the General Assembly should do "to address the declaration requirement" and to "clarify and streamline the form and function of the declaration." *In re Canvass*, 241 A.3d at 1089 (Wecht, J.). But multiple courts have now ruled on the federal law issue this Court identified in 2020 and determined that the envelope-dating provision cannot be used to disenfranchise Pennsylvania voters consistent with federal law (or, as further factual development has shown, consistent with state law). In an effort to promote both clarity and uniformity, the Department of State has also issued administrative guidance. That guidance hews faithfully to the most recent state and federal court decisions.

Petitioners ask this Court to upend an emerging consensus that both federal and state law require counting timely mail ballots in signed return envelopes with no handwritten date. But even accepting

Petitioners' characterization of the law as unsettled, *see* Pet.'s Br. 9, the relief they seek does not follow. Especially in light of the legal and factual developments of the past two years, a last-minute pronouncement disenfranchising qualified, registered voters, most of whom will likely be senior citizens who have been voting in Pennsylvania for decades, is not in the interests of justice. This Court should not exercise its King's Bench jurisdiction to disenfranchise thousands of Pennsylvania voters because they made a minor and inconsequential paperwork error.

CONCLUSION

This Court should hold that timely-received and date-stamped mail ballots without a handwritten date on the Return Envelope must be counted as a matter of state and federal law.

Dated: October 25, 2022

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 6,989 words, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this petition.

Dated: October 25, 2022

/s/ Witold J. Walczak
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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: October 25, 2022

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