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## **APPENDIX A**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**No. 286 MD 2022**

**DAVE McCORMICK FOR U.S. SENATE, and DAVID H.  
McCORMICK,**

**Petitioners**

**v.**

**LEIGH M. CHAPMAN, in her official capacity as Secretary of  
State for the Commonwealth, et al.,**

**Respondents**

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**ACTING SECRETARY CHAPMAN'S ANSWER TO THE MOTION FOR  
IMMEDIATE SPECIAL INJUNCTION**

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## INTRODUCTION

Potentially thousands of Pennsylvanians who voted in the 2022 primary election are at risk of having their right to vote denied because some counties may not canvass timely received absentee and mail-in ballots merely because the voter omitted an inconsequential date from the ballot's return envelope. This Court should order counties to canvass the contested ballots.

First, federal law prohibits counties from voiding any ballot on the basis that a voter neglected to write an inconsequential date on the return envelope, as the United States Court of Appeals for the Third Circuit recently ruled. Under the relevant federal statute, the right to vote may not be denied “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.” 52 U.S.C. § 10101(a)(2)(B). Omitting a date from a voter's ballot return envelope is such an error.

Second, Pennsylvania law does not permit disenfranchising voters for neglecting to write a date on their ballot's return envelope. While the Election Code instructs that voters “shall . . . fill out, date and sign” the declaration on a ballot's return envelope before submitting it, 25 P.S. §§ 3146.6(a), 3150.16(a), the Election Code does not identify any remedy for when a voter overlooks this instruction. The Election Code is thus ambiguous on that point. To avoid a conflict

with federal law and Pennsylvania law, the remedy should not be disenfranchisement.

For either reason, this Court should order counties to canvass those absentee and mail-in ballots that were timely received if the voter's only error was omitting a date on the ballot's return envelope.<sup>1</sup>

### STATEMENT OF THE CASE

Pennsylvania citizens are qualified to vote if, as of Election Day, they: (1) will be 18 years old; (2) will have been a citizen for at least one month; (3) will have lived in Pennsylvania and in their election district for at least thirty days; and (4) are not imprisoned for a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a).<sup>2</sup> Counties initially assess compliance with these conditions when an individual submits a voter registration application. 25 Pa.C.S. § 1328.

Certain qualified voters may vote absentee. Pa. Const. art. VII, § 14; 25 P.S. § 3146.1. Any qualified, registered voter can vote as a "mail-in elector." 25 P.S.

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<sup>1</sup> While the Acting Secretary agrees that the disputed ballots should be counted, she takes no position on whether Petitioners have otherwise shown they are entitled to an immediate special injunction.

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

§ 3150.11. County boards of elections that receive an application to vote absentee or by mail-in ballot must confirm the applicant is eligible to vote before approving the application. *Id.* §§ 3146.2b, 3150.12b. Application approvals are final, except that challenges based on ineligibility to vote can be made through 5 p.m. on the Friday before Election Day. *Id.* §§ 3146.2b(c), 3150.12b.

Election district registers (*i.e.*, poll books) identify which registered voters have requested an absentee or mail-in ballot for a particular election. *Id.* §§ 3146.6(b)(1), 3150.16(b)(1). Those voters may not vote in person unless they surrender their blank absentee or mail-in ballot and its return envelope. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3). Otherwise, a voter who seeks to vote in person, but who has already requested an absentee or mail-in ballot may vote only provisionally. *Id.* §§ 3146.6(b)(2), 3150.16(b)(2). If a voter returns an absentee or mail-in ballot by Election Day and also casts a provisional ballot at a polling place, the absentee or mail-in ballot is counted. *Id.* § 3050(a.4)(5)(ii)(F).

Functionally identical procedures govern how a voter completes and returns an absentee or mail-in ballot. Anytime between receiving the ballot and 8 p.m. on Election Day, the voter secretly marks their ballot, places the ballot in a secrecy envelope, and then places the secrecy envelope in a return envelope. *Id.* §§ 3146.6(a), 3150.16(a). The return envelope contains a printed declaration that the voter “shall [] fill out, date and sign.” *Ibid.* Return envelopes have unique

barcodes associated with both the voter and the particular ballot, allowing for ballots to be tracked through the Statewide Uniform Registry of Electors (SURE). Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* ("Sept. 2020 Guidance"), at 2 (Sept. 11, 2020).<sup>3</sup> After sealing the return envelope, the voter delivers the entire package by mail or by hand to their county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a).

Absentee and mail-in ballots are timely if received by the voter's county board of elections by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Counties have a statutory obligation to maintain records of the date all absentee and mail-in ballots are received. *Id.* §§ 3146.9(b)(5), 3150.17(b)(5). Counties are directed to track when an absentee or mail-in ballot was received by stamping its return envelope with its "received" date. *See* Sept. 2020 Guidance at 2. Additionally, counties are directed to scan a return envelope's barcode upon receipt, which generates an additional record in the SURE system of when a ballot was received. *Id.*

Timely absentee and mail-in ballots that county boards of elections have verified, that have not been challenged, and for which there is not due proof that

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<sup>3</sup> Available at: <https://www.dos.pa.gov/VotingElections/OtherServices/Events/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

the voter has died prior to Election Day, are counted and included with the election results. 25 P.S. § 3146.8(d), (f)-(g).

In recent elections, absentee and mail-in ballots returned without the voter handwriting a date on the return envelope have been a subject of dispute. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1068-69 (Pa. 2020) (identifying thousands of such ballots cast in Allegheny and Philadelphia Counties alone during the 2020 election).

For the 2020 general election, the Supreme Court ruled without a majority opinion that, under Pennsylvania law, timely ballots would be counted even if the voter did not handwrite a date on the return envelope. *Id.* at 1079 (opinion announcing judgment). The opinion announcing the judgment explained that Pennsylvania law forbids disqualifying such ballots because “a signed but undated declaration is sufficient and does not implicate any weighty interest.” *Id.* at 1078 (opinion announcing judgment). Justice Wecht separately wrote that the Election Code requires that timely received ballots from voters who fail to write a date on the return envelope not be canvassed. *Id.* at 1089 (Wecht, J., concurring and dissenting). Justice Wecht concurred in the judgment, however, because even diligent voters would not have known the consequence of omitting the date. *Id.* at 1089 (Wecht, J., concurring and dissenting). The dissenting Justices read the Election Code to require voiding ballots returned without a voter’s handwritten

date, and considered that date to serve important purposes. *Id.* at 1090–91 (Dougherty, J., concurring and dissenting).

In the same case, four Justices identified that voiding ballots for minor errors may conflict with 52 U.S.C. § 10101(a)(2)(B). *Id.* at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting). The opinion announcing the judgment described one party as having argued with “persuasive force” that there would be a conflict, *id.* at 1074 n.5, and later explained that, under Pennsylvania law, “any handwritten date [is] unnecessary and, indeed, superfluous,” *id.* at 1077 (opinion announcing judgment).

Questions about how to treat timely ballots that are undated by voters have persisted since 2020, and counties have not behaved uniformly. In October 2021, for example, Montgomery and Bucks County sought a declaratory judgment from Commonwealth Court that state law permits their practice of canvassing timely received absentee and mail-in ballots cast without a handwritten date on the return envelope. Petition for Review, *Montgomery Cnty. Bd. of Elections v. Chapman*, No. 339 MD 2021 (Oct. 1, 2021 Pa. Commw. Ct.).

Additional litigation arose during the 2021 municipal elections as some counties decided to count timely ballots that voters neglected to date. Ultimately, divided panels of the Commonwealth Court issued non-precedential decisions concluding that Justice Wecht’s concurring opinion compelled the court to order

that ballots not be canvassed if the voter failed to write a date on the return envelope. *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156 (Pa. Commw. Ct. Jan. 10, 2022), *appeal denied* 2022 WL 536196 (Pa. Feb. 23, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 CD 2021, 2022 WL 16577, at \*8 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022).

After one of those Commonwealth Court decisions, some of the affected voters sought an order in federal court that § 10101(a)(2)(B) forbids denying their right to vote based on their failure to date the return envelope. The United States Court of Appeals for the Third Circuit agreed with the voters, ruling that “the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B),” and thus noncompliance with the dating provisions cannot justify denying anyone’s right to vote. Amended Judgment at 2, *Migliori v. Lehigh County Bd. of Elections*, No. 22-1499 (3d Cir. May 23, 2022).

Senate Candidate David McCormick and his campaign committee initiated this action after learning that, despite the Third Circuit’s judgment, some Pennsylvania counties still intend to disqualify ballots cast in the 2022 general primary election if the voter did not handwrite a date on the return envelope. Petitioners ask that all counties be directed not to deny anyone’s right to vote for failing to comply with Pennsylvania’s dating provisions.

## LEGAL STANDARD

Under Pennsylvania Rule of Appellate Procedure 1532(a), this Court may issue a preliminary or special injunction when: (1) an injunction is necessary to prevent immediate and irreparable harm; (2) greater injury would result from refusing an injunction than from granting it; (3) the injunction will restore the parties to their status before the alleged wrongful conduct; (4) there is a likelihood of success on the merits; (5) the injunction is reasonably tailored to the harm; and (6) a preliminary injunction will not adversely affect the public interest. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003); *see also Com. ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Commw. Ct. 2004) (explaining that standard for a preliminary injunction under Pa. R.A.P. 1532 is the same as that for the grant of a preliminary injunction under the Rules of Civil Procedure).

## SUMMARY OF ARGUMENT

Disenfranchising qualified voters whose only mistake was failing to date the declaration on their absentee or mail-in ballot's return envelope violates those voters' rights under federal law. That is so because an individual's right to vote must not be denied for an "an error or omission" on a "record or paper relating to . . . [an] act requisite to voting" that is not "material in determining whether such



individual is qualified under State law,” 52 U.S.C. § 10101(a)(2)(B), and noncompliance with Pennsylvania’s dating provisions is such an error or omission.

Indeed, the Third Circuit recently determined that, under § 10101(a)(2)(B), timely received absentee or mail-in ballots cannot be disqualified on the basis the voter failed to write a date on the return envelope—the same issue raised here. Amended Judgment at 2, *Migliori*, No. 22-1499. Pennsylvania courts regard Third Circuit interpretations of federal law as persuasive authority. One reason it does so is to prevent parties from moving between state and federal courts to achieve their preferred result, a risk that could materialize here if this Court departed from the Third Circuit’s interpretation of federal law.

Even independent of the Third Circuit’s judgment, this Court should rule that § 10101(a)(2)(B) prohibits denying a voter’s right to vote merely because the voter neglected to date their ballot’s return envelope. Pennsylvanians are qualified to vote if they meet the state’s age, citizenship, and residency requirements as of Election Day. *See* Pa. Const. art. VII, § 1; 25 P.S. § 2811(2), (3); *id.* § 3146.8(d); 25 Pa. C.S. § 1301. And mailed ballots are timely if they are received by 8 p.m. on Election Day, which counties independently track. 25 P.S. §§ 3146.6(c), 3150.16(c). Including a date on a ballot return envelope is therefore not “material” to determining a voter’s eligibility.

Alternatively, Pennsylvania law does not allow rejecting timely received absentee or mail-in ballots just because the voter did not date the return envelope. Various parts of the Election Code explicitly indicate when a voter's noncompliance should result in rejecting their ballot. But the Election Code is silent about the remedy for a voter's noncompliance with its dating language. That silence—as reflected in the Supreme Court's *In re Canvass* decisions—leaves ambiguity about what should happen when a voter does not write a date on their return envelope. That ambiguity should be resolved mindful of the General Assembly's intention that all statutes “be effective and certain” and that they not “violate the Constitution of the United States or of this Commonwealth.” 1 Pa.C.S. § 1922(2)-(3). Because interpreting the dating provisions to punish noncompliance by disqualifying the relevant ballot would conflict with federal law and may conflict with the Pennsylvania Constitution, this Court should resolve the statutory ambiguity to avoid such an outcome.

## **ARGUMENT**

### **Petitioner Is Likely To Succeed on the Merits**

#### **A. Federal Law Prohibits Disqualifying Timely Received Absentee and Mail-in Ballots Returned Without the Voter's Handwritten Date**

##### **1. This Court Should Follow the Third Circuit's Interpretation of Federal Law**

When the Supreme Court last considered the class of ballots at issue here, four Justices observed that voiding ballots for minor errors might conflict with 52

U.S.C. § 10101(a)(2)(B). *In re Canvass*, 241 A.3d at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting). But because the relevance of that federal statute had not been briefed, and because the Supreme Court ordered that, under state law, timely received ballots without the voter’s handwritten date must be counted in the 2020 election, there was no reason to resolve if § 10101(a)(2)(B) also required counting those ballots.

The Third Circuit has now answered the federal question that the Supreme Court first identified. In a case about ballots identical in all relevant respects to those that Petitioners want counted here, the Third Circuit ruled that “inasmuch as there is no dispute that ballots that have the wrong date were counted in the election, it is [] ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B).” Amended Judgment at 2, *Migliori*, No. 22-1499. It therefore concluded that “there is no basis on this record to refuse to count” timely received ballots just because the voter failed to comply with Pennsylvania’s dating provision. *Id.* Because federal law prevails even if there is a conflict with state law, U.S. Const. art. VI, cl. 2; *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018); *Dooner v. DiDonato*, 971 A.2d 1187, 1198 (Pa. 2009), the Third Circuit ordered that such ballots be counted, Amended Judgment at 2, *Migliori*, No. 22-1499. While the

Third Circuit has not yet issued an opinion expanding upon the reasons for its judgment, the judgment itself explains the conclusion that matters here.

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

Departing from the Third Circuit’s judgment would be particularly troublesome. Violations of § 10101(a)(2)(B) are privately enforceable through 42 U.S.C. § 1983. Amended Judgment at 2, *Migliori*, No. 22-1499. So if this Court determines that § 10101(a)(2)(B) does not require that undated ballots be counted, any affected voter could then bring a federal action and obtain a contradictory

order. Avoiding that scenario is precisely why this Court should rule consistent with the Third Circuit’s interpretation of § 10101(a)(2).

**2. A Handwritten Date on a Ballot Return Envelope is not “Material” to Determining Eligibility Under Pennsylvania Law**

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

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

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

Applying the federal statute here, a mailing envelope is a “record or paper.” Counties that treat omitting an envelope date as a disqualifying error have made

dating the return envelope an “act requisite to voting.”<sup>4</sup> And dating the declaration on an absentee or mail-in ballot return envelope is not “material” because the date does not assist in determining if the ballot was cast by someone eligible to vote under Pennsylvania law.

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

In Pennsylvania, a person may vote if, as of Election Day, they are 18 years old, have been a citizen for at least one month, have lived in Pennsylvania and in their election district for at least thirty days, and are not imprisoned for a felony

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<sup>4</sup> Congress defined “vote” for purposes of § 10101(a)(2)(B) to include “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(e); *see also id.* § 10101(a)(3)(A) (“For purposes of this subsection . . . the term ‘vote’ shall have the same meaning as in subsection (e) of this section.”).

conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811(2), (3); 25 Pa.C.S. § 1301(a). A dated declaration on a return envelope is not relevant to any of these criteria.

Nor is the date used to determine the point in time against which to measure the elector's eligibility to cast the ballot. Eligibility is assessed as of Election Day. *See* Pa. Const. art. VII, § 1 (imposing residency requirements for the time period “immediately preceding the election”); 25 P.S. § 2811(2), (3) (same); *id.* § 3146.8(d) (directing counties to discard absentee and mail-ballots cast by individuals who died before Election Day); 25 Pa. C.S. § 1301 (allowing anyone “who will be at least 18 years of age on the day of the next election” to register).<sup>5</sup>

Moreover, the handwritten date on the envelope does not assist in separating timely cast absentee or mail-in ballots from untimely ones. A ballot is timely if a county *receives* it by 8 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c).<sup>6</sup>

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<sup>5</sup> Some parties in *Migliori* argued that the date is “material” under § 10101(a)(2)(B) because a person who was eligible at the time they requested an absentee or mail-in ballot might become ineligible before election date. Under their theory, the date was needed to determine if such a person became ineligible before or after the date written on the return envelope. There, too, the date is not “material in determining whether such individual is qualified under State law.” 52 U.S.C. § 10101(a)(2)(B). Anyone who does not meet Pennsylvania’s voter qualifications as of Election Day may not have their vote counted, even if that person may have met the eligibility qualifications when completing their ballot.

<sup>6</sup> For the 2020 election only, the Supreme Court ordered that ballots postmarked by Election Day could be counted if they were received up to three days later, and that ballots received during this three-day window lacking postmarks would “be presumed to have been mailed by Election Day unless a

Counties have a statutory obligation to track the date that every absentee or mail-in ballot was received and make that information available for public inspection. 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5). They have procedures for doing so—including stamping ballots as “received” and scanning return envelopes’ barcodes into the SURE system. *See* Sept. 2020 Guidance at 2; *In re Canvass*, 241 A.3d at 1077 (opinion announcing judgment). Plus, timely and untimely ballots remain segregated. Pennsylvania law and procedures thus provide “a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.” *In re Canvass*, 241 A.3d at 1077 (opinion announcing judgment). In fact, the date written on a return envelope would be an exceedingly poor proxy for determining if a ballot was received by 8 p.m. on Election Day as ballots dated in advance of that day certainly may arrive sometime after.

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

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preponderance of the evidence demonstrates that it was mailed after Election Day.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020). A date might have had utility in that one-off scenario.



convert an ineligible ballot into a seemingly eligible one.<sup>7</sup> A ballot is received by the deadline or it is not.

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

What is more, consistent with the Department’s guidance, most counties do not invalidate ballots with “wrong” dates—meaning dates that do not accurately reflect when the envelope declaration was signed. But for obviously wrong dates—such as birth dates or dates with the incorrect year—there would be no means of

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<sup>7</sup> Dating a mailing envelope also does not communicate the solemnity of the attestations the voter makes when completing the return envelope’s declaration. *Signing* the declaration serves that purpose, as demonstrated by the General Assembly’s decision to punish anyone who “sign[s] an application for absentee ballot, mail-in ballot or declaration of elector on the forms prescribed knowing any matter declared therein to be false.” 25 P.S. § 3553.

verifying that the date written on a declaration envelope is actually the date the declaration was signed. Counting ballots returned with the wrong date underscores that the underlying information is unimportant and thus immaterial.

Pennsylvania has now conducted five elections with no-excuse mail-in voting, and questions relating to undated ballots have been litigated on multiple occasions. All arguments made for disenfranchising voters who omit the date on their return envelope are unsupported by Pennsylvania law or are irrelevant to § 10101(a)(2)(B).

**B. State Law Also Prohibits Disqualifying Timely Received Absentee and Mail-in Ballots Returned Without the Voter’s Handwritten Date**

This Court may separately rule, in accordance with Pennsylvania’s established principles for interpreting ambiguous statutory language, that Pennsylvania law does not permit disqualifying timely but undated ballots.

The Election Code instructs that voters “shall” date the declarations printed on an absentee or mail-in ballots’ return envelope, 25 P.S. §§ 3146.6(a), § 3150.16(a), but is silent about the consequence for failing to provide a date. That silence—as the competing opinions in *In re Canvass* demonstrate—leaves ambiguity about what to do with timely ballots returned without a handwritten date.

When the General Assembly has meant for a voter’s noncompliance with the Election Code to result in a ballot being rejected, it has said so explicitly. For

example, the Election Code explicitly limits the set of absentee ballots (unless cast by a military voter) and mail-in ballots that may be canvassed to those “received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” *Id.* § 3146.8(g)(1)(ii). Elsewhere, the Election Code instructs that if a voter returns an absentee or mail-in ballot with identifying markings on the secrecy envelope, “the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii). Additionally, the Election Code directs that absentee and mail-in ballots cast by someone who died before Election Day “shall be rejected.” *Id.* § 3146.8(d). When ballots were deposited in ballot boxes, any ballot returned without removal of the number used to identify that a voter cast the same ballot they received was “void.” *Id.* § 3055(d). Nothing in the Election Code identifies a remedy for noncompliance with dating provisions, let alone does so with this level of clarity. Courts should not add language to the General Assembly’s statutory schemes. *Sadler v. Workers’ Comp. Appeal Bd.*, 244 A.3d 1208, 1214 (Pa. 2021).

In light of the General Assembly’s practice of specifically identifying when noncompliance results in a ballot rejection, the instruction that voters “shall” date the return envelope does not, alone, identify the remedy for when a voter fails to comply with the dating provisions. Interpreting all Election Code provisions expressing that voters “shall” do something to mean that noncompliance must

result in disenfranchisement would lead to concerning results, further signaling that provisions directing that voters “shall” do something do not unambiguously require a certain remedy for noncompliance. For example, the Election Code directs that voters who vote in person by ballot “shall retire to one of the voting compartments, and draw the curtain or shut the screen door . . . .” 25 P.S. § 3055(a). Those same voters are told that they “shall fold [their] ballot . . . in the same way it was folded when received” before returning it. *Id.* § 3055(d). The General Assembly could not have meant to use “shall” in each case to indicate that voters who do not satisfactorily draw their curtain or who do not fold their ballot properly before returning it must have their ballot voided.

When interpreting an ambiguous statute, Pennsylvania courts determine the General Assembly’s intent by considering, among other factors, the “occasion and necessity for the statute,” “mischief to be remedied,” “the object to be attained,” and the “consequences of a particular interpretation.” 1 Pa.C.S. §§ 1921(c)(1), (3), (4), (6).

Under these principles of statutory interpretation, the Election Code’s dating provisions must be read not to allow disenfranchisement of voters who neglect to date their ballot return envelope. As described, *supra* Section I, a handwritten date on the ballot envelope is not necessary for any purpose, does not remedy any mischief, or advance any other objective. The consequence of interpreting the

Election Code to require that ballots be voided if the voter does not include a date is that voters are disenfranchised for failing to provide the county with inconsequential information.

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

Interpreting § 3146.6(a) and § 3150.16(a) to allow for disqualifying ballots received without a voter’s handwritten date on the return envelope would conflict with 52 U.S.C. § 10101(a)(2). *Supra* Section I. Separately, imposing the drastic consequence of disenfranchisement for noncompliance with the date instructions could pose a conflict with the right, under the Free Elections Clause, of “each voter under the law ... to cast his ballot and have it honestly counted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). As Justice Wecht previously explained, noncompliance with mandatory provisions of the Election Code should not result in disqualification unless voters have “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) (cleaned up). And despite Justice Wecht’s suggestion that the General Assembly might clarify the Election Code’s relevant provisions, *id.*, that has not happened. Indeed, “lived experience”, *id.*, demonstrates that although the Department of State modified the return envelope design after the 2020 election, there remains a risk of “a constitutionally intolerable ratio of rejected ballots.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J., concurring).

### **C. The *Purcell* Principle Cannot Insulate Counties’ Denials of the Right to Vote from Judicial Review**

Finally, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), cannot justify withholding relief from Petitioners. The *Purcell* principle instructs that “lower *federal courts* should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (emphasis added); *see also Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring in grant of application for stays); *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

The *Purcell* principle does not apply here. That principle’s animating concern is avoiding federal interference with state election procedures “on the eve of an election.” *Republican Nat’l Comm.*, 140 S. at 1207. This case, however, is in

state court and, in any event, does not involve a pre-election challenge that risks muddying election rules on the eve of election, or even while voting is already underway. It is a post-election suit to enforce a federal guarantee of the right to vote that is decades old. *Purcell* does not stop courts from adjudicating violations of the right to vote, which, by necessity, will always become apparent during an election.

## CONCLUSION

For the reasons above, this Court should direct counties to canvass timely received absentee and mail-in ballots if the voter's only error was omitting a date on the ballot's return envelope.

May 27, 2022

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**CERTIFICATE OF COMPLIANCE**

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

Dated: May 27, 2022

*/s Jacob B. Boyer*

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**CERTIFICATE OF LENGTH**

I certify that this brief contains 5451 words within the meaning of Pennsylvania Rule of Appellate Procedure 2135. I have relied on Word's word count function to determine the length of this brief.

Dated: May 27, 2022

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\_\_\_\_\_  
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## **APPENDIX B**

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

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**No. 46 MM 2022**

**DAVE McCORMICK FOR U.S. SENATE, and DAVID H.  
McCORMICK,**

**Petitioners**

**v.**

**LEIGH M. CHAPMAN, in her official capacity as Secretary of  
State for the Commonwealth, et al.,**

**Respondents**

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**ACTING SECRETARY CHAPMAN’S ANSWER TO THE APPLICATION  
FOR THE COURT TO EXERCISE JURISDICTION PURSUANT TO ITS  
KING’S BENCH POWERS AND/OR GRANT EXTRAORDINARY RELIEF**

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May 26, 2022

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## INTRODUCTION

Potentially thousands of Pennsylvanians who voted in the 2022 primary election are at risk of having their right to vote denied because some counties may not canvass timely received absentee and mail-in ballots merely because the voter omitted an inconsequential date from the ballot's return envelope. This Court should exercise jurisdiction over this case now so that the status of those ballots can be promptly resolved, and the primary election's winners can be certified based on a count of all lawfully cast ballots.

This Court should order that the contested ballots be counted. First, federal law prohibits counties from voiding any ballot on the basis that a voter neglected to write an inconsequential date on the return envelope, as the United States Court of Appeals for the Third Circuit recently ruled. Under the relevant federal statute, the right to vote may not be denied "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." 52 U.S.C. § 10101(a)(2)(B). Omitting a date from a voter's ballot return envelope is such an error.

Second, Pennsylvania law does not permit disenfranchising voters for neglecting to write a date on their ballot's return envelope. While the Election Code instructs that voters "shall . . . fill out, date and sign" the declaration on a ballot's

return envelope before submitting it, 25 P.S. §§ 3146.6(a), 3150.16(a), the Election Code does not identify any remedy for when a voter overlooks this instruction. The Election Code is thus ambiguous on that point. To avoid a conflict with federal law and Pennsylvania law, the remedy should not be disenfranchisement.

For either reason, Petitioners are entitled to their requested relief.

### **STATEMENT OF JURISDICTION**

This matter raises an issue of immediate public importance. Over a week ago, more than a million Pennsylvanians voted in the Commonwealth’s 2022 primary election. With a recount underway in one statewide election and deadlines to certify election results looming, some counties may not include in their final tallies timely cast absentee and mail-in ballots where the voter failed to write a date on the ballot’s return envelope. Those ballots might determine the outcome of some races. This Court should exercise jurisdiction over this matter now to expeditiously resolve the status of the contested ballots and allow the primary elections to come to a conclusion, with winners determined based on a count of all lawfully cast ballots.

This Court is empowered to exercise extraordinary jurisdiction over “any matter pending before any court” in this Commonwealth involving matters “of immediate public importance,” and to “assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.” 42 Pa.C.S. § 726.

Alternatively, Petitioners have asked this Court to use its King’s Bench powers to immediately exercise jurisdiction over this matter. That power derives from the Court’s authority as “supreme judicial power of the Commonwealth,” Pa. Const. art. V, § 2(a), and its authority to “exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722,” 42 Pa.C.S. § 502. Exercising King’s Bench power is appropriate when “the Court cannot suffer the deleterious effect upon the public interest caused by delays incident to ordinary processes of law, or deficiencies in the ordinary process of law making those avenues inadequate for the exigencies of the moment.” *In re Bruno*, 101 A.3d 653, 671 (Pa. 2014).

The exigencies of this moment require that this Court exercise jurisdiction now. Prompt directives will ensure that all lawfully cast votes are included as counties finish canvassing ballots, and as the Acting Secretary prepares to certify the election’s results. And the public should not be asked to wait any longer than necessary to learn the outcome of the primary elections.

### **STATEMENT OF THE CASE**

Pennsylvania citizens are qualified to vote if, as of Election Day, they: (1) will be 18 years old; (2) will have been a citizen for at least one month; (3) will have lived in Pennsylvania and in their election district for at least thirty days; and (4) are

not imprisoned for a felony conviction. Pa. Const. art. VII, § 1; 25 P.S. § 2811; 25 Pa.C.S. § 1301(a).<sup>1</sup> Counties initially assess compliance with these conditions when an individual submits a voter registration application. 25 Pa.C.S. § 1328.

Certain qualified voters may vote absentee. Pa. Const. art. VII, § 14; 25 P.S. § 3146.1. Any qualified, registered voter can vote as a “mail-in elector.” 25 P.S. § 3150.11. County boards of elections that receive an application to vote absentee or by mail-in ballot must confirm the applicant is eligible to vote before approving the application. *Id.* §§ 3146.2b, 3150.12b. Application approvals are final, except that challenges based on ineligibility to vote can be made through 5 p.m. on the Friday before Election Day. *Id.* §§ 3146.2b(c), 3150.12b.

Election district registers (*i.e.*, poll books) identify which registered voters have requested an absentee or mail-in ballot for a particular election. *Id.* §§ 3146.6(b)(1), 3150.16(b)(1). Those voters may not vote in person unless they surrender their blank absentee or mail-in ballot and its return envelope. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3). Otherwise, a voter who seeks to vote in person, but who has already requested an absentee or mail-in ballot may vote only provisionally.

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<sup>1</sup> *See also* *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (holding that individuals with felony convictions, other than those currently incarcerated, may register to vote); 1972 Op. Atty. Gen. No. 121 (concluding durational residency requirements longer than 30 days are unenforceable); U.S. Const. amend. XXVI (prohibiting denial of right to vote to citizens 18 years of age or older because of age).

*Id.* §§ 3146.6(b)(2), 3150.16(b)(2). If a voter returns an absentee or mail-in ballot by Election Day and also casts a provisional ballot at a polling place, the absentee or mail-in ballot is counted. *Id.* § 3050(a.4)(5)(ii)(F).

Functionally identical procedures govern how a voter completes and returns an absentee or mail-in ballot. Anytime between receiving the ballot and 8 p.m. on Election Day, the voter secretly marks their ballot, places the ballot in a secrecy envelope, and then places the secrecy envelope in a return envelope. *Id.* §§ 3146.6(a), 3150.16(a). The return envelope contains a printed declaration that the voter “shall [] fill out, date and sign.” *Ibid.* Return envelopes have unique barcodes associated with both the voter and the particular ballot, allowing for ballots to be tracked through the Statewide Uniform Registry of Electors (SURE). Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes* (“Sept. 2020 Guidance”), at 2 (Sept. 11, 2020).<sup>2</sup> After sealing the return envelope, the voter delivers the entire package by mail or by hand to their county board of elections. 25 P.S. §§ 3146.6(a), 3150.16(a).

Absentee and mail-in ballots are timely if received by the voter’s county board of elections by 8 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). Counties have a statutory obligation to maintain records of the date all absentee and mail-in ballots

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<sup>2</sup> Available at: <https://www.dos.pa.gov/VotingElections/OtherServices/Events/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

are received. *Id.* §§ 3146.9(b)(5), 3150.17(b)(5). Counties are directed to track when an absentee or mail-in ballot was received by stamping its return envelope with its “received” date. *See* Sept. 2020 Guidance at 2. Additionally, counties are directed to scan a return envelope’s barcode upon receipt, which generates an additional record in the SURE system of when a ballot was received. *Id.*

Timely absentee and mail-in ballots that county boards of elections have verified, that have not been challenged, and for which there is not due proof that the voter has died prior to Election Day, are counted and included with the election results. 25 P.S. § 3146.8(d), (f)-(g).

In recent elections, absentee and mail-in ballots returned without the voter handwriting a date on the return envelope have been a subject of dispute. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1068-69 (Pa. 2020) (identifying thousands of such ballots cast in Allegheny and Philadelphia Counties alone during the 2020 election).

For the 2020 general election, this Court ruled without a majority opinion that, under Pennsylvania law, timely ballots would be counted even if the voter did not handwrite a date on the return envelope. *Id.* at 1079 (opinion announcing judgment). The opinion announcing the judgment explained that Pennsylvania law forbids disqualifying such ballots because “a signed but undated declaration is sufficient and does not implicate any weighty interest.” *Id.* at 1078 (opinion announcing judgment).

Justice Wecht separately wrote that the Election Code requires that timely received ballots from voters who fail to write a date on the return envelope not be canvassed. *Id.* at 1089 (Wecht, J., concurring and dissenting). Justice Wecht concurred in the judgment, however, because even diligent voters would not have known the consequence of omitting the date. *Id.* at 1089 (Wecht, J., concurring and dissenting). The dissenting Justices read the Election Code to require voiding ballots returned without a voter’s handwritten date, and considered that date to serve important purposes. *Id.* at 1090–91 (Dougherty, J., concurring and dissenting).

In the same case, four Justices identified that voiding ballots for minor errors may conflict with 52 U.S.C. § 10101(a)(2)(B). *Id.* at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting). The opinion announcing the judgment described one party as having argued with “persuasive force” that there would be a conflict, *id.* at 1074 n.5, and later explained that, under Pennsylvania law, “any handwritten date [is] unnecessary and, indeed, superfluous,” *id.* at 1077 (opinion announcing judgment).

Questions about how to treat timely ballots that are undated by voters have persisted since 2020, and counties have not behaved uniformly. In October 2021, for example, Montgomery and Bucks County sought a declaratory judgment from Commonwealth Court that state law permits their practice of canvassing timely received absentee and mail-in ballots cast without a handwritten date on the return

envelope. Petition for Review, *Montgomery Cnty. Bd. of Elections v. Chapman*, No. 339 MD 2021 (Oct. 1, 2021 Pa. Commw. Ct.).

Additional litigation arose during the 2021 municipal elections as some counties decided to count timely ballots that voters neglected to date. Ultimately, divided panels of the Commonwealth Court issued non-precedential decisions concluding that Justice Wecht’s concurring opinion compelled the court to order that ballots not be canvassed if the voter failed to write a date on the return envelope. *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, No. 1381 CD 2021, 2022 WL 96156 (Pa. Commw. Ct. Jan. 10, 2022), *appeal denied* 2022 WL 536196 (Pa. Feb. 23, 2022); *Ritter v. Lehigh Cnty. Bd. of Elections*, No. 1322 CD 2021, 2022 WL 16577, at \*8 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 2022 WL 244122 (Pa. Jan. 27, 2022).

After one of those Commonwealth Court decisions, some of the affected voters sought an order in federal court that § 10101(a)(2)(B) forbids denying their right to vote based on their failure to date the return envelope. The United States Court of Appeals for the Third Circuit agreed with the voters, ruling that “the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B),” and thus noncompliance with the dating provisions cannot justify denying anyone’s right to vote. Amended Judgment at 2, *Migliori v. Lehigh County Bd. of Elections*, No. 22-1499 (3d Cir. May 23, 2022).



Senate Candidate David McCormick and his campaign committee initiated this action after learning that, despite the Third Circuit’s judgment, some Pennsylvania counties still intend to disqualify ballots cast in the 2022 general primary election if the voter did not handwrite a date on the return envelope. Petitioners ask that all counties be directed not to deny anyone’s right to vote for failing to comply with Pennsylvania’s dating provisions.

### **SUMMARY OF ARGUMENT**

Disenfranchising qualified voters whose only mistake was failing to date the declaration on their absentee or mail-in ballot’s return envelope violates those voters’ rights under federal law. That is so because an individual’s right to vote must not be denied for an “an error or omission” on a “record or paper relating to . . . [an] act requisite to voting” that is not “material in determining whether such individual is qualified under State law,” 52 U.S.C. § 10101(a)(2)(B), and noncompliance with Pennsylvania’s dating provisions is such an error or omission.

Indeed, the Third Circuit recently determined that, under § 10101(a)(2)(B), timely received absentee or mail-in ballots cannot be disqualified on the basis the voter failed to write a date on the return envelope—the same issue raised here. Amended Judgment at 2, *Migliori*, No. 22-1499. This Court regards Third Circuit interpretations of federal law as persuasive authority. One reason it does so is to prevent parties from moving between state and federal courts to achieve their

preferred result, a risk that could materialize here if this Court departed from the Third Circuit’s interpretation of federal law.

Even independent of the Third Circuit’s judgment, this Court should rule that § 10101(a)(2)(B) prohibits denying a voter’s right to vote merely because the voter neglected to date their ballot’s return envelope. Pennsylvanians are qualified to vote if they meet the state’s age, citizenship, and residency requirements as of Election Day. *See* Pa. Const. art. VII, § 1; 25 P.S. § 2811(2), (3); *id.* § 3146.8(d); 25 Pa. C.S. § 1301. And mailed ballots are timely if they are received by 8 p.m. on Election Day, which counties independently track. 25 P.S. §§ 3146.6(c), 3150.16(c). Including a date on a ballot return envelope is therefore not “material” to determining a voter’s eligibility.

Alternatively, Pennsylvania law does not allow rejecting timely received absentee or mail-in ballots just because the voter did not date the return envelope. Various parts of the Election Code explicitly indicate when a voter’s noncompliance should result in rejecting their ballot. But the Election Code is silent about the remedy for a voter’s noncompliance with its dating language. That silence—as reflected in this Court’s *In re Canvass* decisions—leaves ambiguity about what should happen when a voter does not write a date on their return envelope. That ambiguity should be resolved mindful of the General Assembly’s intention that all statutes “be effective and certain” and that they not “violate the Constitution of the

United States or of this Commonwealth.” 1 Pa.C.S. § 1922(2)-(3). Because interpreting the dating provisions to punish noncompliance by disqualifying the relevant ballot would conflict with federal law and may conflict with the Pennsylvania Constitution, this Court should resolve the statutory ambiguity to avoid such an outcome.

## ARGUMENT

### **I. Federal Law Prohibits Disqualifying Timely Received Absentee and Mail-in Ballots Returned Without the Voter’s Handwritten Date**

#### **A. This Court Should Follow the Third Circuit’s Interpretation of Federal Law**

When this Court last considered the class of ballots at issue here, four Justices observed that voiding ballots for minor errors might conflict with 52 U.S.C. § 10101(a)(2)(B). *In re Canvass*, 241 A.3d at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting). But because the relevance of that federal statute had not been briefed, and because this Court ordered that, under state law, timely received ballots without the voter’s handwritten date must be counted in the 2020 election, there was no reason to resolve if § 10101(a)(2)(B) also required counting those ballots.

The Third Circuit has now answered the federal question that this Court first identified. In a case about ballots identical in all relevant respects to those that Petitioners want counted here, the Third Circuit ruled that “inasmuch as there is no

dispute that ballots that have the wrong date were counted in the election, it is [] ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B).” Amended Judgment at 2, *Migliori*, No. 22-1499. It therefore concluded that “there is no basis on this record to refuse to count” timely received ballots just because the voter failed to comply with Pennsylvania’s dating provision. *Id.* Because federal law prevails even if there is a conflict with state law, U.S. Const. art. VI, cl. 2; *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018); *Dooner v. DiDonato*, 971 A.2d 1187, 1198 (Pa. 2009), the Third Circuit ordered that such ballots be counted, Amended Judgment at 2, *Migliori*, No. 22-1499. While the Third Circuit has not yet issued an opinion expanding upon the reasons for its judgment, the judgment itself explains the conclusion that matters here.

The Third Circuit’s interpretation of federal law should be followed here. Indeed, this Court treats Third Circuit interpretations of federal law as persuasive authority. *Stone Crushed P’ship v. Kassab Archbold Jackson & O’Brien*, 908 A.2d 875, 884 (Pa. 2006). It does so to ensure that individuals denied relief in a Pennsylvania court cannot merely “‘walk across the street’ to gain a different result”—“an unfortunate situation [that] would cause disrespect for the law.” *Hall v. Pennsylvania Bd. of Prob. & Parole*, 851 A.2d 859, 864 (Pa. 2004) (opinion announcing judgment) (quoting *Commonwealth v. Negri*, 213 A.2d 670, 672 (Pa.

1965)). Affording the Third Circuit’s interpretations of federal law persuasive weight means “it is appropriate for a Pennsylvania appellate court to follow the Third Circuit’s ruling on federal questions to which the U.S. Supreme Court has not yet provided a definitive answer.” *W. Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Commw. Ct. 2017).

Departing from the Third Circuit’s judgment would be particularly troublesome. Violations of § 10101(a)(2)(B) are privately enforceable through 42 U.S.C. § 1983. Amended Judgment at 2, *Migliori*, No. 22-1499. So if this Court determines that § 10101(a)(2)(B) does not require that undated ballots be counted, any affected voter could then bring a federal action and obtain a contradictory order. Avoiding that scenario is precisely why this Court should rule consistent with the Third Circuit’s interpretation of § 10101(a)(2).

**B. A Handwritten Date on a Ballot Return Envelope is not “Material” to Determining Eligibility Under Pennsylvania Law**

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

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

determining whether such individual is qualified under State law to vote in such election.

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

Applying the federal statute here, a mailing envelope is a “record or paper.” Counties that treat omitting an envelope date as a disqualifying error have made dating the return envelope an “act requisite to voting.”<sup>3</sup> And dating the declaration on an absentee or mail-in ballot return envelope is not “material” because the date does not assist in determining if the ballot was cast by someone eligible to vote under Pennsylvania law.

To determine whether an error or omission is “material” under § 10101(a)(2)(B), courts compare the erroneous or omitted information against state law voter qualifications. *See, e.g., Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-

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<sup>3</sup> Congress defined “vote” for purposes of § 10101(a)(2)(B) to include “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(e); *see also id.* § 10101(a)(3)(A) (“For purposes of this subsection . . . the term ‘vote’ shall have the same meaning as in subsection (e) of this section.”).

09 (N.D. Ga. 2018); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270 (W.D. Wash. 2006); *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005). If the error or omission, accepted as true, does not preclude (or at least interfere with) determining a voter's eligibility, the error or omission is not "material." *NAACP*, 522 F.3d at 1175.

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

Nor is the date used to determine the point in time against which to measure the elector's eligibility to cast the ballot. Eligibility is assessed as of Election Day. *See* Pa. Const. art. VII, § 1 (imposing residency requirements for the time period "immediately preceding the election"); 25 P.S. § 2811(2), (3) (same); *id.* § 3146.8(d) (directing counties to discard absentee and mail-ballots cast by individuals who died before Election Day); 25 Pa. C.S. § 1301 (allowing anyone "who will be at least 18 years of age on the day of the next election" to register).<sup>4</sup>

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<sup>4</sup> Some parties in *Migliori* argued that the date is "material" under § 10101(a)(2)(B) because a person who was eligible at the time they requested an absentee or mail-in ballot might become ineligible before election date. Under their theory, the date was needed to determine if such a person became ineligible before or after the date written on the return envelope. There, too, the date is not "material

Moreover, the handwritten date on the envelope does not assist in separating timely cast absentee or mail-in ballots from untimely ones. A ballot is timely if a county *receives* it by 8 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c).<sup>5</sup> Counties have a statutory obligation to track the date that every absentee or mail-in ballot was received and make that information available for public inspection. 25 P.S. §§ 3146.9(b)(5), 3150.17(b)(5). They have procedures for doing so—including stamping ballots as “received” and scanning return envelopes’ barcodes into the SURE system. *See* Sept. 2020 Guidance at 2; *In re Canvass*, 241 A.3d at 1077 (opinion announcing judgment). Plus, timely and untimely ballots remain segregated. Pennsylvania law and procedures thus provide “a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfluous.” *In re Canvass*, 241 A.3d at 1077 (opinion announcing judgment). In fact, the date written on a return envelope would be an exceedingly poor proxy for

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in determining whether such individual is qualified under State law.” 52 U.S.C. § 10101(a)(2)(B). Anyone who does not meet Pennsylvania’s voter qualifications as of Election Day may not have their vote counted, even if that person may have met the eligibility qualifications when completing their ballot.

<sup>5</sup> For the 2020 election only, this Court ordered that ballots postmarked by Election Day could be counted if they were received up to three days later, and that ballots received during this three-day window lacking postmarks would “be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 386 (Pa. 2020). A date might have had utility in that one-off scenario.



determining if a ballot was received by 8 p.m. on Election Day as ballots dated in advance of that day certainly may arrive sometime after.

Because in all cases counties can independently verify if a ballot was received by Election Day's 8 p.m. deadline without reference to the date written on the declaration envelope, the written date is not a tool for preventing fraudulently back-dated votes. In any event, because Pennsylvania employs only a received-by deadline, 25 P.S. §§ 3146.6(c), 3150.16(c), back-dating is not a way to fraudulently convert an ineligible ballot into a seemingly eligible one.<sup>6</sup> A ballot is received by the deadline or it is not.

Additionally, the written date on a mailed ballot does not determine which vote to count if someone voted absentee or by mail and also tried to vote in person. Election district registers identify which voters have requested an absentee or mail-in ballot. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1). Those voters may not vote in person unless they surrender their blank absentee or mail-in ballot, and its return envelope, to their polling place; otherwise, they may vote only provisionally. *Id.* §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3). If a voter returns a completed absentee or

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<sup>6</sup> Dating a mailing envelope also does not communicate the solemnity of the attestations the voter makes when completing the return envelope's declaration. *Signing* the declaration serves that purpose, as demonstrated by the General Assembly's decision to punish anyone who "sign[s] an application for absentee ballot, mail-in ballot or declaration of elector on the forms prescribed knowing any matter declared therein to be false." 25 P.S. § 3553.

mail-in ballot before the deadline and also casts a provisional ballot at a polling place, only the absentee or mail-in ballot is counted, regardless of the date written on it. *Id.* § 3050(a.4)(5)(ii)(F).

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

Pennsylvania has now conducted five elections with no-excuse mail-in voting, and questions relating to undated ballots have been litigated on multiple occasions. All arguments made for disenfranchising voters who omit the date on their return envelope are unsupported by Pennsylvania law or are irrelevant to § 10101(a)(2)(B).

## **II. State Law Also Prohibits Disqualifying Timely Received Absentee and Mail-in Ballots Returned Without the Voter’s Handwritten Date**

This Court may separately rule, in accordance with Pennsylvania’s established principles for interpreting ambiguous statutory language, that Pennsylvania law does not permit disqualifying timely but undated ballots.

The Election Code instructs that voters “shall” date the declarations printed on an absentee or mail-in ballots’ return envelope, 25 P.S. §§ 3146.6(a),

§ 3150.16(a), but is silent about the consequence for failing to provide a date. That silence—as the competing opinions in *In re Canvass* demonstrate—leaves ambiguity about what to do with timely ballots returned without a handwritten date.

When the General Assembly has meant for a voter’s noncompliance with the Election Code to result in a ballot being rejected, it has said so explicitly. For example, the Election Code explicitly limits the set of absentee ballots (unless cast by a military voter) and mail-in ballots that may be canvassed to those “received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” *Id.* § 3146.8(g)(1)(ii). Elsewhere, the Election Code instructs that if a voter returns an absentee or mail-in ballot with identifying markings on the secrecy envelope, “the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii). Additionally, the Election Code directs that absentee and mail-in ballots cast by someone who died before Election Day “shall be rejected.” *Id.* § 3146.8(d). When ballots were deposited in ballot boxes, any ballot returned without removal of the number used to identify that a voter cast the same ballot they received was “void.” *Id.* § 3055(d). Nothing in the Election Code identifies a remedy for noncompliance with dating provisions, let alone does so with this level of clarity. Courts should not add language to the General Assembly’s statutory schemes. *Sadler v. Workers’ Comp. Appeal Bd.*, 244 A.3d 1208, 1214 (Pa. 2021).

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

When interpreting an ambiguous statute, Pennsylvania courts determine the General Assembly’s intent by considering, among other factors, the “occasion and necessity for the statute,” “mischief to be remedied,” “the object to be attained,” and the “consequences of a particular interpretation.” 1 Pa.C.S. §§ 1921(c)(1), (3), (4), (6).

Under these principles of statutory interpretation, the Election Code’s dating provisions should be read not to allow disenfranchisement of voters who neglect to date their ballot return envelope. As described, *supra* Section I, a handwritten date on the ballot envelope is not necessary for any purpose, does not remedy any mischief, and does not advance any other objective. Therefore, the consequence of interpreting the Election Code to require that ballots be voided if the voter does not include a date is that voters are disenfranchised for failing to provide the county with inconsequential information.

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

Interpreting § 3146.6(a) and § 3150.16(a) to allow for disqualifying ballots received without a voter’s handwritten date on the return envelope would conflict with 52 U.S.C. § 10101(a)(2). *Supra* Section I. Separately, imposing the drastic consequence of disenfranchisement for noncompliance with the date instructions could pose a conflict with the right, under the Free Elections Clause, of “each voter

under the law ... to cast his ballot and have it honestly counted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). As Justice Wecht previously explained, noncompliance with mandatory provisions of the Election Code should not result in disqualification unless voters have “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) (cleaned up). And despite Justice Wecht’s suggestion that the General Assembly might clarify the Election Code’s relevant provisions, *id.*, that has not happened. Indeed, “lived experience,” *id.*, demonstrates that although the Department of State modified the return envelope design after the 2020 election, there remains a risk of “a constitutionally intolerable ratio of rejected ballots.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 389 (Pa. 2020) (Wecht, J., concurring).

### **III. The *Purcell* Principle Cannot Insulate Counties’ Denials of the Right to Vote from Judicial Review**

Finally, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), cannot justify withholding relief from Petitioners. The *Purcell* principle instructs that “lower *federal courts* should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (emphasis added); *see also Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring in grant of application for stays); *Democratic Nat’l Comm. v. Wisconsin*

*State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay).

The *Purcell* principle does not apply here. That principle’s animating concern is avoiding federal interference with state election procedures “on the eve of an election.” *Republican Nat’l Comm.*, 140 S. Ct. at 1207. This case, however, is in state court and, in any event, does not involve a pre-election challenge that risks muddying election rules on the eve of election, or even while voting is already underway. It is a post-election suit to enforce a federal guarantee of the right to vote that is decades old. *Purcell* does not stop courts from adjudicating violations of the right to vote, which, by necessity, will always become apparent during an election.

### **CONCLUSION**

For the reasons above, this Court should grant Petitioner’s requested relief and direct counties to canvass timely received absentee and mail-in ballots if the voter’s only error was omitting a date on the ballot’s return envelope.

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**CERTIFICATE OF COMPLIANCE**

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

Dated: May 26, 2022

/s/ Jacob B. Boyer  
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**CERTIFICATE OF LENGTH**

I certify that this brief contains 5,655 words within the meaning of Pennsylvania Rule of Appellate Procedure 2135. I have relied on Word's word count function to determine the length of this brief.

Dated: May 26, 2022

*/s/ Jacob B. Boyer*  
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