

IN THE SUPREME COURT OF PENNSYLVANIA

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.

No. 102 MM 2022

vs.

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

Respondents.

[PROPOSED] ORDER

AND NOW, on this ____ day of October, 2022, upon consideration of the Application by Non-Partisan Voter Engagement Organizations for Leave to Intervene and the briefs in support thereof, it is hereby ORDERED that:

1. The Non-Partisan Voter Engagement Organizations' Application for Leave to Intervene is GRANTED;

2. The League Of Women Voters of Pennsylvania, Philadelphians Organized to Witness, Empower and Rebuild (“POWER”), Common Cause Pennsylvania, Black Political Empowerment Project, The NAACP Pennsylvania State Conference, and Make The Road Pennsylvania (“proposed intervenors”) may

intervene in this action as co-Respondents and shall be added to the caption hereof; and

3. The proposed Answer and Memorandum of Law of Intervenor The League of Women Voters of Pennsylvania, POWER, Black Political Empowerment Project, Common Cause Pennsylvania, The NAACP Pennsylvania State Conference, And Make The Road Pennsylvania, attached as Exhibit 1 to the Application of Non-Partisan Voter Engagement Organizations for Leave to Intervene, shall be docketed as proposed intervenors' response to Petitioners' October 16, 2022 Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction.

BY THE COURT:

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Petitioners,

vs.

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

Respondents.

No. 102 MM 2022

**APPLICATION OF NON-PARTISAN VOTER ENGAGEMENT
ORGANIZATIONS FOR LEAVE TO INTERVENE AND
PROPOSED ANSWER AND MEMORANDUM OF LAW IN
RESPONSE TO PETITIONERS' APPLICATION FOR THE
EXERCISE OF KING'S BENCH POWER OR EXTRAORDINARY
JURISDICTION**

IN THE SUPREME COURT OF PENNSYLVANIA

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No. 102 MM 2022

**APPLICATION OF NON-PARTISAN VOTER ENGAGEMENT
ORGANIZATIONS FOR LEAVE TO INTERVENE**

The League of Women Voters of Pennsylvania, Philadelphians
Organized to Witness, Empower and Rebuild, Black Political
Empowerment Project, Common Cause Pennsylvania, the NAACP
Pennsylvania State Conference, and Make the Road Pennsylvania
submit this Application for Leave to Intervene as co-Respondents in the
above-captioned action pursuant to Pennsylvania Rule of Appellate

Procedure 1531(b) and Pennsylvania Rules of Civil Procedure 2327 through 2329.

1. This action could determine whether thousands of registered Pennsylvania voters will be disenfranchised based on a minor paperwork error that has no bearing on their qualification to vote, the validity of their registration, or the timeliness of their ballot return. Petitioners ask this Court to impose a last-minute rule change whereby voters' timely-received mail and absentee ballots would be discounted whenever a voter mistakenly fails to handwrite a date on the outer envelope containing the ballot. The relief Petitioners seek would unfairly burden Pennsylvania voters and deny potentially thousands their fundamental right to vote, and would undermine the efforts of good-government groups like Applicants, who work to educate and expand participation by eligible voters. Petitioners' proposed relief would also violate federal law, which makes it unlawful to deny the right to vote based on an "error or omission" on voting-related paperwork that is "not material in determining whether [a voter] is qualified under State law to vote in [the] election." 52 U.S.C. § 10101(a)(2)(B).

2. Applicants are nonpartisan organizations dedicated to promoting American democracy and the participation of Pennsylvania voters in our shared civic enterprise. Applicants’ ongoing 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. Applicants have an interest in this litigation that is not otherwise adequately represented. In contrast with elections officials or political parties, Applicants are uniquely positioned to represent the interests of Pennsylvania voters in ensuring that every valid vote—regardless of political-party alignment—is counted, to advocate for all voters’ rights under the federal civil rights and state election laws, and to address the burdens that Petitioners’ proposed relief would impose on Pennsylvania’s voters and its democracy. Intervention should be granted.

BACKGROUND

A. Pennsylvania Expands Mail Ballot Voting

3. Pennsylvania has long provided absentee-ballot options for voters who cannot attend a polling place on election day. *See* 25 P.S.

§ 3146.1–3146.9. In 2019, Pennsylvania enacted new mail-in 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 those provisions. *See McLinko v. Dep’t of State*, 279 A.3d 539 (Pa. 2022).

4. A voter seeking to vote by mail must complete an application and have their identity and qualifications verified. 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). As part of the application process, voters provide all the information necessary for county election boards to verify that they 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. 25 Pa. C.S. § 1301.

5. 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).¹ The county board's determinations on that score 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 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).

6. 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, by

¹ *See also* Pa. Dep't of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* at 2 (Sept. 11, 2020), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

mail or in person 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 log it in the Statewide Uniform Registry of Electors (“SURE”) system, the voter registration system used to generate poll books.²

7. Pennsylvania’s expansion of mail-ballot voting has been a boon for voter participation in the Commonwealth. For example, in 2020, 2.7 million Pennsylvanians voted by absentee or mail ballot.³

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

8. Voting in Pennsylvania’s 2022 general election is already underway. When mail ballots are ready, voters may go to their county

² 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).

³ 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 and in Applicants’ Answer and Memorandum of Law to encompass both absentee and mail ballots. The relevant rules governing the treatment of absentee and mail ballots are identical.

elections office, submit a mail ballot application, have it approved, receive their ballot, mark it and submit it, all at the same time. Most 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.

9. 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.

10. Petitioners rely 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).

11. Petitioners’ position is that even if an indisputably eligible and 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 simply because the voter forgot to add a superfluous handwritten date next to their signature on the Return Envelope. Pet. 3.

12. As discussed in more detail in Applicants' Answer and Memorandum of Law, the envelope-dating provision has been the subject of repeated litigation and guidance from the Department of State, virtually all of it suggesting or requiring that such mail ballots be counted even when a voter forgets to handwrite a date next to their signature on the Return Envelope.

13. In 2020, this Court, in the context of a fast-moving post-election suit, concluded that otherwise valid mail ballots contained in signed but undated Return Envelopes would be counted. *In re Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020). The Court's decision, the details of which are discussed in Applicants' Answer and Memorandum of Law, did not produce a single majority opinion.

14. Earlier this year, a unanimous panel of the Third Circuit concluded that it would violate federal law to disenfranchise voters based on the envelope-dating provision. *Migliori v. Cohen*, 36 F.4th 153, 162–64 (3d Cir. 2022), *vacated as moot*, 2022 WL 6571686 (U.S. Oct. 11, 2022); *accord* 52 U.S.C. § 10101(a)(2)(B).⁴ Thereafter, the Commonwealth Court twice held that such mail ballots must be counted as a matter of both state and federal law. *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *12–*29 (Pa. Commw. Ct. Aug. 19, 2022); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9–*15 (Pa. Commw. Ct. June 2, 2022).

15. In May 2022, following the Third Circuit’s decision in *Migliori*, the Acting Secretary of the Commonwealth issued guidance that counties should count timely-received mail ballots in Return Envelopes that were missing a handwritten envelope date. The guidance also reminded counties that untimely ballots, ballots with

⁴ The undersigned counsel represented the Plaintiff Voters at all stages of the *Migliori* litigation.

unsigned Return Envelopes, and ballots without a secrecy envelope should not be counted.⁵

16. The Secretary’s current guidance, issued after the two Commonwealth Court decisions, similarly advises 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.”⁶ The Secretary reaffirmed that guidance after the U.S. Supreme Court vacated as moot the Third Circuit’s *Migliori* decision.⁷

⁵ See Pa. Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* (May 24, 2022), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf>.

⁶ 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>.

⁷ 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>.

17. Petitioners ask this Court to exercise its King’s Bench jurisdiction to impose, in the midst of an election, a new, contrary rule that is inconsistent with the Secretary’s guidance, with the recent decisions of the Commonwealth Court, and with the decision of a unanimous panel of the Third Circuit Court of Appeals. The relief Petitioners propose would likely disenfranchise thousands of mail ballot voters and undermine the efforts of groups like Applicants, who seek to increase civic participation.

REASONS WHY INTERVENTION SHOULD BE GRANTED

18. Applicants are entitled to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327 and Pennsylvania Rule of Appellate Procedure 1531(b). “[A] grant of intervention is mandatory where the intervenor satisfies one of the four bases set forth in Rule No. 2327 unless there exists a basis for refusal under Rule No. 2329.” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. Ct. 2020).

19. Applicants here satisfy at least two of the four Rule 2327 requirements (1) because they could have joined as an original party in the action; and (2) because the determination in this action may affect

Applicants' legally enforceable interests, including the interests of their members and constituents in their fundamental right to vote. *See* Pa.R.C.P. No. 2327(3)–(4). The application to intervene must accordingly be granted unless “(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or (2) the interest of the petitioner is already adequately represented; or (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa.R.C.P. No. 2329.

20. Here, Applicants satisfy Rule 2327, and there is no basis to deny intervention under Rule 2329. Intervention should be granted.

A. Applicants and Their Members Are Directly Affected by This Action

21. The League of Women Voters of Pennsylvania (“the League”) is a nonpartisan statewide non-profit formed in August 1920. The League and its members are dedicated to helping the people of Pennsylvania exercise their right to vote, as protected by the law. The League has 2,500 members across Pennsylvania. Members of the

League are registered voters in Pennsylvania who regularly vote in state and federal elections, including by mail or absentee ballot.

22. The League's mission includes voter registration, education, and get-out-the-vote drives. The League conducts voter-registration drives, staffs nonpartisan voter-registration tables, educates incarcerated and formerly incarcerated individuals about their voting rights, and works with local high schools to register new 18-year-old voters. It also maintains an online database called VOTE411, a nonpartisan and free digital voter resource with information available in both English and Spanish, including voter guides, candidate information, polling rules and locations, and more.

23. The relief sought by Petitioners will disenfranchise potentially thousands of voters, thus directly affecting the League's members and interfering with the League's ability to carry out its mission of increasing voter turnout and participation. The relief sought here will also cause the League to divert resources towards educating voters about the last-minute changes to Pennsylvania election law that Petitioners seek, for example by requiring the League to investigate and educate voters about any available cure processes or even to advocate

for new processes to be developed in real time at the county level to ensure that voters who are eligible and registered and who submitted their ballots on time are not disenfranchised by a trivial paperwork mistake.

24. Philadelphians Organized to Witness, Empower and Rebuild (“POWER”) is a Pennsylvania nonprofit founded in 2011 to advance concrete policy changes to transform and strengthen communities. POWER is an organization of more than 100 congregations of various faith traditions, cultures and neighborhoods committed to racial and economic justice on a livable planet. One of its five priority areas is civic engagement and organizing communities so that the voices of all faiths, races and income levels are counted and have a say in government.

25. POWER engages directly with people who live in the communities which its member congregations serve. Its civic engagement efforts include voter education programs, voter registration drives, information about applying for mail ballots, completing them properly and returning them on time, and “Souls to the Polls” efforts to encourage congregants to vote. In the 2020 election cycle, POWER

contacted more than 700,000 voters and plans to reach a similar number in 2022.

26. In the three weeks leading up to this November's election, POWER has launched a three-week bus tour to promote a vision for building a community in Pennsylvania rooted in inclusivity, diversity and justice. The bus tour has numerous scheduled events including voter registration canvasses and voter education programs that provide information on mail voting.

27. If the court were to grant the relief requested in the Petition, POWER would have to divert its limited resources to re-contacting voters to make sure they dated their ballots. Moreover, last minute changes to the rules making it harder to vote has a suppressive effect on the communities POWER serves by erecting yet another roadblock to prevent them from voting.

28. Common Cause Pennsylvania ("Common Cause") is a non-profit political advocacy organization and a chapter of the national Common Cause organization. Common Cause has approximately 36,000 members and supporters in Pennsylvania. These members live

in all 67 counties of Pennsylvania, and many members are registered voters in Pennsylvania.

29. Common Cause seeks to increase the level of voter registration and voter participation in Pennsylvania elections, especially in communities that are historically underserved and whose populations have a low propensity for voting. Many of these communities are communities of color.

30. In preparation for the statewide election, Common Cause mobilizes hundreds of volunteers to help fellow Pennsylvanians navigate the voting process and cast their votes without obstruction, confusion, or intimidation. Common Cause PA leads the nonpartisan Election Protection volunteer program, which aims to ensure voters have access to the ballot box, provide voters with necessary voting information and answer their questions, quickly identify and correct any problems at polling places, and gather information to identify potential barriers to voting. If this Court newly decides to invalidate ballots with undated envelopes, Common Cause will have to divert resources to educating voters—midway through the current voting period—about the new and devastating consequences for failing to

comply with a requirement that was previously understood (including by a panel of federal judges) to be superfluous, and about any available cure processes to prevent the disenfranchisement of its members and other Pennsylvania voters.

31. Black Political Empowerment Project (“B-PEP”) is a non-profit, non-partisan organization that has worked since 1986 to ensure that the Pittsburgh African-American community votes in each and every single election. B-PEP has numerous supporters, of various ages and races, throughout the Pittsburgh Region, working with numerous community organizations to empower the Black and brown communities.

32. During every election cycle, B-PEP’s work includes voter registration drives, get-out-the-vote activities, education and outreach about the voting process, and election-protection work. B-PEP focuses these activities in predominantly Black neighborhoods in Allegheny County, with some efforts in Westmoreland and Washington Counties. In preparation for the November 8, 2022, election, B-PEP’s work has included educating its members and voters in predominantly Black communities about the importance of voting, and about how to vote,

either in person or by mail. B-PEP's members include many older voters, who are at particularly high risk of having their ballots disqualified for minor errors, such as omitting the date on the mail-in-ballot-return envelope. B-PEP has an interest in preventing the disenfranchisement of eligible voters who seek to have their votes counted.

33. The National Association for the Advancement of Colored People (NAACP) Pennsylvania State Conference is a non-profit, non-partisan organization that works to improve the political, educational, social, and economic status of African-Americans and other racial and ethnic minorities, to eliminate racial prejudice, to keep the public aware of the adverse effects of discrimination, and to take lawful action to secure the elimination of racial discrimination, among other objectives. The NAACP Pennsylvania State Conference has thousands of members who live and/or work in Pennsylvania, many of whom are registered to vote in Pennsylvania.

34. The NAACP Pennsylvania State Conference advocates for civil rights, including voting rights, for Black Americans, both nationally and in Pennsylvania. Every election cycle, the NAACP

engages in efforts to get out the vote, including by educating Black voters in Pennsylvania on different methods of voting, providing educational guides on local candidates to increase voter engagement, and focusing on strategies to eliminate Black voter suppression both nationally and in Pennsylvania.

35. The relief sought by Petitioners will disenfranchise potentially thousands of voters, directly affecting the NAACP Pennsylvania State Conference's members and interfering with its ability to carry out its mission of increasing voter turnout and participation. The relief sought here will also cause the NAACP Pennsylvania State Conference to divert resources towards educating voters about the last-minute changes to Pennsylvania election law that petitioners seek, for example by requiring the NAACP Pennsylvania State Conference to investigate and educate voters about any available cure processes or to advocate that new processes be developed in real time at the county level to ensure that voters who are eligible and registered and who submitted their ballots on time are not disenfranchised by a trivial paperwork mistake.

36. Make the Road Pennsylvania (“Make the Road PA”) is a not-for-profit, member-led organization formed in 2014 that builds the power of the working-class in Latino and other communities to achieve dignity and justice through organizing, policy innovation, and education services. Make the Road PA’s more than 10,000 members are primarily working-class residents of Pennsylvania, many in underserved communities. Many members of Make the Road PA are registered voters in Pennsylvania and are at risk of disenfranchisement if Petitioners’ requested relief is granted.

37. Make the Road PA’s work includes voter protection, voter advocacy and voter education on, for example, how to register to vote, how to apply for mail-in/absentee ballots, how to return mail-in/absentee ballots, and where to vote. Make the Road PA has run active programs to register voters in historically underserved communities of color, especially in Berks, Bucks, Lehigh, Northampton and Philadelphia Counties.

38. The relief sought by Petitioners will disenfranchise potentially thousands of voters, thus directly affecting Make the Road’s members and interfering with Make the Road’s ability to carry out its

mission of increasing voter turnout and participation. Indeed, because Make the Road's efforts are focused on communities where some voters are not native English speakers, the risk that some voters may make a minor paperwork mistake in filling out various forms related to mail or absentee ballot voting is heightened. The relief sought here will also cause Make the Road to divert resources towards educating voters about the last-minute changes to Pennsylvania election law that petitioners seek, for example by requiring Make the Road to investigate and educate voters about any available cure processes or to advocate that new processes be developed in real time at the county level to ensure that voters who are eligible and registered and who submitted their ballots on time are not disenfranchised by a trivial paperwork mistake.

B. Applicants May Intervene Under Rule 2327(3)

39. Applicants qualify for intervention under Rule 2327(3). In particular, Applicants and their members have an interest in avoiding disenfranchisement, and thus could have filed their own lawsuit to assert those interests.

40. Indeed, state and federal courts have repeatedly held that individual voters have standing to sue over rules that affect the right to vote and voters’ ability to exercise that right. *See, e.g., Nat’l Election Def. Coal. v. Boockvar*, 266 A.3d 76, 101 (Pa. Commw. Ct. 2021) (plaintiffs’ “interest in ensuring that their votes ... are recorded and counted in an accurate, secure, and secret manner” supported standing); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *6 (Pa. Commw. Ct. Jan. 17, 2014) (burden of “obtaining a compliant photo ID” was sufficient to create standing); *accord Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 180 (M.D.N.C. 2020).

41. Organizations, like Applicants, whose purpose is to protect and expand voting rights, also have standing to contest voting rules. Especially where, as here, it would be impractical and unnecessary to join some or all of an organization’s individual members, organizations like Applicants may stand for their members in court. *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–59 (1958). For example,

courts have repeatedly held that the League “has standing to sue on behalf of its members or on its own behalf, particularly in lawsuits brought to challenge state laws affecting voters.” *Applewhite*, 2014 WL 184988, at *7 (citing *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008)); *see also, e.g., Thorsted v. Gregoire*, 841 F. Supp. 1068, 1074 (W.D. Wash. 1994) (“The League of Women Voters of Washington has representational standing to sue for its voter-members.”); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 261 (1994) (“the League of Women Voters of Arkansas ... has standing to participate on behalf of its voter-members”).

42. Applicants themselves will also suffer an actual injury if the Petitioners’ requested relief is granted, namely, they will be forced to expend resources ensuring that eligible voters’ timely delivered mail ballots are counted. A last-minute alteration in the election rules, which would result in some voters being disenfranchised for a minor paperwork error, would require Applicants to divert resources and expend additional sums to educate their members and constituents about this change, and to help affected persons cure what would otherwise be an irrelevant mistake so that they will not forever lose

their right to vote in the 2022 election. Applicants accordingly have a direct interest at stake in these proceedings. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982); *Pennsylvania Prison Society v. Cortes*, 622 F.3d 215, 228 (3d Cir. 2010). Courts have routinely “upheld the standing of voter-advocacy organizations that challenged election laws based on similar drains on their resources.” *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019).⁸

43. The voting rights of Applicants’ members, and the potential injury Applicants themselves will suffer if Petitioners’ request is granted, will be addressed in this litigation. Because Applicants could

⁸ See also, e.g., *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (“Because their allegations indicate that the burden would cause them to change significantly their expenditures and operation and a favorable decision would redress that injury, [the Plaintiff] has organizational standing here as well.”); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (“Because . . . those new obstacles unquestionably make it more difficult for the Leagues to accomplish their primary mission of registering voters, they provide injury for purposes both of standing and irreparable harm.”); *Democracy N. Carolina*, 476 F. Supp. 3d at 183 (“Because LWV has alleged its mission to register voters will be at least partly frustrated by the 25-day Deadline, and it will have to divert resources to address this frustrated mission, the court finds Organizational Plaintiff LWV has sufficiently alleged an organizational injury for the purposes of standing.”).

have filed their own lawsuit to assert either (or both) interests, Applicants may intervene on either basis.

C. Applicants May Intervene Under Rule 2327(4)

44. Applicants also satisfy the requirements of Rule 2327(4), which provides for intervention where determination of the action “may affect any legally enforceable interest” of the applicant, “whether or not such person may be bound by a judgment in the action.” Pa.R.C.P. 2327(4).

45. Petitioners’ requested relief would disenfranchise Pennsylvania voters, including Applicants’ members and others served by them, for minor paperwork errors that do not bear on their eligibility to vote, thus affecting their “legally enforceable” (indeed, fundamental) constitutional right to vote. Pa. Const. art. I, § 5; *see also, e.g., Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012) (“[T]he right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one.”). Each organization seeking intervention has a specific and significant interest in preventing Pennsylvanians—including their members and those they serve—from being

disenfranchised and having their fundamental rights violated. That significant interest is unique to Applicants and their members and exceeds the general interests shared by the community or the public in the outcome of this litigation.

46. Moreover, as set forth, *supra*, each Applicant organization will have to devote substantial additional resources to ensuring their members and those they serve are fully aware of the applicable mail ballot requirements against the background of recent developments in case law and Department of State guidance. Courts have routinely allowed intervention based on similar interests in the subject matter of the litigation. *See, e.g., Penn. Med Soc’y v. Dep’t of Pub. Welfare*, 39 A.2d 267, 279 (Pa. 2012) (holding that associations have a direct interest in litigation and thus standing where their members would suffer immediate harm or their interest in the outcome of the litigation clearly surpassed the common interest of the general citizenry).

D. The Narrow Exceptions of Rule 2329 Do Not Apply

47. When a party qualifies under Rule 2327, intervention “is mandatory” unless the application falls within certain narrowly

prescribed circumstances under Rule 2329. *Allegheny Reprod. Health Ctr.*, 225 A.3d at 908.

48. None of those narrow circumstances applies here. First, Rule 2329(1) does not apply because Applicants seek to intervene as co-respondents and do not seek to inject claims that would not be subordinate to the claims asserted by Petitioners. This application does not seek to expand or change the nature of the pending action, and Applicants seek no additional relief from any party beyond the ability to defend their interests against the Petitioners' misguided attempt to disenfranchise Pennsylvania voters. In other words, Applicants properly seek to intervene in this suit as it is, "tak[ing] the suit as [they] find it." *E.g., Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 366 Pa. 149, 154 (1950) (citing Pa.R.C.P. 2329(1)).

49. Second, the existing parties in the litigation do not adequately represent Applicants' interests, Pa.R.C.P. No. 2329(2), because those interests "may diverge" from those of the Petitioners and Respondents. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 314 (Pa. Commw. Ct. 1999).

50. Respondents are the Acting Secretary of the Commonwealth, represented by the Attorney General, and 67 county boards of elections charged with administering the upcoming General Election. Applicants are all organizations directly representing voters, who are differently and very directly impacted by the potential disenfranchisement and violation of their fundamental right to vote. Since the existing parties do not “unequivocally share [Applicants’] interest,” the application to intervene should be granted. *Id.*; see also *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare*, 701 F.3d 938, 958 (3d Cir. 2012) (no adequate representation where agency’s views are colored by public welfare rather than the more personal view of a proposed intervenor); *D.G.A. v. Dep’t of Human Servs.*, No. 1059 C.D. 2018 (Pa. Commw. Jan. 21, 2020) (reversing denial of petition to intervene in administrative proceeding because “the personal interests of [proposed intervenors] in their individual welfare could diverge from the more general interest of [a governmental agency] in public welfare”).

51. Especially if this Court is to exercise its King’s Bench jurisdiction to take up this case, voters and non-partisan civil society

organizations who are dedicated to the advancement of democracy must be included to directly represent their distinct interests.

52. Finally, this Application is timely. *See* Pa.R.C.P. No. 2329(3). Petitioners initiated this litigation just two days ago, on October 17, 2022, and this Application is filed before the Court-ordered October 19, 2022, deadline for responses to the petition. Applicants will adhere to any agreed schedule with respect to briefing and a hearing. Thus, Rule 2329(3) does not apply because the requested intervention will not delay, embarrass or prejudice the trial or the adjudication of the parties' respective rights, and Rule 2329(3) does not apply.

53. A copy of the Answer and Memorandum of Law that Applicants intend to file if this Application is granted is attached hereto as Exhibit 1.

WHEREFORE, Applicants request that the Court grant their Application for Leave to Intervene.

Dated: October 19, 2022

Respectfully submitted,



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Counsel for Proposed Intervenors
**Pro hac vice forthcoming*

VERIFICATION of LEAGUE OF WOMEN VOTERS of PENNSYLVANIA

I hereby verify that the statements made in the foregoing Application to Intervene that are related to the League of Women Voters of Pennsylvania are based on my personal knowledge and are true and correct to the best of my own knowledge, information and belief. I understand that false statements made herein are subject to the penalties of perjury under 18 Pa. C.S. §4904.

Susan Gobreski
Signature

for the League of Women Voters

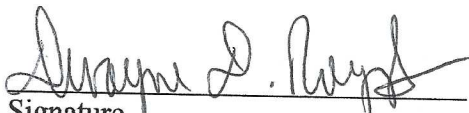
October 18th 2022
Name


Dated: October 18, 2022 *sg*

Susan Gobreski

**VERIFICATION of PHILADELPHIANS ORGANIZED
TO WITNESS EMPOWER AND REBUILD ("POWER")**

I HEREBY verify that the statements made in the foregoing Application to Intervene that are related to "POWER" are based on my personal knowledge and are true and correct to the best of my own knowledge, information and belief. I understand that false statements made herein are subject to the penalties of perjury under 18 Pa. C.S. §4904.


Signature


Name

Dated: October 18, 2022

VERIFICATION of COMMON CAUSE OF PENNSYLVANIA

I hereby verify that the statements made in the foregoing Application to Intervene that are related to Common Cause of Pennsylvania are based on my personal knowledge and are true and correct to the best of my own knowledge, information and belief. I understand that false statements made herein are subject to the penalties of perjury under 18 Pa. C.S. §4904.

Khalif Ali
Signature

Khalif Ali
Name

Dated: October 18, 2022

VERIFICATION of BLACK POLITICAL EMPOWERMENT PROJECT (“B-PEP”)

I HEREBY verify that the statements made in the foregoing Application to Intervene that are related to B-PEP are based on my personal knowledge and are true and correct to the best of my own knowledge, information and belief. I understand that false statements made herein are subject to the penalties of perjury under 18 Pa. C.S. §4904.

/s/ *Tim Stevens* _____
Signature

Tim Stevens _____
Name

Dated: October 18, 2021

VERIFICATION of MAKE THE ROAD PENNSYLVANIA (“MTR”)

I hereby verify that the statements made in the foregoing Application to Intervene that are related to Make the Road Pennsylvania are based on my personal knowledge and are true and correct to the best of my own knowledge, information and belief. I understand that false statements made herein are subject to the penalties of perjury under 18 Pa. C.S. §4904.

A handwritten signature in black ink, appearing to be 'DR', written over a horizontal line.

Signature

Diana Robinson, Civic Engagement Director, Make the Road PA
Name

Dated: October 18, 2021

CONFIDENTIAL DOCUMENTS CERTIFICATION

I certify 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.

/s/ Witold Walczak
Witold Walczak

Exhibit 1

IN THE SUPREME COURT OF PENNSYLVANIA

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,

vs.

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

Respondents.

No. 102 MM 2022

**ANSWER AND MEMORANDUM OF LAW OF INTERVENORS
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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INTRODUCTION

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 refusing to count the mail ballots of Pennsylvania voters because they had neglected to hand-write a date that served no purpose next to their signature on the outer mail-ballot envelope would violate federal law. *See Migliori v. Cohen*, 36 F.4th 153 (3rd Cir. 2022), *vacated as moot*, 2022 WL 6571686 (U.S. Oct. 11, 2022).¹ That decision was later vacated as moot by the Supreme Court, but in a non-merits order that did not question the Third Circuit’s analysis. To the contrary, *Migliori* was rendered moot because the Supreme Court had earlier *refused* to stay the Third Circuit’s decision, thus allowing mail ballots without a handwritten date on the outer envelopes to be counted in a 2021 Lehigh County election. *See Ritter v. Migliori*, 142 S. Ct. 1824 (2022) (mem.).

Now, Petitioners ask this Court to order every county in the Commonwealth to do precisely what the unanimous *Migliori* panel

¹ The undersigned counsel represented the five plaintiff voters at all stages of the *Migliori* litigation.

ruled to be illegal under the federal law. Moreover, Petitioners ask the Court to do so by intervening in the middle of an ongoing election season in which thousands of mail ballots have already been returned—an intervention that will potentially disenfranchise tens of thousands of Pennsylvania voters.

The Court should decline Petitioners’ invitation to needlessly sow chaos and disenfranchise thousands of voters, an outcome that is not required by state law (and certainly not by the Constitution’s Elections Clause). Indeed, as Intervenor’s emphasize here, Petitioners’ requested relief is affirmatively prohibited by federal law. Registered, qualified voters who timely submit their mail ballots should have their votes counted, not thrown out because of a paperwork error that has no effect on the timeliness of their ballots or their eligibility to vote. This Court should so hold as a matter of state law and avoid an irreconcilable conflict with the Civil Rights Act’s Materiality Provision, 52 U.S.C. § 10101(a)(2)(B).

Moreover, even if the merits resolution of the undated-mail-ballot-envelope issue were unclear, the right result at this juncture, and especially in the context of expedited King’s Bench proceedings, is to do

justice for Pennsylvania voters. *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 Absentee*, 242 A.3d at 1089, (Wecht, J.). As Petitioners themselves emphasize, the systemic growing pains identified two years ago have not subsided; rather, there remains a “lack of clarity and transparency” in the law, Pet. 4., in no small part because of Petitioners’ persistent efforts to push back against the multiple state and federal court decisions indicating that ballots in return envelopes without a handwritten date should be counted.

It would be contrary to justice, and thus contrary to this Court’s exercise of King’s Bench jurisdiction, to impose a new, more restrictive rule on Pennsylvania voters, who are now already 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 and thus with the exercise of King’s Bench jurisdiction. Petitioners’ alternative request is not.

BACKGROUND

Intervenors incorporate here by reference the “Background” section of their Application for Leave to Intervene, which details the

underlying statutory scheme for Pennsylvania’s mail-ballot voting, as well as any defined terms set forth therein. *See App. for Lv. to Intervene of League of Women Voters, et al.* at ¶¶ 3–17.

As noted there, the envelope-dating provision at issue here has been the subject of multiple lawsuits, in both federal and Pennsylvania courts.

A. 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 of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020). 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 sufficiently concerned that he urged the Pennsylvania General Assembly to review the Election Code with “[the Materiality Provision] in mind.” *Id.*

B. Migliori

The envelope-dating requirement again became an issue in the November 2021 county elections. In Lehigh County, 257 timely-received mail ballots (*i.e.*, 1% of all mail ballots) were initially excluded based on mail ballot voters’ inadvertent failure to handwrite a date on the Return Envelopes. 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, at 168–169 (¶¶ 21, 25).

Consistent with guidance from the Secretary of the Commonwealth,² the Board *did* count ballots where the Return Envelopes had plainly wrong dates on them—where, for example, a voter wrote their own birthdate instead of the date they signed the envelope. *Id.*, 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) (stating that voters may fill out and return their mail ballot at “any time” after receiving it).

The Lehigh County 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

² *See, e.g.*, Joint App’x, *Migliori v. Cohen*, No. 22-1499 (3d Cir.), Dkt.33-2, at 192.

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.” Joint App’x, *Migliori v. Cohen*, No. 22-1499 (3d Cir.), Dkt.33-2, at 169–170 (¶¶ 30–34); *id.* at 255–258. However, a candidate for County Court of Common Pleas, who was then winning the election by less than 257 votes, challenged the Board of Elections’ decision in the Lehigh County Court of Common Pleas, eventually obtaining a decision in his favor from a divided panel of the Commonwealth Court—a decision which briefly addressed, but did not pass on, the federal law 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).

A bipartisan group of voters then brought suit in federal court. After a federal district judge dismissed their case on procedural grounds, a unanimous three-judge panel reversed, upholding plaintiffs’ right to have their votes counted under federal law. *See Migliori v. Cohen*, 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 on the basis of that omission violated federal law, namely, the Materiality Provision. *Id.*, at 162–63; *accord* 52 U.S.C. § 10101(a)(2)(B). In a concurrence, Judge Matey agreed 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 arguments that are virtually identical to those Petitioners make in this case regarding the Materiality Provision. For example, Ritter suggested that the Third Circuit’s unanimous decision implicated various non-paperwork election rules beyond the requirement to handwrite a date on the Pennsylvania mail-ballot Return Envelope. Ritter Stay Appl., No. 22-30 (U.S.), at 9–11; *compare* Pet. 20–21. He also argued that the return-envelope-dating requirement was a “ballot

validity” rule rather than a mere external paperwork requirement falling within the ambit of the Materiality Provision. *Ritter Stay Appl.*, No. 22-30 (U.S.), at 9, 12–13; *compare* Pet. 20–21.

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 out 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 on the merits. *See Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022). The vacatur means *Migliori* is no longer *binding* precedent, but the well-reasoned and supported opinions remain persuasive authority.³

³ *See Polychrome Int’l Corp. v. Krigger*, 5 F.3d 1522, 1534 (3d Cir. 1993) (prior decision that was vacated as moot was nevertheless “persuasive authority”); *see also, e.g., Barrett v. Harrington*, 130 F.3d 246, 258 n.18 (6th Cir. 1997) (vacatur of out of circuit authority for

C. 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 court held that, as a matter of both state *and* federal law, the mail ballots at issue would be counted. *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9–*15 (Pa. Commw. Ct. June 2, 2022). The court noted, among other things, the development of new facts since the 2020 *In re Canvass* decision, 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, several counties announced that they would not count timely-submitted mail ballots from registered, eligible voters if the Return Envelope was signed, but not dated. The

potential mootness was “irrelevant” in assessing decision’s persuasive force).

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, under *both* state and federal law. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *12–*29 (Pa. Commw. Ct. Aug. 19, 2022) (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 to count otherwise valid and timely-received mail ballots even where voters omitted a handwritten date on the Return Envelope. 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.

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 issue on which Petitioners ask this Court to exercise its King’s Bench jurisdiction is whether voters may be disenfranchised due to a meaningless paperwork mistake on the form declaration that is 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 who unquestionably submits their ballot on time, may nonetheless be denied the right to have their ballot counted based solely on the failure to write some date—any 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, which 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 County*, 2022 WL 4100998, at *25–*29; *McCormick*, 2022 WL 2900112, at *9–*13. A majority of this Court suggested the same 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. 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 immediate aim of addressing disenfranchisement

in the Jim Crow South, Congress used race-neutral terms to more

broadly provide for a prophylactic against unfair disenfranchisement,

the better to protect the fundamental right to vote for all. *See*

Browning, 522 F.3d 1153, 1173 (explaining that, “in combating specific evils,” Congress may nevertheless “choose a broader remedy”).

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:

- (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
the handwritten date on the envelope has no bearing on
whether a voter is qualified to vote or has voted timely).

52 U.S.C. § 10101(a)(2)(B). Petitioners are asking this Court to order a
violation of federal law. The Court should desist.

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 amount to
denying their right to vote. Pet. 20–21. 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 mail ballot itself was “filled out correctly.” Pet. 20 (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), *id.* § 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 error on some required but immaterial paperwork or 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).

Nor does the Materiality Provision implicate various other election rules that have nothing to do with paperwork, as in the inapposite cases Petitioner cites, Pet. 20–21. Those cases involve things

like party registration or absentee ballot deadlines, the availability of fusion voting, in-precinct voting requirements, and mail-ballot-collection practices.⁴ But the Materiality Provision does not apply to rules concerning when, where or how to vote, or to numerous other rules concerning the manner of voting itself, by mail or otherwise. It *does* apply to the type of paperwork errors that Petitioners now rely on to ask this Court to disenfranchise thousands eligible Pennsylvania voters.

Second, Petitioners suggest that the Materiality Provision does not apply because “[t]he date requirement has nothing to do with whether the individual satisfies the four qualifications to vote in Pennsylvania.” Pet. 21–22. Petitioners have that exactly backwards: The Materiality Provision prohibits a voter from being disenfranchised for an error or omission that is “*not* material in determining whether

⁴ See Pet. 20–21 (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)).

such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B) (emphasis added). The fact that the envelope date paperwork requirement concededly has “nothing to do” with a voter’s qualifications is precisely why an error or omission in completing that requirement cannot be used to invalidate the voter’s ballot.

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. Pet. 22. That argument is inconsistent with state law, which does not treat the Return Envelope as equivalent to the ballot itself. 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 v. Crittenden*, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (requirement to write birth year on mail-ballot envelope likely immaterial); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4

(W.D. Ark. Nov. 15, 2021) (duplicative information requirement on mail-ballot envelope potentially immaterial).⁵

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 this might be the case, 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 in multiple courts, and this Court’s concerns from 2020 now look prescient.

Litigation over the past year has also demonstrated that some of the potential rationales for the envelope-dating rule that were previously suggested in *In re Canvass*, such as preventing supposed

⁵ The fact that other, different paperwork requirements have been upheld in Materiality Provision cases because they *were* material is irrelevant. For example, *Vote.Org v. Callanen*, 39 F.4th 297, 305–06 (5th Cir. 2022), upheld a wet-signature requirement that applied to one method of registering to vote. *See* Pet. 21 (citing *Callanen*); *see also Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006).

“back-dating” or “ensuring the elector completed the ballot within the proper time frame,” are not actually at play here. *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).⁶

⁶ Petitioners suggest that the date requirement guards against fraud, pointing to a supposed case in which the date served as evidence that a voter had cast a mail ballot on behalf of her deceased mother. Pet. 15. But votes cast by persons who die before Election Day *do not count*, 25 P.S. § 3146.8(d), and thus there was never any chance that the deceased mother’s ballot would be counted. Meanwhile, the reason the daughter was ultimately charged with a crime appears to be that she admitted to forging her mother’s signature. *See* Pet. Ex. F. And in any case, it is irrelevant *for purposes of federal law* that a handwritten envelope date (if accurate) might theoretically be used for some purpose

And litigation over the past year has also clarified that it is Pennsylvania voters who stand to lose if this Court imposes Petitioners' requested relief. The Plaintiffs in the *Migliori* case were senior citizens who had been voting in Lehigh County for decades. Joint App'x, *Migliori v. Cohen*, No. 22-1499 (3d Cir.), Dkts.33-1 & 33-2, at 62–77, 172–175. They were Republicans and Democrats alike; regular people—a foundry blaster, a teacher, a business owner—who vote in most every election. *Id.* They filled out their mail ballots and sent them in on time, signed the declaration on the Return Envelope, but made a mistake on the Return Envelope paperwork and left off a handwritten date. The Third Circuit in *Migliori* did the right thing to count their votes, consistent with federal law. This Court should do no less.⁷

other than assessing voter qualifications, such as providing evidence in a 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.

⁷ The stories of the voter plaintiffs in *Migliori* highlight the importance of and need for a factual record to consider the issues here. Accordingly, if this Court grants King's Bench jurisdiction, it should convene a hearing to develop a factual record on which to decide the question presented.

B. Petitioners’ Elections Clause Arguments Are Misplaced

In seeking the exercise of King’s Bench jurisdiction, 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 of the Elections Clause in this case. No court has ever accepted the theory that Petitioners posit, namely that “state courts wield no authority to regulate federal elections” even when they are merely interpreting their own state law and constitutions. Pet. 18–19; *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”).⁸ Indeed, while the Supreme Court granted *certiorari* in *Moore*, a redistricting case involving the so-called

⁸ Available at https://www.supremecourt.gov/DocketPDF/21/21-1271/237155/20220906161712850_Moore%20v%20Harper%20Amicus%20Sept%206_FINAL_Filed.pdf

“independent state legislature theory,” it also recently *denied* a petition for certiorari premised on similar arguments in another redistricting case arising out of 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.

But even if Petitioners’ novel theory were the law, 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). Here, as discussed above, Congress *has* legislated on this very subject by passing the Materiality Provision and prohibiting voters from being disenfranchised for immaterial paperwork errors or omissions, like the handwritten envelope date at issue here. If anything, the Elections Clause emphasizes the need for the Court to adhere to the Materiality Provision in resolving the instant petition.

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: The Supreme Court of Pennsylvania’s King’s Bench Powers Rightfully Crown It as King of the Commonwealth’s Judiciary*, 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) (granting King’s Bench and ordering writs of election). But the interests of justice cannot be served by disenfranchising Pennsylvanians.

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. In the years 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.). In the meantime, multiple courts have considered 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 showed, 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 are asking this Court to upend an emerging consensus that both federal and state law require that mail ballots in undated return envelopes should be counted. But even if one views the still-unsettled state of the law more pessimistically, as Petitioners argue, *see* Pet. 4, 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 King's Bench jurisdiction to disenfranchise thousands of Pennsylvania voters because they made a minor and inconsequential paperwork error.

CONCLUSION

The Court should deny King's Bench jurisdiction. If the Court grants review, it should fashion some process for building a factual record on which to resolve questions about what, if any, purpose the envelope date actually serves in administering elections. Regardless of the path, this Court should hold that mail ballots without a

handwritten date on the Return Envelope must be counted as a matter of state and federal law.

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Respectfully submitted,



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