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IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, S. Michael Streib, Republican National Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania,

Petitioners,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, et. al.,

Respondents

AMICI CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND PRESIDENTIAL COALITION BRIEF IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and *amici* in important cases in which these fundamental principles are at stake (*See, e.g.*, Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Petitioner, *Percoco v. United States*, No. 21-1158 (U.S. Sept. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Petitioners, *Moore, et al. v. Harper, et al*, No. 21-1271 (U.S. Sept. 6, 2022); Brief of Citizens United and Citizens United Foundation as *Amici Curiae* in Support of Respondent, *Sec. and Exch. Comm'n v. Cochran*, No. 21-1239 (U.S. Jul. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Appellants and Petitioners, *Merrill, et al. v. Milligan, et al.*, Nos. 21-1086, 21-1087, 2022 WL 1432037 (U.S. May 2, 2022)).

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research, and informing and educating the public on the proper

[1] No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

The Presidential Coalition, LLC is an IRC section 527 political organization founded to educate the American public on the value of having principled leadership at all levels of government.

SUMMARY OF THE ARGUMENT

This case is about who gets to make the rules for elections in the Commonwealth of Pennsylvania. Under the Pennsylvania Constitution and the Constitution of the United States, it is the legislature that properly has authority to make and pass laws governing the conduct of elections. As this Court has recognized, the legislature has spoken clearly on the issue of undated ballots. But the Secretary of State, acting on her own, has sought to usurp the authority of the legislature by directly countermanding its clear legal directive. This cannot be correct.

Under the Pennsylvania Constitution and the Constitution of the United States, the legislative power of the Commonwealth and the power to make rules governing the conduct of elections rests with the General Assembly. The General Assembly expressly mandated that mail-in and absentee ballots must include a written date. A majority of this Court recognized this clear, unambiguous legislative directive as recently as 2020. Nothing in the law has changed since then. The people of Pennsylvania deserve to have the rules of elections set by their elected representatives, and they deserve to have those rules applied fairly and consistently. The rules should not change every time a new Secretary of State disagrees with the law.

Principles of *stare decisis* and the need for consistency in the law counsel against reversing precedent unless there are very strong reasons. Such reasons are not present in this case. The provision at issue in this case is statutory, not constitutional. If the people of the

Commonwealth and their elected representatives no longer believe it is necessary or appropriate, they have the ability to change it through duly enacted legislation. They have not done so.

Accordingly, this Court should exercise its King's Bench power or extraordinary jurisdiction, declare that absentee and mail-in ballots that are undated or incorrectly dated cannot be included in the pre-canvass or canvass under the Pennsylvania Election Code, order county boards of elections to segregate all absentee or mail-in ballots that do not comply with Pennsylvania's date requirement, and direct the Acting Secretary to withdraw any and all guidance that purports to direct, require, or encourage county boards of elections to include undated or incorrectly dated absentee or mail-in ballots in the pre-canvass or canvass.

ARGUMENT

I. The Legislature, Not the Secretary of State, Sets the Laws for the Conduct of Elections

Under both the Pennsylvania Constitution and the Constitution of the United States, the power to make rules governing the conduct of elections has been vested in the General Assembly, not the Secretary of State.

Under the Pennsylvania Constitution, "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Art. II, § 1. In addition, Article VII, concerning the conduct of elections, repeatedly references the power of the General Assembly to make rules and regulations concerning voter registration and voting. For example, article VII, § 1 provides "[e]very citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as *the General Assembly* may enact." (emphasis added). Article VII, § 14 provides "*[t]he Legislature shall*, by general law, provide a manner in which, and the time and place at which, qualified electors who

may, on the occurrence of any election, be absent from the municipality of their residence, . . . may vote, and for the return and canvass of their votes in the election district in which they respectively reside." (emphasis added). It is the General Assembly, not the Secretary of State, that sets the laws regarding voting.

The United States Constitution is even more explicit, providing that the time, place, and manner of federal elections "*shall* be prescribed in each state *by the legislature*" of the states. U.S. Const. art I, § 4, cl. 1 (emphasis added). This "language specifies a particular organ of a state government, and [the Court] must take that language seriously." *Moore, v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay). Thus, "[f]or more than a century, [the] Court has recognized that the Constitution 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power' to regulate federal elections." *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from the denial of certiorari) (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)). This is because the ability to regulate elections for federal office is a power that was delegated to the States under the Constitution; it is not a power reserved to the States to be exercised in the any manner they see fit. *See, e.g., Cook v. Gralike*, 531 U.S. 510 (2001); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

The result is that "[t]he Constitution provides that state legislatures – not federal judges, not state judges, not state governors, not other state officials – bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 29 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) (citations omitted).

The General Assembly, acting through duly enacted laws, has the exclusive authority to set the rules for elections in Pennsylvania. When it does so, the Secretary of State may not countermand its clear enactments.

II. The General Assembly Has Clearly Determined that Mail-In Ballot Dates are Mandatory

"When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b) ("Statutory Construction Act" or "SCA"). "When statutory language is clear and unambiguous, courts must give effect to the words of the statute and must not disregard the text to implement its objective." *Crown Castle NG E. LLC v. Pennsylvania Pub. Util. Comm'n*, 234 A.3d 665, 674 (Pa. 2020). Accordingly, "an agency's interpretation of a clear and unambiguous statute is not entitled to deference." *Id*. at 667-68. This is consistent with the ancient maxim, going back to the Digest of Justinian, "*A verbis legis non est recedendum* ('Do not depart from the words of the law')." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 56 (2012) (quoting Digest 32.69 pr. (Marcellus)).

The words of the statutes at issue in this case are clear. Section 1346.6 provides, in relevant part, "The elector *shall* then fill out, date and sign the declaration printed on such envelope." 25 Pa. Stat. § 3146.6(a) (emphasis added). Similarly, section 3150.16 provides "[t]he elector *shall* then fill out, date and sign the declaration printed on such envelope." 25 Pa. Stat. § 3150.16(a) (emphasis added).

"Mandatory words impose a duty; permissive words grant discretion. The text of this canon is entirely clear, and its contents so obvious as to hardly be worth the saying." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012). In general, "[t]he word 'shall' carries an imperative or mandatory meaning." *In re Canvass of*

Absentee Ballots of Nov. 4, 2003 Gen. Election, Appeal of Pierce, 843 A.2d 1223, 1231 (Pa. 2004) ("*Appeal of Pierce*") (citing to *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) ("By definition, 'shall' is mandatory."); *Shall*, *Black's Law Dictionary* 1375 (6th ed. 1990) ("In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always or which must be given compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."). Thus, "[a]lthough some contexts may leave the precise meaning of the word "shall" in doubt . . . this Court has repeatedly recognized the unambiguous meaning of the word in most contexts." *Appeal of Pierce*, 843 A.2d at 1231-32 (citing *Oberneder*, *supra*; *Zane v. Friends Hospital*, 836 A.2d 25, 32 (Pa. 2003) ("the verbiage that the documents 'shall be kept confidential' is plainly not discretionary but mandatory in this context"); *Cranberry Park Associates v. Cranberry Township Zoning Hearing Board*, 751 A.2d 165, 167 (Pa. 2000) ("Here, the word 'shall' denotes a mandatory, not permissive instruction."); *Coretsky v. Board of Commissioners of Butler Township*, 555 A.2d 72, 74 (Pa. 1989) ("By definition, 'shall' is mandatory."). Thus, "shall means *shall*." *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1084 (Pa. 2020) ("*November 3, 2020, General Election*") (emphasis in the original) (Wecht, J., concurring in part and dissenting in part).

a. Judicially Constructed Rules of Interpretation Cannot Supersede the Plain Language of a Statute

In response, some have turned to the principle that "[e]lection laws will be strictly enforced to prevent fraud, but ordinarily will be construed liberally in favor of the right to vote. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor" to conclude that "shall" is really a direction or polite suggestion, not a

mandate. *See, e.g.*, *November 3, 2020 General Election*, 241 A.3d at 1062 (opinion announcing the judgment of the court ("OATJC") (quoting *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954))). There are two central issues with this approach: First, as a rule of statutory construction, it was statutorily superseded by the subsequently passed SCA, which reaffirmed the primacy of legislative text; and second, to the limited extent that this approach may be said to survive the SCA, it requires a threshold finding of ambiguity and the mandatory language of the statute at issue is unambiguous..

The principle that election laws will "ordinarily be construed liberally in favor of the right to vote" is a judicially constructed rule of statutory interpretation that originated before the adoption of the SCA. *See* 1 Pa. Stat. C.S. 1921(b). To wit, *Appeal of James* and *Appeal of Weiskerger*, 290 A.2d 108, 109 (Pa. 1972), which cited to *Appeal of James* in examining the purpose of a statutory provision concerning the use of blue or black ink to mark ballots, were both decided prior to the adoption of the SCA.

The SCA partially superseded prior judicially constructed rules of statutory interpretation. Under the SCA, such judicially constructed rules only apply when the words of a statute are not "clear" and "free from all ambiguity;" the "letter" of the law cannot "be disregarded under the pretext of pursuing its spirit." 1 Pa. Stat. C.S. 1921(b).

The impact of this change on the interpretation of the word "shall" is evident in this Court's opinion in *Oberneder*, where this Court stated: "Appellants rely upon *Francis v. Corleto*, 418 Pa. 417, 211 A.2d 503 (1965), for the proposition that 'shall' may be merely directory depending upon the legislature's intent. *Francis*, however, was decided before the enactment of the Statutory Construction Act, which dictates that legislative intent is considered only when a statute is ambiguous." 696 A.2d at 150 n. 2 (citations omitted). Whereas before the SCA, the

word "shall" could be open to interpretation based on the "spirit" of the law or other judicially constructed goals, after the SCA, "shall" is unambiguously mandatory.

In the election context, this tension was examined in *Appeal of Pierce*, which "implicitly called into question the *Weiskerger* Court's casual dismissal of the language of the statute . . . because the various factors the *Weiskerger* Court cited as relevant to its decision not to give 'shall' mandatory effect are relevant under the SCA only when the statute is susceptible of two or more reasonable interpretations." *November 3, 2020 General Election*, 241 A.3d at 1082. In *November 3, 2020 General Election*, Justice Wecht took what was "implicit" in *Appeal of Pierce* and made it explicit, reasoning "even if the *Weiskerger* Court faithfully applied the common-law principles it cited, it did so inconsistently with the SCA's contrary guidance, which issued later the same year and binds us today." 241 A.3d at 1082.

Appeal of James and *Weiskerger* relied on a judicially created rule of statutory construction to elevate policy goals over the plain text on a statute when interpreting the word "shall." This approach was foreclosed by the SCA, which mandated that courts apply the "clear" and "unambiguous" statutory text wherever possible before turning to the "spirit" of the law or other policy goals. In other words, where the text is unambiguous, courts are obliged to follow the text post-SCA.

b. The Statutory Language Regarding Dating Mail-In Ballots is Not Ambiguous

The text of the statutes in this case is unambiguous. "Shall" means "*shall*," and imposes a mandatory duty to include a date.

As described above, the word "shall" traditionally imposes a mandatory duty and "this Court has repeatedly recognized the unambiguous meaning of the word in most contexts." *Appeal of Pierce*, 843 A.2d at 1230.

Moreover, "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Accordingly, it is a basic canon of statutory construction that "[a] word or phrase is presumed to bear the same meaning throughout a text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 170 (2012).

In *Appeal of Pierce* this Court concluded "Section 1346.6(a)'s 'in person' delivery requirement is mandatory, and that the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are void." 843 A.2d at 1234. In doing so, this Court interpreted the word "shall" to be mandatory. If shall is unambiguous with respect to the in-person delivery requirement, basic principles of statutory interpretation counsel that it is also unambiguous with respect to the ballot date requirement in the same subpart of the same statute.

"The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 2 (2020) (Alito, J., Statement of Justice). The legislature has acted through clear and unambiguous language. This Court should resist the urge to look beyond the plain text of the statute in pursuit of its own policy goals.

III. Principles of Stare Decisis and the Need for Consistency in the Law Counsel Against Departure from the Rule of a Majority of Justices in *November 3, 2020 General Election*

a. The Opinion of a Majority of Justices in *November 3, 2020 General Election* has Precedential Weight

In *November 3, 2020 General Election*, a majority of this Court determined that the date provision for mail-in ballots is mandatory. *See Id.* at 1079-1088 (Wecht, J., concurring in part and dissenting in part); *id*. at 1090 (Daugherty, J., concurring in part and dissenting in part) ("I cannot agree that the obligation of electors to set forth the date they signed the declaration on that envelope does not carry 'weighty interests.' . . . I therefore respectfully dissent from the holding at Section III(2) of the OAJC which provides that the undated ballots may be counted.") (citations omitted).

"Broadly speaking, a plurality opinion issued by our Supreme Court may be precedential and binding on lower courts, among other ways, under the doctrine of (1) 'result' stare decisis and/or (2) 'false plurality' analysis." *Ritter v. Lehigh County Board of Elections*, 272 A.3d 989 at *7 (Pa. Commw. Ct. 2022) (citing *Commonwealth v. McClelland*, 233 A.3d 717, 730 (Pa. 2020)), *appeal denied* 271 A.3d 1285 (Pa. 2022). With respect to 'result' *stare decisis*, "it seems clear that lower courts must adhere at the minimum to the principle of 'result' stare decisis, which mandates that any specific result espoused by a clear majority of the Court should be controlling in substantially identical cases." *Rappa v. New Castle County*, 18 F.3d 1043, 1061 n.26 (3rd Cir. 1994) (internal citation omitted). With respect to the "false plurality analysis," "a majority agreement among the Justices may be deduced from the rationales of the fragmented opinions." *Ritter*, 272 A.3d at *8.

A clear majority of this Court in *November 3, 2020 General Election* determined that the ballot date requirement is mandatory. Moreover, as the Commonwealth Court determined in

Ritter, there is majority agreement between Justice Wecht's opinion and Justice Daugherty's opinion that the statutory language concerning mail-in ballot dates is mandatory. *See Ritter* at *8. Accordingly, that determination should be accorded weight as precedence.

b. Precedent Should be Accorded Great Weight Based on Principles of *Stare Decisis* and the Need for Consistency in the Law

Even where it is not binding, precedent should generally be accorded great weight based on principles of *stare decisis* and the need for consistency in the law. "Stare decisis is 'a principle as old as the common law itself.'" *Commonwealth v. Alexander*, 243 A.3d 177, 195 (Pa. 2020) (quoting *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1249 (Pa. 2016) (Wecht, J., concurring)). "Without stare decisis, there would be no stability in our system of jurisprudence," therefore "[i]t is . . . preferable 'for the sake of certainty' . . . to follow even questionable decisions" to "'promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process." *Id*. at 195-196 (quoting *Flagiello v. Pennsylvania Hosp.*, 208 A.2d 193, 205 (Pa. 1965); *Commonwealth v. Tilghman*, 673 A.2d 898, 903 n.9 (1996); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted)). Thus, "[t]o reverse a decision, we demand a special justification, over and above the belief that the precedent was wrongly decided." *Alexander*, 243 A.3d at 196 (quoting *Allen v. Cooper*, 140 S.Ct. 994, 1003 (2020) (quotation marks and citation omitted)).

In evaluating whether to reverse precedential decisions, "[t]he high Court has 'identified several factors to consider in deciding whether to overrule a past decision, including the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.'" *Alexander*, 243 A.3d at 196 (quoting *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2177–78 (2019) (citations omitted)). This Court has also

looked to factors such as the age of the opinion at issue and whether the decision revolves around constitutional or statutory interpretation, noting "stare decisis 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" *Alexander*, 243 A.3d at 197 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citations omitted)).

c. Principles of *Stare Decisis* and the Need for Consistency in the Law Counsel Against Reversing of the Determination of a Majority of Justices in *November 3, 2020 General Election*

These factors counsel against reversing the determination of the majority of justices in *November 3, 2020 General Election*. The rule established in *November 3, 2020 General Election* is clear and workable. The reasoning of the majority of justices is clear, well-thought out, and consistent with the prior interpretation of this Court in *Appeal of James*. While the decision in *November 3, 2020 General Election* is relatively recent, it draws on an interpretation of the same word, "shall," in one of the same statutory provisions, section 1346.6(a), that is over fifteen years old. Finally, it is a statutory, not constitutional, decision. If the voters of Pennsylvania and their elected representatives are unhappy with the results of *November 3, 2020 General Election*, they can reverse it with a simple statutory fix. They have not done so.

The plurality opinion in *November 3, 2020 General Election* gave clear direction that, prospectively, Pennsylvania law mandates ballots to include a date and the omission of a date would be sufficient to invalidate a ballot. In accordance with principles of *stare decisis* and in order to promote consistency in the law, this Court should continue to hold that the mail-in ballot date provision is mandatory.

CONCLUSION

For the foregoing reasons, this Court should exercise its King's Bench power or extraordinary jurisdiction, declare that absentee and mail-in ballots that are undated or

incorrectly dated cannot be included in the pre-canvass or canvass under the Pennsylvania Election Code, to order county boards of elections to segregate all absentee or mail-in ballots received for the 2022 general election that do not comply with the date requirement, and direct the Acting Secretary to withdraw any and all guidance that purports to direct, require, or encourage county boards of elections to include undated or incorrectly dated absentee or mail-in ballots in the pre-canvass or canvass.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 Curtis M. Schube
Curtis M. Schube

CERTIFICATE OF SERVICE

I certify that this filing was served via PACFile, email, and first class mail upon all counsel of record this 24th Day of October, 2022.

/s Curtis M. Schube
Curtis M. Schube

WORD COUNT VERIFICATION

I hereby verify that this amici brief contains 3,852 words.

/s Curtis M. Schube
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