[J-85-2022] [MO: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DAVID BALL, JAMES D. BEE, JESSE D. DANIEL, GWENDOLYN MAE DELUCA, ROSS M. FARBER, LYNN MARIE KALCEVIC, VALLERIE SICILIANO-BIANCANIELLO, S. MICHAEL STREIB, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, AND REPUBLICAN PARTY OF PENNSYLVANIA, Petitioners v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH, AND ALL 67 COUNTY BOARDS OF ELECTIONS, Respondents	:	No. 102 MM 2022 SUBMITTED: October 25, 2022

CONCURRING OPINION

DECIDED: November 1, 2022
JUSTICE DONOHUE **OPINION FILED: February 8, 2023**

I join the Majority opinion except for Section III(B)(2) dealing with incorrectly dated declarations provided on the outer envelopes used to return absentee and mail-in ballots.

In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020) ("*In re 2020 Canvass*"), established that undated absentee and mail-in ballots would not be counted following the general election that occurred in 2020. As the author of the Opinion Announcing the Judgment of the Court

and as expressed therein, I disagreed with that conclusion. In my view, the dating requirements found in Sections 3146.6(a) (relating to absentee ballots) and 3150.16(a) (relating to mail-in ballots) of the Election Code, 25 P.S. §§ 3146.6(a), 3150.16(a),[1] are not mandatory but directory, such that the failure to include a date does not require that absentee or mail-in ballots without dates must be set aside and not counted. *In re 2020 Canvass*, 241 A.3d at 1077.

I acknowledge, however, that the law is settled to the contrary, and I join in the Majority in following the precedent established only two years prior. For elections after the 2020 general election, this Court concluded, as to the questions presented, that the "longstanding and overriding policy" within this Commonwealth to protect the right to vote, *id.* at 1071 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)), did not control our interpretive function.[2] Finding no ambiguity in the General Assembly's use of the word "shall," it was decided that voters must date mail-in and absentee ballots for them to be counted. *See id.* at 1079 (Wecht, J., concurring and dissenting) (finding the statutory requirement to date the voter declaration "stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory"); *see also id.* at 1090 (Dougherty, J.,

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[1] Both provisions provide in relevant part that "[t]he elector shall then fill out, date and sign the declaration printed" on the provided envelope. *See* 25 P.S. §§ 3146.6(a), 3150.16(a).

[2] Robust case law developed around that policy called for the liberal construction of the Election Code in favor of the franchise. *In re 2020 Canvass*, 241 A.3d 1058, 1071 (Pa. 2020)*; see also Pa. Democratic Party v. Boockvar,* 238 A.3d 345, 361 (Pa. 2020); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) ("In construing election laws while we must strictly enforce all provisions to prevent fraud [our] overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not to disenfranchise.").

concurring and dissenting) ("[T]he meaning of the terms 'date' and 'sign' — which were included by the legislature — are self-evident, they are not subject to interpretation, and the statutory language expressly requires that the elector provide them.").

Today, the Court provides a rationale for the ultimate unanimous order we entered on November 5, 2022, on an expedited basis directing that "incorrectly dated" ballots would not be counted in the 2022 general election. This author was part of that unanimous court. Since that order controlled the manner in which votes were counted in the 2022 General Election, I feel compelled to concur in the result reached by the Majority that "incorrectly dated" ballots should not have been counted in that election. However, I am unconvinced by the Majority's rationale supporting our expedited order, and I cannot provide an acceptable alternative to support that ruling in future elections. One need not look any further than the history of that order to discern the problem with the rationale of the Majority in support of it: to wit, there is an "implicit" "understanding" in the election code that "date" means the date of signature. Majority Op. at 22-23.

We initially entered an order on November 1, 2022 stating, in pertinent part, that the county boards of election were "ordered to refrain from counting any absentee and mail-in ballots … that are contained in undated or incorrectly dated outer envelopes." Per Curiam Order, 11/1/2022. Four days later, on November 5, 2022, we entered a "supplemental order" stating the following:

> For purposes of the November 8, 2022 general election, "incorrectly dated outer envelopes" are as follows: (1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022.

Per Curiam Order, 11/5/2022. With due respect to the Majority, if the meaning of the word "date" in the context of Sections 3146.6(a) and 3150.16(a) is implicitly understood, there would have been no need for the supplemental order. More importantly, our supplemental order did not require a determination of the date on which the outer envelopes were signed. It described a range of dates on which the signature **could have been** affixed.[3]

In contrast to the previous call for strict interpretation of Sections 3146.6(a) and 3150.16(a) in *In re 2020 Canvas*, the Majority now writes language into those provisions by finding that "date" as used therein means only the date upon which the elector signed the declaration (more or less). This approach is in direct derogation of the rationale upon which the Court relied to support its determination that undated ballots may not be counted - its insistence that the Court look no further than the plain and unambiguous language of the statutes.

The Majority explains its conclusion with reference to an "implicit" understanding within the Election Code that "date" means the date of signature. Majority Op. at 22-23. Such surmising requires that we look beyond the plain language of the statute, which, I reiterate, contravenes the rationale employed in *In re 2020 Canvass* to conclude that the Election Code requires that the absentee or mail-in elector fill in a date on the declaration

[3] From a concurring posture, Justice Brobson now further explains that the timeframes provided in the supplemental order represented the "broadest possible date range" of dates upon which an absentee or mail-in voter could have been in possession of a ballot. He emphasizes that these ranges were calculated for the November 8, 2022 general election only, that the terms of this Court's order should be understood as confined thereto, and for future elections, suggests that each county may identify its own "narrower" date range based upon when it makes absentee and mail-in ballots available to electors. Concurring and Dissenting Op. at 2-3 (Brobson, J.).

printed on the envelope. The Majority attempts to define this implicit understanding by analogizing a signature with the provision of a date. *Id.* at 23 (theorizing that just as a command to "sign" is understood to refer to a person's own name, an attendant command to "date" is understood to mean the date of signing). A person has but one name to sign; there is no other reasonable interpretation of what is meant when the statutes say that the elector shall sign the declaration. A dating requirement simply does not share the singularity that a signature requirement does, such that we can presume that it carries a universal understanding. It obviously does not. This point is proven by the fact that ballots apparently have been returned with dates that could not be the date of signature (such as a date in a year preceding the election).[4] That we have been asked to address this

[4] Petitioners' argument regarding incorrectly dated declarations is sparse, as they consistently refer to undated and incorrectly dated ballots together and without distinction. *See* Petitioners' Brief at 7, 35, 42, 52. Approaching the end of their argument, Petitioners acknowledge that *In re 2020 Canvass* did not involve incorrectly dated ballots, but contend that the Court's interpretation in that case "broadly supports the General Assembly's date requirement in all applications, not merely as applied to some scenarios." *Id.* at 34. While they hypothesized that a date would be incorrect if it were outside of the period between the date the ballot was mailed to the elector and the date it was returned to election officials, *id.* at 8, they offer no examples of returned ballots that met this definition. The lone example of a problematic ballot offered by Petitioners involved a declaration dated twelve days after the elector's death. *Id.* at 27. This example was offered in support of their broad proposition that a dating requirement functions to prevent fraud, not as an example of an incorrectly dated declaration. *Id.* Indeed, Petitioners do not contend that this ballot was received outside of the timeframe they have identified, nor do they suggest that this was an improperly dated declaration. *See id.* The lack of a developed argument dedicated to incorrectly dated ballots or a factual foundation in support of this claim is evidence to me of a longshot and afterthought attempt to invalidate as many ballots as possible.

The Secretary argues that Petitioners are attempting to "piggyback[]" on *In re 2020 Canvass*'s holding regarding undated ballots to have other ballots set aside. Secretary's Brief at 37. The Secretary explains that prior to this litigation, no county board of elections has tried to exclude ballots based on a purported incorrect date because of the impossibility of identifying whether a date is correct. *Id.*

issue at all belies the Majority's assumption that it is "evident" that the date instruction means date of signature. What is evident to the Majority is apparently not evident to some voters attempting to exercise the franchise. Absent some metaphysical phenomenon, the signature and date could only be affixed during the period of time in which the ballot is in the possession of the elector. Consequently, a date outside of that timeframe can only reflect the voter's confusion about what date to provide on the declaration contained on the outer envelope.

Now that we have re-written Sections 3146.6(a) and 3150.16(a) to include a specified date (but in actuality, a range of dates), a voter who followed the instructions of the General Assembly and affixed a different date is disenfranchised, even though the signed and dated envelope containing his or her ballot is received by election day.

In *In re 2020 Canvass*, the Court held that the General Assembly clearly intended that outer envelopes containing mail-in and absentee ballots must be signed and dated because "the statutory language expressly requires that the elector provide them." *In re 2020 Canvass*, 241 A.3d at 1090 (Dougherty, J., concurring and dissenting). However, "date," unencumbered by qualification, is not express and its meaning is not self-evident.[5] This ambiguity must be resolved in favor of protecting the franchise. *Pa. Democratic Party v. Boockvar,* 238 A.3d 345, 361 (Pa. 2020); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972). In my view, a mail-in or absentee ballot received on or before

[5] The General Assembly could have, but did not, enact statutes that provide:

> The elector shall then fill out and sign the declaration printed on such envelope, and affix the date on which the elector signed the declaration.

election or primary day should be counted if it is signed and bears any date affixed by the elector.

Chief Justice Todd joins this concurring opinion.