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ARTICLES

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Clifford B. Levine[*] and Jacob S. Finkel[**]

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[*] Clifford B. Levine is a Shareholder in Dentons Cohen & Grigsby, P.C., where he chairs the firm's Public Law and Regulatory Practices Group. Mr. Levine, who is based in the firm's Pittsburgh office, has extensive experience litigating Election Law matters in Pennsylvania. He served as counsel to the Pennsylvania Democratic Party, Pennsylvania State Senator James Brewster and other parties in over a dozen federal and state court election cases in the 2020 general election cycle, including many of the decisions discussed in this Article. He has served as Pennsylvania State Counsel for Presidential Candidates Barack Obama, Hillary Clinton, and Joseph Biden. The views and analysis expressed in this Article are his and Mr. Finkel's alone. Mr. Levine received a B.A. in Economics, *magna cum laude*, from the State University of New York at Albany in 1977 and a J.D. from Duke Law School in 1980.

[**] Jacob S. Finkel is an Associate at Covington & Burling, LLP, and worked on state and federal litigation during the 2020 general election as a Regional Voter Protection Director for the Pennsylvania Democratic Party. Mr. Finkel received a B.A., *summa cum laude*, in Classical Studies from the University of Pennsylvania in 2011 and graduated from Stanford Law School in 2019.

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INTRODUCTION

The 2020 general election involved an extraordinary amount of litigation. Pennsylvania, as one of the critical battleground states, found itself at the center of this legal maelstrom, which included an array of federal and state court decisions both before and after the November 3 general election. Although unsubstantiated claims of election fraud were voiced in the political sphere,[1] the actual courtroom litigation generally revolved around a more nuanced question: When should technical deviations from statutory voting instructions lead to disenfranchisement?

Courts were asked to address deviations, even relatively minor ones, from Election Code instructions that include the modal verb "shall,"[2] and to consider whether such deviations warranted disenfranchisement of otherwise eligible voters. For instance, would a voter be disqualified for failing to use a secrecy envelope, for leaving identifying marks on a submitted ballot, or for not writing in the date a ballot was prepared, although the same ballot was time-stamped upon receipt? Addressing these questions implicated the eligibility of tens of thousands of votes and proved consequential enough to influence the outcome of a close election.

Pennsylvania is representative of issues that resonate across the country—namely, the tensions and difficulties of providing consistency while avoiding needless disenfranchisement. This Article catalogs how courts—using Pennsylvania courts as a representative example—have addressed these issues in the past in order to formulate a more robust methodology for determining when "shall" is to be treated as mandatory or directory.

The disparate treatment of this question has spanned the better part of a century of appellate opinions, and long perpetuated confusion, culminating in the recent

[1] *Trump Campaign Pennsylvania News Conference*, C-SPAN (Nov. 7, 2020), https://www.c-span.org/video/?477914-1/trump-campaign-pennsylvania-news-conference (Mayor Rudolph W. Giuliani describing "a fraud on the people of Pennsylvania"). *But see* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 389 (3d Cir. 2020) ("[A]t oral argument in the District Court, the Campaign specifically disavowed any claim of fraud.").

[2] For example, "the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.'" 25 PA. CONS. STAT. § 3146.6(a) (2020). *Compare In re* Luzerne Cty. Return Bd. (Appeal of Weiskerger), 290 A.2d 108, 108–09 (Pa. 1972) (finding "shall" in this paragraph to be directory regarding the type of ink used to complete a ballot), *with* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 380 (Pa. 2020) (finding the very same "shall" in this paragraph to be mandatory regarding the enclosure of the ballot in the provided envelope).

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outpouring of state and federal decisions during the 2020 general election. For example, *In re 2,349 Ballots*, one of the most important recent decisions, saw the Pennsylvania Supreme Court split three ways, with three justices concluding a statutory instruction was directory, three justices interpreting that instruction as mandatory, and the decisive seventh justice determining that the instruction was mandatory, but choosing to apply that outcome prospectively.[3]

Cases interpreting any state's Election Code often involve difficult issues that, due to the compressed schedule surrounding an election, frequently travel through the court system at a rapid pace. *In re 2,349 Ballots*, for instance, proceeded from evidentiary hearings before two county boards of election, review by the respective courts of common pleas, consideration by the Commonwealth Court of Pennsylvania, and then the Pennsylvania Supreme Court, all within a two week period.[4] Given this extensive and fast-paced litigation and the number of court decisions issued in 2020, we offer a historical review, a discussion of the 2020 cases, and finally a new analytical framework to aid courts and litigants in future election challenges.

Accordingly, in Part I, we address Pennsylvania Election Law and review two key amendments, Act 77 of 2019 and Act 12 of 2020 which, as newly enacted law, invited an array of legal challenges in the 2020 general election. In Part II, we review a series of Pennsylvania appellate decisions over the last eight decades that address whether the use of "shall" in the Election Code is directory or mandatory. In Part III, we describe how the various state and federal courts in Pennsylvania considered this issue during the unusually litigious 2020 general election. Finally, in Part IV, we present a framework by which the directory or mandatory treatment of Election Code provisions may be considered in future elections.

[3] *See In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election (*In re* 2,349 Ballots), 241 A.3d 1058 (Pa. 2020), *cert. denied sub nom.* Donald J. Trump for President, Inc. v. Degraffenreid, No. 20-845, 2021 WL 666798 (U.S. Feb. 22, 2021).

[4] *Id.* at 1067–68. Although the decision from the Court of Common Pleas of Allegheny County was considered by the Pennsylvania Commonwealth Court, the decisions from the Court of Common Pleas of Philadelphia County went directly to the Pennsylvania Supreme Court, under the court's King's Bench powers. *Id.* at 1062–63.

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I. PENNSYLVANIA ELECTION LAW: AN OVERVIEW

A. Historical Voting Practices: Absentee and Provisional Ballots

Prior to 2020, the options for voting in Pennsylvania were relatively limited. There were two principal avenues—either voting in person on Election Day or submitting an absentee ballot (with a valid excuse) at least four days in advance.[5] The right to vote absentee is specifically enshrined in the Pennsylvania Constitution.[6] Yet, in 2016, only 266,208 absentee ballots were returned, meaning less than five percent of all ballots were absentee.[7] This placed the state in the bottom quartile of states in terms of mail-in ballot utilization.[8]

Pennsylvania does allow for provisional ballots, as required by the Help America Vote Act of 2002 (HAVA).[9] It is worth taking a moment to describe how provisional ballots work, as they often become intertwined with the consideration of general mail-in voting issues.

In Pennsylvania, state law goes further than the federal mandates in HAVA by requiring the issuance of a provisional ballot when an individual who is required to show a form of identification (i.e., a first-time voter in that precinct) is unable to do so.[10] In all eligible cases, the voter is instructed to complete a special ballot that includes a declaration form. The form includes blank space for that voter's name,

[5] I.e., on the Friday before Election Day. For voters whose circumstances changed at the last minute, an emergency absentee ballot was also available for those willing to go to considerable lengths.

[6] PA. CONST. STAT. art. VII, § 14.

[7] U.S. ELECTION ASSISTANCE COMM., THE ELECTION ADMINISTRATION AND VOTING SURVEY 24 (2016), https://www.protectourvotes.com/wp-content/uploads/2016_EAVS_Comprehensive_Report.pdf.

[8] *Id.* at 10.

[9] *See generally* 52 U.S.C. § 21082 (2018) (providing provisional voting and voting information requirements). Provisional ballots had previously been encouraged but not required under the National Voter Registration Act of 1993. *See* H.R. REP. NO. 103-9, at § 8 (1993) (describing provisional voting as "appropriate" under the Act).

[10] 25 PA. CONS. STAT. § 3050(a.4)(1) (2020). HAVA requires that provisional ballots be offered to voters who appear at a polling place but who are not listed on the official list of eligible voters. 52 U.S.C. § 21082(a). Pennsylvania goes further by also offering provisional ballots to voters lacking valid identification. 25 PA. CONS. STAT. § 3050(a.4)(1) (2020).

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date of birth, and address, an affirmation that the voter had not cast another ballot in that election, and is "[s]igned by [the] Judge of Elections and minority inspector."[11]

The voter is instructed to place the completed absentee ballot in a secrecy envelope, and place the secrecy envelope inside a second envelope, which the voter signs.[12] Within seven days of the election, each county board of elections is required to review all provisional ballots—with representatives from each candidate and political party allowed to be present—and determine which ballots belong to eligible voters and which should be challenged for ineligibility.[13] Within another seven days, thus less than two weeks after the election itself, the county board must conduct a hearing on those challenged ballots. The county court of common pleas will review the outcome if petitioned to do so within two days of the hearing's conclusion.[14]

Finally, observe that the Election Code specifies that a provisional ballot "shall not be counted" if one of six specific grounds for disqualification is present.[15] No such analogous provision exists for regular, absentee, or mail-in ballots. This underscores the legislature's willingness to indicate when certain categories of ballots are unsatisfactory, and the fact that it has expressly declined to do so outside of the provisional sphere.

B. Election Reform

In 2019, the Republican-controlled state legislature negotiated with the administration of Democratic Governor Tom Wolf to pass bipartisan election reform legislation called Act 77. The Act was advanced out of the legislature with an overwhelming majority of Republican support (105-2 in the State House) and a smaller majority of Democratic representatives (59-33).[16] In the State Senate, every Republican voted for the bill, but a majority of Democrats (14-8) voted against.[17]

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[11] *Id.* § 3050(a.4)(2). The "minority inspector" is an election officer (i.e., poll worker) representing the minority party in the district. *Id.* §§ 2671, 2675.

[12] *Id.* § 3050(a.4)(3).

[13] *Id.* § 3050(a.4)(4).

[14] *Id.* § 3050(a.4)(4)(v).

[15] *Id.* § 3050(a.4)(5)(ii)(A)–(F).

[16] Charlie Wolfson, *Trump Politicized Mail-in Voting in 2020, but It Came to PA with Strong Republican Support*, PUBLICSOURCE (Dec. 10, 2020), https://www.publicsource.org/trump-politicized-mail-in-voting-in-2020-pa-republicans-supported-it-originally.

[17] *Id.*

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Governor Wolf signed the legislation on October 31, 2019, meaning that the law would first apply in the 2020 Primary Election, scheduled for the following April.[18]

1. Act 77

The legislation introduced several important changes to Pennsylvania election law. Foremost, the Commonwealth's mail-in voting system was entirely redesigned, vastly expanding the option for Pennsylvanians to vote by mail.[19] For the first time, no excuse was necessary to request an absentee ballot. Every Pennsylvania voter was permitted to request a mail-in ballot, while the option remained for eligible voters to request an absentee ballot (collectively, Vote by Mail ballots, or VBM).[20] This measure also equalized mail-in (and absentee) voting with the in-person procedure. Whereas voters had previously been required to submit their absentee ballots in time for receipt by 5:00 p.m. on the Friday before the election—the earliest receipt deadline in the nation—Act 77 brought this deadline into alignment with that for regular ballots. Thus, counties had to receive mail-in ballots by 8:00 p.m. on Election Day.[21]

Act 77 also eliminated the option to vote for straight-ticket voting (selecting all the candidates of a given political party at once), a political trade-off for expanded mail-in voting.[22] In addition, the bill changed a variety of voting mechanics: the voter registration deadline was moved back from thirty to fifteen days before a given election; ninety million dollars in funding was provided for upgrades to voting systems; and the pay structure for poll workers was reorganized, alongside other administrative alterations to the electoral system.[23] Commentators described the bill

[18] *Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting*, PA. GOVERNOR'S OFF. (Oct. 31, 2019), https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting.

[19] PA. DEP'T OF STATE, ACT 77 CHANGES TO THE ELECTION CODE, https://www.pacounties.org/GR/Documents/Act%2077%20-%20Election%20Reform%20Bill%20 summary.pdf.

[20] Act of Oct. 31, 2019, No. 77, 2019 Pa. Laws 552.

[21] 25 PA. CONS. STAT. § 3146.8(g)(1)(ii) (2020).

[22] Democratic state legislators opposed the changes for this reason (elimination of straight ticket voting). *See* Emily Previti, *Pa. Lawmakers, County Officials Raise Concerns About Implementing Election Reforms*, WHYY (Oct. 29, 2019), https://whyy.org/articles/pa-lawmakers-county-officials-raise-concerns-about-implementing-election-reforms.

[23] *Id.*

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as "one of the most significant changes to Pennsylvania election law since the state's election code was written in 1937."[24]

2. Act 12

Act 77 was barely codified when the COVID-19 pandemic emerged in Pennsylvania. With cases mounting in early March, the state legislature agreed to postpone the primary by five weeks to June 2. It passed Act 12 of 2020 on March 25.[25] The bill also refined the framework created in Act 77. With hundreds of thousands of potential absentee and mail-in ballots on the horizon, the legislature voted unanimously to streamline the process.[26]

First, Act 12 permitted county boards of election to begin pre-canvassing already-received absentee and mail-in ballots at 7:00 a.m. on Election Day.[27] This slight thirteen-hour head start was not enough to permit them to make substantial headway in counting large volumes of ballots.[28] Second, Act 12 strictly limited the challenge process by removing the opportunity for third parties to challenge the counting of received absentee or mail-in ballots.[29] Under this approach, the proper time for third parties to challenge a voter's eligibility to cast a ballot was at the ballot application stage, not once a ballot had been received.[30] Act 12 also clarified that there would be no penalty for submitting an absentee ballot application instead of a

[24] Jonathan Lai, Samantha Melamed & Michaelle Bond, *Pennsylvania's New Vote-by-Mail Law Expands Access for Everyone Except the Poor*, PHILA. INQUIRER (Oct. 22, 2020), https://www.propublica.org/article/pennsylvanias-new-vote-by-mail-law-expands-access-for-everyone-except-the-poor.

[25] Marc Levy & Mark Scolforo, *Pennsylvania Lawmakers Vote to Delay Primary Election*, ASSOCIATED PRESS (Mar. 25, 2020), https://apnews.com/article/b236785ad580551a5cf3b711f4fb018d.

[26] *See* S.B. 422, 2019-2020 Gen. Assemb., Reg. Sess. (Pa. 2019).

[27] *Id.* § 1308(G)(1.1).

[28] Repeated efforts to pass legislation in the state legislature to lengthen the pre-canvass period failed to receive a floor vote before the election. *See, e.g.*, Cynthia Fernandez, *Lawmakers Mount New Push to Allow Early Counting of Mail-in Ballots*, YORK DISPATCH (Oct. 11, 2020), https://www.yorkdispatch.com/story/news/2020/10/08/lawmakers-mount-new-push-allow-early-counting-mail-ballots/5925582002 (describing the work of State Rep. Kevin Boyle and others to expand the pre-canvass).

[29] S.B. 422 § 1308(G)(3) (deleting language requiring each county to "give any candidate representative or party representative present an opportunity to challenge any absentee elector or mail-in elector"). This makes sense from an enfranchisement perspective, since once a voter has submitted a ballot, disqualifying that vote is certain to result in disenfranchisement, while doing so at the application stage preserves the possibility of voting in person on Election Day.

[30] *Id.*

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mail-in ballot application or vice versa.[31] Finally, Act 12 provided several one-time exceptions to the current Election Code, including lifting the requirement that poll workers reside in their precinct for the 2020 primary.[32] These were the set of rules in force for the 2020 primary election and general election.

II. PRIOR TREATMENT OF "SHALL" AS DIRECTORY OR MANDATORY

It is a rule of statutory construction that procedural rules can either be mandatory or directory.[33] As one scholar explained,

> The distinction has to do with the effect of breach . . . . [M]andatory rules are those procedural rules the breach of which necessarily invalidates the process to which they relate, while directory rules are procedural rules the breach of which does not necessarily have this effect. This distinction has existed in the common law for about three hundred years . . . .[34]

The Pennsylvania Supreme Court has adopted that distinction: "Failure to conform to a mandatory procedure renders the regulated activity a nullity. Strict compliance with a directory provision, on the other hand, is not essential to the validity of the transaction or proceeding involved."[35]

The state supreme court has explained that in some cases, the phrase "shall" could not reasonably have been meant as a command, and instead is equivalent to "may."[36] For instance, a statute that instructs that in authorizing the sale of certain assets, a corporation's board of directors, "[s]hall adopt a resolution recommending such sale, lease or exchange, and directing the submission thereof, to a vote of the

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[31] *Id.* § 1302.2(C).

[32] *Id.* § 1802-B(A)(2).

[33] *See generally* Commonwealth v. Baker, 690 A.2d 164, 167 (Pa. 1997) (explaining the normal approach to ambiguous interpretations of "shall.").

[34] Jim Evans, *Mandatory and Directory Rules*, 1 LEGAL STUD. 227, 227 (1981). Such a distinction was adopted by the Supreme Court at least as early as 1894. *See* Erhardt v. Schroeder, 155 U.S. 124, 130 (1894) (observing that a mandatory reading would mean official actions "not in strict conformity with the statute [were] void.").

[35] Fishkin v. Hi-Acres, Inc., 341 A.2d 95, 98 n.5 (Pa. 1975) (citations omitted).

[36] MERSCORP, Inc. v. Delaware Cty., 207 A.3d 855, 865 (Pa. 2019) (citing Gardner v. W.C.A.B. (Genesis Health Ventures), 888 A.2d 758, 764–65 (Pa. 2005)).

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shareholders entitled to vote in respect thereof" has been interpreted as directory, as there are weighty consequences to always voiding any transaction completed without exact compliance.[37]

A review of Pennsylvania appellate decisions in the Election Law context prior to the 2020 litigation illustrates the split in the case law between directory and mandatory readings of the Code.

A. Directory Treatment of the Election Code

1. *Appeal of Gallagher* (1945)

This case centered on a township commissioner race in Allegheny County in the 1943 municipal election that was decided by one vote.[38] Two rejected votes, sufficient to overturn the result, were challenged.[39] The statute required that "[n]o ballot which is so marked as to be capable of identification shall be counted."[40] In the first case, the voter wrote "no good" after the name of one candidate.[41] In the second, three lines ran across the ballot.[42]

The court did not find that these unique marks meant the necessary secrecy had been compromised. It looked to whether each ballot represented the individual voter's intent to identify him or herself. For the first ballot, the court determined that the voter's "apparent idea was *not* to have his ballot bear an identifying phrase but to show that he not only voted against that candidate but also that he was unwilling to recognize that there was any 'good' in him."[43] For the second ballot, the court concluded that although irregular shapes other than a check or "X" would not suffice to register a voter's intent, an irregular "X" (here with three lines instead of two) was

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[37] *Fishkin*, 341 A.2d at 97–98.

[38] Appeal of Gallagher, 41 A.2d 630 (Pa. 1945). The Pennsylvania Supreme Court's consideration of enfranchisement long precedes this line of cases, of course. *See, e.g.*, *In re* Fish's Election, 117 A. 85, 88 (Pa. 1922) (determining that tainted ballots did not require disqualifying all votes cast in an affected precinct); Patterson v. Barlow, 60 Pa. 54, 85 (1869) (finding recent election-related legislation satisfied constitutional safeguards). But we begin with *Gallagher* as it begins the line of cases still commonly relied upon in election litigation today.

[39] *Gallagher*, 41 A.2d at 631.

[40] *Id.* (citing 25 PA. CONS. STAT. § 3063 (1937)).

[41] *Id.* at 631–32.

[42] *Id.* at 632.

[43] *Id.*

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enough.[44] This lenient interpretation of the Code set the tone for the next case, which relied directly on *Gallagher*.

2. *Appeal of James* (1954)

Samuel James, a Democratic nominee for town council, united with another Democratic nominee and two independent write-in candidates as a joint slate.[45] The ballot was printed with sufficient space for four write-in candidates, so the slate produced stickers with all four names, pre-checked, to be placed at the bottom of the ballot.[46] The Election Code permitted such arrangements, with the qualification that "the elector may insert the name of any person or persons whose name is not printed on the ballot as a candidate for such office."[47]

When James narrowly won, a Republican candidate challenged this sticker system since it had caused James' name (and that of the other Democrat) to appear on the ballot twice: once as a Democratic candidate and once on the sticker appearing as part of the write-in slate.[48] The court resolved this case, as in *Gallagher*, by looking to voter intent as the "golden thread" running through the law.[49] It distinguished these circumstances from a situation where the use of a sticker must be disallowed because it would have allowed a voter to cast two votes.[50] In that case, voter election officials would be unable to determine the intent of the voter, whereas here the voters' intent was not in doubt.[51] The court observed, "James' name is reproduced twice on the ballot, [but] he received only one vote. On what possible theory can he be denied that one X, which was the honest expression of the citizen desiring to vote for him?"[52]

The court concluded by offering a six-part test for evaluating Election Code infractions: (1) whether a specific provision was explicitly violated; (2) whether the

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[44] *Id.* at 632–33.

[45] Appeal of James, 105 A.2d 64, 65 (Pa. 1954).

[46] *Id.* at 64–65.

[47] *Id.* at 64 (citing 25 PA. CONS. STAT. § 2963 (1937)).

[48] *Id.* at 65.

[49] *Id.*

[50] *Id.* at 66 (citing Appeal of Redman, 33 A. 703 (Pa. 1896)).

[51] *Id.*

[52] *Id.*

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infraction implicated fraud; (3) whether the will of the affected voter was subverted; (4) whether the will of the voter is clear; (5) whether the electoral loser was unfairly harmed; (6) whether the winner of the election achieved victory through unjust means.[53]

Here, with no suggestion of fraud or foul play, the court encountered merely a technical mistake that the court described as "a fleeting and fortuitous flaw."[54] The court concluded, "[I]t would be a stultification of the very principle of democracy behind the Election Code to deprive Samuel A. James of election simply on the basis that the Code does not *ipsissimis verbis* provide for the instant manner in the ascertainment of the voter's intent."[55] Thus, the Election Code's requirement that voters not be permitted to write-in a name already appearing on the ballot was effectively construed as directory and James was declared the winner.[56]

3. *Appeal of Norwood* (1955)

A 1955 borough councilman race was decided by one vote.[57] The losing candidate challenged the disqualification of a single vote that, if counted, would have produced a tie.[58] It was cast with both a light check mark and a heavy "X" symbol over the box for the losing candidate.[59]

The Pennsylvania Supreme Court rejected the argument that the strange symbol on the crucial ballot could be an identifying mark, concluding the statutory requirement that

> "[n]o ballot which is so marked as to be capable of identification shall be counted" must be construed with great liberality, for if every ballot which carried upon it

[53] *Id.* at 66.

[54] *Id.*

[55] *Id.* at 66–67.

[56] *See id.* at 67.

[57] Appeal of Norwood, 116 A.2d 552, 553 (Pa. 1955).

[58] *Id.*

[59] *Id.*

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> some distinctive mark should be invalidated, there is scarcely any limit to the number of ballots which could be rejected for this reason.[60]

As with *Gallagher*, the court focused here not on the statutory purpose of "shall," but on the consequences of a strict interpretation.

4. *In re Petitions to Open Ballot Boxes (Appeal of Reading)* (1963)

In 1962, the City of Reading held a referendum to determine whether its charter should be revised.[61] This plan was narrowly rejected by a ninety-nine-vote majority.[62] Two classes of invalidated votes were challenged: First, votes that contained both a mark in the proper preference box but also the word "yes" or "no" next to that square.[63] Second, ballots with a correct mark but also a mark over the words "yes" or "no" printed on the ballot—in essence, two groups of ballots where voters had twice affirmed the same intent.[64]

The legislature had revised the Election Code in 1960, after *James*. Those changes required that "[a]ny ballot marked by any other mark than an (X) or check (✓) in the spaces provided for that purpose shall be void and not counted."[65] Relying on this provision, the trial court rejected the challenge to these ballots' invalidation.[66]

The Pennsylvania Supreme Court reversed, holding that the legislature's changes did not explicitly overrule *Norwood* and *James*, preserving those cases' permissive approach as the proper lens for these ballots.[67] Notice emerged as a particularly important factor.[68] The court stressed that the ballot instructions did not inform voters that only a check or "X" could be used to cast a ballot.[69] To invalidate

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[60] *Id.* at 554 (quoting 25 PA. CONS. STAT. § 3063 (1937)).

[61] *In re* Petitions to Open Ballot Boxes (Appeal of Reading), 188 A.2d 254, 254 (Pa. 1963).

[62] *Id.* at 255.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 257.

[66] *Id.* at 256.

[67] *Id.* at 256–57.

[68] *Id.* at 257.

[69] *Id.*

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the resulting variation "would disenfranchise these votes for very picayune reasons."[70] Thus, the court decided to include these votes. With the inclusion of these votes, the alterations to Reading's charter passed.[71]

5. *In re Primary Election of 1971* (*Appeal of McKelvey*) (1971)

In the Democratic primary election for Mayor of Williamsport, there was a tie between the leading candidates.[72] A potentially decisive vote was rejected. Although that ballot contained a valid mark for one candidate, it also featured an extraneous name, "Bill Painter," written at the bottom of the ballot.[73] The trial court rejected the ballot on the belief that this might be the name of the voter who had cast that ballot.[74]

During the recount that followed the election, an investigation determined that there was no registered voter in the ward where the ballot originated with that name.[75] Further, a Republican candidate for a different office in the same election (whose name had not appeared on the Democratic ballots at issue) was named William Paynter.[76]

Based on this evidence, the court ruled that it was "reasonable to conclude that the voter in question was either attempting to cast a write-in vote for Mr. Painter on the Democratic ballot or was expressing a preference for Mr. Painter for the office he aspired to."[77] Again, voter intent lay at the heart of the court's approach, and extrinsic evidence pointed the way to its conclusion.

6. *In re Luzerne County Return Board* (*Appeal of Weiskerger*) (1972)

In this case, sixteen absentee ballots were rejected for having been written in red or green ink.[78] These ballots were sufficient to determine the victor in a county

[70] *Id.* at 256.

[71] *Id.* at 257.

[72] *In re* Primary Election of 1971 (Appeal of McKelvey), 281 A.2d 642, 643–44 (Pa. 1971).

[73] *Id.* at 644.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *In re* Luzerne Cty. Return Bd. (Appeal of Weiskerger), 290 A.2d 108, 108 (Pa. 1972).

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school board election. The Election Code requires that "[n]o ballot which is so marked as to be capable of identification shall be counted. Any ballot that is marked in blue, black or blue-black ink, in fountain pen or ball point pen, or black lead pencil or indelible pencil, shall be valid and counted."[79]

The Pennsylvania Supreme Court noted that the statute does not explicitly bar other colors of ink, it merely requires that blue, black, or blue-black ink must be accepted.[80] The court cited *Reading*, *James*, and *McKelvey* as a precedential framework supporting this permissive approach to voter errors.[81] It set out the following test:

> The proper interpretation of this portion of the statute considering the occasion for its enactment, the mischief to be remedied, and the policy to liberally construe voting laws in the absence of fraud, is that the ballot is valid unless there is a clear showing that the ink used was for the purpose of making the ballot identifiable.[82]

The correct question, as formulated by the Luzerne County Court of Common Pleas initially, was not whether there was technical compliance with the statute, but whether the non-compliance interfered with the statutory purpose.[83] Here, the court interpreted the statutory purpose as the identification of a given ballot by distinctive markings.[84] It then concluded that because pens with red and green ink were widespread at the time, the use of such ink would not render a particular ballot identifiable.[85] Thus, it held, "[W]e are not persuaded that the electors involved herein attempted by the use of red ink to render their ballots capable of identification."[86]

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[79] *Id.* at 109 (quoting 25 PA. CONS. STAT. § 3063 (1937)).

[80] *Id.*

[81] *See id.*

[82] *Id.*

[83] *See id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* The court reiterated its holding later the same year in another case featuring red ink. *In re* Gen. Election November 6, 1971, 296 A.2d 782 (Pa. 1972). Relying on *Weiskerger*, the court ordered that the affected ballots be counted. *Id.* at 784–85. Justices Pomeroy and Roberts dissented, sardonically describing the legacy of *Weiskerger*: "The color-blindness of the majority persists; once again it is unable to distinguish red ink from ink that is blue, black, or blue-black." *Id.* at 785.

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7. *Shambach v. Bickhart* (2004)

This case arose out of a 2003 race for the minority commissioner seat in Snyder County that ended in a tie.[87] After a recount, Richard Bickhart was narrowly declared the general election winner with 2,500 votes, versus 2,493 votes for his fellow Democrat, Gregory Shambach.[88]

Shambach appealed primarily based on the inclusion of ten write-in votes for Bickhart. The Election Code provided that the voter

> may so mark the write-in position provided on the ballot for the particular office and . . . write the identification of the office in question and the name of any person not already printed on the ballot for that office, and such mark and written insertion shall count as a vote for that person for such office.[89]

Similar to the situation in *James*, Shambach argued that because Bickhart's name appeared printed on the ballot, the ten write-in votes should be voided.[90] The trial court and commonwealth court reached different conclusions on whether these votes should be counted.[91]

When the case reached the Pennsylvania Supreme Court, the majority examined *James* and *Yerger*[92] at length and concluded that absent fraud, election laws should be interpreted liberally.[93] First, the opinion noted that the statute does not explicitly prohibit counting write-in votes cast for candidates whose names appear printed on the ballot—it merely ensures that those votes cast for candidates

[87] Shambach v. Bickhart, 845 A.2d 793, 795 (Pa. 2004).

[88] *Id.* at 794–95.

[89] 25 PA. CONS. STAT. § 3031.12(b)(3) (2004).

[90] *Shambach*, 845 A.2d at 795.

[91] *Id.* at 796–98.

[92] Appeal of Yerger, 333 A.2d 902 (Pa. 1975). See discussion *infra* notes 110–16.

[93] *Id.* at 798–99. The Commonwealth Court of Pennsylvania has since read *Shambach* to require that contested votes be counted: "where voter intent is clear and there is no sign of fraud, we conclude that, absent an express statutory prohibition, the rationale favoring liberal construction would allow counting of the ballots despite the lack of a fully blackened oval." Rinaldi v. Ferrett, 941 A.2d 73, 74–75 (Pa. Commw. Ct. 2007).

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whose names *do not* appear *must* be counted.[94] This reaffirms the reasoning employed by the *Weiskerger* court.

Second, the opinion noted that the legislature used the paper ballot statute from *James* as its model for the optical scan statute at issue here.[95] The Statutory Construction Act (SCA) creates a presumption that the legislature intends prior judicial interpretations to apply where the legislature uses previously interpreted language in new provisions of law.[96] Therefore, the court concluded that *James*, not *Yerger*, should govern the interpretation of this statute.[97]

Justice Saylor concurred. He explicitly described election law as an area that, although "steeped with requirements phrased in the imperative," should be interpreted liberally.[98] This arises from the conclusion that "some provisions of election law that are phrased in the imperative really must be deemed directory in order for the legislative purposes (including, critically, the enfranchisement of the electorate) to be accomplished."[99] He explained:

> It would be unreasonable to assume that the General Assembly thus intended that, unless each and every such requirement is strictly adhered to by those conducting the elections, election results must be deemed void. Indeed, it is widely accepted that most statutory provisions for the conduct of elections may be regarded as directory, and not mandatory, after the conduct of an election, unless the statute expressly declares that the particular requirement is essential to the validity of the election, or the violation as such impacts on the election result.[100]

For Justice Saylor, it was "clear that it is an inherent function of the interpreters of the law (the judiciary) to distinguish between the mandatory and the directory

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[94] *Shambach*, 845 A.2d at 801.

[95] *Id.*

[96] *See id.* (citing 1 PA. CONS. STAT. § 1922(4) ("[W]hen a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.")).

[97] *Shambach*, 845 A.2d at 797, 801–02.

[98] *Id.* at 806 (Saylor, J., concurring).

[99] *Id.*

[100] *Id.*

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criteria."[101] *Shambach* represented the court's latest word on the interpretation of "shall" in the Election Code until the 2020 general election.

B. Mandatory Treatment of the Election Code

1. *In re Election of Supervisor in Springfield Township* (*Appeal of Weber*) (1960)

John Kopf, the incumbent township supervisor in Mercer County, lost the Republican primary in 1959 and attempted to run for re-election through a write-in candidacy.[102] He was opposed in the general election by Edward Weber, his victorious primary opponent, and by a Democratic candidate.[103]

The initial vote total showed Weber with a twenty-four-vote lead over Kopf, but the county board subsequently counted eleven misspelled write-in ballots for Kopf and then a further sixteen sticker votes that had become tangled together in the voting machine without a clear causal explanation.[104] These added votes made Kopf the victor.[105]

The Pennsylvania Supreme Court affirmed the counting of misspelled votes but reversed on the sixteen sticker votes.[106] Finding that counting these votes would result in more ballots counted than the machine total recorded cast, the court reasoned that it would facilitate fraud to permit the count: "To hold otherwise would render facile the way to fraudulent voting and the thwarting of the electorate's will."[107] The court concluded, "The technicalities of the Election Law (and they are many) are necessary for the preservation of the secrecy and purity of the ballot and must, therefore, be meticulously observed."[108] It therefore declared Weber the winner by thirteen votes.[109]

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[101] *Id.*

[102] *In re* Election of Supervisor in Springfield Twp. (Appeal of Weber), 159 A.2d 901, 902 (Pa. 1960).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 905.

[107] *Id.*

[108] *Id.*

[109] *Id.*

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2. *Appeal of Yerger* (1975)

In a 1973 election for tax collector, William Yerger won by two votes over Norman Frederick.[110] The election board declined to count eight write-in votes for Frederick, as his name was already printed separately on the voting machine ballot.[111]

The statute prohibited the counting of "irregular ballot[s]" cast on a voting machine for a candidate whose name was already listed on the ballot.[112] The trial court found this statute unconstitutional given the outcome in *James*.[113] Namely, if paper write-in votes for pre-printed candidates were to be counted, it violated equal protection under the state constitution for machine votes to be treated differently.[114]

The Pennsylvania Supreme Court reversed, dismissing the notion that it violated equal protection to distinguish these circumstances from *James*.[115] Unlike the purely technical violation there, the legislature here had an identifiable form of fraud it sought to prevent: voters who took advantage of the separate tabulation of write-in ballots from machine votes in order to vote twice for a candidate listed on the ballot.[116] In *James*, by contrast, because the tabulation necessarily involved the same paper ballot, it would be obvious on the face of the ballot if a voter had attempted to cast two votes for a single candidate by submitting a write-in and regular vote.[117]

Justice Nix argued in dissent that the court's permissive case law from *Weiskerger*, *Reading*, *Walko*, and other cases required the clear intent of the write-in voters to prevail here.[118] He noted that voters were never instructed that a write-in vote for a candidate already listed on the ballot would not be counted and that this

[110] Appeal of Yerger, 333 A.2d 902, 903 (Pa. 1975).

[111] *Id.*

[112] *Id.* at 904.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 906–07.

[116] *Id.* at 906.

[117] *See In re* Appeal of James, 105 A.2d 64, 66 (Pa. 1954).

[118] *Appeal of Yerger*, 333 A.2d at 907–08 (Nix, J., dissenting).

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election was the first time the voting machines in question had been used, and "mass confusion" had ensued on Election Day.[119]

3. *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election* (*Appeal of Pierce*) (2004)

Following the 2003 general election, statewide and local candidates contested the invalidation of fifty-six absentee ballots that were hand-delivered to the Allegheny County Board of Elections by third parties on behalf of non-disabled voters.[120] The County had previously allowed for third-party delivery of ballots.[121] The Election Code said that "the elector shall send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election."[122]

The Allegheny County Court of Common Pleas and the Commonwealth Court of Pennsylvania concluded that these ballots had violated the plain language of the statute, but ordered that they be counted nonetheless, as the County had not informed the voters that third party delivery would void their otherwise valid votes.[123] To the contrary, after federal court litigation challenging the delivery of ballots to the county election office by third parties,[124] the county board of elections had each person who hand-delivered another voter's ballot sign a log including the names of both the deliverer and the voter.[125] By the time this case reached the state supreme court, the Republican candidate for judge of the superior court led the Democratic candidate by twenty-eight votes statewide.[126]

The Pennsylvania Supreme Court reversed the commonwealth court. It initially noted that whether "shall" was directory or mandatory first involved a determination as to whether the statute's language created an ambiguity.[127] The court found that the

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[119] *Id.* at 909.

[120] *In re* Canvass of Absentee Ballots of November 4, 2003 Gen. Election (Appeal of Pierce), 843 A.2d 1223, 1225–26 (Pa. 2004).

[121] *Id.* at 1225.

[122] 25 PA. CONS. STAT. § 3146.6(a) (2004).

[123] *Appeal of Pierce*, 843 A.2d at 1229.

[124] Pierce v. Allegheny Cty. Bd. of Elections, 324 F. Supp. 2d 684 (W.D. Pa. 2003).

[125] *Appeal of Pierce*, 843 A.2d at 1227–28.

[126] *Id.* at 1225.

[127] *Id.* at 1231–32.

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use of "shall" in Section 3146.6(a), describing how votes could be delivered was not ambiguous, so the liberal construction of the Election Code employed in *Weiskerger* and *James* should not apply to this particular provision.[128] Further, the court distinguished the directory cases on two grounds: (1) *Weiskerger* predated the SCA; and (2) unlike the colored ink in *Weiskerger*, the in-person delivery requirement has "an obvious and salutary purpose—grounded in hard experience," which was to reduce the number of people who possess a ballot before delivery.[129] The court thus ruled that the fifty-six votes could not be counted, preserving the twenty-eight-vote margin of victory in the statewide judicial election.[130]

C. Observations on Pre-2020 General Election Cases

The cases treating the Election Code instructions as directory frequently state that the Election Code is to be liberally construed. Although not explicitly citing the basis for this approach, it is apparent that these courts recognize that voting involves a fundamental constitutional right, and, therefore, courts should avoid disenfranchising voters for technical errors.[131]

There has been a clear difference between the liberal interpretation attached to actual voting (where the consequence would be the disenfranchisement of the affected voters) and instances of minor transgressions by candidates or political parties in following the statutory rules surrounding running for office. In those cases, the court has been far more willing to adopt a strict mandatory view than in cases involving actual voting.[132] This is likely due to the underlying fact that voters have a fundamental right at stake, whereas candidates do not hold an inviolate right to appear on the ballot if they fail to satisfy the requirements to do so.

In contrast to the pure direct voting cases, those cases interpreting an Election Code requirement as mandatory were more likely to focus on the avoidance of fraud, or the overall administration of the election. Thus, the write-in stickers that clogged

[128] *Id.* at 1232–33.

[129] *Id.* at 1232.

[130] *Id.* at 1234.

[131] The court has construed "shall" in a directory manner in other fields as well. *See* MERSCORP, Inc. v. Delaware Cty., 207 A.3d 855, 869 (Pa. 2019) (reading "shall" as directory due to the practical consequences produced by a mandatory interpretation in the property law context).

[132] *In re* Guzzardi, 99 A.3d 381, 388–89 (Pa. 2014) (affirming a mandatory reading of the Election Code's requirement that candidates file an ethics disclosure form, despite a candidate's good faith failure to do so); Green Party of Pa. v. Dep't of State Bureau of Comm'ns, 168 A.3d 123, 130 (Pa. 2017) (same).

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the machines were distinct from simply requiring the vote counters to review the ballots to ascertain the voter's intent.

The mandatory and directory lines of reasoning each found resonance in one of the two cases, *Appeal of Pierce* and *Shambach*, respectively, that were issued within months of each other. This mixed precedent helped perpetuate the differing perspectives in the treatment of "shall" and became one of the critical focal points of the 2020 general election litigation.[133]

III. THE 2020 GENERAL ELECTION IN PENNSYLVANIA

A. Voting in Pennsylvania

The prior litigation interpreting "shall," described above, was a prelude to the incessant litigation during the 2020 election cycle. Consider the following statistics, which highlight the expansion of VBM ballots and the potential for the greater numbers of votes impacted by technical deficiencies. In the 2020 general election, 6,979,668 votes were cast in Pennsylvania.[134] That represents a 76.5% voter

[133] The Pennsylvania Supreme Court has only on one occasion cited *Appeal of Pierce* to reinforce a mandatory definition of "shall." *See* Commonwealth v. 605 Univ. Drive, 104 A.3d 411, 428 (Pa. 2014) (following *Appeal of Pierce* for a plain text reading of "shall" to conclude "the statutory language requires . . . ."); *cf.* Koken v. Reliance Ins. Co., 893 A.2d 70, 81 (Pa. 2006) ("This Court has emphasized that, while '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.'" (quoting *Appeal of Pierce*, 843 A.2d at 1231)). In *Chanceford Aviation Props. v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099 (Pa. 2007), the court interpreted a statutory provision stating: "In order to prevent the creation or establishment of airport hazards, every municipality having an airport hazard area within its territorial limits *shall* adopt, administer and enforce . . . airport zoning regulations for such airport hazard area." 74 PA. CONS. STAT. § 5912(a) (2007) (emphasis added). The court cited *Appeal of Pierce* for the proposition that "shall" is normally mandatory. 923 A.2d at 1106 (citing *Appeal of Pierce*, 843 A.2d at 1231–32). In this instance, the court concluded, a directory reading of "shall," "would allow municipalities to freely disregard the statute, which would not serve the legislature's purpose of preventing airport hazards." *Id.* at 1105.

The Commonwealth Court of Pennsylvania, though, has rejected the proposition that *Appeal of Pierce* requires "shall" to always be mandatory. That court concluded that the Supreme Court, "did state that in some contexts, ['shall'] can mean 'may,' and that it is the intention of the legislature which governs how the word is to be interpreted." Dubin v. Cty. of Northumberland, 847 A.2d 769, 773 n.8 (Pa. Commw. Ct. 2004). Thus, in that case concerning the validity of mineral rights owned by Northumberland County, the commonwealth court proceeded to read "shall" in a directory manner. *Id.*

[134] *Pennsylvania's Election Stats*, PA. DEP'T ST., https://www.dos.pa.gov/VotingElections/BEST/Pages/BEST-Election-Stats.aspx (last visited Feb. 9, 2021).

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turnout.[135] Of those votes, 2,637,065, or 37.7%, were VBM ballots, and, in addition, 126,573 provisional ballots were cast (including those that were rejected).[136]

Two extremely close and highly contested races are particularly illuminating. In the presidential race, Joe Biden and Kamala Harris prevailed by 80,555 votes in Pennsylvania.[137] Meanwhile, in the 45th State Senatorial District, the race between incumbent Democratic Senator Jim Brewster and GOP challenger Nicole Ziccarelli was among the tightest in the Commonwealth. The two candidates traded the lead repeatedly in the weeks following the election, with the race at one point coming down to an actual tie (out of more than 130,000 votes cast).[138] In the end, after substantial litigation, Senator Brewster prevailed by sixty-nine votes in the certified returns, with litigation culminating in a decisive federal court opinion over two months after the election.[139] These two races were at the center of the maze of litigation that developed around "shall."

B. Pre-Election Day Litigation of "Shall"

1. *In re Nomination Paper of Elizabeth Faye Scroggin* (*In re Scroggin*)

The first major case in Pennsylvania addressing the treatment of "shall" in the 2020 general election involved a ballot access question.[140] On the statutory deadline for seeking ballot access, the Green Party of Pennsylvania submitted a set of

[135] *Id.*

[136] *Id.*

[137] *Official Returns: 2020 Presidential Election*, PA. DEP'T ST., https://www.electionreturns.pa.gov (last visited Feb. 4, 2021).

[138] Rich Cholodofsky, *State Sen. Brewster Now Tied with Challenger Ziccarelli in 45th District Race*, TRIBLIVE (Nov. 19, 2020), https://triblive.com/local/valley-news-dispatch/state-sen-brewster-now-tied-with-challenger-ziccarelli-in-45th-district-race.

[139] Ziccarelli v. Allegheny Cty. Bd. of Elections, No. 2:20-CV-1831-NR, 2021 WL 101683, at *12–18 (W.D. Pa. Jan. 12, 2021) (rejecting the plaintiff's equal protection challenge, in part by relying on the *Rooker-Feldman* doctrine); Jon Delano, *Disputed Pennsylvania State Senate Election May Leave Seat Vacant in January*, KDKA CBS 2 PITTSBURGH (Dec. 15, 2020), https://pittsburgh.cbslocal.com/2020/12/15/disputed-pennsylvania-state-senate-election-may-leave-seat-vacant-in-january.

[140] *In re* Scroggin, 237 A.3d 1006 (Pa. 2020).

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nomination papers to the Secretary of the Commonwealth.[141] Those nomination papers included the names of placeholder candidates.[142]

However, the Party neglected to file a candidate affidavit for its temporary presidential candidate, as required under the Election Code: "There shall be appended to each nomination paper offered for filing an affidavit of each candidate nominated therein . . . ."[143] Thus, the Green Party could not offer its eventual final nominee as its placeholder candidate had not qualified.

Two weeks after the objectors' challenge was filed, the Party revealed that the original place-holder candidate for President had sent a facsimile of her affidavit to the Department of State thirty minutes before the statutory deadline, but this document did not include a cover letter and was not appended to the nomination papers.[144] In fact, no one from the Green Party even notified the Secretary's office that such an affidavit had been sent.[145] At issue was whether the requirement for a candidate to append the affidavit was mandatory or directory.[146]

Writing for the majority of the Pennsylvania Supreme Court, Justice Wecht began by examining the text of the Election Code.[147] The affidavit requirement, he observed, predates the current Pennsylvania Election Code's creation in 1937.[148] "The purpose of this provision as applied to nomination papers is to identify and disqualify so-called 'sore loser' candidacies, i.e., those individuals who unsuccessfully attempted to secure the nomination of a political party before filing nomination papers as a candidate of a political body."[149]

The court cited its decisions in both *Appeal of Pierce* and *James* as reflecting a broader view that when fraud prevention is the goal, the Election Code must be

[141] *Id.* at 1009.

[142] *Id.*

[143] 25 PA. CONS. STAT. § 2911(e)(5) (2020).

[144] *Scroggin*, 237 A.3d at 1010–11.

[145] *Id.* at 1014.

[146] *Id.* at 1013.

[147] *Id.* at 1017; 25 PA. CONS. STAT. § 2911(e).

[148] *Scroggin*, 237 A.3d at 1018.

[149] *Id.* at 1019 (citing *In re* Nomination Paper of Cohen, 225 A.3d 1083, 1093–94 (Pa. 2020) (Wecht, J., dissenting)).

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strictly construed.[150] Because the protections secured by the candidate affidavit could result in fraudulent ballot access, the court determined that the affidavit requirement could not be satisfied by substantial compliance.[151]

Due to the Green Party's erroneous submission, it never had a *bona fide* presidential candidate on the ballot. Therefore, when the Party attempted to substitute its real nominee for the placeholder candidate, there was no valid placeholder candidate for that nominee to replace.[152]

2. *Pennsylvania Democratic Party v. Boockvar*

On the same day *Scroggin* was decided, the Pennsylvania Supreme Court issued a significant decision interpreting various provisions under Act 77.[153] This litigation had started months earlier, when the Trump Campaign sued the Secretary of the Commonwealth and all sixty-seven county boards of election in the Western District of Pennsylvania.[154] However, the federal court had stated that under the *Pullman* Doctrine, it would abstain from considering central issues of state law already being litigated in state court.[155]

After that procedural maneuvering, the Pennsylvania Supreme Court was presented with the following five counts: (1) clarification that Act 77 permits satellite locations and drop boxes;[156] (2) an injunction "lift[ing] the deadline in the Election Code across the state to allow any ballot postmarked by 8:00 p.m. on Election Night to be counted if it is received" by 5:00 p.m. on November 10;[157] (3) require that counties provide voters whose VBM ballots suffer from minor deficiencies an opportunity to cure the shortcomings;[158] (4) declaratory judgment that "Naked Ballots" (ballots submitted with the outside mailing envelope, but no inner secrecy

[150] *Id.* at 1018.

[151] *Id.* at 1019–20.

[152] *Id.* at 1023.

[153] Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

[154] Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 343 (W.D. Pa. 2020).

[155] Donald J. Trump for President, Inc. v. Boockvar, 481 F. Supp. 3d 476, 503 (W.D. Pa. Aug. 23, 2020); R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[156] *Boockvar*, 238 A.3d at 352–53, 359–60.

[157] *Id.* at 353, 362–72.

[158] *Id.* at 353, 372–74.

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envelope) should be counted;[159] and (5) declaratory judgment that the "Election Code's poll watcher residency requirement does not violate the United States Constitution's First and Fourteenth Amendments, its Equal Protection Clause, or the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution."[160]

a. Majority opinion

Writing for the majority, then-Justice Baer noted that the court utilizes Pennsylvania's Statutory Construction Act (SCA) to determine the outcome in cases dealing with ambiguous statutory language.[161] According to the SCA, "[T]he object of all statutory construction is to ascertain and effectuate the General Assembly's intention."[162] But then-Justice Baer maintained that the general principle to be applied in Election Code cases is that "the Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice."[163] Given this framework, the court found in favor of the Pennsylvania Democratic Party on three of the five counts.

For Count I, the court found that both sides' reading of the Election Code regarding the permissibility of satellite offices and drop boxes was plausible, and therefore the relevant statutory language was ambiguous.[164] Given that ambiguity, the court found that the purpose underlying Act 77—the expansion of the ease of voting—militated in favor of an expansive reading.[165] On Count II, the court agreed the statutory language clearly established an 8:00 p.m. deadline on Election Day for the receipt of VBM ballots.[166] However, the court invoked its equitable powers to adopt the Secretary of the Commonwealth's proposed three-day extension of this deadline due to the COVID-19 pandemic and an acknowledgment from the United

[159] *Id.* at 353, 374–80. Note that the issue of "shall" was most relevant in this count and is accordingly our main focus.

[160] *Id.* at 380–86.

[161] *Id.* at 355–56 (citing 1 PA. CONS. STAT. §§ 1501–1991).

[162] *Id.* at 356 (citing Sternlicht v. Sternlicht, 876 A.2d 904, 909 (Pa. 2005)).

[163] *Id.* (citing Perles v. Hoffman, 213 A.2d 781, 783 (Pa. 1965)).

[164] *Id.* at 360.

[165] *Id.* at 361.

[166] *Id.* at 371–72.

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States Postal Service that its delivery time had been increased.[167] This one-time change would not affect the actual language of the Code, nor would it apply in future cycles.[168] On Count III, the court declined to order a mandatory ballot cure requirement in the absence of clear statutory instruction to do so.[169] Finally, on Count V, the court agreed with the joint request of the Pennsylvania Democratic Party and the Secretary of the Commonwealth and issued a declaratory judgment that the poll watcher residency requirement was valid under state and federal law.[170]

Turning to Count IV, the portion of the opinion dealing with the treatment of the Naked Ballots, the opinion referenced the statute, which directs:

> [T]he mail-in elector *shall* . . . fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.[171]

Once such ballots have been received, the statute sets out the conditions under which they may be rejected by the county boards, namely, if the voter has subsequently died before Election Day, if the voter is not eligible to vote, or if any mark or symbol on the outside declaration envelope could reveal the voter's identity.[172] The statute does not expressly articulate any penalty for non-compliance with the inner secrecy envelope requirement. This stands in marked contrast to the rules for provisional

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[167] *Id.*

[168] *Id.* The Trump Campaign sought certiorari to the U.S. Supreme Court on this point. The Court issued two interim decisions on whether to grant a stay, before ultimately denying a stay on an equally divided court including four Justices who would have granted the stay. Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 643 (2020), *cert. denied*, 141 S. Ct. 732 (2021).

[169] *Boockvar*, 238 A.3d at 374.

[170] *Id.* at 386.

[171] 25 PA. CONS. STAT. § 3150.16(a) (2020) (emphasis added).

[172] *Id.* § 3146.8(d), (g).

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ballots, where the failure to use a secrecy envelope constitutes a specific ground for invalidation.[173]

The court concluded that the Naked Ballot prohibition must be construed as mandatory.[174] It dismissed comparisons to *Weiskerger* and *Shambach* as "contain[ing] [no]thing analogous to the directive at issue in this case, which involves secrecy in voting protected expressly by Article VII, Section 4 of this Court's state charter."[175] Instead, the court concluded that the secrecy envelope requirement exists to prevent fraud—although the only ills it explicitly delineates arise from a lack of privacy for the affected voter.[176] Because it described the provision as fraud-related, the court then looked to *Appeal of Pierce* as its source of guiding precedent.[177] That case, in the court's view, stands for the proposition that "even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism."[178] Likewise, here, because the legislature went to substantial lengths to ensure that ballots not contain identifying information, the court reasoned that a ballot without a secrecy envelope evidently contains identifying information (although there were means available to cloak these ballots and prevent their ready identification).

Ultimately, the court concluded that the legislature intended for ballots to be anonymous, and the lack of a secrecy envelope "defeats this intention."[179] It therefore construed "shall" to be mandatory, meaning that "the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid."[180]

b. Justice Wecht's concurrence

While joining the majority's reasoning in full on the Naked Ballots issue, Justice Wecht wrote separately and reflected at greater length on the court's past

[173] *Id.* § 3050(a.4)(5)(ii)(C).

[174] *Boockvar*, 238 A.3d at 380.

[175] *Id.* at 379.

[176] *Id.* at 378.

[177] *Id.*

[178] *Id.* at 380.

[179] *Id.*

[180] *Id.*

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entanglements with "shall" under the Election Code.[181] He described the "potential for mischief" when the court attempts to parse the legislature's intent in choosing "shall" when it meant either "may" or "must."[182]

Justice Wecht observed that "Pennsylvania courts have labored mightily but in vain to fashion a coherent organizing principle" when confronted with such cases.[183] He dismissed prior efforts at a meaningful distinction. First, he referenced a Pennsylvania Superior Court decision which had proposed that the difference should lie in the result of non-compliance,[184] but he dismissed this possibility: "[T]his distinction is nonsensical: we cannot gauge the effect of non-compliance simply by asking what the effect of non-compliance is."[185] He also rejected a prior distinction offered by the court itself: "[Shall] may be construed to mean 'may' when no right or benefit to any one depends on its imperative use, when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction . . . ."[186] This, according to Justice Wecht, "suggests nothing to me so much as that we are free to do whatever we want only when what we do does not matter."[187] He concluded by suggesting that the only workable solution may be for the courts to consistently interpret "shall" as mandatory in order to telegraph to the legislature that it must clearly describe where it does not expect stipulations to be strictly observed in all circumstances.[188] Then-Chief Justice Saylor and Justices Donohue and Mundy variously concurred and dissented from the majority's decision, but none dwelt on the meaning of "shall."

[181] *Id.* at 390–91 (Wecht, J., concurring). He also explored whether notice is necessary for deprivations of the right to vote through invalidation of flawed VBM ballots. *Id.* at 389. Justice Wecht speculated that "[a]bsent some proof that the enforcement of such a uniform, neutrally applicable election regulation will result in a constitutionally intolerable ratio of rejected ballots," the Pennsylvania Constitution did not require pre-deprivation notice (i.e., an opportunity to cure) provided that voters had received "conspicuous warnings regarding the consequences for failing strictly to adhere." *Id.*

[182] *Id.* at 390–91.

[183] *Id.* at 391.

[184] *Id.* (citing Borough of Pleasant Hills v. Carroll, 125 A.2d 466, 469 (Pa. Super. Ct. 1956) (en banc)).

[185] *Id.*

[186] *Id.* (quoting Commonwealth *ex rel.* Bell v. Powell, 94 A. 746, 748 (Pa. 1915) (alterations added)).

[187] *Id.*

[188] *Id.* at 391–92.

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This was the state of the election-related litigation on November 3, 2020.[189]

C. Post-Election Day Litigation of "Shall"

In the days and weeks after the election, the interpretative issue of "shall" returned repeatedly in a variety of different contexts. Litigation involving the presidential race between Joseph Biden and Donald Trump dominated the landscape as Donald Trump and his allies pursued an array of challenges. In addition, the close State Senate race between incumbent Senator Brewster and challenger Zicarrelli also led to prolonged court battles. This litigation took place in both the federal and state courts. As to the litigation relevant to the application of the verb "shall," the state courts tended to review those questions involving statutory interpretation. The Pennsylvania Supreme Court ultimately consolidated several of these cases to provide an analysis that could be applied statewide.

Under the Election Code, challenges to the interpretations adopted by the various county election officials—tasked with administering the election—are to be resolved initially in the county boards of election.[190] An aggrieved person may then file an appeal to the court of common pleas in the affected county, and so the first level of post-Election Day litigation occurred in a number of courts of common pleas across Pennsylvania.[191] We thus begin by surveying representative examples of the lower court decisions before examining the Pennsylvania Supreme Court's ultimate treatment of these issues.

1. *Donald J. Trump for President v. Montgomery County Board of Elections* (Montgomery County Court of Common Pleas)

Little more than twenty-four hours after polls had closed, Trump for President, the former President's campaign, filed suit in the Montgomery County Court of Common Pleas seeking to invalidate 592 VBM ballots where the voter had failed to

[189] After the September 17, 2020 state supreme court decision outlined above, Judge Ranjan granted the state's motion to dismiss in the suit in the Western District of Pennsylvania in which he previously had abstained under the *Pullman* Abstention Doctrine. The court found no colorable equal protection claim under the Plaintiffs' theory. Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 390 (W.D. Pa. 2020).

[190] *See* 25 PA. CONS. STAT. § 2642 (2020).

[191] *Id.* § 3157(a).

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complete the declaration envelope containing the ballot by omitting an address.[192] This case revolved around the statutory requirement that voters "shall . . . fill out" the declaration form on the outer envelope.[193] The county election board had determined that signing and dating the declaration was sufficient to satisfy the statute, which explicitly envisioned that the voter "date and sign" the declaration, but did not specify that the address field must be completed.[194]

The Court of Common Pleas noted that while other statutory provisions specifically reference having to include an address, the legislature did not explicitly make that a requirement here.[195] Further, there was no notice to the affected voters that omitting their address could negate their otherwise satisfactory completion of the form and invalidate their vote.[196] Rather, the instructions stated only, "be sure that you *sign* and *date*" the declaration.[197] Finally, the court pointed to the fact that nearly all (556) of the affected ballots contained the voter's address either via a pre-printed return label, a handwritten address in the return field, or both.[198] The remaining thirty-six ballots could easily have their address determined through the Statewide Uniform Registry of Electors (SURE) barcode printed on the envelope, which is linked to the voter's state file and would immediately reveal the relevant address information.[199] Given this multiplicity of factors—no clear statutory requirement for an address, no notice of the consequences of omission, and immediately evident extrinsic means for obtaining the information—the court ordered that all 592 ballots be counted.[200]

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[192] Memorandum and Order at 1, 2 n.1, Donald J. Trump for President, Inc. v. Montgomery Cty. Bd. of Elections, No. 2020-18680 (Ct. Com. Pl. Montgomery Cty. Nov. 13, 2020) [hereinafter Montgomery Cty. Order].

[193] 25 PA. CONS. STAT. § 3146.6(a).

[194] Montgomery Cty. Order, *supra* note 192, at 5.

[195] *Id.* at 6–8.

[196] *Id.* at 6–7.

[197] *Id.* at 7.

[198] *Id.* at 8.

[199] *Id.*

[200] *Id.* at 8–10.

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2. *In re Canvass of Absentee and/or Mail-In Ballots of November 3, 2020 General Election* (Bucks County Court of Common Pleas)

In this case, the Trump Campaign challenged five categories of VBM ballots: (1) those lacking a date or containing only a partial date; (2) those without a printed name or address; (3) those where only a partial address was printed; (4) those where the printed address did not match the voter's registration file; and (5) those where the ballot was not "naked," but the inner secrecy envelope was not properly sealed.[201] In each case, the Trump Campaign argued that the Election Code instructed that the voter "shall" take the action that was missing from the given category of ballot.

In the first category, the two types of ballots—those without dates and those with only partial dates—had been co-mingled after being opened and initially tabulated in the presence of representatives of both parties.[202] The court concluded that it could not deprive the franchise to voters based on the minor deficiency of failing to fully complete the date, and since those lawful ballots could not be separated from the undated ballots (which the court suggested may have been invalidated if separately presented), all of these challenged ballots should be counted.[203] The court said the Trump Campaign waived its claim by failing to object to the co-mingling of the two groups.[204]

For the second, third, and fourth categories—ballots with address issues, including omitted name and address, partial address, or mismatched address, respectively—the court found no substantial risk of fraud arising from the counting of these votes and therefore determined that, in line with *Weiskerger* and *Shambach*, the votes should be counted.[205]

Finally, for the last category—ballots with improperly sealed privacy envelopes—the court observed that there was no evidence in the record suggesting that the envelopes were not originally sealed but became unsealed in transit (e.g., as a result of the envelope's glue failing).[206] Therefore, it would "be an injustice to

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[201] Memorandum and Order at 10–11, *In re* Canvass of Absentee &/or Mail-in Ballots of November 3, 2020 Gen. Election, No. 20-05786-35 (Ct. Com. Pl. Bucks Cty. Nov. 19, 2020).

[202] *Id.* at 17.

[203] *Id.* at 15–18.

[204] *Id.* at 18.

[205] *Id.* at 19.

[206] *Id.* at 20.

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disenfranchise these voters when it cannot be shown that the ballots in question were not 'securely sealed' in the privacy envelopes."[207] Thus, the court ordered that all categories of challenged ballots be included in Bucks County's final count.[208]

3. *In re 2020 General Election Provisional Ballot Challenges* (Westmoreland County Court of Common Pleas)

The Westmoreland County Court of Common Pleas resolved a dispute in the State Senate race between Senator Brewster and challenger Ziccarelli.[209] The issues were two-fold: first, 250 voters had both cast provisional ballots and signed the poll book (indicating an in-person vote on Election Day); second, twelve provisional ballots were submitted without being placed in the accompanying secrecy envelopes.[210]

Although it appeared likely that incorrect instructions by election officials had caused the poll book entries, the court declined to count the affected votes.[211] It concluded that unless the board of elections had evidence that a particular voter had not voted twice, the poll book signatures must be disqualifying.[212] Therefore, the vast majority (204) of the 250 ballots which lacked such evidence were rejected, while forty-six ballots—where individually proffered evidence existed that the voter had not cast a regular ballot due to inaccurate instructions by poll workers in a few specific voting locations—were counted.[213]

Likewise, the court took a stringent view of the missing secrecy ballots. It equated this deficiency to a VBM Naked Ballot and ruled that under *Boockvar*'s determination that Naked Ballots are invalid, the same logic should apply to

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[207] *Id.*

[208] *Id.* at 21. The Commonwealth Court of Pennsylvania later considered each point and affirmed this decision on all counts. Memorandum Opinion, *In re* Canvass of Absentee &/or Mail-in Ballots of November 3, 2020 Gen. Election, No. 1191 C.D. 2020 (Pa. Commw. Ct. Nov. 25, 2020).

[209] Opinion and Order of Court, *In re* 2020 Gen. Election Provisional Ballot Challenges, No. 4152 of 2020 (Ct. Com. Pl. Westmoreland Cty. Nov. 23, 2020).

[210] *Id.* at 1.

[211] *Id.* at 4, 9.

[212] *Id.* at 5–7.

[213] *Id.* at 7.

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provisional ballots.[214] It therefore disqualified all twelve provisional ballots with missing secrecy envelopes.[215]

4. *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election* (Philadelphia County Court of Common Pleas)

In Philadelphia, where the potential for widespread litigation already had been threatened before November 3,[216] only 13,165 ballots were eventually flagged for review by the board of elections.[217] The board rejected 4,736 ballots—including ballots lacking a signature and Naked Ballots—and accepted the remaining 8,429. The Trump Campaign filed a statutory appeal in the Philadelphia County Court of Common Pleas concerning those accepted ballots. These ballots fell into five categories: 1,211 ballots lacking a date, address, and printed name;[218] 1,259 ballots

[214] *Id.* at 8–9.

[215] *Id.*

[216] *See* Jonathan Tamari, *Trump Says 'Bad Things Happen in Philadelphia.' Here's What Actually Happened in Philadelphia*, PHILA. INQUIRER (Sept. 30, 2020), https://www.inquirer.com/news/trump-bad-things-happen-in-philadelphia-debate-20200930.html.

[217] Brief of Appellee/Intervenor DNC Services Corp./Democratic National Committee in Opposition to Petition for Review of Decision at 6–7, Donald J. Trump for President, Inc. v. Phila. Cty. Bd. of Elections, No. 1136 CD 2020 (Pa. Commw. Ct. Nov. 18, 2020). This means less than 2% of Philadelphia ballots were subject to such review. *See* Layla A. Jones, *Philadelphia Turnout for the 2020 Election Was the Highest in 25 Years*, BILLYPENN (Nov. 17, 2020, 5:55 PM), https://billypenn.com/2020/11/17/philly-turnout-2020-lower-obama-trump-biden.

[218] Order, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100874 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020); Order, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100875 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020); Order, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100876 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020); Order, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100877 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020); Order, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100878 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020).

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lacking only a date;[219] 533 ballots lacking a printed name;[220] 860 ballots lacking an address;[221] and 4,466 ballots that lacked a printed name and address.[222]

The Philadelphia County Court of Common Pleas rejected the Trump Campaign's challenge on two grounds. First, voters had not been notified in the ballot instructions that failure to completely fill out the declaration envelope would result in disenfranchisement.[223] Second, there were no fraud concerns implicated by accepting the flagged ballots.[224] The Trump Campaign appealed this decision to the Commonwealth Court of Pennsylvania, but before that court could issue a decision, the Pennsylvania Supreme Court exercised its extraordinary jurisdiction powers and consolidated these cases with the Allegheny County decision discussed below.[225]

[219] Order, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100875 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020).

[220] Order at 1–2, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100876 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020).

[221] Order at 1, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100877 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020).

[222] Order at 1, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100878 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020).

[223] *See, e.g.*, Order, *In re* Canvass of Absentee & Mail-in Ballots of November 3, 2020 Gen. Election, No. 201100876 (Ct. Com. Pl. Phila. Cty. Nov. 13, 2020).

[224] *Id.*

[225] *See In re* 2,349 Ballots, 241 A.3d 1058, 1062–63 (Pa. 2020) (describing consolidation).

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5. *In re 2,349 Ballots in the 2020 General Election* (Allegheny County Court of Common Pleas)[226]

As noted, the State Senate race in the 45th District, between incumbent Brewster and challenger Ziccarelli, was ultimately decided by just sixty-nine votes.[227] In Allegheny County, Ziccarelli challenged 2,349 ballots (of which 311 were cast in the 45th Senate District) for the failure of these voters to date the ballot declaration (each ballot had been signed by the voter).[228] The Election Code maintained that "[t]he elector shall . . . fill out, date and sign the declaration" on the ballot envelope.[229] The precise form of that declaration is delegated under the Code to the Secretary of the Commonwealth.[230] The Allegheny County Board of Elections had voted two to one to accept these ballots.[231]

The Allegheny County Court of Common Pleas evaluated the situation from the *James* perspective: "It is well settled Pennsylvania law that election laws should be construed liberally in favor of voters, and that '[t]echnicalities should not be used

[226] In a companion case, candidate Ziccarelli contested the counting of 270 provisional ballots. Ziccarelli challenged these voters' failure to sign the provisional ballot twice, as is required, having only signed their ballots once. Memorandum and Order at 1–2, Ziccarelli v. Allegheny Cty. Bd. of Elections, No. GD 20-011793 (Ct. Com. Pl. Allegheny Cty. Nov. 18, 2020).

The Court of Common Pleas ordered that these provisional ballots should be counted. *Id.* at 3. The Commonwealth Court of Pennsylvania reversed. *In re* Allegheny Cty. Provisional Ballots in the 2020 Gen. Election, No. 1161 C.D. 2020 (Pa. Commw. Ct. Nov. 20, 2020). Judge Patricia McCullough held that this case was distinguished from both *Boockvar* and *James* by the statutory requirement that all provisional ballots must be signed twice and must be enclosed in a secrecy envelope. *Id.* at 5–7. Judge McCullough was unpersuaded that voters being actively misled by election officials' advice would constitute sufficient evidence to override the command of this statutory text. *Id.* at 9. Finally, for voters who cast a provisional ballot after being informed their VBM ballot had been rejected, the court summarily suggested that the statute requires their disenfranchisement. *See id.* at 9. The Code states a provisional ballot may not be counted if a VBM ballot is "timely received by a county board of elections." 25 PA. CONS. STAT. § 3050(a.4)(5)(ii)(F) (2020). The court assumed a rejected ballot counts as "timely received" and thus obviates the ability of a voter to cure that deficiency via provisional ballot (notably not discussing that curing deficiencies are among the core purposes provisional ballots are designed to address).

[227] Delano, *supra* note 139.

[228] Memorandum and Order at 2, Ziccarelli v. Allegheny Cty. Bd. of Elections, No. GD 20-11654 (Ct. Com. Pl. Allegheny Cty. Nov. 18, 2020).

[229] 25 PA. CONS. STAT. § 3150.16(a).

[230] *Id.* § 3150.14(b).

[231] Petition for Review at 4, Ziccarelli v. Allegheny Cty. Bd. of Elections, No. GD 20-011793 (Ct. Com. Pl. Allegheny Cty. Nov. 18, 2020).

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to make the right of the voter insecure.'"[232] The court observed that because each ballot is scanned into the SURE system before being dispatched, and again scanned when received by the county, the timeframe within which the ballot was signed was tightly delineated and could not have been outside the legally permitted period (i.e., after the election).[233] Therefore, the court concluded, "In light of the fact that there is no fraud, a technical omission on an envelope should not render a ballot invalid. The lack of a written date on an otherwise qualified ballot is a minor technical defect that does not render it deficient."[234] It ruled that the Allegheny County Board of Elections had properly accepted these 2,349 ballots.[235]

On appeal, the Commonwealth Court of Pennsylvania reversed. It took a rigid view of "shall" and ordered that ballots with even minor deficiencies not be counted.[236] That court concluded there was no ambiguity in the instructions of the Election Code: voters "shall . . . fill out, date and sign the declaration."[237] While the court agreed there was no hint of fraud in that failure, it posited that this plain error, even in the absence of fraud, was sufficient to disenfranchise the affected voters.[238] Further, it stated that the county board of elections itself had also violated the law when it declared itself satisfied with these affected ballots, despite their technical insufficiency under the statute.[239] It described the purpose of this protection as twofold:

> The date provides a measure of security, establishing the date on which the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a

[232] Memorandum and Order at 4, Ziccarelli v. Allegheny Cty. Bd. of Elections, No. GD 20-11654 (Ct. Com. Pl. Allegheny Cty. Nov. 18, 2020) (quoting Pa. Democratic Party v. Boockvar, 238 A.3d 345, 373 (Pa. 2020)).

[233] *Id.* at 4.

[234] *Id.*

[235] *Id.*

[236] *In re* 2,349 Ballots in 2020 Gen. Election, No. 1162 C.D. 2020, 2020 WL 6820816, at *1 (Pa. Commw. Ct. Nov. 19, 2020).

[237] *Id.* at *5.

[238] *Id.* at *6.

[239] *See id.*

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> point in time against which to measure the elector's eligibility to cast the ballot, as reflected in the body of the declaration itself.[240]

Finally, the court disposed of *James*, distinguishing it in a footnote on the grounds that that case related to the treatment of actual ballots, whereas the present case pertained to the outside envelopes.[241] Within days, the Pennsylvania Supreme Court granted Senator Brewster's petition for allowance of appeal and consolidated that appeal with the various appeals from the Philadelphia County Court of Common Pleas.

6. *In re 2,349 Ballots* (Pennsylvania Supreme Court; consolidated Allegheny and Philadelphia appeals)

The Pennsylvania Supreme Court consolidated the appeals from Allegheny County and Philadelphia County.[242] Although it unanimously agreed to count ballots that included a date, the court fractured into three different opinions concerning the undated ballots from both counties.[243] Three justices viewed the use of "shall" as directory.[244] Three justices viewed "shall" as mandatory,[245] and a single justice viewed "shall" as prospectively mandatory, but directory for the 2020 Election.[246]

a. Opinion Announcing the Judgment of the Court

This opinion, authored by Justice Donahue, began by citing *Norwood* for the "well-settled principle of Pennsylvania election law that '[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.'"[247] Based on this philosophy, Justice Donahue observed, "We do not agree . . .

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[240] *Id.*

[241] *Id.* at *5 n.10.

[242] *In re* 2,349 Ballots, 241 A.3d 1058 (Pa. 2020). This decision saw the consolidated consideration of six separate orders from Philadelphia and Allegheny Courts of Common Pleas. For consistency, we refer to the combined matter by reference to the Allegheny case name.

[243] *Id.* at 1079, 1090.

[244] *Id.* at 1076 (Donohue, J., joined by Baer & Todd, JJ.).

[245] *Id.* at 1090–91 (Dougherty, J., joined by Saylor, C.J., Mundy, J., concurring in part and dissenting in part).

[246] *Id.* at 1079 (Wecht, J., concurring in the result and filing a concurring and dissenting opinion).

[247] *Id.* at 1071 (quoting Appeal of Norwood, 116 A.2d 552, 554–55 (Pa. 1955)).

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that because the General Assembly used the word 'shall' in this context, it is of necessity that the directive is a mandatory one . . . ."[248] Instead, Justice Donahue noted, "It has long been part of the jurisprudence of this Commonwealth that the use of 'shall' in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory."[249] The court returned to its survey in *Boockvar* of the "shall" precedents set in *James*, *Weiskerger*, and *Appeal of Pierce*. It distilled its conclusion in those cases into a two-part test that: First, the court looks to the intent of the legislature.[250] Then, it compares whether deficiencies in reaching that intent are "minor irregularities," which could be forgiven, or violate a "weighty interest," in which case "shall" should be read as mandatory.[251] Two examples of such weighty interests, in the court's view, were fraud prevention and ballot secrecy.[252]

Arguing in favor of counting their respective ballots, the Philadelphia and Allegheny County Boards of Elections asserted that although these ballots may have lacked minor details such as date or address, they were each signed by the respective voter and there was absolutely no contention that the lack of complete information was a method conducive of fraud in this case.[253]

Concerning these omissions of handwritten names and addresses, the court noted that the "shall" in the statute does not clearly envision that names and addresses are required at all. While the law requires the voter to "fill out" the declaration, it leaves the content of that declaration to the discretion of the Secretary of the Commonwealth.[254] The Trump Campaign argued that because the statute requires that the voter "fill out" the declaration, any omission on that document is inherently a violation.[255] The court rejected this view, noting that "fill out" is not clearly defined in the Election Code, and further that "the voter's name and address are already on the back of the outer envelope on a pre-printed label affixed no more than one inch

[248] *Id.*

[249] *Id.*

[250] *Id.* at 1062.

[251] *Id.* at 1071–73.

[252] *Id.* at 1073.

[253] *Id.* at 1070.

[254] *Id.* at 1064.

[255] *See id.* at 1073.

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from the declaration itself."[256] Thus, a voter could have easily imagined that the name and address fields were duplicative; indeed they are, as described in more detail below. In sum, because there is no explicit textual requirement that name and address be included, the court concluded that "shall" is best read as directory in this context.[257]

Moving on to the ballots missing dates, the court noted that here, the statute does explicitly instruct that the voter "shall . . . date" the declaration.[258] However, in its view, "[T]he word 'shall' is not determinative as to whether the obligation is mandatory or directive in nature. That distinction turns on whether the obligation carries 'weighty interests.'"[259]

Such interests cannot include dating the ballot envelope, as this step is unnecessary for verifying that the ballot was received in time.[260] The timeframe of the ballot's submission can be ascertained through the SURE system.[261] This Department of State database contains details on each ballot, including when it was mailed to the voter.[262] Because the ballot's date of receipt is known, and the mailing date is known, the ballot must have been signed within that period of time.[263] Thus, because there is no plausible concern over timeliness, "any handwritten date [is] unnecessary and, indeed, superflous [sic]," meaning it cannot serve as a "weighty interest[]."[264]

The court dismissed the alternative "weighty interests" propounded by Ziccarelli and accepted by the Commonwealth Court of Pennsylvania. First, that the date allows the board of elections to verify that a voter was eligible to vote before the election even if no longer eligible to do so on Election Day (e.g., having moved to another state, but still eligible to vote for the President in Pennsylvania).[265] Second,

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[256] *Id.* at 1074 (emphasis removed).

[257] *Id.* at 1075–77.

[258] *Id.* at 1076–77.

[259] *Id.* at 1076.

[260] *Id.* at 1076–77.

[261] *Id.* at 1077.

[262] 25 PA. CONS. STAT. § 1222 (2020).

[263] *In re* 2,349 Ballots, 241 A.3d at 1077.

[264] *Id.*

[265] *Id.*

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that the date may help prevent duplicate voting.[266] The court observed that neither is a weighty interest. There is no system for verifying whether a ballot was cast by a voter who was previously eligible but is now ineligible to vote in Pennsylvania, and the SURE system is the primary method for detecting duplicate voting, and it is entirely unaffected by the inclusion of a handwritten date.[267]

The judgment of the Philadelphia County Court of Common Pleas accepting the five groups of contested ballots was affirmed, and the Commonwealth Court of Pennsylvania's decision was reversed, reinstating the directory reading of the Allegheny County Court of Common Pleas.[268]

b. Concurring and Dissenting Opinion I

Justice Wecht concurred that the delegation to the Secretary of the Commonwealth on the form of the declaration meant that ballots should not be invalidated solely because voters failed to handwrite their names and/or include their addresses on that form.[269] Thus, he fully joined the three justices noted above regarding the three sets of Philadelphia ballots lacking handwritten names or addresses (or both), totaling 5,859 votes. However, Justice Wecht disagreed that for the remaining 2,570 Philadelphia ballots, and the 2,349 Allegheny County ballots, the lack of a date could so easily be forgiven.[270] But ultimately, he concluded that the court should prospectively mandate that any ballot missing either a signature or date not be counted.[271]

Justice Wecht expressed an "increasing discomfort with this Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent."[272] He reiterated his concern, expressed in his concurrence in *Boockvar*, that unless the court makes clear that it will always read "shall" as mandatory, the word will begin to have no independent force whatsoever. He concluded that the court's case law on this subject "is so muddled as to defy consistent application, an inevitable consequence of well-meaning judicial efforts to

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[266] *Id.*

[267] *Id.* at 1077.

[268] *Id.* at 1079.

[269] *Id.* at 1079 (Wecht, J., concurring).

[270] *Id.*

[271] *Id.*

[272] *Id.* at 1080.

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embody a given view of what is faithful to the spirit of the law, with the unfortunate consequence that it is no longer clear what 'shall' even means."[273]

He argued,

> A court's only "goal" should be to remain faithful to the terms of the statute that the General Assembly enacted, employing only one juridical presumption when faced with unambiguous language: that the legislature *meant what it said*. And even where the legislature's goal, however objectionable, is to impose a requirement that appears to have a disenfranchising effect, it may do so to any extent that steers clear of constitutional protections.[274]

The *Weiskerger* case, he noted, was decided before the adoption of the SCA, and therefore lacked the proper tools to make such a determination.[275] But, he pointed out, *Shambach* failed to consistently apply those tools either.[276] *Appeal of Pierce* and *Scroggin* reached the proper mandatory reading, in this view, as did *Boockvar* in preventing the inclusion of Naked Ballots in the final count.[277]

"The only practical and principled alternative," in Justice Wecht's view,

> is to read "shall" as mandatory. Only by doing so may we restore to the legislature the onus for making policy judgments about what requirements are necessary to ensure the security of our elections against fraud and avoid inconsistent application of the law, especially given the certainty of disparate views of what constitute "minor irregularities" and countervailing "weighty interests."[278]

This means that "[w]e must prefer the sometimes-unsatisfying clarity of interpreting mandatory language as such over the burden of seeking The Good in its subtext."[279]

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[273] *Id.* at 1081.

[274] *Id.* at 1082.

[275] *Id.*

[276] *Id.*

[277] *Id.* at 1084.

[278] *Id.* at 1087.

[279] *Id.*

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However, because of the difficult environment created by the COVID-19 pandemic, and the confusion it sowed among election officials and voters in the 2020 election, Justice Wecht agreed that this mandatory reading should apply only prospectively, and he thus joined the judgment of the court ordering the inclusion of the undated ballots.[280] In doing so, he placed particular emphasis on the lack of notice that a retrospective ruling would provide to affected voters: "I cannot say with any confidence that even diligent electors were adequately informed as to what was required to avoid the consequence of disqualification in this case. . . . [I]t would be unfair to punish voters for the incidents of systemic growing pains."[281] It would have been necessary, in his view, for the declaration to "includ[e] conspicuous warnings regarding the consequences for failing strictly to adhere."[282]

He concluded by strongly urging the legislature to revise the Election Code to clarify the meaning of "shall" in these disputed instances.[283] Whether or not the court ultimately reaches a majority view in future election litigation, the undated ballots were counted in the 2020 general election, and Senator Brewster narrowly defeated challenger Ziccarelli in the contested Senate seat by sixty-nine votes.[284]

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[280] *Id.* at 1087–88.

[281] *Id.* at 1089.

[282] *Id.* (emphasis omitted) (quoting Pa. Democratic Party v. Boockvar, 238 A.3d 345, 389 (Pa. 2020)).

[283] *Id.*

[284] Litigant Ziccarelli attempted to invoke Justice Wecht's prospective rule with immediate effect before the Western District of Pennsylvania. She argued, "a four-justice majority of the Court held that an undated signature on the Voter Declaration renders the enclosed mail-in ballot defective." Motion for a Temporary Restraining Order and Preliminary Injunction at 5, Ziccarelli v. Allegheny Cty. Bd. of Elections, No. 2:20-cv-1831, 2020 WL 7315065 (W.D. Pa. Nov. 25, 2020). That court denied her motion for a TRO the same day. *Id.*

Ultimately, two months after Election Day, the court granted summary judgment against Ziccarelli and ordered that the contested ballots be counted. Ziccarelli v. Allegheny Cty. Bd. of Elections, No. 2:20-cv-1831-NR, at *4 (W.D. Pa. Jan. 12, 2021). The district court carefully analyzed the Pennsylvania Supreme Court's splintered plurality opinions and concluded, "four justices—in a case brought by the same plaintiff and challenging the very same ballots at issue here—interpreted Act 77's date requirement as not invalidating non-compliant ballots under the circumstances present here, and thus held that Allegheny County's decision to count those ballots was proper. That interpretation of Pennsylvania law is binding on the federal courts, including on this Court . . . ." *Id.* Beyond the plaintiff's case failing on the merits, there was an impassible procedural defect. Ziccarelli had failed to appeal the Pennsylvania Supreme Court decision to the U.S. Supreme Court; this later attempt to bring an effectively collateral challenge to that outcome in federal district court deprived that court of jurisdiction to consider the matter under the *Rooker-Feldman* doctrine. *Id.* at *6.

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c. Concurring and Dissenting Opinion II

Justice Dougherty, joined by then-Chief Justice Saylor and Justice Mundy, separately echoed the position expressed by Justice Wecht in his concurrence: agreeing that the Philadelphia ballots lacking names and addresses should be counted, but dissenting on the inclusion of the undated Philadelphia and Allegheny County ballots.[285] To this plurality, there is seemingly a distinction between requirements expressly included by the legislature itself and those it delegates to another entity, here the Secretary of the Commonwealth.[286] When the text itself commands it, courts are bound to follow the word of the legislature. However, when a term such as "fill out" is used, one that is "subject to interpretation," the resulting omission need not disqualify a ballot.[287] Here, the legislature delegated the form of the declaration to the Secretary, but it specified that voters must date their ballots.[288] Further, Justice Dougherty wrote, there is a clear purpose behind the legislative pronouncement that voters date their ballots, namely that it verifies when the ballots were cast.[289] Under this view, therefore, that requirement should be construed as mandatory.[290]

IV. A PROPOSED TEST INDICATING DIRECTORY OR MANDATORY MEANING

A. Overview

As reflected in the various judicial decisions considering whether the verb "shall" is to be applied as mandatory or directory in a particular context, a notable dichotomy has emerged. Some courts have recognized that elections must be afforded special deference as the instruments of our democracy, emphasizing that "[t]he purpose in holding elections is to register the actual expression of the electorate's will."[291] Other courts have focused primarily on legislative intent without the same apparent deference to the rights of eligible voters to cast their

[285] *In re* 2,349 Ballots, 241 A.3d at 1090–91 (Dougherty, J., concurring).

[286] *Id.*

[287] *Id.* at 1090.

[288] *Id.*

[289] *Id.* at 1091.

[290] *Id.* at 1090.

[291] Appeal of Gallagher, 41 A.2d 630, 632 (Pa. 1945) (quoting *In re* Carbondale Election, 124 A. 298, 299 (Pa. 1924)).

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ballots, and have those ballots counted. Some of the decisions applying a mandatory interpretation of "shall" have not expressly considered the voter's constitutional rights. Instead, these courts focus only on the legislative purpose or, in some cases, on the "undeserving" voter who failed to submit a perfectly executed ballot. One court noted, "We do not enfranchise voters by absolving them of their responsibility to execute their ballots in accordance with law."[292]

This unforgiving perspective appears to conceive of the right to vote as a concession bestowed by the state legislature. This view equates voting with the areas at the apex of state legislative power such as economic regulation or general state police powers. Voting, however, is not simply a license to participate in our democracy; citizens are endowed with a fundamental right to vote, secured in both the state and federal constitutions.[293] State legislation controlling the franchise must therefore be subject to some type of special or elevated scrutiny to account for the constitutional right at issue. It seems that the more directly the individual right is implicated, the more the courts' focus should fall on the underlying rationale leading to disenfranchisement.

This approach to heightened scrutiny protecting the right to vote has been reliably expounded by the federal courts, where the *Anderson-Burdick* framework offers a consistent tool—albeit with its own remaining uncertainties[294]—for evaluating the constitutionality of voting restrictions.[295] *Anderson-Burdick* essentially compels courts to consider voting cases in the intermediate realm between the rational basis and strict scrutiny standards. As the United States Supreme Court put it, "[T]he rigorousness of [the federal court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."[296] As the burden on those rights grows, the level

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[292] *In re* 2,349 Ballots in the 2020 Gen. Election, No. 1162 C.D. 2020, 2020 WL 6820816, at *6 (Pa. Commw. Ct. Nov. 19, 2020).

[293] The Pennsylvania Constitution in particular explicitly enshrines and protects this right: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. STAT. art. I, § 5; League of Women Voters v. Boockvar, No. 578 M.D. 2019, 2021 WL 62268, at *23 (Pa. Commw. Ct. Jan. 7, 2021) ("[T]here is a fundamental right to vote.").

[294] *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION L.J. 263, 276 (2020) (describing some of the limitations of the framework as currently construed).

[295] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[296] *Burdick*, 504 U.S. at 434.

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of scrutiny on the underlying regulations rises commensurately.[297] So, for instance, poll watcher regulations may not infringe upon any fundamental voting right whatsoever—since they do not directly pertain to the right to vote—making a less elevated standard of scrutiny appropriate.[298] By contrast, where a state's voter registration laws disenfranchise over 30,000 of its voters by demanding proof of citizenship, that impact necessitates increased scrutiny upon the offending law.[299]

Federal courts have long recognized that voting is a fundamental right deserving of, and requiring, protection. As the United States Supreme Court noted eighty years ago, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . . This Court has consistently held that this is a right secured by the Constitution."[300] The Court continued, "And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states."[301] It later added, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[302]

This constitutional context was readily apparent to the Third Circuit Court of Appeals when it considered two election-related appeals in the last weeks of 2020. "Unique and important equitable considerations," the court surmised, "including voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots" must be weighed in favor of a directory reading.[303] And as

[297] For a recent detailed example of the *Anderson-Burdick* test applied to Pennsylvania election law, see Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 393–96 (W.D. Pa. 2020) (finding no burden under the *Anderson-Burdick* test).

[298] Pa. Democratic Party v. Boockvar, 238 A.3d 345, 385 (Pa. 2020) ("As the poll watcher county residency requirement does not burden one's constitutional voting rights, the regulation need only be shown to satisfy a rational basis for its imposition.").

[299] Fish v. Schwab, 957 F.3d 1105, 1133–34 (10th Cir. 2020), *cert. denied*, Schwab v. Fish, 141 S. Ct. 965 (2020) ("Here, the evidence of the approximately 30,000 disenfranchised voters means that heightened scrutiny is appropriate."); *see also* Wilmoth v. Sec'y of N.J., 731 F. App'x 97, 102 (3d Cir. 2018) (applying strict scrutiny to a state's residency requirement for electoral nomination petitioners).

[300] United States v. Classic, 313 U.S. 299, 315 (1941).

[301] *Id.*

[302] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

[303] Bognet v. Sec'y of Pa., 980 F.3d 336, 363 (3d Cir. 2020), *vacated as moot*, No. 20-740, 2021 WL 1520777 (U.S. Apr. 19, 2021).

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it concluded some weeks later, "Free, fair elections are the lifeblood of our democracy."[304] The Third Circuit described how "[t]he Pennsylvania Supreme Court has long 'liberally construed' its Election Code 'to protect voters' right to vote,' even when a ballot violates a technical requirement."[305]

This long-held lenient tradition aligns with the requirement of the SCA: "[I]f a statute is susceptible of two reasonable interpretations, [the Pennsylvania Supreme Court] will interpret the statute in such a manner so as to avoid a finding of unconstitutionality."[306] The Pennsylvania Supreme Court has observed, "[W]e are mindful of our duty 'to declare a statute constitutional if this can reasonably be done.'"[307] This is because the SCA itself presumes "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."[308] Liberally construing the Election Code, particularly when the legislature's purpose in enacting a particular requirement can be safely satisfied despite any omissions on the voter's part, accords with this preference for (un)constitutional avoidance. By favoring the enfranchisement of voters, the risk of depriving them of a fundamental right, and thereby creating an inevitable tension between the Election Code and basic constitutional protections, is averted.

Although it is true that a purely strict constructionist approach will often ignore the underlying constitutionally protected right, there also is a need for clarity and consistency in the law. Justice Wecht, in his concurring opinion in *In re 2,349 Ballots* expressed this dilemma as a choice: must we decide between an automatic mandatory reading and a vague journey "seeking The Good," or can a reasoned, consistent method be found for discerning the meaning of "shall" in the Election Code?[309]

Of course, automatically treating each and every statutory "shall" as a mandatory requirement provides some clarity, but this approach ignores the constitutional aspect of voting. Further, it fails to recognize that the voting population is fairly universal, and is ever-changing, as a new group of registered voters engages

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[304] Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 381 (3d Cir. 2020).

[305] *Id.* at 391 (quoting Shambach v. Bickhart, 845 A.2d 793, 802 (Pa. 2004)).

[306] Wolf v. Scarnati, 233 A.3d 679, 696 (Pa. 2020); 1 PA. CONS. STAT. § 1922(3) (2020).

[307] Triumph Hosiery Mills, Inc. v. Commonwealth, 364 A.2d 919, 921 (Pa. 1976) (quoting Commonwealth v. Girard Life Ins. Co., 158 A. 262, 264 (Pa. 1932)); *see also* Working Families Party v. Commonwealth, 209 A.3d 270, 278–79 (Pa. 2019) (listing cases that reinforce the principle of presuming the constitutionality of statutes).

[308] 1 PA. CONS. STAT. § 1922(3).

[309] *In re* 2,349 Ballots, 241 A.3d 1058, 1079 (Pa. 2020) (Wecht, J., concurring in part and dissenting in part).

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in the American process of democracy each cycle. Will today's fourteen-year-old be sufficiently advised of the rules for completing each part of an outer ballot envelope, when she votes in her first presidential election four years from now? This view also fails to address the increasing complexity of the Election Code, or to consider that voters do not have an opportunity to consult election law attorneys as they cast their ballots. In fact, voters frequently rely on county election workers or volunteer poll watchers who are sometimes themselves confused by the specific statutory requirements associated with the process.

Therefore, while there is some appeal to proposing that Pennsylvania courts should construe all "shall" language as mandatory—such an approach may not adequately consider the potential to disenfranchise voters and implicate the constitutional right upon which our democracy is based.

B. Three-Part Test to Evaluate Mandatory vs. Directory Application

Having wrestled firsthand with the array of circumstances that arise under the Election Code, we propose a three-part balancing test in the *Anderson-Burdick* mold that courts can utilize in assessing whether the use of "shall" is appropriately treated as mandatory or directory. The measure of a successful, useful, test, of course, will be whether it provides sufficient clarity for meaningful distinctions to be drawn, respects the administrative and legislative process, and reflects the voters' constitutional right to vote and have that vote be counted. After all, the Election Code's ultimate purpose, indeed its *raison d'être*, is to effectuate this particular form of expression by the people of Pennsylvania.

In that spirit, we propose the following test to provide an analytical framework to consider whether an Election Code instruction is either mandatory or directory:

1. **Examine the text of the statute to ascertain the context of the instruction and whether any ambiguity exists in its application.**
2. **Determine the subject of the directive and whether that subject (e.g., a voter) was adequately notified of the requirement.**
3. **Evaluate the state interest involved and whether that interest was otherwise satisfied.**

In short, the test seeks to balance the constitutional right of the voter with the role of the government in ensuring an orderly and fair administration of the election.

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1. Examine the Statutory Language

The first step in any interpretation must be a close examination of the text of the statute itself. Where there is ambiguity on the face of the statute, the court must first analyze and resolve it before proceeding. After all, it would be challenging to determine whether "shall" is mandatory or directory if it is unclear what the "shall" clause is instructing be done. The court utilizes the SCA to determine outcomes in these ambiguous cases.[310] Under the SCA, when the

> words of the statute are not explicit, the General Assembly's intent is to be ascertained by considering matters other than statutory language, like the occasion and necessity for the statute; the circumstances of its enactment; the object it seeks to attain; the mischief to be remedied; former laws; consequences of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations.[311]

Justice Dougherty, in *In re 2,349 Ballots*, argued that when the legislature supplies the necessary descriptive details to ascertain fully what constitutes compliance, the statute should be read as mandatory.[312] Conversely, when such details are so lacking that the requirement is ambiguous, a directory meaning is the logical conclusion. Thus, if a statute is ambiguous, it should be presumed to have a directory meaning, although of course that presumption may be overcome with relevant evidence. For instance, if a statute required that the voter "shall provide all indicated details" on the declaration, the necessary actions are substantially clearer than if it had ambiguously requested the voter "finish" the declaration. This is potentially probative of the legislature's intent, as matters which were of high priority to the drafters might naturally receive a more detailed description than would passing guidelines.

Therefore, much as they do now, courts should begin the analysis by considering whether a given "shall" statement is unambiguous under the language of the statute. If so, we proceed to the next step of the analysis. If not—for instance, when the legislature offers no clear details, delegates those details to others' discretion, or offers unclear instructions—this would provide an inadequate basis to determine that the "shall" in question is meant to be mandatory.

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[310] Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).

[311] Pa. Associated Builders & Contractors, Inc. v. Commonwealth Dep't of Gen. Servs., 932 A.2d 1271, 1278 (Pa. 2007).

[312] *In re* 2,349 Ballots, 241 A.3d at 1090.

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This prong has the added benefit of encouraging the legislature to be as clear as possible in describing what it intends to have occur. Rather than assuming that all pronouncements will be read as mandatory, the drafters would need to consider the clarity and purpose of the proposed language.

2. Determine the Subject of the Statutory Requirement

Where the statutory language is unambiguous, the presumption in favor of interpreting ambiguous language as directory would be overcome. However, the inquiry would not be complete as the constitutionally protected right was never considered. Instead, a court would proceed to the second prong. Here, the court would identify the subject of the directive. The Election Code addresses many different actors: poll workers, county election officials, candidates, political parties, and the Secretary of the Commonwealth, in addition to voters themselves. Should each category of actor be treated the same for mandatory vs. directory purposes, particularly where the directive might affect the constitutional right to vote in one setting, but only an administrative requirement in another?

The logic underpinning both directory and mandatory readings suggests that these rules should not be blindly applied in the same fashion. When the Secretary of the Commonwealth—the chief election official in the state, aided by a full-time staff and longstanding expertise with the Code—is instructed to undertake some action by the Code, we can and should expect faithful compliance with every requirement. The same holds true for candidates and their parties; filing requirements, for instance, are necessary for an ordered administration of the electoral system. The failure of a putative candidate to file the necessary forms, fees, or signed affidavits, among other obligations necessary to seek office in Pennsylvania, generally would be strictly construed, subject to the recognition that courts have recognized certain amendable defects. When an individual voter, by contrast, fails to observe every requirement for casting a ballot, there may be reasons to apply a less exacting view.

First, and most important, a voter has a fundamental right to participate in the civic process—there is no corresponding right to be a candidate or elected official. Second, a voter is not usually expected to be personally familiar with the provisions of the Election Code itself. The Department of State and other groups provide written instructions, which, under the Election Code and its county-based administrative structure, are typically considered "guidance."[313] Third, a voter may not have been provided the opportunity to correct a technical deficiency. Thus, a poll worker or

[313] *E.g.*, 25 PA. CONS. STAT. § 3042.

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county official may provide assistance when one votes in person, or hand delivers a ballot. In contrast, a voter who votes by mail may not have a ballot reviewed until there is no time to cure even a minor deficiency.[314] Fourth, there may be situations where minor deviations by voters or candidates could be corrected without any impact to the orderly administration of elections.

Therefore, courts under this second prong would consider to whom the operative language is directed, recognizing that voters may generally stand in a different place than candidates or other election officials.

In the case of voters, an important consideration under this prong would be whether a voter received adequate notice of the requirement, or even whether the voter received misinformation. Basic notice seems essential here because the Pennsylvania Constitution guarantees the right of each eligible citizen to vote.[315] Further, from a federal perspective, summarily depriving an individual of the right to vote could raise procedural due process concerns.

The United States Supreme Court has said: "The right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . ."[316] Therefore, voting instructions accompanying a VBM ballot are a necessary accommodation before declaring an omission to be a technical deficiency. The Commonwealth must assume some degree of responsibility towards its citizens whose efforts to vote go awry.[317]

This leads to the second challenge: How much notice is enough? For Justice Wecht in his concurrence, the Secretary of the Commonwealth and various county boards would have needed to include "conspicuous warnings regarding the consequences for failing strictly to adhere."[318] Here, courts may also wish to employ

[314] Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 403 (W.D. Pa. 2020) ("[U]nlike in-person voters, whose signatures are verified in their presence, mail-in and absentee voters' signatures would be verified at a later date outside the presence of the voter.").

[315] PA. CONST. STAT. art. I, § 5.

[316] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[317] Indeed, it is this concept of evenhandedness—even for benefits that the government is under no obligation to provide, unlike the right to vote—that underlies the field of procedural due process today. *See* Goldberg v. Kelly, 397 U.S. 254, 261–64 (1970) (extending procedural due process rights to statutory entitlements).

[318] *In re* 2,349 Ballots, 241 A.3d at 1089 (Wecht, J., concurring in part and dissenting in part).

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a standard that they know well: whether a reasonable voter would have been aware of the consequences of the requirement.[319]

If this inquiry is answered in the affirmative, and a court concludes that the reasonable voter would have identified and understood the requirement, then absent consideration of the third prong, non-compliance may very well justify voiding the affected ballots. However, in cases where a reasonable person could have misunderstood the instructions, the draconian option of disenfranchisement might be avoided.

3. Evaluate the State Interest Underlying the Requirement

The third prong of the test forces a consideration of whether the technical deviation even mattered. If there was no important interest implicated, why disenfranchise an otherwise eligible voter?[320] For instance, the Code might require that voters include their phone number on a VBM ballot so that the county can contact the voter to resolve any problems. If a completed ballot is received missing only the requested phone number, it would be a cruel irony to void that ballot for an entirely irrelevant omission.

Courts have considered two important state interests: the administration of elections and the avoidance of fraud. These interests, however, may be satisfied in other ways. For instance, not providing a date on the outside ballot may be addressed if the county timestamps each ballot. The use of extrinsic evidence at board of election hearings could establish that an interest was otherwise satisfied, or that the interest was only pretextual.

C. Application of the Three-Prong Test

An appropriate method to evaluate the potential usefulness of this proposed three-prong test would be to apply the test to cases described in this Article to

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[319] *See, e.g.*, Roe v. Alabama, 52 F.3d 300, 302 (11th Cir. 1995) (remanding to the district court to make a finding of "whether a reasonable voter could have understood the written instructions to be aspirational rather than mandatory").

[320] Indeed, doing so risks running afoul of federal voting rights protections. *See* 52 U.S.C. § 10101(a)(2)(B) (2018) ("No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election."). This prong of the proposed test provides an opportunity for courts to examine whether a sufficient material deficiency existed to justify disenfranchisement, thus preventing grounds for suit under this section of federal law. Justice Wecht noted concern about just such a scenario in his separate opinion in *In re* 2,349 Ballots, 241 A.3d at 1080–81 n.7.

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ascertain if the test would produce appropriate and consistent results under the circumstances of those cases. To do so, we apply the test to eight past cases.

1. *Appeal of James*

In *James*, the court considered whether a candidate who already appeared on the ballot could validly be included on a write-in slate.[321] The Election Code held that "the elector may insert the name of any person or persons whose name is not printed on the ballot as a candidate for such office."[322]

The Election Code unambiguously prohibits one voter from casting two votes for the same candidate. The court would therefore proceed to the second prong. The target of this provision is "the elector," which weighs in favor of a directory reading. If the facts were different, the court could consider whether a reasonable voter had sufficient notice of the requirement that double votes not be cast; however, in this instance, there were no double votes cast, so the court would proceed to the third prong. There is clearly an important state interest in preventing double voting from occurring. But in *James*, the evidence before the court made clear that no such duplication was attempted or achieved (nor could it be, since the write-in slate, by being cast, occupied all the votes that a given voter could cast for the office in question).[323]

Therefore, because the state's interest is fully satisfied, the court would read this provision as directory and permit the counting of the affected ballots. This reasoning and result mirrors the path taken by the Pennsylvania Supreme Court in *James* itself, but does so with the benefit of a clear set of factors for a court to consider and weigh.

2. *Appeal of Weber*

In *Weber*, sixteen votes became entangled in the voting machine.[324] Counting these contested ballots would have resulted in more total votes than there were registered voters in the affected precinct.[325]

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[321] Appeal of James, 105 A.2d 64, 64–65 (Pa. 1954).

[322] *Id.* at 64 (citing 25 PA. CONS. STAT. § 2963 (1937)).

[323] *Id.* at 65.

[324] Appeal of Weber, 159 A.2d 901, 902, 905 (Pa. 1960).

[325] *Id.* at 905.

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Here, the decisive prong of the balancing test would likely be the overriding state interest in preventing fraud. As the court itself concluded in this case, these extraneous ballots must be rejected, as "[t]o hold otherwise would render facile the way to fraudulent voting and the thwarting of the electorate's will."[326] Permitting a fraudulent result would plainly belie the conduct of a free and fair election. Such a result warrants strict, mandatory compliance with the provisions of the Code, which would be the test's suggested result here.

3. *Appeal of Walko*

In *Walko*, a case not previously addressed, two candidates for the Beaver County Court of Common Pleas in the 1973 general election were separated by 214 votes in the initial returns.[327] After a recount, their positions flipped, and Robert Reed, the previous loser, was ahead of Joseph Walko by seven votes. Both candidates challenged the counting of a variety of different ballots in the recount.[328]

The challenged votes fell into several groups. Some ballots included a perforated section that should have been removed. This section contained identification numbers printed on the ballot. Election workers were taught to instruct voters to remove this identifying marker, but no printed instructions told the voters to do so.[329]

The statutory text at issue was clear: "The election officer shall direct the elector . . . to remove the perforated corner containing the number . . . . Any ballot deposited in a ballot box . . . without having the said number torn off shall be void and shall not be counted."[330]

Because the statute is not ambiguous, a court would proceed to the second prong. This provision is primarily focused not on the voters themselves but upon the poll workers who "shall direct the elector" to perform the necessary action. However, it also directly addresses the voter by mandating that ballots submitted without the perforated corner torn off will be voided. Further, the action required by the statute pertains directly to notice—it instructs election workers to inform voters to remove the perforated corner. Without that notice, courts should favor a directory reading,

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[326] *Id.*

[327] *In re* Recount of Ballots Cast in Gen. Election on November 6, 1973 (Appeal of Walko), 325 A.2d 303, 305, 308–09 (Pa. 1974).

[328] *Id.*

[329] *Id.* at 308–09.

[330] *Id.* at 308 (quoting 25 PA. CONS. STAT. § 3055 (1963)).

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as voters had no opportunity to avoid the consequence in the manner envisioned by the statute.

The court in *Walko* reached the same result, concluding:

> To rule otherwise would unnecessarily condition the right to vote upon the proper discharge of the responsibility of an election official over whom the voter has no control. . . . [C]ompliance by an election official with his legislatively mandated duties is better achieved by direct action against the derelict official rather than depriving an innocent citizen of his most precious right.[331]

Finally, under the third prong, a court would likely find that the relevant state interest motivating this requirement is secrecy at the ballot box. Because voter privacy does not implicate fraud and does not affect the functioning of the electoral process, there are no immediate reasons for the court to take a mandatory approach. Further, if the affected voters could present evidence that their privacy was not impinged by the perforated corners remaining on the ballots—if, for instance, election officials carefully removed these corners themselves separately from tallying the ballots to ensure privacy—the court could readily conclude that the state's interest is satisfied in this instance and adopt a directory reading of the provision.

4. *Appeal of Weiskerger*

This case tested the Election Code requirement that "[n]o ballot which is so marked as to be capable of identification shall be counted. Any ballot that is marked in blue, black or blue-black ink, in fountain pen or ballpoint pen, or black lead pencil or indelible pencil, shall be valid and counted."[332] Here, sixteen decisive absentee ballots were rejected due to the use of red or green ink.[333]

Applying the first prong of the test, this statute is not ambiguous, although it does fail to describe the consequences of using colors of ink other than those delineated. Moving to the second prong, the target of this provision is the individual voter completing her or his ballot, so this prong would favor a directory interpretation. A court could examine whether the voters were given sufficient

[331] *Id.* at 309.

[332] *Id.* (quoting 25 PA. CONS. STAT. § 3063 (1971)).

[333] Appeal of Weiskerger, 290 A.2d 108, 108–09 (Pa. 1972).

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notice—in the ballot instructions or on the ballot itself—regarding the use of non-blue, black, or blue-black ink. Because the voter is implicated, the second prong would again favor a directory view. Finally, the state interest involved is once again voter privacy, or administrative efficiency, neither of which would be implicated. Therefore, a court examining this situation could adopt a directory interpretation of the statute, as the Pennsylvania Supreme Court indeed did in this case.[334]

5. *Appeal of Pierce*

This opinion involved fifty-six absentee ballots that were hand-delivered to the Allegheny County Board of Elections by third parties on behalf of non-disabled voters.[335] The Election Code requires that "the elector shall send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election."[336]

Applying the test, the courts would have to determine if the statute was ambiguous in stating that votes could be delivered by mail or in person. Does "in person" refer only to the voter? Assuming the court concluded that the statute was not ambiguous, under the second prong, a court would note that the statute targets "the elector." Notice would weigh in favor of a directory reading, as voters were in fact informed that their ballots would be counted in this case.[337] The inquiry still would require an examination of the third prong, where the relevant state interest, as determined by the state supreme court in this case, is the prevention of fraud by preventing third parties from delivering absentee ballots on behalf of others.[338] This might weigh in favor of a mandatory reading—the result reached by the Pennsylvania Supreme Court in its decision in this case. However, the test calls for a further step. Is there extrinsic evidence available to the court that demonstrates the anti-fraud purpose of the statute has been satisfied in this instance?

Here, the court indeed had such evidence at its disposal. The county board of elections had instructed each person who hand-delivered another voter's ballot to sign a log that included the names of both the deliverer and the voter.[339] With this

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[334] *Id.*

[335] Appeal of Pierce, 843 A.2d 1223, 1226 (Pa. 2004).

[336] 25 PA. CONS. STAT. P.S. § 3146.6(a) (1937).

[337] *Appeal of Pierce*, 843 A.2d at 1229.

[338] *Id.* at 1232.

[339] *Id.* at 1227–28.

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evidence, a court could conclude that the state's interest in fraud prevention had been achieved here, despite the deviation from the planned course of conduct. Therefore, based on the extrinsic evidence, the court could rule that "shall" is to be interpreted as directory in this case.

6. *Libertarian Party of Pennsylvania v. Wolf*

In this case, early in the COVID-19 pandemic, a coalition of third parties and their respective candidates sued to lower the ballot qualification requirements in response to the Governor's pandemic emergency measures that interfered with gathering sufficient signatures.[340] Candidates for the President of the United States must provide 5,000 valid signatures to be placed on the Pennsylvania ballot.[341] The minor party candidates argued that they would struggle to satisfy these rules because the large gatherings they typically used to obtain the necessary signatures had been banned by the Governor.[342] The actual resolution of this case centered not on the statutory interpretation of "shall," but on the preliminary injunction standard (which the minor parties failed to satisfy in their bid for automatic ballot placement).[343] However, it is instructive to consider the hypothetical challenge that could have emerged in this scenario.

The Election Code mandates that "[n]o nomination paper shall be circulated prior to the tenth Wednesday prior to the primary . . . nor later than the second Friday subsequent to the primary."[344] How should a court adjudicate a challenge to this rule under the proposed test?

First, the text is unambiguous, with dates clearly delineated within the statute itself. Second, the target of the statute is not individual voters but the political parties, and perhaps their designated signature collection agents. Therefore, the court should apply a mandatory reading of the clause. Third, the state interest involved is one of the efficient and organized administration of the election—without a set period for the collection of signatures, the candidate qualification process would become unmanageable. This again suggests a mandatory reading. Further, this state interest

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[340] Memorandum Opinion at 1–2, Libertarian Party of Pa. v. Wolf, No. 20-2299 (E.D. Pa. July 14, 2020).

[341] *Id.* at 10.

[342] *Id.* at 15.

[343] Judgment Order at 1, Libertarian Party v. Governor of Pa., No. 20-2481 (3d Cir. July 28, 2020) (concluding that the district court correctly applied the *Anderson-Burdick* test and denied the preliminary injunction).

[344] 25 PA. CONS. STAT. § 2913(b) (2020).

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is not satisfied by evidence available in this case—in fact, the case seeks to override the requirement entirely. Therefore, under the proposed test a court would have ample ground to adopt a mandatory reading of the provision. This makes broader practical sense because the relief sought—complete waiver of the statutory requirement—inherently conflicts with the legislative intent underlying this element of the Election Code.

7. *In re Scroggin*

This case questioned whether the Green Party's failure to comply with a statutory deadline was fatal to its placement on the general election ballot.[345] The Party had neglected to file all of the candidate affidavits required under the Election Code.[346] The statute requires that "[t]here shall be appended to each nomination paper offered for filing an affidavit of each candidate nominated therein."[347]

Under the first prong of the test, the statute is indisputably unambiguous. Under the second, this provision targets candidates for elected office, not the voters directly. Therefore, a court would presume that this provision is to be interpreted as mandatory before moving to the final prong. There, the state interests in this provision include the efficient administration of the electoral system; it would be challenging without firm filing deadlines for ballots to be printed or other measures necessary for conducting a statewide election. Thus, all three prongs point towards a mandatory interpretation, which is indeed the outcome reached by the state supreme court.[348]

8. *In re 2,349 Ballots*

The 2,349 Allegheny County ballots at issue here lacked a date on their declaration form, although each had been signed by the voter.[349] In addition, the consolidated Philadelphia County decisions featured a variety of deficiencies, including omitted handwritten names and addresses.[350] The Election Code maintains

[345] *In re* Scroggin, 237 A.3d 100, 1009, 10236 (Pa. 2020).

[346] 25 PA. CONS. STAT. § 2911(e)(5).

[347] *Id.* § 2911(e).

[348] *Scroggin*, 237 A.3d at 1023.

[349] Memorandum and Order at 2, Ziccarelli v. Allegheny Cty. Bd. of Elections, No. GD 20-11654 (Ct. Com. Pl. Allegheny Cty. Nov. 18, 2020) (describing the facts of the case).

[350] Brief of Appellee/Intervenor DNC Services Corp. in Opposition to Petition for Review at 7–8, Donald J. Trump for President, Inc. v. Phila. Cty. Bd. of Elections, 1136 CD 2020 (Pa. Commw. Ct. Nov. 18, 2020).

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that "[t]he elector shall . . . fill out, date and sign the declaration" on the ballot envelope.[351] The Code delegates the precise form of that declaration to the Secretary of the Commonwealth.[352]

While the requirement to "date" the declaration is not ambiguous, the Code's instruction that voters should "fill out" the form could be construed as ambiguous. This suggests a directory interpretation. Further, while the Code addresses the Secretary in its delegation of the formatting of the declaration, it primarily targets the voter as the actor who must "fill out, date and sign" the form.[353] Therefore, a court should consider whether the affected voters were provided adequate notice. In this instance, a fact-specific inquiry would be necessary.

Finally, a court could find that the state's purpose in requiring the information on the ballot declaration, to ensure the timely submittal of the ballot, was met by extrinsic evidence. The timeliness of the ballot submittal can be readily ascertained through the Department of State's SURE database and was further verified because the county time-stamped each ballot upon receipt. Thus, as a plurality of the Pennsylvania Supreme Court concluded in this case, "[A]ny handwritten date [is] unnecessary . . . ."[354]

Therefore, a court following the test would at each prong be moved towards the conclusion that this provision should be read as directory and that the challenged ballots should be accepted as valid votes.

V. CONCLUSION

This Article set out with three objectives: (1) undertake a comprehensive survey of historical approaches to the mandatory/directory split in Pennsylvania election jurisprudence; (2) offer a first-hand account of the litigation involving this issue that took place across the Commonwealth during the 2020 election cycle; and (3) propose a practical test for courts to employ moving forward in order to address these various concerns, balancing the constitutional right to vote with the state interest in ensuring an efficient and orderly election process. Hopefully, courts will consider this test in future cycles when they are again called upon to interpret whether a vote "shall" count.

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[351] 25 PA. CONS. STAT. § 3150.16(a).

[352] *Id.* § 3150.14(b).

[353] *See id.* § 3150.16(a).

[354] *In re* 2,349 Ballots, 241 A.3d 1058, 1086 (Pa. 2020) (Wecht, J., concurring in part and dissenting in part).

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