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

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

CONCURRING AND DISSENTING[1] OPINION

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

By *per curiam* Order dated November 1, 2022, this Court unanimously ruled on two questions. First, the Court held that the individual petitioners lack standing, but that the Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania (Committees) have standing to advance their

[1] I dissent only from the portion of the opinion authored by Justice Wecht that addresses the federal question that evenly-divided the Court in this matter. Accordingly, I will refer to Justice Wecht's opinion below as the "majority opinion" in Part I (concurring) and as the "lead opinion" in Part II (dissenting).

claims and pursue relief in this matter. Second, the Court held that, under Pennsylvania law, undated and incorrectly dated absentee and mail-in ballots are not to be counted by county boards of elections. Due to an evenly-divided vote of the Justices hearing the matter, the Court did not resolve a third question—that being whether enforcing Pennsylvania law with respect to undated and incorrectly dated ballots would violate federal law, specifically, the so-called "materiality" or "material error" provision set forth in Section 1971 of the Civil Rights Act of 1964, codified at 52 U.S.C. § 10101(a)(2)(B) (Section 1971).

This opinion serves two purposes. First, while I join in full the majority opinion on the two questions of state law resolved by the Court,[2] I write to expand upon the majority's discussion of incorrectly dated ballots and how our ruling impacts future elections. Second, while the Court did not resolve the federal law question, I write to explain the reasons why I believe enforcing our state law does not violate federal law.[3]

I. Concurring Opinion

With respect to the majority's discussion of incorrectly dated ballots (*see* Maj. Op. at 27-29), I write to emphasize that our November 5, 2022 supplemental *per curiam* Order sought only to provide guidance and uniformity with respect to the administration of the November 8, 2022 General Election. In so doing, the Court, guided by provisions in the Pennsylvania Election Code (Code),[4] established the broadest possible date range to easily identify those ballots that, on the face of the outside envelope alone, could simply not be "correctly" dated and, therefore, should not be counted.

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[2] Specifically, I join Parts I, II, and III(A) and (B) of the majority opinion.

[3] Accordingly, I do not join Part III(C) of the lead opinion.

[4] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

As the majority correctly notes, our order in this regard is expressly limited in application to the November 8, 2022 General Election. In so doing, I believe the Court recognized that the date on which county boards of elections first make their mail-in and absentee ballots available to voters may not be the earliest date contemplated by the Code and may, in fact, vary from county-to-county.[5] In future elections, then, county boards of elections may identify a narrower date range based on when a county first makes its mail-in and absentee ballots available to voters. This would be entirely consistent with this Court's disposition.

In addition, it bears repeating that this Court's disposition with respect to incorrectly dated ballots deals only with those ballots that are incorrectly dated *on their face* and thus shall not be counted under the Code. It would be wrong to interpret this Court's disposition on this narrow point as a tacit ruling that all ballots with a facially correct date—*i.e.*, a date that falls within the range of the possible—must *ipso facto* be counted. To the contrary, while a ballot that contains a facially invalid date cannot be counted, a ballot that contains a facially valid date remains subject to scrutiny under the canvassing procedures set forth in Section 1308 of the Code, 25 P.S. § 3146.8.

II. Dissenting Opinion

Turning to the federal issue, I first express my reluctance to write at all on a question that this Court has not resolved. In situations where this Court is acting in its appellate jurisdiction, our deadlock would ordinarily mean the affirmance of the lower court's judgment on the question. When this occurs, an individual Justice may wish to write to explain why, in that jurist's view, the undisturbed lower court judgment is correct

[5] *See* Application for Reconsideration/Motion to Clarify Supplemental Order of November 5, 2022 of Respondent Blair County Board of Elections (filed Nov. 6, 2022).

or incorrect.[6] By contrast, where, like here, we are acting under our King's Bench[7] authority, our inability to reach consensus on an issue means nothing in terms of this Court's or any lower court's view of that unanswered question. In my respectful view, an opinion on an unanswered question in this context provides no clarity in the law and has little, if any, value to the bench, the bar, or the public.[8] Not all of my colleagues, however, feel the same way, at least with respect to the undecided federal question in this case. Accordingly, notwithstanding my preference to remain silent on the undecided federal question,[9] I am compelled to offer some counter-explanation for why I believe our

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[6] *But see* Howard J. Bashman, Considering the Prospect of an Extended Vacancy on Pa.'s Highest Court, *The Legal Intelligencer* (Oct. 10, 2022), available at https://www.law.com/thelegalintelligencer/2022/10/10/considering-the-prospect-of-an-extended-vacancy-on-pa-s-highest-court/ ("Writing opinions in support of affirmance and reversal where the court is evenly divided is not only a complete waste of time and effort, but it also risks locking the justices into positions that they would otherwise be free to reconsider once a seventh justice joins the court.").

[7] *See* Pa. Const. art. V, § 10; 42 Pa. C.S. § 502.

[8] The question of whether enforcement of the Code with respect to undated and incorrectly dated mail-in and absentee ballots violates federal law is the subject of two pending lawsuits in the United States District Court for the Western District of Pennsylvania. *See Pa. State Conf. of the NAACP v. Chapman* (W.D. Pa., No. 1:22-cv-00339, filed Nov. 4, 2022); *Eakin v. Adams Cnty. Bd. of Elections* (W.D. Pa., No. 1:22-cv-00340, filed Nov. 7, 2022).

[9] In addition to my concerns expressed above, the parties have not at all addressed the question of whether a private right of action exists to enforce the federal material error provision or, instead, whether that authority lies exclusively with the United States Attorney General. The United States Supreme Court has not spoken on this issue, and there is a split among our federal circuit courts on this question. The United States Court of Appeals for the Sixth Circuit has held that the material error provision is enforceable only by the United States Attorney General and not by private citizens. *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000). The Sixth Circuit reaffirmed its view more recently in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016). The Northeast Ohio Coalition for the Homeless, the Columbus Coalition for the Homeless, and the Ohio Democratic Party filed a Petition for Writ of Certiorari, asking the United States Supreme Court to review the single question of whether private parties can sue to enforce Section 1971's provisions. They noted the circuit court split in their petition. Nonetheless, the United States Supreme Court declined the petition, leaving the (continued…)

unanimous decision to enforce state law in this matter does not violate the federal material error provision.

In relevant part, the material error provision set forth in Section 1971 provides:

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

(Emphasis added.) The material error provision can be broken down into six distinct elements: (1) the person engaging in the applicable conduct must be "acting under color of law;" (2) the conduct must have the effect of "deny[ing] the right of any individual to vote;" (3) the denial of the right to vote must be "because of an error or omission;" (4) the "error or omission" must be "on [a] record or paper;" (5) the "record or paper" must "relat[e] to [an] application, registration, or other act requisite to voting;" and (6) the "error or omission" must "not [be] material in determining whether such individual is qualified under [Pennsylvania] law to vote." 52 U.S.C. § 10101(a)(2)(B).

"The construction of a federal statute is a matter of federal law." *Council 13, Am. Fed'n of State, Cnty. & Mun. Emps., AFL–CIO v. Commonwealth*, 986 A.2d 63, 80 (Pa. 2009). "Under federal rules of statutory construction, in determining the meaning of a federal statute, the courts look not only to particular statutory language, but also to the

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Sixth Circuit's decision intact. *See Ne. Ohio Coal. for the Homeless v. Husted*, 137 S. Ct. 2265 (2017) (mem.). The United States Court of Appeals for the Eleventh Circuit has concluded otherwise, finding a private right of action to enforce the material error provision through 42 U.S.C. § 1983. *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003). Recently, in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022), the United States Court of Appeals for the Third Circuit, like the Eleventh Circuit, concluded that private parties could sue to enforce the material error provision. *Migliori*, 36 F.4th at 162. The United States Supreme Court, however, vacated that Third Circuit decision. *See Ritter v. Migliori*, 143 S. Ct. 297 (2022) (mem.). The lack of advocacy on this threshold question is another reason I am reluctant to offer a viewpoint on the merits in this private party action.

design of the statute as a whole and to its purposes." *Id.*[10] Section 1971, read in its entirety, targets conduct, or state laws, that restrict *who* may vote. There are three subjects covered in subsection (a)(2) toward this aim. The first—(a)(2)(A)—makes it unlawful for political subdivisions to apply discriminatory voter qualification standards, practices, or procedures. The third—(a)(2)(C)—generally bars literacy tests as a qualification for voting, with some exceptions. The second—(a)(2)(B)—is the material error provision. Read in its entirety and in context, like the other two, it relates to determinations of *who* may vote—*i.e.*, voter qualifications.

Of the six distinct elements set forth above, the *sixth* is the most critical in discerning the legislative meaning of the prohibition. It informs us that, like the other two provisions in subsection (a)(2), Congress was concerned about state laws that may require extraneous, unnecessary, or even discriminatory—*i.e.*, immaterial—information that does not bear on determining whether an individual "is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Under this provision, if a voter makes an error in supplying this information or fails to do so, officials are prohibited from using that error or omission "in determining whether such individual is qualified under State law to vote in such election." Thus, it is not enough that the error or omission be immaterial *to* whether the individual is qualified to vote; the paper or record must also be used "in determining" the voter's qualifications.[11]

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[10] *Accord Roethlein v. Portnoff Law Assocs., Ltd.*, 81 A.3d 816, 822 (Pa. 2013) ("In giving effect to the words of the legislature, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.").

[11] This understanding that the scope of the material error provision is limited to records or papers used in determining a voter's qualifications is supported by the *ejusdem generis* canon of statutory construction. Under that canon, courts are instructed "to interpret a general or collective term at the end of a list of specific items in light of any common attributes shared by the specific items." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (internal quotation marks omitted); *see also Dep't of Env't Prot. v. Cumberland* (continued…)

Turning back to the provisions of the Code at issue, the first question is whether Sections 1306(a) of the Code, 25 P.S. § 3146.6(a) (relating to voting by absentee ballot), and 1306-D(a) of the Code, 25 P.S. § 3150.16(a) (relating to voting by mail-in ballot), are provisions used "in determining whether [an] individual is qualified under State law to vote." If they are, then it would be appropriate to test the legality of enforcement of these provisions against the material error provision in Section 1971. If they are not, then they do not fall within the scope of state laws that are subject to the material error provision.

If we do not ask this question first, we risk bringing within the sweep of Section 1971 state election laws that impose requirements "on any record or paper relating to any application, registration, or other act requisite to voting," even when the state election law imposes the requirement for valid purposes *other than* determining voter qualification. And if we do that, all such laws would certainly run afoul of Section 1971 and be unenforceable because they indisputably do not at all relate to voter qualification and thus are not "material in determining" voter qualification. Indeed, they were not intended for that purpose.

Take for example the provisions in Sections 1306(a) and 1306-D(a) of the Code relating to secrecy envelopes. In *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), this Court held that the requirement of securing a ballot in a secrecy envelope was mandatory with the purpose being to maintain the confidentiality of the ballot. *Pa. Democratic Party*, 238 A.3d at 380. In an effort to blunt this Court's

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Coal Res., 102 A.3d 962, 976 (Pa. 2014) (noting that, under *ejusdem generis* canon, general catch-all phrases "should not be construed in their widest context," but rather, should "be construed as applicable only to . . . things of the same general nature or class as those enumerated"). As applied here, the statutory catch-all phrase "other act requisite to voting" is limited by the prior list of "acts," which consist of applying or registering to vote. Limiting the catch-all phrase in this manner is entirely consistent with the remaining text of the material error provision and further supports a conclusion that the material error provision only has in its view those records and papers used "in determining" whether an individual is qualified to vote under State law.

decision on the secrecy envelope requirement, it would not surprise me at all to see, in future litigation, an argument that the absence of a secrecy envelope should be considered an "omission" on any record or paper (the ballot). If that potential argument wins the day, under the broad reading of Section 1971 that the Respondents and their supporters propose here, because the secrecy envelope is "not material [to] determining whether such individual is qualified under State law to vote in such election," federal law would require local elected officials to count mail-in and absentee ballots that arrive without a secrecy envelope. The same can be said of the requirement in these sections that the elector sign the verification accompanying the mail-in or absentee ballot. Like the date requirement, the signature requirement does not bear on an elector's qualification to vote.

The fact is that *none* of the provisions of Sections 1306(a) and 1306-D(a) of the Code have any bearing on determining voter qualification at all, a point the Justices who joined in the Opinion Announcing the Judgment of the Court (OAJC) expressly embraced in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020). As the OAJC observed, these sections "set forth . . . requirements for *how a qualified elector may cast* a valid absentee or mail-in ballot," not how a person may qualify to be an elector. *In re Canvass*, 241 A.3d at 1071 (emphasis added).[12] The qualification of the elector is established under Pennsylvania law *before* the mail-in or absentee ballot is sent to the elector, through the application and approval process set forth in Section 1302.2 of the Code, 25 P.S. § 3146.2b (relating to absentee

[12] None of the Justices who wrote minority opinions in *In re Canvass* took issue with this portion of the OAJC.

ballot application approval), and Section 1302.2-D of the Code, 25 P.S. § 3150.12b (relating to mail-in ballot application approval).[13]

Because Sections 1306(a) and 1306-D(a) of the Code set forth requirements on how a qualified elector may cast a valid absentee or mail-in ballot and not to determine whether the elector, in fact and law, *is qualified* to do so, they do not fall within the scope of the laws that Congress targets in Section 1971. I, therefore, find it unnecessary to delve further into my view of the other five elements of the federal statute. On the other hand, if Respondents are correct, no election law that imposes informational requirements on a record or paper unrelated to determining voter qualification can survive a Section 1971 challenge. That cannot be correct.[14] For these reasons, I do not believe that this Court's unanimous resolution of the state law questions here runs afoul of the federal material error provision in Section 1971.[15]

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[13] Obviously, because these provisions of the Code impose requirements relating to a person's qualification to vote, they could be subject to a challenge under Section 1971.

[14] On this point, the United States Court of Appeals for the Fifth Circuit has recently opined:

> A plausible argument can be made that [Section] 1971 is tied to only voter registration specifically and not to all acts that constitute casting a ballot. For example, if a voter goes "to the polling place on the wrong day or after the polls have closed," is that voter denied the right to vote under [Section] 1971? *Ritter v. Migliori*, ___ U.S. ___, 142 S. Ct. 1824, 1824, ___ L.Ed.2d ___ (2022) (Alito, J., dissenting from denial of application for stay). It cannot be that any requirement that may prohibit an individual from voting if the individual fails to comply denies the right of that individual to vote under [Section] 1971. Otherwise, virtually every rule governing how citizens vote would is [sic] suspect. "Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right." *Id.*

Vote.Org v. Callanen, 39 F.4th 297, 305 n.6 (5th Cir. 2022). Justices Thomas and Gorsuch joined Justice Alito's dissent in *Ritter*.

[15] In Part III(C) of the lead opinion, Justice Wecht, writing for those Justices who would find a violation of federal law, claims agreement with "the Third Circuit's result" and that (continued…)

Justice Mundy joins this concurring and dissenting opinion.

their "analysis . . . offers a rationale that aligns with the Third Circuit's interpretation." (Lead Op. at 29 n.132, 30, 38.) Presumably, Justice Wecht is referring to the Third Circuit's decision in *Migliori*. As indicated above, however, the United States Supreme Court vacated the Third Circuit's judgement in *Migliori*. *See Ritter*, 143 S. Ct. 297. As a result, the Third Circuit's "result" and "interpretation" in *Migliori* have no precedential value. *See O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (citing *U.S. v. Munsingwear*, 340 U.S. 36, 41 (1950)).