

JOINT STATE GOVERNMENT COMMISSION

General Assembly of the Commonwealth of Pennsylvania

MAIL-IN BALLOTS

*An Interim Report of the
ELECTION LAW ADVISORY BOARD*

January 2023



*Serving the General Assembly of the
Commonwealth of Pennsylvania Since 1937*

INTERIM REPORT

Mail-in Ballots

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The Joint State Government Commission was created in 1937 as the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania.¹

A fourteen-member Executive Committee comprised of the leadership of both the House of Representatives and the Senate oversees the Commission. The seven Executive Committee members from the House of Representatives are the Speaker, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. The seven Executive Committee members from the Senate are the President Pro Tempore, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. By statute, the Executive Committee selects a chairman of the Commission from among the members of the General Assembly. Historically, the Executive Committee has also selected a Vice-Chair or Treasurer, or both, for the Commission.

The studies conducted by the Commission are authorized by statute or by a simple or joint resolution. In general, the Commission has the power to conduct investigations, study issues, and gather information as directed by the General Assembly. The Commission provides in-depth research on a variety of topics, crafts recommendations to improve public policy and statutory law, and works closely with legislators and their staff.

A Commission study may involve the appointment of a legislative task force, composed of a specified number of legislators from the House of Representatives or the Senate, or both, as set forth in the enabling statute or resolution. In addition to following the progress of a particular study, the principal role of a task force is to determine whether to authorize the publication of any report resulting from the study and the introduction of any proposed legislation contained in the report. However, task force authorization does not necessarily reflect endorsement of all the findings and recommendations contained in a report.

Some studies involve an appointed advisory committee of professionals or interested parties from across the Commonwealth with expertise in a particular topic; others are managed exclusively by Commission staff with the informal involvement of representatives of those entities that can provide insight and information regarding the particular topic. When a study involves an advisory committee, the Commission seeks consensus among the members.² Although an advisory committee member may represent a particular department, agency, association, or group, such representation does not necessarily reflect the endorsement of the department, agency, association, or group of all the findings and recommendations contained in a study report.

¹ Act of July 1, 1937 (P.L.2460, No.459); 46 P.S. §§ 65–69.

² Consensus does not necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation. At a minimum, it reflects the views of a substantial majority of the advisory committee, gained after lengthy review and discussion.

Over the years, nearly one thousand individuals from across the Commonwealth have served as members of the Commission's numerous advisory committees or have assisted the Commission with its studies. Members of advisory committees bring a wide range of knowledge and experience to deliberations involving a particular study. Individuals from countless backgrounds have contributed to the work of the Commission, such as attorneys, judges, professors and other educators, state and local officials, physicians and other health care professionals, business and community leaders, service providers, administrators and other professionals, law enforcement personnel, and concerned citizens. In addition, members of advisory committees donate their time to serve the public good; they are not compensated for their service as members. Consequently, the Commonwealth receives the financial benefit of such volunteerism, along with their shared expertise in developing statutory language and public policy recommendations to improve the law in Pennsylvania.

The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly. Certain studies have specific timelines for the publication of a report, as in the case of a discrete or timely topic; other studies, given their complex or considerable nature, are ongoing and involve the publication of periodic reports. Completion of a study, or a particular aspect of an ongoing study, generally results in the publication of a report setting forth background material, policy recommendations, and proposed legislation. However, the release of a report by the Commission does not necessarily reflect the endorsement by the members of the Executive Committee, or the Chair or Vice-Chair of the Commission, of all the findings, recommendations, or conclusions contained in the report. A report containing proposed legislation may also contain official comments, which may be used to construe or apply its provisions.³

Since its inception, the Commission has published over 420 reports on a sweeping range of topics, including administrative law and procedure; agriculture; athletics and sports; banks and banking; commerce and trade; the commercial code; crimes and offenses; decedents, estates, and fiduciaries; detectives and private police; domestic relations; education; elections; eminent domain; environmental resources; escheats; fish; forests, waters, and state parks; game; health and safety; historical sites and museums; insolvency and assignments; insurance; the judiciary and judicial procedure; labor; law and justice; the legislature; liquor; mechanics' liens; mental health; military affairs; mines and mining; municipalities; prisons and parole; procurement; state-licensed professions and occupations; public utilities; public welfare; real and personal property; state government; taxation and fiscal affairs; transportation; vehicles; and workers' compensation.

Following the completion of a report, subsequent action on the part of the Commission may be required, and, as necessary, the Commission will draft legislation and statutory amendments, update research, track legislation through the legislative process, attend hearings, and answer questions from legislators, legislative staff, interest groups, and constituents.

³ 1 Pa.C.S. § 1939.

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To Members of the General Assembly:

We are pleased to release *Mail-in Ballots: An Interim Report of the Election Law Advisory Board*.

During 2021 and 2022, the Election Law Advisory Board studied several of the more problematic issues surrounding the use of mail-in ballots in Pennsylvania. This report contains five recommendations of amendments to the Pennsylvania Election Code that are designed to eliminate confusion and litigation with regard to this process.

The full report is available at <http://jsg.legis.state.pa.us>.

Respectfully submitted,

Glenn J. Pasewicz
Executive Director

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INTRODUCTION

The Constitution of the Commonwealth of Pennsylvania Article I, § 5. Elections.

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.

The fundamental precept underlying Pennsylvania's election laws is the Constitutional guarantee of free and equal elections. Pennsylvania's laws intended to protect that constitutional right can be found in the act of June 3, 1937 (P.L. 1333, No.320), known as the Pennsylvania Election Code (Election Code) and Title 25 of the Pennsylvania Consolidated Statutes, added by the act of January 31, 2002 (P.L. 18, No. 3) (Title 25). Read together, these two statutes form Pennsylvania's election law.⁴ Additionally, Article VII of the Pennsylvania Constitution provides further details relating to voting rights and procedures.

In 2019, revisions were made to the Election Code, most significant of which for this study are the elimination of straight ticket voting, the addition of mail-in voting, and the replacement of, and funding for, voting machines.⁵ These amendments were specifically intended to create a fairer, more free and equal election process. New voting machines allow for the use of paper ballots so a voter can see his or her completed ballot and verify its accuracy before casting their votes. Elimination of straight ticket voting focused voters' attention on the candidate, rather than the candidate's party. Each office and its candidates must be considered separately, which allows Independents and third-party candidates a greater ability to compete against the two major parties, prevents weaker candidates from being elected simply because of their party affiliation, and encourages voters review the entire ballot, which may increase voting on ballot initiatives, constitutional amendments and referenda. Mail-in balloting similarly achieves the goals of a more deliberative voting process, as the voter using a mail-in ballot has ample time to research candidates, review the entire ballot, and vote from a more informed stance. Additionally, persons with transportation issues, including the elderly and persons with physical disabilities, and persons

⁴ Pennsylvania does not have a complete formal statutory code. Laws are found in two places – the Pamphlet Laws and the Consolidated Statutes. A commercial vendor, Purdon's, has created a compilation with titles identified by topics which can aid the legal practitioner in locating specific laws, but they do not carry the weight of legal citations. If challenged in court and there is a conflict between Purdon's and the Pamphlet Law or Consolidated Statutes, the Pamphlet Laws or Consolidated Statutes will triumph. In 1972, Pennsylvania began a consolidation process in the which the Pamphlet Laws, which address single topics only and are organized chronologically, are reorganized and codified by topic in the Consolidated Statutes. The process is on-going and more Pamphlet Laws are consolidated each year, and many new enactments are added directly to the Consolidated Statutes at the time of enactment.

⁵ Act of October 31, 2019 (P.L. 552, No. 77), amending the Election Code (Act 77).

whose hours of employment and family responsibilities prevent them from reaching their polling place in the allotted hours for voting can vote from home on a schedule that is convenient to them.⁶

Amendments in 2020 were enacted to provide for temporary emergency general primary election procedures in response to the COVID-19 pandemic, additional revisions to the mail-in voting provisions, and creation of the Election Law Advisory Board (ELAB),⁷ a permanent body within the Joint State Government Commission and directed to:

- Study the election law and identify statutory language to repeal, modify or update.
- Collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues.
- Study the development of new election technology and voting machines.
- Evaluate and make recommendations on:
 - improving the electoral process in this Commonwealth by amending the election law or through regulations promulgated by the Department of State; and
 - implementing best practices identified to ensure the integrity and efficiency of the electoral process in this Commonwealth.

By the end of each fiscal year, extensive and detailed findings are to be published on the Joint State Government Commission's publicly accessible Internet website and made available in electronic format to the Office of the Governor and members of the General Assembly.⁸

Membership of on the board consists of House and Senate leadership and the Secretary of the Commonwealth or their designees, and 18 individuals appointed by the Governor and confirmed by the Senate, one from each Congressional district in Pennsylvania. The gubernatorial appointees are to include members who represent the following groups: those advocating for individuals with disabilities, those advocating for voting rights, and those representing county commissioners or county election officials. No more than half of the appointees may be registered with the same political party.⁹

At the board's May 26, 2022 meeting, the board voted to release its second annual report without recommendations concerning mail-in ballots. Because of on-going litigation regarding numerous issues involving mail-in ballots, the board determined that a meeting dedicated to that topic only should be convened in later summer to discuss potential recommendations to further

⁶ Floor debate on Senate Bill 421 (2019), which became Act 77: *see* Senate Legislative Journal June 25, 2019, pp. 721-722; House Legislative Journal October 28, 2019, pp. 1689-1713; House Legislative Journal October 29, 2019, pp. 1738-1741; and Senate Legislative Journal, October 29, 2019, pp. 999-1003.

⁷ Act of March 27, 2020 (P.L. 41, No. 12), amending the 1937 Election Code (Act 12).

⁸ § 1302-E(c) of Act 12.

⁹ § 1302-E(b) of Act 12.

clarify Pennsylvania's mail-in ballot procedures and requirements. Accordingly, this report provides legislative recommendations concerning mail-in ballots and the research reviewed.

The Board has been mindful of three guiding principles throughout this process: (1) the Commonwealth is diverse, and absolute uniformity across all counties would be difficult to achieve and maintain; (2) that any procedural changes would require funding; and (3) that county election officials need significant lead time to implement any changes made.

While the recommendations in this report are the consensus of the members of the ELAB, it should not be assumed by the reader that agreement was unanimous. Some provisions were the subject of much debate and concerns are noted in context.

RECOMMENDATIONS

While the recommendations in this report are the consensus of the members of the ELAB, it should not be assumed by the reader that agreement was unanimous. Some provisions were the subject of much debate and concerns are noted in context. Any proposed legislation in this chapter follows the Legislative Reference Bureau's drafting convention of using brackets to show deleted materials and underscoring all new language.

RECOMMENDATION #1: Permanent Mailing Lists

The term "permanent," when used to refer to mailing lists for absentee and mail-in ballots should be changed to "annual" to more accurately reflect their operation and purpose.

AN ACT

Amending the act of June 3, 1937 (P.L.1333, No.320), entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," providing for annual voter mailing lists for absentee and mail-in ballots.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Sections 1302 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

§ 1302. Applications for Official Absentee Ballots.--

* * *

(e.1) Any qualified registered elector who is unable because of illness or physical disability to attend his polling place on the day of any primary or election or operate a voting machine and state distinctly and audibly that he is unable to do so as required by section 1218 of this act may, with

the certification by his attending physician that he is permanently disabled, and physically unable to attend the polls or operate a voting machine and make the distinct and audible statement required by section 1218 appended to the application hereinbefore required, be placed on [a permanently] an annual disabled absentee ballot list file. An absentee ballot application shall be mailed to every such person otherwise eligible to receive one, by the first Monday in February each year, so long as he does not lose his voting rights by failure to vote as otherwise required by this act. Such person shall not be required to file a physician's certificate of disability with each application as required in subsection (e) of this section. Should any such person lose his disability he shall inform the county board of elections of the county of his residence. An absentee ballot application mailed to a voter under this section, which is completed and timely returned by the voter, shall serve as an application for any and all primary, general or special elections to be held in the remainder of that calendar year and for all special elections to be held before the third Monday in February of the succeeding year.

* * *

(k) The Secretary of the Commonwealth may develop an electronic system through which all qualified electors may apply for an absentee ballot and request [~~permanent~~] annual absentee voter status under subsection (e.1), provided the system is able to capture a digitized or electronic signature of the applicant. A county board of elections shall treat any application or request received through the electronic system as if the application or request had been submitted on a paper form or any other format used by the county.

Section 2. Sections 1302-D of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

§1302-D Applications for official mail-in ballots.—

* * *

(g) Permanent mail-in voting list.--

(1) Any qualified registered elector may request to be placed on [a permanent] an annual mail-in ballot list file. A mail-in ballot application shall be mailed to every person otherwise eligible to receive a mail-in ballot application by the first Monday in February each year, so long as the person does not lose the person's voting rights by failure to vote as otherwise required by this act. A mail-in ballot application mailed to a voter under this section, which is completed and timely returned by the voter, shall serve as an application for any and all primary, general or special elections to be held in the remainder of that calendar year and for all special elections to be held before the third Monday in February of the succeeding year.

(2) The Secretary of the Commonwealth may develop an electronic system through which all qualified electors may apply for a mail-in ballot and request [permanent] annual mail-in voter status under this section, provided the system is able to capture a digitized or electronic signature of the applicant. A county board of elections shall treat an application or request received through the electronic system as if the application or request had been submitted on a paper form or any other format used by the county.

RECOMMENDATION #2: Deadline to Apply for a Mail-in Ballot

The deadline to apply for a mail-in or absentee ballot by mail or online should be changed from the current deadline of seven days prior to Election Day to between 12 and 15 days prior to Election Day. This move would grant more time for the postal service to deliver ballots to voters and return them to the county elections office in a timely manner. The deadline to apply in person for a mail-in or absentee ballot should remain the current seven days, as less mail-time would be involved and would still permit voters who wait to closer to election day to vote the opportunity

to still vote by mail. For purposes of this draft proposal, the mail/online deadline is set at 12 days, which has been reported to be the most common deadline among the states.

AN ACT

Amending the act of June 3, 1937 (P.L.1333, No.320), entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," providing for date to submit absentee and mail-in ballot request.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Sections 1302.1 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

Section 1302.1. Date of Application for Absentee Ballot.—

(a) Except as provided in subsection (a.3), applications for absentee ballots shall be received in the office of the county board of elections not earlier than fifty (50) days before the primary or election, except that if a county board of elections determines that it would be appropriate to its operational needs, any applications for absentee ballots received more than fifty (50) days before the primary or election may be processed before that time. Applications for absentee ballots that are made in person at a county board of elections office shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election. All other applications for absentee ballots shall be processed if received not later than the twelfth (12th) day prior to the day of any primary or election.

* * *

(a.3) (1) The following categories of electors may apply for an absentee ballot under this subsection, if otherwise qualified:

(i) An elector whose physical disability or illness prevented the elector from applying for an absentee ballot before five o'clock P.M. on the first Tuesday prior to the day of the primary or election.

(ii) An elector who, because of the elector's business, duties or occupation, was unable to apply for an absentee ballot before five o'clock P.M. on the first Tuesday prior to the day of the primary or election.

(iii) An elector who becomes so physically disabled or ill after five o'clock P.M. on the first Tuesday prior to the day of the primary or election that the elector is unable to appear at the polling place on the day of the primary or election.

(iv) An elector who, because of the conduct of the elector's business, duties or occupation, will necessarily be absent from the elector's municipality of residence on the day of the primary or election, which fact was not and could not reasonably be known to the elector on or before five o'clock P.M. on the first Tuesday prior to the day of the primary or election.

(2) An elector described in paragraph (1) may submit an application for an absentee ballot at any time up until the time of the closing of the polls on the day of the primary or election. The application shall include a declaration describing the circumstances that prevented the elector from applying for an absentee ballot before five o'clock P.M. on the first Tuesday prior to the day of the primary or election or that prevent the elector from appearing at the polling place on the day of the primary or election, and the elector's qualifications under paragraph (1). The declaration shall be made subject to the provisions of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

* * *

Section 2. Sections 1302.1-D of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

Section 1302.1-D. Date of application for mail-in ballot.

(a) General rule.--Applications for mail-in ballots shall be received in the office of the county board of elections not earlier than 50 days before the primary or election, except that if a county board of elections determines that it would be appropriate to the county board of elections' operational needs, any applications for mail-in ballots received more than 50 days before the primary or election may be processed before that time. Applications for mail-in ballots that are made in person at a county board of elections office shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election. All other applications for mail-in ballots that are received via U.S. mail or online shall be processed if received not later than the twelfth (12th) day prior to the day of any primary or election.

* * *

Section 3. Sections 1302.2-D of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

Section 1302.2-D. Approval of application for mail-in ballot.

* * *

(b) Duties of county boards of elections and registration commissions.--The duties of the county boards of elections and the registration commissions with respect to the insertion of the mail-in voter's record shall include only the applications as are received in person on or before the first Tuesday prior to the primary or election and applications as are received via U.S. mail or online on or before the twelfth (12th) day prior to the primary or election.

RECOMMENDATION #3: Use of Secrecy Envelopes

Secrecy envelopes should be provided to all mail-in and absentee voters, but it should be in their discretion if they choose to use them or not. This continues to bolster the constitutionally mandated privacy of an individual's vote but leaves the voter the choice to waive that extra precaution by not using the envelope.

AN ACT

Amending the act of June 3, 1937 (P.L.1333, No.320), entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," providing for use of secrecy envelopes to return absentee and mail-in ballots.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Sections 1304 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

Section 1304. Envelopes for Official Absentee Ballots.--

The county boards of election shall provide two additional envelopes for each official absentee ballot of such size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector, and the name and address of the county board of election of the proper county. The larger envelope shall also contain information indicating the local election district of the absentee voter. Said form of declaration and envelope shall be as prescribed by the Secretary of the Commonwealth and shall contain among other things a statement of the electors

qualifications, together with a statement that such elector has not already voted in such primary or election. The mailing envelope addressed to the elector shall contain the two envelopes, the official absentee ballot, lists of candidates, when authorized by section 1303 subsection (b) of this act, the uniform instructions in form and substance as prescribed by the Secretary of the Commonwealth and nothing else. Use of the inner envelope is in the discretion of the voter. Failure to use the inner envelope shall not be an acceptable reason for disqualifying the ballot.

* * *

Section 2. Sections 1304-D of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

Section 1304-D. Envelopes for official mail-in ballots.

(a) Additional envelopes.--The county boards of election shall provide two additional envelopes for each official mail-in ballot of a size and shape as shall be prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope. On the smaller of the two envelopes to be enclosed in the mailing envelope shall be printed, stamped or endorsed the words "Official Election Ballot," and nothing else. On the larger of the two envelopes, to be enclosed within the mailing envelope, shall be printed the form of the declaration of the elector and the name and address of the county board of election of the proper county. The larger envelope shall also contain information indicating the local election district of the mail-in voter. Use of the inner envelope is in the discretion of the voter. Failure to use the inner envelope shall not be an acceptable reason for disqualifying the ballot.

RECOMMENDATION #4: Dating the Ballot

The requirement that an absentee or mail-in ballot be signed and dated by the voter should be amended to clarify that the date required is the date of the signature. Further, failure to date the ballot should not be the sole grounds to disqualify the ballot.

AN ACT

Amending the act of June 3, 1937 (P.L.1333, No.320), entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," addressing the import of the requirement that signature declarations on the return envelopes of absentee and mail-in ballots include the date of the signature.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Sections 1306 of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

Section 1306. Voting by Absentee Electors.—

(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, 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." 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. The date written on the envelope shall be the date the elector has signed the declaration. Failure to sign the envelope or signing the envelope with a date that is not within the time period between

the date the ballot was received by the voter and when it was received by the county board of election shall not disqualify the ballot if the declaration is otherwise properly executed. 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.

* * *

(3) Any elector who has filed his application in accordance with section 1302 subsection (e)(2), and is unable to sign his declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form:

I hereby declare that I am unable to sign my declaration for voting my absentee ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

* * *

Section 2. Sections 1306-D of the act of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, is amended to read:

Section 1306-D. Voting by mail-in electors.

(a) General rule.--At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in 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." 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. The date written on the envelope shall be the date the elector has signed the declaration. Failure to sign the envelope or signing the envelope with a date that is not within the time period between the date the ballot was received by the voter and when it was received by the county board of election shall not disqualify the ballot if the declaration is otherwise properly executed. 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.

(a.1) Signature.--Any elector who is unable to sign the declaration because of illness or physical disability, shall be excused from signing upon making a declaration which shall be witnessed by one adult person in substantially the following form:

I hereby declare that I am unable to sign my declaration for voting my mail-in ballot without assistance because I am unable to write by reason of my illness or physical disability. I have made or received assistance in making my mark in lieu of my signature.

.....

(Mark)

.....

(Date Mark Made)

.....

(Complete Address of Witness)

.....

(Signature of Witness)

* * *

RECOMMENDATION #5: Use of Drop Boxes

The authority of counties to use drop boxes should be statutorily provided. The use of drop boxes should be at the discretion of the county. If drop boxes are used, minimum requirements should be established.

AN ACT

Amending the act of June 3, 1937 (P.L.1333, No.320), entitled "An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections," authorizing the use of drop boxes by counties for the return of absentee and mail-in ballots and providing minimum standards for their use.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 1308.1 is added to the of June 3, 1937 (P.L.1333, No.320), known as the Pennsylvania Election Code, to read:

Section 1308.1. Ballot return receptacles.

(a) Use authorized.—Any county board of elections may establish multiple ballot return locations where voters may return their own absentee or mail-in ballot to a secure ballot return receptacle, subject to the terms and conditions included in this section.

(b) Notice.—If a county board of elections decides to establish ballot return sites, the board shall provide notice to the electors the county in at least 30 days prior to the election in the following formats:

(1) On a poster in the county elections office.

(2) In a highly visible location on the county's website.

(3) On posters in locations in the county in the county where voters may congregation. The following locations are advisory only, and not required: the county courthouse, other county

offices, student centers at local universities and colleges, senior citizen centers, retirement and nursing home community rooms, and the like.

(4) A copy of the notice in any absentee or mail-in voting materials sent to voters.

(c) Notice contents. Notices shall include:

(1) Ballot return deadline.

(2) List of county election offices and ballot return sites, including building names and street addresses.

(3) Days and hours of operation, including election day hours, or if the boxes will be available 24 hours per day, seven days per week.

(4) Contact information for the county board of elections.

(5) Accessibility information.

(d) Locations.—Ballot receptacle sites shall be fully ADA compliant and in a well-lit fixed location.

(e) Hours of operation.—The county board of elections shall determine the hours of operation, which shall begin no later than 30 days prior to the election and include election day. Hours of operation shall include at a minimum one weeknight and one weekend time period during the five days prior to the primary or election.

(f) Security.—Receptacles must be tamper-resistant, locked and secured to ensure immobility while in use.

(g) Monitoring.—Staff authorized by the county board of elections shall monitor the receptables during hours of operation, either in person or via video surveillance. Video recording must be retained for one year.

(h) Signage.—Receptacles shall have a sign posted on or near the receptacle that includes the following:

(1) A label that states “Official Ballot Return Site.”

(2) A notice that the voter should return only his or her own ballot and that third-party return of ballots (including those of family members) is prohibited unless the person is officially authorized to return another person’s ballot.

(3) The penalties for tampering with the ballots or receptacles or intimidating voters, including forging or destroying ballots.

(i) Ballot collection.-- Ballots shall be collected at the end of operating hours of each day that the receptacle is available for use. Ballots shall be collected at the same time each day, as determined by the county elections office, if receptacles are available for use on a 24 hour per day, seven day a week schedule. Two county employees shall be appointed to collect ballots. At least one shall be an employee assigned to the board of elections and the other may be a member of law enforcement, including a constable. The county board of elections shall use a chain of custody log approved by the Department of State and deposit the collected ballots in a secure container within the county board of elections office.

Act 77 of 2019¹⁰ fundamentally altered how Pennsylvania votes by permitting “any qualified elector” to cast a ballot by mail. This new legislation addressed many — but not all — of the important aspects of a mail-in voting system. Issues that the General Assembly addressed in Act 77 include:

- How a voter may request an application for a mail-in ballot and what information they must supply;
- A provision allowing a voter to request to be placed on a permanent mail-in voting list (ensuring they will automatically receive a mail-in ballot for future elections);
- When county election officials may begin receiving applications for mail-in ballots;
- When county elections officials must receive and process applications for mail-in ballot until (“[a]pplications for mail-in ballots shall be processed if received not later than five o’clock P.M. on the first Tuesday prior to any primary or election.”);
- The approval process for mail-in ballot applications;
- Specifications for the envelopes for the mail-in ballots;
- Delivering or mailing the ballots to the voters;
- How the voter is to mark the ballot, seal it in its envelope, and return it to the county board of election;
- Procedure to handle a voter who votes by mail-in ballot who subsequently appears at the polls or who has requested but not returned a mail-in ballot; and
- The deadline to return the complete mail-in ballot to the county board of election.

The first election in the Commonwealth under the new mail-in voting legislation was the 2020 primary election, held in June due to the COVID-19 pandemic. The second election was the November 2020 presidential election. The newness of the law, the magnitude of change it wrought on Pennsylvania elections, and the questions left unanswered by the mail-in voting statute resulted in a torrent of litigation both before and after the November 2020 election. Additionally, guidance

¹⁰ Act of October 31, 2019, P.L. 552, No. 77; Article XIII-D of the Election Code; 25 P.S. § 3150.16.

issued by the Department of State on subjects such as drop boxes and the handling late-arriving ballots, among other policies, resulted in confusion and litigation.

This report addresses grey areas left by Article XIII-D of the Election Code, the problems they cause for the counties and the Commonwealth by remaining unaddressed, and the policy options available to the General Assembly to rectify them. An Election Integrity Grant Program was adopted by Acts 54 and 88 of 2022, as part of amendments to the Fiscal Code and the Election Code of 1937. Monies under this program could be used to fund some of the potential recommendations set forth in this document.

“PERMANENT” MAILING LIST

While similar in practical effect, mailing lists for absentee ballots and mail-in ballots are governed by different provisions of the Election Code.

A person who is unable to attend his/her polling place on election day or unable to operate a voting machine can because of illness or physical disability, with certification submitted by his/her attending physician that he/she is permanently disabled, may be placed on a “permanent disabled absentee ballot list file.” This is a list of permanently disabled voters who have been certified as such. Unless a voter loses the right to vote, he remains on this list indefinitely and receives an absentee ballot application annually. Once submitted and approved, the person will then receive an absentee ballot for each election in that year. Further, certification of permanent disability is only required for the first year, and is not required to be re-submitted in subsequent years.

Persons who wish to vote via mail-in ballot can be placed on a “permanent mail-in ballot list file.” As with the absentee ballot list, this is a list of voters who have requested to be placed on the list to receive a mail-in ballot application each year. Unless a voter loses the right to vote, he remains on this list indefinitely and receives a mail-in ballot application annually. Once submitted and approved, the person will then receive a mail-in ballot for each election in that year.

The use of the adjective “permanent” with respect to voter mailing lists is confusing, as voters may be uncertain as to what “permanent” status means, and it is believed this confusion has led some voters to not apply for absentee and mail-in ballots in a timely manner, potentially disenfranchising them. In the case of both absentee and mail-in ballots, the county board of elections must send a ballot application annually to the voters on the permanent annual list. This process requires a voter the “permanent” list to apply for an absentee or mail-in ballot **every year**. The only automatic mailing that occurs is for the annual application. Once the application is returned by the voter and accepted by the county board of elections the voter will then receive automatic delivery of ballots **for that year’s election cycle**, meaning the primary, general, and special elections that are to be held during that calendar year and special elections before the third Monday in February of the next year.

Because of the confusion caused by the word “permanent” it is recommended that these lists be renamed “annual mailing lists.”

DEADLINE TO REQUEST A MAIL-IN BALLOT

The Election Code permits an elector to apply for a mail-in ballot up to 50 days before the primary or election. The deadline to request an application for a mail-in ballot is five o'clock P.M. of the first Tuesday prior to the day of any primary or election.¹¹ A person who misses the deadline may, in some circumstances, obtain an emergency absentee ballot in the time between the deadline and Election Day.

The Election Code does not prohibit a voter from applying in person for an absentee or mail-in ballot, and then receiving, completing and returning it while in the office. This has been interpreted as a means of "early voting" and is advertised as such on the Department of State's website¹² and can be done up until 5 PM of the first Tuesday prior to the day of any primary or election.

Allowing voters to mail in an application for a mail-in ballot one week before Election Day leaves insufficient time to process the volume of last-minute applications received by the county election offices. Applications for a mail-in ballot submitted at the last minute are burdensome on their staffs. Additionally, U.S. Postal Service turnaround times may not provide enough time for a ballot to be mailed, completed by the voter, and returned via mail in time to be received by 8 o'clock PM on Election Day.

Further, the method of "early voting" described above also poses a burden to the county election offices in terms of labor. As the election nears and staff are busy sending out and receiving mail-in ballots, a wave of persons seeking to "early vote" are arriving in-person at their offices, requesting mail-in ballots, filling out the ballots in the office, and then returning them on the spot, requiring staff to take time out of handling mail-in ballot and applications to assist voters in their offices.

Making the deadline to request a mail-in ballot earlier would space out the amount of work staff must undertake so that there is not a crescendo of applications and ballots to process in the week leading up to the election. The deadline to request a mail-in ballot could be moved to 14 days prior to the day of any primary or election to allow greater time for county election officials to prepare and send mail-in ballots, as well as to allow time for voters to receive, complete, and return the ballot. Moving back the deadline to request a mail-in ballot may inconvenience some voters, but may be necessary to allow county elections staff to conduct a mail-in election in a timely and orderly fashion. If a voter wishes to request a mail-in ballot for a given primary or election, the voter should plan ahead of time to do so.

¹¹ Election Code § 1302.1-D; 25 Pa. C.S. § 3150.12a.

¹² Pennsylvania Department of State, "Voting by mail-in or absentee ballot," accessed Feb. 16, 2022, <https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>. ("As soon as ballots are ready, you can request, receive, vote and cast your mail-in or absentee ballot all in one visit to your county election board or other officially designated site.").

Bills have already been introduced during the 2021-2022 General Assembly which include provisions to move back the deadline for requesting a mail-in ballot. Senate Bill 878 would require that applications for mail-in ballots be received in the office of the county board of elections no later than 14 days before the primary or election.¹³ House Bill 1800 would require that applications be received no later than 15 days prior to the primary or election.¹⁴ House Bill 1971 would also move the deadline back to 14 days prior.¹⁵ The advisory committee members generally favored an earlier deadline of 12-15 days. Allowing counties to set individual deadlines was briefly discussed and dismissed, as was the notion of combining voter registration and mail-in ballot application processes.

¹³ Pennsylvania General Assembly, Senate Bill 878, § 5.

¹⁴ Pennsylvania General Assembly, House Bill 1800, § 18.

¹⁵ Pennsylvania General Assembly, House Bill 1971, § 14.

SECRECY ENVELOPES

Article VII, § 4 of the Pennsylvania Constitution provides that “All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, that secrecy in voting be preserved.” What constitutes “secrecy” is not constitutionally defined.

However, the Election Code does provide for the secrecy of the ballot by requiring that the county boards of election provide two envelopes for each mail-in ballot of a size and shape so that one may be placed inside the other. The smaller of the two envelopes — considered to be the secrecy envelope — must be stamped “Official Election Ballot.” On the larger envelope “shall be printed the form of the declaration of the elector and the name and address of the county board of election of the proper county. The larger envelope shall also contain information indicating the local election district of the mail-in voter.”¹⁶

In Pennsylvania Democratic Party v. Boockvar, the Pennsylvania Supreme Court held that a ballot must be placed inside the secrecy envelope for the ballot to be considered valid. The court made this determination on the basis of the language of the Election Code and not based on the secrecy requirement in Article VII § 4.

One drawback of requiring a secrecy envelope is that some ballots will inexorably be voided due to some voters failing to put their ballot in the secrecy envelope. This disenfranchisement for what amounts to a technical error should be remedied.

Nevertheless, there is good reason to require a secrecy envelope. The constitutional provision addressing secrecy in voting can be read to compel the use of a secrecy envelope in mail-in balloting. Secrecy envelopes had been used prior to Act 77 for absentee ballots. Failing to provide a secrecy envelope could allow an election worker to connect a ballot to a voter. Additionally, the card stock of the presently used outer envelopes is thin, and without a secrecy envelope anyone handling the mail-in ballot may be able to see through it and discern the voter’s selections on the enclosed ballot.

On the other hand, the Pennsylvania Supreme Court has not had the chance to opine on whether Article VII § 4 compels the use of secrecy envelopes, and their constitutional necessity is speculative. Prior to Act 77, absentee ballots were opened at the precinct level. With the advent of widespread mail-in voting, the ballots are opened and counted at the county level, decreasing the odds that an election worker would be able to see what selections a particular voter cast on their ballot. Additionally, most envelopes are now opened by machines in batches, decreasing human interaction with the ballot and making it impossible to match a given ballot in the batch with a specific voter.

¹⁶ Election Code § 1304-D; 25 P.S. §3150.14.

Pennsylvania is one of 16 states to require secrecy envelopes for absentee or mail-in ballots.

States Required to Provide Secrecy Envelopes for Absentee/Mail-in Ballots	
State	Statute
Alaska	Alaska Stat. § 15.20.030(b)
Florida	Fla. Stat. § 101.64(1)(a)
Georgia	Ga. Code Ann. § 21-2-384
Hawaii	Haw. Rev. Stat. § 15-6
Kentucky	Ky. Rev. Stat. § 117.085(10)
Minnesota	Minn. Stat. § 203B.07
New Hampshire	N.H. Laws § 657:7
New Jersey	N.J. Stat. Ann. § 19:63-12
New York	N.Y. Elec. Law § 7-122
North Dakota	N.D. Cent. Code § 16.1-07-08
Ohio	Ohio Rev. Code Ann. § 3509.04
Pennsylvania	25 P.S. §§ 3146 (absentee ballots) and 3150.14 (mail-in voting ballots)
Texas	Tex. Elec. Code Ann. §§ 86.012 (ballot envelope) and 86.013 (carrier envelope)
Virginia	Va. Code Ann. § 24.2-706
Washington	Wash. Rev. Code § 29A.40.91
West Virginia	W. Va. Code § 3-3-12

The advisory committee concluded that although secrecy envelopes should continue to be provided and their use encouraged, if a voter fails to use one (whether purposefully or inadvertently), the ballot should still be counted.

REQUIREMENT TO DATE THE BALLOT

The Election Code specifically requires that voters shall, among other things, sign and date the declaration printed on the outer envelope.¹⁷ While the directive seems clear, this provision has been a source of frequent litigation and the issue has been bounced between the Pennsylvania and federal court systems and the Pennsylvania Department of State for at least two years. Conflicting rulings and guidance have led to confusion and frustration among both election workers and voters. The first case to reach the Pennsylvania Supreme Court combined challenges brought by then-President Trump’s campaign against Philadelphia County and a candidate for the State Senate against Allegheny County for counting undated or misdated ballots. The seven justices of the Pennsylvania Supreme Court issued three opinions.

In the Opinion Announcing the Judgment of the Court, three justices held that undated ballots should be counted because the provision requiring a date is “directory” and failing to count them would result in the “wholesale disenfranchisement of thousands of Pennsylvania voters.” In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058, 1079 (Opinion of J. Donahue announcing the judgment of the court).

Three justices would have found that the failure to date the ballot renders it void, as “the statutory language expressly requires that the elector provide” a date and such a requirement is not “a mere technical insufficiency we may overlook.” Id. at 1090 (J. Dougherty, Concurring and Dissenting).

Justice Wecht issued a Concurring and Dissenting Opinion in which he found, in regard to the statutory provision directing an elector to date the ballot, that such a “requirement is stated in unambiguously mandatory terms....” Justice Wecht continued that “[h]owever, under the circumstances in which the issue has arisen, I would apply my interpretation only prospectively....” Id. at 1079-1080 (J. Wecht, Concurring and Dissenting).

Counting the three justices who joined the Opinion Announcing the Judgment of the Court with Justice Wecht’s Concurring and Dissenting Opinion, the Pennsylvania Supreme Court held that the failure to date the ballot renders it void — except in this specific election.

Ritter v. Migliori

Following this decision, a judicial election was held in Lehigh County in which undated ballots were set aside and not counted. One of the judicial candidates sued in federal court, arguing

¹⁷ Election Code § 1306-D(a); 25 P.S. § 3150.16(a) (directing that “[t]he elector shall then fill out, date and sign the declaration printed on such envelope.”).

that Pennsylvania’s requirement to date the ballot violated the “Materiality Provision” of the Civil Rights Act of 1964. This provision provides that

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.¹⁸

It should be noted here that the suit in the federal District Court was brought by voters who claimed that not counting their undated ballots violated their right to vote. Prior to this action, the Ritter case was heard before the Commonwealth Court, which sided with candidate Ritter in deciding that the undated ballots could not be counted. The Pennsylvania Supreme Court declined to hear the case.

To determine whether the Lehigh County Board of Election’s refusal to count undated ballots violates the Materiality Provision, the Third Circuit articulated the test as “whether this requirement is material in determining whether such individual is qualified to vote under Pennsylvania law.” Migliori v. Cohen, 36 F.4th 153, 162 (3d Cir. 2022). After quoting Pennsylvania law on the qualifications to vote, the Court further explained that a voting law is “material” only if it goes to determining age, citizenship, residency, or current imprisonment for a felony. Id. at 163. Examining the date requirement for mail-in ballots, the Third Circuit concluded that it is not material to any of those factors, and thus violates the Materiality Provision of the federal Civil Rights Act.

An application for a stay to prevent the counting of the ballots until the United States Supreme Court could hear the case was denied. However, Justice Alito, joined by Justices Gorsuch and Thomas, dissented from the denial of the application for stay. Alito stated that “the Third Circuit’s interpretation is very likely wrong” and contrary to the statutory language. First, the cited federal law requires the provision to have the effect of denying a voter the right to vote. An individual’s vote not being counted because they did not follow the rules for casting a ballot is not a denial of the right to vote.

Second, there is no reason why the requirements to register to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted. The scope of Section 10101(a)(2)(B) of the Civil Rights Act is materiality to eligibility to register to vote. Qualification to vote is not the same as following rules for submitting a ballot. According to Alito, “it would be absurd to judge the validity of voting rules based on whether they are material to eligibility.” As an example, he noted that the requirement to sign the ballot is not material to eligibility. Yet under the Third Circuit’s interpretation, such a requirement would violate federal law. Alito, Gorsuch, and Thomas would have granted the stay in order to preserve the opportunity to review the Third Circuit’s decision prior to the elections in November. Ritter v. Migliori, 142 S. Ct. 1824-1826 (Mem.) (Jun 9, 2022).

¹⁸ 52 U.S.C. § 10101(a)(2)(B).

Upon denial of the stay, the federal district court ordered Lehigh County to count the undated ballots and Ritter's lead and expected victory were reversed.

After the Third Circuit decision in Migliori, the Pennsylvania Department of State filed an Emergency Application for Peremptory Judgment and Summary Relief in the Commonwealth Court seeking to compel Berks, Fayette, and Lancaster counties to count undated mail-in ballots. The Department of State argues that Pennsylvania courts, while not bound by Third Circuit decisions, view those decisions as persuasive authority. In this case, the Department contended, departing from the Third Circuit's holding would create a situation where a voter could file suit in a federal court to compel a county to count undated ballots.¹⁹

On August 4, 2022, the Commonwealth Court denied the petition, stating "because no formal motion has been filed, there is nothing properly before the Court to consider. Any party desiring Court action shall file a formal motion setting forth the relief sought and legal basis for same." The Commonwealth Court ordered that any motion be filed with the court no later than August 8, 2022, and that the parties endeavor to file a joint stipulation of facts.²⁰

At the same time the Department of State's suit to compel Berks, Fayette, and Lancaster Counties to count undated ballots was winding its way through the state court system, Ritter filed a petition for a writ of certiorari to the U.S. Supreme Court (SCOTUS) to request a review of the Third Circuit case in Migliori. A petition for a writ of certiorari is a way to appeal a case to the SCOTUS. SCOTUS is under no obligation to accept such cases, and does so sparingly, and usually only if the case could have national significance, could reconcile conflict decisions in the federal circuit courts or has precedential value.²¹ In this case, the petition was granted, the judgment in the Third Circuit opinion was vacated, and the case was remanded to the Third Circuit to dismiss it as moot. Because the votes had already been certified, the only recompense for Ritter was to recover his costs, but the implications for Pennsylvania's elections was monumental, returning the state of the law to the position that undated ballots cannot be counted. The granting of the writ of certiorari and order to dismiss the original case as moot destroyed any precedential value Migliori had. The petition was granted on October 11, 2022, exactly four weeks before the November election.

Ball v. Chapman

A week after the Ritter case was finally closed a suit was filed with the Pennsylvania Supreme Court, seeking an injunction to prevent and county boards of election from counting any absentee and mail-in ballots that are undated or incorrectly dated on the outer envelopes. The injunction in this case, Ball v. Chapman, No. 102 MM 2022 (Pa. Supreme Court, November 1, 2022) was granted. Immediately, county election officials were notified by the Department of

¹⁹ Chapman v. Berks County Board of Elections, et al., No. 355 MD 2022, Memorandum in Support of Petitioners' Emergency Application for Peremptory Judgment and Summary Relief, (Pa. Commw. Ct., Jul. 12, 2022).

²⁰ Pennsylvania Commonwealth Court, Docket Entry of August 4, 2022, Chapman v. Berks County Board of Elections, et al., No. 355 MD 2022.

²¹<https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>

State that counties were not to count undated or wrongly dated ballots and it was strongly recommended that the counties segregated these ballots, and a new formal written guidance was released on November 3, 2022. In a supplemental order issued per curiam on November 5, the Pa. Supreme Court provided a specific definition for the order's purposes:

For purposes of the November 8, 2022 general election "incorrectly dated outer envelopes" are as follows: (1) mail-in ballot outer envelopes with dates that fall outside the date range of September 19, 2022, through November 8, 2022; and (2) absentee ballot outer envelopes with dates that fall outside the date range of August 30, 2022, through November 8, 2022.²²

By November 1, a week before the election, many people had already submitted mail-in ballots. Several counties, including Philadelphia subsequently released the names of individuals who had submitted defective ballots, who, if they wanted their votes to be counted, would have to go to city hall to obtain a replacement ballot. Further, the need to "re-vote" has been alleged to have fallen most heavily on people of color. Spotlight PA and Votebeat²³ conducted an analysis the lists of three urban communities and concluded that defective ballots were more likely to come from communities with higher-than-average nonwhite populations as compared to the voting population as a whole in the county.²⁴

On November 4, 2022, the Pennsylvania NAACP, League of Women Voters and four other organizations filed suit in federal court in the Western District of Pennsylvania, alleging the same civil rights violations as were cited in *Ritter v. Migliori* seeking an injunction to prevent the Commonwealth or any county from certifying 2022 election results that do not include undated or incorrectly dated mail-in ballots. The Secretary of the Commonwealth and the boards of elections of all 67 counties were named as defendants. Briefs and petitions have begun to be filed, and a scheduling conference has been set for January 9, 2023.²⁵

²² Supreme Court of Pennsylvania, Miscellaneous Docket Sheet, Docket No. 102 MM 2022, p. 58, November 30, 2022.

<https://ujportal.pacourts.us/Report/PacDocketSheet?docketNumber=102%20MM%202022&dnh=C8qeSAGrVI6d87OiT4h8Og%3D%3D>.

²³ Spotlight PA describes itself as "an independent, nonpartisan newsroom dedicated to high-quality investigative and public-service journalism about the Pennsylvania state government and urgent statewide issues, including elections, voting, the governor, the legislature, rural communities, criminal justice, economic development, health, human services, and more," (spotlightpa.org/about/) while Votebeat is described as "a nonprofit news organization committed to reporting the nuanced truth about elections and voting at a time of crisis in America." (<https://www.votebeat.org/pages/about-votebeat>).

²⁴ Carter Walker, "Rejecting undated mail ballots disproportionately impact communities of color in Pa., data shows," *Votebeat*, reproduced at

https://www.spotlightpa.org/?utm_source=google&utm_medium=cpc&utm_campaign=brand_exact&gclid=Cj0KCQiAm5ycBhCXARIsAPldzoUcJA3UeJEsAnoEoAg3uSZry-7nfvvPR91gMYBVCC3nyFU9CyIsUXEaAhKAEALw_wcB

²⁵ NAACP v Chapman, 1:22-CV-339 (W. Dist. PA, November 4, 2022).

McCormick v. Oz

The Commonwealth Court again had the opportunity to opine on whether undated ballots should be counted in the Republican primary race for the United States Senate between Dr. Mehmet Oz and Dave McCormick in the spring of 2022. In that case, the Senate campaign of McCormick sought an injunction requiring the Pennsylvania Department of State and various county boards of election to count undated ballots. McCormick for U.S. Senate v. Chapman, 2022 WL 2900112 (Pa. Commw. Ct., Jun. 2, 2022) (unreported).

In this case, President Judge Jubelirer found “the Court finds the analysis in Migliori persuasive in determining whether Petitioners have a likelihood of success on the question of federal law asserted.” Id. at *10. Further, the “Court is also not persuaded that In re 2020 Canvass [referring to In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058, discussed above] requires a different result.” The Commonwealth Court distinguished the present case by noting that the issue of the date requirement conflicting with federal Civil Rights law was not argued, and that the Third Circuit had not yet opined on it. Judge Jubelirer also distinguished the facts of In re 2020 Canvass, noting that in the present case concerning the primary for U.S. Senate ballot envelopes with incorrect dates were also counted. Id. at *14. Ultimately, the Commonwealth Court granted the motion for an injunction, and ordered as follows:

The County Boards are directed, if they are not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require otherwise, and to provide two vote tallies to the Acting Secretary, one that includes the votes from those ballots without a dated exterior envelope and one that does not. Thus, when a final decision on the merits of whether the ballots that lack a dated exterior envelope must be counted or not, the Acting Secretary will have the necessary reports from the County Boards.

Id. at *15.

However, prior to this decision McCormick had conceded the race to Oz, mooted the case.

Irrespective of whether the courts have correctly interpreted the Commonwealth’s statutory provision governing dating the mail-in ballot or whether the Third Circuit or Justice Alito is correct in their respective interpretations of 52 U.S.C. § 10101(a)(2)(B), a requirement to date the mail-in ballot has generated some consternation among this Advisory Committee and election policy commentators more broadly.

Most of the advisory committee is of the opinion that the date the voter fills out the ballot is irrelevant to the voting process. Some voters have mistakenly filled in their date of birth rather than the date the ballot was completed. Omitting the date or using an obviously incorrect date results in the disenfranchisement of the voter for what seems to be harmless error. It can be assumed that the voter filled out the ballot sometime between the date he or she received it and the date it was returned. However, it is important, especially in an area as fundamental as the right to

vote that the letter of the law be followed. If the opinion of the General Assembly and their constituents is that the date a ballot is signed is essentially irrelevant to the voting process, then the letter of the law (the statute) should reflect that position. Accordingly, the advisory committee recommends that the requirement to date the mail-in or absentee ballot be clarified to indicate that the correct date should be the date the ballot was signed, and that failure to provide a date should not disqualify the ballot if all other requirements, including the signature of the voter, have been fulfilled.

DROP BOXES

One of the grey areas left unaddressed by Act 77 was how voters are to return their mail-in ballots. During the 2020 Presidential Election, then-Secretary Boockvar interpreted the provision in the Election Code which requires that ballots be delivered in person to the county board of election, 25 P.S. § 3146.6(a), to permit counties to decide whether they would accept ballots delivered to places other than the county board of election, such as a satellite location or a drop box. The Pennsylvania Supreme Court agreed with this interpretation in a lawsuit brought by the Democratic Party to clarify aspects of the Election Code prior to the 2020 election. Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 361 (Pa. 2020).

Currently there is no statute or regulation governing drop boxes. The guidance issued by the Secretary of State on the eve of the November 2020 presidential election remains in place, as supplemented by additional “Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures,” updated September 26, 2022.

Whether to use drop boxes requires an examination of the effects of competing policies. For instance, more drop boxes would provide more accessibility to return a mail-in ballot, but it also means more work to collect ballots from those drop boxes. Another example — locking the drop box at the end of each day — helps to ensure security and prevents tampering but requires additional time on the part of election workers to close and re-open those boxes.

Other competing policy considerations include:

- **Uniformity vs. flexibility.** The goal of this provision is to give counties the flexibility to have drop boxes but at the same time to have them as consistently administered as possible.
- **Hours of operation.** If drop boxes are available 24/7, they will need to be closed periodically to allow county election staff to collect ballots from the box on an established schedule, which could be done during normal business hours. If boxes are open for a set period of hours, for example 7 AM to 8 PM like a polling place is open, then county employees would have to close and open the boxes each day they are in operation, which would be an additional labor cost to the counties.
- **Accessibility.** Drop boxes need to be accessible to voters with disabilities.
- **Security.** Security to prevent tampering with the boxes and potential voter intimidation and harassment would also need to be considered. Statutory security requirements should be specific and provide options to counties based on their needs.

- **Collecting the ballots.** The DOS's guidance for 2020 recommended a bipartisan team of two people to collect ballots from the drop boxes.
- **Number of drop boxes.** County-level caps and floors on drop boxes have been used in other states. While each county should have flexibility in determining the number and location of drop boxes, other states have required a minimum number of drop boxes or a formula to determine their number or location.

Department of State Ballot Drop Box Guidance

Because there is no specific statutory authority for drop boxes, clarity is needed regarding whether drop boxes are permitted and, if so, what rules govern their use. There are still concerns among some county elections officials that Act 77 did not permit drop boxes. To the extent that drop boxes are permitted, the guidance from the Department of State is insufficient to provide clear, workable rules for the counties to implement.

Although not every aspect of the use of drop boxes needs to be statutorily prescribed, there should be some statutory guidance on the use of drop boxes setting minimum standards. This statutory guidance should seek to balance county autonomy and decision-making with Commonwealth-wide uniformity in standards.

For instance, uniformity may be best for rules regarding aspects such as security, placement, and some physical requirements of the drop box, while it may be best for counties to determine the number, location, and hours of operation of the drop boxes. A statewide statutory cap on the number of drop boxes or a formula for requiring a set number of drop boxes is probably not advisable given Pennsylvania's varied geography and population density. It is advisable to include an opt-out provision in any statutory guidance, leaving to the counties' discretion the determination as to whether to provide drop boxes at all.

Drop Box Security

If drop boxes are to be permitted, then the security of the drop boxes will be of paramount importance. The design of the drop box itself is one aspect affecting security. Currently, the Department of State's 2020 guidance specifies how the hardware of the drop box should function, including the pounds of pressure needed to operate. The DOS 2020 guidance also provides specific design requirements.

Drop box security also includes a monitoring component, which can be a video surveillance system or a physical presence by county election office workers or law enforcement.

Securing the drop boxes against vandalism may be difficult. Such vandalism could include damaging the ballots inside the drop box, and thereby erode voters' confidence in their use and the election process more broadly. However, continuously staffing all drop boxes to prevent

tampering, vandalism, and election law violations is impractical and, even if practical, would be extraordinarily costly.

Video surveillance can monitor the drop boxes to record prohibited behavior but would be powerless to stop it. Procuring and installing video monitoring equipment for all drop boxes may also be costly. Some states also require that the drop boxes be located inside buildings that can be locked after hours to reduce the chances of vandalism and tampering.

Regulation of the functionality or design may be best left to the Secretary of State. However, minimum security standards should be set by statute. These standards should include video surveillance or monitoring, a requirement that the drop boxes be secured from tampering or vandalism, signage warning against election fraud and voter intimidation, and possibly other requirements.

Another solution would be to permit drop boxes at polling places on Election Day only. This policy will eliminate security and cost concerns, as the drop boxes will be staffed with poll workers during regular hours on Election Day.

The Commonwealth could also consider requiring the drop boxes to be located inside a government building to reduce the chances of vandalism and tampering.

Accessibility of the Drop Boxes

The DOS's 2020 guidance states that county boards of elections should ensure that ballot return sites are accessible to voters with disabilities. If there is only one drop box in a given location, that drop box must be accessible. If there are multiple drop boxes at one site, then each inaccessible drop box location should have directional signage indicating the location of the accessible drop box.

It is generally agreed that the drop boxes should be accessible to voters with disabilities. However, some counties may have already purchased drop boxes which may not comply with any future standard requiring uniformity in accessibility. A statutory provision on drop box accessibility could simply direct that drop boxes be compliant with the federal Americans with Disabilities Act. The statute could also grandfather in equipment already purchased by the counties, if the county offered some drop boxes that would be compliant with the federal Americans with Disabilities Act.

Further, the Commonwealth could provide funding to partially offset the cost of obtaining and operating the drop boxes.

Ballot Collection from Drop Boxes

The Department of State largely delegated to the counties the responsibility of crafting rules governing ballot collection. However, the Secretary still offered some rules surrounding ballot collection. The DOS's 2020 guidance states that ballots are to be collected only by personnel authorized by the county board of elections and at times determined by the county board of elections, but at least every 24 hours excluding Saturdays and Sundays.

Not having clear rules regarding the collection of ballots from the drop boxes can result in differing policies across counties and even allegations of wrongdoing by some counties with insufficient oversight of ballot collection. A possible solution to balance uniformity and oversight with county autonomy would be to require that counties come up with plans to oversee the collection of ballots ahead of the election. Some states require such plans to be filed with their respective Secretaries of State.

In some jurisdictions, the ballots are collected by a team of two people — one from each major party. However, this may be difficult to achieve in some counties where one party is dominant.

Another issue to consider is the frequency of the collection. Not collecting the ballots from a drop box every 24 hours can leave those ballots vulnerable to tampering or destruction if the drop box is vandalized. On the other hand, there may not be sufficient activity in every county or at every drop box to justify daily collection. Further, statutorily requiring two persons to collect ballots from every drop box every 24 hours is an imposition on the resources of the county board of elections.

Frequency and manner of collection may be best left to the decision of the counties, so long as there are uniform record keeping and chain of custody safeguards.

OTHER MAIL-IN BALLOT ISSUES

Some states have experienced significant problems with individuals or groups that have collected or gathered ballots of other persons and returned them *en mass* to the local elections office. This practice raises concerns about tampering with ballots, obtaining multiple ballots and voting multiple times. While this has not appeared to be a major occurrence in Pennsylvania, there have been instances where individuals return ballots for their family members along with their own ballots to drop boxes, which is prohibited by Pennsylvania law. Specific rules are in place that detail who, and under what circumstances, an absentee or mail-in ballot may be returned for another person. It may be that further legislative clarification is needed to ensure that ballots are returned safely and intact.

The advisory committee reviewed research and discussed the issues of ballot tracking and pre-paid postage for mail-in ballots and declined to affirmatively make recommendations on either topic.

Ballot Tracking

Under current Department of State protocol, a voter may track their voted mail-in ballot via the Internet by going to PAvoterservices.pa.gov. The ballot tracker identifies when a ballot request was received, when the ballot was mailed or delivered to a third-party mailing service, and when the returned ballot was received. This information is provided to the Department of State by the county boards of elections. It does not and cannot identify whether the ballot was counted, as processing after receipt of the returned ballot is designed to provide secrecy, and the removal of the outside mailing envelope severs any ability to identify who the voter is. The only statutory reference to tracking is a directive in the Election Code that “the county board of elections when preparing the official ballots for absentee electors shall be required to track the name of the applicant to which a ballot is being sent.”²⁶

Two bills introduced in the 2021-2022 General Assembly address ballot tracking. Senate Bill 878 would alter the Election Code to explicitly require the Department of State to “create and maintain a tracking system for each qualified mail-in or absentee ballot, the date on which an elector’s ballot is received and the date on which an elector’s ballot is pre-canvassed or canvassed.”²⁷

House Bill 1800 would direct the Secretary of the Commonwealth to “create and maintain a tracking system for each qualified mail-in or absentee elector to track the status of an application

²⁶ Act of March 27, 2020, P.L. 41, No. 12, § 9; 25 P.S. § 3146.3(a).

²⁷ Pennsylvania General Assembly, Senate Bill 878, § 1 (adding § 201(m) to the Election Code).

for a mail-in or absentee ballot, the date on which an elector's ballot is prepared, the date on which an elector's ballot is mailed, the date on which an elector's ballot is received and the date on which an elector's ballot is pre-canvassed or canvassed.”²⁸

Both bills referenced above would add a requirement to track the pre-canvassing and canvassing of mail-in ballots. This would create an additional step for county election workers — scanning the secrecy envelope once it has been removed from the outer envelope. Even if the new tracking requirement is controlled and paid for by the Commonwealth, this proposal would add an additional step to the process of handling mail-in ballots and thereby introduce an added labor cost for county election workers.

Not all counties are equipped to develop and manage their own ballot tracking systems. Making ballot tracking a statutory obligation of the Department of State — rather than the counties — would avoid imposing unfunded mandates on already tight county budgets.

Pre-Paid Postage for Mail-in Ballots

For the 2020 election, the Pennsylvania Department of State announced that it would provide postage paid envelopes for voters to return their ballots. However, for the 2021 general election, it was noted that voters would have to supply their own stamps, and that given that different jurisdictions had differing numbers of races, and therefore ballot sizes, some voters would have to affix more postage than just one standard stamp.

Requiring the counties to bear the cost of return postage is an unfunded mandate. Most counties, and especially smaller counties with smaller budgets, may not be able to afford another statutory mandate to spend money without the Commonwealth also providing funding. Even if the Commonwealth pays for the postage, it is an unfunded mandate to the counties to prepare the return envelopes (by stamping or affixing the postage).

On the other hand, pre-paid postage can itself create inequities. Paying postage for mail-in ballots appears to give favor to voters who choose to mail in their ballot rather than those who vote in person. The costs of voting in person (e.g., gas for a car or time off work) are not reimbursed by the Commonwealth.

In some elections, particularly off-year elections, municipalities may have a differing number of races or candidates for an office. This requires ballots of differing sizes and therefore weights. Some ballots may need postage greater than that of a standard stamp. Ballot mailed without sufficient postage will still be delivered, but the difference in postage paid will be billed to the counties.

There are also two alternative policies to consider. First, if the ballot return envelopes are to be pre-paid, the Commonwealth should provide pre-paid envelopes to the counties or otherwise provide funding to the counties for the postage and the cost of affixing the postage.

²⁸ Pennsylvania General Assembly, House Bill 1800, § 1 (adding § 201(z.1) to the Election Code).

The second policy recognizes that participation in voting is ultimately the responsibility of the voter, and the voter should provide their own postage. However, if the voters are to provide their own postage but they affix an insufficient amount of postage to the return envelope, cost overruns currently billed by the Postal Service to the county should be paid for by the Commonwealth.

See the table below for a comparison of other states' rules regarding postage for absentee or mail-in ballots.

Postage in States with Mail-in Voting		
State	Postage Rule	Statute
Arizona	“The county recorder or other officer in charge of elections shall mail the early ballot and the envelope for its return postage prepaid to the address provided....”	Ariz. Rev. Stat. § 16-542B
California	“The elections official shall deliver ... [a]ll supplies necessary for the use and return of the ballot, including an identification envelope with prepaid postage for the return of the vote by mail ballot.”	Cal. Elec. Code § 3010
Delaware*	“Postage for all mailings made pursuant to this subsection shall be pre-paid by the Department.”	Del. Code Ann. tit. 15 § 5504. (absentee ballots)
Hawaii	Statute provides that expenses, including “mailing and receipt” of mail-in ballots, are to be the responsibility of either the county, state, or both, depending on the type of election	Haw. Rev. Stat § 11-110
Idaho	“The clerk shall issue a ballot, by mail, to every registered voter in a mail ballot precinct and shall affix postage to the return envelope sufficient to return the ballot.”	Idaho Code Ann. § 34-308(2)
Indiana	“An absentee ballot ... shall be enclosed in an envelope, unsealed and stamped for return to the county election board by at least first-class mail.... The pre-addressed, stamped envelope shall be furnished by the county election board.	Ind. Code § 3-11-4-20 (absentee ballots)
Iowa	“The absentee ballot and affidavit envelope shall be enclosed in or with an unsealed return envelope marked postage paid....”	Iowa Code § 53.8 (absentee ballots)
Maryland**	“The ballot/return envelope described under subparagraph (ii) of this paragraph and the return envelope described under subparagraph (iii) of this paragraph provided to a voter voting by absentee ballot shall include prepaid postage.”	Md. Code Ann. Elec. § 9-310 (absentee ballots)

Postage in States with Mail-in Voting		
State	Postage Rule	Statute
Minnesota	“The county auditor or municipal clerk shall provide first class postage for the return envelope.”	Minn. Stat. § 203B.07
Missouri	“Mailing envelopes for use in returning ballots shall be printed with business reply permits so that any ballot returned by mail does not require postage.”	Mo. Rev. Stat. § 115.285 (absentee ballots)
Nevada	“The return envelope sent pursuant to subsection 1 must include postage prepaid by first-class mail....”	Nev. Rev. Stat. § 293.323
New Mexico	“[O]fficial mailing envelopes for use in returning the official inner envelope to the county clerk, which shall be postage-paid.”	N.M. Stat. Ann. § 1-6-8
Oregon	“[E]lectors shall be provided with a return identification envelope that may be returned by business reply mail. The state shall bear the cost of complying with this subsection.”	Or. Rev. Stat. § 254.473
Rhode Island	“Upon the ballots becoming available, the secretary of state shall immediately issue and mail, by first-class mail, postage prepaid, a mail ballot to each eligible voter who has been certified.”	R.I. Gen. Laws § 17-20-10
Washington	“Return envelopes for all election ballots must include prepaid postage.”	Wash. Rev. Code § 29A.40.091
West Virginia	“For persons voting absentee ballot by mail, one postage paid envelope, unsealed, designated ‘Absent Voter's Ballot Envelope No. 2’”	W. Va. Code § 3-3-5(e)(1)(C) (absentee ballots)
Wisconsin	“If the ballot is mailed, and the ballot qualifies for mailing free of postage under federal free postage laws, the clerk shall affix the appropriate legend required by U.S. postal regulations. Otherwise, the clerk shall pay the postage required for return when the ballot is mailed from within the United States.”	Wis. Stat. § 6.87(3)(a) (absentee ballots)

*Delaware’s mail-in voting statute expired. See Del. Code Ann. tit. 15 § 5601 *et seq.* Voters who wish to vote by mail must apply for and meet the conditions of an absentee ballot. Del. Code. Ann. tit. 15 § 5504 applies to absentee ballots.

**While Maryland’s statute applies to “absentee ballots,” new legislation has provided that “all voters are eligible for permanent absentee ballot status.” Md. Code Ann. Elec. § 9311.1(a).

*Statutory Authority
for Election Law Advisory Board*

PENNSYLVANIA ELECTION CODE - OMNIBUS AMENDMENTS
Act of Mar. 27, 2020, P.L. 41, No. 12 Cl. 25
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**ARTICLE XIII-E
PENNSYLVANIA ELECTION LAW ADVISORY BOARD**

Section 1301-E. Definitions.

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The Pennsylvania Election Law Advisory Board established under section 1302-E(a).

Section 1302-E. Pennsylvania Election Law Advisory Board.

(a) Establishment.--The Pennsylvania Election Law Advisory Board is established within the Joint State Government Commission.

(b) Members.--The board shall be comprised of the following members:

- (1) The Secretary of the Commonwealth or a designee.
- (2) The President pro tempore of the Senate or a designee.
- (3) The Minority Leader of the Senate or a designee.
- (4) The Speaker of the House of Representatives or a designee.
- (5) The Minority Leader of the House of Representatives or a designee.

(6) One member from each congressional district, of whom no more than half may be registered with the same political party, appointed by the Governor and confirmed by the Senate and which shall include members who:

- (i) represent groups advocating for individuals with disabilities;²²
- (ii) represent groups advocating for voting rights; and
- (iii) represent county commissioners or county election officials.

(c) Duties.--The board shall have the following duties:

- (1) Study this act and identify statutory language to repeal, modify or update.
- (2) Collaborate with other agencies and political subdivisions of the Commonwealth to study election-related issues.

- (3) Study the development of new election technology and voting machines.
- (4) Evaluate and make recommendations on:
 - (i) improving the electoral process in this Commonwealth by amending this act or through regulations promulgated by the Department of State; and
 - (ii) implementing best practices identified to ensure the integrity and efficiency of the electoral process in this Commonwealth.
- (5) By the end of each fiscal year, publish extensive and detailed findings on the Joint State Government Commission's publicly accessible Internet website and make them available in electronic format to the Office of the Governor and members of the General Assembly.
- (d) Quorum.--A majority of appointed members shall constitute a quorum for the purpose of conducting business.
- (e) Chairperson and vice chairperson.--The members shall select a member to be chairperson and another member to be vice chairperson.
- (f) Transparency and ethics.--The board shall be subject to the following laws:
 - (1) The act of July 19, 1957 (P.L.1017, No.451), known as the State Adverse Interest Act.
 - (2) The act of October 4, 1978 (P.L.883, No.170), referred to as the Public Official and Employee Ethics Law.
 - (3) The act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law.
 - (4) 65 Pa.C.S. Ch. 7 (relating to open meetings).
- (g) Information gathering.--The board may conduct hearings and otherwise gather relevant information and analysis that it considers appropriate and necessary to fulfill its duties.
- (h) Reimbursement.--Members of the board shall be reimbursed for reasonable expenses.