

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. _____ MM 2022

**DAVE McCORMICK FOR U.S. SENATE, and
DAVID H. McCORMICK,**

Petitioners,

v.

**LEIGH M. CHAPMAN, in her official capacity as
Secretary of State for the Commonwealth,
ADAMS COUNTY BOARD OF ELECTIONS,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
BEAVER COUNTY BOARD OF ELECTIONS,
BEDFORD COUNTY BOARD OF ELECTIONS,
BERKS COUNTY BOARD OF ELECTIONS,
BLAIR COUNTY BOARD OF ELECTIONS,
BRADFORD COUNTY BOARD OF ELECTIONS,
BUCKS COUNTY BOARD OF ELECTIONS,
BUTLER COUNTY BOARD OF ELECTIONS,
CAMBRIA COUNTY BOARD OF ELECTIONS,
CAMERON COUNTY BOARD OF ELECTIONS,
CARBON COUNTY BOARD OF ELECTIONS,
CENTRE COUNTY BOARD OF ELECTIONS,
CHESTER COUNTY BOARD OF ELECTIONS,
CLARION COUNTY BOARD OF ELECTIONS,
CLEARFIELD COUNTY OF ELECTIONS,
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COLUMBIA COUNTY BOARD OF ELECTIONS,
CRAWFORD COUNTY BOARD OF ELECTIONS,
CUMBERLAND COUNTY BOARD OF ELECTIONS,
DAUPHIN COUNTY BOARD OF ELECTIONS,
DELAWARE COUNTY BOARD OF ELECTIONS,**

**ELK COUNTY BOARD OF ELECTIONS,
FAYETTE COUNTY BOARD OF ELECTIONS,
FOREST COUNTY BOARD OF ELECTIONS,
FRANKLIN COUNTY BOARD OF ELECTIONS,
FULTON COUNTY BOARD OF ELECTIONS,
HUNTINGDON COUNTY BOARD OF ELECTIONS,
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UNION COUNTY BOARD OF ELECTIONS,
VENANGO COUNTY BOARD OF ELECTIONS,
WARREN COUNTY BOARD OF ELECTIONS,
WASHINGTON COUNTY BOARD OF ELECTIONS,
WAYNE COUNTY BOARD OF ELECTIONS,**

**WESTMORELAND COUNTY BOARD OF ELECTIONS, and
WYOMING COUNTY BOARD OF ELECTIONS,**

Respondents.

**DAVE McCORMICK FOR U.S. SENATE AND DAVID H.
McCORMICK'S APPLICATION
FOR THE COURT TO EXERCISE JURISDICTION
PURSUANT TO ITS KING'S BENCH POWERS
AND/OR POWERS TO GRANT EXTRAORDINARY RELIEF OVER
THE PROCEEDINGS IN THE COMMONWEALTH COURT AT
DOCKET NO. 286MD2022**

May 24, 2022

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INTRODUCTION

The right to vote is sacrosanct. The handwritten date on an exterior mailing envelope that contains a receipt-stamp or an indisputably timely received absentee or mail-in ballot, required by 25 P.S. §§ 3146.6(a) and 3150.16(a), is anything but. Worse still, the date serves no purpose at all when Boards of Elections throughout the Commonwealth stamp envelopes with the date and time reflecting when the Boards actually receive the ballots; the Commonwealth concedes that any handwritten date will do; and the measure serves no logistical, confidentiality, or anti-fraud purpose. Both a plurality of this Court and the United States Court of Appeals for the Third Circuit agree on this point. Yet many Boards¹ are still refusing to canvass receipt-stamped or indisputably timely received ballots missing only the handwritten date. They are doing so in violation of established federal and Commonwealth law. They are doing so in a manner that disenfranchises qualified

¹ The Boards of Elections in the following counties are refusing to take a position or refusing to agree to count such ballots and are thus named as Respondents here: Adams, Allegheny, Beaver, Bedford, Berks, Blair, Bradford, Bucks, Butler, Cambria, Cameron, Carbon, Centre, Chester, Clarion, Clearfield, Clinton, Columbia, Crawford, Cumberland, Dauphin, Delaware, Elk, Fayette, Forest, Franklin, Fulton, Huntingdon, Indiana, Jefferson, Juniata, Lackawanna, Lancaster, Lawrence, Lebanon, Lehigh, Luzerne, Lycoming, McKean, Mercer, Mifflin, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Pike, Potter, Snyder, Somerset, Sullivan, Tioga, Union, Venango, Warren, Washington, Wayne, Westmoreland, and Wyoming.

voters throughout the Commonwealth. And those who persist in doing so will be acting in open disregard of clear guidance from the Department of State, issued May 24, 2022, to count these ballots. App. at 1–3.

Petitioners, David H. McCormick, a candidate in the Republican primary election, and a Pennsylvania voter, together with his campaign committee, invoke this Court’s jurisdiction to address the issue. He has standing to do so, *In re Gen. Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987), as does his campaign committee, which shares his interest in gaining election. *Id.*; *see also McLinko v. Commonwealth*, 270 A.3d 1278, 1282 (Pa. Commw. Ct. 2022) (“In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters.”) (collecting citations).

Immediate relief is both appropriate and necessary to ensure that the Respondent Boards cannot circumvent federal and Commonwealth law as they continue the canvass of votes. All valid votes should be counted. Period.

**BASIS FOR KING’S BENCH OR
EXTRAORDINARY JURISDICTION**

At its core, this case concerns the safeguarding of the right to vote, “a fundamental political right” “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). This Court may exercise its discretion to take immediate jurisdiction of the case and provide prompt and final relief to thousands of voters

who did everything right to cast their absentee ballot or mail-in ballot except for handwriting a date that, in the final analysis, serves no purpose. *See* PA. CONST. art. V, § 2(a), 42 Pa. C.S. § 502; 42 Pa. C.S. § 726; *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015).

More specifically, this Court is the “supreme judicial power of the Commonwealth,” PA. CONST. art. V, § 2(a), with the ability to “exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 Pa. C.S. § 502. That includes the “power of general superintendency over inferior tribunals even when no matter is pending,” *Bd. of Revisions of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010), and the power over any matter of public importance pending before any other court within the Commonwealth. *See* 42 Pa. C.S. § 726.

This extraordinary power, this “King’s Bench authority[,] is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Williams*, 129 A.3d at 1206. King’s Bench authority is appropriate when this Court deems that the “public interest” should not “suffer” the “deleterious effect . . . caused by delays incident to ordinary processes of law.” *In re*

Bruno, 101 A.3d 635, 670 (Pa. 2014). The “exigencies of the moment” demand the exercise of such jurisdiction here so that valid votes are counted in a timely manner.

STATEMENT OF THE CASE & FACTS

Pennsylvania law requires absentee voters to (1) place their marked ballots in a sealed envelope, (2) place that envelope inside a second envelope, which is marked with a “declaration of the elector” form, (3) “fill out, *date* and sign the declaration printed on such envelope,” and then (4) return the ballot by 8 p.m. on election day. 25 P.S. § 3146.6(a) (emphasis added). The same rules apply to other voters who vote by mail. *See id.* § 3150.16(a).

The Boards referenced in footnote 1 refuse to count (or commit to counting) ballots where the voter failed to handwrite a date on the outer envelope but otherwise complied with all applicable requirements, including timely return, and where the Boards stamped the envelope with the date the Boards received the absentee or mail-in ballot. Other Boards are keeping voters in limbo. Counsel for the Blair County Board, for example, represented to Petitioners’ counsel that the Blair County Board would not take action on these ballots until next week, well after the Board must report the unofficial results of its canvass to the Department of State. *See App.* at 29–31 (compilation of correspondence with Board noting its position). The Allegheny County Board of Elections has taken the same position. *Id.* at 11. Only the following seven Boards have confirmed to Petitioners’ counsel that they are

counting undated but timely received ballots: Armstrong, Erie, Greene, Philadelphia, Schuylkill, Susquehanna, and York. *Id.* at 17.

By refusing to count absentee and mail-in ballots based solely on the lack of a handwritten date on a receipt-stamped or otherwise indisputably timely received outer envelope and lacking any other allegations of impropriety, Boards throughout the Commonwealth are likely depriving thousands of voters of the right to vote. This is so because, as the Pennsylvania Attorney General recently noted in an *amicus* brief, in a recent judicial election in Lehigh County, “257 qualified voters . . . failed to date the declaration on their absentee or mail-in ballot’s return envelope.” Br. of the Commw. of Pa. as *Amicus Curiae* at 7, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 42 (3d Cir. Apr. 1, 2022). The Boards have not been forthcoming with the actual numbers of affected ballots, but Petitioners understand that the number is likely in the thousands.

ARGUMENT

There are two issues here: whether the requirement to provide a handwritten date on a receipt-stamped or indisputably timely received absentee or mail-in ballot complies with federal law, and whether the requirement complies with the Commonwealth’s Constitution. For both, the answer is “no.”

I. The requirement to date the exterior mailing envelope violates the federal Civil Rights Act where there is no dispute that the ballot was timely received.

The federal Civil Rights Act prohibits the Boards from “deny[ing] 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” that “is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). This includes errors committed during any “action necessary to make a vote effective,” “including . . . casting a ballot.” *Id.* § 10101(a)(3)(A), (e) (emphasis added).

On May 20, 2022, a panel of the Third Circuit ruled, unanimously, that this provision prohibited the Lehigh County Board of Elections from rejecting absentee and mail-in ballots cast in a November 2021 municipal election solely because the timely received ballots’ exterior mailing envelopes lacked handwritten dates. *See* App. at 22–27 (Initial and Amended Judgment, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022) (“*Migliori* Judgment”).² Although the court has issued only a judgment, with an opinion to follow, its reasoning is clear from the judgment: these dates “are immaterial under

² The United States Court of Appeals issued an amended judgment on May 23, 2022, apparently to clarify that only timely received ballots are covered by its order to count ballots that are otherwise missing a handwritten date.

§ 10101(a)(2)(B),” meaning that they are immaterial to determining whether the voter is qualified to vote and her ballot is valid.

By refusing to count absentee and mail-in ballots based solely on the lack of a voter-provided date where other indicia of its timely receipt exists, the Respondent Boards are depriving likely thousands of voters of the right to vote that Section 10101(a)(2)(B) explicitly preserves. These ballots were indisputably returned on time. Whether or not a voter neglected to write a date on the mailing envelope is entirely immaterial to whether that voter “is qualified under State law to vote” under Section 10101(a)(2)(B). Just as in *Migliori*, and even more so in light of the *Migliori* judgment, “there is no basis on this record [for the Boards] to refuse to count undated ballots.” *Migliori* Judgment at 2. Guidance from the Pennsylvania Department of State even instructs that “there is no basis to reject a ballot for putting the ‘wrong’ date on the envelope.” App. at 58. If a ballot cannot be rejected because the voter affirmatively wrote the *wrong* date on the exterior envelope, there can be no valid basis to reject a ballot simply because a voter neglected to write a date in that spot. *See id.* at 42–48 (statutory interpretation of Section 10101(a)(2)(B)).

Indeed, federal law overrides any contradictory state requirements, *see* U.S. CONST. art. VI, cl. 2, and Pennsylvania courts presumptively defer to the Third Circuit’s construction of federal law, *see, e.g., W. Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Commw. Ct. 2017). The implication of the Third Circuit’s

judgment for this case is clear as well: Section 10101(a)(2)(B) prohibits the Boards from denying timely absentee and mail-in ballots based solely on the lack of a handwritten date on the exterior mailing envelope where other indicia of its timely receipt exists.

II. The requirement to date the exterior mailing envelope violates the Pennsylvania Constitution where there is no dispute that the ballot was timely received.

The Pennsylvania Constitution affords still more protections. It requires that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. This Free Elections provision “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (emphasis in original). It is “specifically intended to equalize the power of voters in our Commonwealth’s election process.” *Id.* at 812. The Election Code exists “[t]o obtain freedom of choice, a fair election and an honest election return.” *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965).

When votes were being counted for the 2020 general election, the Pennsylvania Supreme Court was asked to decide “whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer

envelope but did not handwrite,” among other things, “a date.” *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1061–62 (Pa. 2020) (plurality op.). The Court’s judgment was that it does not. *See id.* at 1062; *see also id.* at 1079 (Wecht, J., concurring in part and dissenting in part) (agreeing that the undated ballots should not be thrown out in that election). As the plurality opinion noted, it is “a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.* at 1071 (plurality op.) (cleaned up). Viewed through that lens, the plurality “conclude[d] that dating the declaration is a directory, rather than a mandatory, instruction.” *Id.* at 1076; *see also App.* at 48–51 (further analysis of the *In re 2020 Canvass* judgment and import).

Thus, “while constituting [a] technical violation[] of the Election Code,” *id.* at 1079, a failure to handwrite a date on the ballot’s outer envelope does not “implicate . . . ‘weighty interests’ in the election process, like ballot confidentiality or fraud prevention,” *id.* at 1076 (citation omitted). This “minor irregularit[y]” does “not warrant the wholesale disenfranchisement of,” in that case, “thousands of Pennsylvania voters.” *Id.* at 1079. But the Boards persist. They do so in error where other indicia of timely receipt exists.

CONCLUSION

To ensure the protection of fundamental constitutional rights and promote uniformity in the Commonwealth's election administration process, declaratory and injunctive relief is necessary. Petitioners thus ask that this Court (1) declare that timely returned absentee and mail-in ballots may not be rejected due solely to the lack of a date in the declaration on the exterior envelope where other indicia of the ballot's timely receipt exists; (2) direct the Respondent Boards to canvass any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope where the timely receipt has been ascertained and the ballot has no other deficiencies or irregularities; (3) direct the Respondent Boards to report to the Pennsylvania Department of State the unofficial results of the canvass of any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope absent any other irregularities; (4) enjoin the Respondent Boards to take all other steps necessary to effectuate this Court's declaration; and (5) grant any other relief this Court deems appropriate and necessary.

Respectfully submitted,

DATE: May 24, 2022

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**Motions for pro hac vice admission
forthcoming*

APPENDIX



GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES

Date: May 24, 2022

Version: 2.0

May 24, 2022

Background

On May 19, 2022, the U.S. Court of Appeals for the Third Circuit issued a judgment and order in *Migliori, et al. v. Lehigh County Board of Elections, et al.*, No. 22-1499. Citing the “materiality” provision of the federal Civil Rights Act of 1964 (52 U.S.C. § 10101(a)(2)(B)), the Court of Appeals held that undated ballots cast in Lehigh County in the November 2021 election must be counted. It held that there is no basis to refuse to count the undated ballots because “inasmuch as there is no dispute that ballots that have the wrong date were counted in the [Lehigh] election . . . , the dating provisions contained in the [Pennsylvania Election Code] are immaterial.” Subsequent to that judgment, on May 19, the Department of State (Department) asked counties to segregate undated or incorrectly dated ballot return envelopes in anticipation of further guidance from the department.

Though the *Migliori* judgment was issued in the context of the November 2021 election in Lehigh County, it has been the Department’s position that ballots that appear to have “incorrect” dates must be counted. Now, in light of the conclusion of the Third Circuit in *Migliori* it is the Department’s position that ballots with an undated return envelope must also be counted for the May 17, 2022, Primary. However, out of an abundance of caution the Department advises, that those ballots should be segregated and remain segregated from all other voted ballots during the process of canvassing and tabulation. In other words, those ballots with undated ballot return envelopes or with incorrectly dated ballot return envelopes that have been set aside, should continue to be maintained, preserved, and appropriately logged pending litigation, which we anticipate will be undertaken on an expedited basis. A determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation.

Counties should further segregate the ballots in question into two categories:

1. Undated.
2. Dated with an “incorrect” date.

Like the pre-canvass and canvass of absentee and mail-in ballots last week, the canvass of the undated ballot return envelopes and any incorrectly dated ballot return envelopes that were set aside must be conducted in an open meeting:

- One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the ballots are canvassed.
- No challenges by authorized representatives or any third party are permitted during canvass of the mail-in and absentee ballots.
- To facilitate transparency and ensure that all validly cast ballots are counted, it is critically important that county boards maintain accurate records of the disposition of ballots received during this period as directed below.

Canvass Procedures

The guidance concerning mail-in and absentee ballots previously provided by the Department on [September 28, 2020](#), continues to apply unless otherwise specified herein.

The county board of elections shall canvass segregated absentee and mail-in ballots that were previously set aside due to being undated or incorrectly dated.

The canvass meeting shall continue until all segregated absentee and mail-in ballots have been canvassed.

The county board of elections shall examine the voter declaration on each envelope to ensure that it is signed and verify that the voter's name appears on the approved list of mail-in and absentee voters.

Please keep in mind that the county board of elections should continue to set aside and not open or count any of the following:

- Ballots cast by any voter who died prior to the opening of the polls on May 17, 2022.
- Ballots that were received after 8:00 p.m. on May 17, 2022.
- Ballots with a missing signature on the Declaration Envelope.
- Ballots that lack the inner secrecy envelope.
- Ballots where the inner secrecy envelope contains any text, mark, or symbol which reveals the identity of the voter or the voter's candidate preference.

Additionally, the county board of elections should not open or count any ballots pending ID verification as follows:

- If proof of identification for an absentee or mail-in voter was not received or could not be verified, the ballot should not be counted unless the elector provided proof of identification, that can be verified by the county board, by the sixth calendar day following the Primary or on or before Monday, May 23rd.

Other than ballots falling into one of the categories set forth above, mail-in and civilian absentee ballots that comply with the Election Code and the Department's prior guidance shall be canvassed as follows:

- Ballots on which the Declaration Envelopes are signed are valid and must be counted.
- Ballots that are signed and either undated or incorrectly dated are valid and must be counted.
- County boards of elections must maintain separate counts for undated and incorrectly dated ballots.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVE McCORMICK FOR U.S. SENATE, and
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Case No. _____

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WASHINGTON COUNTY BOARD OF ELECTIONS,
WAYNE COUNTY BOARD OF ELECTIONS,
WESTMORELAND COUNTY BOARD OF ELECTIONS,
and WYOMING COUNTY BOARD OF ELECTIONS,

Respondents.

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Petition for Review and Notice are served, or within any other timeframe as ordered by the Court, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Petitioners. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

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(717) 232-7536

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVE McCORMICK FOR U.S. SENATE, and
DAVID H. McCORMICK,

Petitioners,

v.

Case No. _____

LEIGH M. CHAPMAN, in her official capacity
as Secretary of State for the Commonwealth,
ADAMS COUNTY BOARD OF ELECTIONS,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
BEAVER COUNTY BOARD OF ELECTIONS,
BEDFORD COUNTY BOARD OF ELECTIONS,
BERKS COUNTY BOARD OF ELECTIONS,
BLAIR COUNTY BOARD OF ELECTIONS,
BRADFORD COUNTY BOARD OF ELECTIONS,
BUCKS COUNTY BOARD OF ELECTIONS,
BUTLER COUNTY BOARD OF ELECTIONS,
CAMBRIA COUNTY BOARD OF ELECTIONS,
CAMERON COUNTY BOARD OF ELECTIONS,
CARBON COUNTY BOARD OF ELECTIONS,
CENTRE COUNTY BOARD OF ELECTIONS,
CHESTER COUNTY BOARD OF ELECTIONS,
CLARION COUNTY BOARD OF ELECTIONS,
CLEARFIELD COUNTY BOARD OF ELECTIONS,
CLINTON COUNTY BOARD OF ELECTIONS,
COLUMBIA COUNTY BOARD OF ELECTIONS,
CRAWFORD COUNTY BOARD OF ELECTIONS,
CUMBERLAND COUNTY BOARD OF ELECTIONS,
DAUPHIN COUNTY BOARD OF ELECTIONS,
DELAWARE COUNTY BOARD OF ELECTIONS,
ELK COUNTY BOARD OF ELECTIONS,
FAYETTE COUNTY BOARD OF ELECTIONS,
FOREST COUNTY BOARD OF ELECTIONS,
FRANKLIN COUNTY BOARD OF ELECTIONS,
FULTON COUNTY BOARD OF ELECTIONS,

HUNTINGDON COUNTY BOARD OF ELECTIONS,
INDIANA COUNTY BOARD OF ELECTIONS,
JEFFERSON COUNTY BOARD OF ELECTIONS,
JUNIATA COUNTY BOARD OF ELECTIONS,
LACKAWANNA COUNTY BOARD OF ELECTIONS,
LANCASTER COUNTY BOARD OF ELECTIONS,
LAWRENCE COUNTY BOARD OF ELECTIONS,
LEBANON COUNTY BOARD OF ELECTIONS,
LEHIGH COUNTY BOARD OF ELECTIONS,
LUZERNE COUNTY BOARD OF ELECTIONS,
LYCOMING COUNTY BOARD OF ELECTIONS,
MCKEAN COUNTY BOARD OF ELECTIONS,
MERCER COUNTY BOARD OF ELECTIONS,
MIFFLIN COUNTY BOARD OF ELECTIONS,
MONROE COUNTY BOARD OF ELECTIONS,
MONTGOMERY COUNTY BOARD OF ELECTIONS,
MONTOUR COUNTY BOARD OF ELECTIONS,
NORTHAMPTON COUNTY BOARD OF ELECTIONS,
NORTHUMBERLAND COUNTY BOARD OF ELECTIONS,
PERRY COUNTY BOARD OF ELECTIONS,
PIKE COUNTY BOARD OF ELECTIONS,
POTTER COUNTY BOARD OF ELECTIONS,
SNYDER COUNTY BOARD OF ELECTIONS,
SOMERSET COUNTY BOARD OF ELECTIONS,
SULLIVAN COUNTY BOARD OF ELECTIONS,
TIOGA COUNTY BOARD OF ELECTIONS,
UNION COUNTY BOARD OF ELECTIONS,
VENANGO COUNTY BOARD OF ELECTIONS,
WARREN COUNTY BOARD OF ELECTIONS,
WASHINGTON COUNTY BOARD OF ELECTIONS,
WAYNE COUNTY BOARD OF ELECTIONS,
WESTMORELAND COUNTY BOARD OF ELECTIONS,
and WYOMING COUNTY BOARD OF ELECTIONS,

Respondents.

PETITION FOR REVIEW
IN THE NATURE OF A COMPLAINT IN EQUITY

Introduction

The above-listed county boards of elections (“Boards”) refuse to count absentee and mail-in ballots simply because the voters failed to handwrite a date (which the Pennsylvania Attorney General acknowledges can be any date—even a wrong date) on the exterior mailing envelope (which is separated by yet another envelope from the ballot itself). These ballots were indisputably submitted on time—they were date-stamped upon receipt—and no fraud or irregularity has been alleged. The Boards’ only basis for disenfranchising these voters is a technical error that is immaterial under both state and federal law. A plurality of the Pennsylvania Supreme Court has already held that the Commonwealth’s Election Code—which “must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their choice”—“*does not require* boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite . . . [the] date, where no fraud or irregularity has been alleged.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062, 1071 (Pa. 2020) (plurality op.) (quoting *In re Ross Nomination Petition*, 190 A.2d 719, 719 (Pa. 1963)) (“*In re 2020 Canvass*”). And the U.S. Court of Appeals for the Third Circuit

has recently held that federal law—specifically a provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B)—*prohibits* county boards of elections from rejecting absentee or mail-in ballots on that basis. *See* Initial and Amended Judgment, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022) (“*Migliori* Judgment”), Exhibit 1. The Boards’ refusal to count lawful ballots defies these precedents and is inconsistent with the judgments of other Counties that have counted ballots notwithstanding this technical deficiency. Petitioners thus seek an order declaring that voters validly cast the ballots at issue, that the Boards must canvass these ballots, and that the Boards must report the unofficial results of this canvass to the Pennsylvania Department of State. *See* 25 P.S. § 3154(f). In support, Petitioners allege:

Nature of the Cause of Action

1. Pennsylvania law states that “the elector” must place her “absentee ballot” in an exterior mailing envelope that she must “fill out, date and sign.” 25 P.S. §§ 3146.6(a), 3150.16(a).

2. On information and belief, the Boards refuse to count ballots where the voter failed to handwrite a date on the envelope but otherwise complied with all applicable requirements, and where the Boards stamped the envelope with the date the Boards received the absentee ballot. Certain Boards are keeping voters in limbo. Counsel for the Blair County Board of Elections represented to Petitioners’ counsel

that the Blair County Board would not take action on these ballots until next week, well after the Board must report the unofficial results of its canvass to the Department of State. *See* Exhibit 2 (correspondence with Board noting its position). On information and belief, the Allegheny County Board of Elections has taken the same position.

3. The Boards' refusal to count the ballots at issue violates the protections of the right to vote under the federal Civil Rights Act and the Pennsylvania Constitution.

4. The federal Civil Rights Act provides that

[n]o 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.

52 U.S.C. § 10101(a)(2)(B) (emphasis added). On May 20, 2022, a panel of the Third Circuit ruled, unanimously, that this provision prohibited the Lehigh County Board of Elections from rejecting absentee and mail-in ballots cast in a November 2021 municipal election solely because the ballots' exterior mailing envelopes lacked handwritten dates. *See Migliori* Judgment at 2. Although the court has issued only a judgment, with an opinion to follow, its reasoning is clear from the judgment: these dates "are immaterial under § 10101(a)(2)(B)," meaning that they are immaterial to determining whether the voter is qualified to vote. Federal law

overrides any contradictory state requirements, *see* U.S. CONST. art. VI, cl. 2, and Pennsylvania courts presumptively defer to the Third Circuit’s construction of federal law, *see, e.g., W. Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Commw. Ct. 2017). The implication of the Third Circuit’s judgment for this case is clear as well: Section 10101(a)(2)(B) prohibits the Boards from denying absentee and mail-in ballots based solely on the lack of a handwritten date on the exterior mailing envelope.

5. The Pennsylvania Constitution requires that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. This Free Elections provision “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (emphasis in original). It is “specifically intended to equalize the power of voters in our Commonwealth’s election process.” *Id.* at 812. The Election Code exists “[t]o obtain freedom of choice, a fair election and an honest election return.” *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965). The Boards’ refusal to count absentee and mail-in ballots based solely on a technical error runs afoul of these basic guarantees and deprives voters of their right under Commonwealth law to vote absentee or by mail. *See* 25 P.S. §§ 3146.6(a), 3150.16(a).

6. This action seeks declaratory and injunctive relief requiring the Boards to count absentee and mail-in ballots that were returned on time but that lack a handwritten date on the exterior mailing envelope.

Jurisdiction & Venue

7. Pursuant to 42 Pa. C.S. § 764, this Court “has original exclusive jurisdiction of matters relating to statewide office.” *In re Nader*, 905 A.2d 450, 459 (2006).

8. The Declaratory Judgments Act provides a basis for relief. The Act allows this Court to “settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” 42 Pa. C.S. § 7541(a). Among other things, the broadly worded Act allows “[a]ny person . . . whose rights, status, or other legal relations are affected by a statute” to “have determined any question of construction or validity arising under the . . . statute” and to “obtain a declaration of rights, status, or other legal relations thereunder.” *Id.* § 7533. Injunctive relief in furtherance of any declaration is also appropriate.

Parties

9. Petitioner Dave McCormick for U.S. Senate is the principal campaign committee for David H. McCormick, who ran in the May 17, 2022, primary election to serve as the Republican candidate to represent Pennsylvania in the United States Senate.

10. Petitioner David H. McCormick is a candidate in the Republican primary election, and a Pennsylvania voter. On information and belief, some of the ballots that the Boards refuse to count contain votes for Petitioner McCormick. He accordingly has standing to challenge the Boards' decisions, *see In re Gen. Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987), as does his campaign committee, which shares his interest in gaining election. *Id.*; *see also McLinko v. Commonwealth*, 270 A.3d 1278, 1282 (Pa. Commw. Ct. 2022) (“In sum, a candidate has an interest beyond the interest of other citizens and voters in election matters.”) (collecting citations).

11. Respondent Boards have “jurisdiction over the conduct of primaries and elections” in their respective counties. 25 P.S. § 2641(a). Accordingly, the Boards must “receive from district election officers the returns of all primaries and elections, to canvass and compute the same, and to certify, no later than the third Monday following the primary or election, the results thereof to the Secretary of the Commonwealth.” *Id.* § 2642(k).

General Allegations

12. Pennsylvania law requires absentee voters, among other things, to (1) place their marked ballots in a sealed envelope, (2) place that envelope inside a second envelope, which is marked with a “declaration of the elector” form, (3) “fill out, *date* and sign the declaration printed on such envelope,” and then (4) return the

ballot by 8 p.m. on election day. 25 P.S. § 3146.6(a) (emphasis added). The same rules apply to other voters who vote by mail. *See id.* § 3150.16(a).

13. When votes were being counted for the 2020 general election, the Pennsylvania Supreme Court was asked to decide “whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite,” among other things, “a date.” *In re 2020 Canvass*, 241 A.3d at 1061–62 (plurality op.). The Court’s judgment was that it does not. *See id.* at 1062; *see also id.* at 1079 (Wecht, J., concurring in part and dissenting in part) (agreeing that the undated ballots should not be thrown out in that election). As the plurality opinion noted, it is “a well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.* at 1071 (cleaned up). Viewed through that lens, the plurality “conclude[d] that dating the declaration is a directory, rather than a mandatory, instruction.” *Id.* at 1076. Thus, “while constituting [a] technical violation[] of the Election Code,” *id.* at 1079, a failure to handwrite a date on the ballot’s outer envelope does not “implicate . . . ‘weighty interests’ in the election process, like ballot confidentiality or fraud prevention,” *id.* at 1076 (citation

omitted). Accordingly, this “minor irregularit[y]” did “not warrant the wholesale disenfranchisement of,” in that case, “thousands of Pennsylvania voters.” *Id.* at 1079.

14. More recently, on May 20 and 23, 2022, a unanimous Third Circuit panel ruled that Pennsylvania’s date requirements violate the Civil Rights Act, which prohibits the use of state law to “deny the right of any individual to vote in any election because of an error or omission” that is “not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). The panel therefore directed the district court “to forthwith enter an order that the undated ballots be counted” in the November 2021 election for Judge of the Court of Common Pleas of Lehigh County, from which that suit arose. *Migliori* Judgment at 2. This result accorded with the position of the Pennsylvania Attorney General, who argued in an *amicus* brief that “[d]isenfranchising the 257 qualified voters who failed to date the declaration on their absentee or mail-in ballot’s return envelope violates those voters’ rights under federal law.” Br. of the Commw. of Pa. as *Amicus Curiae* at 7, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 42 (3d Cir. Apr. 1, 2022).

15. That same day, counsel for Petitioners emailed a copy of the Third Circuit judgment to counsel for all county boards of elections, including the Respondent Boards. *See* Email from Ronald L. Hicks, Jr. (May 20, 2022, 5:46 P.M. EDT), Exhibit 3. The email explained county boards’ responsibility under federal

law “to count any and all absentee or mail-in ballots that were timely received but were set aside/not counted simply because those ballots lacked a voter-provided date on the outside of the envelope,” and requested a hearing before any boards that refused to do so. *Id.*

16. On information and belief, at least seven county boards — Armstrong, Erie, Greene, Philadelphia, Schuylkill, Susquehanna, and York County Boards of Elections—have proceeded to count the absentee and mail-in ballots that they had previously not counted for lack of a handwritten date on the exterior mailing envelope.

17. The Respondent Boards, however, refuse to count absentee and mail-in ballots that lack a handwritten date in the declaration section of the exterior envelope. This missing date is the only reason these voters are being disenfranchised and rendered unable to exercise their right to vote in a statewide election on an equal footing with voters in other counties.

Count I: Violation of 52 U.S.C. § 10101(a)(2)(B)

18. Petitioners incorporate by reference paragraphs 1 through 17.

19. The federal Civil Rights Act prohibits the Boards from “deny[ing] 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” that “is not material in determining whether such individual is qualified

under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). This includes errors committed during any “action necessary to make a vote effective,” “including . . . casting a ballot.” *Id.* § 10101(a)(3)(A), (e) (emphasis added).

20. By refusing to count absentee and mail-in ballots based solely on the lack of a handwritten date in the declaration section of the exterior mailing envelope, the Boards are depriving likely thousands of voters of the right to vote that Section 10101(a)(2)(B) explicitly preserves. These ballots were indisputably returned on time. Whether or not a voter remembered to write a date on the mailing envelope is entirely immaterial to whether that voter “is qualified under State law to vote.” Just as in *Migliori*, and even more so in light of the *Migliori* judgment, “there is no basis on this record [for the Boards] to refuse to count undated ballots.” *Migliori* Judgment at 2.

Count II: Violation of PA. CONST. art. I, § 5

21. Petitioners incorporate by reference paragraphs 1 through 17.

22. “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. Elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). And, under the Commonwealth’s Constitution, efforts must be made to “equalize the power of

voters” and avoid disenfranchisement even when it happens “by inadvertence.” *League of Women Voters*, 178 A.3d at 810, 812 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

23. The Boards’ refusal to count ballots due solely to the lack of a handwritten date on the exterior mailing envelope—a technical requirement that a plurality of the Pennsylvania Supreme Court has already deemed not mandatory—disenfranchises registered voters of both political parties who chose to exercise their right under Commonwealth law to vote absentee or by mail, in violation of the Free Elections provision of the Commonwealth Constitution.

Prayer for Relief

WHEREFORE, Petitioners ask that this Court grant the following relief so that lawful absentee and mail-in ballots may count for this election:

1. Declare that timely returned absentee and mail-in ballots may not be rejected due solely to the lack of a date in the declaration on the exterior envelope;
2. Direct the Respondent Boards to canvass any timely returned absentee or mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities;
3. Direct the Respondent Boards to report to the Pennsylvania Department of State the unofficial results of the canvass, 25 P.S. § 3154(f), of any timely returned

absentee or mail-in ballot that lacks a date on its exterior envelope absent any other irregularities;

4. Enjoin the Respondent Boards to take all other steps necessary to effectuate this Court's declaration; and

5. Grant any other relief this Court deems appropriate and necessary.

Respectfully Submitted,

Dated: May 23, 2022

/s/ Ronald L. Hicks, Jr.

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Jeremy A. Mercer (PA #86480)

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*Motions for admission pro hac vice forthcoming

Counsel for Petitioners

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1499

MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS; KENNETH
RINGER; SERGIO RIVAS,
Appellants

v.

ZACHARY COHEN,
Intervenor – Plaintiff

v.

LEHIGH COUNTY BOARD OF ELECTIONS

v.

DAVID RITTER,
Intervenor - Defendant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5-22-cv-00397
District Judge: Honorable Joseph F. Leeson

Argued: May 18, 2022

Before: McKEE, GREENAWAY JR., and MATEY, *Circuit Judges*.

JUDGMENT

This judgment is issued at the direction of the Court pursuant to Fed. R. App. P. 36(a)(2).

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on May 18, 2022.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered on March 16, 2022, is reversed insofar as it found Appellants lack the capacity to bring suit under 52 U.S.C. § 10101 as there exists a private right of action under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002).

In addition, inasmuch as there is no dispute that ballots that have the wrong date were counted in the election, it is further ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B). Accordingly, there is no basis on this record to refuse to count undated ballots that have been set aside in the November 2, 2021, election for Judge of the Common Pleas of Lehigh County.

This matter is hereby remanded to the District Court and that court is hereby directed to forthwith enter an order that the undated ballots be counted.

A formal opinion will follow. The mandate will issue immediately upon filing of the opinion. The time for filing a petition for rehearing will be five (5) days from the date that the Court's opinion is entered on the docket.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 20, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1499

MS. LINDA MIGLIORI; FRANCIS J. FOX; RICHARD E. RICHARDS; KENNETH
RINGER; SERGIO RIVAS,
Appellants

v.

ZACHARY COHEN,
Intervenor – Plaintiff

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LEHIGH COUNTY BOARD OF ELECTIONS

v.

DAVID RITTER,
Intervenor - Defendant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5-22-cv-00397
District Judge: Honorable Joseph F. Leeson

Argued: May 18, 2022

Before: McKEE, GREENAWAY JR., and MATEY, *Circuit Judges*.

AMENDED JUDGMENT

This judgment is issued at the direction of the Court pursuant to Fed. R. App. P. 36(a)(2).

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on May 18, 2022.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered on March 16, 2022, is reversed insofar as it found Appellants lack the capacity to bring suit under 52 U.S.C. § 10101 as there exists a private right of action under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284–85 (2002).

In addition, inasmuch as there is no dispute that ballots that have the wrong date were counted in the election, it is further ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under § 10101(a)(2)(B). Accordingly, because it is undisputed that all the undated ballots that have been set aside in the November 2, 2021 election for Judge of the Common Pleas of Lehigh County were received by the deadline, there is no basis on this record to refuse to count them.

This matter is hereby remanded to the District Court and that court is hereby directed to forthwith enter an order that the undated ballots be counted.

A formal opinion will follow. The mandate will issue immediately upon filing of the opinion. The time for filing a petition for rehearing will be five (5) days from the date that the Court's opinion is entered on the docket.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: May 23, 2022

EXHIBIT 2

Hicks, Ronald L., Jr.

From: Nathan Karn <nkarn@blairco.org>
Sent: Monday, May 23, 2022 8:41 AM
To: Hicks, Ronald L., Jr.; 'tgates@pa.gov'; 'mmudd@adamscounty.us'; 'andrew.szefi@alleghenycounty.us'; 'aopsitnick@opsitnickslaw.com'; 'sslaw@windstream.net'; 'gfedeles@beavercountypa.gov'; 'nmorgan@beavercountypa.gov'; 'dcrabtree.kclaw@comcast.net'; 'csadler@countyofberks.com'; 'cschnee@countyofberks.com'; 'Jonathan.Jr@fosterslawfirm.com'; 'WWhite@co.butler.pa.us'; 'wgbarbin@atlanticbb.net'; 'ewtompkinslaw@gmail.com'; 'dam@gmlawoffices.com'; 'bdupuis@babstcalland.com'; 'kmayock@chesco.org'; 'cgabriel@cfwwg.com'; 'Info@VariLaw.com'; 'lec@crwlaw.net'; 'ajm@mmkllp.com'; 'kbutton@shaferlaw.com'; 'solicitor@ccpa.net'; 'jcurcillo@dauphinc.org'; 'martinw@co.delaware.pa.us'; 'info@mwbkllaw.com'; 'rperhacs@eriecountypa.gov'; 'talarico@nwpalawyers.com'; 'jackpurcell146@gmail.com'; 'attorneys@sbgllawoffice.com'; 'Jerrolsulcove@blackanddavis.com'; 'dsslw@dsslawyers.com'; 'rgrimm@co.greene.pa.us'; 'pmcmanamon@penn.com'; 'mtb@bwlaw120.com'; 'cjz@zwick-law.com'; 'dzagurskie@juniataco.org'; 'RuggieroF@lackawannacounty.org'; 'Fredericksond@lackawannacounty.org'; 'chausner@co.lancaster.pa.us'; 'tleslie@co.lawrence.pa.us'; 'warner@buzgondavis.com'; 'Romilda.Crocamo@luzernecounty.org'; 'dsmith@mcclaw.com'; 'theclarkefirm@yahoo.com'; 'wjmpc1@gmail.com'; 'ssnook@bmzllaw.com'; 'john@matergiadunn.com'; 'jstein1@montcopa.org'; 'pnewcome@montcopa.org'; 'info@mmdplaw.com'; 'mrudas@northamptoncounty.org'; 'fwgarrigan@gmail.com'; 'wrb@pa.net'; 'benjamin.field@phila.gov'; 'marcel.pratt@phila.gov'; 'cweed@kfblawoffice.com'; 'tomshaffer@verizon.net'; 'groth@co.schuylkill.pa.us'; 'clawoff@hotmail.com'; 'mpbarbera@barberalaw.com'; 'krllaw@epix.net'; 'fxoconnor@frontiernet.net'; 'reg@gv-law.com'; 'jdewald@mpvhlaw.com'; 'rwinkler@zoominternet.net'; 'contact@theschmidtlawfirm.com'; 'jana.grimm@steptoe-johnson.com'; 'wkay@waynecountypa.gov'; 'solicitor@co.westmoreland.pa.us'; 'krllaw@epix.net'; 'plitwin@epix.net'; 'mpokrifka@yorkcountypa.gov'
Cc: McGee, Carolyn B.; Mercer, Jeremy A.; 'Jonathan Goldstein'; 'Britain Henry'
Subject: #EXT# Re: May 17, 2022 Primary - Undated Absentee/Mail-In/Overseas/Military Ballots

External Email

Attorneys Hicks for McCormick and Henry for Oz:

I am in receipt of both your emails and attached letters. It appears that Attorney Hicks request to immediately count segregated ballots that were not counted due to the Declaration Envelopes not being dated, which only amounts to 10 Republican ballots and 6 Democrat ballots in Blair County, is premature in that the Order appears to indicate (1) that the Order to count ballots from the November 2, 2021 Lehigh County election for judge of the Court of Common Pleas will not be effective until the filing of the opinion ("The mandate will issue immediately upon filing the opinion") and (2) a rehearing can be requested within 5 days of the entry of the Opinion on the docket. Additionally, while I do not always agree with the guidance provided by the Department of State, Bureau of Elections, and Blair County is not legally obligated to follow such guidance, I also do not believe it would be appropriate for the County to

proceed without having reviewed such guidance. Lastly, it is entirely likely that either a request for certiorari will be sought to the US Supreme Court to review the Third Circuit Court's decision or that counsel for US Senate Candidate Oz will seek legal review as to the application of the Third Circuit Court's decision to this particular election.

Obviously, once these ballots are intermixed with the rest of the ballot population, there is no way to retrieve them. With all of the outstanding issues, Blair County will be maintaining the segregation of the undated ballots at this time and will not count them until there is clear finality. As I will be away on an annual family trip starting Thursday that takes me to a location where cell coverage is poor and I will not have access to email, Blair County will not act in any event prior to Memorial Day, although I cannot imagine a scenario where all of the issues I have raised above will result in finality prior to Memorial Day. I will return on the Tuesday following Memorial Day, and I will review any developments that occurred in my absence with my Director of Elections and Board of Elections at that time.

With respect to Attorney Hicks' request regarding ballots placed in secrecy envelopes that were not sealed, Blair County counted such ballots.

Nathan W. Karn, Sr., Esq.
Blair County Solicitor

For convenience, call me at my private law office: 814-695-7581 or fax: 814-695-1750

From: Hicks, Ronald L., Jr. <RHicks@porterwright.com>

Sent: Friday, May 20, 2022 5:45:16 PM

To: 'tgates@pa.gov'; 'mmudd@adamscounty.us'; 'andrew.szefi@alleghenycounty.us'; 'aopsitnick@opsitnickslaw.com'; 'sslaw@windstream.net'; 'gfedeles@beavercountypa.gov'; 'nmorgan@beavercountypa.gov'; 'dcrabtree.kclaw@comcast.net'; 'csadler@countyofberks.com'; 'cshnee@countyofberks.com'; Nathan Karn; 'Jonathan.Jr@fosterslawfirm.com'; 'WWhite@co.butler.pa.us'; 'wgbarbin@atlanticbb.net'; 'ewtompkinslaw@gmail.com'; 'dam@gmlawoffices.com'; 'bdupuis@babstcalland.com'; 'kmayock@chesco.org'; 'cgabriel@cfwwg.com'; 'Info@VariLaw.com'; 'lec@crwlaw.net'; 'ajm@mmkllp.com'; 'kbutton@shaferlaw.com'; 'solicitor@ccpa.net'; 'jcurcillo@dauphinc.org'; 'martinw@co.delaware.pa.us'; 'info@mwbkllaw.com'; 'rperhacs@eriecountypa.gov'; 'ttalarico@nwpalawyers.com'; 'jackpurcell146@gmail.com'; 'attorneys@sbgllawoffice.com'; 'Jerroldsulcove@blackanddavisson.com'; 'dsslav@dsslawyers.com'; 'rgrimm@co.greene.pa.us'; 'pmcmanamon@penn.com'; 'mtb@bwlaw120.com'; 'cjz@zwick-law.com'; 'dzagurskie@juniataco.org'; 'RuggieroF@lackawannacounty.org'; 'Fredericksond@lackawannacounty.org'; 'chausner@co.lancaster.pa.us'; 'tleslie@co.lawrence.pa.us'; 'warner@buzgondavis.com'; 'Romilda.Crocamo@luzernecounty.org'; 'dsmith@mcclaw.com'; 'theclarkefirm@yahoo.com'; 'wjmpc1@gmail.com'; 'ssnook@bmzlaw.com'; 'john@matergiadunn.com'; 'jstein1@montcopa.org'; 'pnewcome@montcopa.org'; 'info@mmdplaw.com'; 'mrudas@northamptoncounty.org'; 'fwgarrigan@gmail.com'; 'wrb@pa.net'; 'benjamin.field@phila.gov'; 'marcel.pratt@phila.gov'; 'cweed@kfbllawoffice.com'; 'tomshaffer@verizon.net'; 'groth@co.schuylkill.pa.us'; 'clawoff@hotmail.com'; 'mpbarbera@barberalaw.com'; 'krllaw@epix.net'; 'fxoconnor@frontiernet.net'; 'reg@gv-law.com'; 'jdewald@mpvhlaw.com'; 'rwinkler@zoominternet.net'; 'contact@theschmidtlawfirm.com'; 'jana.grimm@steptoe-johnson.com'; 'wkay@waynecountypa.gov'; 'solicitor@co.westmoreland.pa.us'; 'krllaw@epix.net'; 'plitwin@epix.net'; 'mpokrifka@yorkcountypa.gov'

Cc: McGee, Carolyn B.; Mercer, Jeremy A.; 'Jonathan Goldstein'; 'Britain Henry'

Subject: May 17, 2022 Primary - Undated Absentee/Mail-In/Overseas/Military Ballots

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Dear Counsel,

Our firm represents the Dave McCormick for U.S. Senate committee and its candidate David H. McCormick. We are writing to advise you of a decision issued today by the United States Court of Appeals for the Third Circuit which impacts the counting of ballots in the May 2022 Primary.

In *Migliori v. Lehigh County Board of Elections*, Case No. 22-1499, the Third Circuit determined that the lack of a voter-provided date on the outside of an absentee or mail-in ballot envelope cannot prevent that ballot's counting because the lack of that date on an indisputably-timely ballot is immaterial under federal law. As the Third Circuit summarized: "[I]t is further ORDERED and ADJUDGED that, the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16(a) are immaterial under [52 U.S.C.] § 10101(a)(2)(B). Accordingly, there is no basis on this record to refuse to count undated ballots that have been set aside" For your convenience, a copy of the Third Circuit's judgment is attached.

We trust that in light of the Third Circuit's judgment you will advise your respective Boards to count any and all absentee or mail-in ballots that were timely received but were set aside/not counted simply because those ballots lacked a voter-provided date on the outside of the envelope. To the extent you are not willing to provide this advice, we ask for a formal hearing before your Boards on this issue.

Please let me know by response email whether your respective Boards will be counting the aforementioned ballots so that I may advise my clients accordingly. Should you wish to discuss, please feel free to contact me or my colleagues Jeremy Mercer (j Mercer@porterwright.com or 724-816-2309) or Carolyn McGee (cbmcgee@porterwright.com or 412-867-0722)

Best regards,

RONALD L. HICKS, JR.

Pronouns: he / him / his

Porter Wright Morris & Arthur LLP
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EXHIBIT 3

Hicks, Ronald L., Jr.

From: Hicks, Ronald L., Jr.
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To: 'tgate@pa.gov'; 'mmudd@adamscounty.us'; 'andrew.szefi@alleghenycounty.us'; 'aopsitnick@opsitnickslaw.com'; 'sslaw@windstream.net'; 'gfedeles@beavercountypa.gov'; 'nmorgan@beavercountypa.gov'; 'dcrabtree.kclaw@comcast.net'; 'csadler@countyofberks.com'; 'cschnee@countyofberks.com'; 'nkarn@blairco.org'; 'Jonathan.Jr@fosterslawfirm.com'; 'WWhite@co.butler.pa.us'; 'wgbarbin@atlanticbb.net'; 'ewtompkinslaw@gmail.com'; 'dam@gmlawoffices.com'; 'bdupuis@babstcalland.com'; 'kmayock@chesco.org'; 'cgabriel@cfwwg.com'; 'Info@VariLaw.com'; 'lec@crwlaw.net'; 'ajm@mmkllp.com'; 'kbutton@shaferlaw.com'; 'solicitor@ccpa.net'; 'jcurcillo@dauphinc.org'; 'martinw@co.delaware.pa.us'; 'info@mbwklaw.com'; 'rperhacs@eriecountypa.gov'; 'ttalarico@nwpalawyers.com'; 'jackpurcell146@gmail.com'; 'attorneys@sbglawoffice.com'; 'Jerroldsulcove@blackanddavis.com'; 'dsslw@dsslwlaw.com'; 'rgrimm@co.greene.pa.us'; 'pmcmanamon@penn.com'; 'mtb@bwlaw120.com'; 'cjz@zwick-law.com'; 'dzagurskie@juniataco.org'; 'RuggieroF@lackawannacounty.org'; 'Fredericksond@lackawannacounty.org'; 'chausner@co.lancaster.pa.us'; 'tleslie@co.lawrence.pa.us'; 'warner@buzgondavis.com'; 'Romilda.Crocamo@luzernecounty.org'; 'dsmith@mcclaw.com'; 'theclarkefirm@yahoo.com'; 'wjmpc1@gmail.com'; 'ssnook@bmzlaw.com'; 'john@matergiadunn.com'; 'jstein1@montcopa.org'; 'pnewcome@montcopa.org'; 'info@mmdplaw.com'; 'mrudas@northamptoncounty.org'; 'fwgarrigan@gmail.com'; 'wrb@pa.net'; 'benjamin.field@phila.gov'; 'marcel.pratt@phila.gov'; 'cweed@kfblawoffice.com'; 'tomshaffer@verizon.net'; 'groth@co.schuylkill.pa.us'; 'clawoff@hotmail.com'; 'mpbarbera@barberlaw.com'; 'krllaw@epix.net'; 'fxoconnor@frontiernet.net'; 'reg@gv-law.com'; 'jdewald@mpvhlaw.com'; 'rwinkler@zoominternet.net'; 'contact@theschmidtlawfirm.com'; 'jana.grimm@steptoe-johnson.com'; 'wkay@waynecountypa.gov'; 'solicitor@co.westmoreland.pa.us'; 'krllaw@epix.net'; 'plitwin@epix.net'; 'mpokrifka@yorkcountypa.gov'
Cc: McGee, Carolyn B.; Mercer, Jeremy A.; 'Jonathan Goldstein'; 'Britain Henry'
Subject: May 17, 2022 Primary - Undated Absentee/Mail-In/Overseas/Military Ballots
Attachments: 22-1499 Third Circuit Judgment.pdf

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McGee, Carolyn B.	Delivered: 5/20/2022 5:47 PM	Read: 5/20/2022 5:51 PM
Mercer, Jeremy A.	Delivered: 5/20/2022 5:47 PM	
'Jonathan Goldstein'		
'Britain Henry'		

Dear Counsel,

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Best regards,

RONALD L. HICKS, JR.

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VERIFICATION

I, Jonathan Ewing, hereby swear or affirm that I am Campaign Manger for McCormick for Senate; and that the facts contained in the attached Petition are true and correct based on information supplied to be by others.

This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: May 23 2022

A handwritten signature in black ink, appearing to read "Jonathan Ewing", is written over a horizontal line. The signature is stylized and cursive.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Ronald L. Hicks, Jr.
Ronald L. Hicks, Jr.
PA Supreme Court No. 49520

20919394

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVE McCORMICK FOR U.S. SENATE and
DAVID H. McCORMICK,

Petitioners,

v.

Case No. 286MD2022

LEIGH M. CHAPMAN, in her official
capacity as Secretary of State for the Commonwealth,
ADAMS COUNTY BOARD OF ELECTIONS,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
BEAVER COUNTY BOARD OF ELECTIONS,
BEDFORD COUNTY BOARD OF ELECTIONS,
BERKS COUNTY BOARD OF ELECTIONS,
BLAIR COUNTY BOARD OF ELECTIONS,
BRADFORD COUNTY BOARD OF ELECTIONS,
BUCKS COUNTY BOARD OF ELECTIONS,
BUTLER COUNTY BOARD OF ELECTIONS,
CAMBRIA COUNTY BOARD OF ELECTIONS,
CAMERON COUNTY BOARD OF ELECTIONS,
CARBON COUNTY BOARD OF ELECTIONS,
CENTRE COUNTY BOARD OF ELECTIONS,
CHESTER COUNTY BOARD OF ELECTIONS,
CLARION COUNTY BOARD OF ELECTIONS,
CLEARFIELD COUNTY BOARD OF ELECTIONS,
CLINTON COUNTY BOARD OF ELECTIONS,
COLUMBIA COUNTY BOARD OF ELECTIONS,
CRAWFORD COUNTY BOARD OF ELECTIONS,
CUMBERLAND COUNTY BOARD OF ELECTIONS,
DAUPHIN COUNTY BOARD OF ELECTIONS,
DELAWARE COUNTY BOARD OF ELECTIONS,
ELK COUNTY BOARD OF ELECTIONS,
FAYETTE COUNTY BOARD OF ELECTIONS,
FOREST COUNTY BOARD OF ELECTIONS,
FRANKLIN COUNTY BOARD OF ELECTIONS,
FULTON COUNTY BOARD OF ELECTIONS,

HUNTINGDON COUNTY BOARD OF ELECTIONS,
INDIANA COUNTY BOARD OF ELECTIONS,
JEFFERSON COUNTY BOARD OF ELECTIONS,
JUNIATA COUNTY BOARD OF ELECTIONS,
LACKAWANNA COUNTY BOARD OF ELECTIONS,
LANCASTER COUNTY BOARD OF ELECTIONS,
LAWRENCE COUNTY BOARD OF ELECTIONS,
LEBANON COUNTY BOARD OF ELECTIONS,
LEHIGH COUNTY BOARD OF ELECTIONS,
LUZERNE COUNTY BOARD OF ELECTIONS,
LYCOMING COUNTY BOARD OF ELECTIONS,
MCKEAN COUNTY BOARD OF ELECTIONS,
MERCER COUNTY BOARD OF ELECTIONS,
MIFFLIN COUNTY BOARD OF ELECTIONS,
MONROE COUNTY BOARD OF ELECTIONS,
MONTGOMERY COUNTY BOARD OF ELECTIONS,
MONTOUR COUNTY BOARD OF ELECTIONS,
NORTHAMPTON COUNTY BOARD OF ELECTIONS,
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PERRY COUNTY BOARD OF ELECTIONS,
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VENANGO COUNTY BOARD OF ELECTIONS,
WARREN COUNTY BOARD OF ELECTIONS,
WASHINGTON COUNTY BOARD OF ELECTIONS,
WAYNE COUNTY BOARD OF ELECTIONS,
WESTMORELAND COUNTY BOARD OF ELECTIONS,
and WYOMING COUNTY BOARD OF ELECTIONS,

Respondents.

MOTION FOR IMMEDIATE SPECIAL INJUNCTION AND
SUPPORTING MEMORANDUM OF LAW

The above-listed County Boards of Elections (“Boards”), on information and belief, refuse to count (or to commit to counting) absentee and mail-in ballots simply because the voters failed to handwrite a date on the exterior mailing envelope, which is separated by yet another envelope from the ballot itself. These are valid ballots: they were indisputably received on time, having been date-stamped upon receipt, and the absence of a handwritten date on the exterior envelope is immaterial under both state and federal law. Yet as things stand, the ballots will not be included in the tally when the Boards report the unofficial returns of the canvass to the Department of State on Tuesday, May 24, 2022. *See* 25 P.S. § 3154(f). Without immediate relief from this Court, these qualified voters will be disenfranchised today.

Pursuant to Pennsylvania Rule of Civil Procedure 1531(a), Petitioners therefore seek an immediate special injunction, and request that the Court issue the injunction before holding a hearing either in-person or by video conference on this motion. In support, Petitioners state as follows.

1. Rule 1531(a) allows the Court to issue an injunction without notice or a hearing if it appears “that immediate and irreparable injury will be sustained before notice can be given or a hearing held.” PA. R. CIV. P. 1531(a). In determining whether to issue an injunction and whether to do so before a hearing, “the court may act on the basis of,” among other things, “the averments of the pleadings or petition.” *Id.*

2. A special injunction is warranted where (1) it is necessary to prevent immediate and irreparable harm, (2) greater injury would result from refusing than from granting the injunction, (3) the injunction would restore the status quo ante, (4) the movant is likely to succeed on the merits, (5) the requested injunction is appropriately tailored to the harm, and (6) the injunction is not adverse to the public interest. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). All factors are satisfied here.

3. Starting with the merits (factor 4), Petitioners are overwhelmingly likely to prevail in this action. Pennsylvania law states that “the elector” must place his “absentee ballot” in an exterior mailing envelope that he must “fill out, date and sign.” 25 P.S. §§ 3146.6(a), 3150.16(a). Relying on these provisions, the Boards are currently refusing to count (or to commit to counting) ballots where the voter failed to handwrite a date on the envelope but otherwise complied with all applicable requirements, and where the Boards stamped the envelope with the date the Boards received the ballot. *See Pet. for Decl. & Inj. Relief* (May 23, 2022), Exhibit 2 (correspondence with counsel for Blair County Board of Elections).

4. Pennsylvania’s dating requirement, however, is unenforceable under both state and federal law. A plurality of the Pennsylvania Supreme Court has already held that the Commonwealth’s Election Code—which “must be liberally construed so as not to deprive . . . the voters of their right to elect a candidate of their

choice”—“*does not require* boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot’s outer envelope but did not handwrite . . . [the] date, where no fraud or irregularity has been alleged.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062, 1071 (Pa. 2020) (plurality op.) (“*In re 2020 Canvass*”). And the U.S. Court of Appeals for the Third Circuit has held that federal law—specifically a provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B)—*prohibits* county boards of elections from rejecting absentee or mail-in ballots on that basis. *See* Initial and Amended Judgment, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022) (“*Migliori Judgment*”) (Exhibit 1 to Pet. for Decl. & Inj. Relief). Federal law overrides any contradictory state requirements, *see* U.S. CONST. art. VI, cl. 2, and Pennsylvania courts presumptively defer to the Third Circuit’s construction of federal law, *see, e.g., W. Chester Area Sch. Dist. v. A.M.*, 164 A.3d 620, 630 (Pa. Commw. Ct. 2017).

5. Section 10101(a)(2)(B) provides:

[n]o 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.

52 U.S.C. § 10101(a)(2)(B) (emphasis added). On May 20, 2022, a panel of the Third Circuit ruled, unanimously, that this provision prohibited the Lehigh County

Board of Elections from rejecting timely received absentee and mail-in ballots cast in a November 2021 municipal election solely because the ballots' exterior mailing envelopes lacked handwritten dates. See *Migliori* Judgment at 2.¹ Although the court has issued only a judgment, with an opinion to follow, its reasoning is clear from the judgment: these dates “are immaterial under § 10101(a)(2)(B),” *id.*, meaning that they are immaterial to determining whether the voter is qualified to vote.

6. That reading is correct. The mailing envelope of an absentee or mail-in ballot is a “record or paper relating to” an “act requisite to voting,” but an error on that “record or paper” is “not material in determining whether [an] individual is qualified under State law to vote in [an] election.” 52 U.S.C. § 10101(a)(2)(B). The statute defines “vote” to include “all action necessary to make a vote effective,” including “casting a ballot.” *Id.* § 10101(e). And it defines “qualified under State law” to mean, as pertinent, “qualified according to the laws, customs, or usages of the State.” *Id.* Putting these together, a state may reject a ballot on account of an “error or omission” that a voter commits on a “record or paper” in the act of “casting a ballot” only if the error or omission is relevant under the state’s “laws, customs, or usages” to the voter’s qualification to vote.

¹ The Third Circuit issued an amended judgment on May 23, 2022, apparently to clarify that only timely received ballots are covered by its order to count ballots that are missing a handwritten date.

7. As the Pennsylvania Attorney General told the Third Circuit in *Migliori*, the Commonwealth imposes four qualifications on the right to vote: as of election day, the voter must be 18 years old, a United States citizen for at least one month, a resident of the Commonwealth and of his election district for at least thirty days, and not an incarcerated felon. *See* Br. of the Commw. of Pa. as *Amicus Curiae* at 2, *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499, Doc. 42 (3d Cir. Apr. 1, 2022) (“Commw. *Amicus* Br.”). The date when the voter filled out and signed the exterior envelope of his absentee or mail-in ballot has nothing to do with any of these voter qualifications, nor with whether the voter’s absentee or mail-in ballot was timely received by the county board of elections. The presence of a handwritten date on that envelope is therefore “not material” under Section 10101(a)(2)(B).

8. Other courts read Section 10101(a)(2)(B) similarly. The U.S. Court of Appeals for the Eleventh Circuit, for example, has interpreted the provision to “ask[] whether, accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant.” *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008) (emphasis in original); *see* Commw. *Amicus* Br. at 15 (collecting further cases). That cannot be the case where, as here, Commonwealth law—as interpreted by the Department of State—does not even require a voter to write the *correct* date on the exterior mailing envelope. *See* Email from Jonathan Marks, Deputy Sec’y for Elections & Comm’ns

(June 3, 2021, 9:21 a.m. EDT), Ex. A. If a voter could date his ballot May 32, or 300 B.C.E., and if that error, taken as true and correct, does not impede elections officials from determining his qualification to vote, then the absence of a handwritten date cannot be material under Section 10101(a)(2)(B), either. Under the “laws, customs, [and] usages of the State,” the date on the exterior envelope of an absentee or mail-in ballot is simply irrelevant to that question. 52 U.S.C. § 10101(e).

9. Nothing would be gained by reading the statute any differently. The date on the exterior envelope does not help determine whether the voter in fact is qualified to vote under Commonwealth law, *e.g.*, is 18 years old, has been a citizen for a month, and has lived in his election district for 30 days. All those qualifications are determined by the date *of the election*. The handwritten signing date does not help separate timely received ballots from tardy ballots. A ballot is timely if returned by 8 p.m. on election day, and Boards will know that a ballot is timely because they date-time stamp ballots upon receipt. The handwritten date does not help prevent any hypothetical fraud that might be accomplished by backdating the envelope. If the ballot is received by the deadline (and has no other material deficiencies), it will count; if not, then it will not count. And again, the Commonwealth does not even require that any handwritten date the voter might place on the exterior envelope be the date he actually executed the ballot.

10. In short, Pennsylvania’s date requirement for absentee and mail-in ballots serves no logistical, confidentiality, or anti-fraud purpose. All these purposes are already served by other Commonwealth election practices and laws. The ballot-return deadline and ballot-stamping process ensure that ballots will be counted only if received on time. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). The sealed inner-secrecy envelope, in which the ballot must be placed before being placed in the exterior mailing envelope, protects voter confidentiality. *See id.* §§ 3146.6(a), 3150.16(a). Voters cannot use absentee or mail-in ballots to vote twice, because they must surrender their blank absentee or mail-in ballots in order to vote in-person. *Id.* §§ 3146.6(b)(3), 3150.16(b)(3). And if an absentee or mail-in voter’s ballot is timely received after the voter has moved out of state, renounced his citizenship, or entered prison for a felony, Commonwealth law requires that his vote be invalidated regardless of whatever date he might write on the mailing envelope, which would not help elections officers determine any of those facts. *See* PA. CONST. art. VII, § 1; 25 P.S. § 2811; 25 Pa. C.S. § 1301(a). In short, enforcing the dating requirement serves only one purpose—to gratuitously disenfranchise qualified Pennsylvania voters who have cast otherwise valid ballots on a timely basis.

11. In this case, Section 10101(a)(2)(B) prohibits the Boards from rejecting absentee and mail-in ballots cast in the May 17, 2022 Primary solely because they lack the handwritten date required by 25 P.S. §§ 3146.6(a) and 3150.16(a). Whether

or not a voter neglected to write a date on the mailing envelope is entirely immaterial to whether that voter “is qualified under State law to vote” under Section 10101(a)(2)(B). Indeed, guidance from the Pennsylvania Department of State instructs that “there is no basis to reject a ballot for putting the ‘wrong’ date on the envelope.” Ex. A (Email from Jonathan Marks, Deputy Sec’y for Elections & Comm’ns). If a ballot cannot be rejected because the voter affirmatively wrote the *wrong* date on the exterior envelope, there can be no valid basis to reject a ballot simply because a voter neglected to write a date in that spot. Just as in *Migliori*, and even more so in light of the *Migliori* judgment, “there is no basis on this record [for the Boards] to refuse to count undated ballots.” *Migliori* Judgment at 2.

12. Separately, the Commonwealth’s Constitution affords similar protections to voters whose ballot remains hostage to an immaterial requirement. It declares that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. The Pennsylvania Supreme Court has long held that elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). And the Court has explained that efforts must be made to “equalize the power of voters” and to avoid disenfranchisement even when it happens “by inadvertence.” *League of Women Voters v. Commonwealth*, 178

A.3d 737, 810, 812 (Pa. 2018) (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

13. That is precisely why a plurality of the Pennsylvania Supreme Court held that ballots should count regardless of whether they include a handwritten date. See *In re 2020 Canvass*, 241 A.3d at 1061–62 (plurality op.). The plurality reiterated the “well-settled principle of Pennsylvania election law that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.” *Id.* at 1071 (cleaned up). Viewed through that lens, the plurality “conclude[d] that dating the declaration is a directory, rather than a mandatory, instruction.” *Id.* at 1076. “[W]hile both mandatory and directory provisions of the Legislature are meant to be followed,” the plurality explained, “the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will *not nullify* the validity of the action involved.” *Id.* at 1078–79 (emphasis added; internal quotation marks omitted). To qualify as mandatory, a statutory requirement must advance a “weighty interest.” *Id.* at 1073. And “while constituting [a] technical violation[] of the Election Code,” *id.* at 1079, a failure to handwrite a date on the ballot’s outer envelope does not “implicate . . . ‘weighty interests’ in the election process, like ballot confidentiality or fraud prevention,” *id.* at 1076 (citation omitted). It is instead a “minor irregularit[y],” which does “not warrant the wholesale disenfranchisement

of,” in that case, “thousands of Pennsylvania voters,” and likely thousands of voters here. *Id.* at 1079.

14. The imperative to count votes now is starker still. In 2020, the dissenting and concurring opinions in *In re 2020 Canvass* diverged from the plurality on the handwritten-date issue because they saw the requirement as providing a fixed point in time when the voter filled out the ballot. *See id.* at 1079 (Wecht, J., concurring in part and dissenting in part), 1090 (Dougherty, J., concurring in part and dissenting in part). If that date fell *after* the deadline to return a ballot, *i.e.*, at 8 p.m. on election day, then the ballot was late and could not be canvassed. Or if that date fell *after* the deadline for the voter to register to vote, then the voter was ineligible to cast a ballot in the election that followed.

15. But the reasons that the dissenting and concurring justices found compelling collapse under the weight of current facts: county boards of elections now uniformly date-stamp absentee and mail-in ballots upon receipt; Petitioners are aware of no county board that failed to do so in this Primary. The date stamp provides “a clear and objective indicator of timeliness, making any handwritten date unnecessary and, indeed, superfl[u]ous.” *Id.* at 1077 (plurality op.). Moreover, the Commonwealth has said that “there is no basis to reject a ballot for putting the ‘wrong’ date on the envelope,” and “the date written” on the envelope is not “used to determine the eligibility of the voter.” Ex. A (Email from Jonathan Marks, Deputy

Sec’y for Elections & Comm’ns). In other words, the date serves no purpose. It is only a “regulation of the right to exercise the franchise” that now threatens to “deny the franchise itself” to thousands of qualified Pennsylvania voters. *Winston*, 91 A. at 523. Under the circumstances, the Commonwealth’s Constitution requires that the Boards canvass ballots where the only omission is a handwritten date on an outer envelope, the only material effect of which is to prevent a valid vote from being counted by virtue of 25 P.S. §§ 3146.6(a) and 3150.16(a). Otherwise, voters of both political parties will be disenfranchised by mere “inadvertence,” in violation of the Commonwealth Constitution. *League of Women Voters*, 178 A.3d at 810.

16. The above provisions and precedents demand that the Boards count absentee and mail-in ballots that lack a handwritten date on the exterior mailing envelope but no other deficiencies. A ruling to this effect will return the Boards and voters to the conditions that prevailed under *In re 2020 Canvass*, and that the Third Circuit has reinstated for an intervening municipal election in *Migliori*, and would be tailored to redress the harm that the Boards would otherwise cause this defined class of voters (factors 3 and 5).

17. As for the equities (factors 1, 2, and 6), the Boards must complete their canvass of the recent primary election and report the unofficial returns to the Department of State by today. If this Court does not act before then, likely thousands of voters will be unlawfully disenfranchised on account of an immaterial technical

error. There is no more fundamental right in our democracy than the right to choose one's representatives. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”). And there is no more irreparable injury than being denied that right.

18. Voters in the Boards' counties will be denied that right in a matter of hours. Counting their votes will cause no harm to the Board and could cause no harm to the public interest, which is best served when valid votes of all qualified voters are counted. Relief thus need not—and, under the circumstances, cannot—wait for a hearing.

WHEREFORE, Petitioners ask that this Court issue a special injunction without a hearing, which Rule 1531(d) allows to be held “within five days after the granting of the injunction or within such other time as the parties may agree or as the court upon cause shown shall direct.” PA. R. CIV. P. 1531(d).

Dated: May 24, 2022

Respectfully Submitted,

/s/ Ronald L. Hicks, Jr.

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forthcoming

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DAVE McCORMICK FOR U.S. SENATE, and
DAVID H. McCORMICK,

Petitioners,

v.

Case No. 286MD2022

LEIGH M. CHAPMAN, in her official capacity
as Secretary of State for the Commonwealth,
ADAMS COUNTY BOARD OF ELECTIONS,
ALLEGHENY COUNTY BOARD OF ELECTIONS,
BEAVER COUNTY BOARD OF ELECTIONS,
BEDFORD COUNTY BOARD OF ELECTIONS,
BERKS COUNTY BOARD OF ELECTIONS,
BLAIR COUNTY BOARD OF ELECTIONS,
BRADFORD COUNTY BOARD OF ELECTIONS,
BUCKS COUNTY BOARD OF ELECTIONS,
BUTLER COUNTY BOARD OF ELECTIONS,
CAMBRIA COUNTY BOARD OF ELECTIONS,
CAMERON COUNTY BOARD OF ELECTIONS,
CARBON COUNTY BOARD OF ELECTIONS,
CENTRE COUNTY BOARD OF ELECTIONS,
CHESTER COUNTY BOARD OF ELECTIONS,
CLARION COUNTY BOARD OF ELECTIONS,
CLEARFIELD COUNTY BOARD OF ELECTIONS,
CLINTON COUNTY BOARD OF ELECTIONS,
COLUMBIA COUNTY BOARD OF ELECTIONS,
CRAWFORD COUNTY BOARD OF ELECTIONS,
CUMBERLAND COUNTY BOARD OF ELECTIONS,
DAUPHIN COUNTY BOARD OF ELECTIONS,
DELAWARE COUNTY BOARD OF ELECTIONS,
ELK COUNTY BOARD OF ELECTIONS,
FAYETTE COUNTY BOARD OF ELECTIONS,
FOREST COUNTY BOARD OF ELECTIONS,
FRANKLIN COUNTY BOARD OF ELECTIONS,

FULTON COUNTY BOARD OF ELECTIONS,
HUNTINGDON COUNTY BOARD OF ELECTIONS,
INDIANA COUNTY BOARD OF ELECTIONS,
JEFFERSON COUNTY BOARD OF ELECTIONS,
JUNIATA COUNTY BOARD OF ELECTIONS,
LACKAWANNA COUNTY BOARD OF ELECTIONS,
LANCASTER COUNTY BOARD OF ELECTIONS,
LAWRENCE COUNTY BOARD OF ELECTIONS,
LEBANON COUNTY BOARD OF ELECTIONS,
LEHIGH COUNTY BOARD OF ELECTIONS,
LUZERNE COUNTY BOARD OF ELECTIONS,
LYCOMING COUNTY BOARD OF ELECTIONS,
MCKEAN COUNTY BOARD OF ELECTIONS,
MERCER COUNTY BOARD OF ELECTIONS,
MIFFLIN COUNTY BOARD OF ELECTIONS,
MONROE COUNTY BOARD OF ELECTIONS,
MONTGOMERY COUNTY BOARD OF ELECTIONS,
MONTOUR COUNTY BOARD OF ELECTIONS,
NORTHAMPTON COUNTY BOARD OF ELECTIONS,
NORTHUMBERLAND COUNTY BOARD OF ELECTIONS,
PERRY COUNTY BOARD OF ELECTIONS,
PIKE COUNTY BOARD OF ELECTIONS,
POTTER COUNTY BOARD OF ELECTIONS,
SNYDER COUNTY BOARD OF ELECTIONS,
SOMERSET COUNTY BOARD OF ELECTIONS,
SULLIVAN COUNTY BOARD OF ELECTIONS,
TIOGA COUNTY BOARD OF ELECTIONS,
UNION COUNTY BOARD OF ELECTIONS,
VENANGO COUNTY BOARD OF ELECTIONS,
WARREN COUNTY BOARD OF ELECTIONS,
WASHINGTON COUNTY BOARD OF ELECTIONS,
WAYNE COUNTY BOARD OF ELECTIONS,
WESTMORELAND COUNTY BOARD OF ELECTIONS,
and WYOMING COUNTY BOARD OF ELECTIONS,

Respondents.

[PROPOSED] ORDER

And now, to wit, this _____ day of May, 2022, upon consideration of Petitioners' Motion for Immediate Special Injunction, and finding that good cause exists for the same, it is hereby ORDERED that the Respondent County Boards of Elections shall count all timely received absentee and mail-in ballots that lack a voter-provided date on the exterior envelope as part of their unofficial and/or official results for the May 17, 2022, Primary.

By the Court

_____ J.

EXHIBIT A

From: Marks, Jonathan <jmarks@pa.gov>
Sent: Tuesday, June 1, 2021 9:21 AM
To: Marks, Jonathan <jmarks@pa.gov>
Subject: DOS Email: Reminder Regarding Requirement to Sign AND Date Declaration Envelopes

County of Lehigh Warning: This is an external email. Please exercise caution.

Good morning everyone.

Since the Municipal Primary on May 18, the department has seen several news articles suggesting that some counties are continuing to accept and count ballots that do not contain both a signature and a date on the voter's declaration.

As you know, the department updated the content and the instructions on the declaration envelope to ensure that voters know they must **sign and date** the envelope for their ballot to be counted. Furthermore, our updated guidance is consistent with the Supreme Court's ruling last September in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, wherein the Court held that in future elections a voter's declaration envelope must be both signed and dated for the ballot to count. Though we share your desire to prevent the disenfranchisement of any voter, particularly when it occurs because of a voter's inadvertent error, we must strongly urge all counties to abide by the Court's interpretation of this statutory requirement.

We also believe that it is prudent to again remind you of our previous clarification of 10/25/2020. As noted in that communication, there is no basis to reject a ballot for putting the "wrong" date on the envelope, nor is the date written used to determine the eligibility of the voter. You should process these ballots normally.

If you have any questions about the guidance posted on the department's website, please contact us and please consult with your solicitor.

Thank you for everything that you do.

Kind Regards,

Jonathan M. Marks

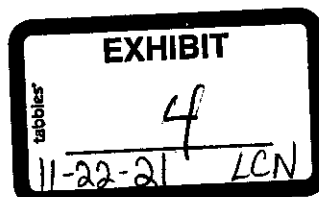
Deputy Secretary for Elections & Commissions

PA Department of State

302 North Office Building

Harrisburg, PA 17120

Phone: 717-783-2035



VERIFICATION

I, Jonathan Ewing, hereby swear or affirm that I am Campaign Manger for McCormick for Senate; and that the facts contained in the attached Petition are true and correct based on information supplied to be by others.

This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: May 24, 2022

A handwritten signature in black ink, appearing to read "Jonathan Ewing", is written over a horizontal line.