

IN THE SUPREME COURT OF PENNSYLVANIA

**DAVE McCORMICK FOR U.S.
SENATE, et al.,**

Petitioners,

v.

**LEIGH M. CHAPMAN, in her
official capacity as Secretary of
State for the Commonwealth, et
al.,**

Respondents,

**REPUBLICAN NATIONAL
COMMITTEE AND REPUBLICAN
PARTY OF PENNSYLVANIA,**

Proposed Intervenors.

No.: 46 MM 2022

APPLICATION TO INTERVENE

**Filed on Behalf of Proposed
Intervenor:**

**REPUBLICAN NATIONAL
COMMITTEE AND
REPUBLICAN PARTY OF
PENNSYLVANIA**

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Party:**

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PROPOSED INTERVENORS' APPLICATION TO INTERVENE

Proposed Intervenors, Republican National Committee, and Republican Party of Pennsylvania (hereinafter the “**Applicants**”), by and through their undersigned counsel, respectfully file the within Application to Intervene (the “**Application**”) in the above-referenced matter, seeking to participate fully therein as Intervenors. If permitted to intervene, Applicants request to incorporate by reference and will file an Answer to Petitioners’ 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. 286 MD 2022, as attached hereto. In support of this Application, the Applicants state as follows:

1. On May 24, 2022, Petitioners David McCormick for U.S. Senate and David H. McCormick, Republican Primary Election candidate for the United State Senate, (hereinafter jointly “Petitioners”) filed an 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. 286 MD 2022 (hereinafter “**Application for Extraordinary Relief**”).

2. Petitioners’ Application for Extraordinary Relief requests that this Court exercise its King’s Bench Jurisdiction over the Proceedings currently

pending in the Commonwealth Court at Docket No. 286 MD 2022 and an Order which seeks, in relevant part, relief in the form of a declaration that “timely returned absentee and mail-in ballots may not be rejected due to the lack of a date in the declaration on the exterior envelope;” that directs “Respondent Boards to canvass any timely returned absentee and mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities;” that directs “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 and mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities;” and that enjoins “Respondent Boards to take all other steps necessary to effectuate this Court’s declaration”.

Applicant Republican National Committee (“RNC”)

3. The Applicant Republican National Committee (hereinafter “RNC”) is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14).

4. The RNC manages the Republican Party's business at the national level, including development and promotion of the Party's national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those

on the ballot in Pennsylvania; and assists state parties throughout the country to elect Republican candidates, including, the Republican candidate in Pennsylvania for the United States Senate.

5. The RNC will make significant contributions and expenditures in support of Republican candidates, including, but not limited to, the Republican candidate in the Commonwealth of Pennsylvania for the United States Senate.

6. The RNC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections. In particular, the legislature in the Commonwealth of Pennsylvania has statutorily required that mail-in ballots be dated by the elector. The Supreme Court of Pennsylvania has affirmed that mail-in ballots must be dated by the elector. The RNC has an interest in assuring that elections involving Republican candidates are conducted in accordance with the laws of the Commonwealth of Pennsylvania and as affirmed by the Supreme Court of Pennsylvania.

7. As such, the RNC will oppose any deviation, by **any** candidate, from the mandates of Pennsylvania Law or the Orders of this Court and will oppose **any** County Board being ordered to count, or voluntarily counting, such undated ballots.

Applicant Republican Party of Pennsylvania

8. The Applicant Republican Party of Pennsylvania (hereinafter “RPP”) is duly constituted, organized, and exists in accordance with the laws of the Commonwealth of Pennsylvania with its party headquarters located at 112 State Street, City of Harrisburg, Dauphin County, Commonwealth of Pennsylvania 17101. 25 P.S. §§ 2831, et seq., and 2861, et seq.

9. Applicant RPP represents the interests of approximately 3,517,090 registered Republican electors within the Commonwealth of Pennsylvania. See 2020 Report to the General Assembly: Administration of Voter Registration in Pennsylvania, dated June 2021.

10. The RPP manages the Republican Party's business at the State level, including development and promotion of the Party's state platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the Commonwealth of Pennsylvania; and assists county parties throughout the Commonwealth to elect Republican candidates, including, the Republican candidate in Pennsylvania for the United States Senate.

11. The RPP will make significant contributions and expenditures in support of Republican candidates throughout the Commonwealth,

including, but not limited to, the Republican candidate for the United States Senate.

12. The RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections. In particular, the legislature in the Commonwealth of Pennsylvania has statutorily required that mail-in ballots be dated by the elector. The Supreme Court of Pennsylvania has affirmed that mail-in ballots must be dated by the elector. The RPP has an interest in assuring that all elections involving Republican candidates are conducted in accordance with the laws of the Commonwealth of Pennsylvania, as affirmed by the Supreme Court of Pennsylvania.

13. As such, the RPP will oppose any deviation, by **any** candidate, from the mandates of Pennsylvania Law or the Orders of this Court and will oppose **any** County Board being ordered to count, or voluntarily counting, such undated ballots. The Republican Party of Pennsylvania will support the Appellee Ritter in the Third Circuit in the case captioned *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 22-1499 (3d Cir. 2022) and will likewise support Appellee Ritter in the Supreme Court of the United States.

14. Candidate McCormick is a registered member and candidate of the Republican Party of Pennsylvania.

15. Candidate McCormick is one of seven Republican candidates running in the Republican Primary Election to represent the Republican Party of Pennsylvania in the General Election for the United States Senate.

16. If successful in the Primary Election, Candidate McCormick will be the Applicants' candidate in the General Election for the United States Senate.

17. The Applicants have a vested interest in assuring that Pennsylvania's Republican Primary Election (and indeed all future elections) is conducted in strict accordance with the laws of the Commonwealth of Pennsylvania and the Constitutions of the United States and of the Commonwealth of Pennsylvania.

18. Petitioner McCormick's Application for Extraordinary Relief seeks declaratory and injunctive relief that, if granted, may directly impact the outcome of the Republican Primary Election, and as such, will determine the Applicants' candidate in the General Election for the United States Senate.

19. Each of the Republican candidates in the Primary Election for the United States Senate may be impacted by the Court's Order in this matter. Any Order entered by this Court in this matter will affect any other candidate seeking the nomination of the Republican Party within the Commonwealth of

Pennsylvania and will also have an effect on all future elections (which will include Republican candidates). The Proposed Relief is in direct contravention of Act 77 and Pennsylvania law and would be contrary to the decisions of the Pennsylvania Supreme Court relative to this matter.

Legal Standard

20. It is well-settled that “[i]ntervention is ‘a procedural step by which a person not a party to an action is admitted or permitted to become a party to the action on his own application.’” *Socy. Hill Civic Ass'n v. Philadelphia Bd. of License & Inspection Rev.*, 905 A.2d 579, 585 (Pa. Commw. 2006) (citing *Bannard v. New York State Natural Gas Corp.*, 404 Pa. 269, 279, 172 A.2d 306, 312 (1961)).

21. “Intervention is permitted ‘only where the party seeking it has an interest in or will be affected by the pending litigation.’” *Id.*

22. “At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein...if

(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or

(2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.”

Pa.R.C.P. No. 2327.

23. Additionally, Pennsylvania Rule of Civil Procedure 2329, titled, “Action of Court on Petition,” declares:

Upon the filing of the petition, and after hearing...the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if

(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

(3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass, or prejudice the trial or the adjudication of the rights of the parties.

Pa.R.C.P. No. 2329.

24. “Generally, pendency, for purposes of intervention, has been defined as the state of an undetermined proceeding since in those cases in which intervention has been allowed, there was a pending proceeding with further steps remaining to be taken before the case was concluded.” See *Time for intervention, generally; allowable during pendency of action*, 3

Standard Pennsylvania Practice 2d § 14:374 (citing *In re Estate of Albright*, 545 A.2d 896 (1988)).

25. In sum, intervention is to be granted where the proposed intervenor is within a class set forth in Rule 2327 and no grounds for refusal are present under Rule 2329. See *Allegheny Rep. Health Ctr. v. Pa. Dep't of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. 1999) (citing *Larock*, 740 A.2d at 313).

26. “The determination of whether a proposed intervenor has a ‘legally enforceable interest’ calls for ‘a careful exercise of discretion and consideration of all the circumstances involved,” *Carter, et al. v. Acting Sec. of the Commw. of Pennsylvania, et al.*, 132 M.D. 2021, 2021 Pa. Commw. Unpub. LEXIS 535, 2021 WL 4735059, at *1 (Pa. Commw. September 2, 2021) (citing *Realen Valley Forge Greenes Associates v. Upper Merion Township Zoning Hearing Board*, 941 A.2d 739, 744 (Pa. Cmwlth. 2008) (citations omitted)).

27. “[A]n applicant for intervention must have some right, either legal or equitable, that will be affected by the proceedings.” *Id.* (citing *Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1122 (Pa. Cmwlth. 1998)).

28. The test to intervene in the Commonwealth of Pennsylvania can be best summarized as meeting the “substantial, direct, and immediate,’ test set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).” See *Carter, et al.*, 132 M.D. 2021, 2021 WL 4735059, at *17 (Pa. Cmmw. September 2, 2021).

29. “To have a substantial interest, the proposed intervenor’s concern in the outcome of the action must surpass ‘the common interest of all citizens in procuring obedience to the law.’” *Id.*

30. Lastly, here, Pennsylvania Rule of Appellate Procedure 1531(b) allows a person not named as a respondent in an original jurisdiction petition to seek leave to intervene by filing an application with the court.

Argument for Intervention

31. Paragraphs 1 through 30 of this Application are incorporated herein as if fully set forth.

32. The Applicant RNC has the statutory authority, right and obligation to protect, defend and represent the interests of all Republican voters and Republican candidates throughout the United States.

33. The Applicant RPP has the statutory authority, right and obligation to protect, defend and represent the interests of all Republican

voters and Republican candidates throughout the Commonwealth of Pennsylvania.

34. Both RNC and RPP are necessary intervenors as both oppose the relief sought by Petitioners and inasmuch as the Respondent Secretary of the Commonwealth has issued “guidance” directing the County Boards of Elections to proceed with the canvass of such votes, there is no other party who will represent the positions and interest of RNC and RPP as set forth herein.

35. Section 2831 of Pennsylvania’s Election Code provides, in relevant part, as follows:

[a]ny party or political body. . . shall nominate all its candidates for any of the offices provided for in this act, ... in accordance with the provisions of this act and party rules.

25 P.S. § 2831.

36. In accordance with Section 2861, the Secretary of the Commonwealth has determined that the Applicant is the political party representing the interests of the registered Republicans within the Commonwealth of Pennsylvania. 25 P.S. § 2861.

37. Section 2862 of Pennsylvania’s Election Code provides for the nomination of candidates and party officers at primaries, and states in relevant part, as follows:

[a]ll candidates of political parties, as defined in [25 P.S. § 2831], for the offices of United States Senator, ... shall be elected at primaries held in accordance with the provisions of this act, ...

25 P.S. § 2862.

38. The Applicants have direct and significant interests in the continued enforcement of Pennsylvania’s laws governing mail-in and absentee ballots as those laws are designed to ensure “the integrity of [the] election process,” *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the “orderly administration” of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Were these validly enacted laws to be cast aside—and the recent decisions of this Court and the Pennsylvania Supreme Court turned on their head—the current competitive electoral environment in Pennsylvania, in which the Republican Committees invest substantial resources in support of Republican candidates to try to win elections, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018).

39. Courts routinely recognize that political parties have interests supporting intervention in litigation concerning elections and election procedures. *See, e.g., Harriet Tubman Freedom Fighters Corp. v. Lee*, Doc. 34, No. 4:21-cv-242 (N.D. Fla. July 6, 2021); *Florida Rising Together v. Lee*,

Doc. 52, No. 4:21-cv-201 (N.D. Fla. July 6, 2021); *Fla. State Conference of Branches & Youth Units of NAACP v. Lee*, Doc. 43, No. 4:21-cv-187 (N.D. Fla. June 8, 2021); *League of Women Voters of Fla. v. Lee*, Doc. 72, No. 4:21-cv-186 (N.D. Fla. June 4, 2021); *Sixth District of the African Methodist Episcopal Church v. Kemp*, Minute Order, No. 1:21-cv-1284 (N.D. Ga. June 4, 2021); *Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980); *Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 54269, 2020 WL 1505640, at *5 (W.D. Wisc. Mar. 28, 2020); *Citizens United v. Gessler*, No. 14-002266, 2014 U.S. Dist. LEXIS 128669, 2014 WL 4549001, at *2 (D. Colo. Sept. 15, 2014); *Libertarian Party of Michigan v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, 2011 WL 5868225, *1 (N.D. Ill. Nov. 22, 2011); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991). Indeed, courts generally recognize that political parties have “an interest in the subject matter of [a] case,” when “changes in voting procedures could affect candidates running as Republicans and voters who [are] members of the ... Republican Party.” See

Ohio Democratic Party v. Blackwell, No. 04-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005).

40. If Petitioners' action succeeds, the orderly administration of Pennsylvania's elections will be upended, a week *after* the primary election was conducted, a course of action soundly rejected by the United States Supreme Court and the Chief Justice thereof.

41. Not only would this undercut democratically enacted laws that protect voters and candidates (including the Applicants' members), *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. 2013), it would change the "structure of the competitive environment" in Pennsylvania's elections and "fundamentally alter the environment in which [the Applicants] defend their concrete interests (e.g. their interest in ... winning [elections])," *Shays v. Fed. Elec. Comm'n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

42. The Applicants possess legally enforceable interests in ensuring that elections which determine the Republican candidates, including, the Republican candidate for the United States Senate, are conducted in accordance with laws of the Commonwealth of Code and the Constitutions of the United States and the Commonwealth.

43. The Applicants meet the requirements of Pa.R.C.P. No. 2329. Likewise, the Applicant are not barred by the exceptions listed in Pa.R.C.P. No. 2329.

44. The determination of the within action may affect the legally enforceable interests of the Applicants.

45. The Applicants' interests surpass the common interest of the citizens of the Commonwealth of Pennsylvania, the Petitioner, and/or the Respondents in this action.

46. The ultimate determination of this case will affect all the parties in the litigation as well as individuals not a party to the present case, including, but not limited to, the Applicants and the Republican candidates in the Republican Primary Election for the United States Senate.

47. The Applicants' interests, statutory rights, and authority are not, and will not, be adequately represented by any of the existing parties.

48. If granted intervention, the Applicants will Oppose Petitioners' Application for Extraordinary Relief as this Court has already addressed the dating requirement for mail-in ballots and absentee ballots in the case of *In re Canvass of Absentee and Mail-in ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020).

49. In the *In re Canvass* case, Justice Dougherty, joined by Chief Justice Saylor and Justice Mundy, filed a concurring and dissenting opinion, dissenting from the OAJC holding at Section III(2), which permitted undated ballots to be counted. Thus, giving the issue three votes in favor of excluding undated mail-in ballots. In authoring his dissent, Justice Dougherty stated,

[i]n my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration. As Judge Brobson observed below, the date on the ballot envelope provides proof of when the ‘elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot.’

In re Canvass of Absentee and Mail-in ballots of November 3, 2020 General Election, 241 A.3d 1058, 1090 (Pa. 2020) (Dougherty, J., concurring and dissenting).

50. Additionally, Justice Wecht, in a lone concurring and dissenting opinion, also concluded that an elector’s failure to comply with the dating requirement of Pennsylvania’s Election Code should not be overlooked as a “minor irregularity,” stating,

I part ways with the conclusion reflected in the Opinion Announcing the Judgment of the Court (“OAJC”) that a voter’s failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a “minor irregularity.” This requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended

that courts should construe its mandatory language as directory. ***Thus, in future elections, I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.***

In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058, 1079 (Pa. 2020) (Wecht, J., concurring and dissenting) (emphasis added).

51. Accordingly, the Pennsylvania Supreme Court has reached a four-Justice majority in favor of excluding mail-in ballots which fail to comply with the dating requirement unambiguously set forth in Pennsylvania's Election Code, thus establishing binding precedent regarding the same.

52. The Applicants will not unduly delay, embarrass, or prejudice the trial or adjudication of the parties' rights.

WHEREFORE, Proposed Intervenors, Republican National Committee ("RNC") and Republican Party of Pennsylvania, respectfully request that this Honorable Court grant them leave to intervene to file their Answer to Petitioners' Application for Extraordinary Relief, as attached hereto, and permit the Commonwealth Court to proceed at docket number 286 MD 2022 to apply this Court's precedent set forth in *In re Canvass of Absentee and Mail-in ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1090 (Pa. 2020) (Dougherty, J., concurring and dissenting).

Respectfully Submitted,

**Dillon, McCandless, King,
Coulter & Graham L.L.P.**

Date: May 26, 2022

By: /s/ Thomas W. King, III

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Counsel for Proposed Intervenors

VERIFICATION

I, Angela Alleman, Executive Director of the Republican Party of Pennsylvania, hereby verify that the facts set forth in the foregoing Application to Intervene are true and correct to the best of my knowledge and belief. This verification is made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.

Date: 5/26/22



Angela Alleman

VERIFICATION

I, Michael Reed, Chief of Staff of the Republican National Committee, hereby verify that the facts set forth in the foregoing Application to Intervene are true and correct to the best of my knowledge and belief. This verification is made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.

Date: 5/26/2022



Michael Reed

CERTIFICATE OF COMPLIANCE

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

/s/ Thomas W. King, III
Thomas W. King, III

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PARTY OF PENNSYLVANIA,**

Proposed Intervenors.

No.: 46 MM 2022

PROPOSED ORDER

AND NOW, this ___ day of May 2022, upon consideration of the within Application to Intervene, and any opposition thereto, it is hereby ORDERED that said Application is GRANTED; and the Proposed Intervenors, the Republican National Committee, and the Republican Party of Pennsylvania, are GRANTED leave to intervene. The Prothonotary is directed to file Intervenors' Answer in Opposition to Petitioners' Application for Extraordinary, as attached to Applicants' Application to Intervene.

J.

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**INTERVENORS' ANSWER TO
PETITIONERS' APPLICATION
FOR EXTRAORDINARY
RELIEF**

Filed on Behalf of Intervenors:

**REPUBLICAN NATIONAL
COMMITTEE AND
REPUBLICAN PARTY OF
PENNSYLVANIA**

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**INTERVENORS' ANSWER TO PETITIONERS' APPLICATION FOR
EXTRAORDINARY RELIEF**

Intervenors, Republican National Committee, and Republican Party of Pennsylvania (hereinafter "Intervenors"), by and through their undersigned counsel, respectfully file the within Answer to Petitioners' 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. 286 M.D. 2022 (hereinafter "Application for Extraordinary Relief"), stating in support as follows:

On May 23, 2022, Petitioners filed their Petition for Review in the nature of a Complaint in Equity seeking declaratory relief under and pursuant to the Declaratory Judgment Act, 42 Pa.C.S. § 7541(a), seeking an Order declaring that "timely returned absentee and mail-in ballots may not be rejected due to the lack of a date in the declaration on the exterior envelope;" directing "Respondent Boards to canvass any timely returned absentee and mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities;" directing "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 and mail-in ballot that lacks a date on its exterior envelope and no other deficiencies or irregularities;"

and enjoining “Respondent Boards to take all other steps necessary to effectuate this Court’s declaration.” See Pets. Petition for Review, filed May 23, 2022, Docket No. 286 M.D. 2022 (Pa. Commw. 2022).

On May 24, 2022, Petitioners filed the present Application for Extraordinary Relief, requesting that this Court exercise its Extraordinary Jurisdiction, pursuant to 42 Pa.C.S. § 762 and Pa. R.A.P. 3309, over Petitioners’ above referenced Petition for Review, filed in the Commonwealth Court at Docket No. 286 M.D. 2022.

Petitioners’ Application for Extraordinary Relief seeks to invoke this Court’s Extraordinary Jurisdiction to address the issue of the dating requirements for mail-in and absentee ballots, as contained in Pennsylvania’s Election Code at 25 P.S. §§ 3146.6(a) and 3150.16(a). However, it is unnecessary for this Court to address such issue as the precise issue of the dating requirement for mail-in and absentee ballots under 25 P.S. §§ 3146.6(a) and 3150.16(a) has already been addressed by a majority of this Court in the case of *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020); See *Id.*; (Dougherty, J., concurring and dissenting); (Wecht, J., concurring and dissenting).

Pennsylvania's Election Code clearly and unambiguously states, 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.*** 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.

25 P.S. § 3146.6(a) (emphasis added).

[a]t 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.*** 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.

25 P.S. § 3150.16(a) (emphasis added).

These requirements have been reviewed and interpreted by the Pennsylvania Supreme Court and Pennsylvania's Department of State, to clearly require that mail-in and absentee ballots be dated in order for the ballot to be counted.

In the *In re Canvass* case, Justice Donahue authored the Opinion Announcing Judgment of the Court ("OAJC"), concluding that a violation of the dating requirement for mail-in ballots under Pennsylvania's Election Code does not warrant the rejection of such defective ballots. *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058, 1079 (Pa. 2020). However, the OAJC is not binding precedent. Rather, where the Court issues its opinion through an OAJC, the relevant legal principle on any given issue before the Court must be discerned from the concurring and dissenting opinions which contain a majority of the Justice's votes, if any so exist. *In re T.S.*, 192 A.3d 1080, 1088 (Pa. 2018).

In the *In re Canvass* case, Justice Dougherty, joined by Chief Justice Saylor and Justice Mundy, filed a concurring and dissenting opinion, dissenting from the OAJC holding at Section III(2), which permitted undated mail-in and absentee ballots to be counted. Thus, giving the issue three votes in favor of excluding undated mail-in ballots. In authoring his dissent, Justice Dougherty stated,

[i]n my opinion, there is an unquestionable purpose behind requiring electors to date and sign the declaration. As Judge Brobson observed below, the date on the ballot envelope provides proof of when the ‘elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also establishes a point in time against which to measure the elector’s eligibility to cast the ballot.’

In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058, 1090 (Pa. 2020) (Dougherty, J., concurring and dissenting).

Further, in a lone concurring and dissenting opinion, Justice Wecht concluded that a voter’s failure to comply with the dating requirement of Pennsylvania’s Election Code should not be overlooked as a “minor irregularity,” stating,

I part ways with the conclusion reflected in the Opinion Announcing the Judgment of the Court (“OAJC”) that a voter’s failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a “minor irregularity.” This requirement is stated in unambiguously mandatory terms, and nothing in the Election Code suggests that the legislature intended that courts should construe its mandatory language as directory. ***Thus, in future elections, I would treat the date and sign requirement as mandatory in both particulars, with the omission of either item sufficient without more to invalidate the ballot in question.***

In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058, 1079 (Pa. 2020) (Wecht, J., concurring and dissenting) (emphasis added).

Accordingly, the Pennsylvania Supreme Court has reached a four-Justice majority in favor of excluding mail-in ballots which fail to comply with the dating requirement unambiguously set forth in Pennsylvania's Election Code, thus establishing binding precedent regarding the same.

Intervenors are aware that the Pennsylvania Department of State has modified its guidance regarding the dating requirement for mail-in and absentee ballots on May 24, 2022, with such updated guidance recognizing that, "[a] determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation." *See Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*, Dated May 24, 2022, Pennsylvania Department of State.

Notwithstanding the Department's May 24, 2022 guidance, the Department of State's previous guidance on this issue clearly recognized this Court's majority decision in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020); (Dougherty, J., concurring and dissenting); (Wecht, J., concurring and dissenting).

On June 1, 2021, the Pennsylvania Department of State issued guidance to the various County Boards of Elections entitled, "Reminder Regarding Requirement to Sign AND Date Declaration Envelopes," This guidance provided,

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.

See Reminder Regarding Requirement to Sign AND Date Declaration Envelopes, June 1, 2021, Pennsylvania Department of State (emphasis added).

This Court further reinforced its position on the applicability of the dating requirements contained in 25 P.S. §§ 3146.6(a) and 3150.16(a) when choosing to deny allocatur to review the decision of the Commonwealth Court in *Ritter v. Lehigh County Board of Elections*, 1322 C.D. 2021 (Pa. Commw. 2021), permitting the Commonwealth Court's decision to not count ballots failing to comply with the dating requirements in 25 P.S. §§ 3146.6(a) and 3150.16(a) to remain undisturbed. See Order Denying Petition for Allowance of Appeal, *Ritter v. Lehigh Co. Bd. of Elections*, 9 MAL 2022 (Pa. 2022).

Petitioners rely upon the United States Third Circuit Court of Appeals' Order in *Migliori v. Lehigh Co. Bd. of Elections*, No. 22-1499, ECF Doc. 80 (3d Cir. May 20, 2022), which Order, without an accompanying opinion, prohibits County Boards of Elections from rejecting mail-in or absentee ballots that fail to comply with the dating requirement contained in 25 P.S. §§ 3146.6(a) and 3150.16(a). However, on May 23, 2022, Appellee Ritter in the above referenced matter filed his Motion to Stay the Order of the Third Circuit Court of Appeals [ECF Doc. 81], pending certiorari to the United States Supreme Court.

This Court should not act hastily in granting Petitioners' Application for Extraordinary Relief given the *Migliori* case's current pending status. Moreover, this Court has already resolved the issue of the applicability of the dating requirement for mail-in and absentee ballots, as contained in 25 P.S. §§ 3146.6(a) and 3150.16(a). See *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020); (Dougherty, J., concurring and dissenting); (Wecht, J., concurring and dissenting). The resolution of this matter is reserved for the Courts of the Commonwealth of Pennsylvania regarding an interpretation of an Act of Pennsylvania's General Assembly. See *Democratic National Committee v. Wisconsin State Legislature*, 592 U.S. ___ (2020) (Gorsuch, J., concurring)

("[t]he Constitution provides that state legislatures bear primary responsibility for setting election rules. Art. I, §4, cl.1.")

Lastly, Petitioners' requested relief seeks to change the requirements of Pennsylvania's Election Code for Pennsylvania's May 17, 2022 Primary Election, after the Primary Election. This course of conduct has been specifically rejected by the United States Supreme Court in the case of *Purcell v. Gonzalez*, 549 U.S. 1 (2006), wherein the U.S. Supreme Court declined to upset a State's electoral apparatus close to an election, stating as follows,

[f]aced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

...

In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals.

Purcell v. Gonzalez, 549 U.S. 1, 5 (2006); See also *Veasey v. Perry*, 135 S. Ct. 9 (2014).

As this Court has already addressed and resolved the issues of the applicability of the dating requirement for mail-in and absentee ballots, as

contained in 25 P.S. §§ 3146.6(a) and 3150.16(a), it is unnecessary for the Court to grant Petitioners' Application for Extraordinary Relief. Rather, Intervenors respectfully request that this Court deny Petitioners' Application and permit this matter to proceed in the Commonwealth Court at docket number 286 M.D. 2022, so that such Court may apply this Court's majority holding as contained in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020); (Dougherty, J., concurring and dissenting); (Wecht, J., concurring and dissenting).

WHEREFORE, Intervenors, Republican National Committee ("RNC") and Republican Party of Pennsylvania ("RPP"), respectfully request that this Honorable Court deny Petitioners' Application for Extraordinary Relief, and permit this matter to proceed in the Commonwealth Court at docket number 286 M.D. 2022, together with such other relief this Court deems appropriate.

Respectfully Submitted,

**Dillon, McCandless, King,
Coulter & Graham L.L.P.**

Date: May 26, 2022

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Counsel for Intervenors

VERIFICATION

I, Angela Alleman, Executive Director of the Republican Party of Pennsylvania, hereby verify that the facts set forth in the foregoing Answer to Petitioners' Application for Extraordinary Relief are true and correct to the best of my knowledge and belief. This verification is made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.

Date: 5/26/22


Angela Alleman

VERIFICATION

I, Michael Reed, Chief of Staff of the Republican National Committee, hereby verify that the facts set forth in the foregoing Answer to Petitioners' Application for Extraordinary Relief are true and correct to the best of my knowledge and belief. This verification is made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.

Date: 5/26/2022



Michael Reed

CERTIFICATE OF COMPLIANCE

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

/s/ Thomas W. King, III
Thomas W. King, III