

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

No. 46 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,
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 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.

ANSWER ON BEHALF OF WESTMORELAND COUNTY TO
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. 286 MD 2022

May 26, 2022

/s/ Melissa A. Guiddy
Melissa A. Guiddy (PA #79223)
2 North Main Street
Suite 103
Greensburg, PA 15601
(724) 830-3553 (Telephone)
(724) 830-3055 (Fax)
mguiddy@co.westmoreland.pa.us

TABLE OF AUTHORITIES

CASES

Commonwealth v. Williams,
634 Pa. 290, 129 A.3d 1199, 1205–06 (2015).....2

Friends of Danny DeVito v. Wolf,
227 A.3d 872, 884 (Pa.), *cert. denied*, 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020).....1

In re Assignment of Avellino,
547 Pa. 385, 690 A.2d 1138, 1140 (1997)).....2

In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election,
241 A.3d 1058, 1061–62 (Pa. 2020) (plurality op.).....3

Ritter v. Lehigh County Board of Elections,
2022 WL 16577 (1322 C.D. 2021)3

STATUTES

25 P.S. §§ 3146.6(a) and 3150.6(a)2

42 Pa.C.S. § 502.....1

OTHER AUTHORITIES

Migliori v. Lehigh County Board of Elections,
No. 22-1499 (3d Cir).....2,3, 5

CONSTITUTIONAL PROVISIONS

Pa. Const. art. V, § 2(a).....1

**POSITION OF RESPONDENT,
WESTMORELAND COUNTY BOARD OF ELECTIONS**

On or about May 24, 2022, the Petitioners, Dave McCormick for U.S. Senate and David H. McCormick, filed their 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. The pending application was filed a week after the May 17, 2022 General Primary Election.

The Pennsylvania Constitution provides that the Pennsylvania Supreme Court “shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth,” Pa. Const. art. V, § 2(a), and further provides that the Supreme Court “shall have such jurisdiction as shall be provided by law.” *Id.* at 2(c). “The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and 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. The Supreme Court’s 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.” *See Friends of*

Danny DeVito v. Wolf, 227 A.3d 872, 884 (Pa.), *cert. denied*, 141 S. Ct. 239, 208 L. Ed. 2d 17 (2020), citing *Commonwealth v. Williams*, 634 Pa. 290, 129 A.3d 1199, 1205–06 (2015). This Honorable Court may “exercise King's Bench powers over matters where no dispute is pending in a lower court.” *Williams*, 129 A.3d at 1206 (citing *In re Assignment of Avellino*, 547 Pa. 385, 690 A.2d 1138, 1140 (1997)).

When making their request, Petitioners contend that “many Boards [including Westmoreland County] are still refusing to canvass receipt-stamped or indisputably timely received ballots missing only the handwritten date . . . in violation of established federal and Commonwealth law.” Petitioners further contend that such actions are in “open disregard of clear guidance from the Department of State, issued May 24, 2022, to count these ballots.”

The actions of Respondent do not in constitute a violation of federal and Commonwealth law. Rather, it is Petitioners who are demanding that the Respondent counties immediately count ballots where the voter failed to date the outer envelope. The applicable section of the Election Code provides that voters who choose to vote by mail-in or absentee ballot “shall . . . fill out, date, and sign the declaration” on the envelope. *See* 25 P.S. §§ 3146.6(a) and 3150.6(a).

In support of its position, the Petitioners rely on the Judgment issued by the Third Circuit in *Migliori v. Lehigh County Board of Elections*, No. 22-1499, Doc.

80 (3d Cir. May 20, 2022). It is beyond reason to compel action based on this Judgment when it was entered at the end of the day on May 20, 2022, three days subsequent to the May 17, 2022 Primary Election. Moreover, it was issued without an explanatory opinion. Without the Third Circuit Court of Appeals' opinion, it is unknown if the Third Circuit Court of Appeals intended to apply its decision to the May 17, 2022 Primary Election. Additionally, a stay has been sought in *Migliori*. See Motion to Stay the Mandate, *Migliori v. Lehigh County Board of Elections*, No. 22-1499 (3d Cir. May 23, 2022)(Doc 81). As such, the judgment is not final and remains subject to potential review by the Third Circuit itself and potentially, the United States Supreme Court.

In further support of its position, the Petitioners cite to *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1061–62 (Pa. 2020) (plurality op.). While citing to this decision, Petitioners disregard the fact that this Honorable Court's decision was to the effect that the undated ballots should be counted in the 2020 General Election, but that with respect to future elections, undated ballots should not be counted.

While Petitioners cite to *Migliori* and *In re Canvass 2020*, they fail to take into consideration the decision of the Commonwealth Court in *Ritter v. Lehigh County Board of Elections*, 2022 WL 16577 (1322 C.D. 2021). In *Ritter*, the Commonwealth Court rejected claims to count undated ballots based upon this

Honorable Court’s decision in *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*. It should be noted that this Honorable Court issued an order denying the Petition for Allowance of Appeal in *Ritter*. In light of the foregoing, it cannot be said that the Respondent Counties violated federal¹ and Commonwealth law.

Moreover, Respondents’ actions are not in “open disregard of clear guidance² from the Department of State, issued May 24, 2022, to count these ballots.” Westmoreland County agrees with the statement made by Blair County in its filing that “[b]eing guidance only, it represents the Department’s recommendation regarding how it thinks that the counties should proceed with respect to the undated ballots; however, the Department has no legal authority to require any of the Respondent counties . . . to follow the same.” While the Guidance cites to *Migliori*, it fails to take into consideration *In re Canvass 2020* or the Commonwealth Decision in *Ritter* and in fact directs the County Board of Elections to act contrary to this Honorable Court’s decision in *In re Canvass 2020* and the applicable provisions of

¹ The Third Circuit Court of Appeals’ judgment, without opinion, in *Migliori*, was issued subsequent to the date of the May 17, 2022 Primary Election. This is the first time since the November 3, 2020 Municipal Election that a court found that undated ballots should be counted and that requiring a date is an undue burden on voters under federal law.

² Even without the guidance, Westmoreland County had already segregated its 64 undated ballots.

the Pennsylvania Election Code. Moreover, the Department's guidance is replete with references to pending and ongoing litigation.

As this Honorable Court is aware, the Respondent counties are presently tasked with attempting to certify election results, while awaiting the results of three pending court actions, including this Application, proceedings in the Commonwealth Court docketed at 46 MM 2022 and the pending federal litigation in *Migliori v. Lehigh County Board of Elections*, No. 22-1499 (3d Cir.). In considering whether to exercise its King's Bench powers, this Honorable Court should take into account that the actions of Respondent do not constitute a violation of federal and Commonwealth law. In the event that this Honorable Court would take jurisdiction pursuant to its powers as the King's Bench, it should be done judiciously and in such a way as not to delay the certification of the other races in the May 17, 2022 Primary Election.

Respectfully submitted,

May 26, 2022

/s/ Melissa A. Guiddy
Melissa A. Guiddy (PA #79223)
2 North Main Street
Suite 103
Greensburg, PA 15601
(724) 830-3553 (Telephone)
(724) 830-3055 (Fax)
mguiddy@co.westmoreland.pa.us