

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 286 MD 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 BERKS COUNTY BOARD OF ELECTIONS
TO DAVE McCORMICK FOR U.S. SENATE AND DAVID H.
McCORMICK'S MOTION FOR IMMEDIATE SPECIAL INJUNCTION

Dated: May 27, 2022

*/s/ Cody L. Kauffman, Esq.*_____

Cody L. Kauffman, Esq.

Supreme Court I.D. No. 320506

First Assistant County Solicitor

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*For The Berks County Board of
Elections*

TABLE OF AUTHORITIES

Cases

In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election,
241 A.3d 1058, 1061–62 (Pa. 2020) 2

Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-1499, Doc. 80
(3d Cir. May 20, 2022) 2, 3

Statutes

25 P.S. § 3146.6 2

25 P.S. § 3150.16 2

POSITION STATEMENT OF
THE BERKS COUNTY BOARD OF ELECTIONS

On May 24, 2022, Petitioners filed the instant Motion for Immediate Special Injunction, asking this Honorable Court to order the Respondent Boards of Elections to count timely received absentee/mail-in ballots that lack a voter-provided date. In determining whether to count mail-in and absentee ballots that are otherwise timely received, but lacking a voter-supplied date, Berks County does so in accordance with the law. The Berks County Board of Elections files this response because Berks County is not “refusing” to count these ballots, nor is it clear that the dating requirement is “unenforceable under both state and federal law” as Petitioners allege. Those assertions ignore the current state of Pennsylvania law, which requires mail-in and absentee ballots to be both signed and dated.

While recent court orders and legal challenges have raised the question of whether undated absentee/mail-in ballots should be counted, Berks County has navigated this uncertainty by following the current state of Pennsylvania law, as we always have. For these reasons, pursuant to paragraph 4 of this Honorable Court’s May 25, 2022, Order, Berks County opposes the Petitioners’ Motion for Special Injunction insofar as it is inconsistent with the current state of Pennsylvania Law. However, Berks County welcomes finality on the issue prior to final vote certification.

On November 23, 2020, the Pennsylvania Supreme Court issued its opinion in the matter of In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058 (Pa. 2020), which, pursuant to a 3-3-1 decision, established that, in Pennsylvania, undated mail-in/absentee ballots should be counted in the November 2020 General Election, but should not be counted in future elections as long as adequate instructions and conspicuous warnings are given to the voter. See id., at 1089.¹ Leading up to, and during, the May 17, 2022, General Primary election, there was little dispute between the Counties that undated absentee/mail-in ballots were not be counted in Pennsylvania. This was, and still is, reiterated on the Department of State’s website, which states “[c]omplete, sign and date the voter’s declaration on the outside of the outer return envelope. If you do not sign and date below the declaration on the return envelope your ballot will not be counted.”

On May 20, 2022, after Counties had already begun to precanvass and canvass absentee and mail-in ballots for the 2022 General Primary Election, the Third Circuit Court of Appeals issued its judgment, without opinion, in the Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-1499, Doc. 80 (3d Cir. May 20, 2022) matter. While the judgment did find that the dating provisions of 25 P.S. § 3146.6 and 25 P.S. § 3150.16 were “immaterial” under federal law, no formal opinion has yet been issued

¹ This was consistent with 25 P.S. § 3146.6 and 25 P.S. § 3150.16, which require voters to “fill out, date and sign the declaration” on mail-in and absentee ballot envelopes.

by the Third Circuit to provide further clarity on the applicability of the ruling to the 2022 General Primary election or to other Counties outside of the Lehigh County judicial race at issue in that matter.

Additionally, a stay of the Third Circuit's decision has since been requested by David Ritter, a party in the Migliori matter, who is preparing a Petition to the United States Supreme Court. Accordingly, at this time, it is not definitive, or clear, that the Third Circuit's judgment in Migliori changes the status of current Pennsylvania law. Further, even if it is determined in the future that the judgment does apply to all Counties, the application for stay remains pending.

Likewise, while Petitioners have filed the instant matter pending before this Honorable Court, along with Petitioners' companion matter currently filed in the Pennsylvania Supreme Court, No. 46 MM 2022, there have been no rulings or judgments in either matter that substantively change the current status of Pennsylvania law. Rather, the instant matter is currently scheduled for oral argument before this Honorable Court on May 31, 2022. A decision in either matter, or further guidance in the Migliori matter, *could* affect the current status of Pennsylvania law, but as it currently stands, Berks County believes that Pennsylvania law currently requires a mail-in/absentee ballot to be both signed and dated.

Based upon the foregoing, Berks County, like all Counties, is in a position where a decision must be made as whether to count undated absentee and mail-in

ballots, while these legal challenges are pending. Consistent with the Department of State's guidance regarding undated ballots that was issued on May 24, 2022, Berks County has begun to canvass undated absentee/mail-in ballots while keeping the ballots and results segregated pending the ongoing litigation. Prior to the guidance being issued, Berks County had already segregated these ballots. It is important to note that the Department of State's guidance is not definitive on the issue, but rather, acknowledges that "a determination on whether the segregated tabulations will be used in certifying elections has not yet been made, given the ongoing litigation."

Given that the ongoing litigation, to date, has not definitively addressed or altered the current status of Pennsylvania law, it is Berks County's intention to not count undated absentee/mail-in ballots from the 2022 General Primary election, absent further clarity or finality from the Courts that substantively changes Pennsylvania law. Should the law change prior to final vote certification, Berks County plans to adapt our practices accordingly. In the interim, Berks County is choosing, as we always have, to follow the current state of the law, which we respectfully assert is contrary to the relief requested within Petitioners' pending Motion for Immediate Special Injunction.

Respectfully Submitted,

Dated: May 27, 2022

*/s/ Cody L. Kauffman, Esq.*_____

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