

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.

RESPONSE TO MOTION FOR SPECIAL INJUNCTION
BY WESTMORELAND COUNTY

May 27, 2022

/s/ Melissa Guidy _____
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**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 Motion for Immediate Special Injunction. The pending Motion was filed a week after the May 17, 2022 General Primary Election.

The remedy sought by Petitioners' Motion for Immediate Special Injunction is to have the "Respondent County Boards of Elections . . . count all timely received absentee and mail-in ballots that lack a voter-provided date on the exterior envelope." 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, (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).

In each of their filings, the Petitioners and Intervenors, Doctor Oz for Senate & Dr. Mehmet Oz, have addressed each of the factors for an injunction and set forth their respective positions. It is the position of the Respondent Westmoreland County that it would be premature to issue a special injunction at this time given the present state of the law.

When making their request, Petitioners contend that certain “Boards [including Westmoreland County] 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.” 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 grant an injunction 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 the Pennsylvania Supreme 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 this Honorable Court in *Ritter v. Lehigh County Board of Elections*, 2022 WL 16577 (1322 C.D. 2021). In *Ritter*, the Court rejected claims to count undated ballots based upon the Supreme Court’s decision in *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*. It should be noted that the Supreme Court of Pennsylvania issued an order denying the Petition for Allowance of Appeal in *Ritter*.

Moreover, Petitioner relies on guidance¹ from the Pennsylvania Department of State, issued May 24, 2022, to count the undated 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

¹ Even without the guidance, Westmoreland County had already segregated its 64 undated ballots.

consideration *In re Canvass 2020* or the Commonwealth Court Decision in *Ritter* and in fact directs the County Board of Elections to act contrary to the decision in *In re Canvass 2020* and the applicable provisions of 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 proceeding, proceedings in the Supreme Court of Pennsylvania docketed at 46 MM 2022 and the pending federal litigation in *Migliori v. Lehigh County Board of Elections*, No. 22-1499 (3d Cir.).

In light of the foregoing, the Respondent, Westmoreland County Board of Elections, respectfully requests that this Honorable Court deny the request for an immediate Special Injunction.

May 27, 2022

Respectfully submitted,

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