

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

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

Petitioners,

v.

Case No. 67 MAP 2022

LEIGH M. CHAPMAN, in her official
capacity as Secretary of State for the
Commonwealth, ADAMS COUNTY
BOARD OF ELECTIONS, et al.

Respondents,

REPUBLICAN NATIONAL
COMMITTEE AND REPUBLICAN
PARTY OF PENNSYLVANIA

Intervenors.

**ANSWER OF MONTGOMERY COUNTY BOARD OF ELECTIONS
TO INTERVENORS' EMERGENCY APPLICATION TO STAY
JUNE 2, 2022 ORDER OF THE COMMONWEALTH COURT**

AND NOW, comes Respondent, Montgomery County Board of
Elections, by and through its attorneys, Joshua M. Stein, Esquire, Maureen
E. Calder, Esquire and John A. Marlatt, Esquire and answers Intervenors'
Emergency Application to Stay the Order of the Commonwealth dated June

2, 2022 as follows:

1. Admitted.

2. Denied as stated. In an Opinion dated November 23, 2020, the Pennsylvania Supreme Court (the “Court”) considered the question of 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 their name, their address, and/or a date, where no fraud or irregularity had been alleged. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058 (Pa 2020).

3. Denied as stated. In an Opinion Announcing the Judgment of the Court (OAJC), a four-justice majority of the Pennsylvania Supreme Court ruled that although failure to include a date in the voter declaration on the back of the ballot envelope constituted a technical violation of the Election Code, it did not warrant the resultant disenfranchisement of thousands of Pennsylvania voters. The Pennsylvania Supreme Court specifically held that a county board of elections must have a compelling reason for refusing to canvass a ballot due to mere minor irregularities.

4. Denied as stated. The Pennsylvania Supreme Court’s Opinion in In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election,

Id. was authored by Justice Donohue. Justices Baer and Todd joined in the opinion. Justice Wecht concurred in the PA Supreme Court’s result and filed a separate Opinion. Justice Dougherty filed a concurring and Dissenting Opinion that Chief Justice Saylor and Justice Mundy joined. In his Concurring Opinion, Justice Wecht qualified his agreement to count the ballots that were the subject of the appeal and explained that in future elections, the date requirement should be viewed as “mandatory,” rather than “directory” and prospectively, the omission of a date would be sufficient to invalidate the ballot in question. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d at 1079. Judge Wecht’s concurrence that the ballots that were at issue before the Pennsylvania Supreme Court should be counted was based, in part, on his belief that voters were not adequately informed of the consequences of failing to include the date along with a signature in the Voter’s Declaration. Id. at 1089. In finding that the date should be required in future elections, Judge Wecht expressed confidence that the issues raised during the 2020 General Election would be addressed by the legislature. “[B]ecause this is the second time this Court has been called upon to address the declaration requirement, it seems clear that the General Assembly might clarify and streamline the form and function of the declaration, perhaps prescribing its form to advance clarity and uniformity

across the Commonwealth.” Id.

5. Denied as stated. Contrary to the representation of the Intervenor, “[a]n opinion shall be designated as the "Opinion Announcing the Judgment of the Court" when it reflects only the mandate, and not the rationale, of a majority of Justices.” 210 Pa. Code §63.4 (B)(3). Since the OAJC was issued, it has been repeatedly mischaracterized by parties in support of disqualifying undated ballots as a majority opinion declaring that for all future elections, mail-in and absentee ballots without dates may not be counted. It is clear, that the mandate from the OAJC is that the ballots in question for that particular election without dates should be counted. Any argument that the reasoning from Justice Wecht in his concurring opinion regarding undated ballots in future elections should be treated as precedential is incorrect. Further, the legislature has failed to provide any clarification for voters or county boards of election regarding the Voter’s Declaration. Accordingly, Montgomery County and Bucks County Boards of Election filed a Declaratory Judgment action requesting a definitive ruling from the Commonwealth Court that ballot envelopes that have a signed but undated Voter Declaration should be accepted for canvassing by county boards of election in all elections. See Exhibit 1. Prior to the June 2, 2022 Decision of the Commonwealth Court in this case, the procedures of the 67

counties in Pennsylvania regarding how to treat ballots in undated envelopes has varied as demonstrated by the continued lawsuits concerning this issue.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Denied. The Commonwealth Court Decision addressed not only that federal law dictates that ballots in undated envelopes should be counted as found by the Third Circuit in Migliori v. Lehigh County Board of Elections, (Case No. 22-1499) but also under state law, the absence of a handwritten date on the exterior envelope could be considered a “minor irregularity” without a compelling reason that justifies the disenfranchisement of otherwise eligible voters by not counting their timely received ballot. In reaching this conclusion, the Commonwealth Court found “the Election Code should be liberally construed so as not to deprive electors of their right to elect the candidate of their choice. The power to throw out a ballot for minor irregularities should be used very sparingly, and voters should not be disenfranchised except for compelling reasons.”

12. Denied as moot. The Montgomery County Board of Elections has

certified the results of the 2022 Primary Election. See Exhibit 2.

WHEREFORE, for the reasons set forth above, the Montgomery County Board of Elections respectfully request that Intervenors' Emergency Application to Stay the June 2, 2022 Order of the Commonwealth Court be denied.

MONTGOMERY COUNTY SOLICITOR'S OFFICE

BY: /s/ Maureen E. Calder
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Attorneys for Montgomery County
Board of Elections

Date: June 6, 2022

CERTIFICATE OF COMPLIANCE

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

/s/ Maureen E. Calder

Maureen E. Calder

Date: June 6, 2022

EXHIBIT 1

Attorney I.D. No. 68055
John A. Marlatt, Esquire
Attorney I.D. No. 210141

BUCKS COUNTY SOLICITOR

/s/ Joseph J. Khan

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Attorneys for the Petitioners

Dated: October 1, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**MONTGOMERY COUNTY BOARD
OF ELECTIONS**

and

**BUCKS COUNTY BOARD
OF ELECTIONS**

Petitioners,

v.

No. _____

**VERONICA DEGRAFFENREID
ACTING SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA**

Respondents.

NOTICE TO DEFEND

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 thirty (30) days after this complaint and notice are served, in accordance with Pennsylvania Rule of Appellate Procedure 1516(b), 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 plaintiff. 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, THESE OFFICES 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.

MidPenn Legal Services
213A North Front Street
Harrisburg, PA 17101
(717) 232-0581

Dauphin County Lawyer Referral Service
Dauphin County Bar Association
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**MONTGOMERY COUNTY BOARD
OF ELECTIONS**

and

**BUCKS COUNTY BOARD
OF ELECTIONS**

Petitioners,

v.

No. _____

**VERONICA DEGRAFFENREID
ACTING SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA**

Respondents.

**PETITION FOR REVIEW IN THE NATURE OF AN
ACTION FOR DECLARATORY JUDGMENT**

The Plaintiffs, Montgomery County and Bucks County Boards of Elections, bring this action for declaratory judgment against the Defendant, Veronica Degraffenreid, the Acting Secretary of the Commonwealth of Pennsylvania, seeking a declaration from the Court to determine whether votes from a ballot contained in an undated ballot envelope should be counted.

In support of this action for declaratory judgment, the Plaintiffs County Boards of Election aver the following:

I. The Parties

1. Montgomery County Board of Elections consists of the county commissioners and has its principal offices at One Montgomery Plaza, Suite 602, Norristown, PA 19404-0311. The Montgomery County Board of Elections has jurisdiction over the conduct of primary, special, and general elections in Montgomery County. 25 P.S. § 2642.

2. Bucks County Board of Elections consists of the county commissioners and has its principal offices at 55 E. Court Street, Doylestown, PA 18901. The Bucks County Board of Elections has jurisdiction over the conduct of primary, special, and general elections in Bucks County. 25 P.S. § 2642.

3. Veronica Degraffenreid, Acting Secretary of the Commonwealth (“Secretary Degraffenreid”), currently leads the Department of State (“DOS”), an agency of the Commonwealth of Pennsylvania maintaining its principal offices at 302 North Office Building, 401 North Street Harrisburg, PA 17120. DOS promotes the integrity of the electoral process in Pennsylvania. The powers and duties of the Secretary of Commonwealth are outlined in the Election Code. 25 P.S. § 2621.

II. Nature of Action and Jurisdiction

4. This is an action for declaratory judgment brought pursuant to the Declaratory Judgments Act, 42 Pa. C.S.A. §7531, et seq. This action falls within

the original jurisdiction of the Commonwealth Court of Pennsylvania pursuant to 42 Pa. C.S.A. §761(a)(1).

III. Factual Background

5. Pennsylvania's Election Code (25 P.S. §§2601-3354) was first enacted in 1937, establishing a county-based system for administering elections. *See* 25 P.S. §2641(a).

6. The Election Code vests each county board of elections with discretion to conduct elections and implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania's elections. 25 P.S. §§2641(a), 2642(g); Perles v. Hoffman, 419 Pa. 400, 213 A.2d 781, 783 (1965). The Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice. Id. at 784.

7. In October 2019, the General Assembly of the Commonwealth of Pennsylvania enacted Act 77, bipartisan legislation that made significant changes to the Election Code. Act 77 provided, *inter alia*, the opportunity for all qualified electors in Pennsylvania to vote by mail, without any excuse required. 25 P.S. §§ 3150.11-3150.17.

8. The Election Code provides direction for the submission of Absentee and Mail-in ballots as follows:

[O]n 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), 3146.6(a) (emphasis added).

9. The Election Code also outlines the process for counties to canvass official absentee ballots and mail-in ballots. 25 P.S. § 3146.8.

10. On September 11, 2020, the Secretary of the Commonwealth, Kathy Boockvar, ("Secretary Boockvar"), issued guidance to the counties for examining absentee and mail-in ballot envelopes during pre-canvassing and canvassing. (Attached as Exhibit A). The guidance stated definitely that "if the Voter's Declaration on the return envelope is blank, that ballot return envelope must be set aside and not counted."

11. Secretary Boockvar's guidance allowed the counties discretion to determine if the Voter's Declaration was sufficiently completed to be approved for canvassing.

12. On September 28, 2020, the Secretary issued additional guidance that stated that ballot materials should include a “pre-addressed outer ballot-return envelope that contains a declaration which the voter must sign and date.” (Attached as Exhibit B). “A ballot-return envelope with a declaration that is filled out, dated, and signed by an elector who was approved to receive an absentee or mail-in ballot is sufficient and counties should continue to pre-canvass and canvass these ballots.”

13. In an Opinion dated November 23, 2020, the Pennsylvania Supreme Court (the “PA Supreme Court”) considered the question of 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 their name, their address, and/or a 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 (Pa 2020).

14. One of the appeals reviewed by the PA Supreme Court was that of Nicole Zicarelli (“Zicarelli”), a candidate for the Pennsylvania Senate in the 45th Senatorial District (Allegheny-Westmoreland counties) who challenged the November 10, 2020 decision of the Allegheny County Board of Elections (the “Allegheny County Board”) to canvass 2,349 mail-in ballots that contained a signed – but undated – declaration.

15. Before the PA Supreme Court, Zicarelli argued “in regard to outer envelopes not containing a voter-supplied date, this Court's opinion in In Re: Nov. 3, 2020 General Election, No. 149 MM 2020, 2020 WL 6252803 (Pa. Oct. 23, 2020) definitively speaks to the mandatory nature of the date requirement and, without much extrapolation, requires that such ballots not be counted. The Allegheny County Board agrees with its Philadelphia counterpart. It counters Zicarelli's reliance on In Re Nov. 3, 2020 General Election by noting that Zicarelli's challenge to the ballots for lack of a date is based on the premise that the date is essential to the validity of the signature. Allegheny County Board points out this is the precise type of challenge that was disavowed in the case upon which Zicarelli relies.” In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d at 1070.

16. A four-justice majority of the PA Supreme Court held that the ballots were not invalid, and thus, Allegheny County could properly count them. Relying on its Opinion in Pa. Democratic Party v. Boockvar, 238 A.3d 345, 356 (Pa. 2020), the PA Supreme Court explained that “while both mandatory and directory provisions of the Legislature are meant to be followed, 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.” Pa. Democratic Party, 238 A.3d at 378.

Accordingly, the PA Supreme Court ruled that although failure to include a date in the voter declaration on the back of the ballot envelope constituted a technical violation of the Election Code, it did not warrant the resultant disenfranchisement of thousands of Pennsylvania voters. The PA Supreme Court specifically held that a county board of elections must have a compelling reason for refusing to canvass a ballot due to mere minor irregularities.

17. The PA Supreme Court's Opinion was authored by Justice Donohue. Justices Baer and Todd joined in the opinion. Justice Wecht concurred in the PA Supreme Court's result and filed a separate Opinion. Justice Dougherty filed a concurring and Dissenting Opinion that Chief Justice Saylor and Justice Mundy joined.

18. In his Concurring Opinion, Justice Wecht qualified his agreement to count the ballots that were the subject of the appeal and explained that in future elections, the date requirement should be viewed as "mandatory," rather than "directory" and prospectively, the omission of a date would be sufficient to invalidate the ballot in question. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d at 1079.

19. Judge Wecht's decision that the challenged ballots should be counted was based, in part, on his belief that voters were not adequately informed of the consequences of failing to include the date along with a signature in the Voter's

Declaration. Id. at 1089. In finding that the date should be required in future elections, Judge Wecht expressed confidence that the issues raised during the 2020 General Election would be addressed by the legislature. “[B]ecause this is the second time this Court has been called upon to address the declaration requirement, it seems clear that the General Assembly might clarify and streamline the form and function of the declaration, perhaps prescribing its form to advance clarity and uniformity across the Commonwealth.” Id.

20. Since the date of Judge Wecht’s Concurring Opinion, the legislature has failed to provide any clarification for voters or county boards of election regarding the Voter’s Declaration.

21. Zicarelli filed a separate action in the Western District of Pennsylvania, contending that even though a majority of the PA Supreme Court determined that Allegheny County could count ballots in envelopes with undated declarations, she interpreted the decision to mean that those ballots were invalid under Pennsylvania’s election code. Zicarelli v. Allegheny Cty. Bd. of Elections, 2021 WL 101683,*1 (W.D. Pa., Jan. 12, 2021).

22. Zicarelli argued that the decision of the PA Supreme Court was not controlling and that, instead, reading Justice Wecht’s concurring opinion together with the other dissenting opinions shows that four justices found that the date requirement was “mandatory,” such that the ballots are per se invalid under

Pennsylvania law, and thus cannot be counted. Judge Ranjan disagreed and instead found that the correct interpretation of the PA Supreme Court's decision on Zicarelli's state-court appeal was that the challenged ballots were valid and should be counted.

23. The 2021 Pennsylvania Primary was held on May 18, 2021. During its pre-canvass and canvass, the Montgomery County and Bucks County Boards of Election approved the canvassing of ballots received by 8:00 p.m. on Election Day and in envelopes with a signed declaration but no date. The ballots were counted based on the decisions issued in In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058 (Pa 2020) and Zicarelli v. Allegheny Cty. Bd. Of Elections, 2021 WL 101683, *1 (W.D.Pa., Jan. 12, 2021), as well as the guidance issued by the Secretary in September of 2020.

24. In the 2021 Primary Election, 176 voters returned ballots in undated envelopes which amounts to approximately .000029 percent of the total returned ballots. In the 2020 General Election, a very similar percentage of returned ballots were in undated envelopes. These numbers show that voters have not become more aware that a failure to date a ballot envelope disqualifies their votes.

25. On June 1, 2021, Jonathan Marks, Deputy Secretary for Elections & Commissioners at the DOS sent an e-mail communication to counties. (A copy of

the e-mail is attached as Exhibit C). The e-mail communication stated the following:

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.

IV. Declaratory Relief Sought

26. Pennsylvania courts ruled that ballots submitted without a dated Voter's Declaration should be counted in the 2020 General Election.

27. A question remains as to how these ballots should be treated in future elections.

28. The Plaintiff County Boards of Election, therefore, seek to have this Court declare that ballot envelopes that have a signed but undated Voter's Declaration should be accepted for canvassing by county boards of election.

29. Without the declaration, voters will be disenfranchised in future elections.

WHEREFORE, the Plaintiffs hereby request the entry of an Order declaring that ballot envelopes that have a signed but undated Voter Declaration should be accepted for canvassing by county boards of election.

Respectfully submitted,
MONTGOMERY COUNTY SOLICITOR

/s/ Joshua M. Stein
Joshua M. Stein, Esquire
Attorney I.D. No. 90473
Maureen E. Calder, Esquire
Attorney I.D. No. 68055
John A. Marlatt, Esquire
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BUCKS COUNTY SOLICITOR

/s/ Joseph J. Khan

Joseph J. Khan, Esquire

Attorney I.D. No. 86620

Amy M. Fitzpatrick, Esquire

Attorney I.D. No. 324672

BUCKS COUNTY SOLICITOR'S OFFICE

55 East Court Street

Doylestown, PA 18901

(215) 348-6464

Attorneys for the Petitioners

Dated: October 1, 2021

VERIFICATION

I, Lee A. Soltysiak, Chief Clerk of the Montgomery County Board of Elections, hereby state that I am authorized to make this verification on behalf of the Plaintiffs, and that the statements made in the foregoing Action for Declaratory Judgment are true and correct to the best of my knowledge, information and belief. I understand that this statement is being made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.



Lee A. Soltysiak

Dated: October 1, 2021

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/ Maureen E. Calder
Maureen E. Calder, Esquire

Dated: October 1, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**MONTGOMERY COUNTY BOARD
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and

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No. _____

**VERONICA DEGRAFFENREID
ACTING SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA**

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Petition to Review upon the following by certified mail, which service satisfies the requirements of Pa.R.A.P. 121:

Veronica Degraffenreid
Acting Secretary
Commonwealth of Pennsylvania
302 North Office Building
401 North Street
Harrisburg, PA 17120

Josh Shapiro
Attorney General
Commonwealth of Pennsylvania
15th Floor
Strawberry Square
Harrisburg, PA 17120

/s/ Maureen E. Calder
Maureen E. Calder, Esquire

Dated: October 1, 2021

EXHIBIT 2

2022 PRIMARY Election BALLOT CERTIFICATION

OFFICE OF THE COUNTY BOARD OF ELECTIONS
CERTIFICATION AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
MONTGOMERY COUNTY (46)

COUNTY OF Montgomery Norristown, PA _____

WE HEREBY CERTIFY THAT THESE _____ PAGES ARE THE OFFICIAL RETURNS AS THEY APPEAR ON RECORD OF
THE VOTES CAST AT THE PRIMARY ELECTION HELD 5/17/2022

IN WITNESS WHEREOF, WE HAVE HEREUNTO SET OUR HANDS AND SEAL OF OFFICE THIS
6th DAY OF June, 2022

SEAL

Therese E. Lawrence, Jr
[Signature]

COUNTY BOARD OF ELECTIONS

ATTEST:

[Signature]
CLERK