

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

LEIGH M. CHAPMAN, Acting  
Secretary of the Commonwealth of  
Pennsylvania, and the  
PENNSYLVANIA DEPARTMENT  
OF STATE,

Petitioners,

v.

BERKS COUNTY BOARD OF  
ELECTIONS, FAYETTE  
COUNTY BOARD OF  
ELECTIONS, and LANCASTER  
COUNTY BOARD OF  
ELECTIONS,

Respondents.

) No. 355 MD 2022  
)  
) **ORIGINAL JURISDICTION**  
)  
) **ANSWER TO PETITIONERS’**  
) **EMERGENCY APPLICATION**  
) **FOR PEREMPTORY**  
) **JUDGMENT AND SUMMARY**  
) **RELIEF**  
)  
) Filed on behalf of Respondents  
) Berks County Board of Elections and  
) Lancaster County Board of Elections  
)  
) Counsel for Respondents  
) Berks County Board of Elections and  
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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

LEIGH M. CHAPMAN, et al.,	)	
	)	
Petitioners,	)	
	)	No. 355 MD 2022
v.	)	
	)	
BERKS COUNTY BOARD OF	)	
ELECTIONS, et al.,	)	
	)	
Respondents.	)	

**ANSWER OF RESPONDENTS BERKS COUNTY BOARD OF  
ELECTIONS AND LANCASTER COUNTY BOARD OF ELECTIONS TO  
PETITIONERS’ EMERGENCY APPLICATION FOR  
PEREMPTORY JUDGMENT AND SUMMARY RELIEF**

Pursuant to the Court’s July 13, 2022 Order, respondents the Berks County Board of Elections (“Berks County”) and the Lancaster County Board of Elections (“Lancaster County”) (collectively, “Berks & Lancaster Boards”), by and through their undersigned counsel, hereby answer the Emergency Application for Peremptory Judgment and Summary Relief (“Emergency Application”) filed by Petitioners Leigh M. Chapman, Acting Secretary of the Commonwealth, and the Pennsylvania Department of State (collectively, “Petitioners”) as follows:

1. Admitted in part, denied in part. Berks & Lancaster Boards admit only that Petitioners are requesting that this Court grant peremptory judgment under Pa. R.C.P. 1098 and summary relief under Pa. R.A.P. 1532(b). Berks & Lancaster Boards specifically deny that Petitioners are entitled to either

peremptory judgment or summary declaratory or injunctive relief. To the contrary, if any summary relief is warranted, it should be this Court's immediate dismissal with prejudice of Petitioners' flawed and meritless Petition for Review.

2. Denied. The averment in Paragraph 2 of the Emergency Application is a conclusion of law to which no response is required. To the extent a response is deemed to be required, Berks & Lancaster Boards specifically deny the averment in Paragraph 2 of the Emergency Petition that Petitioners' requested relief is warranted under the facts and applicable law. Petitioners are not entitled to a writ of mandamus or declaratory or injunctive relief. "*Canvassing and computing*" election returns "necessarily embrace acts of discretion," *Appeal of McCracken*, 370 Pa. 562, 565, 88 A.2d 787, 788 (Pa. 1952) (emphasis in original), thereby defeating Petitioners' claim for a writ of mandamus. *Id*; *County of Fulton v. Secretary of Commw.*, 277 M.D. 2021, 2022 WL 1609574, at \*9 (Pa. Commw. Ct. May 23, 2022) (where the action sought to be compelled is discretionary, mandamus will not lie to control that discretionary act). Petitioners are not entitled to declaratory or injunctive relief because there is no "actual case or controversy," which is required for any court to issue a declaratory judgment. *Brouillette v. Wolf*, 213 A.3d 341, 357 (Pa. Commw. Ct. 2019). Thus, the Declaratory Judgments Act, 42 Pa. C.S.A. §§ 7531-7541, requires a petition praying for declaratory relief to state an actual controversy between the petitioner and the named respondent. *Id.*

Here, no candidate or voter has challenged the certified returns timely submitted by the Berks & Lancaster Boards on June 6, 2022 and June 8, 2022 that do not include votes from undated absentee and mail-in ballots. The only 2022 Primary Election candidate who, at one point, challenged the refusal to include votes from undated absentee and mail-in ballots in the certified results, McCormick for Senate, conceded that race and voluntarily dismissed his challenge in this Court prior to the Berks & Lancaster Boards submitting their certified results to Petitioners. No aggrieved person filed an appeal challenging the certified results submitted by the Berks & Lancaster Boards. Now, however, Petitioners seek to manufacture a case or controversy by directing the Berks & Lancaster Boards to submit re-certified election returns that include votes from undated absentee and mail-in ballots—without any statutory authority to do so—and then suing for mandamus and declaratory relief when the Berks & Lancaster Boards refuse to comply with Petitioners’ unlawful order. Based on the facts and the applicable law, if any summary relief is warranted, it should be this Court’s immediate dismissal with prejudice of Petitioners’ flawed and meritless Petition for Review.

3. Denied. The averment in Paragraph 3 of the Emergency Application is a conclusion of law to which no response is required. To the extent a response is deemed to be required, Berks & Lancaster Boards specifically deny the averment in Paragraph 3 of the Emergency Petition as a mischaracterization of the cited

sections of the Election Code. 25 Pa. Stat. § 2642 (“Powers and duties of county boards”) vests in county boards of elections the power and responsibility, within their respective counties, to perform all the duties imposed upon them by the Election Code, including the duty to “receive from district election officers the returns of all primaries and elections, *to canvass and compute the same*, and to certify, no later than the third Monday following the primary or election, the results thereof to the Secretary of the Commonwealth, as may be provided by law, and to such other authorities as may be provided by law.” 25 Pa. Stat. § 2642(k) (emphasis added). 25 Pa. Stat. § 3154 (“Computation of returns by county board; certification; issuance of certificates of election”) establishes, among other things, deadlines for county boards of elections to submit unofficial election returns to the Secretary of the Commonwealth and for certifying returns under various circumstances. 25 Pa. Stat. § 3158 (“Copy of certified returns to be filed; copy to be forwarded to the Secretary of the Commonwealth; duplicate copies”) requires county boards of elections, in the case of certain enumerated elections (including, without limitation, elections for United States Senators, Representatives in Congress, and Governor) to “forward a separate certificate (of the election returns), showing totals of the returns cast for each of such offices respectively, to the Secretary of the Commonwealth on forms furnished by the Secretary of the Commonwealth.” Significantly for purposes of Petitioners’ Emergency

Application, over seventy years ago, the Pennsylvania Supreme Court recognized, “The Legislature has entrusted the County Board of Elections with plenary powers in the administration of the election code.” *Appeal of McCracken*, 370 Pa. 562, 565, 88 A.2d 787, 788 (Pa. 1952). “***Canvassing and computing***” election returns necessarily embrace acts of discretion. *Id.* (emphasis in original). Ten years before *McCracken*, the Pennsylvania Supreme Court observed, “The Election Code makes the County Board of Elections more than a mere ministerial body. It clothes [it] with quasi-judicial functions . . . .” *Id.* (quoting *Boord v. Maurer*, 343 Pa. 309, 312, 22 A.2d 902, 904 (Pa. 1941)). Berks & Lancaster Boards have complied in all respects with their discretionary duties to canvass ballots and compute election returns in the 2022 Primary Election under the Election Code, as interpreted by the Pennsylvania Supreme Court and this Court. Having done so, they timely submitted a copy of their certified returns to Petitioners on June 6, 2022 and June 8, 2022. The Acting Secretary is required under the Election Code—which is a ministerial duty—immediately upon receipt of certified returns of any primary or election from the various county boards, “to tabulate, compute and canvass the votes cast” and “certify and file in [her] office the tabulation thereof.” 25 Pa. Stat. § 2159. The Election Code provides methods for candidates and electors to challenge the decision by a County Board of Elections to disqualify a ballot. No one has challenged any decision by the Berks & Lancaster Boards to not include

votes from undated absentee and mail-in ballots in their certified election results submitted to Petitioners. Petitioners lack the authority under the Election Code to file this action seeking a writ of mandamus or summary declaratory relief from this Court compelling Berks & Lancaster Boards to certify the specific election results that Petitioners desire. Therefore, if any summary relief is warranted, it should be this Court's immediate dismissal with prejudice of Petitioners' flawed and meritless Petition for Review.

4. Denied as stated. This Court's June 2, 2022 Order in *McCormick v. Chapman*, No. 286 MD 2022, required all county boards of elections to segregate timely received absentee and mail-in ballots that lack a dated exterior envelope, to canvass those ballots (assuming they were not otherwise defective), "report two vote tallies" to the Acting Secretary, "one that includes the votes from ballots that lack dated exterior envelopes and one that does not, and to report a total vote tally which includes the votes from ballots that had both dated and undated exterior envelopes as the total votes cast." This Court's June 2, 2022 Order does not mention "certification" or require county boards of election to include the votes from undated absentee and mail-in ballots in their certified returns. The Court's rationale for requiring the reporting of two vote tallies was so that, "when a final decision on the merits of whether the ballots that lack a dated exterior envelope must be counted or not, the Acting Secretary will have the necessary reports from

the County Boards.” Berks & Lancaster Boards complied with this Court’s Order and timely provided Petitioners with separate vote tallies that included and excluded votes from undated absentee and mail-in ballots. When the statutory deadline to certify the election results arrived, this Court in *McCormick* had not made a final decision on the merits of this issue because McCormick for Senate had conceded the election and voluntarily discontinued his challenge.

Accordingly, Berks & Lancaster Boards certified their election results without including votes from the undated absentee and mail-in ballots as required by the Election Code, as interpreted by the Pennsylvania Supreme Court and this Court. The averment in Paragraph 4 of the Emergency Application that undated ballots must be included in the certified election returns is a conclusion of law to which no response is required. To the extent a response is deemed to be required, Berks & Lancaster Boards specifically deny this averment. To the contrary, this Court in *McCormick* never issued a final decision on the merits of whether to include votes from undated absentee and mail-in ballots in certified election results. The Election Code, as interpreted by the Pennsylvania Supreme Court and this Court, requires that votes from undated absentee and mail-in ballots be excluded from the certified election returns. Accordingly, if any summary relief is warranted, it should be this Court’s immediate dismissal with prejudice of Petitioners’ flawed and meritless Petition for Review.

5. Denied. The averments in Paragraph 5 of the Emergency Application that Pennsylvania and federal law require timely received absentee and mail-in ballots to be counted even if a qualified voter neglected to write a date on the declaration printed on the ballot's return envelope is a conclusion of law to which no response is required. To the extent a response is deemed to be required, Berks & Lancaster Boards specifically deny this averment. To the contrary, as to federal law, the Third Circuit panel's decision in *Migliori v. Lehigh County Bd. Of Elections (Migliori v. Cohen)*, 36 F.4th 153, 162-164 (3d Cir. 2022) did not involve the 2022 Primary Election. Even if it had, it is not binding precedent on Pennsylvania courts. *Breckline v. Metro. Life Ins. Co.*, 406 Pa. 573, 578-79, 178 A.2d 748, 751 (Pa. 1962) (even though a federal question is involved, a federal court of appeals decision is not binding "in the absence of a ruling on the question by the United States Supreme Court"); *see also Cambria-Stoltz Enterprises v. TNT Invs.*, 2000 PA Super 52, ¶ 20, 747 A.2d 947, 952 (Pa. Super. Ct. 2000) (citing *Martin v. Hale Products, Inc.*, 699 A.2d 1283, 1287 (Pa. Super. 1997)). Nor is the Third Circuit's interpretation of state law binding on Pennsylvania courts. *Cambria-Stoltz*, ¶ 20, 747 A.2d at 952 (citing *Martin*). Moreover, the Third Circuit panel's decision in *Migliori* was not in effect at the deadline for the county boards of elections to certify their election results because the mandate was stayed by the United States Supreme Court until June 9, 2022,

when the stay was lifted. Moreover, the Third Circuit panel’s decision in *Migliori* was wrongly decided. Three justices of the United States Supreme Court opined that the Third Circuit panel’s decision in *Migliori* is “very likely incorrect.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1826 (U.S. Jun. 9, 2022) (Alito, J. dissenting). At last check, the Third Circuit panel decision in *Migliori* is the subject of a petition for a writ of certiorari to the United States Supreme Court. The Third Circuit panel’s decision in *Migliori* requiring counting votes from undated absentee and mail-in ballots conflicts with the Pennsylvania Supreme Court’s decision in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. Nov. 24, 2020), which is binding precedent. In the multi-part decision in *In re Canvass*, the will of the majority of Justices has been expressed in terms of the validity of the undated absentee and mail-in ballots: For all elections after the 2020 General Election, votes from undated absentee and mail-in ballots should be excluded from the certified results. *See Ritter v. Lehigh County Board of Elections*, No. 1322 C.D. 2021, 272 A.3d 989, 2022 WL 16577, at \*9 & n.8 (unpublished disposition) (McCullough, J.). “[A] at this moment, a majority of the Justices agree the undated mail-in ballots are invalid.” *Id.* Alternatively, even assuming the collective result in *In re Canvass* of Justice Dougherty’s concurring and dissenting opinion (“CDO Opinion”) and Justice Wecht’s opinion concurring in the result (“CIR Opinion”) were not binding, this Court’s same panel majority

adopted the reasoning of the CDO and CIR as persuasive authority, concluding that one or the other should be adopted by this Court. Ironically, this Court's decision in *Ritter* involves the very same judicial election that was later collaterally challenged in federal court in *Migliori*. This Court got it right in *Ritter*; the Third Circuit panel got it wrong in *Migliori*. Finally, this Court's decision in *McCormick v. Chapman* was a preliminary decision, not a final decision on the merits, and did not reach the ultimate question of whether undated absentee and mail-in ballots should be included in the certified election returns.

6. Denied. The averments in Paragraph 6 of the Emergency Application are conclusions of law to which no response is required. To the extent a response is deemed to be required, Berks & Lancaster Boards specifically deny this averment. To the contrary, the certified election returns that were timely submitted by Berks & Lancaster Boards for the 2022 Primary Election, which do not include undated absentee and mail-in ballots, fully comply with the Election Code. By way of further answer, Berks & Lancaster Boards incorporate by reference their response in Paragraph 5 above as though set forth at length here.

7. Denied. The averments in Paragraph 7 of the Emergency Application do not require a response. To the extent a response is deemed to be required, the Court has already scheduled expedited consideration of the Emergency Application.

8. Denied. The averment in Paragraph 8 of the Emergency Application is an incorporation paragraph that does not require a response. To the extent a response is deemed to be required, Berks & Lancaster Boards incorporate by reference their responses in Paragraphs 1 through 7 above and their contemporaneously filed memorandum of law in opposition to the Emergency Petition and proposed order as though set forth at length here.

**WHEREFORE**, respondents Berks County Board of Elections and Lancaster County Board of Elections respectfully request this Honorable Court to deny Petitioners' Emergency Application. Based on the facts and applicable law, this Court also should enter judgment in favor of Berks & Lancaster Boards and against Petitioners on Claims I and II of Petitioners' Petition for Review, dismiss with prejudice Petitioners' Petition for Review, and grant such other relief as the Court deems appropriate.

Dated: July 19, 2022

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**CERTIFICATE OF COMPLIANCE**

I, Jeffrey D. Bukowski, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: January 19, 2022

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below, a true and correct copy of the foregoing **ANSWER TO PETITIONERS' EMERGENCY APPLICATION** has been served upon the below counsel of record through the Court's PACFile system and/or by electronic mail:

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