

IN THE SUPREME COURT OF PENNSYLVANIA

No. 102 MM 2022

David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae DeLuca,
Ross M. Farber, Lynn Marie Kalcevic, Vallerie
Siciliano-Biancaniello, S. Michael Streib, Republican National
Committee, National Republican Congressional Committee, and
Republican Party of Pennsylvania,

Petitioners,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the
Commonwealth, and All 67 County Boards of Elections

Respondents.

**AMICUS CURIAE BRIEF OF STEVEN ADAMS, ROBERT BUTLER,
DONALD CICERO, RICHARD HARRIS, DON HOFFMAN, JOSEPHINE
FERRO, TONI MCANDREW, DOUG MCLINKO, ERIC MATTHEWS,
DANIEL NAYLOR, THOMAS J. SHEPSTONE, LYNETTE VILLANO,
THOMAS WHITEHEAD, AND THE BRADFORD COUNTY
REPUBLICAN COMMITTEE IN SUPPORT OF PETITIONERS**

Brian Gallagher, Esq.
1348 Cotton Hollow Rd.
Athens, PA 18810
570.731.0378
briangallagher2588@gmail.com
PA Attorney ID: 321486
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

INTEREST OF AMICUS CURIAE.....3

SUMMARY OF ARGUMENT.....4

STATEMENT OF JURISDICTION.....5

ORDER OR OTHER DETERMINATION IN QUESTION.....6

STATEMENT OF THE SCOPE AND STANDARD OF
REVIEW.....7

STATEMENT OF THE CASE.....8

ARGUMENT.....9

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES:

In re 2,349 Ballots in the 2020 Gen. Election, 2020 Pa. Commw. Unpub. Lexis 560.....12

In re Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election, 241 A.3d 1058 (Pa. 2020).....11-12

Migliori v. Cohen, 36 F.4th 153 (3d Cir. 2022).....13

Ritter v. Migliori, No. 22-30, 2022 U.S. LEXIS 4530 (Oct. 11, 2022).....13-14

STATUTES:

25 P.S. Section 3146.6(a).....9-11

25 P.S. Section 3150.16(a).....9, 11

52 U.S.C. Section 10101(a)(2)(B).....13

I. INTEREST OF AMICUS CURIAE

Steven Adams is Chairperson of the Wayne County Republican Committee. Robert Butler is Chairperson of the Monroe County Republican Committee. Donald Cicero is Chairperson of the Sullivan County Republican Committee. Josephine Ferro is a state Committeewoman for Monroe County. Richard Harris is Chairperson for the Bradford County Republican Committee. Don Hoffman is former Chairperson for the Tioga County Republican Committee. Toni McAndrew is a state Republican Committeewoman for Wayne County. Doug McLinko is Vice-Chairperson for the Bradford County Republican Committee. Eric Matthews is a state Republican committeeman for Bradford County. Daniel Naylor is Chairperson of the Lackawanna County Republican Party. Thomas J. Shepstone is a state Republican committeeman for Wayne County. Lynette Villano is a committeewoman from the Luzerne County Republican Committee, and Thomas Whitehead is a state Republican committeeman from Monroe County. The Bradford County Republican Committee is an organization that assists the political campaigns of responsible and qualified Republican political candidates.

Amicus Curiae have a strong interest in maintaining and strengthening the integrity of political elections in the Commonwealth of Pennsylvania.

II. SUMMARY OF ARGUMENT

Petitioners' requested relief should be granted. The Secretary of the Commonwealth's guidance to the sixty-seven county boards of elections of this Commonwealth contradicts the Election Code, contradicts what already appears to be the opinion of a majority of this Honorable Court, and is instead reliant on a now vacated Third Circuit holding. The statute requiring the outer envelope of each mail-in ballot is mandatory. This requirement does not violate the Civil Rights Act of 1964. If the Secretary of the Commonwealth's guidance is permitted to continue, it would erode the public trust in this Commonwealth's next election.

III. STATEMENT OF JURISDICTION

Amicus Curiae adopt the Statement of Jurisdiction, if any, in the brief(s) of
Petitioners.

IV. ORDER OR OTHER DETERMINATION IN QUESTION

Amicus Curiae adopt the Order or Other Determination in Question, if any,
in the brief(s) of Petitioners.

V. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amicus Curiae adopt the Statement of the Scope and Standard of Review, if any, in the brief(s) of Petitioners.

VI. STATEMENT OF THE CASE

Amicus Curiae adopt the Statement of the Case, if any, in the brief(s) of Petitioners as well as the Statement of the Case in their Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction.

VII. ARGUMENT

This Honorable Court should immediately declare that absentee and mail-in ballots that are undated or incorrectly dated cannot be included in the pre-canvass or canvass under 25 P.S. Sections 3146.6(a) and 3150.16(a) of the Election Code or, at the very least, order county boards of elections to segregate all absentee or mail in ballots received for the 2022 general election that do not comply with the date requirement. These statutes passed by the Pennsylvania General Assembly requiring electors to date the declaration printed on the outer envelope of their ballots are clear and unambiguous. A majority of this Honorable Court already appears to agree the date requirement should be mandatory. Regarding the requirement as mandatory does not violate the materiality provision of the Civil Rights Act of 1964. The Secretary of the Commonwealth's guidance to county boards of elections to include undated or incorrectly dated ballot-return envelopes in the canvass and pre-canvass contravenes the plain meaning of the statutes as well as the learned opinions of a majority of this court. Presumably the Secretary bases her guidance on a federal decision that the United States Supreme Court has since vacated. Thus, this Honorable Court should grant the relief requested of the Petitioners. To not do so would cause confusion among the individual boards of elections and erode public trust in this Commonwealth's elections.

The Election Code is clear and unambiguous. The plain meaning of the statute calls for an elector to date and sign the declaration printed on the outer envelope of the ballot.

Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the 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. Section 3146.6(a) (emphasis added). This language is repeated in 25 P.S. Section 3150.16(a). Allowing the Secretary of the Commonwealth to encourage county boards of elections to include undated and incorrectly dated ballots in their canvas and pre-canvas thus clearly contradicts what the General Assembly expressly requires of each elector who chooses to submit their vote via a mail-in ballot, and therefore, Petitioners' relief requested should be granted.

A majority of this Honorable Court appears to agree that the date requirement is important and should be construed as mandatory. In a concurring and dissenting opinion in which then Chief Justice Saylor and Justice Mundy joined, Justice Dougherty opined, "I cannot agree that the obligation of electors to set forth the date they signed the declaration on that envelope does not carry 'weighty interests.'" In re Canvass of Absentee & Mail-In Ballots of November 3, 2020 Gen. Election, 241 A.3d 1058, 1079 (Pa. 2020). Justice Dougherty further elaborated, "I do not view the absence of a date as a mere technical insufficiency we may overlook." Id. In a concurring and dissenting opinion, Justice Wecht submitted, "I part ways with the conclusion reflected in the Opinion Announcing the Judgment of the Court that a voter's failure to comply with the statutory requirement that voters date the voter declaration should be overlooked as a 'minor

irregularity.” Id. Justice Brobson, while still on the Commonwealth Court, opined, “there is an obvious and salutary purpose behind the requirement that a voter date the declaration[,] . . . [it] . . . provides a measure of security, establishing the date on which the elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place . . . [and] . . . establishes a point in time against which to measure the elector’s eligibility to cast the ballot, as reflected in the body of the declaration itself.” In re 2,349 Ballots in the 2020 Gen. Election, 2020 Pa. Commw. Unpub. Lexis 560 at 16. Most importantly Justice Brobson wisely observed, “[t]he danger to our democracy is not that electors who failed to follow the law in casting their ballots will have their ballots set aside due to their own error; rather, the real danger is leaving it to each county board of election to decide what laws must be followed (mandatory) and what laws are optional (directory), providing a patchwork of unwritten and arbitrary rules[,] . . . [and] [s]uch a patwork system does not guarantee voters an ‘equal’ election, particularly where the election involves inter-county and statewide offices.” Id. Allowing each county board of election, or in the case *sub judice* each Secretary of the Commonwealth from one election cycle to the next, to decide what election laws must be followed and what election laws are optional would erode public trust in this Commonwealth’s elections. A majority of this Honorable

Court already appears to agree. Thus, the Petitioners' relief requested should be granted.

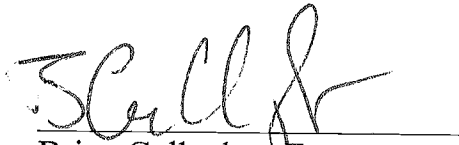
Regarding the date requirement as mandatory does not violate the materiality provision of the Civil Rights Act of 1964. Presumably the Secretary of the Commonwealth's guidance is based primarily on a Third Circuit holding that the federal materiality statute preempts the date requirement. Migliori v. Cohen, 36 F.4th 153 (3d Cir. 2022). This holding was vacated on October 11, 2022. Ritter v. Migliori, No. 22-30, 2022 U.S. LEXIS 4530 (Oct. 11, 2022) (granting petition for writ of certiorari). Three United States Supreme Court Justices have already voiced their opinion that the Third Circuit's now vacated holding was "very likely wrong." Ritter v. Migliori, 142 S. Ct. 1824 (2022). In the opinion of Justice Alito in dissent of the majority's denial of application for stay, with whom Justice Thomas and Justice Gorsuch joined, Justice Alito submitted, "it appears to me, based on the review that I have been able to conduct in the time allowed, that the Third Circuit's interpretation is very likely wrong . . . [i]t seems plainly contrary to the statutory language. Id. Justice Alito went on to observe, "[w]hen a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.' Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot." Id. Justice Alito also questioned, "the Third Circuit held that this state-law rule is preempted by 52 U.S.C. Section

10101(a)(2)(B) because the inclusion of a date is not material to the question whether a person is qualified to vote. Can that possibly be correct?” Id. Since the Secretary of the Commonwealth’s legal basis for her guidance is presumably based primarily on a Third Circuit holding that is now vacated and which multiple United States Supreme Court Justices have already declared “very likely wrong”, allowing the Secretary of the Commonwealth to continue to publish such guidance would erode the public trust in this Commonwealth’s election process. Since regarding the date requirement as mandatory does not violate the Civil Rights Act, Petitioners’ requested relief should be granted.

VIII. CONCLUSION

For the reasons stated above and for the reasons stated in Petitioners' brief(s), the Amicus Curiae respectfully request this Honorable Court grant Petitioners' relief requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. Gallagher", written over a horizontal line.

Brian Gallagher, Esq.
1348 Cotton Hollow Rd.
Athens, PA 18810
570.731.0378 (phone)
briangallagher2588@gmail.com
PA Attorney ID.: 321486
Counsel for Amicus Curiae

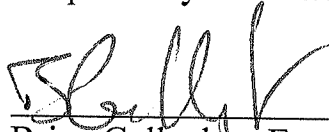
IN THE SUPREME COURT OF PENNSYLVANIA

David Ball, Et. Al. :
v. : 102 MM 2022
Leigh Chapman, Et. Al. :
: : : : : : : : : : :

STATEMENT OF INTERESTS PURSUANT TO RULE 531(b)(2)

I, Brian Gallagher, Esq., counsel for Amicus Bradford County Republican Committee and Friends of the Committee, with full knowledge of the penalties for perjury or making false statements to the court, verify that no other person besides myself paid for or authored any part of the Amicus Brief of the Bradford County Republican Committee and Friends of the Committee. I, Brian Gallagher, Esq., am the sole author of the brief and I authored the brief *pro bono*.

Respectfully submitted,



Brian Gallagher, Esq.
Counsel for Amicus
1348 Cotton Hollow Road
Athens, PA 18810
570.731.0378
Attorney ID No. 321486

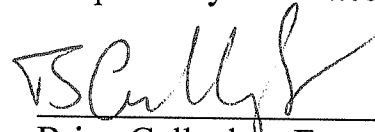
IN THE SUPREME COURT OF PENNSYLVANIA

David Ball, Et. Al. :
v. : 102 MM 2022
Leigh Chapman, Et. Al. :
: : : : : : : : : : : : : :

WORD COUNT VERIFICATION

I, Brian Gallagher, Esq., counsel for Amicus, verify that the Amicus Brief complies with the Rules of Appellate Procedure’s restrictions on word limits. The total number of words including tables of contents and authorities and the cover page is only 2104 words.

Respectfully submitted,



Brian Gallagher, Esq.
Counsel for Amicus
1348 Cotton Hollow Road
Athens, PA 18810
570.731.0378
Attorney ID No. 321486